Environmental Hearing Board

Adjudications and Opinions

2002 Volume I

COMMONWEALTH OF PENNSYLVANIA

George J. Miller, Chairman

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OF THE

ENVIRONMENTAL HEARING BOARD

2002

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Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 2002 EHB 1

ISBN NO. 0-8182-0279-3

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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SECRETARY TO THE BOARI

RICHARD and CATHY MADDOCK	:	
	:	
v.	:	**EHB Docket No. 2000-145-L**
	:	**EHB Docket No. 2000-164-L**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: January 22, 2002**
PROTECTION and CONSOL COAL	:	
COMPANY, Permittee	:	

ADJUDICATION

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

Synopsis:

The Board dismisses an appeal from the renewal of a coal refuse disposal permit where the appellants failed to prove that the continuing use of a borehole at the permitted facility presents any threat of an adverse impact on the appellants' well. The Board dismisses an appeal from the Department's decision to release a mining company from liability for bonds posted to cover reclamation responsibilities at a deep mine in the same complex for the same reason.

INTRODUCTION

The Board is issuing this joint Adjudication in two unconsolidated appeals because the appeals involve the same parties and related issues, and the appellants--with only a few words changed--filed nearly identical briefs in both cases.

FINDINGS OF FACT

1. The Department of Environmental Protection (the "Department") is the agency

with the duty and authority to administer and enforce the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§ 1396.1-1396.19a ("Surface Mining Act"); the Bituminous Mine Subsidence and Land Conservation Act, Act of April 27, 1996, P.L. 31, *as amended*, 52 P.S. §§ 1406.1-1406.21 ("Mine Subsidence Act"); the Coal Refuse Disposal Control Act, Act of September 24, 1968, P.L. 1040, *as amended*, 52 P.S. §§ 30.51-30.206 ("Coal Refuse Disposal Act"); and the Clean Streams Law, Act of June 22, 1937, P.L. 1987 *as amended*, 35 P.S. §§ 691.1-691.1001 ("Clean Streams Law"). (*Maddock v. DEP*, EHB Docket No. 99-224-L ("*Maddock I*"), Finding of Fact ("F.F.") 1.)[1]

2. Richard and Cathy Maddock (the "Maddocks") are individuals who reside in Plum Borough, Allegheny County. (*Maddock I*, F.F. 2.)

3. Consolidation Coal Company ("Consol") is a Delaware corporation authorized to do business in Pennsylvania. (*Maddock I*, F.F. 3.)

4. Consol is the permittee for the Renton Coal Refuse Disposal Area, Permit No. 02733702, located in Plum Borough, Allegheny County (the "refuse area"). The permit was first issued in 1984, and it has subsequently been renewed and revised. (*Maddock I*, F.F. 4.)

5. The refuse area is adjacent to the Renton deep mine, which is permitted under Permit No. 02841305 (the "deep mine"). The refuse area and deep mine are inactive except for compliance with ongoing treatment obligations. (*Maddock I*, F.F. 5.)

6. Under the terms of a 1983 Consent Order and Agreement between the Department and Consol, a 1987 Consent Order and Adjudication between the Department and Consol, and plans submitted pursuant to the consent orders and approved by the Department, Consol is required to pump the mine pool in the deep mine, maintain a certain mine pool elevation, collect

[1] The findings of fact in *Maddock I* are repeated here for the convenience of the parties.

seeps and discharges present at the refuse area, divert those discharges to the deep mine, and treat the water in the deep mine. (*Maddock I*, F.F. 6.)

7. Consol was authorized pursuant to the consent orders to direct the discharges from the refuse area to the deep mine through boreholes. (*Maddock I*, F.F. 7.)

8. Consol drilled Borehole 10, the borehole that is pertinent in these appeals, as a conduit to the deep mine. (*Maddock I*, F.F. 10.)

9. The Maddocks live near Borehole 10. (*Maddock I*, F.F. 11.)

10. At about the same time as Consol drilled the borehole, the Maddocks' well went dry. (*Maddock I*, F.F. 13.)

11. The Maddocks reported the loss of their water supply to Consol and the Department. (*Maddock I*, F.F. 14.)

12. Consol provided the Maddocks with a temporary water supply and began investigating the Maddocks' reported water loss. (*Maddock I*, F.F. 15.)

13. Consol installed casing and grouted the annular space of Borehole 10 after the Maddocks reported their water loss to the Department. Thereafter, the Maddocks' well began producing again. (*Maddock I*, F.F. 16.)

14. In that there is no background information regarding the Maddocks' well, the Department evaluated the well's output to assess whether an adequate quantity is produced for its preexisting uses and whether its quantity meets regulatory drinking-water criteria. (*Maddock I*, F.F. 18.)

15. The Department directed Consol to apply for a revision to its refuse area permit that would authorize the continuing use of Borehole 10. (*Maddock I*, F.F. 20.)

16. Consol applied for the permit revision in February 1999. Consol did not include

any updated hydrogeology information or alternative water supply information in its application. It simply referred the Department to information concerning those issues that was generated in connection with the original permit in 1984. (*Maddock I*, F.F. 21.)

17. The Department approved the permit revision on October 6, 1999. (*Maddock I*, F.F. 22.)

18. On June 13, 2000, the Department renewed and revised the permit again (the "permit renewal"). (Maddock Exhibit ("M.Ex.") 25.) The appeal docketed at EHB Docket No. 00-145-L is taken from the permit renewal.

19. The permit renewal for the most part continued all of the preexisting terms and conditions of the permit, but it also required Consol to (1) post additional bond to cover future water treatment obligations and (2) sample the Maddocks' well once a month for one year. (M. Ex. 25.)

20. Although the Renton complex is inactive, the permit continues to be renewed because Consol has continuing maintenance and treatment responsibilities at the site. (M. Ex. 25; Consol Ex. 2.)

21. Although at least one result from the sampling of the Maddocks' well pursuant to the renewed permit showed an elevated level of sulfates, the Department nevertheless concluded in a letter dated June 18, 2001 that the Maddocks' water supply had been adequately restored, and it authorized Consol to cease providing the Maddocks with an alternate temporary supply. The Maddocks' appeal from the Department's determination was dismissed as untimely. *Maddock v. DEP*, EHB Docket No. 2001-183-L (Opinion and Order issued October 19, 2001).

22. The continuing use of Borehole 10 has not had and will not have any continuing adverse effect on the quality or quantity of water produced by the Maddocks' well. (T. 219-222,

243.)

Additional Facts Relating to EHB Docket No. 2000-164-L

23. Pursuant to a consent order and adjudication entered in Aetna Casualty & Surety Company and Consolidation Coal Company v. DER, EHB Docket No. 87-520-R (September 22, 1989), the Department agreed to waive collection of reclamation bonds posted by Villa Coal Company for the Renton deep mine if Consol (as guarantor of those bonds) reclaimed the site. (Consol Ex. 1 [in the 00-164-L appeal].)

24. After Consol completed the reclamation, the Department notified the Maddocks by a letter dated July 7, 2000 that the Department would be waiving collection of the bonds guaranteed by Consol, and the bonds were thereafter released on August 9, 2000. (Consol Ex. 2.) The appeal docketed at EHB Docket No. 00-164-L is taken from the Department's decision to release Consol from further responsibility for the bonds.

25. Ongoing activities at the deep mine do not present any apparent continuing threat to the Maddocks' well water. (T. 116.)

DISCUSSION

EHB Docket No. 00-145-L: The Permit Renewal

Our responsibility in this appeal is to make a *de novo* determination of whether Consol's permit should have been renewed. *Warren Sand & Gravel, Inc. v. Department of Environmental Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975); *Smedley v. DEP*, EHB Docket No. 97-253-K (Adjudication issued February 8, 2001) slip op. at 25-30. We assess whether the issuance of the renewal is consistent with the law and is otherwise reasonable and appropriate. *Smedley, supra*; *O'Reily v. DEP*, EHB Docket No. 99-166-L (Adjudication issued January 3, 2001). As the parties challenging the issuance of the permit renewal, the Maddocks bear the burden of proving

by a preponderance of the evidence that renewing the permit constituted an error of law or was otherwise unreasonable or inappropriate. 25 Pa. Code § 1021.101(c)(2).

In *Maddock I*, the Maddocks appealed from the Department's revision of Consol's coal refuse disposal permit to allow for the continuing use of Borehole 10. After a hearing, we concluded that the Department should have required Consol to update hydrogeological and water-supply information originally compiled in 1984 before it revised Consol's permit. We remanded the permit to the Department for reconsideration in light of updated information. Consol supplied updated information. The Department advised the parties and us that it was satisfied with the updated information, whereupon we closed the docket in that appeal. The Maddocks did not file an appeal from the Department's determination, or bring any complaints concerning the Department's compliance with our remand order to our attention in the context of *Maddock I*.

As we read the Maddock's scant post-hearing briefs, they have preserved only one argument for our consideration. The Maddocks assert that the Department did not require Consol to comply with this Board's remand order in *Maddock I*. The Department did not comply with the remand order because it did not insist that Consol "develop a plan to deal with the problems [it] created when [it] knocked out the Maddocks' well." Therefore, Consol's permit, which has still not been adequately revised, should not be renewed until this situation is resolved.

We have serious doubts regarding the propriety of addressing this issue in this appeal. If the Maddocks had concerns regarding the Department's compliance with our remand order, they could have either brought them to our attention in the context of *Maddock I*, or filed an appeal from the Department's approval of Consol's submissions pursuant to our remand order. The

Maddocks did neither. We also note that it appears that the issue is clearly articulated for the first time in the post-hearing briefs. It is in the *prehearing* memorandum that the theories that a party may raise are to be finalized. *Midway Sewerage Authority v. DER*, 1991 EHB 1445, 1473. Still further, the question of the Department's compliance with our remand order in *Maddock I* does not appear in the notice of appeal in this case, and the Maddocks made no attempt to amend that notice following the Department's response to our remand order.

Putting these concerns aside, we also have serious doubts that the Maddocks' allegations regarding their well are germane to the fundamental question presented in this appeal, which is whether Consol's permit should have been renewed. Indeed, we dealt with nearly the identical question in *Maddock I*. When we substitute "renewal" for "revision" in the language we used in *Maddock I*, our holding there applies with equal force here:

> We see no added value to conditioning the [renewal] on the results of the water loss investigation. First, we have not been referred to any legal authority to support such a condition. Secondly, such a condition would serve no incremental purpose. Regardless of how the investigation turns out, it will not dictate whether the [renewal] should remain in place. For example, even if the investigation eventually disclosed that the Maddocks' well has been irreparably damaged as a result of the mining activity, it does not follow that the [renewal] should be denied or that measures be taken with regard to the borehole. Consol may in such a case need to take action regarding the Maddocks' water needs, but it will in no event need to take any action regarding the borehole as a result of *that* investigation. The ongoing legitimacy of the permit [renewal] and the water loss investigation are on parallel but completely independent tracks. One does not affect the other.
>
> As we noted at the outset of this discussion, the Maddocks have not asked that Borehole 10 be closed. They have not presented any proof that it is causing any ongoing untoward effects. The hole has been integrated into the treatment system at the complex, and we have no independent reason to believe that its ongoing use presents any immediate danger.

Id., slip op. at 9-10.

To this we would add that Consol's permit continues to be renewed merely to authorize it to conduct its ongoing reclamation obligations at the facility. The Maddocks would have us

reverse the renewal as a mechanism for forcing Consol to supply them with a new water supply. Not only is the Maddocks' contention a *non sequitur* as we discussed above and in *Maddock I*, we fail to see that any purpose would be served by tampering with the permit under the circumstances presented.

In a slight change from the situation in *Maddock I*, the Department has now completed its investigation of the Maddocks' well and concluded that Consol may stop providing an alternate water supply. The fact that the investigation has now been resolved does not change the fundamental problem with the Maddocks' argument: the renewal of the permit and Consol's duties vis-à-vis the water supply are simply unrelated.

Putting all of the foregoing difficulties aside, it would nevertheless be necessary to reject the Maddocks' claim on its merits. There is simply no evidence in the record to support the Maddocks' premise that Consol has created any continuing "problems" regarding the Maddocks' well. The Maddocks failed to present any proof that Consol has caused any continuing harm to their water supply. The Department presented convincing and uncontraverted expert opinion testimony that the continuing use of Borehole 10 is having no adverse effect on the quantity or quality of water produced by the Maddocks' well. (T. 219-222, 243.) The drilling of Borehole 10 had a temporary impact on the *quantity* of water produced by the well only, and that impact was relieved by the casing and grouting of the well. (T. 219-220.) There is no evidence of any kind that Consol's activities ever had or will ever have any impact on the *quality* of the Maddocks' well water. In sum, the Maddocks have not provided us with any factual or legal basis for granting the relief they request in the context of this appeal.

EHB Docket No. 00-164-L: Bond Collection Waiver

With the exception of a few words here and there, the Maddocks copied the post-hearing

briefs that they submitted in their appeal at Docket No. 00-145-L and filed it as their briefs in Docket No. 00-164-L. For the same reasons discussed above, the Maddocks' sole remaining argument does not provide a basis for overturning the Department's decision to release Consol from its responsibility regarding the deep mine bonds. Once again putting aside our procedural concerns, the analytical connection between the alleged condition of the Maddocks' well and the Department's waiver of collection of bonds at the deep mine is at least as remote as the relationship between the well and the permit renewal. Again, neither the continuing use of Borehole 10 nor ongoing reclamation activities at the deep mine have been shown to present any ongoing threat to the Maddocks' well based on the record before us. (T. 116.) Consol has posted a substantial reclamation bond for the refuse area that covers Borehole 10 and treatment responsibilities associated with both the refuse area and the deep mine. (T. 236-237.) The Maddocks have not argued that the bond is inadequate to cover any future difficulties associated with the borehole. The Maddocks have provided us with no legal or factual basis whatsoever for reversing the Department's decision to waive collection of the bonds.

CONCLUSIONS OF LAW

1. The Board has jurisdiction in these matters.

2. The appellants bear the burden of proving that the Department acted unlawfully or otherwise unreasonably and inappropriately in renewing the subject permit or waiving collection of the deep mine bonds.

3. The appellants have failed to prove that the Department acted unlawfully or unreasonably in renewing Consol's permit.

4. The appellants have failed to prove the Department acted unlawfully or unreasonably in waiving collection of reclamation bonds posted for the deep mine.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RICHARD and CATHY MADDOCK	:	
	:	
v.	:	**EHB Docket No. 2000-145-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOL COAL COMPANY, Permittee	:	

ORDER

AND NOW, this 22nd day of January, 2002, this appeal is **DISMISSED.**

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
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **January 22, 2002**

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

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MMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RICHARD and CATHY MADDOCK	:	
	:	
v.	:	**EHB Docket No. 2000-164-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOL COAL COMPANY, Permittee	:	

ORDER

AND NOW, this 22nd day of January, 2002, this appeal is **DISMISSED.**

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
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
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DATED: **January 22, 2002**

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JUDITH ANNE WAYNE	:	
	:	
v.	:	**EHB Docket No. 2001-030-R and 98-175-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROBINSON COAL COMPANY, Permittee	:	**Issued: January 24, 2002**

ADJUDICATION

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Where a landowner agrees in writing that a haul road can remain in place on her property and need not be reclaimed, the permittee is not responsible for maintenance of the road following the completion of reclamation. The permittee's duty to submit a maintenance plan under such circumstances is limited to making recommendations to the landowner. The Department of Environmental Protection has no authority to impose restrictions on the landowner for how the road is to be maintained.

FINDINGS OF FACT

1. The Appellant is Judith Anne Wayne, the owner of property located at 3103 Donaldson Road, McDonald, Pennsylvania. (Notice of Appeal, T. 6)

2. Ms. Wayne purchased the property at Donaldson Road through Bankruptcy Court. (T. 7)

3. The Department of Environmental Protection (Department) is the agency with the duty and authority to administer and enforce 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 – 1396.19a, and the rules and regulations promulgated thereunder.

4. The Permittee is Robinson Coal Company (Robinson). (Notice of Appeal)

5. Robinson conducted surface mining operations on and around the Wayne property on sites known as the McWreath I and II sites. *Wayne v. DEP and Robinson Coal Co.*, 2000 EHB 888 (*Wayne I*).

6. As part of the mining operation, Robinson constructed a haul road on the property prior to Ms. Wayne's purchase of the property. (*Wayne I*)

7. The haul road is located on the McWreath II site. (*Wayne I*)

8. After being informed by Robinson that they were no longer using the haul road, Ms. Wayne built a fence around an area of the haul road to contain goats and sheep that she was raising on the property. (T. 8; *Wayne I*)

9. Early the following morning, Robinson cut down the fence that Ms. Wayne had constructed. (T. 8; *Wayne I*)

10. Ms. Wayne sought relief in the Bankruptcy Court; this resulted in a Stipulation and Settlement Agreement entered into between Robinson and Ms. Wayne on April 16, 1993. (T. 8; Wayne Ex. A; *Wayne I*)

11. Pursuant to the Stipulation and Settlement Agreement, Robinson agreed to reinstall the fence at its own expense when reclamation was completed. In addition, Robinson was required to reinstall a gate with locks. (Wayne Ex. A)

12. As of the date of the hearing, the fence and gate had not been installed. (T. 9-10)

13. The Stipulation and Settlement Agreement also stated that Ms. Wayne would agree in writing that Robinson need not reclaim that portion of the haul road on her property. (Wayne Ex. A)

14. On April 23, 1993, Ms. Wayne signed a notarized statement as follows: "The haul road, permitted under Robinson Coal Company SMP 63890101, currently located between the former Joseph McWreath residence and Barn will remain as a permanent structure and will remain as presently constructed." (Wayne Ex. B)

15. In 1998, Ms. Wayne filed an appeal with the Environmental Hearing Board (Board) challenging the Department's approval of Stage II bond release for the McWreath I site and Stage II and III bond release for the McWreath II site. (*Wayne I*)

16. Section 87.160(a) of the surface mining regulations states as follows: "Upon completion of the associated surface mining activities, the area disturbed by the [haul] road shall be restored in accordance with § 87.166 (relating to haul roads and access roads: restoration) unless retention of the road and its maintenance plan is approved as part of the postmining land use." 25 Pa. Code § 87.160(a).

17. In an adjudication dated July 11, 2000, the Board determined that no maintenance plan had been approved in accordance with 25 Pa. Code § 87.160(a) and, therefore, bond release for the McWreath II site was not appropriate. The Board overturned the approval of bond release for the McWreath II site until such time as the Department had approved a maintenance plan for the haul road located on the Wayne property. (*Wayne I*)

18. Robinson submitted a maintenance plan to the Department stating that Ms. Wayne was responsible for maintenance of the haul road and setting forth guidelines for maintaining the road. (T. 26; Wayne Ex. C)

19. By letters dated January 5 and February 1, 2001, the Department notified Ms. Wayne's counsel and Ms. Wayne, respectively, that the Department had approved the maintenance plan submitted by Robinson and attached a copy of the plan. (Wayne Ex. C)

20. The maintenance plan provides that the property owner, Ms. Wayne, should inspect the road a minimum of two times per year and take certain action to prevent erosion and sedimentation. (Wayne Ex. C)

21. Neither Robinson nor the Department contacted Ms. Wayne about the maintenance plan or its terms prior to the submission and approval of the plan. (T. 12-13, 30-31, 46-47)

22. Ms. Wayne was not a party to preparing the maintenance plan nor did she agree to its terms. (Wayne Ex. C; T. 12-13, 30-31, 46-47)

23. Reclamation is completed at the McWreath I and II sites. (T. 28)

DISCUSSION

This adjudication involves two appeals filed by Judith Anne Wayne at EHB Docket No. 98-175-R and 2001-030-R. In the appeal at Docket No. 98-175-R, Ms. Wayne challenged the Department of Environmental Protection's (Department) approval of the release of bonds for two adjacent surface mines operated by Robinson Coal Company (Robinson) known as the McWreath I and II sites. A portion of the mine sites was on property owned by Ms. Wayne. In an adjudication issued on July 11, 2000, the Environmental Hearing Board (Board) dismissed all of Ms. Wayne's appeal, except for one issue related to a haul road on the property. *Wayne v. DEP and Robinson Coal Co.*, 2000 EHB 888 (*Wayne I*)

Following an incident in which Robinson cut down a fence constructed by Ms. Wayne in the area around the haul road, Ms. Wayne and Robinson entered into a Stipulation and Settlement

Agreement[1] in which the parties agreed as follows: Ms. Wayne agreed to state in writing "that Robinson need not reclaim that portion of the haul road which runs over and upon Wayne's property."[2] Robinson agreed to reinstall the fence and a gate after completion of reclamation.[3] As of the date of the hearing in this matter, Robinson had not installed the fence and gate.[4]

In *Wayne I*, the Board found that there had not been compliance with 25 Pa. Code § 87.160(a), which states as follows:

> Upon completion of the associated surface mining activities, the area disturbed by the [haul] road shall be restored in accordance with § 87.166 (relating to haul roads and access roads: restoration) unless retention of the road and its maintenance plan is approved as part of the postmining land use.

Department witnesses admitted there was no maintenance plan in place for the haul road at the time of the bond release; nor had they required one. Because it appeared there had not been compliance with this section of the surface mining regulations, the Board overturned the bond release with regard to the site on which the haul road was located and remanded the matter to the Department to take action in accordance with 25 Pa. Code § 87.160(a).

Following the Board's adjudication in *Wayne I*, Robinson submitted a proposed maintenance plan to the Department. The plan required Ms. Wayne to assume responsibility for maintaining the road and contained a list of "guidelines" for maintenance of the road. The guidelines were as follows:

1. The property owner should conduct a minimum of (2) two inspections per year of the existing roadway.

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[1] The Stipulation and Settlement Agreement was filed in Bankruptcy Court because this was the forum in which Ms. Wayne purchased the property due to the prior property owner having filed for bankruptcy. (Wayne Ex. A; T. 7)
[2] F.F. 13
[3] F.F. 11
[4] F.F. 12

2. The road crowns and the road surface should be maintained to prevent erosion and sedimentation runoff.

3. Minor erosion problems should be corrected with the application of stone to the erosion area and compacting the material for stability.

4. Existing drainage courses should be maintained and cleaned to insure that all drainage continues to drain to the existing drainage course, located along Donaldson Road.

5. Should any sediment accumulate in the road drainage courses, it should be removed to prevent adverse impact on the receiving streams.

6. Addition of a seed mix to the adjacent road berms may aid in minimizing sediment runoff and aid in long term stability.

7. The property owner, not the permittee, is responsible for maintaining the road.[5]

The Department approved the maintenance plan submitted by Robinson and notified Ms. Wayne's counsel and Ms. Wayne of the approval by letters dated January 5, 2001 and February 1, 2001, respectively.[6] Ms. Wayne learned that she was to be responsible for maintenance of the haul road only after receipt of the Department's notification. She was not a party to the maintenance plan, nor did anyone from Robinson or the Department contact her about the terms of the maintenance plan prior to its approval.[7] Ms. Wayne filed a timely appeal from the Department's approval of the maintenance plan. That appeal was docketed at EHB Docket No. 2001-030-R.

Ms. Wayne has the burden of proving by a preponderance of the evidence that the Department erred in approving the maintenance plan.[8] It is Ms. Wayne's contention that since the requirement of posting bonds is to ensure that the mining operator performs proper reclamation of the mine site, it follows that a release of bonds based upon a maintenance plan

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[5] (Wayne Ex. C)
[6] F.F. 19
[7] F.F. 22
[8] 25 Pa. Code § 1021.101(c)(2); *Wayne I*, 2000 EHB at 902.

requiring the landowner, rather than the mining operator, to perform the work is improper. Ms. Wayne further argues that Department's approval of a maintenance plan that calls on someone who does not have the experience, expertise or means to maintain a haul road violates 25 Pa. Code § 87.160(a). Finally, Ms. Wayne contends that the Department acted in bad faith when it approved a plan to be performed by the landowner, which will result in the release of bonds for the operator, while never conferring with the landowner as to the requirements of the plan.

Robinson and the Department contend that it is reasonable for Ms. Wayne to assume responsibility for maintaining the haul road since she consented to it remaining on her property. Robinson also points out that the Environmental Quality Board (EQB) has recently proposed amending Section 87.160(a) to delete the requirement for a haul road maintenance plan when the road is intended to be left in place as part of the postmining land use.[9] 31 Pa. Bulletin 4538-41. In the preamble to the proposed rulemaking, the EQB states the reasons for the proposed deletion as follows:

> This requirement for a road maintenance plan is proposed for deletion because it is more stringent than the corresponding Federal requirements. In addition, since the landowner has agreed to the retention of the road as a postmining land use and will be responsible for its maintenance, the Department has never required a maintenance plan after the completion of mining and reclamation activities. Therefore, the [Environmental Quality] Board also proposes to delete this requirement because it is unnecessary.[10]

We agree with Robinson and the Department that Ms. Wayne, by signing a Stipulation and Settlement allowing the haul road to remain in place as part of the postmining land use, has relieved Robinson from responsibility for maintaining the road. Since reclamation of the mine site has been completed, there is no basis for requiring Robinson to continue to maintain the haul

[9] 31 Pa. Bulletin 4538-41.
[10] *Id.* at 4538.

road. As Robinson and the Department point out, if mine operators were to have perpetual responsibility to maintain haul roads, it would be impractical to leave such structures in place. Robinson's only duty under the circumstances presented here is to make nonbonding recommendations to the landowner.

It is not clear to us that either the maintenance plan or the Department's approval thereof attempted to impose a legally binding obligation on Ms. Wayne to maintain the road. To the extent, however, that the Department has attempted to impose such an obligation, the Department lacks such authority. Neither the Department nor Robinson has given us any authority for imposing requirements on Ms. Wayne as to the manner in which she is to maintain the road. The Department has not demonstrated that it has jurisdiction to regulate Ms. Wayne with regard to the maintenance of the road on her property. Thomas Kovulchuk, Technical Services Chief in the Department's Greensburg District Office, testified the Department has no way to impose such restrictions once the permit has ended.[11] It is also worth noting that Ms. Wayne was not a party to any agreement to impose such maintenance restrictions. For these reasons, while any maintenance that is required is now her responsibility, she cannot be held bound to the maintenance plan.

In conclusion, because we find that Robinson now meets the criteria for bond release for the McWreath II site, the Department's approval of bond release is hereby reinstated.

Finally, Ms. Wayne requests the award of costs and counsel fees. Because it appears that this matter is governed by 27 Pa.C.S.A. § 7708 (Costs for mining proceedings), the Board will entertain a petition for attorney's fees filed under that provision within thirty days of the date of this adjudication.

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[11] T. 50.

CONCLUSIONS OF LAW

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

2. Ms. Wayne has the burden of proving by a preponderance of the evidence that the Department erred in approving the maintenance plan submitted by Robinson. 25 Pa. Code § 1021.101(c)(2).

3. Ms. Wayne met her burden of proving that the Department erred to the extent that its approval of the maintenance plan attempted to impose certain legally binding requirements on her for maintaining the haul road following reclamation. Ms. Wayne failed to meet her burden of proving that Robinson remains responsible for maintenance of the road.

4. Robinson meets the criteria for bond release at the McWreath II site and, therefore, the Department's approval of bond release for that site is reinstated.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JUDITH ANNE WAYNE	:	
	:	
v.	:	**EHB Docket No. 2001-030-R**
	:	**and 98-175-R**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and ROBINSON COAL	:	
COMPANY, Permittee	:	

ORDER

AND NOW, this 24th day of January, 2002, the appeal of Judith Anne Wayne at EHB Docket No. 2001-030-R is granted in part and dismissed in part in accordance with this adjudication. The appeal at EHB Docket No. 98-175-R is dismissed, and the Department's approval of bond release for Robinson Coal Company for the McWreath II site is reinstated.

If the Appellant wishes to have the Board entertain a petition for costs and attorney's fees under 27 Pa.C.S.A. § 7708, she may file said petition within thirty days of the date of this adjudication.

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: **January 24, 2002**

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

For the Commonwealth, DEP:
Barbara J. Grabowski, Esq.
Southwest Region

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WILLIAM T. PHILLIPS IV
SECRETARY TO THE BOARD

JOHN CHIRICO, LISA PARKER, BONNIE BERRY, TERRY BERRY and KIM ERNST	:	
v.	:	
	:	**EHB Docket No. 2001-048-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PROGRESS LANSDALE DEVELOPMENT ASSOCIATES, L.P., PROGRESS LANSDALE DEVELOPMENT HOLDINGS, L.P., PROGRESS DEVELOPMENT I, L.P., NSLAC ACQUISITIONS, LLC, PENNSYLVANIA STATE EMPLOYEES RETIREMENT SYSTEM, PENNSYLVANIA REAL ESTATE HOLDINGS, INC. and 1180 CHURCH ROAD, INC.	:	**Issued: January 28, 2002**

OPINION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis:

The Board upholds the Department's entry into a prospective purchaser agreement for the development of commercial facilities at a contaminated site while EPA and the Department are conducting a remedial investigation and the development of a feasibility study leading to the final decision for remediation of the entire site. The Department has authority under the Hazardous

Sites Cleanup Act to enter into such an agreement, and the administrative record gives no indication that the Department's action was arbitrary or capricious.

BACKGROUND

This appeal challenges the Department's authority to promote the development and reuse of existing and former Superfund sites through Prospective Purchaser Agreements,[1] Buyer-Seller Agreements and other similar instruments in absence of a firm agreement from the purchaser to remediate the site to applicable remediation standards. The Department contends that it has this authority under the Hazardous Sites Cleanup Act (HSCA),[2] provisions of other environmental statutes such as the Clean Streams Law (CSL)[3] and its powers of prosecutorial discretion. The Appellants claim that the Department improperly approved such an agreement in this case because, among other things, there is no commitment to remediate the contamination at the site and there is no assurance that the existing contamination at the site will ever be remediated as a result of EPA's ongoing investigation under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund).[4]

On June 24, 2000 the Department published notice in the *Pennsylvania Bulletin* of its intent to enter into such a prospective purchaser agreement with a Buyer Group relating to a site of approximately 80.5 acres in Lansdale Borough and Upper Gwynedd Township, Montgomery County. This site is located within the boundaries of the North Penn Area 7 NPL Superfund site. The notice stated that, among other things, EPA and the Department were conducting response

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[1] The notice published in the *Pennsylvania Bulletin*, attached to the Department's motion as part of Exhibit A, refers to an agreement with EPA in which the Buyer Group has agreed to resolve their potential liability to the United States associated with their intended purchase of the site in an agreement with the EPA.

[2] Act of October 18, 1988, P.L. 756, 35 P.S. §§ 6020.101 – 6020.1305.

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

actions directed at remediating the contamination at this Superfund site under the authority of CERCLA and HSCA. The Appellants responded to this notice with timely comments to the Department objecting to this proposal. The EPA held a hearing on EPA's related prospective purchaser agreement. Following the hearing and receipt of comments on the Department's proposed prospective purchaser agreement (CO&A), the Department rejected the Appellants' comments in a Comment and Response Document. Under the provisions of section 1113 of HSCA[5] the CO&A became final with the filing of this response document.

The Appellants, John Chirico, Lisa Parker, Bonnie Berry and Kim Ernst, are residents of Lansdale, Pennsylvania in the area of the site subject to the CO&A. They claim that their properties are located within the North Penn Area 7 site and will be adversely affected by this agreement. The notice of appeal states that the Department's approval of this agreement is unlawful and an abuse of discretion and arbitrary and capricious. In particular, the notice of appeal claims, among other things, that the Department failed to determine the role of the parties in the Buyer Group, did not review any development plans for the property, granted a release from liability without any indication that they might have any such liability, and absolved them from contribution claims even though the remedial investigation of the property has not been completed. Appellants also claim that the Department has no authority to grant such a release or grant contribution protection under statutes other than HSCA cited in the CO&A, that the Department failed to consider the existence of RCRA disposal facilities without any RCRA closure action and failed to respond adequately to the Appellants' comments objecting to the Department's action. *See* Notice of Appeal.

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[4] 42 U.S.C. § 9601 *et seq.*
[5] 35 P.S. § 6020.113.

The Department's motion for summary judgment is supported by the Appellees.[6] The Appellants filed a cross motion for summary judgment. Much of the administrative record in this case is attached to the Department's motion for summary judgment. The administrative record has been expanded by agreement to include, among other things, the Phase I and Phase II environmental studies referred to in the CO&A as providing part of the baseline information on the existing contamination.

The Prospective Purchaser Agreement

The CO&A in this appeal relates to the development of the 1180 Church Road Facility, North Penn 7 site, Montgomery County Pennsylvania by certain private development agencies, referred to as the "Progress Entities" and several entities of the Commonwealth referred to as the PSERS entities.[7] These entities are collectively referred to in this appeal as the Buyer Group or Appellees. The Department and the Buyer Group entered into the CO&A on May 24, 2000.

The CO&A, attached to the Department's motion for summary judgment, is stated to be entered under HSCA, the Clean Streams Law (CSL),[8] the Solid Waste Management Act

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[6] The brief of the PSERS Appellees attempts to support the Department's motion by arguing that the Appellants have no standing to appeal. Since no motion before the Board raises this issue so as to require and enable the Appellants to respond to this argument setting forth the factual basis of their claim of standing, we cannot consider this contention.

[7] The Progress Entities are Progress Lansdale Development Associates, L.P., a Pennsylvania limited partnership, Progress Lansdale Development Holdings, L.P., a Pennsylvania limited partnership, Progress Development I, L.P., a Pennsylvania limited partnership and general partner to Progress Lansdale Development Associates, L.P. and Progress Lansdale Development Holdings, L.P., NSALC Acquisitions, LLC, a Pennsylvania limited liability company and sole general partner of Progress Development I, L.P. The PSERS entities are the Pennsylvania State Employees Retirement System (PSERS), an instrumentality of the Commonwealth of Pennsylvania, Pennsylvania Real Estate Holdings, Inc. (PREHI), a subsidiary of PSERS, and 1180 Church Road, Inc., a subsidiary of PREHI.

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

(SWMA),[9] and the Storage Tank and Spill Protection Act (STSPA)[10] The CO&A states that the Appellees have proposed to purchase the site property and develop it for commercial purposes, including, but not limited to office, light industrial, hotel and related ancillary commercial uses. The agreement also recites that the EPA under CERCLA will either perform or direct the performance of a remedial investigation designed to identify the nature and extent of the release or threatened release of hazardous substances or contaminants at the site as well as a feasibility study proposing alternative response actions to address and abate the contamination at the site. These studies, together with the Phase I and Phase II environmental assessment performed by the Appellees, shall constitute the existing contamination under the CO&A.

Under the terms of the CO&A the Appellees were required to pay the Department $2,000 toward the response costs incurred by the Department for the site. In addition to promising to develop the property, the Appellees promised not to contribute to or otherwise exacerbate the existing contamination and to take steps immediately to abate any such exacerbation in a manner approved by the Department. Appellees also agreed not to interfere with any response actions to remediate the existing contamination. The Department in response granted the Appellees a covenant not to sue for response costs incurred as a result of the existing contamination subject to a reservation of rights set forth in the agreement.[11]

The Department's Motion for Summary Judgment

The Department's motion, supported by the Appellees, seeks a judgment based on the administrative record that its entry into the prospective purchaser agreement was proper. The

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

[10] Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. §§ 6021.101 – 6021.2104.

[11] The transcript of the hearing held by EPA indicates that the Department's proposed purchaser agreement is very similar to EPA's prospective purchaser agreement except that the

Department says that under HSCA any proposed settlement agreement is to be subjected to public comment and that the settlement shall become final upon the filing of the Department's Response to Significant Comments. Section 1113 of HSCA provides that subject to notice, including newspaper advertising, and a 60 day comment period:

> The settlement shall become final upon the filing of the department's Response to the significant written comments. The notice, the written Comments and the department's response shall constitute the written record upon which the settlement will be reviewed. A person adversely affected by the settlement may file an appeal to the board. The settlement shall be upheld unless it is found to be arbitrary and capricious on the basis of the administrative record. [12]

The Department's motion contends that it properly responded to the Appellants' comments in the Department's response document, that the Department has authority to enter into the CO&A and grant a covenant not to sue and protection against contribution actions under HSCA and related environmental statutes. The Department further claims that it was unnecessary to conduct a time and resource consuming investigation into the details of the nature of the Buyer Group and the plans for construction and that the remediation of the existing pollution, including RCRA disposal facilities, because remediation of the site will be addressed by the Department and EPA in the remediation process under CERCLA and HSCA. The Department also contends that the Board's scope of review under HSCA is limited whether the Department's action was arbitrary and capricious on the basis of the administrative record.

Appellants' Cross Motion for Summary Judgment

The Appellants' cross motion for summary judgment states, among other things, that no remedial investigation or feasibility study has yet been completed, that the property subject to the

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agreement with EPA calls for the buyer group to pay $225,000 to EPA for its costs. (Tr. 5-10)

CO&A and the North Penn Area 7 Superfund site are contaminated by elevated levels of trichloroethylene, vinyl chloride, TCE, 1,1-dichloroethylene and tetrachloroethylene, that the Department failed to consider a large number of facts relating to the Buyer Group and the property, that there is no express statutory authority for the Department to enter into such an agreement, that the Department has no guidelines for its decision as to whether or not to enter into such an agreement, that it has not reviewed the scope of the liability of any member of the Buyer Group, and that the scope of the contribution protection granted to the Buyer Group under the CO&A is, by the Department's admission, unknown at this time.

OPINION

The grant of summary judgment is proper under Rule 1035.2 of the Pennsylvania Rules of Civil Procedure whenever (1) there is no genuine issue of material fact that could be established by additional discovery or expert report, or, (2) after completion of discovery relevant to the motion, the party opposing the motion who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury. *Jones v. SEPTA*, 772 A.2d 435 (Pa. 2001); *Schreck v. Department of Transportation*, 749 A.2d 1041 (Pa. Cmwlth. 2000). The grant of summary judgment is warranted only in a clear case, and the record must be viewed in the light most favorable to the non-moving party resolving all doubts regarding the existence of a genuine issue of material fact against the grant of summary judgment. *Young v. Department of Transportation*, 744 A.2d 1276 (Pa. 2000); *County of Adams v. Department of Environmental Protection*, 687 A.2d 1222 (Pa. Cmwlth. 1997).

There are two threshold questions in considering the Department's motion. The first is

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[12] 35 P.S. § 6020.1113.

whether HSCA is sufficient to provide the Department with authority to enter into the CO&A. The second is whether HSCA's limitations on the scope of this Board's review of this action under HSCA apply to this motion for summary judgment.

Authority under HSCA

HSCA's Declaration of Policy expressly declares that the cleanup of properties contaminated with hazardous materials is vital to the economic development of the Commonwealth and that the Department should be provided with flexible and effective means to enter into various settlement agreements with responsible parties at contaminated sites. 35 P.S. 6020.102(3), 6020.102(12(vii) and (ix).

While the primary purpose of HSCA is to enable the Department to require parties responsible for contamination of land by hazardous substances to take remedial action or bear the expense of any remedial action directed by the Department, HSCA contains ample authority for the Department to issue orders to other persons as a part of its overall approach to enforcement. HSCA specifically authorizes the issuance of orders to other persons in order to achieve the goals of the Act. Section 1102(a) of HSCA,[13] provides:

> **(a) General rule** – The department shall issue orders to persons as it deems necessary to aid in the enforcement of the provisions of this act. Orders shall include, but shall not be limited to, orders requiring response actions, studies and access and orders modifying suspending or ceasing a response action by a responsible person even though the response may have been initially approved by the department. An order issued under this section shall take effect upon notice unless the order specifies otherwise. The power of the department to issue an order under this section is in addition to any other remedy which may be afforded to the department under this act or any other statute.

[13] 35 P.S. § 6020.1102(a).

In addition, section 503(b) of HSCA[14] authorizes the Department to require access to the property and to obtain information relating to possible sources of contamination.

The CO&A in this case, permitting development of a portion of the contaminated site while the Department and EPA undertake the time consuming effort of studying the entire site and developing a remedial response for the entire site, appears to be necessary to the Department's enforcement powers under HSCA. It most certainly requires the Appellees to aid the Department in any action it may take against responsible parties or the Appellees. It requires a $2,000 contribution to the Department's response costs[15] and requires the Appellees to take response action immediately in the event their activities should contribute to or otherwise exacerbate the existing contamination at the site. The CO&A also requires the Appellees not to interfere with or otherwise impair any response actions directed or undertaken by the Department or EPA and to give access to the property to persons responsible for investigation or remedial activities with respect to contamination on the property. Finally, the CO&A contains a broad reservation of rights with respect to any further action that the Department might justifiably take against the Appellees as responsible parties.

The Board's Scope of Review

The second threshold question is whether the Board should review the Department's

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[14] 35 P.S. § 6020.503(b).

[15] The transcript of the hearing held by EPA on the EPA's prospective purchaser agreement indicates that the Buyer Group agreed to pay EPA $225,000 for its past costs. (Tr. 5-10) The Department's Comment and Response Document states at page 6 that the $2,000 amount to be paid to the Department covers most of the cost the Department has incurred at this site. It also states that the Department has not been required to spend significant public monies toward this particular site and, because the site will be cleaned up by existing viable private parties under the supervision of EPA, the Department does not anticipate that it will incur significant public monies in the future. (Response to Significant Comments attached to Exhibit A of the Department's motion for summary judgment, p. 6)

action under its "reasonable and appropriate" standard[16] or whether its powers of review are limited by section 1113 of HSCA.[17] The Appellants acknowledge that this Board's review under HSCA is pursuant to an "arbitrary and capricious standard."[18] Section 1113 of HSCA provides in relevant part as follows:

> When a settlement is proposed in any proceeding brought under this act, notice of the proposed settlement shall be sent to all known responsible persons and published in the Pennsylvania Bulletin and in a newspaper of general circulation in the area of the release. The notice shall include the terms of the settlement and the manner of submitting written comments during a 60-day public comment period. The settlement shall become final upon the filing of the department's response to the significant written comments. The notice, the written comments and the department's response shall constitute the written record upon which the settlement will be reviewed. A person adversely affected by the settlement may file an appeal to the board. The settlement shall be upheld unless it is found to be arbitrary and capricious on the basis of the administrative record.

The CO&A is certainly a "settlement" of any claim the Department may have against the Appellees. Since the order was issued under the authority of HSCA, the CO&A was certainly proposed in a "proceeding" brought under HSCA. We therefore conclude that since the Department has followed the procedure dictated by this provision of HSCA, our scope of review is necessarily limited by the legislature's specific decree that such a settlement "shall be upheld unless it is found to be arbitrary and capricious on the basis of the administrative record." The fact that the order was also issued under the authority of other statutes such as the Clean Streams Law and the Storage Tank Act does not control the application of this limited scope of review.

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[16] *Smedley v. DEP*, EHB Docket No. 97-253-K (Adjudication issued February 8, 2001).
[17] 35 P.S. § 6020.1113.
[18] Appellants' Memorandum, p. 10.

Section 1102 of HSCA[19] which authorizes the issuance of the order to persons other than responsible parties specifically provides that the power to issue an order under this section "is in addition to any other remedy which may be afforded to the department under this act or any other statute."

The administrative record on which the Department's motion for summary judgment is based appears to be complete. Section 506(a) of HSCA[20] specifically defines the contents of the administrative record that the Board may consider its review of the Department's action. It provides as follows:

> **(a) Contents** – The administrative record upon which a response section is based shall consist of all of the following:
>
> (1) The notice issued under subsection (b).
> (2) Information, including but not limited to, studies, inspection reports, sample results and permit files, which is known and reasonably available to the department and which relates to the release or threatened release and to the selection, design and adequacy of the response action.
> (3) Written comments submitted during the public comment period under subsection (c).
> (4) Transcripts of comments made at the public hearing held under subsection (d).
> (5) The department's statement of the basis and purpose for its decision, including findings of fact, an analysis of the alternatives considered and the reasons for selecting the proposed response action, and its response to significant comments made during the public comment period.
> (6) The docket maintained under subsection (f), listing the contents of the administrative record.

The administrative record as defined in the Department's motion for summary judgment purports to meet these requirements with the additions agreed upon by the parties including the environmental studies referred to in the CO&A as providing part of the baseline information on

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[19] 35 P.S. § 6020.1102.

the existing contamination. As supplemented, the administrative record includes the following:

1. Certification of Administrative Record
2. Prospective Purchaser Agreement for the1180 Church Road Facility
3. Pennsylvania Bulletin Notice dated June 24, 2000
4. Comment Letter dated August 11, 2000 (with an attachment consisting of a letter dated July 27, 2000, addressed to the USEPA regarding a Prospective Purchaser Agreement the USEPA was proposing to enter into with the same parties)
5. Comment letter dated August 23, 2000
6. Transcript of Public Hearing dated November 29, 2000
7. DEP Response to Significant Comments
8. The Phase I and Phase II reports submitted with the affidavit of Bruce D. Beitler.

The Department's response document suggests that the Department's action may be upheld because it responds to the comments set forth by Appellants in their written comments and at EPA's hearing. The adequacy of these responses is considered below.

The Appellants' Contentions

The Appellants' response to the motions of the Department and the appellees and its cross motion for summary judgment contend that the Department was without authority to enter into the prospective purchaser agreement and CO&A under statutes other than HSCA and that its agreement to do so was improper for a number of reasons as discussed below.

Absence of Express Authority

Appellants claim that there is no express authority for the Department to enter into the prospective purchaser agreement under any statutes of the Commonwealth. Cross-Motion ¶ 18.

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[20] 35 P.S. § 6020.506(a).

The Appellants concede, however, that the Department has implied authority to enter into prospective purchaser agreements under HSCA.[21] Whether the Department also had such authority under other statutes is a purely academic question in the context of this appeal. We see no need to address that question here.

Absence of a Final RI/FS

Appellants state that neither the property nor the North Penn Area 7 NPL site have received a final remedial investigation/feasibility study or selection of a remedy. Cross-motion ¶¶ 3, 14-17. While this is true, the site is being investigated by EPA and the Department under Superfund and HSCA. Since the existence of these investigations provide reasonable assurance that appropriate remedial action will be taken in the future, this fact does not indicate that the Department has abused its discretion in failing to wait until these studies have been completed.[22] EPA and the Department undoubtedly will assure that the remediation following the Superfund investigation will meet Act 2 standards because that is what the law requires.

Character, Plans and Potential Liability of the Progress Entities

Appellants state that the Department did not consider the exact role of the Buyer Group or its connection to the property or the site or the proposed development plans for the property and has not reviewed the responsibility of the Buyer Group under various environmental statutes. Cross-Motion ¶¶ 6-13, 21-25.

The Department's memorandum of law asserts that the CO&A identifies all individual

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[21] Appellants' Memorandum, p. 12.

[22] At the EPA hearing, the EPA counsel stated that the EPA is conducting an RI/FS of the groundwater and also the soils at one particular facility. He further stated that the responsible parties are conducting an RI/FS of the soils at the remaining facilities including the 1180 Church Road facility. Transcript of EPA hearing attached to Exhibit A to the Department's motion for summary judgment. (Tr. 12)

members of the Buyer Group and they have conducted an environmental assessment of the property. In addition, each member of the Buyer Group has specifically represented that it neither caused, contributed to, nor is otherwise liable for the contamination at the North Penn Area Site, and the Department has expressly reserved the right to take action against the Buyer Group if any unknown information demonstrates that any member of the Buyer Group did cause, contribute to, or is otherwise liable for such contamination.

We agree with the Department's contention that its failure to conduct a time consuming investigation into each member of the Buyer Group and all of the potential corporate interrelations among them does not render the approval of the CO&A arbitrary or capricious under these circumstances. The Department retains authority under the CO&A to require the Buyer Group to take corrective action for both unknown environmental conditions and any exacerbation of existing environmental conditions.

The Department's Costs

Appellants state that the Department failed to consider any future costs that it might incur at the site. Cross-Motion ¶ 5. The Department's answer denies this claim. The Department says that the site is being investigated by non-party potentially responsible parties and the Department expects that the final remedial action will be implemented in a similar fashion. The Comment and Response Document attached to the Department's Motion as part of Exhibit A states at page 6 that the Department does not anticipate that it will be required to spend significant public monies toward this particular site in the future. The Department believes that the $2,000 contribution to the Department's costs represented nearly all of its costs and was reasonable under the circumstances. There is nothing in the administrative record that indicates that this conclusion is arbitrary or capricious.

Covenant Against Suit and Contribution Protection

The Appellants state that the Department takes no position on whether or not "contribution protection" is available even though the CO&A expressly addresses contribution protection. Cross-Motion ¶ 20. The notice of appeal also asserts that the Department does not possess the authority to provide a covenant not to sue or contribution protection.

The Department undoubtedly has authority to grant a covenant not to sue under HSCA. Section 706 of HSCA[23] grants this power to the Department, and we see nothing in that section that would limit the Department's power to issue such a covenant under these circumstances. Nothing in the administrative record indicates to us that this grant is not in the public interest or would not have a tendency to expedite necessary response action.

Similarly, contribution protection is authorized under section 705(c)(2) of HSCA. We would add that such a grant has become a traditional device in reaching settlements with some, but not all parties potentially responsible for contamination at a site.[24]

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[23] 35 P.S. § 6020.706.

[24] The Department's motion for summary judgment attaches as Exhibits B and C actions by both federal and state courts approval of such a grant of protection as well as a covenant not to sue. The brief of the Progress Entities also include citations to authorities upholding a federal grant of contribution protection against claims that it violates the constitutional rights of the public. *See United States v. Lackawanna Refuse Removal, Inc.*, 781 F. Supp. 336, 338 (M.D. Pa. 1992); *United States v. Cannons Engineering Corp.*, 720 F. Supp. 1027 (D. Mass. 1989, *aff'd.* 899 F.2d 79 (1st Cir. 1990); *General Time Corp. v. Bulk Materials,* 826 F. Supp. 471, 477 (M.D. Ga. 1993). EPA's ability to grant contribution protection as a result of a settlement has a statutory basis in Section 113(f) under CERCLA. 42 U.S.C. § 9713(f). In language virtually identical to that set forth in section 705(c)(2) of HSCA, that paragraph provides as follows:

> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement.

Absence of DEP Guidelines

Appellants complain that the Department has no guidelines as to when and on what terms to enter into a prospective purchaser agreement. (Cross-Motion ¶ 19) The Department acknowledges that this is true in its answer to the cross-motion. The Department has attached to its motion for summary judgment as Exhibit D a Consent Order Model Buyer and Seller Agreement which provides some guidance for Department personnel. In addition, we note that the transcript of the EPA hearing sets forth the EPA's policy on its willingness to enter into a prospective purchaser agreement and that the Department's CO&A appears to largely follow the outline of the EPA Agreement. Accordingly, the absence of DEP guidelines for entry into such an agreement, even if material, is hardly evidence of arbitrary or capricious action.

Necessity of a "Proceeding"

In paragraph 14 of the Appellants' answer to the Department's motion, it claims that to be within the scope of section 1113 of HSCA, the Department must have instituted a proceeding. It claims that no "proceeding" was instituted in this case. As indicated above, we disagree. The negotiation and issuance of the CO&A is a proceeding under HSCA.

Hazardous Chemicals at the Site

Appellants state that the Property and the Site have been found to have been contaminated by elevated levels of trichloroethylene, vinyl chloride, TCE,1,1-dichloroethylene and tetrachloroethylene. The Department's answer admits the truth of this statement. The environmental studies recently submitted to the Board as a part of the administrative record indicate that the groundwater under the property is contaminated with those chemicals.

While we would be concerned by the approval of a prospective purchaser agreement for a highly contaminated property, we see nothing in the administrative record to indicate that

approval of the agreement under these circumstances is arbitrary or capricious in the sense that it will present an undue risk to nearby residents or workers. The Appellants' statement of objections submitted to EPA dated July 27, 2000 primarily concern the existence of lagoons of hazardous waste on the property which were not closed until the late 1980's. This statement claims that conditions at the site "could have provided impacts to drinking water supplies provided to most of the people living in the area by North Penn Water Authority." However, the comment letter does not claim that the Buyer Group's development creates a substantial, present threat to the well-being of residents, workers or visitors to the proposed facility.

The transcript of the hearing on the prospective purchaser agreement held by EPA does not disclose a serious present threat at the site to the safety of the public. An environmental consultant did testify that the Phase I environmental assessment, referred to as the EMG report, seems to have missed the unlined lagoons and shows a soil sample in front of a building that does exceed statewide standards. He acknowledged, however, that the EMG report concluded that the existence of this sample of contamination is "sort of okay." (Tr. 18-19) However, the consultant did not contend that the approval of the prospective purchaser agreement would present a threat to public health. While he did testify that there were hazardous materials in the ground water, his point was only that the existing contamination should be further delineated. (Tr. 19-26)

By contrast, the EPA staff attorney at the hearing, Mr. Cinti, stated that EPA would be at the site while the development is being undertaken and would ensure that the development does not pose a health risk. This includes being sure that the developers do not dig through any contaminated areas which may pose a risk for the community. (Tr. 45)

The Phase I and Phase II environmental reports consisting of the EMG Phase I

Environmental Site Assessment and the Weston Final Report on the Lansdale Property properly have been made a part of the administrative record by agreement of the parties so that the HSCA definition of the contents of the administrative record will be met. Nevertheless, the Appellants have made no argument or other presentation before this Board that these documents indicate that the approval of the prospective purchaser agreement before a full remedial action plan was approved and implemented would present a health threat to any person.

The Department's Comment and Response Document reviewed the objections raised by the Appellants and concluded that none of these comments or the testimony at the hearing constitute a sufficient basis for the Department to withdraw from the prospective purchaser agreement. Rather the Department concluded after review of these matters that the prospective purchaser agreement serves the public interest in an effective and efficient manner.

Since nothing in the Appellant's notice of appeal, its cross motion for summary judgment, supporting legal memoranda or the administrative record indicate that the Department's approval of the agreement was arbitrary or capricious or otherwise in violation of law, we enter the following order:

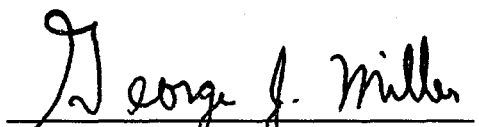
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN CHIRICO, LISA PARKER, BONNIE BERRY, TERRY BERRY and KIM ERNST	:	
v.	:	
	:	**EHB Docket No. 2001-048-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PROGRESS LANSDALE DEVELOPMENT ASSOCIATES, L.P., PROGRESS LANSDALE DEVELOPMENT HOLDINGS, L.P., PROGRESS DEVELOPMENT I, L.P., NSLAC ACQUISITIONS, LLC, PENNSYLVANIA STATE EMPLOYEES RETIREMENT SYSTEM, PENNSYLVANIA REAL ESTATE HOLDINGS, INC. and 1180 CHURCH ROAD, INC.	:	

ORDER

AND NOW, this 28th day of January, 2002, the Department's Motion For Summary Judgment is granted and the appeal is **DISMISSED**. The Appellants' Cross Motion For Summary Judgment is **DENIED**.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: **January 28, 2002**

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

NAOMI R. DECKER	:	
	:	
v.	:	**EHB Docket No. 2001-279-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DILLSBURG AREA AUTHORITY	:	**Date Issued: February 4, 2002**

OPINION AND ORDER ON MOTION TO DISMISS AND REQUEST FOR LEAVE TO FILE AN APPEAL NUNC PRO TUNC

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

Synopsis:

The Board dismisses an untimely appeal. The Appellant's claim that she did not understand section 1021.52 of the Board's regulations, relating to timeliness of appeals, even if true, does not provide the Board with a basis for accepting jurisdiction over the untimely appeal. The Appellant's request for leave to file an appeal *nunc pro tunc* because she believes that it is important to bring alleged statutory violations to this Board's attention is denied.

OPINION

The Department of Environmental Protection (the "Department") issued Part II NPDES Permit No. 678402(00-1) to the Dillsburg Area Authority on or about October 5, 2001. The Department published notice of the permit issuance in the Pennsylvania Bulletin on October 20, 2001. Naomi R. Decker filed this appeal with the Board on November 29, 2001. The Department

has moved to dismiss Ms. Decker's appeal as untimely filed. The Dillsburg Area Authority concurred in the motion. Ms. Decker, who is appearing *pro se*, responded that it was difficult to understand the Board's regulations regarding timeliness and party designations. Ms. Decker asserted that it was her understanding that she had 30 days from the date she actually became aware of the Department's action to file her appeal. Ms. Decker stated that she found out about the Department's action on November 2, 2001 and filed her appeal on November 19, 2001, which is within 30 days of receiving actual notice of the action.

The Board lacks jurisdiction over untimely filed appeals. 25 Pa. Code § 1021.52; *Rostosky v. Department of Environmental Resources*, 364 A.2d 761, 763 (Pa. Cmwlth. 1976); *Broscious Construction Co. v. DEP*, 1999 EHB 383, 384. Notice of the permit issuance was published at Volume 31, No.42, page 5834 of the Pennsylvania Bulletin on October 20, 2001. Because Ms. Decker is not a person to whom the Department's action was directed, and because notice of the permit issuance was published in the Pennsylvania Bulletin, Ms. Decker was required to file her appeal within 30 days of that publication. 25 Pa. Code § 1021.52(a)(2)(i); *Lower Allen Citizens Action Group, Inc. v. Department of Environmental Resources*, 546 A.2d 1330 (Pa. Cmwlth. 1988); *Middleport Materials v. DEP*, 1997 EHB 78, 81. Under the circumstances presented here, it is irrelevant whether Ms. Decker understood the Board's regulations and when she received actual notice of the Department's action. *Lower Allen Citizens*, 546 A.2d at 1331; *Middleport Materials*, 1997 EHB at 81. Ms. Decker did not appeal until 10 days beyond the 30-day deadline.

At various points in her response, Ms. Decker seems to make arguments regarding an Act 537 Plant Expansion/Special Study dated April 5, 2001. The notice of appeal, however, states that "[m]y appeal is in reference to D.E.P.'s issuance of WQM permit No. 6780402 to Dillsburg

Area Authority," and we view this appeal to be from the issuance of the permit, not the Special Study. To the extent that this appeal was intended to relate to the Act 537 Plant Expansion/Special Study dated April 5, 2001, Ms. Decker already has a timely appeal pending from that action at EHB Docket No. 2001-107-L.

Ms. Decker asserts that she should have received personal notice of the permit issuance because she is a supervisor of a township that is partially served by the POTW that is the subject of the permit. Ms. Decker does not cite any authority in support of her assertion, and we are not independently aware of any such authority. Whether or not Ms. Decker was entitled to such personal notice, the fact remains that she is clearly not a person to whom the Department's action is directed. As a third party, her appeal window is unambiguously defined in our rules at 25 Pa. Code § 1021.52(a)(2)(i).

Finally, Ms. Decker makes a number of substantive arguments concerning the merits of this appeal and her other appeal in her response to the Department's motion. Those arguments, however, are not relevant to the timeliness issue presented in the Department's motion.

Decker's separate motion for leave to file the appeal *nunc pro tunc* is denied. Decker's only basis for seeking permission to file a late appeal is that she strongly desires to bring alleged statutory violations to the Board's attention. This does not constitute a permissible basis for allowing a *nunc pro tunc* appeal. 25 Pa. Code § 1021.53(f).

For the foregoing reasons, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NAOMI R. DECKER	:	
	:	
v.	:	**EHB Docket No. 2001-279-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	

ORDER

AND NOW, this 4th day of February, 2002, the Department's motion to dismiss is hereby **GRANTED**. This appeal is dismissed as untimely filed. The Appellant's motion for leave to file her appeal *nunc pro tunc* is **DENIED**.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **February 4, 2002**

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MUNICIPAL AUTHORITY OF UNION TOWNSHIP	:	
v.	:	**EHB Docket No. 2001-043-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 4, 2002**

OPINION AND ORDER ON MOTIONS
FOR PARTIAL SUMMARY JUDGMENT

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

Synopsis:

The Department may not refuse to set otherwise applicable, technology-based effluent limits in the Appellant's NPDES permit solely because the Appellant's POTW is designed for and is in fact meeting more stringent limits.

OPINION

The facts set forth in the following narrative are undisputed. The Municipal Authority of Union Township (the "Municipal Authority") operates a publicly owned treatment works ("POTW") in Union Township, Mifflin County that discharges effluent to the Kishacoquillas Creek pursuant to NPDES Permit No. 0024708. Dean Dairy Products Company, Inc. ("Dean Dairy") is an industrial user of the POTW. In the course of manufacturing dairy products, Dean Dairy generates wastewater, which it discharges after pretreatment to the POTW.

The Municipal Authority obtained its first NPDES permit in 1974. The relationship

between the Authority and Dean Dairy on the one hand, and the Department of Environmental Protection (the "Department") and the Environmental Protection Agency ("EPA") on the other hand has been defined by a significant amount of litigation over the years. *See United States v. Municipal Authority of Union Township, et al.*, 929 F. Supp. 800 (M.D. Pa. 1996), *aff'd*, 150 F.3d 259 (3rd Cir. 1998); *Municipal Authority of Union Township v. DER*, 1989 EHB 1156.

In early 1990s, the POTW consistently exceeded its NPDES limits for total suspended solids ("TSS" or "SS") and carbonaceous biochemical oxygen demand ("$CBOD_5$"),[1] at least in part because of Dean Dairy's discharge to the plant. Dean Dairy's wastewater contained high levels of SS and $CBOD_5$. The Municipal Authority and the Department entered into a consent order and agreement in 1994. The Municipal Authority agreed to upgrade the POTW. The Department agreed to reissue the Municipal Authority's NPDES permit to contain interim limits of 58 milligrams per liter (mg/l) for SS and 51 mg/l for $CBOD_5$, and final limits (to apply after the upgrade) of 58 mg/l for SS and 45 mg/l for $CBOD_5$. The Department issued such a permit on August 25, 1994. The Municipal Authority upgraded the POTW. It paid for the upgrade at least in part with federal grant money. In the meantime, Dean Dairy installed a pretreatment system to reduce the levels of SS and $CBOD_5$ in its wastewater before discharging it to the POTW. As a result of these developments, the POTW as upgraded and supplied with Dean Dairy's pretreated wastewater is not only designed to meet its permit limits, it has, in fact, consistently exceeded the performance mandated by those limits over the last several years.

The current dispute arises from the Department's most recent renewal of the Municipal Authority's permit on January 19, 2001. When the Municipal Authority applied for the renewal in August 1999, it requested that its permit limits for TSS and $CBOD_5$ be adjusted to account for

[1] The regulations and cases occasionally shift between "$CBOD_5$" and "BOD_5". The two are interchangeable based upon the application of a simple conversion factor.

the fact that a significant portion of its inflow comes from Dean Dairy. After a series of draft permits, comment letters, and responses thereto, the Department issued a permit to the Municipal Authority that rejected the Authority's request for an adjustment. Instead, the permit contained limits of 25 mg/l for $CBOD_5$ and 30 mg/l for TSS, which are the secondary treatment limits for sewage. The Department explained why it denied the adjustment as follows:

> The technology-based average monthly limits of 25 mg/l for $CBOD_5$ and 30 mg/l for TSS...are appropriate for this permit based on our consideration of the following:
>
> - Organic loading to the plant has been well below the design loading of the plant. Also, there were no effluent violations for TSS or $CBOD_5$ in the previous permit cycle, and TSS and $CBOD_5$ concentrations in the effluent have been below secondary treatment requirements.
> - The intent of the Consent Order and Agreement between the Department and Union Township was that the upgraded plant would be designed to meet secondary treatment requirements. Documentation for the upgrade indicates the plant has been designed to meet secondary treatment limits. Additional aeration capacity was provided for in the upgrade to deal with the elevated organic loading.
> - The federal regulations allow for the use of [the] permitting authority's discretion in this situation.

In other words, based upon the POTW's design and performance, the Municipal Authority did not need an adjustment to account for the Dean Dairy contribution, so the Department did not allow it. This appeal followed.

Pollutants may not be discharged from a point source into surface waters of the Commonwealth except as authorized by a national pollutant discharge elimination system ("NPDES") permit. 25 Pa. Code § 92.3. The Department determines the amount of pollutants that may be discharged and/or the type of treatment that must be applied to the wastewater by establishing effluent limits or standards in the permit.

There are two basic types of effluent limits: technology-based limits and water-quality-based limits. EPA has established technology-based limits based upon pollution control

technologies that are available to a particular industry or type of source. Pennsylvania's Environmental Quality Board ("EQB") has adopted the federal technology-based limits by reference. 25 Pa. Code § 92.2d. The technology-based limits may need to be adjusted to protect the uses or classification of the particular receiving stream. Limits based upon consideration of the receiving waters are known as water-quality-based limits. Specific treatment requirements and effluent limits for each permitted discharge *must* be based upon the more stringent of the applicable technology-based and the water-quality-based standards. 25 Pa. Code § 92.2a.

We may put water-quality-based standards to the side. The Municipal Authority acknowledges that technology-based limits that might otherwise be included in its permit may need to be adjusted based upon water-quality criteria. The permit limits at issue here were not based upon the application of any water-quality-based standards. In other words, they were not directly based upon the need to protect the receiving stream's uses or classification.

The technology-based standards that are to be applied to a POTW depend upon the nature of the wastestream flowing into the POTW. Most of what a POTW treats is usually sewage. "Sewage" is defined as "[a] substance that contains any of the waste products or excrementitious or other discharge from the bodies of human beings or animals." 25 Pa. Code § 92.1. Sewage, with exceptions not relevant here, must be given a minimum of "secondary treatment." 25 Pa. Code § 92.2c. As previously noted, the minimum level of effluent quality attainable by secondary treatment is numerically defined in the pertinent part of the regulations as a 30-day average for $CBOD_5$ of 25 mg/l and a 30-day average of 30 mg/l for SS. 25 Pa. Code § 92.2c, incorporating 40 C.F.R. § 33.102.[2]

As exhibited by the POTW at issue here, POTWs also treat wastestreams other than

[2] The precise nuances of what constitutes "secondary treatment" are the subject of another appeal currently pending before the Board, *see Lower Paxton Township v. DEP*, EHB Docket No. 2000-169-K (Opinion and Order issued August 23, 2001), but are not at issue here.

sewage. A POTW may also treat industrial waste discharged into its system from industrial facilities. Dean Dairy is such an indirect discharger. Technology-based effluent limits that are separate and distinct from the secondary treatment requirements for sewage would ordinarily apply to Dean Dairy's discharge. Given Dean Dairy's business, the limits for $CBOD_5$ and SS happen to be less stringent than the secondary treatment limits for a POTW's treatment of sewage. 40 C.F.R. §§ 405.32(a), 405.52(a), 405.72(a), and 405.92(a), incorporated by reference at 25 Pa. Code §§ 92.2 and 92.2d.

The question, then, arises as to what limits are to be imposed on a POTW with a mixed wastestream. One set of limits applies to sewage, but a different set of limits would normally apply to the industrial component of the wastestream. The regulations solve this problem by providing that POTWs must attain secondary treatment of the entire wastestream if 10 percent or less of the influent to the POTW comes from the industrial source. It would simply be too much of an administrative burden to recalculate limits for every POTW with indirect discharges that is subject to less stringent limits, so 10 percent was selected as the cutoff. *See* 38 Fed. Reg. 22,298 (August 17, 1973).[3]

Where, however, more than 10 percent of the influent to the POTW originates from the industrial source, it is arguably not appropriate to effectively impose one technology-based limit--secondary treatment--on a wastestream that is ordinarily subject to different technology-based limits--here being the limits for the dairy products industry found at 40 C.F.R. Part 405. To allow for a proper adjustment, EPA promulgated the following regulation, which the Commonwealth has adopted by reference:

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[3] "[A] provision has been added [to the applicable regulation] which limits the use of the upward adjustment provision to only those cases in which the flow or loading from an industrial category exceeds 10 percent of the design flow or loading of the treatment works. This is intended to reduce or eliminate the administrative burden which would be involved in making the biochemical oxygen demand and suspended solids criteria." *Id.*

> *Industrial Wastes.* For certain industrial categories, the discharge to navigable waters of BOD_5 and SS permitted under [applicable statutory and regulatory provisions] may be less stringent than the values given in §§ 133.102(a)(1), 133.102(a)(4)(i), 133.102(b)(1), 133.105(a)(1), 133.105(b)(1) and 133.105(e)(1)(i). In cases when wastes would be introduced from such an industrial category into a publicly owned treatment works, the values for BOD_5 and SS in §§ and 133.102(a)(1), 133.102(a)(4)(i), 133.102(b)(1), 133.105(a)(1), 133.105(b)(1) and 133.105(e)(1)(i) may be adjusted upwards provided that: (1) The permitted discharge of such pollutants attributable to the industrial category, would not be greater than that which would be permitted under section 301(b)(1)(A)(i), 301(b)(2)(E) or 306 of the Act, if such industrial category were to discharge directly into the navigable waters, and (2) the flow or loading of such pollutants introduced by the industrial category exceeds 10 percent of the design flow or loading of the publicly owned treatment works. When such an adjustment is made, the value for BOD_5 or SS in §§ 133.102(a)(2), 133.102(a)(4)(ii), 133.102(b)(2), 133.105(a)(2), 133.105(b)(2) and 133.105(e)(1)(ii) should be adjusted proportionately.

40 C.F.R. § 133.103(b), adopted by reference at 25 Pa. Code § 92.2c(b)(1). In other words, the secondary treatment limits that would normally apply to a POTW for the treatment of sewage are adjusted upward to account for the contribution to inflow from the nonsewage wastestream.

The immediate dispute turns on whether the Department should have granted the Municipal Authority an adjustment pursuant to Section 133.103(b). Both the Municipal Authority and the Department have filed motions for partial summary judgment that are addressed to this issue. The Municipal Authority poses the question presented and proposed response as follows:

> The issue is whether as a matter of law, DEP can refuse to establish the technology-based effluent limitations under § 133.103(b) for a municipal facility that meets all the requirements of the regulation wherein such refusal is based upon *ad hoc* DEP policy or subjective criteria which has not been subject to rulemaking procedures. The Authority asserts that, as a matter of law, it continues to be entitled to have its technology-based effluent limitations adjusted under § 133.103(b), as occurred in issuing its August 25, 1994 permit.

The Department also summarizes the basis for its motion well:

> In a nutshell, it is the Department's position that 40 CFR § 133.103(b), as well as state law and regulations, provide it with discretion in deciding whether to

> grant a variance from secondary treatment requirements. Because the upgraded Union Township plant was designed to meet secondary treatment limits and was consistently achieving such limits, the Department decided that there was no need for a variance.

Partial summary judgment may be granted whenever a party is entitled to judgment in its favor on a particular issue as a matter of law based upon undisputed material facts. Pa. R.C.P. 1035.2. The facts material to whether the Department should have performed an adjustment pursuant to § 133.103(b) are not disputed, and based on those facts, it is clear that the Municipal Authority is entitled to a ruling in its favor as a matter of law on that issue.

There is no dispute that the Municipal Authority's POTW treats a mixed wastestream that meets the specified regulatory prerequisites for adjustment pursuant to 40 C.F.R. § 133.103(b). There is also no dispute that an application of the technology-based process, including § 133.103(b), would have resulted in a different set of permit limits than those set by the Department (although the precise values remain to be determined). Nevertheless, the Department admittedly did not set those limits, solely because it determined that the POTW does not need them.

We should be clear that the Department's only basis for denying the adjustment was that the POTW did not need it. The only basis for denying the adjustment cited by the Department in its cover letter accompanying the permit was that the POTW was designed for and was in fact meeting secondary treatment limit for sewage. The Department has also noted that Dean Dairy pretreats its wastestream, and that as a result of a consent order and agreement, the POTW upgrade was designed to meet limits more stringent than secondary treatment in order to receive federal grant money. The Department has not claimed that these facts independently justify its permitting action, and the permit reviewers did not list these factors as bases for denying the adjustment. See Department Motion, Exhibits F and K. Rather, these facts explain *why* the

POTW is able to meet secondary treatment limits.

The Department asserts that it can deny the adjustment because § 133.103(b) states that the secondary treatment limits *may* be adjusted upwards if there is a mixed wastestream. On the other hand, the Municipal Authority suggests that the Department has little or no discretion in granting an adjustment under § 133.103(b). We need not define the outer boundaries of the Department's discretion in this case. After all, the regulation does say that the limits *may* be adjusted.[4] Even if we assume for current purposes that the Department has the discretion to refuse to employ the regulatory defined limits, however, there must be a lawful, reasonable, and appropriate basis for doing so. We conclude that refusing to employ the limits because a source does not really need them does not constitute a lawful basis for doing so.

There is no express regulatory basis for changing the technology-based limits that would otherwise apply to POTW treating a qualified mixed wastestream based upon perceived need. Beyond the use of the word "may," Section 133.103(b) does not include language specifically authorizing the Department to consider need.

The foundation for setting effluent limits in NPDES permits is 25 Pa. Code § 92.2a. (*Accord*, 25 Pa. Code § 92.31.) As previously noted, that section provides that treatment

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[4] *But see Belcher v. State Harness Racing Commission*, 728 A.2d 425, 427 n. 9 (Pa. Cmwlth. 1999) ("However, where, as here, a statute gives power to public officials and individual rights call for the exercise of that power, the word "may" mean the same thing as the word 'shall'.") It could be that the federal regulation used the word "may" in order to give primacy states the option of not providing the adjustment. The state regulations may be more, but not less, stringent than their federal equivalents. This is another question that need not be resolved here.

The Department cites isolated portions of the regulatory history of Section 133.103(b) as proof that the permitting authority may deny the adjustment based upon performance data at a particular plant. Of course, none of the regulatory references actually says that. The references do support the point that Section 133.103(b) was drafted in part because it can be difficult for a POTW to treat a high-strength industrial discharge. The fact that the regulation may have been motivated in part by this concern, however, should come as no surprise, and it does not reflect an intention one way or the other that permit authorities would have the authority to deny such adjustments where it is not difficult for a particular plant to treat an industrial discharge. The regulation could very easily have been drafted to provide that the adjustment would only be granted where shown to be necessary, but it was not. We also note in passing--not as independent support for our holding today but in reference to the Department's regulatory-history argument--that EPA appears to interpret Section 133.103(b) to mean that it is not necessary that a POTW demonstrate a need for an adjustment from a compliance standpoint; the POTW is *entitled* to the variance once the prerequisites set forth in the section are met.' (DEP Exhibit S.)

requirements and effluent limitations in permits *shall* be based on the most stringent requirement in a list of applicable federal and state regulations.[5] *See also Vesta Mining Company v. DER*, 642 A.2d 568, 570 (Pa. Cmwlth. 1994) (in setting effluent limits, DER is required to impose the more stringent of technology-based effluent limitations or water quality-based effluent limitations). Again as previously discussed, those regulations boil down to a list of technology-based standards and a process for setting water-quality-based standards. *See* 25 Pa. Code Chapters 91-96.

Notwithstanding the mandatory language of 25 Pa. Code § 92.2a, and the existence of a very detailed regulatory roadmap for setting permit limits, we do not mean to suggest that every permitting decision that the Department makes must find its source in express regulatory language. But in the absence of express regulatory authority, it is necessary to at least find that such authority can be implied by an examination of the regulatory program as a whole. We are unable to make such an implication here.

To change technology-derived numbers based upon actual treatment capabilities represents a significant departure from the detailed, well-established, regulatory program for setting effluent limits. Although it is not unheard of to adjust technology-based limits based upon a particular plant's actual performance and/or design, *see, e.g.*, 40 C.F.R. § 133.105(f), it is certainly unusual to do so. In the limited cases where an adjustment can be made in light of actual performance, it is usually a *relaxation* of permit limits that would otherwise apply. *See, e.g.*, 40 C.F.R. § 133.103(a). Generally speaking, the regulatory program is designed to put all sources in a particular category on as equal a footing as possible. Value judgments and policy considerations were already incorporated into the selection of the technology to be imposed on

[5] Limitations may also be based upon interstate compacts or international agreements, § 92.2a(b), or the need to protect endangered species, § 92.2a(c). Those factors are not implicated here.

categories of sources. *See* 33 U.S.C. § 1314(b). Absent the rare presence of fundamentally different factors (FDFs) not implicated here, *see* 33 U.S.C. § 1311(n)(describing FDF process), the technology-based limits that resulted are designed to be industry- or category-specific, not location-specific.[6] In other words, the limit for Dean Dairy's wastewater should normally remain the same regardless of who is actually responsible for treating the wastestream prior to discharge. The limit is based upon technology that is available to treat that particular wastestream, not the resources or circumstances of any individual discharger.

Furthermore, by failing to make an adjustment to account for the mixed nature of the wastestream, the Department's action effectively imposes a treatment standard for sewage on industrial wastewater. It has taken the technology that must be dedicated to the treatment of one type of wastestream and imposed it on a different wastestream that has its own technological requirements.

The Department and to some extent the Municipal Authority have referred to the § 133.103(b) adjustment throughout their materials as a "waiver" or a "variance." This usage, while common, to some extent loses sight of the basis for technology-based standards. The Section 133.103(b) adjustment is not intended to affect the POTW's obligation to apply secondary treatment to *sewage*. Even if an adjustment in final limits is made, the POTW's duty vis-à-vis sewage has not changed. Rather, Section 133.103(b) merely adjusts the final limits in an arithmetic fashion that incorporates the different limits that apply to the nonsewage component of the mixed wastestream discharge. If anything, declining to make an adjustment

[6] The Department refers us to *Appalachian Power Company v. EPA*, 671 F.2d 801 (4th Cir. 1982), and other FDF cases, but they are inapposite. In fact, they illustrate that technology-based limits are set based upon generic factors that apply to an industry as a whole. A given source may only obtain an FDF variance if it can show that those generic factors are so different from a particular source as to make the generic limits unfair. *Appalachian Power*, 671 F.2d at 809. There is no claim here that there are circumstances so unique to the POTW or Dean Dairy that it would be unfair to apply the generic technology-based limits that would ordinarily apply to such sources. To its credit, the Department stops short of arguing that the FDF process can be superimposed upon or incorporated into the Section 133.103(b) adjustment.

would constitute a "waiver" or "variance" from the effluent limits that would normally apply to the nonsewage wastestream.

The adjustment called for in this case is hardly a radical concept. For example, it is not unlike the process used for setting pretreatment requirements for industrial sources that combine wastestreams with different regulatory standards into one discharge. 40 C.F.R. § 403.6(e)(the "combined wastestream formula").

There are also practical concerns that make us hesitate to imply that the Department had the requisite authority to take the approach that it did in this case. The Department's requires an analysis of the treatment plant's actual capabilities, which is not necessarily an easy task. Among other difficulties, conditions are rarely static. For example, Dean Dairy might dramatically increase or decrease its production at any time. What the POTW "needs" today might be less than what it "needs" tomorrow. In order to justify such a fundamental change in the permitting process, the Department must have more of a regulatory foundation to stand upon than we see here.

The Department, neither able to cite a specific regulatory basis for its action, nor able to construct a persuasive regulatory basis for implied authority, cites generic provisions in the federal Clean Water Act, the Clean Streams Law, and state regulations. Thus, the Department points out that the Clean Water Act allows for state regulations in primacy states that are more stringent than their federal equivalents. 33 U.S.C. § 1370. The citation, however, does not solve the problem with the Department's position, which is that there is *no* state regulation--or federal equivalent for that matter--that authorizes an adjustment of the technology-based limits applicable to POTWs based upon the POTW's need for an adjustment under the circumstances presented here. This is not a case of comparing state and federal requirements. The applicable

federal regulations have been adopted *verbatim* by the EQB by reference. 25 Pa. Code § 92.2c. *See also* 25 Pa. Code § 92.2. The state regulations providing that state regulations are to be followed in the event of a conflict with federal regulations, 25 Pa. Code §§ 92.2(a) & 92.17, are similarly inapplicable.

The Clean Streams Law provides the authority to regulate industrial and municipal discharges generally. 35 P.S. §§ 691.202, 691.203, 691.301, and 691.307. These general provisions, however, are too far removed from the issue at hand. They do not give the Department the authority to do whatever it chooses in setting effluent limits. If the Department's argument were true, the Department could simply bypass the comprehensive regulatory program for establishing permit limits by virtue of generic Clean Streams Law provisions. Rather, the Clean Streams Law provides the statutory basis for the detailed and comprehensive regulatory program, and it is that program that the Department must follow.

In sum, while the Department's action at first blush appears to have been justified by the use of the word "may" in § 133.103(b), it is in fact inconsistent with the background, purpose, letter, and spirit of the remainder of the technology-based regulatory process. In other words, the Department cannot rely upon the use of the word "may" in § 133.103(b) as a basis for disregarding everything else in the applicable regulatory program. *See Commonwealth v. State Conference of State Police Lodges*, 520 A.2d 25, 28 (Pa. 1987)(agency regulations have the force and effect of law and rein in agency discretion to a significant degree); *Teledyne Columbia-Summerhill Carnegie v. Unemployment Compensation Board of Review*, 634 A.2d 665, 668 (Pa. Cmwlth. 1993)(it is improper for any agency to ignore or fail to apply its own regulations). The Department may not refuse to make the Section 133.103(b) adjustment solely because a POTW is designed for and is in fact capable of meeting the unadjusted secondary treatment limits for

sewage.

The Municipal Authority contends that the Department in refusing to make the §133.103(b) adjustment improperly relied upon a document entitled "Interim Guidance-Guidance on Granting Secondary Treatment Waivers in NPDES Permits Under Federal Regulation 40 CFR § 133.103(b)." Although this contention is subject to dispute, we deem it to be beside the point. The Department based its decision not to adjust the effluent limits in this particular situation on an invalid reason. Whether or not that reason also happens to be embodied in a document that should have been promulgated in a regulation is beside the point here. The Department's error was not so much that it relied upon a procedurally defective document as that it relied upon an unlawful criterion. Whether the Department's action would have been valid if it had been based on a specific grant of authority in a regulation or a guidance document is a question that is not presented in this appeal. The Department has not attempted to justify its action as supported by the draft guidance document. *Contrast Dauphin Meadows v. DEP*, 2000 EHB 521, 535 (Department relied upon guidance document in making its decision). We certainly do not independently view the draft guidance document as filling the gap.

Both the Department and the Municipal Authority seem to argue that the 1994 consent order and agreement has no continuing relevance. The arguments are somewhat confusing and occasionally self-contradictory,[7] but we view them to be beside the point. The consent order may be relevant for other purposes (see, e.g., antibacksliding provisions, 33 U.S.C. § 1342(o)), but we agree that the consent order is not relevant to whether an adjustment should have been performed under § 133.103(b). The consent order did not form the basis for the Department's

[7] For example, the Department suggests that the CO&A is relevant because it "envisioned" an upgraded plant (Opposition memorandum at 11), but it vigorously denies that it was bound by the final limits set forth in the CO&A in setting limits in the instant permit renewal. It is not clear exactly what role Section 133.103(b) played in establishing final limits in the CO&A. (See, e.g., DEP Opposition, Exhibit Q (the limits were water-quality based)). In the end, at least with respect to the § 133.103(b) adjustment, the CO&A is almost solely of historical interest.

action in any event. As with the guidance document, it is beside the point of our immediate deliberations.[8]

The Board's adjudication in *Municipal Authority of the Township of Union v. DER*, 1989 EHB 1156, involved a nearly identical permitting dispute between the parties to this appeal. The Board found that the Department issued the Municipal Authority an NPDES permit in 1981 that contained effluent limits of 77 mg/l for BOD and 52 mg/l for SS. 1989 EHB at 1159. The Board did not expressly explain why those effluent limits had been selected, but it is apparent from a reading of the adjudication that the limits were designed to account for BOD and SS being contributed to the Municipal Authority's plant by Dean Dairy.

The Board found that Dean Dairy's contribution of BOD and SS to the plant had materially declined after 1981. *Id.* at 1160. When the Municipal Authority applied for a renewal of its 1981 permit in late 1985, the Municipal Authority's plant was consistently meeting 30 mg/l for BOD and SS. The Department issued a draft permit containing limits of 30 mg/l for BOD and SS. The Municipal Authority protested those limits for exactly the same reason it protests the limits in the instant appeal; namely, it argued that it was entitled to an upward adjustment of its limits pursuant to § 133.103(b). The Department denied the Municipal Authority's protest for the same reason it did so here; namely, the Municipal Authority's plant was capable of meeting the secondary limits. The Municipal Authority, there as here, appealed from the final permit.

The Board concluded that the Municipal Authority had failed to meet its burden of proving that a regulatory prerequisite for the application of § 133.103(b) had been met. There was no question that Dean Dairy contributed more than ten percent of the flows going into the

[8] The Department filed a motion to strike portions of the Authority's motion that allegedly averred that (1) the CO&A provided a continuing variance, (2) the Department acted out of ill will, and (3) the Department acted arbitrarily and capriciously. It argues that these averments go beyond the notice of appeal. As evidenced by this Opinion, we have not considered any of these averments in ruling on the parties' motions. Therefore, the Department's motion is moot.

plant. The other regulatory prerequisite set forth in § 133.103(b), however, requires that the permitted discharge of BOD and SS attributable to the industrial category may not be greater than that which would have been allowed if the industrial category discharged directly into navigable waters. The Board ruled that the Municipal Authority had failed "to establish what technology-based effluent limits [Dean Dairy] would have to meet if it discharged directly into Kishacoquillas Creek." *Id.* at 1164. The Board continued:

> Since the effluent limits [Dean Dairy] would have to meet if it were a direct discharger are essential in determining both the maximum permissible adjustment allowable to the Authority, as well as the proportionate adjustment, the absence of such data makes it virtually impossible for DER to perform the analysis required by 40 CFR § 133.103(b).

Id. Thus, the Board appears to have held that the found inability to establish the precise parameters of the adjustment precluded any adjustment at all. Today, however, even the Department acknowledges (as it should) that "[t]he first eligibility requirement [in § 133.103(b)] is more of a directive on how effluent limits should be calculated if the permitting authority deems that a secondary treatment waiver should be granted []." (DEP Motion, Exhibit 13.)

In what is clearly *dicta*, the Board prefaced its ruling with the following statement: "It is obvious that DER had the discretion to grant or deny an upward adjustment of the effluent levels." *Id.* at 1164. The Board, however, did not address the exercise of that assumed discretion because of its ruling that the Municipal Authority had failed to satisfy one of the threshold requirements of § 133.103(b).

In what is also clearly *dicta*, the Board concluded its discussion with the following statement: "Even if the [threshold] data had been presented, we would be hesitant to charge DER with abusing its discretion in setting effluent limits the plant is capable of meeting." *Id.* at 1165. Again, the Board did not actually reach such a conclusion of law because of the found

failure to satisfy the threshold requirement contained in § 133.103(b).

Here, there is no contention that the Municipal Authority has failed to satisfy the threshold requirements of § 133.103(b). Therefore, the binding part of our prior ruling is not on point. Further, as previously noted, we stop short of holding today that the Department has no discretion under any circumstances under § 133.103(b). There is simply no need to define the limits of the Department's discretion in this appeal. To the extent, however, that the Board suggested in *dicta* that the Department may exercise that discretion by declining to adjust the technology-based effluent limits that would otherwise apply to those levels that a source is capable of meeting for no reason other than that capability, we decline to follow that suggestion here.

Based upon the criteria for determining whether a remand is appropriate as discussed in *Giordano v. DEP*, 2000 EHB 1184, 1194-99, we conclude that a remand to the Department to recalculate the permit limits for $CBOD_5$ and SS is appropriate.[9] The Municipal Authority, however, has raised additional challenges to its permit in this appeal. We will, therefore, proceed to the previously scheduled hearing to address those issues. *See* Pa.R.C.P. 1035.5.

For the above reasons, we issue the Order that follows.

[9] Although we hold that an adjustment must be made under § 133.103(b), we express no opinion on the mechanics or result of the adjustment to be performed by Departmental personnel. We also express no opinion on the relevance of any other regulatory provisions, such as water-quality criteria, the 85 percent removal requirement, the antibacksliding prohibition, or any other provisions that may or may not have an impact on the recalculation, all of which are beyond the scope of this opinion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MUNICIPAL AUTHORITY OF UNION TOWNSHIP	:	
v.	:	**EHB Docket No. 2001-043-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 4th day of February, 2002, the Department's Motion for Partial Summary Judgment is **DENIED**. The Municipal Authority of Union Township's Motion for Partial Summary Judgment is **GRANTED**. Following issuance of a final adjudication that addresses the other challenges raised by the Municipal Authority, the Municipal Authority's permit will be remanded to the Department for recalculation of the effluent limits for $CBOD_5$ and SS in accordance with this Opinion and Order. Pre-Hearing Order No. 2 remains in effect for those issues not addressed in this Opinion and Order.

ENVIRONMENTAL HEARING BOARD

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Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **February 4, 2002**

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SECRETARY TO THE BOARD

TOWNSHIP OF PARADISE AND LAKE SWIFTWATER CLUB, INC.	:	
v	:	**EHB Docket No. 2001-024-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AVENTIS PASTEUR INC., Permittee	:	**Issued: February 5, 2002**

OPINION AND ORDER ON PERMITTEE'S MOTION TO STRIKE EXPERT REPORTS.

By Michael L. Kramer, Administrative Law Judge

Synopsis:

The Board treats a Motion To Strike two supplemental expert reports of Appellants' experts filed after the deadline for the filing of Appellants' expert reports established by Order to be a Motion In Limine and grants the motion. Under the circumstances here, supplemental or augmented expert reports of Appellants provided after the deadline established by Order for providing expert reports are a nullity. Moreover, the prospective trial testimony of the two experts will be limited to the fair scope of expert reports that were filed on time pursuant to the mandate of Pa. R. Civ. P. 4003.5(c)

Discussion

We deal here with Permittee's Motion To Strike Expert Reports. This matter has already been the subject of three previous Opinions and Orders of the Board. *Township of Paradise and Lake Swiftwater, Inc. v. DEP*, Docket No. 2001-024-MG (Opinion and Order issued October 2,

2001)(*Township of Paradise I*); *Township of Paradise and Lake Swiftwater, Inc. v. DEP*, Docket No. 2001-024-MG (Opinion and Order issued October 30, 2001)(*Township of Paradise II*); and *Township of Paradise and Lake Swiftwater, Inc. v. DEP*, Docket No. 2001-024-MG (Opinion and Order issued November 15, 2001)(*Township of Paradise III*). The reader is referred to those opinions for a background of this case. Briefly, this is an appeal of an NPDES Permit the Department issued to Aventis Pasteur Inc. Two of the three previous Opinions and Orders, *Paradise Township* I and II, dealt with the denial of Appellants' request to amend their Notice of Appeal to include objections regarding mercury and heavy metal limitations contained in the NPDES permit.

The Appellant in this case filed and served six expert reports on or about November 19, 2001 pursuant to Board Order dated November 9, 2001, which set November 19, 2001 as the deadline for Appellants to file their expert reports. The Order of November 9, 2001 was the *fifth* order in this case extending the date for Appellants submission of expert reports. Among the expert reports filed and served by Appellants on November 19, 2001 were the expert reports of Donald L. Baylor and Dr. Jay Stauffer, Jr. Pursuant to the Board's November 9, 2001 Order, Appellee, Aventis Pasteur Inc., filed and served its countering expert reports on December 19, 2001. Then, on or about January 17, 2002, Appellants served its opponents, but did not file with the Board, a second set of expert reports of Mr. Baylor and Dr. Stauffer. Appellants did not seek leave from the Board or concurrence of their opponents to produce supplemental or amended expert reports.

In response, Aventis Pasteur filed the instant Motion To Strike Expert Reports. The Motion attaches as exhibits the original expert reports of Mr. Baylor and Dr. Stauffer filed on November 19, 2001 and their respective supplemental reports of January 2002. As for Mr.

Baylor, Aventis Pasteur's Motion shows in yellow highlighting the additional paragraphs contained in the January, 2002 report which were not contained in the November 19, 2002 report. As for Dr. Stauffer, his January, 2002 report is dubbed "Amended Expert Report" and it is materially different from his November 19, 2001 report in that it contains additional data and additional conclusions. Unbelievably, much of the "amendment" to the Stauffer expert report purports to deal with mercury. That despite the fact that the Board denied twice Appellants' attempt to amend its Notice of Appeal to add contentions relating to mercury.

On January 29, 2002, a conference call was held among the Board and counsel for all parties to this case for the purpose of establishing a schedule for pre-trial submissions and trial of this matter. The schedule, including dates for trial and the filing of motions in limine, was discussed and established and subsequently memorialized in a January 29, 2002 Pre-Trial and Trial Scheduling Order. Trial is set to begin on April 9, 2002 and April 1, 2002 is the deadline for motions in limine.

Also, during the conference call of January 29, 2002, the Board provided counsel for Appellants and Permittee the opportunity to address the Board regarding the present Motion. Counsel for Permittee made the oral request to have the Motion considered as a motion in limine. The Board would have so treated this Motion as a motion in limine even without a request to do so since the expert reports sought to be "stricken" were not filed with the Board by Appellants and they would not be considered as evidence in any event.

On February 1, 2002, Appellant filed a letter response to the pending Motion which states in full:

> I am writing to inform you that, as a result of our conference call I will not be responding to the Motion to Strike, and do not intend to submit any additional expert reports beyond those permitted by Judge Miller.

The prejudice to Aventis Pasteur from this attempted procedure of filing supplemental or piecemeal expert reports by Appellants is manifest. Aventis Pasteur's experts digested the expert reports of Mr. Baylor and Dr. Stauffer produced and filed on November 19, 2001 and devised its experts' reports to counter and/or respond to Appellants' experts. That is how our process is supposed to work and that process was provided for in this case from the very beginning in Pre-Hearing Order No. 1, entered on February 7, 2001, and continued through the fifth extension of the expert report deadlines entered by Order dated November 9, 2001. To allow Appellants to read the Appellee's responsive expert reports and then to slip in another set of expert reports would contravene fair litigation practice and the pending Order governing the exchange of expert reports. It would be like continuing to write in your final examination blue book after the Professor has announced to the class that "time is up, please put your pencils down". Under the Board's Order of November 9, 2001, the Appellants expert reports were supposed to be filed by November 19, 2001. Under the circumstances here, we deem the two supplemental or amended expert reports of Mr. Baylor and Dr Stauffer produced in January, 2002 to be untimely and, therefore, nullities.

Moreover, the bounds of the prospective trial testimony of Mr. Baylor and Mr. Stauffer will be governed by Rule 4003.5(c) of the Pennsylvania Rules of Civil Procedure. That Rule states as follows:

> To the extent that the facts known or opinions held by an expert have been developed in discovery proceedings [through interrogatories or deposition], the direct testimony of the expert at trial may not be inconsistent with or go beyond the fair scope of his or her testimony in the discovery proceedings as set forth in the deposition, answer to an interrogatory, separate report, or supplement thereto.

Pa. R. Civ. P. 4003.5(c). The explanatory notes to this Rule state that the Rule is designed "[t]o prevent incomplete or 'fudging' of reports which would fail to reveal fully the facts and opinions

of the expert or his grounds therefore". Pa. R. Civ. P. 4003.5(c) Explanatory Note No. 6. We think that Appellants' filing one set of expert reports which disclose X, waiting for the Appellee's responsive expert reports, reviewing them and then attempting to provide supplemental or enhanced expert reports which restate X, but then go on to talk about Y and Z is very much the type of "fudging" that this Rule was intended to deal with. Thus, the direct trial testimony of Mr. Baylor and Dr. Stauffer will be limited to the fair scope of their respective *November 19, 2001* expert reports.

Therefore, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TOWNSHIP OF PARADISE AND LAKE SWIFTWATER CLUB, INC.	:	
v.	:	**EHB Docket No. 2001-024-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AVENTIS PASTEUR, INC., Permittee	:	

ORDER

AND NOW, this 5th day of February, 2002, it is HEREBY ORDERED that the Motion of Appellee Aventis Pasteur Inc. to Strike Expert Reports, which the Board treats as a Motion In Limine, is GRANTED. The expert reports produced by Mr. Baylor and Dr. Stauffer and delivered to Appellees on or about January 17, 2002 are in violation of the Board's Order dated November 9, 2001 establishing the deadline for Appellants' expert reports and are thus deemed to be nullities. Furthermore, the direct trial testimony of Mr. Baylor and Dr. Stauffer shall be limited, in accordance with Pa.R. Civ.P. 4003.5(c), to the fair scope of their respective expert reports filed and produced to Appellees on November 19, 2001.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: February 5, 2002
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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: February 6, 2002**

OPINION AND ORDER ON MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

By Michael L. Krancer, Administrative Law Judge

Synopsis:

Permittee's motion to dismiss or for summary judgment asserting that Appellant, a municipal sewer and water authority, has no standing is denied. Both Permittee, who is also a municipal sewer and water authority, and the Appellant are constituent members of a regional sewer authority and both secure treatment of their respective sewage flow from facilities owned and operated by the regional sewer authority for a fee payable by each to the regional authority. The Appellant water and sewer authority is appealing the issuance of a Part II NPDES permit for the construction by the Permittee of its own treatment facility. The Appellant alleges, among other things, that the construction of the plant will force the rates that it, as a constituent municipal authority of the regional authority, pays to the regional authority for treatment at the regional authority's plant to increase due to the loss of Permittee's flow. The Board holds that it cannot conclude at the motion stage, on the basis of the pleadings and the record as it stands, that

the Appellant has no standing. The Appellant sewer authority is asserting an interest or right of its own as opposed to solely the putative interests or rights of its customers, in that the Appellant is alleging that its own fees payable to the regional authority will increase. The Board also declines to undertake a specific analysis now of whether Appellant has established standing for each separate allegation in its Notice of Appeal for the same reason that the Board declined to do so in the case of *Riddle v. DEP*, No. 98-142-MG (Opinion and Order issued April 16, 2001), wherein Chairman Miller wrote that a number of the Board's Judges believe that the past holdings of the Board which state that an appellant must have standing on each individual objection asserted in the Notice of Appeal may be out of date.

Factual and Procedural Background.

This is an appeal filed on November 19, 2001 by the Perkasie Borough Authority (PBA) from the Department's issuance to the Hilltown Township Water and Sewer Authority (HTWSA) of a Part II Water Quality Management Permit (Part II Permit). The Part II Permit covers the construction of a 150,000 gallon per day (GPD) sewage treatment plant. HTWSA filed a Motion to Dismiss Or In The Alternative For Summary Judgment (Motion) on December 26, 2001 which alleges that PBA does not have standing to maintain this action. PBA responded to HTWSA's Motion by response and accompanying memorandum of law on January 18, 2002. A routine case status conference was held on Tuesday, January 22, 2002 at which the pending Motion, among other things, was discussed and counsels for the parties were able to address argument for and against the Motion to the Board. HTWSA submitted its reply to PBA's response papers on February 4, 2002.[1]

[1] The recitation of the basic factual background in this case is derived from the parties' filings on the instant Motion which includes various exhibits and affidavits.

Both PBA and HTWSA are municipal authorities responsible for the provision of 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 themselves 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. The Pennridge Wastewater Treatment Authority operates a regional sewage treatment facility into which PBA and HTWSA, pursuant to the terms of the inter-municipal agreement, connect and discharge sewage for treatment for a fee.

HTWSA, however, has been planning 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 its construction of a new 150,000 GPD sewage treatment plant to be known as the Highland Park Sewage Treatment Plant. 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 Part I NPDES 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.

PBA's Notice of Appeal states various legal bases for its appeal including the following: (1) issuance of the Part II Permit does not comply with the Sewage Facilities Act, the Clean Streams Law, and the Administrative Code (NOA ¶¶ 3-1 and 3-2); (2) issuance of the Part II Permit is in violation of, and inconsistent with, the approved official Act 537 Plans and Wasteload Management Annual Reports for the affected municipalities (NOA ¶ 3-3); (3)

issuance of the Part II Permit constitutes a nuisance in that the issuance is contrary to sound sewage facilities planning and is in derogation of the public health, safety and welfare of the residents the affected municipalities. (NOA ¶ 3-4); and (4) special permit condition II of the Part II Permit, which provides that HTWSA must apply for and receive certain approvals from the Department to operate the Hillcrest Road pump station in excess of its current rated capacity, is arbitrary and capricious and contrary to law. (NOA ¶ 3-5).

HTWSA's Motion is a broad-based attack on PBA's standing to maintain the appeal. HTWSA alleges that PBA does not have any facilities or property adjacent to or close to the location of the proposed Highland Park Wastewater Treatment facility or the point where that facility will discharge its effluent or which could in any way be adversely impacted by operation of the facility or its discharge. HTWSA alleges that the only arguable interest of PBA in the Part II Permit is that upon construction and operation of the Highland Park Wastewater Treatment facility, PBA's future customers may have to pay higher connection or tapping fees for wastewater treatment services provided by Pennridge on account of Pennridge's having lost the inflow of HTWSA.

Both parties have submitted various documents and affidavits in support of and in opposition to the HTWSA's Motion. Both parties have asked that we review those additional materials which go beyond the pleadings in deciding this motion and we have done so. Thus, we will treat the instant Motion as one for summary judgment. 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).

Discussion.

The centerpiece of HTWSA's argument on standing is the Commonwealth Court's case of *Ramey Borough v. Department of Environmental Resources*, 327 A.2d 647 (Pa. Cmwlth. 1975), and our case of *Berwick Area Joint Sewer Authority v. DEP*, 1998 EHB 150. In the *Ramey Borough* case, the Borough had appealed from an Order of the Department which mandated that the Borough build a sewage treatment plant. The Borough's theory was that the Order would, by definition, require that residents pay connection and maintenance fees. The Commonwealth Court held that the Borough did not have standing because it could not vicariously assert the claim of individual property owners. *Ramey, supra*, 327 A.2d at 650.

The *Berwick* case was an application of the principle of *Ramey Borough*. In *Berwick*, the Berwick Joint Area Sewer Authority (Berwick Authority) appealed the Department's approval of the Act 537 Plan of Nescopeck Borough. The Nescopeck Act 537 Plan allowed Nescopeck to replace its existing sewage treatment plant with a new facility instead of connecting to the Berwick Authority's treatment plant for which the Berwick Authority would have charged Nescopeck a fee. The Berwick Authority argued that it had standing because as a result of the Department's action, *its customers* would have to incur higher sewage treatment rates. 1998 EHB at 155.

The Board correctly held that the Berwick Authority did not have standing to assert the putative claims of its customers. Central to the Board's analysis was its apprehension that the Berwick Authority "does *not* assert that *it* is "aggrieved" by the Department's action". *Berwick*, 1998 EHB at 156 (emphasis original). The Board correctly diagnosed, that, instead, the Berwick Authority was attempting to assert that *its customers* were aggrieved. The Board held that, under those circumstances, the Berwick Authority had no standing reasoning that, "[l]ike Ramey Borough, the Joint Authority here is merely a third party without any interest in the claims of individual property owners. 1998 EHB at 157.

Both *Ramey Borough* and *Berwick*, of course, were applications of the overarching principle of standing under Pennsylvania law as set forth in the Pennsylvania Supreme Court decision of *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975). Since both the Borough in *Ramey* and the Berwick Authority in *Berwick* were attempting exclusively to assert vicariously the interests or rights of third parties, the citizens of the Borough in *Ramey Borough* and the customers of the Berwick Authority in *Berwick*, and neither Ramey Borough nor the Berwick Authority were attempting in any way to assert rights or interests that were their own as a Borough or as an Authority, neither the Borough nor the Authority had standing in those particular cases.

We reject PBA's assertion that *Ramey* and *Berwick* are dispositive in its favor in this case. At least we cannot so conclude on a motion to dismiss or for summary judgment in which we take the record and the parties' allegations in the light most favorable to the non-moving party. In our view, the underlying facts of *Ramey* and *Berwick* which resulted in the application of the legal principle applied in those cases are not present in this case. The difference here is that PBA is, at least on the face of the matter, asserting a claim in its own right relating to an

interest of its own.

Berwick, for example, involved the appeal by a municipal authority attempting to assert the putative rights of its customers. Berwick's complaint was that rates its customers would have to pay would increase as a result of the Department's action. As the Board noted, "Berwick has not asserted any substantial interest of its own". 1998 EHB at 158. This case is much different. HTWSA itself alleges that, it, in its own right, as a constituent member of Pennridge, pays fees to Pennridge. Moreover, HTWSA asserts that "each customer" of Pennridge pays fees to Pennridge. HTWSA Brief at pp. 7-8. In addition, PBA asserts that it is a customer of Pennridge and pays fees to Pennridge in its own right. In fact, PBA attaches as an exhibit to its response papers a Pennridge invoice in the amount of $108,001.01 directed to PBA and the associated PBA check to Pennridge covering Pennridge fees payable by PBA covering the third quarter of 2001.

The interrelationship of the various parties in this case, then, is different than in the *Ramey Borough* or *Berwick* cases. Here, the various constituent municipal authority members of Pennridge pay fees to Pennridge. PBA asserts in this appeal, among other things, that the fees it pays, in its own right, to Pennridge, will increase as a result of the Department's action under appeal. As such, PBA has, at least at the motion stage with all inferences drawn in its favor, asserted a substantial interest of its own and thus, has the substantial, direct and immediate interest that is distinguishable from the interest shared by others generally. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975)

HTWSA argues that, in reality, it is ultimately PBA's customers that will have to pay the higher rates and that, therefore, PBA is in actuality, attempting to assert the interests of its customers. Accordingly, argues HTWSA, the fundamental jurisprudential principles of *Berwick*

and *Ramey Borough* apply here and PBA, just as Ramey Borough and the Berwick Authority, has no standing. However, whether a full factual record may establish the correctness of HTWSA's factual premise is unclear at this point. In any event, even if HTWSA were able to demonstrate that its factual premise were true, we are not convinced that the legal conclusion would be that PBA has no standing. It seems to us, and counsel for HTWSA so acknowledged, that application of HTWSA's thesis to defeat PBA's standing in this case would require an extension of the rationale of *Berwick.* We think that the extension would be unwarranted. HTWSA's argument, if true, would result in no corporate or other non-individual entity ever having standing. For example, it is the corporate shareholders whose interests are ultimately at stake in a dispute involving a corporation, the partners whose interests are ultimately at stake in a dispute involving a partnership, and the labor union members whose interests are ultimately at stake in a dispute involving a labor union. Obviously, corporations, partnerships and labor unions can all have standing, but under HTWSA's argument they cannot. Both PBA and HTWSA are distinct municipal corporate entities with interests and rights, the assertion thereof being capable of creating standing. In this case PBA is so asserting *its* interests and rights.

Also, neither party has even mentioned Judge Renwand's decision in *Highridge Water Authority v. DEP*, 1999 EHB 27, in this regard. We find that case quite instructive here. In *Highridge*, Judge Renwand held that a public water supply agency had a direct and substantial interest, *i.e.*, standing, to challenge the action of the Department where the main allegation by the Appellant, *Highridge,,* was that the Department's action would harm it financially because the action would result in the loss to Highridge of a substantial water consumption customer. In that case, Highridge Water Authority, Blairsville Municipal Authority and Lower Indiana County Municipal Authority, who were all parties to the case, were municipal public water supply

agencies. Lower Indiana was a longtime substantial water purchase customer of Highridge's. The Department took an action which would have permitted Lower Indiana to obtain its water supply at a substantially lower price from Blairsville. Highridge sought a supersedeas to block that action from taking place. Blairsville and Lower Indiana argued that Highridge had no standing. After having denied a motion to dismiss which contended that Highridge's appeal should be dismissed for, among other things, lack of standing, *see Highridge Water Authority v. DEP*, 1999 EHB 1, and taking evidence at the supersedeas hearing, Judge Renwand concluded that Highridge had standing. He concluded that Highridge had standing, in part, because Highridge stood to loose "a great deal of business from one of its major customers" and the "testimony establishing that the impact of the Department's action will have a financial impact on Highridge..." *Highridge*, 1999 EHB at 33.

HTWSA argues that even assuming, *arguendo*, that Appellant can establish standing generally, it lacks the issue specific standing it says is required to raise any of the enumerated objections set forth in its Notice of Appeal. HTWSA states that, "[t]he Board has consistently required that appellants establish standing separately for each objection within the appeal." HTWSA Brief at 15 *citing Borough of Glendon*, 1990 EHB 1501, 1504-05, *Simpson v. DER*, 1985 EHB 759. HTWSA analyzes, one by one, each of the separately stated legal bases in the Notice of Appeal and posits that, as to each and every one of them, PBA does not have standing as to any of them.

We decline at this time to undertake that analysis for the same reason Judge Miller recently declined to do so in *Riddle v. DEP*, No. 98-142-MG (Opinion and Order issued April 16, 2001). *Riddle* was an appeal by Riddle of the Department's release of Hepburnia Coal Company's Stage I bond release. Riddle asserted that the Department's action was improper

because, among other things, the Department failed to notify other landowners besides Riddle himself of Hepburnia's request for release of its bond. The Department argued that Riddle lacked standing to assert this particular claim and that this particular objection should be dismissed on the basis of the Board case law providing that an appellant must have standing on each individual objection to the Department's action raised in the Notice of Appeal. Judge Miller declined to do so writing as follows:

> Although the Board has historically ruled that an appellant must have standing on each individual objection to a Department action which is raised in a notice of appeal, [n.2] a number of the Board's administrative law judges believe that those holdings may be out of date. Instead, they would hold that where an appellant has standing to challenge a Department action, he may raise any legal argument in support of that claim. This raises an important question and would signal a significant departure from Board case law. Accordingly, we do not believe it is appropriate to rule on the standing question in the context of a motion for summary judgment. We will deny the Department's motion at this time, without prejudice. At the hearing on the merits the parties may present evidence concerning the notice issue and fully brief the standing question in post-hearing memoranda.

Riddle, *slip op.* at 9-10. (*citing* in footnote no. 2, *Florence Township v. DEP*, 1996 EHB 282, 289-90; *Concerned Citizens of Earl Township v. DER*, 1992 EHB 645, 651; *Estate of Charles Peters v. DER*, 1992 EHB 358, 365-67; *Borough of Glendon v. DER*, 1990 EHB 1501, 1504-05, *reversed on other grounds*, 603 A.2d 226 (Pa. Cmwlth. 1992).

We, therefore, enter the following:

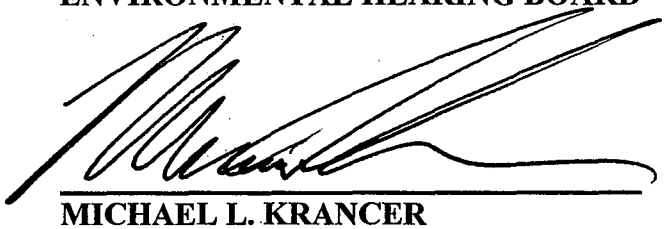
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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 6th day of February, 2002, Hilltown Township Water and Sewer Authority's Motion to Dismiss Or In The Alternative For Summary Judgment is **DENIED**.

ENVIRONMENTAL HEARING BOARD



MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: February 6, 2002
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

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: February 6, 2002**

ORDER AMENDING OPINION AND ORDER
TO CORRECT NON-SUBSTANTIVE DRAFTING ERROR

AND NOW this 7th day of February, 2002, it is hereby ordered that the Board's Opinion and Order Dated February 6, 2002, is amended to correct a clerical drafting error such that the reference to "PBA's assertion..." on page six, last paragraph is amended to read "HTWSA's assertion...".

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: February 7, 2002
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SOUTHEASTERN CHESTER COUNTY REFUSE AUTHORITY	:	
v.	:	**EHB Docket No. 2001-032-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND LONDON GROVE TOWNSHIP, Intervenor	:	**Issued: February 6, 2002**

OPINION AND ORDER ON
CROSS-MOTIONS FOR SUMMARY JUDGMENT

By Michael L. Krancer, Administrative Law Judge

Synopsis:

The Department's and Permittee's motion for summary judgment is granted and the motion for summary judgment of Appellant is denied. Southeastern Chester County Refuse Authority (SECCRA) delivered a Phase I landfill expansion permit on December 22, 2000, one day before the new municipal waste management regulations became effective. The landfill facility is located in London Grove Township, the intervenor in this case. The Department determined that the application was administratively incomplete and, in addition, returned the application to SECCRA, because the application showed that there was more than five years of remaining capacity for the landfill and new 25 Pa. Code § 127.202(f) provides that the Department will not accept an application for an expansion where there is more than five years of remaining capacity at the site. The return of the application was without prejudice to SECCRA's right to submit another application at a later date. SECCRA is not entitled to

summary judgment while the Department and London Grove are. Section 127.202(f) is not invalid as being beyond the scope of the authority provided by statute. In addition, the Department's returning to the applicant of an admittedly incomplete application cannot be considered improper under these circumstances. To the extent SECCRA contends that the Department's action is an unlawful retroactive application of Section 127.202(f) that argument fails and the Department is entitled to judgment as a matter of law because under Board and Commonwealth Court precedent, where, as here, the condition triggering the application of the statue or regulation exists on its effective date, there is no "retroactive application" vis-à-vis a application pending before the effective date of the regulation.

Introduction

Before the Board are cross motions for summary judgment by the Appellant, Southeastern Chester County Refuse Authority (SECCRA), on the one side, and by the Appellee, the Department of Environmental Protection (Department or DEP) and the Intervenor, London Grove Township (London Grove or Township), on the other side. The case involves SECCRA's Phase I application for an expansion of its landfill facility which application was not accepted by the Department and returned to SECCRA. This particular litigation is a product of the confluence of the facts that: (1) SECCRA's Phase I landfill expansion application was delivered to DEP on Friday, December 22, 2001; and (2) new municipal solid waste management regulations became effective the very next day, on Saturday, December 23, 2001, *via* their publication on that day's edition of the Pennsylvania Bulletin. The relevant procedural and factual background behind these cross-motions, and the record for these cross-motions, is set forth below and is derived from the Notice of Appeal, the motions, the responses thereto and the

exhibits attached to them. [1]

Factual and Procedural Background

There is no dispute as to the material facts relevant for purposes of the cross motions for summary judgment. Indeed, SECCRA practically admits every factual allegation in both the Department and London Grove motions. Specifically page one of SECCRA's response states "SECCRA has no quarrel with the first 40 of the Department's 42 allegations supposedly supportive of its motion for summary judgment . . . ." SECCRAJR p. 1. Page two of SECCRA's response states "SECCRA has no quarrel with any of the Township's allegations supposedly supportive of its motion for summary judgment other than" ¶¶ 10 and 11, 17-18, 34, 39, and 43-44. SECCRAJR p. 2.

SECCRA is a municipal authority that provides solid waste management services to 10 full and 14 associate member municipalities. DEPM ¶ 2. As its primary activity, SECCRA operates a permitted municipal waste landfill in London Grove Township in southern Chester County (Landfill). DEPM ¶ 3.

On Friday, December 22, 2000, SECCRA, through its environmental consultant William B. Satterwaite Associates, Inc., deposited at the front reception desk of the Department's

[1] 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 entirely from SECCRA's NOA, and the parties' various filings of and on each other's dispositive motions. Citation form will be as follows: "DEPM" is the Department's motion, "DEPB" is the Department's brief in support of its motion, DEPRB is the Department's reply brief, and DEPRSB is the Department response brief in opposition to SECCRA's motion; "SECCRAM" is SECCRA's motion, "SECCRAB" is SECCRA's brief in support of its motion, "SECCRARPB" is SECCRA's reply brief, "SECCRAJR" is SECCRA's joint response to the Department's and London Grove's motions, and "SECCRAJRB" is SECCRA's joint response brief in opposition to the Department's and London Grove's motions; "LGM" is London Grove's motion, "LGB" is London Grove's brief in support of its motion, and LGRSB is London Grove's response brief in opposition to SECCRA's motion.

Southeast Regional Office a Phase I application for expansion of the Landfill by 29 acres. DEPM ¶ 24.[2] That same day, clerical staff for the Department delivered SECCRA's application to James Wentzel, Chief of Engineering Services for the southeastern region. DEPM ¶ 29. On the next day, December 23, 2000, the new municipal solid waste management regulations became effective through their publication in the Pennsylvania Bulletin of that day. 30 Pa. Bull. 6685 (December 23, 2000).

Among the amendments to the municipal solid waste regulations were provisions regarding receipt of applications and completeness reviews thereof. Of particular relevance here is 25 Pa. Code § 271.202 which provides in relevant part:

> (a) After receipt of a permit application, the Department will determine whether the application is administratively complete.
>
> (b) For purposes of this section, "receipt of a permit application" does not occur for an application for a new facility or a permit modification that would result in an increased average or maximum daily waste volume, increased disposal capacity or expansion of the permit area, until the following requirements are met:
>
> (1) The Department, applicant and municipal official meet to discuss the permit application, the Department's permit application review process and the public involvement steps in that process and to hear and understand the concerns and questions of the municipal officials, as described in the Department's *Local Municipality Involvement Process Policy*, Document Number 254-2100-100. The Department may invite other persons from the local municipalities who have an interest in the application.

[2] A Phase I permit application for a municipal waste landfill address such items as conceptual design, siting criteria, balancing of harms and benefits, soils and hydrology. *See* 25 Pa. Code §§ 273.11 - 273.121 and 271.101 – 271.144; DEPM ¶ 25. A Phase II permit application is then necessary which addresses specific items such as planned operations, financial responsibility, access roads, cover and vegetation, and leachate and gas management. *See* 25 Pa. Code §§ 273.131 – 273.197; DEPM ¶ 26.

(2) An alternative project timeline is established for review of a permit application for a municipal waste landfill, construction/demolition waste landfill or resource recovery facility through negotiation among the Department, applicant and representative of the host county and host municipality. If the parties are unable to reach agreement, the Department will determine an appropriate timeline, taking into consideration the level of public interest and incorporating into the timeline sufficient opportunity for meaningful public participation. Public notice of a negotiated timeline will be made in the *Pennsylvania Bulletin* as part of the permit application receipt announcement required by § 271.142 (relating to public notice by Department).

(c) For purposes of this section, an application is administratively complete if it contains necessary information, maps, fees and other documents, regardless of whether the information, maps, fees and documents would be sufficient for issuance of the permit. If the Phase I and Phase II parts of the application for a landfill are submitted separately, the application will not be considered to be administratively complete until both parts are determined to be administratively complete.

(d) If the application is not administratively complete, the Department will, within 60 days of receipt of the application, return it to the applicant, along with a written statement of the specific information, maps, fees and documents that are required to make the application administratively complete.

(e) The Department will deny the application if the applicant fails to provide the information, maps, fees and documents within 90 days of receipt of the notice in subsection (d).

(f) The Department will not accept a permit application for an expansion that would result in an increase in capacity of a municipal waste landfill or construction/demolition waste landfill if more than 5 years of disposal capacity remains at the landfill based upon information submitted in the most recent annual report or equivalent information that includes a topographic survey map and a description of the capacity used since the last annual report. 25 Pa. Code § 271.202.[3]

---

[3] The proposed amendments to the municipal solid waste regulations, which were enacted as final regulations by the December 23, 2000 publication in the *Pennsylvania Bulletin* had been published for notice and comment in the *Pennsylvania Bulletin* on August 29, 1998.

The new regulations also contain a public notice provision at 25 Pa. Code § 271.141 which requires, among other things, that an applicant provide public notice and notice to local municipalities of the filing of an application like the one here as well as requiring that the application contain proof that such notification has been made. See 25 Pa. Code § 271.141. Finally, the new regulations increased the application fee for applications like the one SECCRA filed from $4,600 to $7,800. See 25 Pa. Code § 271.128(b)(2).

As the Department and London Grove point out, even before the new regulations became effective on December 23, 2000, the Department had for many years subjected landfill permit applications to administrative completeness review. Pursuant to its "Model Permit Review Policy" the Department must determine that a permit application is administratively complete before it can accept the application for technical review. DEPM ¶¶ 35-36; DEPM Attachment B to "Affidavit of Ronald Furlan." This policy is in accordance with the Executive Order known as the "Governor's Money-Back Guarantee." DEPM ¶ 37; Attachment D to "Affidavit of Ronald Furlan." Also, as both the Department and London Grove point out, the previous version of 25 Pa. Code § 271.141 regarding public notice of applications was in all material respects exactly the same as the reenacted version of 25 Pa. Code § 271.141.

Sometime during the week of December 25, 2000 Mr. Wentzel performed an administrative review of SECCRA's application. DEPM ¶ 35. By letter dated January 12, 2001 from Ronald C. Furlan, DEP Regional Manager, Waste Management Program, to William Stullken, SECCRA's General Manager, SECCRA was told that "[w]e have initially reviewed the Phase I part of your application to determine whether it contains the information, plans, fees, and other documents necessary for administrative completeness as defined in 25 Pa. Code § 271.202(c). The Department's letter goes on to tell SECCRA that its application had not passed

muster for administrative completeness. Specifically, the Department had determined that SECCRA's application was administratively incomplete for the following reasons: (1) proof of public

notice pursuant to 25 Pa. Code § 271.141 had not been provided; (2) the Local Municipality Involvement Process had not been completed as required by 25 Pa. Code § 271.202(b)(1); (3) an alternative project timeline had not been established for the review of the application as required by 25 Pa. Code §271.202(b)(2); and (4) a permit application fee of $7,800 had not been submitted as required by 25 Pa. Code § 271.128(b)(2). LGM Ex. C. The Department was specific that the administrative completeness determination must be made under the provisions of the newly enacted municipal solid waste regulations, specifically, 25 Pa. Code § 271.202(c).

Also, and this is the real matter at the heart of this appeal and on these motions, the Department's letter provided as follows:

> 25 Pa. Code § 271.202(f) of the amended regulations precludes DEP from accepting a permit application for an expansion of a municipal waste landfill resulting in an increase in capacity if more than five years of disposal capacity remains at the landfill. Utilizing information provide[d] in SECCRA's latest annual operation report (calendar year 1999) and the Phase I application, and adjusting for estimated annual disposal capacity utilization, we estimate that SECCRA has approximately eleven to twelve years disposal capacity remaining.
>
> Since the administrative review process will not take six to seven years, even accounting for Phase I and Phase II parts of the application, we see no point in proceeding with the formalities of conducting these administrative reviews knowing that we will ultimately reach a decision point whereupon we cannot accept the application for technical review because of its failure to satisfy the requirements of 25 Pa. Code [§] 271.202(f). Therefore, we are terminating our administrative review and returning the application...If you choose, you may wish to resubmit your application at a time more likely to coincide with compliance with the five-year disposal capacity restrictions of 271.202(f).

LGM Ex. 3.

SECCRA filed a Notice of Appeal and Amended Notice of Appeal from the Department's January 12, 2001 action on February 8, and February 26, 2001 respectively (collectively "NOA"). Its appeal challenges the Department's decision to terminate its review of SECCRA's Phase I application for expansion of the Landfill and to return that application to SECCRA. NOA. On April 18, 2001 the Board granted London Grove Township's Petition to Intervene. *SECCRA v. DEP*, Docket No. 2001-032-K (opinion issued April 14, 2000).[4]

Discovery has closed and SECCRA filed its motion for summary judgment and a supporting brief on November 30, 2001. The Department filed a motion for summary judgment and supporting memorandum of law on December 4, 2001. London Grove filed a "Motion to Dismiss SECCRA's Appeal and for Summary Judgment" and a supporting memorandum of law on December 4, 2001. All of the parties filed responses to the others' motions for summary judgment and replies were also provided and motion practice came to an end on or about January 11, 2002.

Summary Judgment Standard

As we set forth in *Stern v. DEP*, EHB Docket No. 2000-221-K (Opinion and Order issued June 15, 2001):

> 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

[4] In so doing, the Board denied the request of SECCRA that the scope of London Grove's intervention by peremptorily limited. *SECCRA v. DEP*, Docket No. 2001-032-K (opinion issued April 14, 2000).

> 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).

Stern v. DEP, *supra*, slip op. at 12.

Discussion

The crux of SECCRA's legal action here is to attempt to avoid the application of the five-year remaining capacity bar outlined in 25 Pa. Code § 271.202(f) to its Phase I application. SECCRA admits that its 1999 Annual Report shows that the landfill has more than five years of remaining capacity. LGM ¶ 36; LGM Ex. B, Ex. D "Deposition of Gregory Wilhelm" pp. 81 and 218. Indeed, SECCRA's own Phase I permit application specifies that, "[c]urrently, SECCRA calculates that it will exhaust its permitted disposal capacity in 2009". LGM Ex. B. SECCRA does not attempt to contend in its Motion that the landfill had five years or less capacity on December 22, 2001 or any other time.

Also, SECCRA does not dispute that its application was not administratively complete when it was filed on December 22, 2000. DEPM ¶ 42(misnumbered 40), LGM ¶¶ 26, 28, 30, 32; SECCRAR p. 2, LGM Ex. D "Deposition of William Stullken" pp. 112-117. SECCRA concedes that it did not submit proof of public notice under 25 Pa. Code § 271.141(a)(1) or (d) to the Department, that the Local Municipality Involvement Process was not completed prior to the Department's return of the application, that an alternative project timeline had not been established for the application prior to the Department's return of its application, and that it failed to remit the proper application fee after December 23, 2000. LGM ¶ 26; SECCRAR p. 2; LGM Ex. D "Deposition of William Stullken" p. 112; LGM Ex. H "Deposition of David Farrington" pp. 262-63; LGM ¶ 28; SECCRAR p.1, LGM Ex. D "Deposition of William Stullken" p. 112; LGM ¶ 30, SECCRAR p.1; LGM Ex. D "Deposition of William Stullken" p.

113-15; LGM ¶ 32; SECCRAR p.1, LGM Ex. D "Deposition of William Stullken" p. 113.

The essence of SECCRA's Motion is its argument that the Department acted illegally when it declined to "accept" SECCRA's application and returned it to SECCRA without prejudice to SECCRA's filing one later. It tries to get to that point by two routes. First, it argues that the Environmental Quality Board (EQB) acted *ultra vires* in passing Section 271.202(f). Second, even if the regulation were not invalid *ad initio*, application of it to SECCRA's Phase I expansion permit application, which came in one day before the new regulation took effect would be an improper retroactive application of the regulation. In other words, the Department, on December 22, 2000, did not have the legal right or authority to "not accept" SECCRA's application and SECCRA's delivery of the application on December 22, 2000 effectively grand-fathered that application into a safe-harbor from application of 25 Pa. Code § 271.202(f).

SECCRA's Regulatory Invalidity Argument

We will address first SECCRA's argument that 25 Pa. Code § 271.202(f) is invalid. For a regulation to be valid the answer must be affirmative to the following questions: (1) is the challenged regulation within the authority granted by the statute, (2) was the challenged regulation issued pursuant to proper procedure, and (3) is the challenged regulation reasonable. *Pennsylvania Assoc. of Life Underwriters v. Dep't of Ins.*, 371 A.2d 564, 566 (Pa. Cmwlth. 1977), *aff'd*, 393 A.2d 1131 (1978). SECCRA's challenge involves only the first of these three questions, as it has not placed the second or third ones into contention.

SECCRA asserts that there is no statutory authority for allowing the Department to not accept an application and that the only options allowed by statute are for the Department to process it and then either grant it or deny it. Also, SECCRA contends that the section 271.202(f)

five-year horizon conflicts with other statutes regulating solid waste which call for not a five year approach to solid waste planning, but instead, a 10 year view forward. SECCRAM p. 11-14. Neither argument is successful to show that the regulatory enactment here was beyond the authority provided by statute.

Curiously, SECCRA recognizes that the Department does have discretion to not accept an application for administrative incompleteness. As we have noted, and as SECCRA apparently knows and recognizes, the Department has applied an administrative completeness review to solid waste management permit applications for years. SECCRA argues, however, that the Department's non-acceptance of an application whether for administrative completeness review, the money back guarantee program or the municipal involvement process is "an entirely different animal from a non-acceptance in toto, which is the discretion with which this regulation purports to invest in DEP." SECCRARB p. 3.

We find this argument difficult to grasp. In any event, that argument is far from convincing that the EQB acted *ultra vires* when it passed a regulation that states that the Department is not to accept an application under certain circumstances. As explained in Preamble to the December 23, 2000 regulations, the five year limitation in section 271.202(f) is necessary "to avoid permitting facilities that are technologically obsolete by the time they are utilized [, and the five year limit] . . . enables the more efficient use of Department staff who review permits." 30 Pa. Bull. 6685, 6694 (December 23, 2000). Among the purposes of the Solid Waste Management Act (SWMA) are to require permits for the operation of waste facilities, protect the public health, safety and welfare from the short and long term dangers of waste disposal and to provide a flexible and effective means to implement and enforce the provisions of the Act. 35 P.S. § 6018.102(3), (4), (5). The SWMA provides that the EQB shall

have the power, and its duty shall be, to adopt rules and regulations, criteria and standards of the Department to accomplish the purposes of the Act and to carry out the provisions of the Act. 35 P.S. § 6018.105. That includes, but is not limited to, the power to establish rules and regulations relating to the protection of the safety, health, welfare and property of the public and the air, water and other natural resources of the Commonwealth. *Id.*

The avoidance of allowing the operation of facilities that are technologically obsolete by the time they are utilized is certainly squarely within the purview of requiring permits, and protecting the public health, safety, and welfare. The public is being protected from suffering the environmental hazards associated with the operation of obsolete facilities. Likewise, the enabling of the more efficient use of Department staff who review permits is squarely within the purview of providing a flexible and effective means to implement and enforce the provisions of the SWMA.

We also reject SECCRA's "conflict" arguments. While SECCRA points out that the SWMA provides that the Department will accept or deny permit applications but does not say that the Department may "not accept" them, SECCRA simply has made no argument, let alone a convincing one, that the EQB acted beyond the scope of the SWMA when it passed a regulation providing that the Department was to "not accept" a permit application under certain circumstances. In this regard, we note that under SECCRA's argument here, it would have no complaint had Section 271.202(f) provided that the Department will "deny" any application for an expansion where the landfill in question has five or more years of remaining capacity. From there, we agree with London Grove, that this, then, is merely a semantic distinction of no consequence. Whether the regulation provides that the Department will "not accept" an

application or that it will "deny" the application is of no legal consequence because the end result is the same; the applicant's application is not granted and, as in this case, an appeal follows.

Nor does the regulation conflict with the planning provisions of the SWMA or Act 101. SECCRA points out that both the SWMA and Act 101 reference a 10 year horizon for planning purposes. *See* 35 P.S. §§ 6018.201(d) and (e)(2), 53 P.S. §§ 502(a)(2) and 505(b)(4). Those sections' 10 year horizon and section 271.202(f)'s five year horizon, though, are apples and oranges. The SWMA and Act 101 sections deal with planning and not directly with permitting. Also, as the Department correctly points out, the SWMA and Act 101 planning provisions, with one exception, deal with disposal capacity available to a particular county while Section 271.202(f) deals with remaining disposal capacity at the particular landfill. DEPRB pp. 4-5.

SECCRA's "Retroactivity" Argument

For SECCRA's argument regarding supposed "retroactive" application of Section 271. 202(f) to be true, and consequently for its Motion to be meritorious, then its delivery on "day one" of an admittedly incomplete, first part only of a two part landfill expansion application, precludes the effect on that incomplete partial application of the five-year remaining capacity rule which became effective on "day two." To pose the question is to reveal the answer. This argument cannot be sustained from a factual or a legal standpoint.

We do not even see that there is necessarily a question of retroactive application of regulation present in this case. First, as we noted, SECCRA has admitted that its application as of December 22, 2000 was not administratively complete. Second, SECCRA has conceded that the Department does have discretion to not accept an application for administrative incompleteness. As we noted, SECCRA makes the difficult to comprehend point that the "Department's non-acceptance of an application whether for administrative completeness

review, the money back guarantee program, or the municipal involvement process is an entirely different animal from a non acceptance in toto, which is the discretion with which this regulation purports to invest in DEP". SECCRARB p. 3. Given this, it is hard to fathom how the Department's return of an admittedly administratively incomplete permit application could in any way be unlawful. In fact, the contrary would seem evident.

Even if there were an issue of supposed "retroactive" application of a regulation in this case, the Department and London Grove are on the correct side of that issue anyway. The Department's application of new regulations to a pending permit request is proper. *Borough of Glendon v. DER*, 603 A.2d 226, 235-36, *allocatur denied* 608 A.2d 32 (1992); *R & P Services Inc. v. Department of Revenue*, 541 A.2d 432, 434-36; *Franconia Twp. v. DER*, 1991 EHB 1290, 1295 ("since the revised regulations became effective between the request for Department action and the Department's decision on that request, the Department decision must comport with the revised regulations . . . ."); *New Hanover Twp. v. DER*, 1991 EHB 1234, 1256 ("the Department is bound to apply the regulations which were in effect at the time it made its decision . . .") Consequently, it is not an illegal retroactive application of the law for the Department to apply regulations that become final after the permit application is submitted to the pending permit request. *Borough of Glendon* 603 A.2d at 235-36; *R & P Services Inc.* 541 A.2d at 434-36.

In *Borough of Glendon*, the Glendon Energy Company (GEC) applied to the Department for a solid waste permit for a mass burn incinerator on February 26, 1988. The Department accepted the application as administratively complete on August 15, 1988. On September 26, 1988, which was during the pendancy of GEC's application, section 511(a) of Act 101 became effective. Section 511(a) is a siting prohibition which states as follows:

> The department shall not issue a permit for, nor allow the operation of, a new municipal waste landfill, a new commercial

> residual waste treatment facility or a new resource recovery facility within 300 yards of a building which is owned by a school district or a parochial school and used for instructional purposes, parks or playgrounds existing prior to the date the department has received an administratively complete application for a permit for such facilities. This subsection shall not affect any modification, extension, addition or renewal of existing permitted facilities.

53 P.S. § 4000.511(a). On February 5, 1990, the Department issued the permit to GES, but with the following condition,"[b]efore construction of the facility can begin, a waiver of the isolation distance regarding Heil Park in the City of Easton must be obtained under Section 511 of Act 101." (Solid Waste Permit Condition No. 14). 603 A.2d at 230.

GEC appealed the condition which required compliance with Section 511(a) on the ground, among other things, that the application of that provision to its facility constituted an illegal retroactive application of the law. Specifically, GEC argued there, as SECCRA would like to here, that it was an error for the Department to apply section 511(a) to its permit request because it had submitted the application before section 511(a) became effective. The Commonwealth Court flatly rejected that argument stating that "we conclude that the [Department's] application of Section 511(a) to GEC's permit does not constitute a retroactive application of the law". *Id.* at 236 *citing R & P Services Inc. v. Department of Revenue,* 541 A.2d 432 (Pa. 1988).

In the case cited by and relied upon by the *Borough of Glendon* Court, *R & P Services Inc.*, R & P sought cigarette dealer license renewals from the Department of Revenue. While its application was pending, amendments to the pertinent regulations became final and the Department of Revenue applied them denying R & P's application. On appeal to Commonwealth Court, R & P argued that it had been improperly denied its cigarette dealer

licenses as the result the retroactive application of the amended regulations. The Court disagreed and held:

> Where, however, a condition triggering the application of the statue or regulation exists on its effective date, it can not be said that the statue or regulation has been given retroactive operation merely because the substantive right it affects is claimed or asserted in an application or petition prior to its effective date.

R & P Services Inc. 541 A.2d at 435-36.

This case is the same as both *Borough of Glendon* and *R & P Services Inc.* with respect to the question of supposed retroactive application of law. Here, as in both of those cases, to paraphrase the *R & P* Court's formulation, the condition triggering the application of the statue or regulation, in this case the capacity figure, existed on the effective date of Section 271.202(f), and, therefore, it cannot be said that Section 271.202(f) has been given retroactive operation merely because the substantive right it affects is claimed or asserted in an application or petition prior to its effective date. *R & P, supra* 541 A.2d at 435-36.

Indeed, this case would be an even stronger case for rejection of the "retroactive" application of law argument than was the *Borough of Glendon* case. In *Borough of Glendon*, GEC's application was administratively complete before the Section 511(a) citing restriction became effective. Here, on the other hand, at the time the new regulations became effective SECCRA's application was admittedly not administratively complete and, moreover, it was only a Phase I application which would have required a Phase II application to follow.[5]

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[5] If SECCRA is arguing that the Department must be deemed to have "accepted" its Phase I permit application simultaneously with its physical intake by the Department's secretarial/clerical staff on December 22, 2000 and, thus, it could not, on January 12, 2001, either "un-accept" or undo the acceptance, then we reject that argument too. Such a construction of the term "accept" would be illogical. As we have noted, for years the practice of permitting has involved, physical submission of an application by delivery or mail, clerical/secretarial intake or receipt by the Department, and then various progressive degrees of substantive review

Conclusion

Given all we have discussed, we must conclude that the Department's action in these circumstances in deeming the SECCRA Phase I application administratively incomplete, declining to accept it and returning it to SECCRA without prejudice to SECCRA's right to submit a future expansion application was legally and factually correct, reasonable, appropriate and otherwise in conformance with the law. Accordingly, SECCRA is not entitled to summary judgment while the Department and London Grove are.

Accordingly we enter the following order:

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starting with administrative completeness review and then on, *i.e.*, acceptance, for substantive technical review. To suggest that "acceptance" occurs at the moment that the Department's clerical/secretarial staff opens the mail or takes the package by hand and time stamps the application package would be completely at odds with normal practice, common sense and, of course, the new regulations, specifically 25 Pa. Code § 271.202. Such a construction is so tortured that, if true, it would mean that the Department is required to have done a substantive review of the application package to determine compliance or non-compliance with the five-year remaining capacity matter before the application arrives to the Department to review. That, of course, describes an impossibility and, thus, demonstrates that the proffered construction of the term "accept" cannot be correct. Also, we note that the *Borough of Glendon*, touches upon this question in a way which is inimical to SECCRA's argument. In that case, the Commonwealth Court noted that there is a distinction between the date of initial submission of a perspective permitee's application and the date of acceptance of that application by the Department. In the Court's recitation of the facts it stated that "on February 26, 1988, GEC applied to DER for a solid waste management permit . . .[and] DER accepted GEC's application as administratively complete on August 15 1988." *Borough of Glendon*, 603 A.2d at 229. Clearly, the Department's treatment of the concept of "acceptance", or in this case, "non-acceptance" of the SECCRA application for technical review as dealt with in its January 12, 2001 letter is reasonable, logical, consistent with past practice and with regulation effective at the time it took its action.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SOUTHEASTERN CHESTER COUNTY REFUSE AUTHORITY	:	
v.	:	**EHB Docket No. 2001-032-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND LONDON GROVE TOWNSHIP, Intervenor	:	

ORDER

AND NOW this 6th day of February, 2002, upon consideration of the cross motions for summary judgment of Appellant, SECCRA on the one hand, and the Appellees, the Department and London Grove Township on the other hand, **IT IS HEREBY ORDERED**, that the motion for summary judgment of SECCRA is hereby **DENIED** and the motions for summary judgment of the Department and London Grove Township are both **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
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: February 6, 2002

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

NAOMI R. DECKER	:	
	:	
v.	:	**EHB Docket No. 2001-107-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DILLSBURG AREA AUTHORITY	:	**Issued: February 12, 2002**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

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

Synopsis:

The Board will proceed to a hearing on whether a resident of a municipality served by a POTW has standing, where the resident alleges that the approved expansion of the POTW will, among other things, foster further development of the previously rural area, thereby resulting in a loss of open space and a strain on drinking water supplies. The Department letter approving the plant expansion is a final appealable action.

OPINION

The Dillsburg Area Authority ("Dillsburg") operates a sewage treatment plant that serves Dillsburg Borough, York County, and portions of four nearby municipalities, one of which is Franklin Township. It appears that, due to population growth, the plant is approaching full capacity. As the first step in the process of planning to meet future needs in accordance with the Pennsylvania Sewage Facilities Act, 35 P.S. § 750.1, *et seq.* ("Act 537"), Dillsburg commissioned a "Special Study" to assess the feasibility of and possible alternatives to

expanding the plant (the "Special Study"). The Special Study concluded that a plant expansion was the best alternative and that it should go forward. Dillsburg submitted the Special Study to the Department of Environmental Protection (the "Department") for approval.

On April 5, 2001, the Department approved the Special Study. It found that the expansion plan "is consistent with the planning requirements given in Chapter 71 of the rules and regulations of the Department." The Department's letter cautioned that an NPDES permit, Water Management Part II permit, and possibly other permits would be necessary before the plant expansion could actually be constructed. The letter contained the standard "appeal paragraph" notifying aggrieved parties of their right to appeal to this Board the Department's action as embodied in the letter.

Naomi R. Decker ("Decker") is a resident of Franklin Township, one of the municipalities served in part by the POTW. Decker filed an appeal from the Department's April 5 letter. Although Decker happens to be a Township Supervisor, she has made it clear that she is acting in her individual, not representative, capacity as a citizen and a resident within the area addressed to at least some extent by the Special Study. She is appearing *pro se*. She raises ten challenges to the Department's approval of the Special Study. As we read her notice of appeal (as amended), she believes that the Special Study was not approved in accordance with applicable procedures, and that it failed to account for several important facts. More fundamentally, she asserts that the plant expansion is ill-advised because it could ultimately result in higher sewer bills and tap-in fees, and because it will foster further population growth and development in the study area. This development will, in turn, adversely affect the rural nature of the area, the availability of open space, and drinking water supplies. For these reasons, she argues that the Department should not have approved the plan.

Dillsburg has moved for summary judgment. The Department concurs in the motion. Dillsburg makes three basic arguments: (1) Decker lacks standing; (2) the Department's approval of the Special Study does not constitute an appealable action; and (3) Decker's notice of appeal fails to state a cause of action by, among other things, failing to specifically allege any wrongdoing by the Department.

The grant of summary judgment is appropriate when (1) there is no genuine issue of material fact that could be established by additional discovery or expert report, or (2) after the completion of discovery relevant to the motion, the party opposing the motion who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury. Pa.R.C.P. 1035.2. The grant of summary judgment is warranted only in a clear case and the record must be viewed in a light most favorable to the nonmoving party, resolving all doubts regarding the existence of a genuine issue of material fact against the grant of summary judgment. *Graves v. DEP*, EHB Docket No. 2000-189-MG (Opinion and Order issued August 28, 2001) slip op. at 3.

Standing

Dillsburg's first challenge is to Decker's standing. We summarized the principles regarding standing in *Giordano v. DEP*, 2000 EHB 1184, 1185-86, as follows:

> In order to establish standing, appellants must prove that (1) the action being appealed has had – or there is an objectively reasonable threat that it will have – adverse effects, and (2) the appellants are among those who have been – or are likely to be – adversely affected in a substantial, direct, and immediate way. *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 and Order issued February 29, 2000). The first question expresses the Board's gatekeeper function; the Board will not allow a waste of resources on cases where there is no actual harm or credible threat of any harm **to anybody** and, therefore, no legitimate case or controversy. The appellants are not required to prove their case on the merits, but they must show

that they have more than subjective apprehensions, and that the likelihood of adverse effects occurring is not merely speculative. *Ziviello v. DEP*, EHB Docket No. 99-185-R, slip op. at 7 (Opinion and Order issued July 31, 2000). The second question focuses on the particular appellants to ensure that they are the appropriate parties to seek relief because they personally have something to gain or lose as a result of the Board's decision. The second question cannot be answered affirmatively unless the harm suffered by the appellants is greater than the population at large (i.e. "substantial"), and there is a direct and immediate connection between the action under appeal and the appellants' harm (i.e. causation in fact and proximate cause). *William Penn, supra.* Ultimately, "[t]he purpose of the standing doctrine is not to evaluate whether a particular claim has merit but rather to determine whether an appellant is the appropriate party to file an appeal from an action of the Department." *Ziviello*, slip op. at 7 (citing *Valley Creek Coalition v. DEP*, 1999 EHB 935, 944).

We suspect that Decker may have a difficult time establishing the requisite causal connection between the Department's approval of the Special Study and her alleged harms (i.e. increased fees and population growth). Nevertheless, we are not prepared to deprive her of the attempt based upon the limited record currently before us.[1] We will proceed to a hearing on this issue.

Appealable Action

In *Borough of Kutztown v. DEP*, EHB Docket No. 2001-244-L (Opinion and Order issued December 13, 2001), we enunciated several factors that are worth considering in assessing whether a Departmental letter embodies an appealable action:

> In deciding whether a Departmental letter constitutes a final "action" or "adjudication," we consider such factors as the wording of the letter, the substance, meaning, purpose, and intent of the letter, the practical impact of the letter (with an eye to what actions a reasonably prudent recipient of the letter would take in response to the letter), the regulatory and statutory context of the letter, the apparent finality of the letter, what relief the Board can offer (i.e., the

---

[1] For example, Exhibit D to Dillsburg's memorandum contains documents that were apparently attached to Decker's interrogatory responses. One document appears to be the transcript of a public hearing, wherein a person who appears to be speaking on behalf of Dillsburg answered a question from a member of the public as follows:

> Q: Isn't it true that once you provide public sewage, you will drastically have an increase in housing development?
>
> * * *
>
> Chris: There's no doubt about it. The famous saying "that if you build it, they will come." More than likely in those areas of public sewer, you perhaps will see some increased growth.

> practical value of immediate Board review), and any other indicia of a letter's impact upon its recipient's personal or property rights.

Slip op. at 7.

When we consider these factors, we conclude that the Department's April 5, 2001 letter constitutes an appealable action. The letter on its face makes an important determination, describes its action as an "approval" of a planning document, and contains the standard appeal-rights paragraph. With regard to the purpose, impact, and intent of the letter, Dillsburg makes the best case for describing how the Department's approval of the Special Study has materially affected personal or property rights, privileges, immunities, duties, liabilities, or obligations in the memorandum in support of its motion:

> PaDEP's approval of the Special Study accomplished three things: (1) it notified Dillsburg that if it submitted permit applications for the [POTW] improvements based on the selected alternative, PaDEP would not reject them for failure to conform to Act 537 requirements or for conceptual reasons; (2) it assured the contributing municipalities that they could use the Special Study in revising their Act 537 Plans; and (3) it indicated that if Dillsburg applied to be reimbursed for 50% of its costs in undertaking the Special Study, the application would not be rejected for failure of the Special Study to conform to applicable regulations.

(Memorandum at p. 5.)

The Department's letter does not suggest that any analysis, review, study, or action will be forthcoming regarding the approval of the plan for the plant expansion. Dillsburg points out that subsequent permits and approvals will be necessary before the plant can actually be expanded. Dillsburg's argument seems to forget that this is a *planning* case. By definition, it does not in and of itself result in any actual and immediate environmental impact. If Dillsburg's argument were valid, few planning decisions made under Act 537 would be appealable. The fact that subsequent permits will be necessary does not make the Department's conceptual approval of the plant expansion any less final.

Had Decker *not* appealed the approval, but then challenged the concept of the plant expansion in connection with future appealable actions, she would doubtless have been subject to credible challenges based upon administrative finality. Finally, this Board is in a position to offer meaningful relief. In fact, if there are legal infirmities associated with expanding the plant from an Act 537 perspective, it makes perfect sense to resolve them now before Dillsburg or other affected parties undertake tasks that are ultimately dependent upon the validity of the expansion concept.

The Notice of Appeal

Dillsburg argues that Decker has not alleged any wrongdoing by the Department, and that her notice of appeal fails to state a cause of action. Dillsburg argues that Decker failed to specifically allege in her notice of appeal that the Department's acts were arbitrary, an abuse of discretion, or "*ultra vires*." (Memorandum at 11.) Dillsburg complains that some of Decker's challenges are phrased as questions. Dillsburg complains that it is difficult to understand the legal and factual bases for many of Decker's "vague" assertions, and that Decker does not specify exactly what relief she seeks from the Board.

While we sympathize with Dillsburg's frustration, we are reluctant to accept its invitation to apply strict pleading rules to the notice of appeal filed by a *pro se* party in this administrative action. We are equally reluctant to accept the invitation to delve into the substantive merits of each and every one of Decker's allegations in the context of the motion for summary judgment. If Decker is unable to explain and back up her claims in forthcoming prehearing filings and at the hearing on the merits scheduled to begin in a few weeks, it will be apparent soon enough.[2]

[2] We note with concern that Decker stated in response to interrogatories that she does not intend to call *any* expert or lay witnesses. (Dillsburg memorandum, Exhibit D.) We are having trouble imagining how a party with the burden of proof could prevail under such circumstances.

For the foregoing reasons, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NAOMI R. DECKER	:	
	:	
v.	:	**EHB Docket No. 2001-107-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DILLSBURG AREA AUTHORITY	:	

ORDER

AND NOW, this 12th day of February, 2002, Dillsburg Area Authority's motion for summary judgment is **DENIED**.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: February 12, 2002
See next page for service list

c: **DEP Bureau of Litigation**
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MIDDLE PAXTON TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2001-137-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 19, 2002**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

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

Synopsis:

A landowner submitted a private request to the Department asking the Department to order a municipality to revise its official plan. The Department agreed with the landowner, concluded that the municipality's plan is inadequate, and, within the regulatory timeframe permitted for acting upon a private request, issued an order to the municipality to revise its plan. The Department then rescinded the order and reissued a slightly revised version of the order after the deadline for acting upon a private request. The Board finds that the rescission of the order did not necessarily act to rescind the private request that precipitated the order, and in any event, it is not necessary for a private request to be "pending" for the Department to order a municipality to revise an inadequate plan. The Board also finds that the Department's order may include a requirement that the municipality describe in its planning modules how it will ensure that the small flow system required by the order will be operated and maintained.

OPINION

Kenneth Peck submitted a sewage facilities planning module to Middle Paxton Township, Dauphin County (the "Township") seeking approval to build a small flow treatment facility ("SFTF") on his property. The Township refused to approve the module. As a result, on September 26, 2000, Peck filed a private request with the Department of Environmental Protection (the "Department") pursuant to Section 5 of the Pennsylvania Sewage Facilities Act, 35 P.S. § 750.5, and 25 Pa. Code § 71.14 requesting that the Department order the Township to revise its official plan to allow for the small flow treatment facility.

The Department notified the Township and appropriate official planning agencies of the private request and informed them that they could submit written comments. The Township submitted comments in opposition to the private request near the end of the comment period.

Section 5 of the Sewage Facilities Act describes how the Department is required to respond to a private request:

> The department [of Environmental Protection] shall render a decision [regarding a private request] and inform the person requesting the revision and the appropriate municipality in writing within one hundred twenty days after...receipt of the comments...or within an extended period if agreed to in writing by the person making the request....In the event the department fails to act within the specified time limits and the applicant takes a mandamus action against the department, the court may award costs for counsel and court costs to the prevailing party.

35 P.S § 750.5(b.2). The applicable regulation tracks the statute as follows:

> The Department will render its decision, and inform the person requesting the revision and the appropriate municipality, in writing, within 120 days after either receipt of the comments permitted by this section or 120 days after the expiration of the 45-day comment period when no comments have been received or within an extended period if agreed to in writing by the person making the request.

25 Pa. Code § 75.14(e). The regulation goes on to provide that the Department must either order

the municipality to revise its official plan or, if the Department refuses to issue such an order, notify the person who filed the request, in writing, of the reasons for the refusal. 25 Pa. Code § 75.14(e)(1) and (2).

Within the prescribed 120 days, the Department issued an order to the Township requiring it to adopt and submit to the Department a complete planning module package for the use of a small flow system on the Peck property. The order specifically directed the Township to complete the portion of the module describing the assurances that would be put into place to ensure the proper operation and maintenance of the system over the long term. The Township appealed the order to this Board. On April 13, 2001, however, the Department rescinded the order. The Township withdrew its appeal.

On June 4, 2001, the Department issued a new order to the Township that was substantially identical to its earlier order. The Township received the order on June 5, which was well beyond the 120-day period described in the above-quoted sections of the statute and regulations. This appeal followed.

The Township has moved for summary judgment, which the Department has opposed. The Township makes three arguments. First, the Township contends that the Department's rescission of its first order also automatically rescinded the Peck's private request. Because no private request was pending at the time of the second order, the Department was precluded from issuing the second order. Second, the Department was also precluded from issuing the second order because the 120-day period for acting upon a private request had expired. Third, the Department did not have the authority to order the Township to complete the assurances section of the planning module. All three arguments are without merit.[1]

[1] Summary judgment may be granted when it is clear that a party is entitled to judgment in its favor as a matter of law based upon undisputed facts. Pa. R.C.P. 1035.2.

With respect to the first two arguments, the Township summarizes its position as follows:

> The legal issue for consideration by this Hearing Board is the status of the rescission, *vis a vis* the Pecks' request. If the rescission [of the first order] constituted a denial of the application, then PaDEP was barred from taking additional actions because the application had been finally acted on. If the rescission constituted a return to the *status quo ante*, however, then the Pecks' request was neither approved nor denied. In this case, although the application was still "pending," PaDEP's power to act had dissipated because it had not met the statutory requirements. Thus, in either case the Order is *ultra vires* and void, the status of the rescission merely determines under which legal theory the conclusion is true.

(Memorandum at 12-13.) The Township's argument strikes us as an effort to elevate form over substance. There is no factual or legal basis for concluding that the Department's rescission of its first order to the Township somehow automatically or as a matter of law acted to deny or rescind Peck's private request. The Township cites no authority in support of its argument, and we are not independently aware of any. Here, the Department never "refused to order a revision" and it never notified Peck in writing of a refusal, which is what it is required to do if it means to, in effect, deny a private request. 25 Pa. Code § 71.14(e). Until it took such an action, the request remained viable.

Furthermore, if a municipality's official plan is inadequate to meet a resident's sewage disposal needs, it must be revised. A private request is only one mechanism by which the Department may come to learn that a plan is inadequate. The Department could have just as well made an independent finding, without the impetus of a private request, that the Township's plan was inadequate. In other words, the Department does not need to ignore a deficiency in a municipality's plan simply because no private request has been made or is "pending." Once the Department knows there is a problem, it needs to see that it is fixed. Whether or not the private request that first brought the problem to the Department's attention is "pending" is of no practical significance.

Along the same lines, whether or not the Department's statutory deadline for acting in response to a private request has expired, an order to a municipality to revise its plan must be evaluated on its own merits. The plan either needs to be revised or it does not. The resolution of that question turns on whether the plan is adequate, not whether the Department has timely acted upon a private request. Although the Department's delay in responding to the private request may be unfortunate and it might have exposed it to reimbursing Peck's attorneys' fees in the event a mandamus action had been brought, 35 P.S. § 750.5, it is of no consequence in deciding whether the Township's plan needs to be revised, which is the proper focus of this appeal.

Turning to the Township's third argument, the regulations point out that "small flow treatment facilities require adequate operation and maintenance to prevent the creation of environmental problems or public health hazards associated with improperly treated sewage. This requires the control of small flow treatment facilities through specific restrictions on their use." 25 Pa. Code § 71.64(a). Therefore, when an official plan or revision proposes the use of small flow treatment facilities, the official plan or revision must, among other things, include the following:

> An evaluation that establishes specific responsibilities for operation and maintenance of the proposed system which shall include documentation that one or a combination of the following operation and maintenance requirements have been established or approved in writing by the municipality:
>
> (i) A maintenance agreement between the property owner and an individual, firm or corporation experienced in the operation and maintenance of sewage treatment systems.
>
> (ii) A maintenance agreement between the property owner and municipality or its designated local agency which establishes the property owner's responsibility for operating and maintaining the system and the responsibility of the municipality or local agency for oversight of the system.
>
> (iii) A municipal ordinance which requires that the small flow

treatment facilities be operated and maintained through a maintenance agreement between the property owner and an individual, firm or corporation experienced in the operation and maintenance of sewage treatment systems.

(iv) Municipal ownership of the system.

(v) Inclusion of the system under a sewage management agency developed in accordance with § 71.73 (relating to sewage management programs for sewage facilities permitted by local agencies) operated by the municipality.

(vi) A properly chartered association, trust or other private entity which is structured to manage the system.

(vii) Establishment of bonding, escrow or other security prior to planning approval. The bonding, escrow or other security shall be forfeited to the municipality upon notice of continuing noncompliance of the system....

25 Pa. Code § 71.64(c)(5).

The second paragraph of the Department's order specifically requires the Township to describe how the Peck system will be operated and maintained. This provision of the order is somewhat redundant because the first paragraph requires the Township to submit "a complete planning module package," and information regarding operation and maintenance is part of a complete package. The package would not be complete without it. The Department appears to have added the provision because the proposed planning module that was attached to Peck's private request did not include operation and maintenance information. The Department seems to be saying that the Township may use Peck's draft module, but it must add operation and maintenance information.

The Township's challenge to this requirement is difficult to follow. As we understand it, the Township argues that the Department has no authority to order a municipality to implement any of the acceptable options for assuring operation and maintenance. For example, the

Department may not order the Township to enter into an agreement with the landowner (§ 71.64(c)(5)(ii)) or pass an ordinance requiring the landowner to enter into an agreement with a firm qualified to operate small systems (§ 71.64(c)(5)(iii)). Because the Department lacks authority to require the Township to implement any of the available options, the Department should have ordered *Peck* to select an option.

Thus, the Township does not appear to have mounted a facial challenge to the requirement that a planning module for a small flow system must contain operation and maintenance information. It has not directly attacked 25 Pa. Code § 71.64(c)(5). It simply argues that the Department erred by requiring the Township, instead of Peck, to submit the information.

To describe the Township's argument is to reveal its fundamental flaw. Because the Township has not questioned the basic regulatory requirements, there is no dispute here that the Department has the authority to order a municipality to revise its official plan if in response to a private request it finds that the plan is not being implemented or is inadequate to meet a property owner's sewage disposal needs. 25 Pa. Code § 71.14. The Township also does not dispute the generic requirement that a revision that proposes a small flow system must include operation and maintenance assurances. 25 Pa. Code § 71.64(c)(5). Thus, as a matter of simple logic, there can also be no dispute that the Department can order a municipality to select operation and maintenance assurances in support of its proposed revision (along with all of the other components of a complete planning package).

If we have misconstrued the Township's argument and it did intend to attack these basic regulatory requirements, then we note that it has failed to provide sufficient grounds for the challenge. A regulation may only be shown to be invalid by a showing that it was not (1) within

the agency's granted power, (2) issued pursuant to proper procedure, or (3) reasonable. *Housing Authority of the County of Chester v. Pennsylvania State Civil Service Commission*, 730 A.2d 935 (Pa. 1999); *Rohrbaugh v. Pennsylvania Public Utilities Commission*, 727 A.2d 1080 (Pa. 1999). The Township has made no such showing here. It seems eminently lawful, reasonable, and appropriate to us to require as part of proper sewage facilities planning that enforceable arrangements be made to ensure that a small flow system will be adequately maintained over the long term.

That leaves us with the Township's contention that the Department should have required Peck "to select from among the O&M [operation and maintenance] options as a condition of approving the module." (Motion ¶ 42.) Initially, we join with the Department in questioning why the Township would *want* to give up the right to pick the option of its choice, particularly given the fact that it is ultimately legally responsible for the plant *vis-a-vis* the Department. 25 Pa. Code § 71.71. But be that as it may, the Department's authority under Section 71.14 is to order a *municipality* to revise its plan. While the private request serves to bring a problem to the Department's attention, planning responsibility always remains with the municipality. It would not be appropriate for the Department to direct a landowner to plan for the municipality. The landowner has no planning responsibilities. The Department's authority with respect to planning is limited to requiring the municipality to act. That is the process that is described in Section 71.14, and that is precisely what the Department did here. Furthermore, the Township's argument has little practical significance. Because the Township as the planning authority must sign off on any choice made by Peck, for the Department to have required Peck to make the initial choice would still have required the Township to approve that choice.

The Township's position appears to be based upon its mistaken understanding that the

Department "approved" not only the private request, but the draft planning module that Peck prepared and attached to the private request. That module did not select an O&M alternative. Thus, the Township does not understand why the Department "approved" an incomplete module.

The Department, however, did not approve the private request, and it did not approve the planning module that was attached to that request. It could not approve the module because it had not been adopted by the Township. To repeat, only the Township can revise its official plan. What has happened here is that the Department has agreed with the landowner that the Township's plan is inadequate and needs to be revised. Accordingly, the Township, not Peck, must revise its plan. The Township must revise its plan by submitting all of the information mandated by the regulations. That information includes a plan for operation and maintenance assurances. To the extent that there is flexibility under the regulation and the Department's order on what information must support the planning revision, that flexibility appropriately lies with the planning authority--the Township.

The Township may, but it is not required to, use the planning module prepared by Peck. (DEP Response ¶ 14.) The Department's order suggests that a module substantially identical to Peck's module, with the addition of O&M information, would likely be approved. But so long as the Township submits "a complete planning module package" that provides for "the use of a SFTF on the Peck Property," it will have complied with the Department's order.

In sum, the Township's third argument overlooks the fact that this is a planning case. Whether or not the Department has the authority to order a municipality to build a certain size POTW on a particular stream is beside the point of whether or not the Department can order a municipality to plan for the adequate resolution of its sewage disposal needs. Similarly, whether or not the Department can order the Township to pass an ordinance that would satisfy the O&M

requirements is a different question than the question that is presented in this appeal, which is whether the Department can order the Township to select among acceptable alternatives for assuring the proper long-term operation and maintenance of a small flow system as part of its plan for that system. The difference between the two inquiries is admittedly subtle, but it is critical. This appeal only involves the second inquiry. At least in the first instance, the Township as the planning authority has the right to select among acceptable alternatives. What Departmental actions would be authorized and appropriate if the Township is unwilling or unable to make that selection are questions that are not ripe for our consideration in the immediate setting. Here, we simply conclude that the Township can be ordered to make a selection.

We note that the Township has raised numerous other challenges to the Department's action in its notice of appeal, and we express no opinion regarding those challenges here. We do conclude, however, that the three arguments raised by the Township in support of its motion for summary judgment are lacking in any merit. Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MIDDLE PAXTON TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2001-137-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 19th day of February, 2002, Middle Paxton Township's motion for summary judgment is **DENIED**.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: **February 19, 2002**

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CITIZENS ALERT REGARDING THE ENVIRONMENT	:	
v.	:	**EHB Docket No. 2000-162-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JEFFERSON TOWNSHIP	:	**Issued: February 28, 2002**

OPINION AND ORDER ON MOTION IN LIMINE

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

Synopsis:

The Department of Environmental Protection's (the "Department's") motion in limine to bar the Aqua Tech Report and the Tethys Report and the facts and opinions expressed therein and to preclude the testimony of James Richenderfer is denied. The Board is unable to determine based on the existing record that the facts and opinions expressed in the materials are beyond the scope of the objections set forth in the notice of appeal.

OPINION

This appeal relates to the July 3, 2000 approval of Jefferson Township's Official Sewage Facilities Plan Update Revision, which was appealed by the Citizens Alert Regarding the Environment ("CARE" or "Appellant"). On February 5, 2002, the Department filed a motion in limine seeking to preclude certain reports and testimony from introduction into evidence in this

matter. Specifically, the Department seeks to bar the Aqua Tech and Tethys reports as well as the testimony of James Richenderfer, arguing that the issues addressed therein are beyond the scope of this appeal. Jefferson Township ("Jefferson") concurs with the Department's motion.

In support of its motion the Department argues that Appellant's notice of appeal fails to allege the issues of (1) Jefferson Township's sewage facilities' impact on the water quality of Moosic Lakes and (2) the impact to the local groundwater system if the Lakes area is connected to a public sewage system, which is how the Department characterizes the issues addressed in the expert reports in question. The Department points to 25 Pa. Code § 1021.51(e), which provides that a notice of appeal:

> shall set forth in separate numbered paragraphs the specific objections to the action of the Department. The objections may be factual or legal. An objection not raised by the appeal or an amendment thereto . . . shall be deemed waived, provided that, upon good cause shown, the Board may agree to hear the objection.

25 Pa. Code §1021.51(e). The Department contends that, because Appellant's notice of appeal failed to specifically raise an objection with regard to the impact of the Township's sewage facility on the water quality of Moosic Lakes and the impact to the local groundwater system if the Lakes area is connected to a public sewage system, the objections were waived. Accordingly, the Department asserts that the reports and testimony relating to these issues should be barred from evidence.

Appellant responds that its notice of appeal encompasses the issue of the water quality of the Moosic Lakes area. Among other things CARE points out that its notice of appeal complains that there has been no analysis of direct, secondary, or cumulative impacts of the plan upon the "Moosic Mountains Barrens" and that the plan revision is not appropriately geared toward the actual needs of the Township.

In *Ainjar Trust v. DEP*, EHB Docket No. 99-248-K (Opinion issued January 5, 2001), this Board held that it "has jurisdiction over issues not specifically recited in a notice of appeal if the issue falls within the scope of a broadly worded objection found in the notice of appeal." *Id.* slip op. at 8. Thus, the fact that an issue is not specifically recited in a notice of appeal does not automatically preclude its consideration. In this case, we are unable to determine based on the existing record that the facts and opinions the Department seeks to exclude through its motion are beyond the scope of the objections set forth in Appellant's notice of appeal. The record here simply lacks the information needed to rule on a motion of such significance. For example, the connection between "Moosic Lakes" and the "Moosic Mountain Barrens," if any, is unclear at this point.

Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CITIZENS ALERT REGARDING THE ENVIRONMENT	:	
v.	:	**EHB Docket No. 2000-162-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JEFFERSON TOWNSHIP	:	

ORDER

AND NOW, this 28th day of February, 2002, in consideration of the Department's motion in limine and CARE'S response in opposition thereto, it is hereby ordered that the motion is **DENIED.**

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: **February 28, 2002**

c:

DEP Bureau of Litigation
Attention: Brenda Houck, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JEFFERSON COUNTY COMMISSIONERS, et al.	:	
	:	**EHB Docket No. 95-097-C**
v.	:	
	:	**(Consolidated with EHB Dkt. Nos. 95-102-C and 2000-066-C)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LEATHERWOOD, INC., Permittee	:	**Issued: February 28, 2002**

ADJUDICATION

By Michelle A. Coleman, Administrative Law Judge

Synopsis: The Board sustains a third-party appeal and revokes the Department's issuance of a permit under the Solid Waste Management Act, 35 P.S. § 6018.101 *et seq.* and the Municipal Waste Planning, Recycling and Waste Reduction Act, 53 P.S. § 4000.101 *et seq.* to construct and operate a municipal waste disposal facility to be located in Jefferson County in close proximity to the Dubois Jefferson County Airport. Third-party appellants sustained their burden of proving that the permittee had failed to comply with various applicable statutory and regulatory provisions and that the agency committed errors of law and acted unreasonably in issuing the landfill permit.

BACKGROUND

On May 12, 1995, the Department of Environmental Protection ("DEP") issued Solid Waste Permit No. 101604 (the "Permit") to Leatherwood, Inc. ("Leatherwood") pursuant to DEP's authority under the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as*

amended, 35 P.S. § 6018.101 *et seq.* (SWMA). The Permit authorized Leatherwood to construct and operate a municipal waste disposal facility to be located in Pinecreek Township, Jefferson County (the "Landfill"). The present controversy before the Board was initiated on June 8, 1995 when the Commissioners of Jefferson County, the Jefferson County Solid Waste Authority, and the Clearfield-Jefferson Counties Regional Airport Authority (the "Airport Authority") filed a third-party appeal of the Permit, docketed at EHB Docket No. 95-097-C. A separate appeal of the Permit was filed by Pinecreek Township on June 12, 1995 (EHB Docket No. 95-102); the two appeals were consolidated by the Board at Dkt. No. 95-097-C.

A motion to dismiss several objections raised by the appeals was denied, *Jefferson County Commissioners v. DEP,* 1995 EHB 1066, and, following discovery proceedings, Appellants in the consolidated appeals (the "Local Government Officials") filed a motion for summary judgment. Leatherwood filed its own motion with respect to several issues raised by the appeal.[1] The Board denied the Local Government Officials' motion, and granted in part and denied in part Leatherwood's motion. *Jefferson County Commissioners v. DEP,* 1996 EHB 997. Pre-hearing memoranda were filed, and the appeals were set for a hearing when external events interrupted the process. Indeed, the resolution of this matter has been convoluted by a series of federal legislative enactments and repeatedly punctuated by excursions into other judicial fora.

I. Federal Aviation and Reauthorization Act of 1996 and the 1996 Suspension Order

On October 9, 1996, the Federal Aviation and Reauthorization Act of 1996 ("FARA") was enacted into law. Pub. L. 104-264, 110 Stat. 3213. Section 1220(a) of FARA prohibited Leatherwood from constructing and operating the Landfill in the absence of an agreement to

[1] The appeals consolidated at No. 95-097-C were originally assigned to Administrative Law Judge Richard S. Ehmann; however, after the close of briefing on the summary judgment motions, the appeals were transferred in February 1996 to Administrative Law Judge Michelle A. Coleman following the retirement of Judge Ehmann from the Board.

such by the Airport Authority—one of the Appellants seeking revocation of the Permit.[2]

In response to the federal legislation, DEP issued an order dated October 21, 1996 (the "1996 Suspension Order") suspending the Permit pursuant to Section 503(c) of the SWMA, 35 P.S. § 6018.503(c).[3] The 1996 Suspension Order noted: the Landfill's proposed location is within three miles of the Dubois-Jefferson County Airport (the "Dubois Airport"); the Happy Landing Landfill is proposed to be established within six miles of the Dubois Airport; and the remaining criteria of Section 1220(a) were met with respect to the Landfill. DEP concluded that Leatherwood could not comply with Section 1220(a) of FARA—a "federal statute relating to public safety"—and suspended the Permit until Leatherwood demonstrated its compliance with the applicable federal law.

Leatherwood appealed the 1996 Suspension Order to the Board on November 20, 1996, which appeal was docketed at EHB Docket No. 96-249-C. The proceedings in No. 95-097-C were stayed pending disposition of Leatherwood's appeal of the 1996 Suspension Order, and the parties' focus shifted to the effect of the federal legislation and the 1996 Suspension Order.

Eagle Environmental, L.P.—proponent of the Happy Landing Landfill—commenced an

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[2] Section 1220(a) of the Act stated in pertinent part as follows:

> [49 U.S.C.] Section 44718 is amended by adding at the end the following:
>
> > (d) Landfills: For the purposes of enhancing aviation safety, in a case in which 2 landfills have been proposed to be constructed or established within 6 miles of a commercial service airport with fewer than 50,000 emplanements per year, no person shall construct or establish either landfill if an official of the Federal Aviation Administration has stated in writing within the 3-year period ending on the date of the enactment of this subsection that 1 of the landfills would be incompatible with aircraft operations at the airport, unless the landfill is already active on such date of enactment or the airport operator agrees to the construction or establishment of the landfill.

Federal Aviation and Reauthorization Act of 1996, Pub. L. 104-264, § 1220(a), 110 Stat. 3213, 3286 (codified as amended at 49 U.S.C. § 44718(d) (2000)).

[3] Section 503(c) gives the Department the authority to suspend a solid waste permit if it finds that the permittee has failed or continues to fail to comply with any federal statute relating to "the protection of the public health, safety and welfare." 35 P.S. § 6018.503(c).

action in the Federal District Court for the Western District of Pennsylvania, *Khodara Environmental, Inc. v. Beckman, et al.*, Civil Action No. 97-93 (W.D. Pa. filed April 25, 1997), seeking primarily a declaration that Section 1220(a) of FARA was facially unconstitutional because it violated the Equal Protection Clause, U.S. CONST. amend XIV, § 1. Although Leatherwood did not join the *Khodara* case, the Airport Authority was a named defendant and Jefferson County and Pinecreek Township intervened as defendants. Given the prohibition imposed on establishment of the Landfill by FARA, and the potentially dispositive impact of the federal court action, all proceedings before the Board were stayed while the constitutional challenge to the federal legislation was being decided in federal court.[4] Nearly two years after the federal case was commenced, in March 1999, the Federal District Court held that Section 1220(a) of FARA violated the Equal Protection Clause, U.S. CONST. amend. XIV, § 1, and must be struck down. *Khodara Environmental, Inc. v. Beckman*, 91 F. Supp.2d 827, 850-57 (W.D. Pa. 1999), *affd in part, vacated in part and remanded*, 237 F.2d 186 (3d Cir. 2001).[5] In June 1999, Leatherwood requested that DEP terminate the 1996 Suspension Order and reinstate the Permit in light of the decision in *Khodara.*

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[4] A further circumlocution occurred when the Local Government Officials sought leave to intervene in Leatherwood's appeal of the 1996 Suspension Order. In December 1996, the Board denied their request to intervene, primarily because the issues they wanted to raise in No. 96-249-C were already being addressed in their third-party appeals. Not deterred, the Local Government Officials sought interlocutory review of the Board's order by the Commonwealth Court (Cmwlth. Ct. No. 178 C.D. 1997). The Local Government Officials' interlocutory petition was ultimately quashed by the Commonwealth Court in December 1997. *Jefferson County v. DEP,* 703 A.2d 1063 (Pa. Cmwlth. Ct. 1997).

[5] In reaching its decision, the *Khodara* court concluded that:

> [the] extremely specific criteria [of the statute] create a classification of affected landfills that is so grossly underinclusive as to be irrational. Indeed, notwithstanding the presumably national interest in air traffic safety, the statute for all intents and purposes applies only to two landfills in all of the United States: namely, the Leatherwood Landfill and the Happy Landing Landfill, both of which are located within six miles of the Dubois-Jefferson County Airport.

Khodara Environmental, Inc., 91 F. Supp.2d at 851 (footnote omitted). The District Court's decision was appealed to the Third Circuit Court of Appeals. *Khodara Environmental, Inc.*, 237 F.3d at 191-92.

After the *Khodara* decision, the Board sought to move ahead with the third-party Permit appeal proceedings and scheduled a hearing for August 1999. However, Leatherwood filed a motion to postpone the hearing so that all outstanding issues could be resolved at one time, including those arising from an additional approval needed by Leatherwood before landfill operations could commence. Pursuant to a Permit condition, Leatherwood was required to submit to DEP a plan detailing how the Landfill operator would mitigate any bird hazard caused by the Landfill. *See Jefferson County Commissioners*, 1996 EHB at 998-1003. Leatherwood had not yet submitted the mitigation plan to DEP, but intended to do so by September 1999. In an effort to resolve all relevant issues simultaneously, the Board accommodated Leatherwood's request and rescheduled the hearing for January 2000.

In August 1999, DEP indicated that its decision on whether to terminate the suspension and reinstate the Permit would be delayed. It was DEP's intent to decide all outstanding critical issues at one time—including whether to approve the bird hazard mitigation plan. Leatherwood submitted the plan by early September 1999, but DEP had not yet rendered a decision by the end of October 1999. Rather, DEP had decided to engage an expert to review Leatherwood's mitigation plan, and expected a decision to be further delayed until the end of 1999.

II. The Wendell Ford Act and the 2000 Suspension Order

Given the continued absence of a DEP determination on the bird hazard mitigation plan, the parties requested that the hearing on the merits set for January 2000 be postponed while DEP made a final decision on all outstanding issues. The Board granted the request and postponed the hearing until July 2000. Before the hearing could occur, however, Congress responded to the *Khodara* decision with new legislation. On March 15, 2000, Congress passed the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. 106-181, 114 Stat. 61 (2000) (the "Wendell Ford Act"). Section 503(b) of the Wendell Ford Act amended 42 U.S.C. §

44718(d)—the provision struck down in 1999 by the District Court in *Khodara*—as follows:

> (d) Limitation on construction of landfills.
>
> (1) In general. No person shall construct or establish a municipal solid waste landfill . . . that receives putrescible waste . . . within 6 miles of a public airport that has received grants under chapter 471 and is primarily served by general aviation aircraft and regularly scheduled flights of aircraft designed for 60 passengers or less unless the State aviation agency of the State in which the airport is located requests that the Administrator of the [FAA] exempt the landfill from the application of this subsection and the Administrator determines that such exemption would have no adverse impact on aviation safety.
>
> (2) Limitation on applicability. Paragraph (1) . . . shall not apply to the construction, establishment, expansion, or modification of, or to any other activity undertaken with respect to, a municipal solid waste landfill if the construction or establishment of the landfill was commenced on or before the date of the enactment of this subsection.

Pub. L. 106-181, § 503(b), 114 Stat. 61, 133 (codified at 49 U.S.C. § 44718(d) (2000)).[6]

Though passed by Congress on March 15th, the new legislation was not presented to the President until March 28, 2000, and the bill was not signed into law until April 5, 2000. In the interim between passage and signing, a flurry of activity occurred in these proceedings. On March 17, 2000, Leatherwood filed a petition for supersedeas of the 1996 Suspension Order. Through a supersedeas of the permit suspension Leatherwood was trying to assure that it would fit into the exception carved out by amended § 44718(d)(2)—*i.e.*, landfills that had commenced

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[6] Congress supported the restrictions imposed by Section 503(b) with explicit findings:

> (a) FINDINGS.—Congress finds that—
> (1) collisions between aircraft and birds have resulted in fatal accidents;
> (2) bird strikes pose a special danger to smaller aircraft;
> (3) landfills near airports pose a potential hazard to aircraft operating there because they attract birds;
> (4) even if the landfill is not located in the approach path of the airport's runway, it still poses a hazard because of the birds' ability to fly away from the landfill and into the path of oncoming planes;
> (5) while certain mileage limits have the potential to be arbitrary, keeping landfills at least 6 miles away from an airport, especially an airport served by small planes, is an appropriate minimum requirement for aviation safety; and
> (6) closure of existing landfills (due to concerns about aviation safety) should be avoided because of the likely disruption to those who use and depend on such landfills.

Pub. L. 106-181, § 503(a), 114 Stat. 61, 133 (2000).

"construction or establishment" on or before the enactment date of Section 503(b). Leatherwood sought a supersedeas of the permit suspension so it could hastily perform additional construction activities at the Landfill site prior to the Wendell Ford Act being signed into law by the President. The Local Government Officials responded by filing a supersedeas petition in the third-party appeals at No. 95-097-C; they sought to immediately supersede the Permit issuance and thereby prevent any construction activity by Leatherwood.

On March 20, 2000, DEP joined the fray by issuing an order revoking the 1996 Suspension Order and simultaneously suspending the Permit for a second time (the "2000 Suspension Order").[7] Concurrent with its issuance of the 2000 Suspension Order, DEP moved to dismiss Leatherwood's appeal of the 1996 Suspension Order as moot. Leatherwood countered by appealing the 2000 Suspension Order; the Board docketed the new appeal at EHB Docket No. 2000-066-C. Along with its notice of appeal, Leatherwood filed a petition for supersedeas of the 2000 Suspension Order. The Local Officials requested leave to intervene in No. 2000-066-C which, unopposed, was subsequently granted.

On March 21, 2000, the Board conducted a hearing to address the supersedeas petitions in No. 96-249-C and No. 95-097-C. The Board denied Leatherwood's petition for supersedeas in No. 96-249-C, explaining that the petition was rendered moot by revocation of the 1996 Suspension Order.[8] After taking testimony with respect to the Local Government Officials'

[7] The 2000 Suspension Order no longer relied on Leatherwood's inability to comply with a federal public safety law as the basis for its re-suspension of the Permit. Instead, DEP issued the 2000 Suspension Order because it had determined that future operations at the proposed Landfill may create a hazard to public safety. *See* 35 P.S. § 6018.503(e) (2000) (SWMA permit subject to suspension any time DEP determines that permitted solid waste disposal facility "is creating a potential hazard to the public safety, health and welfare"). The 2000 Suspension Order suspended the Permit indefinitely while DEP decided whether to approve a bird hazard mitigation plan submitted by Leatherwood to DEP in September 1999. *See* Notice of Appeal (Dkt. No. 2000-066-C), at Exhibit A (Suspension Order issued March 20, 2000).

[8] By Order dated April 18, 2000, the Board granted DEP's unopposed motion to dismiss the appeal of the 1996 Suspension Order (No. 96-249-C) as moot.

petition for supersedeas in No. 95-097-C, the Board denied their petition. *Jefferson County v. DEP*, 2000 EHB 394. The Board held a hearing on Leatherwood's petition to supersede the 2000 Suspension Order on March 27-28, 2000. On April 5, 2000, the Wendell Ford Act was enacted into law, thus obviating any need for supersedeas of the 2000 Suspension Order. Leatherwood withdrew its supersedeas petition shortly thereafter.

On June 13, 2000, the Board granted the parties' requests to consolidate the third-party appeals with the 2000 Suspension Order appeal and to postpone the merits hearing until after Leatherwood had completed revisions to its bird hazard mitigation plan.[9] On January 17, 2001, though DEP had still not rendered a determination on Leatherwood's bird hazard mitigation plan, the Board commenced a hearing in the third-party appeals consolidated at No. 95-097-C. Issues relevant only to validity of the 2000 Suspension Order were excluded from the hearing by joint stipulation and Board consent. Administrative Law Judge Michelle A. Coleman presided over 28 days of hearing on the merits, and conducted a site view, before closing the record on August 9, 2001. Filing of post-hearing briefs was completed on January 11, 2002, and the matter is now ripe for adjudication. The record consists of a 4,312-page hearing transcript, nearly 200 exhibits, portions of deposition testimony designated for inclusion in the record, and numerous documents made subject to judicial notice. After a careful review of the record, the Board makes the following findings of fact.

[9] In May 2000, the independent expert hired by DEP had submitted a report evaluating the proposed bird hazard mitigation plan, and Leatherwood was in the process of responding to the recommendations contained in the independent expert's report. At that time, DEP had indicated to the Board its intention to reach a final determination on whether to approve the mitigation plan within a few months.

FINDINGS OF FACT

1. The Department of Environmental Protection is the agency with the duty and authority to administer and enforce the Solid Waste Management Act, 35 P.S. § 6018.101 *et seq.*, 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"), and the regulations promulgated pursuant to those statutes. (Joint Stipulation ("Jt. Stip."), at ¶ 1).

2. The Permittee, Leatherwood, Inc., is a Pennsylvania corporation with a business address at 655 Church Street, Indiana, PA 15701. (Jt. Stip., at ¶ 2; Exh. B-1, at Form C, Att. 4).

3. Third-party appellants are the duly-elected Commissioners of Jefferson County, Pennsylvania; the Jefferson County Solid Waste Authority, a municipal authority delegated with responsibility for promulgating and implementing a solid waste management plan for Jefferson County; the Clearfield-Jefferson Counties Regional Airport Authority, a municipal authority delegated by Jefferson and Clearfield Counties with responsibility for operating the Dubois-Jefferson County Airport; and, Pine Creek Township, a municipal corporation located in Jefferson County. (Hearing Transcript ("Tr.") at 89-90, 94-95, 129-31).

4. Beginning in July 1991, Leatherwood submitted application materials to DEP for certain permits necessary to construct and operate a proposed solid waste landfill to be located in Pine Creek Township. In or about October 1994, Leatherwood submitted its final permit application materials for the Landfill to DEP (the "Permit Application"). (Jt. Stip. at ¶ 4; Exh. B-1 through B-10; Exh. B-11, at 2-4).

5. The proposed Landfill facility consists of approximately 650 acres located in a sparsely populated area in the northeast corner of Pinecreek Township, approximately 1.5 miles north of Interstate 80. The total disposal area for the Landfill consists of approximately 57 acres.

(Exh. B-1, at Form A and Fig. A-1A; Exh. B-3, at Form 1; Exh. B-11, at 4; Tr. 1155-56, 1599).[10]

6. An access road to the facility would connect with State Route 830 at a distance of approximately 600 feet from the Exit 15 interchange off Interstate 80. (Exh. B-2, at Fig. E-1; Exh. B-10, at Form 46, Att. 1).

7. The Landfill disposal area would be situated on previously strip-mined land with poor vegetative growth as a result of limited reclamation by the former strip mine operator. A large portion of the disposal area would be located in a natural depression in the terrain containing improperly reclaimed mine spoil. The permit area surrounding the disposal site is covered by forested land containing hardwood and pine trees intended to serve as a buffer to the disposal area. (Exh. B-1, Fig. A-1A; Exh. B-10, at Form 46; Exh. B-18; Tr. 1154-57, 1160-61).

8. The Landfill would be located in close proximity to the Dubois Airport; the eastern perimeter of the Landfill disposal area would lie approximately 12,600 feet from the western end of the Dubois Airport's single runway, and the entire disposal area would range between 12,500 and 15,500 feet from the western end of the airport runway. (Exh. B-1 at Form D, Fig. D-1; Exh. B-1 at Form D, Att. 4).

I. The Landfill Permit Application and Review Process

9. Guy McCumber has been employed by DEP as a Solid Waste Supervisor since approximately 1990, and was involved in DEP's review of the Permit Application. Prior to reviewing the Permit Application, Mr. McCumber had been involved with the review of only one other application for a new municipal solid waste landfill. (Tr. 523-24, 528-29, 531-33, 640-41).

10. Mr. McCumber reviewed the Permit Application with respect to consistency with

[10] The permit application documents and other relevant evidence are somewhat inconsistent with respect to the actual size of the facility and disposal areas to be permitted. Some evidence indicates that the permitted site will consist of 747 total acres, *see, e.g.*, Exh. B-10, Att. C; Exh. B-17, at 3; Tr. at 566, 570, and that the disposal area will consist of 127 acres, *see* Exh. B-16, at application page 1; Exh. B-17, at 3. The more credible evidence supports the figures stated above.

waste management plans, compliance with applicable municipal waste regulations, the site suitability analysis, the need for the disposal capacity created by the proposed facility, the identification and mitigation of harms to the environment and public safety posed by the Landfill's operation, the balancing of harms with need, and the social and economic benefits analysis. He was specifically responsible for reviewing Form 1, portions of Form D, Form 45, and Form 46. (Tr. 523-24, 528-29, 531-33).

11. Mr. Neville is employed by DEP as a Facility Specialist, and he is generally responsible for coordinating the administration of landfill permit applications. With respect to Leatherwood's Permit Application, he was responsible for reviewing the portions of Form D related to areas in which a landfill may not be located, *i.e.*, the exclusionary criteria contained in 25 Pa. Code § 273.202(a) (1995). (Tr. 1105-06).

12. During the relevant period, Arthur Provost was the Facilities Manager in DEP's Northwest Regional office and was responsible for supervising the landfill permitting review process within the regional office. He directed the review of Leatherwood's Permit Application and participated in some of the decisions made by his staff during the permit review process. He was the supervisor of Richard Neville and Guy McCumber. (Tr. 1231-32).

13. During the relevant period, Patrick Boyle was Regional Waste Management Manager for the DEP Northwest Regional office. He supervised Mr. Provost and was responsible for the ultimate decision to issue the Permit to Leatherwood. Mr. Boyle was supervised during the relevant period by James Rozakis, Acting Regional Director for the DEP Northwest Regional office, and Terry Fabian, the DEP Deputy Secretary for Field Operations. (Tr. 1233-35).

A. Consistency with Waste Management Plans

14. The Landfill proposed to accept waste originating in only two locations—Armstrong County, Pennsylvania, and the New York City metropolitan area in New York State.

(Exh. B-3, at Form 1 and Atts. 1, 5, and 8).

15. The Permit Application included contractual commitments for approximately 3,000 tons per year of municipal solid waste generated in Armstrong County, and approximately 300,000 tons per year of municipal waste generated within "the five boroughs comprising the City of New York." (Exh. B-3, at Form 1 and Atts. 1, 5, and 8; Exh. A-26; Exh. A-27).

16. The New York City metropolitan area—which is comprised of five separate boroughs: Queens, Bronx, Kings, New York and Richmond—also constitutes a county in New York State. *See* Map-NY (as visited November 1, 2001), http://www.state.ny.us.

17. The Landfill is not expressly provided for in the approved Act 101 municipal waste management plan for Jefferson County (*i.e.*, the host county), and the Permit Application did not include any commitment for disposal of waste originating in the host county. (Exh. B-10, Form 46, Att. 1; Tr. 534).

18. The Landfill is expressly provided for in Armstrong County's approved municipal waste management plan. (Exh. B-3, Att. 5; Exh. B-10, Form 46, Att. 1; Tr. 534-36).

19. The Permit Application included implementing documents for municipal waste generated in Armstrong County which the Landfill proposed to accept. (Exh. B-1, Form D, Att. B-1; Exh. B-10, Form 46, Att. A).

20. In 1992, New York City government officials adopted a "Comprehensive Solid Waste Management Plan" pursuant to applicable New York law. New York City submitted its Comprehensive Solid Waste Management Plan to the New York Department of Conservation, and the Comprehensive Solid Waste Management Plan for the City of New York was approved by the New York Department of Conservation in October 1992. (Exh. L-584; Exh. L-62).

21. The Permit Application does not demonstrate that the Landfill is provided for in

New York City's approved solid waste management plan. (Exh. B-1, at Form D, Att. A; Exh. B-3, at Atts. 1 and 8; Exh. B-10, at Form 46, Att. 1, pp. 1-5; Tr. 537-38, 580-85, 1557).

22. There was no evidence presented to the Board showing that the Landfill is expressly provided for in New York City's 1992 Comprehensive Solid Waste Management Plan, nor any recent amendment to New York City's plan. (Exh. L-584; Exh. L-586; Tr. 1557).

23. During his review of the Permit Application, Mr. McCumber was aware of the existence of New York City's 1992 Comprehensive Solid Waste Management Plan. (Tr. 971-72, 975-78; 983, 989-90; Exh. L-62; Exh. L-62A).

24. Mr. McCumber has never examined any version of New York City's solid waste management plan; he did not obtain a copy of New York City's 1992 Comprehensive Solid Waste Management Plan during his review of the Permit Application. (Tr. 583).

25. Neither Mr. Provost, nor any other member of his staff, examined the New York City solid waste management plan during the review process. (Tr. 583, 1034, 1559, 1586).

26. In November 1993, Leatherwood entered into a contract with Better Management Corporation of Ohio, Inc. for the disposal of construction/demolition and municipal solid waste at the Landfill. The Leatherwood/Better Management agreement is to commence on the start of Landfill operations and is to continue for a term of three years. Pursuant to the agreement, Better Management is obligated to deliver a minimum of 500 tons per day of waste to the Landfill during the term of the agreement. (Exh. B-3, at Att. 8, Exh. A-26).

27. In March 1994, Leatherwood entered into a contract with Star Recycling, Inc. for the disposal of construction/demolition and municipal solid waste at the Landfill. The Leatherwood/Star Recycling agreement is to commence on the start of Landfill operations and is to continue for a term of four years. Pursuant to the agreement, Star Recycling is obligated to

deliver a minimum of 500 tons per day of waste to the Landfill during the term of the agreement. (Exh. B-3, at Att. 8, Exh. A-27).

28. The Permit Application does not demonstrate that Leatherwood's contracts for disposal of waste originating in New York City were sanctioned by appropriate New York City officials or implemented New York City's waste management plan. DEP did not ascertain whether New York City waste management officials approved of the disposal of New York City municipal solid waste at the Landfill. (Exh. B-3, at Atts. 1 and 8; Tr. 595-611, 615-32, 841-45, 862-67, 874-76, 1034-57, 1557-60).

B. Compliance with Applicable Waste Transportation and Disposal Laws

29. The Permit Application does not contain a description of New York State and local laws that may affect, limit or prohibit transportation or disposal of waste at the Landfill, nor a description of the proposed facility's compliance with such laws. (Exh. B-3, at Atts. 1 and 8; Exh. B-10, at Form 46, Att. 1, pp. 1-5; Tr. 581-82, 841-45, 862-67, 874-76, 1034-57, 1566-72).

30. DEP undertook a limited independent investigation as to whether disposal of New York City waste at the Landfill complied with New York state or local laws relating to waste transport and disposal. (Tr. 581-82, 628, 841-45, 862-67, 874-76, 1034-57, 1566-72).

31. Joseph Lhota, Deputy Mayor for Operations for New York City, sent a letter to DEP Secretary James M. Seif, dated February 8, 1999, in response to a letter from Secretary Seif to the Mayor of New York City. (Exh. A-9; Exh. A-10; Tr. 1399-1400).

32. Mr. Lhota's letter stated in part: "The City of New York has adopted an unequivocal commitment of disposing its municipal waste at facilities in conjunction with signed 'Host Community Agreements.' Your letter to Mayor Giuliani . . . incorrectly questions the City's commitment to this policy. This is unfortunate because New York City would never send its waste to a community that does not agree to receive it." (Exh. A-10).

33. Secretary Seif sent a letter to Rudolph Giuliani, Mayor of New York, dated April 27, 1999, in which Secretary Seif informed Mayor Giuliani of a survey of host municipalities conducted by DEP and provided a copy of the survey results. Mr. Lhota responded by letter, dated May 10, 1999, in which he acknowledged receipt of the DEP survey results and again stated that "the City will only dispose its waste at facilities in conjunction with signed host community agreements." (Exh. A-11; Exh. A-12; Exh. A-13; Exh. A-14).

C. Site Suitability Analysis

34. In its Permit Application, Leatherwood proposed to take municipal solid waste generated "within the City of New York." Leatherwood proposed to take a minimum of 500 tons per day for four years, and 500 tons per day for three years, or a total of 1,050,000 tons of municipal solid waste generated within the City of New York. (Exh. B-3, at Form 1, Atts. 1 and 8; Exh. A-26; Exh. A-27; Tr. 1074-76).

35. The Permit Application contains a detailed site suitability analysis only with respect to potential locations in Armstrong County and Jefferson County, and does not contain any site suitability analysis *per se* for potential locations in the five boroughs that comprise New York City. (Exh. B-10 at Form 46, Att. D).

36. Instead, the Permit Application asserts that there are no potential landfill sites in New York City and submits a one-page letter, dated June 30, 1994, from Phillip J. Gleason, Dir. Landfill Engineering, New York City Dept. of Sanitation, to Bernice M. Boyer, Vice-President of Leatherwood, in support of this assertion. (Exh. B-10 at Form 46, Att. 1, p. 5 and Att. C).

37. The Permit Application contains no comparison between the Landfill's proposed location and existing or potential landfill locations in the county of New York City with respect to transportation distances and associated impacts from municipal waste hauling; contains no comparison of the harm to the environment associated with the Landfill as against similar harms

posed by reasonable alternative landfill locations within New York City; and contains no actual comparison of alternative locations in New York City with respect to the siting criteria and technical standards described in 40 C.F.R. Parts 257 and 258. (Exh. B-10, at Form 46, Att. 1, pp. 1-5, Atts. C and D; Exh. B-2, at Att. D, sec. H and App. H; Exh. B-3, at Form 1, Atts. 1 and 8).

38. The Permit Application does not contain an analysis of the disposal capacity for any existing landfill sites in the five boroughs that comprise New York City. *Id.*

39. DEP conducted a very limited independent investigation into the suitability of existing or potential landfill sites in the county of New York City. (Tr. 538-46, 548-52, 562-70, 573-76, 630-31, 971-72, 975-78, 1011-15).

40. As part of its investigation, DEP received a letter from Walter Czwartacky, Director/Special Projects, City of New York Sanitation Department, dated March 30, 1995, which enclosed a copy of a document entitled "City of New York, Comprehensive Solid Waste Management Plan, Compliance Report," dated March 1, 1995 ("NYC Compliance Report"). DEP considered the NYC Compliance Report as part of its review of the Permit Application. (Tr. 971-72, 975-78; 983, 989-90; Exh. L-62; Exh. L-62A).

41. According to the NYC Compliance Report, the Fresh Kills landfill on Staten Island "is currently the only operating MSW landfill serving the five boroughs" of the City; the Fresh Kills landfill is a 2,400 acre landfill site divided into four sections and "has a capacity of 100 million cubic yards"; approximately 13,000 tons per day of solid waste was disposed at Fresh Kills in fiscal year 1994; and at current fill rates, the Fresh Kills landfill "will have capacity for another 15 to 20 years of disposal." (Exh. L-62, at pp. 6-1, 6-11).

42. The NYC Compliance Report also states that the Department of Sanitation "has identified in the Plan a need to have alternate disposal options including export of solid waste to

landfills located outside of the City," and that the City had initiated efforts to secure out-of-city landfill capacity in 1993. (Exh. L-62, at pp. 6-1, 6-11).

43. DEP conducted no investigation into New York City's proposals for securing out-of-city landfill capacity. (Tr. 1034-57, 592-93).

44. DEP did not investigate, nor request Leatherwood to analyze, the suitability of existing sites located in Pennsylvania counties situated along major transportation routes between Jefferson County and New York City. Nor did DEP investigate, or require Leatherwood to analyze, the suitability of existing landfill facilities which lie at a significantly closer distance to New York City than the proposed Landfill site in Jefferson County. (Tr. 538-46, 548-52, 562-70, 573-76, 630-31, 971-72, 975-78, 1011-15).

D. Determination of the Need for the Landfill Facility

45. Mr. McCumber was responsible for performing a needs assessment for the Landfill pursuant to 25 Pa. Code § 271.127(f), (g) and (h). He purportedly performed an "analysis of need" for all of the wastes the Landfill proposed to accept, *i.e.*, the Armstrong County waste and the New York City waste. (Tr. 577-78; Exh. B-39).

46. Mr. McCumber did not actually perform an independent needs assessment during his review of the Permit Application. He did not apply the criteria set forth in § 271.127(g) to the Armstrong County waste, nor did he examine evidence relevant to a determination of whether the Landfill would provide *needed* disposal capacity for the New York City waste. (Tr. 779, 856-57, 862-64, 938; Exh. B-39).

47. Instead, Mr. McCumber decided that if Leatherwood demonstrated that the "proposed location of the Landfill was 'at least as suitable' as alternative locations in the generating counties passing the consistency test," then the Landfill had *ipso facto* demonstrated that it was providing needed disposal capacity for a waste-generating county's waste stream.

(Exh. B-39; Tr. 856-57, 862-64).

48. After Mr. McCumber agreed with the applicant's conclusion that the Landfill is at least as suitable as locations in Armstrong County and New York City, he concluded from this premise that the need for the Landfill "is therefore a minimum of 1,053,285 tons of municipal waste." Mr. McCumber quantified "need" into tons of waste for which he believed the Landfill had binding disposal contracts. (Exh. B-39; Exh. C-2, at pp. 310-11; Tr. 938, 1073-76).

49. He converted "need" into waste volume by multiplying the minimum amount of waste obligated to be disposed at the Landfill in the Better Management contract (500 tpd) and the Star Recycling contract (500 tpd), times 300 days per year, times the length of each contract (3 and 4 years respectively); thus, 500 x 300 x 3 = 450,000 tons; 500 x 300 x 4 = 600,000 tons or 1,050,000 total tons of waste originating in New York City. (Tr. 1073-76; Exh. B-39).

50. Mr. McCumber then multiplied the minimum amount of waste in the Slease Trucking contract (9 tpd), by 365 days per year, the length of that contract (1 year); thus 9 x 1 x 365 = 3,285 total tons originating in Armstrong County. He could not explain the discrepancy in the number of days per year used in the two sets of calculations. (Tr. 1073-76; Exh. B-39).

51. Leatherwood's contract with Slease Trucking for delivery of a specific quantity of waste generated in Armstrong County to the Landfill is no longer valid and enforceable because Slease Trucking has gone out of business. (Exh. B-10, at Form 46, Att. 1 and Att. A; Tr. 85-88).

E. The Environmental Assessment and Identification of Potential Harms to the Environment or Public Health and Safety Posed by Operation of the Landfill

52. Pursuant to federal regulations, owners or operators of new or existing municipal solid waste landfills that are located within 10,000 feet of any airport runway end that is used by turbo-jet aircraft "must demonstrate that the [landfill] units are designed and operated so that the [landfill] unit does not pose a bird hazard to aircraft." 40 C.F.R. § 258.10(a) (1995).

53. "Bird hazard" means "an increase in the likelihood of bird/aircraft collisions that may cause damage to the aircraft or injury to its occupants." 40 C.F.R. § 258.10(d)(2) (1995).

54. Federal Aviation Administration Order 5200.5A, dated January 31, 1990, provides guidance concerning establishment of waste disposal facilities in the vicinity of airports. According to Order 5200.5A, a waste disposal facility will be considered incompatible with safe flight operations if the facility is located "within a 5 mile radius of a runway end," and the facility "attracts or sustains hazardous bird movements from feeding, water or roosting areas into or across the runways and/or approach and departure patterns of aircraft." (Exh. B-31).

55. Federal regulations require that owners or operators who propose to site a new municipal solid waste landfill unit "within a five-mile radius of any airport runway end used by turbojet or piston-type aircraft" must "notify the affected airport and the Federal Aviation Administration." 40 C.F.R. § 258.10(b) (1995).

56. In January 1991, Leatherwood notified the FAA of its intention to construct and operate the Landfill at a location approximately 12,500 to 15,500 feet from the western end of the Dubois Airport runway. (Exh. B-1, at Form D, Att. 4).

57. The FAA conducted a review of the proposed landfill site and communicated its findings to Leatherwood by letter dated May 3, 1991, from William De Graaf, Manager, Safety and Standards Branch, to Jeffrey Fliss, Vice-President and General Manager of Leatherwood (the "1991 FAA Review Letter"). (Exh. B-1 at Form D, Att. 4; Exh. B-52).

58. The 1991 FAA Review Letter stated in pertinent part as follows:

> We have completed our review of this proposed landfill site and concluded that it would be incompatible with aircraft operations at Dubois-Jefferson County Airport. Our review was based on FAA Order 5200.5A dated 1/31/91 titled "WASTE DISPOSAL SITES ON OR NEAR AIRPORTS" (copy enclosed), specifically Paragraph 7.c. This Paragraph states "Disposal sites will be considered as incompatible if located within areas established for the airport

through application of the following criteria:

> c. Any waste disposal site located within a 5 mile radius of a runway end that attracts or sustains hazardous bird movements from feeding, water or roosting areas into, or across the runways and/or approach and departure patterns of aircraft."
>
> The proposed landfill would be in line with the centerline of Runway 27 at a distance of 12,600'. Birds which would be attracted to the landfill would have a detrimental effect on aircraft operating in and out of Dubois-Jefferson County Airport.

(Exh. B-1, at Form D, Att. 4; Exh. B-52; Exh. B-31).

59. The Permit Application was required to contain an environmental assessment which included a detailed analysis of the potential impacts of the proposed facility on the environment, public health, and public safety. 25 Pa. Code §§ 271.126, 271.127(a) (1995).

60. DEP, after consultation with appropriate governmental agencies and potentially affected persons, was required to evaluate the environmental assessment submitted by Leatherwood to determine whether the proposed Landfill operation has the potential to cause harm to the environment or public health and safety. 25 Pa. Code § 271.127(b) (1995).

61. If DEP or the applicant determines that the proposed landfill operation may cause harm to the environment or public health and safety, the applicant must provide DEP with a written explanation of how it plans to mitigate the potential harm, through alternatives to the design or siting of the facility or other appropriate measures. 25 Pa. Code § 271.127(c) (1995).

62. The environmental assessment in the Permit Application did not identify bird hazard as a potential harm to public safety resulting from operation of the Landfill, and did not provide any assessment of the likelihood of bird/aircraft collisions that could cause damage or injury as a result of Landfill operations. (Exh. B-1, at Form D, p. 12; Exh. B-10, at Form 46, Att. 1, pp. 7-19 and Att. D; Exh. B-28).

63. The Permit Application also did not identify attraction of birds to the Landfill as a

potential nuisance and the nuisance control plan submitted with the application did not address birds in any way. (Exh. B-6, at Form 14, Att. 1; *see* 25 Pa. Code §§ 273.136, 273.218).

64. The Permit Application did not contain any analysis of the Landfill's potential to attract birds to the site, nor any analysis of the Landfill's potential to attract or sustain hazardous bird movements into or across the approach and departure patterns of aircraft using the Dubois Airport. The Permit Application did not contain any analysis of the likelihood of birds attracted to the Landfill to strike aircraft using the Dubois Airport. (Exh. B-1, at Form D, p. 12; Exh. B-10, at Form 46, Att. 1, pp. 7-19 and Att. D; Exh. A-28; Tr. 732-33; 878; 927).

65. During its review of the Permit Application, DEP determined that the potential for a bird/aircraft collision could significantly increase with activity at the proposed Landfill, and that the Landfill consequently posed a threat to public safety. (Tr. 638-39, 747-48, 1167, 1271; Exh. A-28; Exh. B-39).

66. DEP's determination that the proposed landfill posed a significant threat to public safety in the form of a bird hazard was based on the 1991 FAA Review Letter, testimony given at a public hearing by officials from Pennsylvania Department of Transportation (PADOT) Bureau of Aviation and airline executives, other oral and written correspondence with FAA officials, and correspondence with the PADOT Bureau of Aviation. (Exh. C-2, at pp. 130-33, 136-40; Tr. 1110-12, 1183-95, 1209-12, 1243-74; Exh. B-52; Exh. B-53; Exh. B-61, at pp. 86-97, 117-22; Exh. A-4; Exh. L-72; Exh. L-379; Exh. A-28; Exh. B-48; Exh. B-62; Exh. A-5).

67. Messr. Provost and Neville testified that applicable regulations place the burden on the applicant to provide DEP with adequate, site-specific, information with respect to each of the environmental assessment criteria listed in 25 Pa. Code § 271.127(a). (Tr. 1189-90, 1518-19).

68. Nevertheless, prior to issuing the Permit, DEP did not request Leatherwood to

engage an expert to conduct a study of the Landfill's potential to attract birds, the types and numbers of birds the Landfill would likely attract, the typical flight patterns of such birds, the standard approach/departure patterns of aircraft using Dubois Airport, or the likelihood of a bird/aircraft collision occurring as a result of bird activity at the proposed Landfill. In short, DEP did not require Leatherwood to provide any analysis quantifying the bird hazard. (Exh. C-2, at pp. 130-33, 136-40; Tr. 1110-12, 1183-95, 1209-12, 1243-74, 1347-48).

69. Prior to issuing the Permit, DEP did not engage an expert on birds and landfill operations, airport operations, or bird hazards in an effort to comprehend, analyze or quantify the perceived harm posed by the bird hazard resulting from the Landfill's operations. (Exh. C-2, at 130-33, 136-40; Tr. 1110-12, 1183-95, 1209-12, 1215-16, 1219, 1243-74, 1347-48).

70. Although DEP had identified a bird hazard as a significant harm to public safety resulting from operation of the proposed Landfill, DEP did not request or require Leatherwood to submit a written plan for mitigating the perceived bird hazard at any time during DEP's review of the Permit Application, nor prior to issuing the Permit. (Exh. B-32; Exh. C-2, at pp. 140-41, 146-52; Tr. 877-78, 916-20, 1183-95, 1209-12, 1215-16, 1219, 1243-74; Exh. B-39).

F. Balance of Need for the Proposed Facility against Potential Harms to Environment and Public Safety Posed by Operation of the Facility

71. To obtain a permit, Leatherwood was required to demonstrate that the need for the proposed landfill facility "clearly outweighed" the potential harm to the environment or public health and safety posed by operation of the Landfill facility. 25 Pa. Code § 271.201(a)(3) (1995).

72. After quantifying "need for the facility" into a waste volume, Mr. McCumber assessed the harm posed by the Landfill operation by listing the factors identified in the environmental assessment of the proposed facility, describing the extent of the Landfill's impact with respect to each factor, and noting the correlative regulatory standard or the mitigation

measure, if any, to be taken by the applicant. (Exh. B-39; Exh. C-2, at pp. 310-11; Tr. 835-38).

73. DEP set forth the final conclusions of the need/harm balancing test in a May, 9, 1995 memorandum as follows:

> The weighing process provided for in the Policy and Procedure can now be considered, in which identified need is weighed versus potential harm. Need has been identified as 1,053,285 tons of municipal waste. Potential harms, as listed above, have been properly addressed through meeting regulatory standards, and, where necessary, through specific mitigative measures. The potential harms from mitigative measures, in and of themselves, are not significant. This would consist of disturbances associated with treatment plant and roadway development.
>
> Particular attention should be given to the potential harm associated with aircraft birdstrike. Although the facility is not in a regulatory excluded area, therefore making mitigation possible, efforts must be taken to ensure that potential for birdstrikes will not be increased. The applicant should be required to have a site specific birdstrike mitigation plan, which should require Departmental approval prior to waste acceptance at the facility.
>
> In weighing the identified need versus potential harm of the facility, I find the need outweighs the harm significant to the extent of allowing permit issuance. As detailed above, actual impacts are relatively low, in most cases not resulting in significant environmental disturbance nor requiring significant mitigation.

(Exh. B-39).

74. Mr. McCumber was unable to explain how he was capable of weighing the total harm posed by the Landfill against the need for the Landfill in the absence of any thorough assessment of the bird hazard *per se.* He was also unable to explain how, in the absence of any mitigation plan for the identified bird hazard or any evaluation by DEP of the adequacy of such mitigation plan, he was able to quantify the degree of harm to aircraft safety posed by the Landfill *after mitigation.* (Tr. 774-93, 914-20).

II. DEP's Assessment of the Bird Hazard and its Decision to Issue the Permit With a Condition Requiring Subsequent Submission of a Bird Hazard Mitigation Plan by the Permittee

75. The 1991 FAA Review Letter, which was included in the Permit Application materials submitted with respect to exclusionary criteria, clearly indicated FAA's position that

the proposed site of the Landfill is incompatible with operations at the Dubois Airport. Mr. McCumber and Mr. Neville examined the 1991 Review Letter during their review of the Permit Application. (Exh. B-1 at Form D, Att. 4; Exh. C-2, at 131-32; Tr. 1106; 1184-87).

76. On December 6, 1994, DEP held a public hearing at the Jefferson County Courthouse in Brookville, Pennsylvania with respect to Leatherwood's permit application. (Exh. B-47; Exh. A-61).

77. At the public hearing, Lugene Inzana, Chairman of the Jefferson County Board of Commissioners, presented and had entered into the record a letter, dated December 2, 1994, from Anthony Spera, Manager of the Airports Division in the FAA Eastern Regional office, addressed to the Office of Jefferson County Commissioners. (Exh. A-61, at pp. 30-36; Exh. A-4).

78. In the 1994 letter, Mr. Spera reiterates FAA's position that the proposed Landfill site is incompatible with aircraft operations at Dubois Airport, and requests that the letter serve as a statement of FAA's formal opposition to permitting of the Landfill. (Exh. A-4).

79. At the December 1994 public hearing, DEP heard testimony related to the bird strike issue from various individuals, including Charles Steeber, Robert Dynan and Jack Marshall. (Exh. A-61, at pp. 86-98, 117-22).

80. Charles Steeber testified that he is the vice-president of flight operations for Liberty Express Airlines, which operates as USAir Express, and that Liberty Express provides airline service from Dubois Airport to the Pittsburgh International Airport, with a typical weekly schedule being six departures and six arrivals. Mr. Steeber testified that his company objected to the Leatherwood Landfill project, warned the DEP panel of the "safety consequences of locating this landfill at the proposed distance and bearing from the arrival end of runway seven," and described some of the factors which would contribute to an increased likelihood of bird strikes

from the proposed siting of the Landfill. (Exh. A-61, at 86-91).

81. Robert Dynan, President of Liberty Express Airlines, also testified in opposition to the proposed site of the Landfill due to the potential for damaging bird strikes to aircraft flying in and out of the Dubois Airport. (Exh. A-61, at 92-98).

82. Jack Marshall, an aviation specialist at the PADOT Bureau of Aviation, testified that the Bureau of Aviation "strongly objected" to construction of the Landfill at the proposed site due to the bird strike hazard posed by the Landfill's operation. (Exh. A-61, at 117-22).

83. Following the public hearing, DEP sent a letter, dated December 12, 1994, to William DeGraaf, Manager of the FAA Safety and Standards Branch. The DEP letter to DeGraaf noted that FAA's "negative comment" in the 1991 Review Letter was of concern to DEP, but stated that "the FAA advisory letter is inadequate because no specific factual information regarding bird strike potential has been provided to the Department and [DEP's] prohibitory siting criteria of 10,000 feet from this site to the runway is exceeded by 2,500 feet." The letter also requested that "any substantial changes in the advisory nature of your decision and a site-specific bird strike analyses [sic] regarding this property sited for landfill use be submitted to the Department by December 30, 1994." (Exh. L-72).

84. On December 15, 1994, DEP received a response from FAA to DEP's December 12, 1994 letter. FAA employee Vincent Cimino sent a memo with copies of two letters regarding recent requests for a site-specific analysis of bird hazard to be conducted for the Grove City Airport and Tri-County landfill in Mercer, Pennsylvania as a means of showing FAA's position on conducting site-specific analyses of bird hazards. These letters state that FAA does not perform specific landfill site studies, and advise that where a bird hazard site-specific analysis is needed, a specialist in nuisance wildlife control should be contacted. The attached letters note

that the U.S. Department of Agriculture can provide this service on a contract basis, and the name and telephone number of an employee of USDA to contact regarding a site-specific analysis of bird hazard is provided. (Exh. L-379; Exh. B-22; Tr. 1211-12).

85. DEP did not attempt to contact a nuisance wildlife specialist or the USDA with respect to performance of a site-specific study of the potential of the proposed Landfill operation to attract birds or to create a bird hazard for aircraft at Dubois Airport. (Tr. 1214-16).

86. Mr. McCumber authored an initial draft, dated February 1, 1995, of a memo setting forth the conclusions he had reached with respect to his review of the Permit Application. This draft memo, which was circulated to Mr. Neville and Mr. Provost, notes that the Permit Application "does not specifically address potential harm associated with bird strikes to aircraft." The memo also states that "potential harm is associated with bird strikes to aircraft. However, based on the fact that the facility is not in a regulatory excluded area, mitigation options do exist." (Exh. A-28; Tr. 758-59, 1047).

87. Mr. McCumber understood that applicable regulations and DEP's Policy Manual require *the applicant* to provide DEP with a written explanation of how the applicant plans to mitigate all potential harm to the environment or public safety as part of the permit review process. He was aware that a bird hazard mitigation plan was not submitted to DEP by Leatherwood as part of the Permit Application. (Exh. C-2, at pp. 320-21).

88. Mr. McCumber was unable to describe any factual basis for his determination that the bird hazard posed by the Landfill's operation could be successfully mitigated to an acceptable level of risk. No mitigation plan for the bird hazard was submitted with the Permit Application, and Mr. McCumber did not review any proposed bird control plan for the Landfill prior to issuance of the Permit. He reached a conclusion that the specific bird hazard posed by

the Landfill could be successfully mitigated to an acceptable degree of harm to public safety based solely on the text of the exclusionary-criteria regulation. (Exh. C-2, at pp. 148-53, 320-21; Tr. 747-49, 916-20).

89. Messr. Neville and Provost testified that the regulations place the obligation on the applicant (and not on the FAA) to present information in the permit application with respect to potential impacts on public safety, but that DEP had placed the burden on the FAA to provide site-specific information on the Landfill bird hazard that should have been provided by Leatherwood. (Tr. 1184-91, 1518-20).

90. Mr. Provost was not aware of any reason why a bird hazard mitigation plan was not required to be submitted by Leatherwood prior to issuance of the Permit, other than a direction from Terry Fabian to that effect. (Tr. 1238, 1243, 1236).

91. Mr. Neville could not point to any regulatory basis for deferring review of a bird hazard mitigation plan until after issuance of the Permit. He noted that in late 1994 DEP had obtained an evaluation from the USDA of a bird hazard mitigation plan which had been submitted by the applicant as part of permit application materials for the Tri-County Industries landfill near the Grove City Airport in Mercer, Pennsylvania. (Tr. 1183, 1219).

92. An interoffice memo from Pat Boyle to Terry Fabian, dated February 27, 1995, conveyed information to Mr. Fabian concerning the FAA position on the incompatibility of the proposed Landfill site, and stated: "I feel that if we get our PaDOT Bureau of Aviation to clarify it's [sic] position (and if it agrees with the FAA) that we should deny the permit based on this [bird hazard] issue alone and let the Hearing Board decide this issue. We have another permit application (Tri-County) that is in a similar situation . . . ." (Exh. B-62; Tr. 1244-45, 1323-24).

93. On March 1, 1995, Mr. Provost telephoned Mr. Hornberger of PADOT to discuss

PADOT's testimony in opposition to the proposed Landfill site presented by Mr. Marshall at the December 1994 public hearing. Mr. Hornberger indicated that he expected to receive additional information from the Bureau of Aviation regarding the Bureau's opposition to the Landfill site. (Tr. 1252-54; Exh. B-22).

94. Charles E. Hostetter, Director of the PADOT Bureau of Aviation, sent a three-page letter, dated March 27, 1995, to Mr. Provost elaborating the reasons why the Bureau of Aviation is "of the opinion that it would be unsafe to place a landfill" at the proposed Leatherwood landfill site (the "Hostetter Letter"). (Exh. A-5).

95. The Hostetter Letter stated, in part, that the proposed Landfill would be located on the extended centerline of the Dubois Airport runway, "significant numbers of arrival and departure aircraft will overfly the proposed landfill as a result of its placement directly on the extended centerline of the runway," and, consequently, the probability of a bird/aircraft collision would be significantly increased. (Exh. A-5).

96. The Hostetter Letter indicated that the "Bureau of Aviation has direct experience with attempts to control bird hazards" at Harrisburg International and Capital City airports, but that "efforts to control birds really do not show consistent success." Further, the letter stated that "[m]itigation of the problem has been quite unsuccessful elsewhere in Pennsylvania and throughout the country," and provided examples of FAA trial studies involving landfills in close proximity to airports where mitigation had not been successful. (Exh. A-5).

97. The Hostetter Letter concluded that, independently of the FAA, the Bureau of Aviation considered "the proposed landfill to be hazardous on account of its location on the extended centerline" of the Dubois Airport runway, and that the Bureau "believes through its own experience that mitigation techniques to control birds are unsuccessful." (Exh. A-5).

98. At the time of the Permit review, Mr. Provost was not aware of anyone employed by DEP with expertise on bird hazard issues. (Tr. 1267-68).

99. Messr. Neville and Provost believe that officials in the FAA and PADOT Bureau of Aviation have much greater expertise in aviation safety issues, and bird strike matters in particular, than DEP personnel. (Tr. 1187-88, 1210-11, 1274-76, 1527-28).

100. In late 1994, Leatherwood hired William Southern, Ph.D. and his consulting firm to perform various services related to the Landfill. (Tr. 2241, 2947; Exh. L-557).

101. In December 1994, Dr. Southern made a single visit to the proposed Landfill site to review bird habitats surrounding the site and ascertain the orientation of the Dubois Airport relative to the Landfill site. (Tr. 2173, 2280).

102. On April 12, 1995, DEP received a copy of a letter from Dr. Southern addressed to Charles Hostetter of the Bureau of Aviation (the "Southern Letter"). DEP considered the content of the Southern Letter as part of its review of the Permit Application. (Exh. L-78; Tr. 1254, 1339-41, 1344, 1348-52).

103. At the time he authored the Southern Letter, Dr. Southern had not conducted any site-specific study of bird populations or bird flight patterns in the Landfill area. (Tr. 2173).

104. The Southern Letter indicated that Dr. Southern had reviewed the Hostetter Letter and that, based on his experience with bird control at landfills, Dr. Southern disagreed with Hostetter "about the potential for successful bird control at Leatherwood." The Southern Letter briefly described Dr. Southern's experience and his work on bird control issues at landfills, and attached a resume of his landfill-related experience. The Southern Letter indicated that Dr. Southern had visited the proposed Landfill site, and that he was consulting with Leatherwood representatives on an as-needed basis. (Exh. L-78).

105. The Southern Letter noted that FAA Order 5200.5A states that a landfill should not be positioned relative to runways so that birds traveling between roosting and feeding areas will pass across runways or approaches, and asserted that "there is no information showing that the landfill is positioned so that this type of event will occur." The Southern Letter stated:

> Migrating and locally nesting birds of a variety of species now occur in the vicinity of the airport and their natural movement patterns undoubtedly result in travel across or along the runways. The question is whether or not Leatherwood Landfill will increase the risk of bird strikes that now exists at the airport. If the answer to this question is yes, then bird control will be implemented to assure that the operational landfill will not cause bird numbers in the area to increase because of the food source associated with the active face.

Southern disagreed with the Hostetter Letter's assertions that bird control techniques do not show consistent success, and asserted that he had implemented ongoing successful control programs in several States. (Exh. L-78).

106. Mr. Provost knew nothing about Dr. Southern when he reviewed the Southern Letter and had never read anything written by Dr. Southern. DEP did not attempt to evaluate Dr. Southern's credibility during the review process, other than to examine his resume of projects attached to the Southern Letter. Mr. Provost knew nothing about the projects listed in Dr. Southern's resume, including whether any mitigation efforts undertaken for the listed projects were actually successful. DEP did not attempt to evaluate whether any of the statements made in the Southern Letter were true. (Tr. 1526-31).

107. Mr. Boyle told Mr. Provost that he was considering denial of the Permit Application based on the concerns expressed by FAA and the PADOT Bureau of Aviation. Some time between the receipt of the Southern Letter on April 12, 1995 and April 26, 1995, Mr. Boyle also told Bernice Boyer, Vice-President of Leatherwood, that he intended to deny the Permit Application. (Tr. 1251-55, 1324; Exh. B-22).

108. An interoffice memo from Pat Boyle to Terry Fabian, James Snyder and James

Rozakis, dated April 25, 1995, states that Mr. Boyle had "talked extensively with Bernice Boyer of Leatherwood" the day before. The memo continues in pertinent part as follows:

> They are meeting with Sec. Seif on Wed. at 9:00 in Harrisburg. As per my last discussion with Bernice (5:00), they, among other things, will probably ask that we issue the permit with a condition that hinges operation upon the Bureau of Aviation's approval of their Bird Strike Safety Plan and fight it out with them.

(Exh. B-58, Tr. 1246-47).

109. A handwritten memo from Terry Fabian to then DEP Secretary James Seif, also dated April 25, 1995, states: "I propose that we contact the Penn DOT Dep'y or maybe even the Sec'y to insure that the 3/27/95 letter represents the PennDOT position. I suggest that, in any case, we issue a condition in the permit requiring bird mitigation to the satisfaction of PennDOT." (Exh. B-61; Tr. 1243-44).

110. Representatives of Leatherwood met with Secretary Seif on April 26, 1995 regarding the Permit Application. (Tr. 1255, 1260-61; Exh. B-22).

111. A handwritten note on letterhead of Terry Fabian, dated April 26, 1995, states: "Leatherwood Lfl. Seif wants to issue. I'll talk to Penn DOT to insure they'll back up decision." (Exh. B-59; Exh. B-60; Tr. 1247-48, 1250-51).

112. Terry Fabian directed Pat Boyle to issue the Permit with a condition addressing the subsequent submission of a bird hazard mitigation plan. (Tr. 1235-36, 1540-44).

113. Mr. Provost was unable to describe any factual basis for DEP's determination that the specific bird hazard posed by the Landfill's operation could be successfully mitigated to an acceptable level of risk. Mr. Provost did not review any bird control plans prior to issuance of the Permit. He reached a conclusion that any bird hazard posed by the Landfill could be successfully mitigated to an acceptable degree of harm to public safety based only on the text of certain regulations and statements in the Southern Letter. (Tr. 1272-74, 1370-73, 1658-63).

114. On April 27, 1995, Jay Ort, from DEP Central Office Bureau of Waste Management, faxed a draft permit condition addressing the Landfill bird hazard issue to Pat Boyle. This initial draft stated in part: "Prior to the commencement of construction of the landfill, the applicant must prepare and submit to the Bureau of Aviation a plan detailing how the applicant will mitigate the bird hazard. The bird hazard plan must be approved by the Bureau of Aviation before construction of the landfill may begin." (Exh. A-21; Tr. 1256-67).

115. On April 28, 1995, William Pounds, from DEP Central Office, faxed a second draft of a permit condition to Pat Boyle. The second draft, in part, stated: "In order to ensure that the landfill does not create a potential hazard to public safety, the landfill operator must prepare and submit to the Bureau of Aviation . . . a plan detailing how the operator will mitigate the bird hazard posed by the landfill to air traffic approaching and leaving the Dubois-Jefferson County Airport. The plan must be approved in writing by the Bureau of Aviation before construction of the landfill may begin." (Exh. A-30; Tr. 1256-67; Exh. B-22).

116. Mr. Provost reviewed the second draft of the permit condition and recommended various substantive changes which were incorporated into a final version. These changes included submission of the bird hazard mitigation plan "prior to accepting waste at the landfill," as opposed to prior to construction. (Exh. A-30; Tr. 1258-65, 1335-38; Exh. B-22).

117. Mr. Provost's testimony was vague as to why he recommended changing the bird hazard permit condition to require submission of a mitigation plan "prior to accepting waste at the landfill," as opposed to prior to commencement of construction. He agreed that deferring submission and review of the plan until after Landfill construction was completed would place a significant financial risk on the permittee. He also agreed that deferring submission until after construction would not better enable DEP to review the mitigation plan. (Tr. 1258-59, 1266-67).

118. Mr. McCumber prepared a final version of a memorandum, dated May 9, 1995, setting forth the conclusions he had reached on the various aspects of the Permit Application review for which he was responsible. Mr. McCumber, Mr. Provost and Mr. Boyle met on May 9, 1995, at which meeting the contents of Mr. McCumber's memo were discussed and approved by Mr. Provost. (Tr. 1332-33; Exh. B-39; Exh. B-63; Exh. B-47).

119. On May 12, 1995, DEP issued Solid Waste Permit No. 101604 pursuant to which Leatherwood was authorized to construct and operate a municipal waste disposal facility in Pinecreek Township. That same day DEP issued several related permits to Leatherwood including Soil and Waterway Permit Nos. E33-157 and PA S103304, and NPDES Permit No. PA 0220957. (Jt. Stip. at ¶ 12; Exh. B-11; Exh. B-12; Exh. B-13; Exh. B-14).

120. Condition No. 40 in the Permit states in pertinent part as follows:

> Bird Hazard to Aircraft:
>
> a. In order to ensure that the landfill does not create a potential hazard to public safety, the landfill operation must prepare and submit to [DEP] a plan detailing how the operator will mitigate the potential bird hazard posed by the landfill to air traffic approaching and leaving the Dubois-Jefferson County Airport.
>
> b. The plan must be approved in writing by the Department prior to accepting waste at the landfill.
>
> c. The written determination by the Department on this plan may be appealed pursuant to Section 4 of the Environmental Hearing Board Act . . . .

(Exh. B-11, at pp. 20-21).

III. Evidence Concerning Bird Strike Risk and the Landfill

121. Bird strikes are a significant problem for airports and aviation. Bird/aircraft collisions can cause, and have caused, serious damage to aircraft, loss of aircraft, and loss of life in aviation accidents. (Tr. 2799-803, 3888-90; Exh. A-53; Exh. B-19).

122. Most bird strikes occur during the descent and landing phases of flight, followed

by the take-off and climb-out phases. Aircraft activity in these phases of flight generally occurs at elevations of 1,000 feet or below, and most bird flight activity occurs at similar elevations. The FAA is consequently concerned about bird movements into or across a runway or the approach and departure patterns of aircraft using that runway, and with land uses that cause such bird movements. (Tr. 3589-95; Exh. A-53; Exh. B-19; Exh. B-57).

123. Landfills attract birds such as gulls, vultures, crows and blackbirds, primarily because of the ready availability of food at a landfill. Landfills provide a consistent food source for birds, and birds develop a habit of returning to a location where they have found a consistent food supply. (Tr. 2089, 2443, 2557, 2586-87, 3564-67).

124. Birds are attracted to landfills also because the facility provides open spaces for them to loaf relatively undisturbed by predators and human activity, and because the digging operations usually create puddles of water the birds can use for drinking. (Tr. 3564-67).

A. Dubois Airport and the Proposed Landfill Site

125. The Dubois Airport is an FAA-certified regional commuter service airport primarily serving Elk, Jefferson and Clearfield counties; the airport provides regularly scheduled commuter service to and from Pittsburgh International Airport, as well as general aviation aircraft such as charter and private planes. As of 1992, the Dubois Airport served over 42,000 commercial service passengers annually (emplaned and deplaned) through its regional commuter carrier USAir Express; that number had increased to approximately 47,000 annual passengers by the time of the hearing. (Exh. B-23, at pp. 1-4, 1-8; Exh. B-49; Tr. 168, 460-61).

126. The Dubois Airport generally provides six daily commercial flights departing to and arriving from the Pittsburgh International Airport. The commercial passenger service currently utilizes turboprop aircrafts, which is a kind of jet aircraft powered by a turbine engine with a propeller on the front. The airport is also used by piston engine (propeller-driven) aircraft

for business, training and recreational flights. (Tr. 278-79; Exh. B-23, at page 1-4; Tr. 130-32, 168-70; 3081-82; Exh. B-23, at pp. 1-23, 3-12).

127. The Landfill disposal area would be located in a direct line with the centerline of the Dubois Airport runway. (Exh. B-1, Form D, Fig. D-1; Exh. B-1, Form D, Att. 4; Tr. 89-90).

128. Turboprop airplanes and smaller passenger aircraft landing on the western end of the Dubois Airport runway will typically make the final turn to line up with the runway between one and 1.5 miles from the runway end, and not less than one-half mile from the runway end. (Tr. 3172-76, 3185-86; Exh. A-61, at pp. 86-91).

129. Planes would typically descend to about 480 feet above airport elevation at a distance of between two and three miles from the airport when approaching for a landing at the southwest end of the runway. When using a glide slope for an instrument landing system approach, a plane would typically reach an altitude of 200 feet above the runway at a distance of about 3500 feet from the runway. (Tr. 3106, 3172-73; Exh. B-28b, Exh. B-28c).

130. Turboprop airplanes and smaller passenger aircraft traveling from west to east pass over the Landfill area when preparing to land on the northeastern end of the Dubois Airport runway. Turboprop airplanes and smaller passenger aircraft taking off from the southwestern end of the runway fly over the Landfill area. Turboprop aircraft would typically reach the perimeter of the proposed Landfill disposal area approximately one minute after takeoff. (Tr. 3166-67, 3170-71, 4094-97, 4116-38, 4150-51, 4155; Exh. B-58; Exh. B-59; Exh. B-60).

131. Turboprop airplanes and smaller general aviation aircraft routinely fly over the proposed Landfill area at altitudes of less than 500 feet. (F.F. # 125-131).

B. Testimony of Leatherwood's Expert on Bird Strikes and Bird Control at Landfills

132. William E. Southern, Ph.D. testified as an expert on behalf of Leatherwood with respect to bird strikes and bird control at landfills. Dr. Southern holds a Ph.D. from Cornell

University in comparative vertebrate ecology, with an emphasis in bird behavior and wildlife management. He was a professor in the Biological Sciences Department at Northern Illinois University from 1959 until he retired in 1990, where he taught courses in ornithology and wildlife management, directed graduate studies and conducted extensive research, primarily on gull ecology. (Tr. 1920-2199; Exh. L-557).

133. Dr. Southern was President of ENCAP, an environmental consulting company, from 1974 to 1994, and a consultant for WES Ecological Consulting from 1995 to date. He has ample experience in the study of bird behavior related to landfills and the development and implementation of bird control programs for landfills. (Tr. 1920-2199; Exh. L-557).

134. Dr. Southern was qualified as an expert in: ornithology, avian ecology, bird behavior, bird management, bird mitigation as it relates to landfills, and the potential for bird/aircraft strikes. (Tr. 1968, 2199).

135. Based on his experience with the relevant geographic area surrounding the Landfill site, information he gathered on bird habitats in the area, his experience with birds at other landfill sites, and his knowledge of bird distribution and migration patterns, Dr. Southern concluded in 1995 that the Landfill would attract birds. He predicted that the numbers of birds likely to be attracted to the Landfill would be relatively small. (Tr. 2241-42).

136. In early 1995, at the time he authored the Southern Letter, Dr. Southern reached the conclusion that, even in the absence of a bird control program, the Landfill operations would not create a hazard to aircraft operations at Dubois Airport because the number of gulls would be limited in the Landfill site area and the Landfill would not attract significant numbers of birds once it was operating. (Tr. 2279-80, 2751).

137. Dr. Southern subsequently performed a study of the bird species and populations

in the area of the proposed Landfill site. The study was designed to provide site-specific baseline data on bird occurrence within a 30-mile diameter area centered on the proposed Landfill site. (Tr. 2238-29, 2242-44; Exh. L-557, at App. B).

138. The bird population study was conducted from October 1996 through June 1997. Dr. Southern completed a report in 1997, titled "Seasonal Bird Populations in the Vicinity of the Proposed Landfill Site and Dubois-Jefferson County Airport" in which he described the methodology employed and the results of his sampling of bird populations in the study area. (Tr. 2244-51; Exh. L-557, at App. B).

139. According to Dr. Southern, the data in the bird population study provide an indication of the types of bird species occurring in the study area, the relative abundance of various species, and the distribution of the species within the target area. Dr. Southern's report concluded that several bird species often attracted to landfills are present seasonally in the Landfill site area; these include Ring-billed gulls, turkey vultures, blackbirds, crows and starlings. (Tr. 2253-54; Exh. L-557, at App. B).

140. The bird population study included observations in the vicinity of the Greentree Landfill, located just outside the northeastern boundary of the general study area near Challenge, Pennsylvania. According to Southern's report, the data collected at the Greentree Landfill "provide a basis for evaluating the extent to which an operational landfill at the Leatherwood site will influence bird occurrence in the area." (Exh. L-557, App. B, at p. 2; Tr. 2563-64).

141. Dr. Southern's observations were made from the perimeter of the Greentree Landfill, near the entrance gate or along the road approaching the landfill. His observations along the approaching road were made from a considerable distance, approximately two miles from the landfill. Southern did not make any observations at the active face of the landfill; the entrance

gate was the closest point from which he made observations. He did not go onto the landfill disposal area at any time, and he had no knowledge of bird occurrence surrounding the active phases of the landfill. (Tr. 2514-19).

142. Dr. Southern agreed that the best time to observe vultures feeding at a landfill disposal area would be in the late afternoon. However, he made very few observations in the perimeter of the Greentree Landfill at that time of day. (Tr. 2519-21).

143. Dr. Southern's bird population study recorded a total of only 9 turkey vultures at the Greentree Landfill resulting from 28 occasions of observation. The study recorded a total of only 213 individual birds occurring at the Greentree Landfill counted during the 28 observation occasions. (Exh. L-557, App. B, Table B-5).

144. At the hearing, Dr. Southern opined that the Landfill operations would not create a significant hazard to aircraft operations at Dubois Airport, even in the absence of a bird control program. He reached this opinion based on his knowledge of bird behavior, his prior experience with birds at landfills and airports, and his observations of bird habitats and bird populations in the area surrounding the Landfill site, including observations of birds at the Greentree Landfill located northeast of the Landfill site. (Tr. 2267-68).

145. Dr. Southern believes that the Landfill operations will not create a significant hazard to aircraft operations—regardless of implementation of a bird control program—because of the small numbers of bird species of concern that he expects will occur in the Landfill site area and the short period of time he expects that such species will actually be in the vicinity of the Landfill site. (Tr. 2268; Exh. L-557, at 5-7 and App. B).

146. Dr. Southern did not perform an assessment of the risk of a bird-aircraft collision caused by the Landfill operations. He did not attempt to calculate the risk of a bird strike under

current conditions at the Dubois Airport; nor did he attempt to calculate the risk of a bird strike once the Landfill becomes operational. (Tr. 2628, 2695, 2733, 2741, 2747-49).

147. He does not know the risk under existing conditions of a bird colliding with aircraft approaching or departing the Dubois Airport. He does not know what the risk of a bird-aircraft collision will be once the Landfill is operational and implements a bird control plan. (Tr. 2628).

148. Dr. Southern used bird occurrence data to address the issue of the likelihood of a bird strike being caused by the Landfill operations, not risk analysis or information about flight activity at the Dubois Airport. (Tr. 2630-31).

149. Dr. Southern agreed that if an increased number of birds are attracted to the area around the Dubois Airport, the risk of a bird strike would increase. He conceded that birds will be attracted to the operational Landfill. (Tr. 2643-44, 2719, 2649-50).

150. He opined, however, that the number of birds in the vicinity of the Landfill site will not increase as a result of an operational Landfill. He inferred from this premise that the risk of a bird strike, whatever that may be under existing conditions, will remain constant when the Landfill is operational. (Tr. 2633, 2748-49).

151. Dr. Southern agreed that bird movement patterns in the vicinity of the Landfill site and Dubois Airport must be taken into account in order to properly determine the risk of a bird strike. (Tr. 2696).

152. The 1997 report on the bird population study performed by Dr. Southern contains some discussion of bird movement patterns around the selected survey locations. The report does not contain an examination of existing bird movement patterns into or across the approach and departure paths of aircraft using the Dubois Airport. The report contains no discussion of how an

operational Landfill would affect bird movements into or across the approach and departure paths of aircraft using the Dubois Airport. (Exh. L-557, App. B).

153. Dr. Southern did not adequately examine how the operational Landfill will affect bird movement patterns in the area surrounding the Landfill site and particularly the movements of birds into or across the approach and departure paths of aircraft using the Dubois Airport. (F.F. #145-53; Exh. L-557, App. B; Tr. 2243-51, 2584-85, 2696-98, 2723-24).

154. After completing the bird population study in late 1997, Dr. Southern prepared a bird control program for use at the Landfill (the "Bird Control Plan"). (Tr. 2421; Exh. L-557).

155. The Bird Control Plan was submitted by Leatherwood to DEP in September 1999 in order to satisfy Permit Condition 40 concerning the submission of a plan by Leatherwood detailing how it will mitigate the bird hazard posed by the Landfill operations. The Bird Control Plan was revised and resubmitted twice, most recently on August 17, 2001. (Jt. Stip. at ¶ 22).

156. The stated purpose of the Bird Control Plan is to prevent the bird species of concern identified in the bird population study—Ring-billed gulls, turkey vultures, blackbirds, crows and starlings—from foraging, loafing, roosting or otherwise gathering at the Landfill in a manner which may increase the potential for bird strikes at the Dubois Airport. (Exh. L-557, at 5; Tr. 2421-22, 2502-03).

157. The Bird Control Plan is intended to actively disperse birds from the Landfill site in order to prevent them from foraging at the site and thereby developing an attachment to the Landfill as a food source. (Exh. L-557, at 3-11; Tr. 2421-22, 2443-44, 2447, 2478-90).

158. The Bird Control Plan primarily involves the use of pistol-fired pyrotechnics to scare birds from the Landfill and to discourage birds from foraging there. The Bird Control Plan specifically prescribes the use of two pyrotechnic devices fired from a .22 caliber starter pistol;

the pistol contains a small charge that launches one of two types of projectiles at birds on or near the active face of the Landfill. The first device, a bird bomb, flies out approximately 150 feet and then explodes, making a loud banging sound. The second type, a whistler, is similar to a self-propelled rocket. It flies out approximately 200 feet emitting a whistling sound and expelling smoke as it flies. (Tr. 2444-45; Exh. L-557, at 8-11).

C. Testimony of Local Government Officials' Expert on Ornithology

159. Charles Schaadt, Ph.D. testified as an expert on behalf of the Local Government Officials; he obtained a doctorate in evolutionary ecology and wildlife biology from McGill University and is an assistant professor at Penn State University. He was qualified as an expert in bird identification and bird behavior. (Tr. 3977, 3987).

160. Dr. Schaadt provided testimony which sharply controverted data in the 1997 bird population study conducted by Dr. Southern, particularly with respect to the numbers of birds being attracted to the Greentree Landfill located approximately 15 to 20 miles northeast of the proposed Landfill site. (Tr. 3981-4000).

161. Dr. Schaadt visited the Greentree Landfill for several hours in the late afternoon on June 21, 2001. He was accompanied by David Black, a Jefferson County Commissioner. They met with the landfill manager, who escorted them to the working face of the landfill where they were able to observe birds in and around the active disposal area. (Tr. 3981-82).

162. Dr. Schaadt observed three working cells of the landfill disposal area: two cells already had the daily cover applied; landfill equipment operators were actively working the third. Dr. Schaadt observed substantial numbers of birds flying into the landfill disposal area from many different directions and altitudes. The birds were coming in from all directions to the landfill cell then being filled with waste. In addition, large numbers of birds were landing on the ground adjacent to the disposal area. More than half of the birds arriving were turkey vultures.

(Tr. 3983-86, 3988-90).

163. Dr. Schaadt counted 200 to 300 birds on the active face of the landfill, of which at least 50 to 60 were turkey vultures. He observed numerous birds perched in the trees surrounding the landfill face, approximately 150 to 200 yards away, many of which were turkey vultures; he counted 37 vultures in the trees. He also counted a flock of an additional 32 turkey vultures circling high overhead of the landfill disposal area. (Tr. 3991-94, 4029-33, 4070-71).

164. Dr. Schaadt noted that a person would have difficulty observing birds coming into or already on the active faces of the Greentree Landfill unless that person was actually present on the landfill face, due to the undulating terrain. He stated that a person would not be able to make any effective observations of birds from locations near the landfill gate house due to the nature of the terrain. (Tr. 3989-90, 3999-4000).

165. Based on his knowledge and experience, Dr. Schaadt opined that an accurate study of bird occurrence at the Greentree Landfill would require observing birds at various times of the day, from early morning to late afternoon and evening, throughout the seasons of the year in order to obtain data that would indicate patterns or trends. He also opined that an accurate count could not be made without examining the landfill's active disposal area, particularly around closing time. (Tr. 3997-98, 4073-76).

166. David Black, a Jefferson County Commissioner, accompanied Dr. Schaadt on his visit to the Greentree Landfill to observe birds on June 21, 2001. Mr. Black provided testimony corroborating Dr. Schaadt's testimony on the occurrence of birds at Greentree Landfill. Mr. Black also recorded a videotape of some of his observations; the videotape shows large numbers of turkey vultures and other birds on the landfill disposal area, in the trees surrounding the landfill disposal area, and flying overhead of the landfill. (Tr. 3290-3329; Exh. A-51).

D. Testimony of the Local Government Officials' Expert on Bird Strikes and Bird Control

167. Major Ronald Merritt testified on behalf of the Local Government Officials with respect to bird strikes and bird control. Major Merritt obtained an M.S. in Biology at North Texas State University; he was commissioned as an officer in the United States Air Force where he served as an assistant professor of biology at the Air Force Academy, an administrative officer in the C130 Tactical Airlift Squadron, and commander of the headquarter section of the 463rd Tactical Airlift Wing. From 1984 to 1994, he was assigned to the Air Force Environmental Engineering Division, where he was Chief of the Bird Aircraft Strike Hazard (BASH) Team. He is currently employed as the director of the avian research laboratory for Geo-Marine, Inc., an environmental engineering consulting company. (Tr. 3330-31, 3343-47; Exh. A-52).

168. As Chief of the BASH Team, Major Merritt was responsible for providing on-site technical assistance to military operational units worldwide concerning the reduction of bird strike hazards, including on-site bird surveys and evaluation of bird habitats, bird control plan reviews, and implementation of hazard reduction plans. The BASH Team also collects bird-strike data, assists Air Force engineering units to develop birdstrike-resistant aircraft components, conducts investigations of aircraft mishaps involving bird strikes, and assists with prevention of future mishaps. (Tr. 3351-57; Exh. A-52).

169. Major Merritt has extensive experience in the assessment of bird hazards at airports, military air bases, and landfills in close proximity to airports and air bases. He has extensive experience in the development of three-dimensional risk assessment models for bird/aircraft collisions, and an avian hazard advisory system using radar and GIS technology. He also has substantial experience in the preparation of bird control programs for airports and landfills. (Tr. 3357-85, 3401-15, Exh. A-52).

170. At the hearing, Major Merritt was qualified as an expert in bird/aircraft strike

hazards, bird/aircraft strike risk assessments, and bird hazards related to landfills and airports. (Tr. 3511-12).

171. Major Merritt was hired by the Local Government Officials to review and critique Dr. Southern's work for Leatherwood, including the bird population study performed by Dr. Southern in 1996-97, the testimony given by Dr. Southern on Leatherwood's behalf, and the Bird Control Plan submitted by Leatherwood to DEP. To perform his task, Major Merritt conducted an initial assessment of the proposed Landfill site and the surrounding area, reviewed the reports and Bird Control Plan prepared by Dr. Southern for Leatherwood, and reviewed Dr. Southern's testimony. (Tr. 3526-27, 3842-44, 3847-48).

172. Major Merritt opined that the location of the proposed Landfill site in a direct line with the centerline of the Dubois Airport runway at a distance of only 12,600 feet from the end of the runway, combined with the geography in the Landfill/Airport area, the distribution of bird species of concern in the region, and the presence of vultures in relatively large numbers at the nearby Greentree Landfill, led him to an initial assessment that the operational Landfill would likely create a high risk of a bird/aircraft collision. (Tr. 3598-99, 3842-44).

173. Major Merritt opined that the methodology employed by Dr. Southern in the 1996-97 bird population study was flawed in several respects. According to Merritt, the central purposes of such a study are to ascertain bird movement patterns surrounding the airport and to estimate bird movement patterns once the Landfill is established and begins to attract birds. The study must establish the type and quantity of species of concern in the general area, how they move through the landscape, and the association of birds with particular land uses in the relevant area. Merritt believed that Southern's bird study failed to adequately examine bird movements and the association of birds with particular land uses in the relevant area. (Tr. 3637-40,

174. According to Major Merritt, Greentree Landfill is the best site to examine for an indication of the type, quantity, and movement of birds attracted to an operational landfill in the Jefferson County area. He criticized the nature of Dr. Southern's observations at the Greentree Landfill, and the fact that Dr. Southern spent a very small percentage of his observation time at the Greentree Landfill location. (Tr. 3605-07, 3640, 3644-47).

175. Major Merritt believed that Dr. Southern also failed to adequately research historical bird strike data for the region and to correlate such data with bird observation periods. Data reviewed by Merritt indicate that the greatest number of bird strikes have occurred in the region surrounding the proposed Landfill site during the months of July, August, September and October, however, Southern's study did not observe bird occurrence in the relevant area during July, August and September. (Tr. 3588-89, 3844-46).

176. Based on his knowledge and experience, and his review of Southern's data, Merritt opined that the bird study contained insufficient data from which to reasonably predict the types and quantities of birds likely to be attracted to the operational Landfill. (Tr. 3641-44).

177. According to Major Merritt, in order to determine the relative risk of a bird/aircraft collision created by a landfill operation in proximity to an airport, one must conduct a comprehensive study of the bird movements in the relevant area and their relation to air traffic patterns. Otherwise, there is no means of knowing whether or not birds attracted to the landfill's food source will be intersecting the critical air space used by aircraft. (Tr. 3814-15).

178. When performing an assessment of the relative risk of a bird/aircraft collision being caused by a landfill operation, Major Merritt examines a variety of factors including: the location of the landfill relative to the airport, the aircraft traffic patterns, airport operations (such as flexibility of scheduling and busyness), FAA bird strike data for the airport and the region

(noting distribution of strikes by location, month, and time of day), species of birds in the area, historical bird distribution in the area, numbers of bird species of concern in the area, bird movement patterns, habitat in the area that attract birds. (Tr. 3469-74).

179. Major Merritt opined that, given the limited nature of Dr. Southern's study, it was not possible for Dr. Southern to make any prediction as to the impact that the Landfill operations would have on aircraft using the Dubois Airport, and that the limited data collected by Dr. Southern did not provide any means of assessing the risk of a bird/aircraft collision resulting from Landfill operations. (Tr. 3641-42, 3660-62).

180. With respect to possible mitigation of an increased risk of a bird/aircraft collision resulting from Landfill operations, Major Merritt believes that Dr. Southern's underlying bird study contains insufficient and inadequate data from which to draw the conclusion that any risk of a bird/aircraft collision created by the Landfill operations can be successfully mitigated through implementation of a bird control program. (Tr. 3662-63).

181. Major Merritt disagreed with Dr. Southern's conclusion that implementation of the Bird Control Plan would completely deter bird species of concern, such as vultures and gulls, from being attracted to the Landfill. In Major Merritt's opinion, bird species of concern will continue to be attracted to the Landfill despite use of dispersal techniques, thus creating a different distribution pattern of birds in the air relative to the Landfill/Airport area than would otherwise exist in the absence of the Landfill. (Tr. 3677-85).

182. Major Merritt criticized the Bird Control Plan for its focus on bird numbers and dispersal of birds on the ground, and the Plan's insufficient attention to impacting bird movements in the critical air space. In addition, the Plan is deficient, in his opinion, for failing to account for the movements of birds dispersed from the active face of the Landfill by the

pyrotechnic devices prescribed by the Plan. (Tr. 3655-58, 3677-85).

E. The Continued Absence of a Decision by DEP on the Adequacy of the Bird Control Plan

183. Leatherwood submitted its proposed Bird Control Plan to DEP in September 1999 in order to satisfy Permit Condition 40 concerning mitigation of the bird hazard posed by the Landfill operations. (Jt. Stip. at ¶ 22).

184. On March 20, 2000, DEP issued an order to Leatherwood suspending the Permit pursuant to, *inter alia*, Section 503 of the SWMA, 35 P.S. §§ 6018.503. After reciting a number of "significant events and developments" that had occurred subsequent to the Permit's issuance, the 2000 Suspension Order concluded:

> In light of the legitimate, well-founded concerns that the Jefferson Landfill may create a potential hazard to public safety because of the possibility that operation of the landfill may increase the likelihood of a collision between aircraft using the [Dubois Airport] and birds attracted to the Jefferson Landfill, it is prudent for landfill construction to occur only if and when the Department has approved Leatherwood's Bird Mitigation Plan.

Notice of Appeal (Dkt. No. 2000-066-C), at Exhibit A.

185. DEP hired an outside consultant to review the Bird Control Plan in order to assist in its evaluation of the plan. The outside consultant, Dr. Rolph Davis, supplied DEP with reports regarding the plan on May 17, 2000, August 11 and August 29, 2000. The Bird Control Plan was revised and resubmitted twice, most recently on August 17, 2000. (Jt. Stip. at ¶¶ 22-23).

186. DEP has not issued a decision on the adequacy of the Bird Control Plan or the sufficiency of Dr. Southern's bird population study. *See* DEP Post-Hearing Brf., at 45 n.38.

187. Administrative Law Judge Michelle A. Coleman performed an extensive site visit on June 11, 2001.

DISCUSSION

I. Standard of Review

It is well settled that the Board reviews DEP's final actions *de novo*. *See, e.g., Pequea Township v. Herr*, 716 A.2d 678, 686-87 (Pa. Cmwlth. 1998); *Warren Sand & Gravel Co., Inc. v. DER*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975); *Smedley v. DEP*, EHB Dkt. No. 97-253-K, slip. op. at 25-30 (Adjudication issued Feb. 8, 2001). Generally, the Board reviews DEP final actions to determine, based on the evidence presented to the Board, whether those actions conformed with applicable law and were reasonable and appropriate. *See Smedley*, EHB Dkt. No. 97-253-K, slip. op. at 30 (we determine whether "DEP's action is reasonable and appropriate and otherwise in conformance with the law"); *O'Reilly v. DEP*, EHB Dkt. No. 99-166-L, slip. op. at 14 (Adjudication issued Jan. 3, 2001) (Board assesses "whether the issuance of the permit is consistent with the law and is otherwise appropriate").

The Board's duty is to review the correctness and fitness of the agency action challenged in an appeal. If the Board finds that the agency's action was unreasonable or otherwise contrary to law, the Board may substitute its judgment for that of the agency. *Pequea Township*, 716 A.2d at 686-87 (the "Board's duty is to determine if [DEP's] action can be sustained or supported by the evidence taken by the Board"); *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991) (de novo review "involves full consideration of the case anew"; consequently, the EHB, "as a reviewing body, is substituted for the prior decision maker, DER, and redecides the case"); *Warren Sand & Gravel Co., Inc.*, 341 A.2d at 565 (the Board "may substitute its discretion for that of DER"). *See also Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California,* 508 U.S. 602, 618 (1993) ("Where an initial determination is made by a party acting in an enforcement capacity, due process may be satisfied by providing for a neutral adjudicator to conduct a de novo review of all

factual and legal issues.").

Notably, while the Board conducts a *de novo* review of all relevant factual and legal issues, the Board has traditionally applied 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; *Herr v. DEP,* 1997 EHB 593, 596; *Fiore v. DER*, 1986 EHB 744, 752-53. *But see Giordano v. DEP*, EHB Dkt. No. 99-204-L, slip op. at 20 (Adjudication issued Aug. 22, 2001) (it may be appropriate to apply subsequently-enacted regulations in some cases). Unlike in *Giordano*, the parties here contend that the Board should apply the regulations in force at the time of DEP's final action. Thus, although the Environmental Quality Board recently passed new regulations governing landfill permit applications, *see* 30 Pa. Bull. 6685 (Dec. 23, 2000), we will apply the regulations in effect on May 12, 1995 when the Permit was issued.

It is also important to emphasize that, because the hearing on the merits did not address the specific issues raised in Docket No. 2000-066-C pertaining to Leatherwood's challenge to issuance of the 2000 Suspension Order, this Adjudication will not resolve the appeal at Docket No. 2000-066-C. We will address only the Local Government Officials' challenge to DEP's issuance of the Permit raised by the third-party appeals consolidated at Docket No. 95-097-C.

According to the SWMA: "No person . . . shall store, collect, transport, process, or dispose of municipal waste within this Commonwealth unless such storage, collection, transportation, processing or disposal is authorized by the rules and regulations of the department." 35 P.S. § 6018.201(a). This appeal has required the Board to examine the complex interplay between the SWMA, Act 101, and the regulations implementing those statutes. *See* 53 P.S. § 4000.104(b) (Act 101 "shall be construed *in pari materia* with the Solid Waste Management Act"). The Local Government Officials bear the burden of proving by a

preponderance of the evidence that issuing a landfill permit to Leatherwood violated the SWMA, Act 101 or their implementing regulations, was an error of law, or was otherwise unreasonable. 25 Pa. Code § 1021.101(c)(2). We are persuaded that the Local Government Officials have carried their burden of proof. We will address the relevant arguments of the parties in turn, focusing initially on requirements drawn from the SWMA, then considering Act 101-related requirements, and finally examining the confluence of Act 101 and the SWMA in the agency's balancing of need with potential harm mandated by 25 Pa. Code § 271.201(a)(3) (1995).

II. SWMA-Related Regulatory Requirements

A fundamental purpose of the SWMA is to "protect the public health, safety and welfare from the short and long term dangers of transportation, processing, treatment, storage, and disposal of all wastes." 35 P.S. § 6018.102. As part of its duty to implement this protective purpose, *see* 35 P.S. § 6018.104, the agency undertakes an environmental assessment process. 25 Pa. Code §§ 271.126(a), 271.127(a), (b), (c) (1995). Section 271.127(a) prescribes a detailed analysis to be submitted in the permit application:

> Each environmental assessment in a permit application shall include at a minimum a detailed analysis of the potential impact of the proposed facility on the environment, public health and public safety, including traffic, aesthetics, air quality, water quality, stream flow, fish and wildlife, plants, aquatic habitat, threatened or endangered species, water uses, and land use. The applicant shall consider features such as . . . wetland, special protection watersheds designated under Chapter 93 (relating to water quality standards), public water supplies and other features deemed appropriate by the Department or the applicant.

25 Pa. Code § 271.127(a) (1995). DEP must evaluate the applicant's assessment and undertake its own analysis:

> The Department, after consultation with appropriate governmental agencies and potentially affected persons, will evaluate the assessment provided under subsection (a) to determine whether the proposed operation has the potential to cause environmental harm. In determining whether the proposed operation has the potential to cause environmental harm, the Department will consider its experience with a variety of factors, including . . . similar designs and

> materials employed at comparable facilities . . . . If the Department determines that the proposed operation has this potential, it will notify the applicant in writing.

25 Pa. Code § 271.127(b) (1995). For each harm identified, the applicant must formulate and submit a written mitigation plan, the adequacy of which must be evaluated by the agency:

> If the Department or the applicant determines that the proposed operation may cause environmental harm, the applicant shall provide the Department with a written explanation of how it plans to mitigate the potential harm, through alternatives to the proposed facility or portions thereof, including alternative locations, traffic routes or designs or other appropriate mitigation measures.

25 Pa. Code § 271.127(c) (1995).

The environmental assessment under §§ 271.127(a), (b) and (c) is generally a four-step process: (1) the applicant identifies and analyzes the negative impacts of the proposed facility on the environment and public health and safety; (2) DEP reviews the applicant's identification of harms and then undertakes its own analysis of harms posed by the facility—part of the agency's evaluation necessarily involves consultation with other appropriate governmental agencies and potentially affected persons; (3) if any harms are identified, *the applicant* must provide DEP with a written explanation of how it plans to mitigate each identified harm; and, (4) DEP must evaluate the efficacy of the applicant's mitigation plans. 25 Pa. Code § 271.127(a), (b), (c) (1995); *see also Throop Property Owners Association v. DEP*, 1999 EHB 997, 1007; *Eastern Consolidation,* 1999 EHB at 333-35.

The Local Government Officials claim that DEP committed errors of law and acted unreasonably when applying §§ 271.127(a), (b) and (c) to the facts concerning a harm to public safety posed by the Landfill in the form of a bird hazard. They also contend that the evidence presented to the Board amply demonstrates that the Landfill will cause a significant bird hazard and that Leatherwood has not yet shown that this serious threat to public safety can be successfully mitigated to an acceptable level. Leatherwood counters that, based on the evidence

available to DEP prior to Permit issuance, the agency acted lawfully and reasonably by addressing the bird hazard issue through imposition of Permit Condition 40. Leatherwood further argues that the Local Government Officials have not carried their burden of proving that the Landfill poses an unacceptable risk of harm. The permittee also contends that the Board is not entitled to reach any determination on the adequacy of its Bird Control Plan because DEP has yet to make a final determination on that mitigation plan. DEP disagrees with this last contention and urges the Board to reach a decision on the efficacy of the Bird Control Plan.

Before engaging in our analysis of this issue, it is important to precisely characterize the nature of the harm to public safety being discussed. Bird strikes are a significant problem for aviation. Indeed, bird/aircraft collisions cause, and have caused, serious damage to aircraft and loss of life in aviation accidents. *See, e.g.*, FEDERAL AVIATION ADMINISTRATION, U.S. DEPARTMENT OF TRANSPORTATION, HAZARDOUS WILDLIFE ATTRACTANTS ON OR NEAR AIRPORTS 1 (Advisory Circular No. 150/5200-33, May 1, 1997) ("wildlife-aircraft strikes have resulted in the loss of hundreds of lives world-wide, as well as billions of dollars worth of aircraft damage"). While there inevitably exists a risk of a random bird strike in flight, the existence of certain conditions will increase the risk of the occurrence of a bird/aircraft collision. Those conditions which attract or sustain bird movements into or across the approach or departure patterns of aircraft significantly increase the risk of a bird-aircraft collision. Landfills attract birds. In fact, because an operational landfill offers a consistent food source, birds develop a habit of returning to the landfill location. Thus, a landfill situated in close proximity to an airport runway can create a condition which significantly increases the risk of occurrence of a bird/aircraft collision.[11]

[11] *See* FAA Order 5200.5A ("Landfills . . . will attract rodents and birds. While the chance of an unforeseeable, random bird strike in flight will always exist, it is nevertheless possible to define conditions within fairly narrow

The Landfill disposal area would be located in a direct line with the centerline of the Dubois Airport runway, at a distance of approximately 12,600 feet from the end of the runway. The basic contention is that, on account of the Landfill's orientation vis-à-vis the runway and the continual attraction of birds to the Landfill's disposal area, the Landfill will attract and sustain bird movements into or across the approach or departure patterns of aircraft using the Dubois Airport. Landfill operations will therefore *significantly increase the risk* of occurrence of a bird/aircraft collision for aircraft using the Dubois Airport. It is this *significant* increase in the risk of a bird/aircraft collision—a "bird hazard"—which constitutes the harm to public safety posed by the Landfill in its proposed location. *See* 40 C.F.R. § 258.10(d)(2).

Consequently, the first task of the environmental assessment with respect to any bird hazard posed by the Landfill, was to identify, analyze, and, if at all possible, to quantify the bird hazard. In other words, will the Landfill increase the risk of occurrence of a bird/aircraft collision over existing conditions by tenfold, hundredfold, or perhaps not at all? If it was determined that Landfill operations will cause a significant increase in such risk, then a written plan had to be submitted by the applicant to DEP detailing the measures the applicant would take to mitigate the harm to public safety. The purpose of a mitigation plan for the bird hazard is to prevent any increase in the risk of a bird/aircraft collision caused by the Landfill or, at a minimum, to reduce this risk to a reasonably acceptable level.

We turn first to an examination of DEP's handling of the bird hazard issue during the Permit review process. The environmental assessment in the Permit Application did not identify bird hazard as a potential harm to public safety caused by the Landfill, and did not provide any

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limits where the risk is increased. Those high-risk conditions exist in the approach and departure patterns and landing areas on and in the vicinity of airports. . . . Various observations support the conclusion that waste disposal sites are artificial attractants to birds. Accordingly, disposal sites located in the vicinity of an airport are potentially incompatible with safe flight operations."). (Exh. B-31).

assessment whatsoever of the likelihood of bird/aircraft collisions as a result of Landfill operations. This omission is surprising and troubling in light of the 1991 FAA Review Letter. The Manager of the FAA's Safety and Standards Branch communicated to Leatherwood's General Manager, four years prior to issuance of the Permit, that the FAA had completed a review of the proposed Landfill site and "concluded that it would be incompatible with aircraft operations at Dubois-Jefferson County Airport." The letter explained that the Landfill "would be in line with the centerline" of the Dubois Airport runway at a distance of 12,600 feet, and "[b]irds which would be attracted to the landfill would have a detrimental effect on aircraft operating in and out of Dubois-Jefferson County Airport." The 1991 FAA Review Letter cited Leatherwood to FAA Order 5200.5A, and quoted portions of Order 5200.5A concerning waste disposal sites attracting bird movements into or across approach and departure aircraft patterns. (Exh. B-1, at Form D, Attachment 4).

Leatherwood was clearly alerted to the bird hazard issue years in advance of submitting its final Permit Application in October 1994. Yet, with respect to the bird hazard issue, Leatherwood did not provide a "detailed analysis of the potential impact of the proposed facility on . . . public safety" as required by § 271.127(a). The Permit Application contained no analysis of the Landfill's potential to attract birds to the site, no analysis of its potential to attract or sustain hazardous bird movements into or across the approach and departure patterns of aircraft using the Dubois Airport, and no analysis of an increase in the risk of bird/aircraft collisions being caused by the Landfill. DEP's willingness to accept the Permit Application's environmental assessment in the absence of such analysis was the first in a series of errors and unreasonable actions connected with the bird hazard issue. *See Tinicum Tp. and Eco, Inc. v. DEP*, 1997 EHB 1119, 1139 (finding that due to various omissions in the environmental

assessment there was inadequate information in the permit application for a meaningful evaluation by the agency of all of the environmental impacts of the proposed facility).

DEP was made fully aware of the bird hazard issue. DEP examined the 1991 FAA Review Letter, heard substantial testimony at a public hearing by officials from PADOT Bureau of Aviation and USAir airline executives warning of the Landfill creating a bird hazard, engaged in oral and written correspondence with FAA officials on the issue, and corresponded with PADOT Bureau of Aviation officials. Both of the "appropriate governmental agencies" with whom DEP consulted, *i.e.*, those possessing expertise in aircraft safety generally and bird hazard specifically, strongly opposed the siting of the Landfill in a direct line with the center line of the Dubois Airport runway at such close proximity to the runway end. Executives from USAir and officials from the Airport Authority, as well as other "potentially affected persons" expressed serious concerns to DEP over the potential for the Landfill to significantly increase the risk of bird/aircraft collisions for aircraft using the Dubois Airport. Based on our review of the bird hazard evidence available to DEP prior to Permit issuance, there is no question that DEP rightfully concluded that the Landfill posed a harm to public safety in the form of a potentially significant increase in the risk of a bird/aircraft collision caused by Landfill operations.

We are puzzled, however, by DEP's response to this conclusion. DEP did not "notify the applicant in writing" of the identified harm, as required by § 271.127(b); did not request Leatherwood to undertake a bird study of the kind performed by Dr. Southern years after Permit issuance; did not require a detailed analysis of the bird hazard posed by the Landfill; did not engage its own expert to perform a bird study and risk assessment. Indeed, despite having been informed by the FAA that the USDA can perform site-specific bird hazard analyses on a contract basis, and being given the name and telephone number of an employee of USDA to contact

regarding a site-specific analysis of bird hazard, DEP did not follow up in any way. DEP's failure to obtain a proper analysis of the bird hazard posed by the Landfill is particularly striking given Mr. Neville's testimony that in late 1994 DEP had obtained an evaluation from the USDA of a bird hazard mitigation plan submitted by the applicant as part of permit application materials for the Tri-County Industries landfill near the Grove City Airport in Mercer, Pennsylvania.

It need hardly be said that threats to aviation safety are very serious in nature. Yet, despite ample evidence of a significant increase in the risk of bird/aircraft collisions being caused by the Landfill, DEP did not properly evaluate the Landfill bird hazard. This was a failure to perform its duty to "protect the public health, safety and welfare." 35 P.S. §§ 6018.102, 6018.104; 25 Pa. Code § 271.127(b) (1995). *See Fontaine v. DEP*, 1996 EHB 1333, 1354-55 (exclusionary criteria with respect to proximity to FAA-certified airports relate only to whether there is a bar to permit as a matter of law; permit issuance over FAA opposition may still constitute an error of law by the agency).

Leatherwood argues that insertion of Condition 40 into the Permit, which deferred the submission of a bird hazard mitigation plan until any time "prior to accepting waste at the landfill," was an acceptable manner of applying the requirements of §§ 271.127(a), (b) and (c) to the evidence available to the agency. We disagree.

Allowing a *permittee* to submit a mitigation plan for an identified harm contradicts the text of the regulation. Section 271.127(c) states that "*the applicant* shall provide the Department with a written explanation of how it plans to mitigate the potential harm." 25 Pa. Code § 271.127(c) (1995). As we previously held, "the Department must determine whether or not a permit applicant can mitigate a potential nuisance *before* it issues the permit." *Jefferson County Commissioners*, 1996 EHB at 1002 (citing *Korgeski v. DER*, 1991 EHB 935, *aff'd*, 1482 C.D.

1991 (Pa. Cmwlth. Feb. 3, 1992)); *see also New Hanover Tp. v. DEP*, 1996 EHB 668 (although DEP has power under SWMA to place conditions in a landfill permit, that power may not be used to contravene statutory and regulatory requirements).

Addressing the issue by imposing Condition 40 further conflicts with the agency's statutory duty to "protect the public health, safety and welfare from the short and long term dangers of transportation, processing, treatment, storage, and disposal of all wastes." 35 P.S. § 6018.102. Although DEP had identified a serious potential harm to public safety, the agency did not properly assess the contours of that harm, *i.e.*, the degree of increase in the risk of a bird/aircraft collision occurring as a result of Landfill operations. In the absence of a thorough understanding of the nature and degree of bird hazard harm posed by the Landfill, it would not be possible to rationally evaluate the efficacy of a mitigation plan. Deferring submission and evaluation of a mitigation plan until prior to commencement of landfilling would not solve the problem created by the lack of information concerning the precise scope of the harm. DEP speculated that the specific bird hazard posed by the Landfill, however grave, could be successfully mitigated to an acceptable degree of harm to public safety. This judgment was without any rational basis in fact and expert opinion drawn from a proper site-specific analysis. Indeed, the agency does not appear to have decided what would constitute an "acceptable degree of harm to public safety" from a bird hazard, or developed criteria applicable to its judgment in consultation with other appropriate agencies such as the FAA or PADOT.

DEP's use of Condition 40 also leads to irrational consequences. Leatherwood was entitled by the Permit to commence and complete construction of the Landfill prior to submitting the bird hazard mitigation plan for DEP review. Thus, Leatherwood could construct the entire Landfill and then find that DEP had decided not to approve the permittee's bird hazard

mitigation plan. While there is testimony that deferral would not enable DEP to better review the mitigation plan, there was no reasonable explanation given for Condition 40. Any potential problems arising from deferral are avoided simply by requiring the *applicant* to submit a mitigation plan and having the agency complete a thorough and properly-informed evaluation of such plan prior to permit issuance. Instead of properly examining the applicant's ability to successfully mitigate the bird hazard as part of its review of the Permit Application, DEP simply deferred any decision on mitigation. Deferring its decision in this manner was neither fair to the applicant nor to the public trust, and it was an evasion of the agency's duty under the SWMA. 35 P.S. § 6018.104; *Jefferson County Commissioners*, 1996 EHB at 1002.

Finally, the circumstances surrounding approval of the Permit with the inclusion of Condition 40 do not evidence a reasoned determination by agency officials. An "agency must cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 48-49 (1983). The sudden reversal of Mr. Boyle's decision to deny the Permit Application was left unexplained. Neither Mr. McCumber nor Mr. Provost credibly explained the rationale for the speculative conclusion that *any* bird hazard posed by the Landfill—of whatever magnitude—could be successfully mitigated to an acceptable degree of risk. DEP officials readily acknowledged that they possessed no expertise on aircraft safety or bird hazards, and that FAA and PADOT were the agencies with such expertise. They knew nothing of Dr. Southern prior to issuing the Permit, did not inquire into his expertise after receiving the Southern Letter, and did not review any of his bird control plans. After a careful review, the Board was unable to discern any reasonable grounds for DEP's handling of the bird hazard issue

through imposition of Condition 40 in the Permit.[12]

Having determined that DEP committed errors of law and otherwise acted unreasonably when applying §§ 271.127(a), (b) and (c) to Leatherwood with respect to the bird hazard issue, we next examine the evidence presented to the Board relevant to bird hazard and Leatherwood's Bird Control Plan. *See Pequea Township*, 716 A.2d at 686-87 (the "Board's duty is to determine if [DEP's] action can be sustained or supported by the evidence taken by the Board"). The Board must analyze the harm to public safety posed by the Landfill in the form of a bird hazard. 25 Pa. Code § 271.127(b) (1995). After the evidence of harm has been examined, the efficacy of the Bird Control Plan can be adjudged. 25 Pa. Code § 271.127(c) (1995).

We first note the opposition of the FAA and PADOT Bureau of Aviation—agencies with expertise in air traffic safety—to the proposed Landfill site. The FAA and PADOT believe the Landfill facility will significantly increase the bird hazard primarily because of the Landfill's orientation relative to the Dubois Airport. The Landfill disposal area would be situated in a direct line with the center line of the runway at a distance of approximately 12,600 feet from the runway end. Alignment with the center line, at that distance, places the disposal area directly beneath the approach and departure path for aircraft using the runway at a point where aircraft would be flying relatively low to the ground. Evidence presented at the hearing confirmed that turboprop airplanes and smaller general aviation aircraft routinely fly over the proposed Landfill

[12] Leatherwood argues that this Board's holding in *Pennsylvania Environmental Management Services, Inc. v. DER*, 1981 EHB 395 ("*PEMS*") supports DEP's decision to address the bird hazard issue through imposition of Condition 40. However, the basis of the *PEMS* decision was the common law public nuisance doctrine, not the comprehensive implementing regulations at issue in this appeal. Moreover, the factual discussion in *PEMS* is anachronistic given subsequent development of information on bird/aircraft collisions. *PEMS* essentially stands for the proposition that, prior to a final decision by DEP denying a landfill permit application, an applicant must be given the opportunity to demonstrate that it can successfully mitigate harms to public safety which will be created by the landfill's operation. The decision merely applied principles of fairness to the agency's decisionmaking process. *See PEMS*, 1981 EHB at 405-11. Sections 271.127(a), (b) and (c) not only provide the opportunity to demonstrate ability to successfully mitigate all identified harms, they *require* the permit applicant to do so. Thus, to satisfy *PEMS*, DEP need only scrupulously follow its own regulations.

area at altitudes of less than 500 feet. FAA and PADOT officials are aware that landfills continually attract substantial numbers of birds. Thus, they logically conclude that, as the Landfill attracts birds to its disposal area, it would necessarily sustain bird movements into or across the approach and departure paths—the "critical air space"—for aircraft using the Dubois Airport. In the opinion of FAA and PADOT, a land use which sustains bird movements into the critical air space *significantly* increases the likelihood of damaging bird/aircraft collisions, and is therefore incompatible with air traffic safety. The FAA and PADOT opinion is bolstered by the testimony of airline executives at the 1994 public hearing. For example, Mr. Steeber, vice-president of flight operations for Liberty Express Airlines, warned of the "safety consequences of locating this landfill at the proposed distance and bearing from the arrival end of runway seven." (Exh. A-61, at 86-91).

Conclusions drawn by Dr. Southern using data from his 1997 Bird Population Study sharply contrast with those of FAA, PADOT and the airline executives. Dr. Southern concurs that the Landfill would attract bird species of concern. However, he believes that the number of bird species of concern that he expects will occur in the Landfill site area is so small, and the time period such species will actually be in the Landfill site vicinity so short (due to seasonal migrations), that Landfill operations will not significantly affect the existing bird strike risk. He opined that the number of birds in the vicinity of the Landfill site will not increase as a result of an operational Landfill. He inferred from this premise that the risk of a bird strike, whatever that may be under existing conditions, will remain constant when the Landfill is operational.

In our view, Dr. Southern's testimony circumvented the key factors in the analysis. Bird movements into critical air space are the most important factor. Numbers of birds within a 30-mile area surrounding the Landfill site do not necessarily correlate with frequent bird movements

into the critical air space, though sheer numbers would certainly be a contributing factor. (Automobile insurance rates are higher in more densely populated areas, but number of vehicles on the road is not the only factor used by actuarial science to calculate the risk of auto accidents). It is the intersection of bird flight patterns with critical air space that increases the risk of a bird/aircraft collision. Dr. Southern, in both the Bird Population Study and his testimony, focused primarily on numbers of birds in the Landfill vicinity. There was little or no analysis by Southern of the impact the Landfill would have on attracting or sustaining bird movements into the critical air space. Even if it were true that bird numbers in the Landfill vicinity would not increase as a result of Landfill operations, that fact says nothing about the effect of the Landfill on the movements of birds currently found in the Landfill vicinity or seasonally migrating through the relevant geographic area.

In addition, we did not find credible Dr. Southern's conclusions regarding the numbers of bird species of concern likely to be attracted to the Landfill. Notably, the conclusions from the Bird Population Study were the same as those Dr. Southern had reached in 1995 after a single visit to the Landfill site area. The evidence of Dr. Schaadt's observations of turkey vultures at the Greentree Landfill was credible and convincing, and calls into question the methodology employed for the Bird Population Study. We also found persuasive Major Merritt's testimony concerning both the Bird Population Study's deficiencies and Dr. Southern's conclusions on the bird hazard posed by the Landfill. Merritt pointed out the failure of the Bird Population Study to adequately examine bird movements and the association of birds with particular land uses in the relevant area. He noted the importance of observation data from the working face of Greentree Landfill, and he questioned Dr. Southern's inexplicable omission of this key data as well as Southern's failure to correlate historical bird strike data with bird observation periods.

Finally, Dr. Southern did not perform a relative risk assessment which, we believe, is what is required to properly analyze the harm. Dr. Southern stated the issue himself in 1995 in the Southern Letter: "The question is whether or not Leatherwood Landfill will increase the risk of bird strikes that now exists at the airport." (Exh. L-78). Yet, the Bird Population Study did not accumulate the kind of data necessary for a reasonable calculation of the increase in the risk of a bird/aircraft collision caused by the Landfill. We found Major Merritt's testimony on assessing the risk of bird/aircraft collisions to be substantially more credible and persuasive than that of Dr. Southern. In particular, Major Merritt testified that in order to determine the relative risk of a bird/aircraft collision created by a landfill operation in proximity to an airport, one must conduct a comprehensive study of the bird movements in the relevant area and their relation to air traffic patterns. Otherwise, there is no means of knowing whether or not birds attracted to the landfill's food source will be intersecting the critical air space used by aircraft. In our view, the Bird Population Study does not contain sufficient information on bird movements, and their potential intersection with critical air space, to adequately assess the bird hazard.

Thus, there remains no adequate site-specific analysis of the bird hazard posed by the Landfill. The Board was presented with the additional opinion testimony of Major Merritt that the location of the proposed Landfill site in a direct line with the centerline of the Dubois Airport runway at a distance of only 12,600 feet from the end of the runway, combined with the geography in the Landfill/Airport area, the distribution of bird species of concern in the region, and the presence of vultures in relatively large numbers at the nearby Greentree Landfill, led him to an initial assessment that the operational Landfill would likely create a high risk of a bird/aircraft collision. However, Major Merritt's initial assessment was not buttressed by any systematic study of the factors affecting bird hazard at the Landfill site and a risk assessment

analysis grounded on a comprehensive study.

Leatherwood submitted to the Board, as the subject of judicial notice, numerous annual reviews of aircraft accident data compiled by the National Transportation Safety Board. *See, e.g.*, NATIONAL TRANSPORTATION SAFETY BOARD, U.S. GENERAL AVIATION, CALENDAR YEAR 1995, ANNUAL REVIEW OF AIRCRAFT ACCIDENT DATA (NTSB/ARG-98/01, Sept. 1998). The permittee asks the Board to infer from these reports that, in general, there is an extremely low risk that a bird strike will cause an aircraft accident. Leatherwood argues that, regardless of whether the Landfill will significantly increase the risk of a bird/aircraft collision for aircraft at the Dubois Airport, the Landfill nevertheless will not create an unacceptable risk of harm to public health and safety because the risk of an accident being caused by a bird strike is generally very low.

We decline to draw the inference requested by Leatherwood. It is not clear that the information in the admittedly incomplete selection of reports submitted for judicial notice actually support Leatherwood's assertion. Moreover, in the absence of any explanatory testimony, we are unable to decipher how the data correlates with the factual context of this appeal and the other evidence before us. Finally, we are not willing to conclude, in the face of direct assertions to the contrary by the FAA, PADOT and executives from the airline operating at the Dubois Airport, that a significant increase in the risk of a bird/aircraft collision from the Landfill's proposed siting should be considered an acceptable risk of harm to public safety.

Under these circumstances, we must lean heavily on the expert opinion of the government agencies charged with oversight of air traffic safety in the Commonwealth and the nation. *See* 25 Pa. Code § 271.127(b) (1995) (harms must be evaluated in "consultation with appropriate governmental agencies"). Based on the evidence presented to the Board, we conclude that the Landfill will cause a *significant* increase in the risk of bird/aircraft collisions

for aircraft using the Dubois Airport. In the absence of a properly performed risk assessment, it is not possible to precisely quantify this significant increase in risk. Nevertheless, a significant increase in the risk of a damage- or injury-producing bird/aircraft collision constitutes a harm to public safety that Leatherwood has to demonstrate can be mitigated to an acceptable degree before the Permit can be lawfully issued. 35 P.S. § 6018.201(a); 25 Pa. Code § 271.127(c); *Throop Property Owners Association*, 1999 EHB at 1007 (under § 271.127 both permit applicant and DEP have a duty to determine whether proposed facility could result in harm; if either entity so concludes, the applicant must provide DEP with a written explanation of how it will mitigate the harms).

Accordingly, we turn to an examination of the Bird Control Plan.[13] The mitigation plan was grounded on the data and conclusions in the Bird Population Study. Consequently, the Bird Control Plan is necessarily flawed because the underlying bird study contains insufficient data from which to draw conclusions regarding successful mitigation of the bird hazard through implementation of a bird control plan. As discussed above, in the absence of a comprehensive study of the factors and conditions at the Landfill site affecting bird hazard, and a consequent risk assessment analysis, formulation of an efficacious mitigation plan is not possible. The degree of harm created by the Landfill must first be ascertained before an evaluation of an adequate mitigation plan can be performed.[14]

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[13] Contrary to DEP's position, Leatherwood argued that the Board is not entitled to adjudge the efficacy of the Bird Control Plan; this argument assumes that Condition 40 was a valid exercise of DEP's authority. However, we have held that addressing the bird hazard issue through imposition of Condition 40 was an error of law and otherwise unreasonable under the circumstances confronted by the agency prior to Permit issuance. The permittee's argument also conflicts with the Board's *de novo* review of DEP's issuance of the Permit which "involves full consideration of the case anew," *Young*, 600 A.2d 668, and pursuant to which the Board's *duty* is to determine if DEP's "action can be sustained or supported by the evidence taken by the Board." *Pequea Township*, 716 A.2d at 686-87.

[14] With the limited amount of evidence before us, we do not venture an opinion on what would constitute an acceptable reduction in the risk of a bird/aircraft collision posed by the Landfill. Whether a bird hazard mitigation

In addition, we found certain deficiencies in the Bird Control Plan to be significant. We were not convinced by Dr. Southern's conclusion that implementation of the Bird Control Plan would completely deter bird species of concern from being attracted to the Landfill. Rather, it seems likely that bird species of concern will continue to be attracted to the Landfill despite use of dispersal techniques, thus creating a different distribution pattern of birds in the air relative to the Airport than would otherwise exist in the absence of the Landfill. We are also concerned by the plan's focus on bird numbers and dispersal of birds on the ground, and consequent inattention to affecting bird movements in the critical air space. In our view, the plan is particularly deficient for failing to account for the movements of birds dispersed from the active face of the Landfill by the pyrotechnic devices prescribed by the Plan. Because of the Landfill's location directly beneath the critical air space, dispersing substantial numbers of turkey vultures from the working face of the Landfill would seem likely to drive large, high-flying birds right into the critical air space. When queried on this point, Dr. Southern's testimony was vague and evasive. Under the circumstances, it seems imperative for a mitigation plan relying so heavily on dispersal techniques to address the effects of those techniques on bird movements.

In sum, the Local Government Officials have carried their burden of proving that DEP committed various errors of law and otherwise acted unreasonably when applying the applicable law to the bird hazard issue. Our *de novo* review of the evidence presented at the hearing leads us to conclude that the Landfill will create a substantial harm to public safety in the form of a significant bird hazard. Moreover, the evidence before us does not demonstrate that the harm to public safety will be adequately and successfully mitigated by Leatherwood. Thus, the Local Government Officials have carried their burden of proving that issuance of the Permit violated

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plan should reduce the risk to baseline conditions, or whether some higher threshold is tolerable, is a judgment best made by agencies charged with the duty of assuring air traffic safety.

applicable statutory and regulatory provisions and was otherwise unreasonable.[15]

While our holding above on the bird/aircraft collision issue is dispositive of this appeal, we have decided to address the other issues raised by the parties for two main reasons. First, this litigation has been very prolonged and has involved the Board in an arduous task of sorting through and carefully analyzing the numerous contentions of the parties. Addressing the other issues raised by the parties at this time, while the record is fresh, will help to assure that this litigation is not further protracted in light of any future appellate review. Second, while we recognize that many of the Act 101-related regulations at issue in this appeal have now been repealed or significantly amended, (thus rendering discussion of these regulations somewhat academic), we also recognize that the parties have expended tremendous amounts of time and effort, and incurred substantial costs, in prosecuting this litigation over the course of approximately seven years. Fairness to the litigants requires us to provide them with a complete and thorough review of the many issues they have raised, on which they presented evidence at the hearing, and which they fully discussed in their post-hearing memoranda.

III. Act 101-Related Regulatory Requirements

Act 101 placed on Pennsylvania counties the primary responsibility to address and plan for the disposal of municipal waste generated within their boundaries. 53 P.S. §§ 4000.102(A)(5), 4000.102(B)(10). The Legislature allocated to each county both the power and the duty to "insure the availability of adequate permitted processing and disposal capacity for the

[15] The Local Government Officials have also argued that DEP misapplied §§ 271.127(a), (b) and (c) with respect to the analysis of harmful air contaminant emissions from the Landfill and Leatherwood's proposed mitigation plan for addressing such emissions. We previously addressed this question in our ruling on the cross-motions for summary judgment. *See Jefferson County Commissioners*, 1996 EHB at 998-1001. At that time, after granting Leatherwood's motion in part with respect to the issue, we left open a narrow question whether the air quality information submitted to DEP was inadequate because it did not comply with explicit regulatory requirements. *Id.* at 1001. Our review of the evidence presented at the hearing related to air quality convinces us that the Local Government Officials have failed to carry their burden of proof on this issue. *See Somerset County Commissioners v. DEP*, 1996 EHB 351, 371-73; *Township of Florence v. DEP*, 1996 EHB 871, 876-79.

municipal waste which is generated within its boundaries." 53 P.S. § 4000.303(a). As part of its responsibility for municipal waste disposal, each county must prepare and submit to DEP for approval an officially adopted waste management plan. 53 P.S. § 4000.501. Among other information, the county plan must contain a description of the kind and amount of municipal waste currently generated within the county boundaries; the amount of such waste estimated to be generated over the next ten years; a description of waste facilities where the county's waste is currently being disposed and the available disposal capacity for those facilities; and, an estimate of the amount of disposal capacity needed for municipal waste generated within the county during the next ten years. 53 P.S. § 4000.502.

Through these and other relevant provisions, *see, e.g.*, 53 P.S. §§ 4000.102(A)(5) and 4000.513, Act 101 clearly expresses the Legislature's preference for a planning relationship between a county's waste generation and the available capacity of disposal facilities located within the waste-generating county. *See generally City of Harrisburg v. DER*, 630 A.2d 974 (Pa. Cmwlth. 1993). Consequently, Act 101 created an explicit relationship between county waste management planning and the permits for municipal waste landfills issued pursuant to the SWMA, *see, e.g.*, 53 P.S. § 4000.507, and, various DEP regulations have been promulgated to implement this integrated system. We again note that many of these Act 101-related regulations have been materially changed or repealed by subsequent amendments to the solid waste regulations, *see* 30 Pa. Bull. 6685 (Dec. 23, 2000), and emphasize that we are applying the regulations in effect at the time DEP issued the Permit in 1995.

A. Consistency with Waste Management Plans for Waste-Generating Counties

An application for a municipal waste landfill must include "a detailed explanation of . . . the consistency of the facility with municipal, county, State or regional solid waste plans in effect where the waste is generated." 25 Pa. Code § 271.127(f). The 1995 regulations do not

specifically define how an applicant demonstrates "consistency" with the relevant solid waste plans, however, a related provision casts light on the question:

> A permit application will not be approved unless the applicant affirmatively demonstrates that the following conditions are met . . .
>
> If an application for a permit for a municipal waste landfill . . . includes approval for the disposal or processing of municipal waste generated in a county, municipality or state that has an approved municipal waste management plan under applicable law, the facility is expressly provided for in the approved plan, and the approved plan designates the proposed facility to receive that waste volume under §§ 272.227, 272.231 and 272.245 (relating to selection and justification of municipal waste management program; implementing documents; and submission of implementing documents).

25 Pa. Code § 271.201(a)(6) (1995). The Local Government Officials argue that Leatherwood failed to demonstrate compliance with §§ 271.127(f) and 271.201(a)(6), and that DEP's determination that Leatherwood adequately met the requirements imposed by these regulatory provisions was an error of law.

DEP has interpreted these two regulations as essentially imposing the same requirements. In other words, a landfill permit applicant demonstrates consistency with municipal, county, State or regional solid waste plans in effect where the waste is generated by showing: (1) that the proposed facility is expressly provided for in the relevant waste management plan; and, (2) the facility is designated to receive a specific volume of waste in acceptable plan implementing documents. *See Mutilee, Inc. v. DER*, 1994 EHB 989, 990-91; BUREAU OF WASTE MANAGEMENT, DEPARTMENT OF ENVIRONMENTAL RESOURCES, POLICY AND PROCEDURE MANUAL FOR MUNICIPAL WASTE PLANNING/PERMITTING RELATIONSHIP ANALYSIS UNDER ACT 101 AND MUNICIPAL WASTE REGULATIONS, 7-11 (1993) ("1993 Policy Manual") (Exh. B-24).

DEP has also interpreted these regulations as applying equally to in-state and out-of-state waste, and has applied § 271.201(a)(6) to waste from out-of-state localities which have county waste management plans. *Mutilee, Inc.*, 1994 EHB at 990-91; 1993 Policy Manual, at 7-11. This

Board has, on at least one occasion, deferred to DEP's construction in that regard. *See Florence Tp. v. DEP*, 1997 EHB 616, 629-31 (analyzing and rejecting appellant's argument that proposed expansion of landfill which accepted waste from two New Jersey counties was not expressly provided for in waste management plans for those counties as required by § 271.201(a)(6)).

Neither the Local Government Officials nor Leatherwood have disputed DEP's manner of interpreting §§ 271.127(f) and 271.201(a)(6), nor have they contested the propriety of applying § 271.201(a)(6) to the New York City waste Leatherwood proposes to accept at the Landfill. In fact, both parties adopted the interpretation set forth in the 1993 Policy Manual; they simply have conflicting views on whether DEP properly applied the consistency requirements here. We defer to DEP's interpretation that the requirements of § 271.201(a)(6) are applicable to waste generated in out-of-state localities, and that an applicant demonstrates consistency with solid waste plans, as required in § 271.127(f), by meeting the criteria stated in § 271.201(a)(6). *Florence Tp.*, 1997 EHB at 629-31.[16] Consequently, before its Permit Application could be lawfully approved, Leatherwood was required to "affirmatively demonstrate" that the Landfill is "expressly provided for" in the relevant solid waste management plan for each county generating waste which the Landfill proposed to accept, and that acceptable implementing documents for such solid waste plans designate the Landfill to receive a specified volume of waste.

1. Express Provision in Relevant Solid Waste Plans

The Landfill is not expressly provided for in Jefferson County's approved Act 101 plan,

[16] We note that DEP's interpretation is not free of difficulties. Extra-territorial application of § 271.201(a)(6) assumed that other States use a scheme for waste management planning parallel to that created by Act 101; smaller neighboring States, in particular, may have only a State-wide waste management plan. It would seem incongruous to compare county-based with State-wide or regional plans. The regulations on their face also appeared to involve different requirements. While § 271.127(f) imposed a more general requirement of a facility's "consistency" with "municipal, county, State or regional *solid waste plans* in effect where the waste is generated," § 271.201(a)(6) specifically referred to a facility's provision in an "approved *municipal waste management plan*"—a defined term meaning Act 101 plans. *See* 25 Pa. Code § 271.1 (1995). Section 271.201(a)(6) also specifically referred to regulatory provisions pertaining to Act 101 plans.

and Leatherwood had no commitment for disposal of waste originating in the host county. Rather, the Permit Application proposed to accept (and had commitments for) approximately 3,000 tons per year of waste generated in Armstrong County, Pennsylvania, and 300,000 tons of municipal waste generated within the City of New York. The application of § 271.201(a)(6) to the waste from Armstrong County presents little difficulty, and in fact the Local Government Officials do not contend that Leatherwood failed to meet the requirements of these regulations with respect to the Armstrong County waste. Their dispute concerns the New York City waste.

Leatherwood was required to affirmatively demonstrate that the Landfill is expressly provided for in New York City's solid waste management plan or, that solid waste plans are not prepared in New York at the state, county or municipal level under applicable New York law. 25 Pa. Code §§ 271.201(a)(6); 271.127(f) (1995). Of course, if no solid waste management plans are prepared by New York City under applicable New York Law, then these particular regulations would simply be inapplicable to the New York City waste. There is no dispute that New York City government officials adopted a "Comprehensive Solid Waste Management Plan" in 1992 ("NYC Plan"); the NYC Plan was submitted to the New York State Department of Environmental Conservation for its approval; and, the NYC Plan was approved in 1992. Indeed, Leatherwood introduced sections of the NYC Plan into evidence at the hearing. The Landfill facility was not expressly provided for in the NYC Plan as of 1995 when DEP issued the Permit, and Leatherwood does not contend otherwise. Nor does Leatherwood contend that the Landfill is expressly provided for in any recent amendment to the NYC Plan. Thus, Leatherwood failed to satisfy the first criterion of § 271.201(a)(6).

Leatherwood seeks to avoid this conclusion by reiterating the assertion made in its Permit Application that the approximately 300,000 tons per year of municipal waste originating in New

York City which the Landfill proposed to accept "is not subject to planning guidelines," (Exh. B-3, Form 1, Att. 1), and "New York City's Solid Waste Management Plan is a guideline only on the optimum methods of waste management." (Exh. B-10, at Form 46, Att. 1, p. 2). The question for purposes of satisfying § 271.201(a)(6) is whether New York City "has an approved municipal waste management plan under applicable law"; if it does, then the *proposed landfill facility* must be expressly provided for in that plan, not the particular waste proposed for acceptance. Leatherwood's assertion that the NYC Plan "is a guideline only on the optimum methods of waste management" also conflicts with the facts. According to the NYC Plan Compliance Report for 1992-94 (Exh. L-62, at 1-1), the NYC Plan was prepared by the City Department of Sanitation, adopted by New York City Council, and approved by the New York State Department of Environmental Conservation. The Report refers to a 10-year planning period for the NYC Plan, similar to Act 101 plans. Even a cursory review of the Compliance Report and the sections of the NYC Plan accepted into evidence reveals a strong resemblance between the NYC Plan and Act 101 plans. Given that New York City constitutes a county in New York State, the waste management planning scheme for New York appears remarkably similar to that devised and implemented in Act 101. The relevant question is whether the NYC Plan is "an approved municipal waste management plan under applicable law." The NYC Plan generally fits that description and, as such, Leatherwood was required to affirmatively demonstrate in its Permit Application, or to the Board, that the Landfill is expressly provided for in the NYC Plan.

We are persuaded that DEP committed an error of law and otherwise acted unreasonably when it determined that Leatherwood satisfied the criterion of § 271.201(a)(6) concerning express provision in waste management plans. DEP accepted at face value the vague assertions in the Permit Application regarding consistency with the NYC Plan. DEP was clearly aware of

the NYC Plan, yet inexplicably never attempted to obtain a copy. Nor did DEP request additional relevant information from Leatherwood, which should have been done given the paucity, and lack of clarity, of the information contained in the Permit Application on the NYC Plan and the New York City waste proposed to be received at the Landfill. Although the testimony was contradictory, DEP apparently decided to apply a different type of consistency test to the Permit Application because: the "City does not have plan regulations comparable to Pennsylvania." (Exh. B-39). This conclusion disregards the facts available to DEP concerning the NYC Plan, and displays a misapprehension of the applicable regulatory criteria. The effect was to improperly relieve Leatherwood of its obligation under § 271.201(a)(6). *See East Pennsboro Tp. Authority v. DER*, 334 A.2d 798, 803 (Pa. Cmwlth. 1975) ("if the EQB has established a regulation whereby a specific requirement or prohibition is set forth, . . . then DER is under an obligation to enforce such regulation literally"); *see also Upper Allegheny Joint Sanitary Authority v. DER*, 567 A.2d 342, 345 (Pa. Cmwlth. 1989) ("the department is under an obligation to enforce specific requirements in a regulation"); *Eastern Consolidation*, 1999 EHB at 330 (an agency cannot, under the guise of interpretation, ignore the language of its regulations, for the agency as well as the regulated public is bound by the regulation).

2. Designation in Acceptable Implementing Documents

To satisfy the second criterion of § 271.201(a)(6), Leatherwood was required to demonstrate that acceptable implementing documents for the NYC Plan designate the Landfill to receive a specified volume of waste. According to Act 101, a county must submit copies of "all executed ordinances, contracts or other requirements to implement its approved plan." 53 P.S. § 4000.513(a). The statute lists several types of acceptable implementing documents, including "third-party contracts for the right to use a facility" with available capacity. *See* 53 P.S. § 4000.513(b)(3); *see also* 25 Pa. Code § 272.231(a)(3) (1995). The disputing parties have argued

extensively, and somewhat confusedly, over Leatherwood's compliance with the implementing document requirement.[17] The Local Government Officials contend that the two contracts for disposal of New York City waste at the Landfill are not acceptable because the contract terms are not sufficiently definite. They also argue that the contracts are not an acceptable form of implementing document for New York City's solid waste management plan.

We reject the Local Government Officials' argument that Leatherwood's contracts for disposal of specified volumes of New York City municipal waste do not meet the requirements of § 271.201(a)(6). The agreements are sufficiently definite. The regulations provide that implementing documents "shall be in final form and ready for approval or signature without further significant modification." 25 Pa. Code § 272.231(b) (1995). Leatherwood's contracts contain all the terms necessary to constitute a binding legal agreement. *See, e.g., Schreiber v. Olan* Mills, 627 A.2d 806, 808 (Pa. Super. 1993) (elements of an enforceable contract are offer, acceptance, consideration, or mutual meeting of the minds); RESTATEMENT (SECOND) OF

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[17] Much of the confusion was caused by DEP's flawed application of the regulation. DEP concluded that the New York City waste "falls under the Policy and Procedure's 'binding commitment' test, for the City does not have plan regulations comparable to Pennsylvania." (Exh. B-39, at 2). However, this so-called "binding commitment test' is drawn solely from the 1993 Policy Manual, which states in part:

> For municipal waste from states, counties or municipalities outside of Pennsylvania that do not have applicable planning requirements, . . . the applicant must demonstrate that it has a binding commitment for the delivery and acceptance of the proposed waste at the facility. The commitment must be with the governmental body or some other entity, including, for instance, a waste hauler. . . . Revocable or indefinite agreements for delivery of waste, lacking contract obligations, will generally be insufficient, just as in the case of waste generated in Pennsylvania.

1993 Policy Manual, at 10. In other words, if a proposed facility intends to accept waste from an out-of-state locality which does *not* have any solid waste management planning requirements under State or local law, the manual directs the agency reviewer to impose a separate requirement, loosely related to the concept of Act 101 implementing documents but which clearly has no grounding in Act 101 or the regulations. The parties do not contest DEP's use of the 1993 Policy Manual in this respect; that said, application of the manual's 'binding commitment test' was clearly problematic. An agency guidance document, in and of itself, may not impose a requirement on a permit applicant which in substance and effect constitutes a regulation. *See Dauphin Meadows, Inc. v. DEP*, 2000 EHB 521, 524-34; *see also* 45 Pa.C.S. § 501 (defining "regulation"); *Pennsylvania Dept. of Health v. North Hills Passavant Hospital*, 674 A.2d 1141, 1147 n.20 (Pa. Cmwlth. 1996) (a "statement of policy" is any other document promulgated by an agency that is not a regulation; "a regulation is the exercise of delegated power to make a law," whereas a statement of policy "is merely interpretive and not binding").

CONTRACTS § 1 (1981). The agreements were fully executed by the contracting parties as of 1995, and there was no evidence presented to the Board that the agreements are no longer valid or capable of being performed if the Landfill were to commence operations.

As to the argument that the waste broker contracts are not acceptable implementing documents, testimony of DEP officials did not evince a clear understanding of how the contracts *implemented the NYC Plan.* DEP did not determine whether Star Recycling or Better Management had agreements with New York City with respect to hauling municipal solid waste, or whether the contracts were sanctioned by appropriate New York City officials. Indeed, there is practically no information in the Permit Application, nor was there evidence presented at the hearing, on the sources of the New York City waste, where that waste is currently being disposed, how it would be transported, or the entities that would be hauling such waste.

On the other hand, third-party contracts like those submitted by Leatherwood are an acceptable type of implementing document under Act 101. 53 P.S. § 4000.513(b)(3). Leatherwood's contracts with Better Management Corporation and Star Recycling fit within this broad category of acceptable documents. More importantly, the Local Government Officials presented no hard evidence that such third-party contracts are unacceptable implementing documents for the NYC Plan. They did not provide any substantive guidance to the Board on what constitutes an acceptable implementing document for the NYC Plan, pursuant to applicable New York law. The Local Government Officials had to demonstrate that the contracts at issue are not acceptable implementing documents for the NYC Plan in order to satisfy their burden of proof on this point, and they failed to make such a demonstration.

B. Compliance With Applicable Laws Affecting Disposal of Waste at the Proposed Facility

An additional regulatory requirement was imposed on Leatherwood as a result of its intention to accept waste generated outside the proposed Landfill's host county:

> If the waste to be disposed or processed is generated outside the county in which the facility is proposed to be located, the application shall also include a description of applicable State and local laws, including State and local solid waste management plans adopted under those laws, that may affect, limit or prohibit the transportation, processing or disposal of the waste at the proposed facility. The application shall state whether or not disposal or processing of waste from each generating county may violate each applicable law or plan.

25 Pa. Code § 271.125(b) (1995). Thus, with respect to the Armstrong County and New York City waste, Leatherwood was required to include in the Permit Application a description of State and local laws that "may affect, limit or prohibit" the transportation or disposal of waste at the proposed Landfill, and to state whether or not disposal of waste from each generating county may violate such laws. The Local Government Officials focus on Leatherwood's alleged failure to satisfy § 271.125(b) with respect to the New York City waste; they do not point to any relevant defects related to the Armstrong County waste.

After careful review of the relevant evidence, we conclude that the Permit Application does not contain a description of New York law adequate to meet the requirements of section 271.125(b). Although Leatherwood generally asserts that the Permit Application describes the laws affecting New York City municipal waste, the permittee does not refer the Board to anything in the Permit Application which provides the description required by § 271.125(b). There was also no evidence that DEP requested Leatherwood to supplement the application with the appropriate description of laws affecting the New York City waste; the agency simply failed to strictly apply § 271.125(b) to the applicant, contrary to law. *Upper Allegheny Joint Sanitary Authority*, 567 A.2d at 345; *East Pennsboro Tp. Authority*, 334 A.2d at 803.

Leatherwood argues that § 271.125(b) does not require an application to contain an extensive legal analysis, or actual copies, of the laws that may affect transport or disposal of waste at the proposed Landfill. Although we agree an extensive legal analysis is not necessary, the regulation requires a description adequate to meet its purposes. At a minimum, the agency

must be made aware of local laws which will negatively affect disposal of waste at the facility. Legal impediments to accepting waste from non-host counties will impact, among other decisions, the agency's site suitability analysis and its determination of need for the proposed facility. Section 271.125(b) requires the applicant to undertake a reasonable examination of waste disposal laws, prepare a summary description, and explain how the proposed landfill facility complies with, or at least does not violate, such laws. The Permit Application should have contained such a description, and it was error for DEP not to compel Leatherwood to submit one. *Cf. Forwardstown Area Concerned Citizens Coalition v. DER*, 1995 EHB 731, 738-39 (DEP's failure to issue written finding prior to permit revision approval, as expressly required by regulation, was error and omission was significant; the agency's "compliance with its own regulations is never a *de minimis* issue").

DEP did, however, conduct its own limited investigation into whether disposal at the Landfill of New York City waste violated New York laws relating to waste transportation and disposal. Mr. McCumber had a telephone conversation with a New York State Department of Environmental Conservation employee, engaged in some correspondence with New York City Department of Sanitation officials, obtained a copy of the 1994 Compliance Report, and had a telephone conversation with a representatives of Star Recycling and Better Management regarding their respective disposal contracts. There was no evidence that DEP reviewing officials consulted with DEP legal staff concerning potential violation of applicable New York laws by the transport and disposal of New York City waste at the Landfill.

Further, at the hearing, the Local Government Officials did not present sufficient competent evidence to prove that disposal of New York City waste at the Landfill will actually violate any applicable New York state or local law affecting waste transport or disposal. They

cited the Board to N.Y. COMP. CODES R. & REGS. tit. 6, § 360-11.4(b) (1995), and argued that disposal of New York City waste at the Landfill would violate this provision. We disagree. Section 360-11.4(b), which regulates transfer stations, states in pertinent part: "All solid waste passing through the transfer station must be ultimately treated or disposed of at a facility authorized by the department if in this State, or by the appropriate governmental agency or agencies if in other states . . . ." *Id.* Even assuming the New York City waste would pass through a transfer station before being transported to the Landfill, such waste would be disposed at a facility authorized by the "appropriate governmental agency" because DEP is the appropriate agency for permitting the Landfill.

The Local Government Officials also presented evidence on correspondence between New York City officials and the former DEP Secretary. The 1999 correspondence concerns a stated commitment by certain New York City officials not to send New York City waste to communities that have not agreed to accept such waste in written host community agreements. However, even assuming New York City officials have made such a commitment, the Local Government Officials did not refer the Board to any law which would be violated by disposal of New York City waste at a facility located in a community that has not agreed to accept disposal of such waste. Section 271.125(b) requires the applicant to state whether or not disposal of waste from each generating county may violate *applicable law*. A political promise is not legally enforceable. In sum, DEP's conclusion that disposal of the New York City waste at the Landfill would not violate applicable laws was reasonable based on the evidence presented to the Board.

C. Site Suitability Analysis

When enacting Act 101, the Legislature found that "proper and adequate processing and disposal of municipal waste generated within a county requires the generating county to give first choice to new processing and disposal sites located within that county." 53 P.S. §

4000.102(A)(6). To help implement this policy, Act 101 placed certain limits on DEP's issuance of landfill permits under the SWMA, including a requirement that the proposed facility either be provided for in the host county's Act 101 plan, or be "at least as suitable" as alternative disposal locations:

> [T]he department shall not issue any permit . . . for a municipal waste landfill . . . under the Solid Waste Management Act, in [a county with an approved Act 101 plan] unless the applicant demonstrates to the department's satisfaction that the proposed facility: (1) is provided for in the plan for the county; or (2) meets all of the following requirements . . . (iii) The proposed location of the facility is at least as suitable as alternative locations giving consideration to environmental and economic factors.

53 P.S. § 4000.507(a)(2)(iii). *See also* 25 Pa. Code § 271.201(b)(2)(iii) (1995).

Section 273.139 provides detail on the site suitability analysis that must be performed by a permit applicant for a facility not expressly provided for in the host county Act 101 plan. The implementing regulation limits the examination of suitable alternative locations to existing municipal waste disposal facilities in waste-generating counties, and describes some "environmental and economic factors" that must be considered:

> (c) If the application is for a facility that is not expressly provided for in the host county plan, an application for a proposed facility . . . shall contain an environmental siting analysis for each county generating municipal waste that will be disposed at the facility, demonstrating that the proposed location of the facility is at least as suitable as alternative locations within the generating county, giving consideration to environmental and economic factors. The environmental siting analysis shall include a discussion and analysis of the following:
>
> (1) Transportation distances and associated impacts;
>
> (2) The environmental assessment criteria in § 271.127(a) (relating to environmental assessment);
>
> (3) The siting criteria and technical standards of 40 CFR Part 257 (relating to classification of solid waste disposal facilities) and 40 CFR Part 258 (relating to municipal solid waste landfills).

25 Pa. Code § 273.139(c) (1995).

The Local Government Officials claim that Leatherwood failed to comply with the requirements of these two provisions with respect to the New York City waste. They argue that the information submitted in the Permit Application was deficient, particularly as to impacts resulting from the considerable distance involved in transporting the New York City waste to the Landfill and the suitability of other landfills, such as the 2400-acre Fresh Kills Landfill located on Staten Island, situated in the county of New York City. They further argue that DEP's acceptance of the suitability analysis in the Permit Application concerning New York City waste was unreasonable, and DEP's application of § 273.139(c) was therefore flawed.

Because the Landfill is not provided for in the host county Act 101 plan, Leatherwood was required to comply with § 273.139(c). *See Tinicum Tp. v. DEP*, 1996 EHB 816, 823. Leatherwood acknowledges that the Permit Application did not contain a site suitability analysis conforming to the requirements of section 273.139(c) with respect to the New York City waste. However, the permittee argues that DEP correctly employed "common sense" when it did not require a detailed suitability analysis for New York City because, Leatherwood argues, the information provided in the Permit Application established that no suitable alternative locations existed in New York City. Leatherwood contends that the information in the Permit Application, when coupled with information reviewed by DEP in the New York City Compliance Report and obtained in correspondence with New York officials, was sufficient for DEP to make a reasonable determination that no suitable alternative facility existed in New York City.

The parties' dispute on this issue distills to a question of the reasonableness of DEP's determination that no suitable alternative to the Landfill for the New York City waste existed in the county of New York City. We believe that the agency's determination was not reasonable, and DEP should have concluded that there existed a facility of equivalent suitability.

The information contained in the Permit Application on alternative locations for the New York City waste is quite limited. The application lists only the Fresh Kills Landfill under the category of in-county "permitted" sites, and describes the landfill as: "city owned; site operating under a NYSDEC Consent Order to upgrade; availability of long-term disposal capacity is uncertain." (Exh. B-10, Form 46, Att. 1, p. 5). Under the category of in-county, "potential" sites, the application states "None, as per NYS Department of Sanitation survey, copy of letter attached as Attachment C." *Id.* The support for this assertion is a one-page letter from Phillip Gleason, of New York City Department of Sanitation.

The application also includes a category for "out-of-county sites"; the information for this category of alternative locations is as follows: "In New York State, solid waste haulers are not required to report destinations as this information is considered proprietary, therefore, it is not possible to accurately list sites." *Id.* Finally, with respect to transportation distances and associated impacts, *see* 25 Pa. Code § 273.139(c)(1), the Permit Application states: "Haulers traveling from New York City will likely use the interstate highway system, including Route 3 and I-495 to reach Interstate 80. Since all routes to the facility use improved state or federal highways and are presently being used as transportation routes for truck traffic, no adverse effects from a minimal increase in truck traffic is expected." (Exh. B-10, Form 46, Att. 1, p. 6).

The information contained in the Permit Application does not provide a sufficient basis upon which to make any reasonable decision as to alternative suitable disposal sites for the New York City waste. There is no information on the available disposal capacity of the Fresh Kills Landfill, no comparison of transport distances, and no comparative analysis of environmental and economic considerations. In addition, the only supporting documentation provided in the Permit Application is both confusing and potentially misleading. Mr. Gleason's letter states that

the New York Department of Sanitation has identified potential sites, but does not list any of these sites. The letter further states that there were no sites greater than 200 acres deemed suitable, and concludes that "there is no parcel of land at least 747 acres located within the City of New York which has been considered suitable for landfill development." (Exh. B-10 at Form 46, Att. C). Mr. Gleason's inquiry was apparently arbitrarily circumscribed to exclude sites of less than 200 acres or parcels of land of less than 747 acres. The statute and regulations make no such arbitrary distinctions on landfill size when comparing equivalent suitability.

The Permit Application's paucity of information was supplemented by DEP's limited independent investigation into equally suitable alternative disposal facilities for the New York City waste. DEP obtained a copy of the 1994 New York City Solid Waste Plan Compliance Report from a City Department of Sanitation official. Mr. McCumber had a few telephone conversations with New York officials, and confirmed that Fresh Kills Landfill was the only existing operating facility located within the boundaries of New York City at that time. However, DEP also learned that Fresh Kills landfill is a 2,400 acre landfill site and "has a capacity of 100 million cubic yards"; approximately 13,000 tons per day of solid waste was disposed at Fresh Kills in fiscal year 1994 and, at current fill rates, the Fresh Kills landfill "will have capacity for another 15 to 20 years of disposal." (Exh. L-62). The Compliance Report also described a series of operational improvements being made to Fresh Kills, (*e.g.*, modern gas control and recovery system, leachate control system), designed to mitigate its impact on the surrounding environment. Perhaps most importantly, the Fresh Kills Landfill is located on Staten Island, only a few miles from any point in New York City; in contrast, the proposed site of the Landfill is approximately 280 miles from New York City.

There was more than adequate capacity at Fresh Kills for the New York City solid waste

Leatherwood proposed to accept, and the difference in transport distance is remarkable. In 1995, the Fresh Kills Landfill was implementing corrective actions, pursuant to a consent order with the New York Department of Environmental Conservation, to update the environmental control technology used at the site. Thus, differences between Fresh Kills and the Landfill with respect to operational equipment and environmental impacts were apparently being minimized. In our view, Fresh Kills Landfill should have been considered more suitable for disposal of the New York City waste than the proposed Landfill site. DEP's conclusion to the contrary was unreasonable and an error of law.[18]

D. Determination of Need for the Landfill

The Legislature gave counties the primary responsibility to plan for disposal of municipal waste generated within their boundaries in order "to insure the timely development of *needed* processing and disposal facilities." 53 P.S. § 4000.102(a)(5). As part of the implementation of Act 101's comprehensive waste management planning scheme, the regulations require the permit applicant to provide a "detailed explanation of the need for the [landfill] facility." 25 Pa. Code § 271.127(f) (1995). To comply with § 271.127(f), Leatherwood was required to explain the need for the Landfill. *Cf. Pen Argyl Borough v. DEP*, 1999 EHB 701, 704 (§ 271.127(f) "requires an applicant for a permitted landfill expansion to explain the need for the expansion"). DEP was required to review Leatherwood's explanation and undertake a needs assessment to determine

[18] At the hearing, Leatherwood did not supplement its Permit Application materials with any site suitability analysis pertaining to the New York City waste. With the exception of some excerpts from the NYC Plan, the permittee did not present any new evidence relevant to the site suitability point. After examining the record before us we continue to find the information relevant to alternative landfill locations for the New York City waste to be insufficient to meet the detailed requirements of 25 Pa. Code § 273.139(c) (1995). Although we are aware that significant changes in the status of the Fresh Kills Landfill have occurred over the course of the seven years since Permit issuance, we must make our determination based on the evidence of record. The evidence presented to the Board by Leatherwood relevant to site suitability did not sufficiently cure the omissions in the Permit Application's site suitability information presented to DEP in 1995; consequently, Leatherwood has not demonstrated its compliance—as of the time of the hearing and based on the evidence presented to the Board—with the requirements of 53 P.S. § 4000.507(a)(2)(iii) and 25 Pa. Code § 273.139(c) (1995).

whether the disposal capacity to be created by the Landfill is needed for municipal waste disposal. *See Somerset County Commissioners v. DEP*, 1996 EHB 351, 373-75.

According to section 271.127(g) of the regulations:

> The Department may consider a proposed municipal waste landfill . . . to be needed for municipal waste disposal or processing if the following are met:
>
> (1) The proposed facility or expansion is provided for in an approved county plan. [and]
>
> (2) The proposed facility will actually be used to implement an approved county plan based on implementing documents submitted under § 272.245 (relating to submission of implementing documents) or other clear and convincing evidence acceptable to the Department.

25 Pa. Code § 271.127(g) (1995). Section 271.127(h) further states that "[m]eeting the requirements of this section does not, by itself, mean that the proposed facility or expansion is actually needed." 25 Pa. Code § 271.127(h) (1995).

The Local Government Officials argue that Sections 271.127(f), (g) and (h), when read together, require an explanation by the permit applicant of why the proposed landfill facility is actually needed. For them, it is not enough merely to show that the proposed landfill is provided for in an approved Act 101 plan and its implementing documents. They argue that the regulations always require a demonstration of actual need—as a factual matter—and they assert that there has never been any demonstration by Leatherwood of an actual need for the Landfill's disposal capacity. In addition, the Local Government Officials contend that DEP's performance of the needs assessment was fundamentally flawed because the law does not support the agency's manner of applying the regulations to the facts of this case.

Leatherwood argues that the regulations grant DEP complete discretion over what evidence is sufficient to demonstrate the need for a proposed landfill. In other words, DEP may determine that a landfill is needed based solely on the criteria articulated in § 271.127(g), or the

agency may require evidence in addition to, or in lieu of, satisfaction of the two criteria in § 271.127(g). For Leatherwood, the evaluation of need pursuant to § 271.127 is not necessarily a consideration of "actual need," but is a case-by-case determination left to DEP's unfettered discretion. The permittee goes on to assert that the provision of the Landfill in the Armstrong County Act 101 Plan, in and of itself, is sufficient to establish that the Landfill is needed, if DEP so determines in its unfettered discretion. Leatherwood cites *Somerset County Commissioners v. DEP*, 1996 EHB 351 as support for its arguments.

In a further twist, DEP argues that a permit applicant must provide an explanation of need for each waste stream that the landfill proposes to accept. Thus, according to DEP, Leatherwood was required to demonstrate that landfill disposal capacity is needed for the 3,000 tons per year of Armstrong County waste, and to separately show that capacity is needed for the 300,000 tons of New York City waste the Landfill proposes to accept. DEP argues that the needs assessment must be separately undertaken for each generating county's waste, and a permit applicant must show either that the proposed landfill is provided for in the county plan and its implementing documents, thus satisfying § 271.127(g), or, demonstrate a need for disposal capacity by other clear and convincing evidence.

The application of § 271.127 has been examined by this Board on several previous occasions. *Somerset County Commissioners* involved a third-party appeal of DEP's issuance of a permit to construct and operate a landfill in Somerset County. 1996 EHB at 352-53. The appellants claimed there was no longer an actual need for the new facility because the county was generating less waste than originally estimated in their Act 101 plan and the county's current need was being satisfied by existing landfills. *Id.* at 373. The permittee responded that the facility was expressly provided for in the host county's approved Act 101 plan, and that implementing

documents for the plan—a disposal agreement between the county and the proposed facility and a flow control ordinance—specifically designated the facility to receive waste generated in Somerset County. *Id.* at 373-75. The Board held that the regulations did not require DEP to look beyond the facility's satisfaction of the two criteria in § 271.127(g) and examine whether the facility was no longer actually needed by Somerset County. Noting that if the county had decided the facility was no longer needed to implement its waste management plan the appropriate remedy was to revise the plan, the Board concluded that DEP did not act unlawfully or unreasonably when the agency determined that the requirements of the needs assessment had been satisfied by the permittee. *Somerset County Commissioners*, 1996 EHB at 375.

Similarly, in *Caernarvon Tp. Supervisors v. DEP*, 1997 EHB 217, third-party appellants objected to DEP's issuance of a permit modification resulting in additional landfill capacity because a showing of actual need for the new capacity had not been made by the permittee. *Id.* at 222-23. The facility was provided for in the two host county plans and designated in acceptable plan implementing documents (county ordinances and disposal agreements), and the host county plans expressly contemplated the need for expansion of landfill capacity. *Id.* at 223. The Board held that the regulations did not require the permittee to demonstrate actual need under those circumstances, and that DEP was "well within its authority to rely on provisions of these plans and documents providing for the facility and subsequent modifications for satisfying the required demonstration of need." *Caernarvon Tp. Supervisors*, 1997 EHB 222-23.

These cases recognize that §§ 271.127(f), (g) and (h) give DEP discretion as to what constitutes sufficient evidence of a need for new landfill disposal capacity; however, the agency's exercise of its discretion must be tempered by reason. *Somerset County Commissioners*, 1996 EHB at 375. The caselaw does not support Leatherwood's argument that DEP has

unfettered discretion when deciding what constitutes sufficient evidence of need, nor that provision in the Armstrong County plan, irrespective of designation in acceptable implementing documents, is sufficient to demonstrate compliance with § 217.127(f) and (g). The caselaw provides no authority for appellants' argument that an actual need, in fact, for the proposed landfill disposal capacity must *always* be demonstrated by the permit applicant.

The Board has not previously addressed DEP's contention that a separate needs assessment must be undertaken for each waste-generating county's waste stream.[19] DEP's interpretation draws support in part from the comprehensive waste management planning structure created by Act 101, and the Act's express coordination between a county's waste generation and the available capacity of disposal facilities located within the waste-generating county. *See* 53 P.S. §§ 4000.102(A)(5); 4000.502; 4000.513. Act 101 and the SWMA recognize that "improper and inadequate solid waste practices create public health hazards, environmental pollution, and economic loss, and cause irreparable harm to the public health, safety and welfare." 53 P.S. § 4000.102(a)(1); 35 P.S. § 6018.102. A central mandate for DEP under these statutes is to "protect the public health, safety and welfare from the short and long term dangers of transportation, processing, treatment, storage, and disposal of all wastes." 35 P.S. § 6018.102(4); 53 P.S. 4000.102(b)(3). In light of these statutory provisions, DEP's interpretation is logically based on the premise that a demonstration of need should function as a check on uncontrolled proliferation of unnecessary landfill capacity within the Commonwealth.

Undertaking a needs assessment for each waste-generating county's waste stream is also

[19] DEP generally treated the two waste streams separately when reviewing the Permit Application. *See* Exh. B-39. Moreover, under the applicable regulations the Permit could not be approved unless Leatherwood affirmatively demonstrated that "the need for the facility . . . clearly outweigh[s] the potential harm posed by operation of the facility based on the factors described in § 271.127 (relating to environmental assessment)." 25 Pa. Code § 271.201(a)(3) (1995). DEP's application of § 271.201(a)(3) was challenged in this appeal. Of course, when applying the balancing test of § 271.201(a)(3) to the Landfill, "the need for the facility" would be quite different if the New York City waste is excluded and the need for the Landfill was limited to providing disposal capacity for only a small amount of waste from Armstrong County.

consistent with, and necessary for, the application of § 271.201(a)(3), which required the permit applicant to affirmatively demonstrate that "the need for the facility . . . clearly outweigh[s] the potential harm posed by operation of the facility." 25 Pa. Code § 271.201(a)(3) (1995). It would not be possible for the agency reviewer to ascertain a sense of the current overall "need for the facility," and thereby properly perform the balancing test mandated by § 271.210(a)(3), without examining need with respect to each waste stream the landfill proposes to accept for disposal.

We agree with DEP that § 271.127 required the agency to perform a needs assessment for both the Armstrong County and New York City waste. *See DEP v. North American Refractories Company*, No. 1298 C.D. 2001, slip op. at 6-10 (Pa. Cmwlth. Feb. 8, 2002) (the Board must defer to DEP's interpretation of environmental regulations when the Board determines that DEP's interpretation is reasonable); *DER v. BVER Environmental, Inc.*, 568 A.2d 298, 300 (Pa. Cmwlth. 1990) (the Board must defer to DEP's interpretation of an environmental regulation that comports with the regulation's plain language and is consistent with the statute under which the regulation was promulgated). A permit applicant may satisfy § 271.127—with respect to a particular waste-generating county's waste stream—by meeting both criteria set forth in § 217.127(g); a demonstration of actual need is not required under those circumstances. *Somerset County Commissioners*, 1996 EHB at 375. However, if unable to meet the § 271.127(g) criteria for a particular waste stream, the applicant is required to provide DEP with sufficient evidence upon which to make a reasonable determination that the landfill was creating *needed* disposal capacity for such waste. *Cf. Ardolino v. Pennsylvania Securities Commission*, 602 A.2d 438, 439-40 (Pa. Cmwlth. 1992) ("Substantial evidence is that evidence which a reasonable person might accept as adequate to support the conclusion reached."). After examining the evidence with respect to each waste stream, the regulations require a final determination as to whether the

applicant has demonstrated a sufficient need for the facility. 25 Pa. Code § 271.127(f) (1995) (requiring detailed explanation of "the need for the facility").

1. DEP's Needs Assessment

With these principles in mind, we first review the agency's application of §§ 271.127(f) and (g) to Leatherwood's Permit Application. DEP's performance of the needs assessment was seriously flawed; in effect, the agency failed to conduct any meaningful needs assessment with respect to any of the waste the Landfill proposed to accept for disposal. Instead of weighing the information submitted in the Permit Application and judging its adequacy as against an appropriate standard, DEP decided that if Leatherwood had satisfied the consistency and suitability tests for a waste-generating county, then the Landfill had automatically demonstrated a need for disposal capacity for both the Armstrong County and New York City waste. DEP then quantified "need" into total tons of waste for which it believed the Landfill had binding disposal contracts, and concluded that "need is therefore a minimum of 1,053,285 tons of municipal waste." *See* Exh. B-39.

DEP misapplied the requirements of §§ 271.127(f), (g) and (h) to the Permit Application. Although the regulations grant a certain latitude to the agency when judging evidence of need, the agency may not simply conflate the requirements of § 271.127(f) with those of § 273.139(c) concerning suitability of alternative disposal facilities. Nor can need for disposal capacity be equated with disposal contracts between waste brokers and the proposed Landfill. Information on equally suitable alternative locations, or the existence of contracts obligating disposal of waste at the landfill, will constitute relevant evidence of need for disposal capacity. However, DEP's failure to accumulate and examine the relevant information submitted in the Permit Application and otherwise obtained by DEP—as that evidence related to the specific question of a need for the disposal capacity being created by the Landfill—constituted an abuse of the discretion

afforded the agency by § 271.127(f), (g) and (h). Where applicable regulations require the agency to make a law-applying judgment, the administrators must provide reasons showing that appropriate factors were carefully considered. *Cf. Motor Vehicle Manufacturers Association of the United States, Inc.*, 463 U.S. at 48-49 ("an agency must cogently explain why it has exercised its discretion in a given manner").

2. Evidence of Need Presented to the Board

Thus, the Board must examine the evidence presented by the parties at the hearing to determine whether Leatherwood nevertheless satisfied the requirements of § 271.127(f) with respect to demonstration of need for the Landfill. *See Warren Sand & Gravel Co., Inc.*, 341 A.2d at 565 (if the agency "acts with discretionary authority, then the Board, based upon the record made before it, may substitute its discretion for that of DER"). Evidence of need presented to the Board included the Permit Application's need analysis and supporting documentation, portions of the 1992 NYC Plan, sections from a May 2000 Draft Modification to the NYC Plan, and the 1994 New York City Compliance Report.

The Permit Application contained a needs analysis for the Landfill as part of its Social and Economic Benefits Evaluation. The applicant determined there is a need for the disposal capacity the Landfill would provide and supported its conclusion with the following evidence: (1) designation of the Landfill in Armstrong County's Act 101 Plan as a secondary facility for the long-term handling of the county's municipal solid waste (along with seven other existing or proposed facilities); (2) a letter from the Armstrong County Planning Department of Planning and Development stating that the Landfill's designation as a primary facility for county waste will be deemed complete upon approval by DEP; (3) a contract between Armstrong County and Leatherwood—executed by Leatherwood and "to be executed by County Commissioners upon permit approval"—pursuant to which Leatherwood will guarantee availability of disposal

capacity for Armstrong County waste for a ten-year period; (4) a report prepared by the National Solid Wastes Management Association entitled "Landfill Capacity in North America, 1991 Update." (Exh. B-2, Form D, Att. D, § H).[20]

Review of these materials shows that Leatherwood has met the § 271.127(g) criteria for the Armstrong County waste. The Landfill is expressly provided for in the Armstrong County Plan. In addition, Leatherwood's contract with Armstrong County guaranteeing availability of capacity is an acceptable implementing document for the county plan. 53 P.S. § 4000.513; 25 Pa. Code § 272.231(b) (1995).[21] Where a facility has satisfied the two criteria in § 271.127(g), the regulations do not require the reviewer to examine evidence of actual need for the new disposal capacity. *Somerset County Commissioners*, 1996 EHB at 375. We note that the Landfill was designated in the Armstrong County plan as one of eight secondary facilities and five primary landfill facilities, thus weakening the Landfill's claim that it will be needed for disposal of Armstrong County waste. Nevertheless, we believe that a need for the Landfill's disposal capacity, with respect to the Armstrong County waste, was sufficiently demonstrated by the evidence presented to the Board at the hearing.

However, the evidence before the Board does not sufficiently demonstrate a need for the Landfill with respect to the New York City waste. The only evidence in the Permit Application

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[20] The Permit Application's need analysis also contains information concerning designation of the Landfill in Westmoreland County's Act 101 plan and implementing documents. However, the Permit Application advises that as of March 1993 all Westmoreland County materials are no longer pertinent to the Permit Application and should be disregarded. The need analysis asserts that the Landfill meets certain preferred characteristics for long-term disposal facility options stated in Jefferson County's Act 101 Plan, and that the Landfill would be the most economically viable landfill in Jefferson County. However, a 1992 letter from the Jefferson County Commissioners to DEP disavows any inference that the Landfill is a potential disposal option for Jefferson County. (Exh. B-2, Att. D, § H, App. H-5).

[21] The contract between Leatherwood and Slease Trucking for disposal at the Landfill of a minimum of 9 tpd of municipal waste originating in Armstrong County, while not included within the confines of the Permit Application's need analysis, could also be considered evidence of a need for disposal capacity for Armstrong County waste. The contract may be an acceptable implementing document for the Armstrong County Plan. In any event, we have not considered the Slease Trucking contract because Leatherwood has indicated that Slease Trucking is no longer in business, and the contract therefore cannot be performed.

relevant to a showing of need for disposal capacity for the New York City waste is a 1991 report on landfill capacity in North America prepared by the National Solid Wastes Management Association. In its need analysis, Leatherwood claimed that data in the report "indicate that there is a need for disposal capacity in Pennsylvania and the northeastern United States." The data in the report belie this claim, however. For example, the report states that, between 1986 and 1991, Pennsylvania increased landfill capacity from less than five years to "greater than 10 years" of available capacity. (Exh. B-2, Form D, Att. D, § H, App. H-1, at p. 6). The report also indicated that New York State had "five to 10 years" of remaining landfill capacity. *Id.* at pp. 5-6.

Leatherwood supplemented the Permit Application material at the hearing with portions of the 1992 NYC Plan, sections from a May 2000 Draft Modification to the NYC Plan, and references to statements in the 1994 Compliance Report. (Exh. L-584; L-586; L-62). According to the 1992 NYC Plan, as of 1990 New York City generated approximately 26,000 tons per day of municipal solid waste. Private businesses generated about 14,000 tons of that waste, and the City's residents and public institutions were responsible for approximately 12,000 tons per day. The waste generated by private businesses, "commercial MSW," is collected by private haulers. Those private haulers recycled approximately 2,500 tons of commercial MSW per day, and the remainder was exported to landfills outside the city. The waste from City residents and public institutions, "residential MSW," was collected by the New York City Department of Sanitation. The NYC Plan states that virtually all of the commercial MSW is delivered to transfer stations, where after some processing, the waste is shipped to landfills outside the city. Ninety percent of the commercial MSW is disposed in five States (Pennsylvania, 35 percent; Ohio, 19 percent; West Virginia; 13 percent; New York 13, percent; Indiana, 11 percent). The NYC Plan expresses concern over the gradual decrease in the number of landfills within City limits, and the City's

increased dependence on disposal of commercial MSW in out-of-state facilities. (Exh. L-584).

The 1994 Compliance Report reiterates the concern over the City's reliance on the Fresh Kills Landfill and export of commercial MSW for disposal at out-of-state facilities. City waste management officials specifically identified "a need to have alternate disposal options including export of solid waste to landfills located outside of the City." The 1994 Compliance Report indicates that, as of 1994, at least 10,000 tons per day of commercial MSW was being exported outside of the City. (Exh. L-62, at pp. 6-1 to 6-14).

The May 2000 Draft Modification to the NYC Plan indicates that approximately 5,100 tpd of waste was still going to the Fresh Kills Landfill as of December 1999, but that the City was in the process of phasing down disposal at that landfill. The document also states that the City is in the process of acquiring out-of-City disposal capacity which will allow it to replace the Fresh Kills Landfill. (Exh. L-586, at pp. 95-96). Finally, we consider Leatherwood's two contracts with waste brokers for disposal at the Landfill of specific volumes of commercial MSW originating in New York City.

The evidence submitted by Leatherwood at the hearing adequately demonstrates a generic need for disposal capacity for NYC commercial MSW at facilities located outside of New York City. The City reportedly has been exporting virtually all its commercial MSW to out-of-City facilities for many years, is dependent upon that practice to address its waste disposal needs, and intends on continuing the practice for the foreseeable future. But, the pertinent question is whether *the Landfill* provides needed disposal capacity for the New York City waste.

Leatherwood's evidence of need does not pinpoint the Landfill as a source of needed disposal capacity for the New York City waste the Landfill proposes to accept. There was no evidence that the New York City waste results from an increase in waste generation. Evidence of

a future decrease in available capacity at other landfills currently used for New York City's commercial MSW was sketchy at best. Leatherwood did not present any expert testimony on this issue, and did not supplement the 1991 National Solid Wastes Management Association Report on landfill capacity submitted with its Permit Application. We must presume that the New York City waste has been legally disposed at other suitable facilities during the nearly seven-year period from Permit issuance to the present, in the absence of any evidence to the contrary. No evidence on the disposal capacity remaining in facilities currently being used to dispose of New York City commercial MSW was presented to the Board. In our view, the evidence does not adequately demonstrate that *the Landfill* would provide *needed* disposal capacity for the New York City waste it proposes to accept.

Finally, the evidence does not demonstrate a need for the Landfill facility as a whole, as opposed to a particular waste stream. Meeting the criteria of § 271.127(g) for the Armstrong County waste is not necessarily sufficient to show a need *for the facility*. *See* 25 Pa. Code § 271.127(h) (1995) ("Meeting the requirements of this section does not, by itself, mean that the proposed facility or expansion is actually needed."). The Landfill was designated as one among thirteen different existing or proposed facilities in the plan for Armstrong County (a not very densely populated county), and was not designated in any other Act 101 plan (such as Allegheny or Westmoreland counties which encompass much of the Pittsburgh urban area). The amount of waste the Landfill would likely receive from Armstrong County alone would be so low as to be insignificant when considering the overall need for a landfill facility. The evidence does not show a need for the Landfill with respect to the 300,000 tons per year of NYC commercial MSW, and there were no other firm sources of waste proposed for acceptance.

Without addressing the question of the minimum threshold a permit applicant must meet

to demonstrate a "need for the facility," it is clear that the Landfill's showing of an ongoing need for disposal capacity for only the Armstrong County waste does not surmount the threshold for demonstrating a "need for the facility." In sum, based on the evidence before the Board, Leatherwood has not satisfied the requirements of § 271.127(f) with respect to the demonstration of need for the Landfill.

IV. The Need/Harm Balancing Test

According to Section 271.201(a): "A permit application [for a municipal landfill] will not be approved unless the applicant affirmatively demonstrates that the following conditions are met: . . . the need for the facility shall clearly outweigh the potential harm posed by operation of the facility, based on the factors described in § 271.127 (relating to environmental assessment)." 25 Pa. Code § 271.201(a)(3) (1995). Before the Permit could be lawfully issued, DEP had to reach a determination on "the need for the landfill," in accordance with §§ 271.127(f), (g) and (h); complete the environmental assessment process for all harms to the environment or public health and safety posed by the Landfill; balance "need" with "harm"; and, reasonably conclude that "the need for the facility clearly outweigh[ed] the potential harm posed by operation of the facility." 25 Pa. Code § 271.201(a)(3) (1995).

The Local Government Officials argue that DEP incorrectly applied § 271.201(a)(3) to the Permit Application. In particular, they point to DEP's conversion of need into a volume of waste and the consequent irrationality of the required balancing judgment. They also contend that DEP failed to properly weigh all of the harms posed by the Landfill. Finally, they assert that there remains no demonstrated need for the Landfill, and that the harms posed to aviation safety, air quality and highway traffic are tangible and grave. Consequently, they argue that, contrary to the regulatory requirement, the harms actually outweigh the need for the facility.

Leatherwood insists DEP thoroughly considered the harms posed by the Landfill when

undertaking the environmental assessment process, and that DEP collectively weighed all of the information establishing need against all the identified potential harms. Leatherwood argues that DEP correctly concluded that the actual negative impacts from the Landfill "are relatively low," and that the Permit Application contained ample evidence of need for Armstrong County and New York City waste streams. Leatherwood contends that the Local Government Officials have failed to prove that DEP's conclusion that need clearly outweighed harm was a clear error of law. Finally, Leatherwood vigorously disputes DEP's argument that the Board should effectively disregard DEP's performance of the need/harm balancing test and, given the new evidence presented at the hearing, should essentially balance "on a clean scale."

When applying § 271.201(a)(3), DEP must engage in a complex judgment similar to the kind of judgment exercised by a court of law; indeed, the regulation explicitly speaks of *weighing* "need" against "harm." This regulation does not involve a mechanical application of a check-list type requirement, *see, e.g.*, 25 Pa. Code § 271.125(a) (1995) (compliance history information); nor a determination that an activity meets a quantified technical standard, *see, e.g.*, 25 Pa Code § 273.254(a) (1995) (performance standards for secondary liner). Nevertheless, the regulations provide little guidance on precisely how the balancing judgment should be made, and the 1993 Policy Manual merely states: "Once the harms and need are identified, they must be weighed against each other." (Exh. B-39, at 16). The litigants do not cite the Board to any prior cases examining the agency's application of the need/harm balancing test and our research has not uncovered any guiding precedent.

When considering the proper manner of applying the need/harm balancing test of section 271.201(a)(3) , we find the Commonwealth Court's discussion in *Payne v. Kassab* instructive:

> [Article I, Section 27 of the Pennsylvania Constitution] was intended to allow the normal development of property in the Commonwealth, while at the same time

> constitutionally affixing a public trust concept to the management of public natural resources of Pennsylvania. The result of our holding is a controlled development of resources rather than no development.
>
> We must recognize, as a corollary of such a conclusion, that decision makers will be faced with the constant and difficult task of weighing conflicting environmental and social concerns in arriving at a course of action that will be expedient as well as reflective of the high priority which constitutionally has been placed on the conservation of our natural, scenic, esthetic and historic resources.
>
> Judicial review of the endless decisions that will result from such a balancing of environmental and social concerns must be realistic and not merely legalistic.

Payne v. Kassab, 312 A.2d 86, 94 (Pa. Cmwlth. 1973), *aff'd*, 468 Pa. 226 (1976). *See also* 35 P.S. § 6018.102(10) (an express purpose of the SWMA is to "implement Article I, section 27 of the Pennsylvania Constitution"); 53 P.S. § 4000.102(B)(13) (same); *National Solid Wastes Management Association v. Casey*, 600 A.2d 260, 265 (Pa. Cmwlth. 1991), *aff'd*, 619 A.2d 1063 (Pa. 1993) (the "balancing of environmental and societal concerns . . . mandated by Article I, Section 27, was achieved through the legislative process which enacted Acts 97 and 101 and which promulgated the applicable regulations").

Turning to DEP's review of the Permit Application, we find that the agency committed an error of law when applying the need/harm balancing test required by § 271.201(a)(3) for several reasons. First, DEP did not properly conduct the need assessment and therefore could not have weighed the substantial evidence of need in any reasonable fashion; second, the conversion of need into a numerical figure, without similarly quantifying overall harm and developing a standard for comparison of the two numerical figures, rendered futile any attempt to rationally compare "need" and "harm"; third, the degree of harm to aviation safety in the form of a bird hazard was never adequately assessed by the applicant or the agency, nor was a bird hazard mitigation plan submitted, thus making it impossible to properly weigh all the harm posed by the Landfill; finally, in the absence of a determination of the level of bird hazard after mitigation, a

rational comparison of need with harm could not be made.

We disagree with Leatherwood's contention that DEP collectively weighed all of the information concerning need for the Landfill facility for the reasons articulated above in Section II(D). DEP's analysis of need was mechanical, and did not involve a judicious consideration of the need-related evidence. In addition, the reduction of "need" into a number ("1,053,285 tons of municipal waste") for use in the need/harm balancing test created multiple problems. The various harms posed by the Landfill were not similarly reduced into a numerical figure. There was no evidence of any system for translating the individual harms (*e.g.*, disturbance to on-site surface stream flows, negative impacts on "aesthetics," or highway traffic from 130 vehicles per day) into a numerical value, before or after mitigation. Even if harms to the environmental and public health and safety could be assigned a numerical value based on an elaborate conversion system, there would seem to be no reasonable method for comparing need as a volume of waste with the harm number, *i.e.*, for comparing apples with apples.

With the exception of the bird hazard, we do not fault DEP's examination of the harms to the environment and public health and safety, *see* Exh. B-39 at pp. 3-5, nor its conclusion that the actual impacts from the particular harms evaluated "are relatively low, in most cases not resulting in significant environmental disturbance nor requiring significant mitigation." *Id.* at 5. However, the treatment of the bird hazard was illogical and unreasonable. Mr. McCumber noted in his analysis that "[p]articular attention should be given to the potential harm associated with aircraft birdstrike." Exh. B-39, at p. 5. Yet, no adequate assessment of the degree of harm posed to aviation safety was completed prior to performing the need/harm balancing test. Regardless of the weight given to the individual bird hazard harm, in the absence of such an evaluation the reviewer could not have weighed all the harms posed against the need for the facility, as required

by the regulation. Similarly, without submission of a bird hazard mitigation plan prior to completing the need/harm balancing analysis, DEP could not reach a determination on the gravity of the bird hazard after mitigation.

Having concluded that DEP incorrectly applied the need/harm balancing requirement of § 271.201(a)(3) to the Permit Application, we must decide whether to consider the balance of need against harm anew in light of the evidence presented to the Board. Leatherwood asserts that, despite its power of *de novo* review, the Board is limited to determining whether DEP's application in 1995 of the need/harm balancing test was unlawful or unreasonable. This argument contradicts the relevant caselaw. As Commonwealth Court explained nearly two decades ago:

> [W]hen an appeal is taken from DER to the Board, the Board is required to conduct a hearing *de novo* in accordance with the provisions of the Administrative Agency Law. In cases such as this, the Board is not an appellate body with a limited scope of review attempting to determine if DER's action can be supported by the evidence received at DER's factfinding hearing. The Board's duty is to determine if DER's action can be sustained or supported by the evidence taken by the Board. If DER acts pursuant to a mandatory provision of a statute or regulation, then the only question before the Board whether to uphold or vacate DER's action. If, however, DER acts with discretionary authority, then the Board, based upon the record before it, may substitute its discretion for that of DER.

Warren Sand & Gravel, 341 A.2d at 565. DEP's judgment that the need for the Landfill clearly outweighed the harms was unlawful and unreasonable; consequently the Board, based upon the record before it, may substitute its judgment for that of DEP. *Id.*

We need not engage in a comprehensive examination and weighing of the evidence of need and harm for purposes of performing the need/harm balancing test anew, however. We note that the evidence of need, as analyzed in detail above, is very weak. The Landfill is one of many designated landfills in the Armstrong County plan, and there was no evidence that the Landfill, in particular, is needed for disposal of the NYC commercial MSW—as opposed to any number

of out-of-state landfills currently being used for disposal of such waste. On the other hand, we generally concur with DEP's analysis of the individual harms set forth in Exhibit B-39 and its conclusion that the negative impacts on the environment from the Landfill, after the proposed mitigation measures, would be relatively low and within tolerable limits. Nevertheless, the gap left by the inadequate assessment of the bird hazard posed by the Landfill remains unfilled. A prerequisite of the need/harm balancing test is an understanding of the gravity of *all* the harm to the environment and public health and safety which the proposed landfill will create. Until a proper risk assessment has been completed, and until a bird hazard mitigation plan has passed muster with technical experts at government agencies by demonstrating reduction of the risk of bird/aircraft collisions to an acceptable level, the need/harm balancing test cannot be rationally performed. As such, DEP's action cannot be sustained by the evidence taken by the Board.[22]

CONCLUSIONS OF LAW

1. DEP committed errors of law and otherwise acted unreasonably when applying 25 Pa. Code §§ 271.127(a), (b) and (c) (1995) with respect to the harm to public safety posed the Landfill in the form of a bird hazard.

2. The evidence presented to the Board demonstrated that the Landfill will cause a

[22] The Local Government Officials presented evidence to the Board concerning the analysis of social and economic benefits contained in the Permit Application, and they argued extensively that the analysis violated the regulations. Section 271.127(d) states: "If the application is for the proposed operation of a municipal waste landfill or resource recovery facility, the applicant shall describe in writing the social and economic benefits of the project to the public." 25 Pa. Code § 271.127(d) (1995). It is not clear precisely how § 271.127(d) was violated. There is no dispute that Leatherwood submitted a comprehensive analysis of the social and economic benefits Leatherwood claimed the Landfill would provide. On its face, the regulation does not delineate how the information in the benefits analysis shall be used in the review process, but merely requires the application to contain the benefits analysis. Logically, the information would not be required unless it would have an impact on the agency's decisionmaking process. But we were unable to ascertain from the evidence what effect, if any, the benefits analysis had on DEP's ultimate decision to issue the Permit. The Local Government Officials did not offer any persuasive arguments on how the benefits analysis must be used; instead they attempted to prove that Leatherwood's analysis contained various factual inaccuracies. *See Throop Property Owners*, 1999 EHB at 1009 (to comport with § 271.127(d), application's description of the social and economic benefits "must be accurate"). Given the disposition of this appeal, and particularly in light of the recent amendments to the solid waste regulations significantly revising § 271.127(d), *see* 30 Pa. Bull. 6685 (Dec. 23, 2000), we decline to further address this issue.

significant bird hazard, and that Leatherwood has not yet shown that this serious threat to public safety can be successfully mitigated to an acceptable level of risk, contrary to the mandate of the SWMA and 25 Pa. Code §§ 271.127(a), (b) and (c) (1995).

3. Leatherwood failed to demonstrate compliance with 25 Pa. Code §§ 271.127(f) and 271.201(a)(6) (1995), and DEP's determination that Leatherwood adequately met the requirements of these regulatory provisions was an error of law.

4. DEP committed an error of law and otherwise acted unreasonably when it determined that Leatherwood satisfied the criterion of § 271.201(a)(6) concerning express provision in waste management plans.

5. The Permit Application does not contain a description of New York law adequate to meet the requirements of 25 Pa. Code § 271.125(b) (1995), and DEP failed to strictly apply § 271.125(b) to the applicant, contrary to law.

6. DEP's conclusion that disposal of the New York City waste at the Landfill would not violate applicable laws was reasonable based on the evidence presented to the Board.

7. Leatherwood failed to comply with 53 P.S. § 4000.507(a)(2)(iii) and 25 Pa. Code § 273.139(c) (1995) with respect to the New York City waste.

8. DEP's acceptance of the site suitability analysis in the Permit Application concerning New York City waste was unreasonable, and DEP's application of § 273.139(c) was therefore an error law.

9. DEP misapplied the requirements of §§ 271.127(f), (g) and (h) to the Permit Application. DEP's failure to accumulate and examine the relevant information submitted in the Permit Application and otherwise obtained by DEP—as that evidence related to the specific question of a need for the disposal capacity being created by the Landfill—constituted an abuse

of the discretion afforded the agency by § 271.127(f), (g) and (h).

10. The evidence presented to the Board did not demonstrate a need for the Landfill facility, as required by 25 Pa. Code § 271.127(f), (g) and (h) (1995).

11. DEP committed an error of law when applying the need/harm balancing test required by § 271.201(a)(3) during its review of the Permit Application.

12. The Local Government Officials have carried their burden of proving that DEP committed errors of law and acted unreasonably when issuing the Permit to Leatherwood.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

JEFFERSON COUNTY COMMISSIONERS, et al.	:	
	:	**EHB Docket No. 95-097-C**
v.	:	
	:	**(Consolidated with EHB Dkt. Nos. 95-102-C and 2000-066-C)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LEATHERWOOD, INC., Permittee	:	**Issued: February 28, 2002**

ORDER

AND NOW, this 28th day of February, 2002, it is hereby ORDERED as follows:

1. The appeals docketed at 95-097-C and 95-102-C are unconsolidated with the appeal docketed at 2000-066-C;

2. The appeals of the Local Government Officials docketed at 95-097-C and 95-102-C are hereby sustained;

3. Solid Waste Permit No. 101604 issued by the Department of Environmental Protection on May 12, 1995 to Leatherwood, Inc. is hereby revoked.

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
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

Dated: February 28, 2002

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

DAUPHIN MEADOWS, INC.	:	
	:	
v.	:	**EHB Docket No. 2000-212-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and UPPER DAUPHIN AREA CITIZENS' ACTION COMMITTEE and COUNTY OF DAUPHIN, Intervenors	:	**Issued: March 5, 2002**

OPINION AND ORDER ON MOTIONS IN LIMINE

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

Synopsis:

In denying two motions in limine, the Board finds that a party's argument that a claim is barred by administrative finality is not the proper subject of the motions. The arguments in the appellant's pre-hearing memorandum are not clearly outside the scope of challenges raised in the notice of appeal. Given the possibility that the permit in question will be found to be ambiguous, the Board declines to exclude extrinsic evidence relevant to the meaning of the permit, including evidence of expiration dates at other landfills. Pa.R.Ev. 611 governs the appellant's examination of a Departmental employee when called in the appellant's case in chief.

OPINION

This appeal boils down to two basic issues: (1) Did Dauphin Meadows, Inc.'s ("Dauphin Meadows's") permit for its landfill in Washington and Upper Paxton Townships, Dauphin County expire in 2000, or does it expire in 2004? and (2) If the permit did expire in 2000, did the

Department of Environmental Protection (the "Department") err in refusing to renew the permit? If we decide the first issue in favor of Dauphin Meadows, there will be no need to address the second issue for the time being.

The parties are debating permit's expiration date because the Department issued Dauphin Meadows a permit in 1990 that contained an express expiration date of September 26, 2000. The Department issued a modification of the permit in 1994 that authorized a major expansion of the landfill. The modification did not contain an express expiration. For a number of reasons that we need not get into here, Dauphin Meadows contends that the 1994 modification had a ten-year term of its own. The Department argues that the 1994 modification did not change the expiration date, and the permit as modified retained the 2000 expiration date.

The Department has filed a motion in limine. It argues that Dauphin Meadows raised issues in its pre-hearing memorandum that are outside the scope of the issues listed in its notice of appeal. Therefore, Dauphin Meadows should be precluded from presenting any evidence on those new issues. Secondly, the Department asks that we preclude Dauphin Meadows from presenting any evidence regarding the Department's permitting actions at other facilities. Third, in an expansion of its second argument, the Department argues that the only evidence that should be considered in interpreting the permit as modified is the permit itself. Finally, the Department asks that Dauphin Meadows not be permitted to call one of its employees as a witness "as if on cross." The Intervenor, Dauphin County, concurs in the Department's motion.

The other intervenor, the Upper Dauphin Area Citizens' Action Committee ("UDACAC"), has also filed a motion in limine. UDACAC first argues that Dauphin Meadows's appeal amounts to a collateral attack on the 1994 permit modification, and is, therefore, precluded by the doctrine of administrative finality. Secondly, UDACAC joins with

the Department in seeking to bar Dauphin Meadows from introducing any evidence aside from the permit itself regarding the expiration date. UDACAC characterized this extrinsic evidence as parole evidence. UDACAC also joins the Department in arguing that evidence regarding the Department's permitting actions at other facilities should not be admitted, and that Dauphin Meadows has raised issues in its pre-hearing memorandum that go beyond its notice of appeal. Dauphin Meadows contests all of the bases for evidentiary exclusion in both motions.

"A party may obtain a ruling on evidentiary issues by filing a motion in limine." 25 Pa. Code § 1021.88. A motion in limine is a procedure for obtaining a ruling on the admissibility of evidence before it is offered at the hearing. *Delpopolo v. Nemetz*, 710 A.2d 92, 94 (Pa. Super. 1998). The motion is an extremely useful device that enables the Board to consider important evidentiary questions in a setting more conducive to thoughtful analysis than that presented when an oral objection is raised in the midst of a hearing. Therefore, the Board welcomes such motions.

Motions in limine, however, should not be used as motions for summary judgment in everything but name. A typical (and perfectly acceptable) motion in limine is presented on the eve of a hearing and otherwise does not usually comply with all of the procedural requirements that relate to a motion for summary judgment. *See* 25 Pa. Code § 1021.73. There is obviously good reason for those requirements, and we must be wary of permitting parties to disregard them by using the vehicle of a motion in limine to obtain a ruling on the merits. Thus, a motion in limine generally should only be used to challenge whether certain evidence relative to a given point is admissible, not whether the point itself is a valid one. Of course, this principle can be easier to state than to apply. One clue to determining whether a motion is properly limited is whether it cites to specific pieces of evidence and asks that they be excluded.

Dauphin Meadows characterizes both of the motions as motions for summary judgment, essentially in their entirety, and argues that they should be rejected on that basis alone. Although we do not go as far as Dauphin Meadows, we do agree that UDACAC's argument regarding administrative finality relates to the merits of appeal far more than any particular evidence offered in support of an issue in the appeal. Therefore, we will not address that issue in the instant context. Although the argument that Dauphin Meadows's pre-hearing memorandum goes beyond its notice of appeal is also not evidence-specific, it could not have been raised until Dauphin Meadows filed its pre-hearing memorandum. Therefore, it is appropriate to address that issue in the current context. The other issues raised are also appropriately the subject of motions in limine.

Pre-Hearing Memorandum v. Notice of Appeal

Issues not raised in the notice of appeal (or authorized amendments thereto) are waived. *Pennsylvania Game Commission v. Department of Environmental Resources*, 509 A.2d 877 (Pa. Cmwlth. 1986), *aff'd*, 555 A.2d 812 (Pa. 1989). Only issues that are clearly outside the scope of challenges raised in the notice of appeal are waived, and the Board will not find a waiver unless the matter is free from doubt. *Ainjar Trust v. DEP*, EHB Docket No. 99-248-K slip op. at 9-10 (January 5, 2001); *Williams v. DEP*, 1999 EHB 708, 716.

Dauphin Meadows claimed in its notice of appeal that the Department acted unlawfully and improperly when it determined that the permit expired in 2000. In its pre-hearing memorandum, it explains why the Department acted improperly and unlawfully. It argues that the Department acted unlawfully and improperly in finding that the permit expired in 2000 because that finding, among other things, violated Dauphin Meadows's constitutional rights and its right to be treated fairly, was inconsistent with contract law, was discriminatory, and was

motivated by improper factors. These arguments do not clearly fall outside of the scope of the claim set forth in the notice of appeal.

Extrinsic Evidence

The movants' argument that we should not consider any extrinsic evidence regarding the meaning of the permit as modified is based on the premise that the permit is clear and unambiguous. In some such cases, it may not be necessary to look beyond the four corners of the document in defining its meaning. *See Southwest Pennsylvania Natural Resources, Inc. v. DER*, 1982 EHB 48, 54, *aff'd*, 465 A.2d 108 (Pa. Cmwlth. 1983).

Although we will reserve a final decision on the question for our adjudication, there appears to at least be a possibility that the Board will conclude that the permit as modified is not free from ambiguity. For example, condition 33 of the 1994 modification discusses the permittee's right to pay the performance bond in installments if the facility will operate for at least 10 years. The Department will argue that the condition is inapplicable boilerplate. Dauphin Meadows will argue that there was no reason to include language allowing for installment payments if the permit modification was not intended to last for 10 years. The issue is certainly not free from doubt. Because the movants' premise is questionable, we cannot at this time conclude that all extrinsic evidence must be excluded. Of course, the movants are free to object to particular items of evidence at the hearing, but we decline to make an all-inclusive ruling at this time that all extrinsic evidence is irrelevant.

Along the same lines, whether the permit as modified can be considered to be a fully integrated document is, at best, questionable at this point. Accordingly, the parole evidence rule would also not appear to be applicable.

The movants specifically challenge Dauphin Meadows's announced intention to present

evidence regarding expiration dates in other landfill permits. Dauphin Meadows counters that this evidence will help the Board interpret the permit as modified. It also argues that we may rely on such evidence to assess whether the Department's "actions" were reasonable.

It is not entirely clear to what "actions" Dauphin Meadows is referring in its second argument. The motions in limine and the response thereto focus upon the expiration-date issue. Therefore, the "action" would appear to be the Department's determination that the permit expired in 2000 (as opposed to its denial of the renewal based upon inadequate remaining capacity). One of the reasons that we are having difficulty following the argument is that, if the permit expired in 2000, there does not seem to be any room for debating the "reasonableness" of the determination that a renewal was required. Whether the permit expired in 2000 or 2004 is a question of permit interpretation for this Board to resolve.

The Department posits that decisions regarding a permit's expiration date are case-specific. As a result, it argues that delving into the reasons why a date was selected at other facilities leads us too far afield. Dauphin Meadows's claim, however, seems to be that expiration dates are generally not case-specific, and that, absent unusual circumstances not present here, permit modifications for major landfill expansions nearly always contain a ten-year term, as demonstrated by the Department's actions at other facilities.

The Board has traditionally been wary of looking into what the Department did in connection with another party under a different set of facts, particularly in enforcement cases. *See, e.g., F.R.& S., Inc. v. DEP*, 1998 EHB 947, 951-52. Quite simply, how the Department acted in another case is unlikely to have much probative value to the Board in deciding whether the Department's action in the case at hand was *reasonable*. 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. *See Sunbeam Corp. v. Liberty Mutual Insurance Co.*, 781 A.2d 1189, 1193 (Pa. 2001). Therefore, although we will remain vigilant in ensuring that evidence concerning other facilities does not go too far afield, we will allow Dauphin Meadows to at least proceed with the effort in support of its permit interpretation claim.

Leading Questions

In response to the Department's motion, Dauphin Meadows has acknowledged that its examination of a Department witness that it calls in its case in chief is constrained by Pa. R.Ev. 611(c).

For the foregoing reasons, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAUPHIN MEADOWS, INC.	:	
	:	
v.	:	**EHB Docket No. 2000-212-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and UPPER DAUPHIN AREA CITIZENS' ACTION COMMITTEE and COUNTY OF DAUPHIN, Intervenors	:	

ORDER

AND NOW, this 5th day of March, 2002, the Department's and the Intervenor's motions in limine are **DENIED**.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: March 5, 2002

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JAMCRACKER, INC. **c/o JOHN GONSALVES**	:	
v.	:	**EHB Docket No. 2001-249-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 7, 2002**

OPINION AND ORDER
ON MOTION TO AMEND

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

Synopsis:

In response to a motion for leave to amend, the Board corrects an ambiguity in the caption of the appeal to clarify that John Gonsalves is an appellant separate from Jamcracker, Inc.

OPINION

The Department of Environmental Protection (the "Department") issued a water obstruction and encroachment permit to John M. Gonsalves ("Gonsalves"). By letter addressed and sent to Gonsalves, the Department suspended the permit. On October 29, 2001, the Board received a notice of appeal captioned as follows:

JAMCRACKER, INC.
c/o JOHN GONSALVES
[address]
Appellant,

vs.

[DEP]
Appellee.

The first paragraph of the notice read: "On July 12, 1999, John M. Gonsalves, on behalf of Jamkracker, Inc. (Appellant) received a permit...." In listing objections to the Department's permit suspension, the notice of appeal switches back and forth between allegations referring to "Mr. Gonsalves" and allegations referring to "Appellant." Except for the first paragraph, it would appear that the author of the notice may have viewed the two entities as interchangeable. This Board captioned the appeal as "Jamcracker, Inc. c/o John Gonsalves" in Pre-Hearing Order No. 1 (October 31, 2001), and that caption has remained in place ever since.

In attempting to obtain discovery responses, the Department learned that the attorney who entered his appearance in this case has left the country on an extended tour of duty in the Peace Corps. After being advised of the attorney's absence, the Department wrote "Jamcracker, Inc. c/o John Gonsalves" directly in an effort to obtain discovery responses.

We received a motion for leave to amend appeal shortly thereafter. The motion in its entirety reads as follows:

> Appellant moves to amend the appeal filed in this action to remove Jamcracker Inc. as appellant, and in support thereof states as follows:
>
> [DEP's permit] is issued to "JOHN M. GONSALVES" individually.
>
> A copy of said permit is attached hereto as Exhibit A.
>
> John M. Gonsalves, individually, intends to pursue this appeal.
>
> John M. Gonsalves

The Department opposes the motion because it does not comply with the Board's rules, has been filed by a non-attorney on behalf of a corporation, and contains insufficient justification for allowance of an amendment. The Department also argues that allowing Gonsalves to pursue the

appeal individually would, in effect, allow a new, late appeal by a new party.

Needless to say, the appeal papers are somewhat ambiguous, and this Board must bear some responsibility for perpetuating the ambiguity by captioning the appeal as we have. As the caption now stands, it can fairly be argued either that Gonsalves is a separate appellant or that Gonsalves was named simply to provide a contact person and mailing address for the true appellant, Jamcracker. When we consider that (1) Gonsalves's fundamental rights are at stake, (2) this Board included both names in the caption, and (3) this Board's has a preference for deciding cases in a just manner and on the merits, 25 Pa. Code § 1021.4, we must resolve this ambiguity in favor of Gonsalves. We will interpret the appeal papers to mean that Jamcracker and Gonsalves are both appellants. Therefore, Gonsalves is not being added as a party, and the 30-day rule is not implicated. There is no need to amend the appeal to add Gonsalves.

Under the circumstances, we will accept the motion as an appropriate vehicle for effecting a withdrawal of Jamcracker's appeal.

For the foregoing reasons, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAMCRACKER, INC.	:	
c/o JOHN GONSALVES	:	
	:	
v.	:	**EHB Docket No. 2001-249-L**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

ORDER

AND NOW, this 7th day of March, 2002, in consideration of the motion for leave to amend appeal and the response in opposition thereto, IT IS HEREBY ORDERED that the caption of this appeal is revised to read as follows:

JOHN GONSALVES

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

The appeal of Jamcracker, Inc. (but not of Gonsalves) shall be marked closed and discontinued with prejudice.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: March 7, 2002

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BENJAMIN A. STEVENS and JUDITH E. STEVENS	:	
v.	:	**EHB Docket No. 2000-030-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASHINGTON TOWNSHIP MUNICIPAL AUTHORITY, Permittee	:	**Issued: March 7, 2002**

ADJUDICATION

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

Synopsis:

In an appeal brought by landowners who live adjacent to a site used for the land application of sewage sludge, the Board upholds the procedures and standards utilized by the Department in reviewing the site's suitability. The Board rejects the argument that the site cannot be reviewed in accordance with procedures applicable under the general permit for the beneficial use of sludge. In addition, the permittee may use the site in question because it was adequately investigated, despite the fact that it is not possible to determine with precision exactly how much sludge was previously applied to the site.

FINDINGS OF FACT

1. Benjamin A. and Judith E. Stevens (the "Stevenses") reside at 7985 Lyons Road in Washington Township, Franklin County (Joint Stipulation of the Parties (hereinafter "Stip.")

3; Appellants' Exhibit ("A.Ex.") A-1, A-2; Commonwealth's Exhibit ("C.Ex.") 1.)

2. The Department of Environmental Protection (the "Department") is the agency of the Commonwealth of Pennsylvania authorized to administer and enforce the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101, *et seq.*, the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1, *et seq.*, Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. 510-17, and the rules and regulations promulgated thereunder.

3. The Washington Township Municipal Authority (the "Authority") operates a sewage treatment facility in the Township that generates sewage sludge. (C. Ex. 1.)

4. The Authority owns approximately 98.7 acres of farm fields on the north side of Lyons Road next to the Sevenses' property (the "WTMA farm"). (Stip. 4, 5, 22; A.Ex. A-1.)

5. On May 24, 1997, the Department issued and published for availability statewide General Permit 08, which authorizes under certain conditions the beneficial use of non-exceptional quality sewage sludge to be land applied in the Commonwealth. (Stip. 8; A.Ex. 11.)

6. The Department granted the Authority's Notice of Intent to be covered under General Permit 08 by issuing a coverage approval to the Authority on June 3, 1999. (Stip. 9.) The coverage approval document was denominated "Permit No. PAG-08-3538." (Stip. 10; A.Ex. A-11.) The coverage approval did not specify that the use of any particular site was authorized. (Transcript of Proceedings page ("T.") 237; A.Ex. A-11.)

7. Coverage Approval PAG-08-3538 sets forth the minimum requirements for the quality of sludge to be generated at the Authority's facility and the requirements for the land application activity itself. (Stip. 11; A.Ex. A-11.)

8. The parties have stipulated that the Stevenses have not challenged the Authority's

use of General Permit 08 in that they have not asserted that the sludge generated at the Authority's facility fails to meet the requirements or parameters set forth in the General Permit or 25 Pa. Code Chapter 271, Subchapter J, 25 Pa. Code §§ 271.901-933. (Stip. 12.)

9. The parties have also stipulated that the Stevenses have not asserted that the sludge generated at the Authority's facility fails to meet the requirements set forth at 25 Pa. Code Chapter 271, Subchapter J, 25 Pa. Code §§ 271.901-933. (Stip. 13.)

10. By letter dated January 24, 2000, the Authority notified adjacent landowners, including the Stevenses, of its intention to land apply sewage sludge to the farm fields. (Stip. 14; A.Ex. A-9.)

11. By packet dated May 18, 2000, the Authority, as required, submitted a Notice of First Land Application (the "30-day notice") to the Department, which contained technical information regarding the WTMA farm and its suitability for land application. (Stip. 15; T. 238-239; A.Ex. A-12; C.Ex. 1.)

12. In the course of its review of the 30-day notice, the Department conducted a field inspection of the WTMA farm. (Stip. 16; C.Ex. 2.) The Authority revised its 30-day notice in response to comments from the Department. (Stip. 17, 18; C.Ex. 3, 4.)

13. The Department wrote the Authority a letter dated July 28, 2000 indicating that the use of the WTMA farm for land application of the Authority's sludge conformed with the Coverage Approval and applicable regulations. (Stip 19; A.Ex. A-26.)

Prior Metals Loading on the WTMA Farm

14. Based upon risk assessments, the Environmental Protection Agency ("EPA") has developed a list of metals that are typically found in sewage sludge that, when applied to land over time, can accumulate to the point of posing a risk of harm. EPA has prepared a list of

values expressed in pounds per acre for each metal. Each value is the level at which cumulative loading of the metal is still safe, but poses a concern if the metal continues to accumulate. The values are known as Cumulative Pollutant Loading Rates ("CPLRs"). The Environmental Quality Board has adopted the CPLRs as part of the Commonwealth's regulatory program. 25 Pa. Code § 271.914(b)(Table 2). (T. 272-274, 282, 300; A.Ex. A-12.)

15. The Authority's coverage approval provides as follows:

> Before non-exceptional quality sewage sludge is applied to the land, the person who proposes to apply the sewage sludge shall contact the Department's regional office or the District Mining Office that has jurisdiction for the site where the sewage sludge will be applied to determine, based on existing and readily available information, whether non-exceptional quality sewage sludge has been applied to the site since September 7, 1980.
>
> 3. If non-exceptional quality sewage sludge has been applied to the site, and the cumulative amount of each pollutant applied to the site in the sewage sludge is not known, an additional amount of each pollutant shall **not** be applied to the site.

(Section C.1.f.3 [A.Ex. A-11].)

16. The Authority historically utilized several farms for the land application of its sludge. (T.113; A.Ex. A-18.)

17. The Authority is not able to identify with precision where it land applied sludge in the past, although it knows generally what farms were used. (T. 113-114, 162, 188, 366, 437-438.)

18. The WTMA farm consists of two fields: Field 1 and Field 2. (C. Ex. 2.) Sludge was applied to Field 1 in 1980-81, and in Field 2 at times between 1981 and 1988 pursuant to permit previously held by the Authority (Permit No. 601861). (T. 147-148, 175, 412-413; A.Ex. A-25.)

19. In seeking approval to use the WTMA farm, the Authority estimated the amount of loading on the site of metals as a result of prior land applications. (A.Ex. 12; C.Ex. 1, 4.)

20. In estimating prior loading, the Authority assumed that all of the sludge generated from 1980 through April 1981 was applied to each WTMA farm field, even though some or all of it could have been applied to other fields. (T. 161, 202, 412, 416, 439, 441.) In other words, the Authority assumed that all of the sludge was applied to Field 1 *and* all of the sludge was applied to Field 2. (T. 416.)

21. The Authority arrived at its estimate of pollutant loading using prior sludge analyses of metal concentrations, records regarding the volume produced, production values at the plant, data regarding the wastewater flowing into the plant, and other relevant facts. (T. 160, 414-415, 421.)

22. The quality of the wastewater flowing into the Authority's plant has been consistent since it started operating in 1980. (T. 160.)

23. The Authority's system does not include any industrial discharges. (T. 159-160, 368.)

24. In addition to the estimates of prior loading, numerous soil samples were taken at the site. (T. 192-193, 201, 274-283.)

25. In approving the use of the site, the Department placed its greatest reliance on the results of the actual soil samples taken on the site. (T. 192.)

26. The Authority's estimates of prior pollutant loading on the site were supported by actual soil sample results. (T. 193, 201, 274-275, 282-283.)

27. There was not a significant difference between the results of the soil samples and background levels typical of southcentral Pennsylvania soils. (T. 194, 198-199, 213, 275-280,

423; C.Ex. 9.)

28. There is no significant difference in pollutant levels between the soil samples that were taken where sludge was historically applied and nearby background samples. (T. 194, 198-199, 213, 277; C.Ex. 9.)

29. The soil samples did not reveal any pollutants at levels close to the CPLRs. (T. 199, 204-205, 278; C.Ex. 9.)

30. Depending upon the pollutant involved, assuming a consistent quality and quantity of sludge, it will take decades of land application for the site to approach CPLR limits. (T. 279-280, 418, 425.)

31. Although the exact amount of each pollutant previously applied to the site cannot be known with certainty, it was appropriate to approve the use of the WTMA farm based upon the Authority's well-supported estimate of prior loading, the results of actual soil samples, and the fact that the Authority's system does not have any industrial discharges. (T. 193-194, 198-199, 201, 208, 275-280, 281, 301, 423; C.Ex. 9.)

DISCUSSION

We addressed the somewhat unusual procedural context of the Stevenses' appeal in a prior opinion in this matter. *Stevens v. DEP*, 2000 EHB 438. Suffice it to say at this point that the Stevenses vigorously object to the use of the WTMA farm for the land application of sludge.

The Stevenses have preserved two basic arguments for our consideration in their post-hearing briefs. First, the Stevenses have launched a generalized assault on the process that the Department used for reviewing the WTMA farm's suitability for land application of sewage sludge. Among other things, the Stevens contend that the Department lacks authority to issue letter approvals for the use of a specific site, and even if the Department has the requisite

authority, such letter approvals are actually permits that should be, but are not, issued in accordance with all of the regulatory requirements applicable to the issuance of permits under statute or regulation.

The Stevenses' second argument questions whether adequate background information regarding metals loading was available for the WTMA farm. The coverage approval states that, if sludge has previously been applied to a site, and the cumulative amount of each pollutant applied to the site in the sewage sludge is not known, an additional amount of each pollutant shall not be applied to the site. (Finding of Fact ("F.F.") 15.) Here, the Stevenses complain that the Department has "accepted in lieu of 'known' values, values based on sketchy records, imprecise locations, illegible records, estimates and assumptions." (Post-Hearing Brief at 59.)

As the parties challenging the Department's approval, the Stevenses bear the burden of proof. 25 Pa. Code § 1021.101. That burden never shifted to the Department in this appeal. In order to prevail, the Stevenses must show by a preponderance of the evidence that the Department's approval of the use of the WTMA farm was unlawful or otherwise unreasonable and inappropriate. *Smedley v. DEP*, EHB Docket No. 97-253-K (Adjudication issued February 8, 2001). The Stevenses have fallen short of such a showing.

The Site Suitability Review

The Stevenses' attack on the Department's site review process is perhaps best characterized as a generalized assault on the way the Department goes about reviewing the suitability of individual sites for the land application of sludge. The Stevenses' primary argument as we understand it is that there are no regulatory procedures or standards for the approval of individual sites under the general permit. At some points in their brief, the Stevenses seem to assert that the Department must issue individual permits for individual sites and,

therefore, it must comply with the regulations that govern the issuance of individual permits. This contention is incorrect.

The regulations expressly authorize general permits. 25 Pa. Code §§ 271.901(a) and 271.902. The Stevenses do not challenge the validity of these regulations. A general permit, by definition, does not apply to any particular site. A general permit is the opposite of an individual permit for an individual site. The Stevenses cannot at once accept the validity of general permits and complain that individual permits are not required. There is no statute, regulation, or other authority that we are aware of that would require the Department to follow procedures applicable to individual permits in implementing the general permit. Indeed, if it were necessary to follow regulations applicable to individual permits, there would be no point in having a general permit.

The Stevenses argue that there is no express authority for the Department to approve the use of individual sites under the general permit program. They note that the regulation that speaks most directly to the use of individual sites, 25 Pa. Code § 271.913, never mentions that the Department may approve or disapprove the use of individual sites under the general permit program.

Although the Stevenses are strictly correct, the Department nevertheless acted well within its authority in taking it upon itself to review the suitability of the WTMA farm. It is true that it is not necessary for the Department to approve or disapprove the use of any particular site once a facility obtains coverage approval under a general permit. So long as the facility provides the proper notices, waits 30 days, and concludes that a site meets the regulatory siting criteria, it may proceed at its own risk and use the site. 25 Pa. Code § 271.913. The legal ability to use any compliant site is conferred when the facility obtains its coverage approval.[1]

[1] The Stevenses correctly point out that no party is likely to be in a position to file an immediate appeal from a coverage approval because the coverage approval does not identify any particular site. It does not

That is not to say, however, that the Department lacks the authority, should it chose to do so, to review the suitability of a proposed site. The Department's ability to disapprove the use of a particular site is really no different than its ability to sample a facility's sludge. In both cases, the Department is simply ensuring that the permittee is performing in accordance with the permit and applicable regulations. Just as the permit and regulations spell out certain criteria that must be met regarding the quality of sludge before it may be used, the permit and the regulations spell out certain criteria regarding the application sites that must be met. *See, e.g.*, 25 Pa. Code §§ 271.913-271.915. The Department's authority to ensure a permittee's compliance with its permit and the law is beyond reasonable dispute. 35 P.S. § 6018.104(7); 35 P.S. § 691.5(b)(8); 25 Pa. Code § 271.920. Indeed, the Department would have the authority to inspect and/or disapprove the use of particular sites with or without the 30-day notice provision. *Id.* The 30-day notice requirement is not the source of the Department's authority; it simply provides the Department with notice so that it has the *opportunity* to prohibit the use of a site. Although the Department sends a letter in response to the 30-day notice, the letter does not actually "approve" the use of the site. Rather, it simply verifies that the permittee is in compliance with applicable requirements. (A.Ex. A-26.)

The Stevenses have not referred us to any authority that would support their apparent contention that a regulatory program is invalid if it allows permittees to use individual sites without the express prior authorization of the Department. We are not independently aware of any such authority. The closest that the Stevenses come to citing a legitimate attack on the

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follow, however, that the coverage approval is not an appealable action or is inherently unconstitutional. As we discussed in our earlier opinion, *Stevens*, 2000 EHB 438, when a party is notified that it could be adversely affected by the coverage approval, it has the right to appeal that coverage approval, even if it is notified well beyond the 30-day deadline that would normally apply for an appeal from the coverage approval to this Board. In fact, that is precisely what the Stevenses have done in this case.

program is their argument that the general permit program in its current form, lacking as it does any requirement for an individual site approval, is unconstitutional because it does not afford adversely affected parties with notice. The Stevenses might have had a point if this Board had not found that their right to appeal was activated by the notice of intent to use a particular site provided to nearby landowners. *Stevens v. DEP*, 2000 EHB 438, 444. That finding relieved the program from any constitutional infirmity as it relates to the notice and appeal rights provided to the Stevenses. We would add that the Stevenses obviously received notice in this case, obviously understood it, and obviously had the benefit of due process in the form of this Board's proceedings.

The Stevenses argue that the site suitability review process is objectionable because the Department does not have any standards to follow in conducting its review. The Stevenses' argument is incorrect. The regulations set forth detailed standards that must be met before a site may be used. *See, e.g.*, 25 Pa. Code §§ 271.913-271.915. Indeed, the WTMA farm was the focus of considerable study and investigation to ensure that it satisfied all of the applicable standards. Pointedly, the Stevenses provided no evidence that the site failed to comply with any of those standards.

The Stevenses make a stronger point in criticizing the fact that there are no regulatorily defined procedures for the Department to follow in making site suitability assessments under the general permit. As we discussed in *Stevens,* 2000 EHB at 443-444, the Department has filled this void with a Program Directive that sets forth the mechanics of the review process that are to be followed by Department personnel. Of course, that Program Directive is not binding. The Department may eventually chose to supplement its regulations to create binding procedures, solidify its authority vis-à-vis individual sites, and remove any lingering doubt regarding the

constitutionality of the program, but its failure to do so as of yet does not provide the Stevenses with grounds for a successful appeal in this case. The fact remains that the Department is not currently required to take *any* action in response to 30-day notices. If it is not required to take *any* action, it can hardly be criticized for failing to follow binding procedural requirements when it takes the extra steps that it did in this case to ensure the protection of the public, at least so long as it acts lawfully, reasonably, and appropriately. The record demonstrates that the Department comported itself with that general standard of conduct here.

Finally, the Stevenses have raised several other miscellaneous issues related to the Department's approval procedures. For example, they complain that the Department occasionally uses the term "biosolids" instead of sewage sludge, even though "biosolids" is not defined in the regulations. They complain that it is misleading for the Department to caption its 30-day notice "Notification of *First* Land Application" because there are situations, such as here, where sludge has actually been applied to the site previously. They complain that the Department should not be relying upon a program directive to outline procedures for renewing individual site approvals. 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 WTMA farm. 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.

Cumulative Loading

The Stevenses' second basic argument is premised on a provision in the Authority's

coverage approval that states as follows:

> If non-exceptional sludge has been applied to the site, and the cumulative amount of each pollutant applied to the site in the sewage sludge is not known, an additional amount of each pollutant shall **not** be applied to the site.

(F.F. 15.) This language tracks, but does not mimic, the language of the pertinent regulation. 25 Pa. Code § 271.913(j)(2)(iii).[2] The Stevenses complain that the Authority is only able to *estimate* the prior amount of pollutants applied to the WTMA farm, and that the estimate is not to be trusted because it is based upon sketchy records, unsupported assumptions, and the like.

Initially, we note that Stevenses have not come forward with any evidence whatsoever that the Authority's estimates and the Department's conclusions based thereon were actually wrong. They have not shown that the pollutant loadings on the site are, in fact, higher than estimated. They took no samples, offered no expert testimony, and did not attempt to show that anything specific was wrong with the Authority's calculations. In a case such as this, it is very difficult for a party who carries the burden of proof to prevail by simply criticizing the other party's methodology without at least some showing that a proper analysis would have yielded a different result. As we have said before, our role is not to pick away at errors that may have been made along the way in the permitting process, but to determine whether the Department in the final analysis made the correct decision. *O'Reilly v. DEP*, EHB Docket No. 99-166-L (Adjudication issued January 3, 2001) slip op. at 27; *Belitskus v. DEP*, 1998 EHB 846, 864. Here, the ultimate question before us is whether the WTMA farm is acceptable for land

[2] The Department states that Section 271.913(j)(2)(iii) clearly only applies to sludge applied to a site after the CPLRs were published in 1994, and that we must defer to its interpretation under the Commonwealth Court's recent decision in *Commonwealth v. NARCO*, Docket No. 1298 C.D. 2001 (February 8, 2002). (Post-Hearing Brief at 23-24.) The Stevenses' argument, however, is premised on the coverage approval, not the regulation. *NARCO* only applies to the interpretation of a *regulation*. Slip op. at 10. We do not defer to the Department's interpretation of permit conditions. *Harriman Coal Corp. v. DEP*, 2000 EHB 1008, 1014.

application. The Stevenses have made no showing whatsoever that it is not.

Turning more directly to the Stevenses' argument, we do not read the coverage approval to mean that the prior application of pollutants to a site must be known with an absolute certainty before a site may be used. We suspect that such absolute knowledge will rarely, if ever, exist. Here, the Authority performed detailed, conservative estimates of prior loadings. The Authority's plant does not service any industrial customers. And we, like the Department, are particularly persuaded by the actual soil samples that were taken on the site, which not only confirmed the Authority's estimates, but showed that the levels of metals in the soils on the site are similar to background levels of nearby sites and Pennsylvania in general. The levels found are orders of magnitude below the CPLRs, and it will take anywhere from 90 to well in excess of 1000 years (depending upon the metal involved) of applying the Authority's sludge to the site to approach the CPLRs. (T. 419.) When all of this information is combined, we are quite satisfied that the previous cumulative loading on the site is not only "known" as that term is used in the coverage approval, there is nothing to suggest that use of the site for further land application would be unsafe.

The Stevenses have devoted considerable attention to a permit for land application of sludge that the Department issued to the Authority in 1981 (Permit No. 601860). (A.Ex. A-18.) This permit was referenced in the first draft of the Authority's 30-day notice materials. The Authority believed that the permit covered what is now designated as Field 1 on the WTMA farm. (A.Ex. A-12.) When the Department questioned that conclusion, the Authority performed a more thorough review and concluded that Permit No. 601860 did not cover any fields that are now part of the WTMA farm. (T. 409.)

The Stevenses continue to contend that Permit No. 601860 may have covered part of the

WTMA farm.[3] We understand their argument to be that sludge that was previously applied to the WTMA farm pursuant to this permit was not accounted for in the calculations supporting the Authority's estimate of prior loading of the site. In support of the Stevenses' argument, a map attached to Permit No. 601860 shows two fields marked "C" and "D" that correlate to Field 2 on the WTMA farm. (A.Ex. A-18, last page.) The map also shows fields marked "A," "B," and "O." The permit provided that fields "A" and "B" were not to be used due to excessive slopes. (¶ 20.)

There are several problems with the Stevenses' argument. First, the Authority through its consultant testified that it believed that the Authority only used field "O." (T. 410.) The Stevenses have not offered any direct proof (beyond inference and innuendo) that fields "C" and "D" (now part of the WTMA farm) were used.[4] In addition to the Authority's direct testimony of only using field "O," Permit No. 601860 on its face only applied to property owned by Allen

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[3] Once again, we are confronted with conflicting arguments in the Stevenses' brief. The Stevenses' general theme is, first, that the Authority is not to be believed because of the error on their 30-day notice, (Post-Hearing Brief, passim) and second, that the WTMA farm fields were previously used as demonstrated by the old permit (Post-Hearing Brief at 47). At other points, however, they seem to concede that what is now the WTMA farm was *not* used pursuant to Permit No. 601860. (Post-Hearing Brief at 46.)

[4] The Stevenses offered into evidence a floodplain map as further proof that fields "A" and "B" were not used, which presumably was intended to bolster their case that fields "C" and "D" must have been used. The administrative law judge sustained a relevancy objection to the map, and the Stevenses continue to protest that ruling in their brief. We reaffirm the ruling here. Whatever minute probative value the floodplain map may have had was outweighed by considerations of undue delay, waste of time, and needless presentation of cumulative evidence. Pa.R.Ev. 403. The Stevenses had already devoted a disproportionate amount of time and energy in the hearing to Permit No. 601860. Whether fields "A" & "B" were designated by a federal agency to be in a floodplain provides little additional support for the Stevenses' contention that fields "C" and "D" were used. It does not disprove the Authority's position that only field "O" was used. The permit itself prohibited the use of fields "A" and "B." An additional prohibition as a result of the presence of a floodplain would have little or no incremental value. Furthermore, even if the Stevenses proved that fields "C" and "D" were used, for the reasons discussed in the text, it would not affect our resolution of this appeal in any way. The Stevenses' effort seemed largely directed at embarrassing the Authority and questioning its credibility by emphasizing its acknowledged mistake in the first draft of the 30-day notice, which was admittedly corrected in response to the Department's comments. In our view, that attempt at impeachment was ineffective.

M. Baumgardner. (A.Ex. A-18, pp. 1, 4.) Mr. Baumgardner did not own what is now Field 1 of the WTMA farm. (A.Ex. A-1.)

Even if we accept, *arguendo*, that the old permit covered fields "C" and "D" (not proven), and that fields "C" and "D" were actually used (not proven), it would still be immaterial to the result we reach in this appeal. The Stevenses did not take the next crucial step, which would have been to show that the prior use of the fields somehow affected the Authority's calculations in any way, let alone in any significant or meaningful way. Finally, and as discussed above, whatever doubt existed about the prior use of the site is largely academic in light of the soil sampling that was performed. That sampling provides the best evidence of whether the site poses any risk associated with metals loading as a result of past usage, regardless of what that usage may have been. The Stevenses' made no attempt to dispute the results and significance of the soil samples, and they have not proven, in this respect or otherwise,[5] that use the WTMA farm poses *any* actual harm to themselves or anybody.

[5] In their reply brief, the Stevenses belatedly renew their allegations that use of the site will cause malodors and water contamination. These allegations were not articulated in the post-hearing brief, and it is not appropriate for a party to expand its arguments into entirely new areas in a reply brief. *Triggs v. DEP*, EHB Docket No. 2000-240-MG, slip op. at 5 (Opinion and Order issued May 3, 2001). In any event, as with the claim of excess soil contamination, the allegations have not been supported. The Stevenses concede that no party offered any proof that use of the site had contaminated the Stevenses' well. (Reply Brief at 14.) Similarly, the Stevenses' testimony regarding malodors was not credible. Mrs. Stevenses' testimony was the only evidence of isolated instances of malodors, and there was no credible proof or reasonable inference that those incidents were associated with the application of sewage sludge as opposed to the application of manure and/or odors associated with the treatment plant itself, which is directly across the road from the Stevenses' property and the WTMA farm.

CONCLUSIONS OF LAW

1. The Stevenses bear the burden of proving by a preponderance of the evidence that the Department acted unlawfully or otherwise unreasonably or inappropriately in approving the use of the WTMA farm for the land application of the Authority's sewage sludge.

2. The Stevenses failed to meet their burden of proof in this appeal.

3. It is not necessary to comply with regulations that relate solely to individual permits for the land application of sludge in implementing the general permit authorizing such use of sludge.

4. The Department has the authority to review the suitability of individual sites for the land application of sludge when regulating facilities operating pursuant to the general permit.

5. The Department is not required to review individual sites when regulating facilities operating pursuant to the general permit.

6. The Authority's estimations of past pollutant loading, knowledge regarding the quality of the Authority's sludge, and actual soil samples taken from the site qualify the site for land application, even though it is impossible to determine exactly how much sludge was previously applied to the site.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

BENJAMIN A. STEVENS and JUDITH E. STEVENS	:	
v.	:	**EHB Docket No. 2000-030-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASHINGTON TOWNSHIP MUNICIPAL AUTHORITY, Permittee	:	

ORDER

AND NOW, this 7th day of March, 2002, this appeal is **DISMISSED.**

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
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **March 7, 2002**

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DICKINSON TOWNSHIP, CUMBERLAND COUNTY	:	
v.	:	**EHB Docket No. 2002-044-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 8, 2002**

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

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

Synopsis:

A petition to supersede a Department order to a Township directing the Township to comply with its official sewage plan is denied because of a low likelihood of success on the merits. The Township committed in its plan to adopt a sewage-management-program ordinance consistent with applicable regulatory requirements. The Department's order simply requires the Township to comply with its own plan commitment.

OPINION

In 1994, the Department of Environmental Protection (the "Department") approved Dickinson Township's official sewage facilities plan. In order to implement its plan, the Township committed to

> [a]dopt a Sewage Management Program Ordinance which would be consistent with [25 Pa. Code] Chapter 71, Sections 71.72 and 71.73 and would also require the testing and designation of an alternative absorption area for each proposed lot included in a subdivision or land development plan.

Official Plan, pp. 8-3 to 8-4. Almost eight years later, the Township has yet to adopt an acceptable ordinance. On January 28, 2002, the Department ordered the Township to adopt and implement an ordinance that is consistent with the applicable regulatory requirements. The Township has appealed from that order. It has also petitioned this Board to supersede the order. The Department has moved to dismiss the petition. We held a lengthy conference call with counsel on February 21, 2002 to discuss the merits of the parties' filings and the need for an evidentiary hearing. After considering the matter further, we deny the petition for supersedeas.

The criteria for granting a supersedeas are set forth at 35 P.S. § 7514(d)(1) and 25 Pa. Code § 1021.78. Among other things, the petitioner must demonstrate a likelihood of success on the merits. *See generally Global Eco-Logical Services, Inc. v. DEP*, 1999 EHB 649, 651 (discussing supersedeas criteria). Here, even if we accept all of the factual allegations set forth in the Township's petition and notice of appeal as true, we predict that the Township is very unlikely to succeed on the merits. Therefore, it is unnecessary to balance the relative harms suffered by the parties pending resolution of the appeal. Because we have taken all of the petitioner's factual allegations as true and nevertheless see little likelihood of success, an evidentiary hearing on the petition is also unnecessary.

The Department's order merely requires that the Township do what it committed to do in its own plan. The order does not expand upon the plan. It does not get into any detail regarding the specifics of the ordinance, other than stating the obvious requirement that it must comply with all applicable regulatory requirements. It simply directs the Township to live up to its own commitment and comply with its own plan. Although it is admittedly early in the case, we are having great difficulty imagining how such a limited order could be found to be unlawful, unreasonable, or inappropriate, particularly in light of the amount of time that has passed since

the plan was approved.

The Township's defenses all essentially boil down to a claim that it wished that it had not made such a promise in its plan. If that is the case, the Township is free to pursue a plan revision. The order in no way precludes the Township from revising its plan. In the meantime, however, it is unlikely that we will conclude that the Department has acted unlawfully or unreasonably in insisting that the Township comply with the plan that it has had in place for approximately eight years. An appeal before this Board is not intended to serve as a *de facto* substitute for the plan revision process provided for under the Sewage Facilities Act, 35 P.S. § 750.1, *et seq. Carroll Township v. DER*, 409 A.2d 1378, 1380-81 (Pa. Cmwlth. 1980); *Jefferson Township Supervisors v. DEP*, 1999 EHB 837, 842-43.[1]

The Township places great weight on the fact that there are not a lot of malfunctioning on-lot systems in the Township, so an ordinance is unnecessary. Again, accepting this allegation as true does not translate into a likelihood of success. First, it is unlikely that we will be able to look behind the plan itself in this proceeding, *Carroll Township*, and that plan identifies malfunctioning systems in the Township. Second, even if there are only a small number of malfunctioning systems, we fail to see at this point why an ordinance to address those systems would be ill advised. Third, and most fundamentally, the operative regulation appears to require that an ordinance be adopted whenever the Department determines that existing sewage facilities need periodic inspection, operation, or maintenance to provide long-term proper operation, regardless of whether systems are in fact malfunctioning. 25 Pa. Code § 71.73(b). We do not expect it to be subject to reasonable dispute that septic systems as a general matter should be

[1] The Department moves us to dismiss, as opposed to deny, the petition for supersedeas because this Board lacks jurisdiction over the appeal in light of *Carroll Township*. The Department's motion would have us decide the case on the merits in the context of a petition for supersedeas. Our current function is limited to predicting the likely outcome of the case on its merits.

periodically inspected and maintained. We also anticipate that the Department will succeed in proving that it is necessary, reasonable, and appropriate for a municipality to have the legal authority in place to insist that septic systems be periodically inspected and properly maintained. Finally, we do not foresee a likelihood of success in challenging the regulation that is the source of these requirements (§71.73) as improperly promulgated, beyond statutory authority, unreasonable, or unconstitutional.[2]

The Township contends *Carroll Township* does not apply because the Township does not find its current plan unsuitable; rather, the Department is merely interpreting the plan incorrectly. The Township is unlikely to prevail on this argument. Any question regarding interpretation goes to the number and cause of malfunctions in the Township. As just discussed, the resolution of that question is unlikely to be dispositive in this case. The very clear commitment on page 8-4 of the plan to pass an inspection and maintenance ordinance does not appear to be in any need of interpretation. Furthermore, claims such as the Township Board was unaware of the requirements of its own plan (Notice of Appeal ¶8), that the Township's Board was not informed of what its consultant drafted (¶8), and that previous attempts at a compliant ordinance were prepared by a "former sewage enforcement officer no longer employed by the Township" (¶10) do not support the Township's argument that the plan is in need of interpretation.

The Township asserts that the Department has treated it unfairly over the years, even to the point of intentional deception. We do not have a sense yet of whether this is likely to be proven, but even if it is, it is unlikely to support any action by this Board regarding the order in light of the Township's unequivocal plan commitment.

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[2] We take note of the Township's argument that the Commonwealth may not order a township to adopt an ordinance. We are not sure this question will actually arise in this appeal. The Department has only ordered the Township to comply with its own plan commitment. If it does arise, we will need to see authority to support that proposition. There is no such authority cited in the petition for supersedeas.

To the extent that the Township makes allegations concerning what will be required in the ordinance in order for it to be approved by the Department, we repeat that the order under consideration only requires the ordinance to meet applicable regulatory requirements. As previously noted, it is quite difficult to successfully challenge the validity of a regulation, and we do not anticipate such success here. In any event, issues regarding the details of an acceptable ordinance are not yet ripe for consideration. Such issues are only likely to be ripe if the Township passes an allegedly inadequate ordinance that results in a future Departmental action or an enforcement action in Commonwealth Court for alleged failure to comply with the order under appeal.

Finally, we acknowledge the Township's concern that passing an ordinance will place an onerous burden Township residents. At bottom, this claim is basically a challenge to the regulatory requirement itself, which we have already observed is unlikely to be successful. Beyond that, although we are open to being shown otherwise as this matter moves forward, we find it difficult to accept that requiring owners of on-lot systems to ensure that those systems are properly operated and maintained is unduly burdensome.

For the foregoing reasons, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DICKINSON TOWNSHIP, CUMBERLAND COUNTY	:	
	:	
v.	:	**EHB Docket No. 2002-044-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 8th day of March, 2002, in consideration of Dickinson Township's petition for supersedeas and the Department's motion to dismiss that petition, IT IS HEREBY ORDERED that the petition is **DENIED**.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: **March 8, 2002**

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ROBERT S. WEAVER	:	
	:	
v.	:	**EHB Docket No. 2000-242-C**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: March 14, 2002**
PROTECTION	:	

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 the appeal for lack of jurisdiction where the appeal was untimely filed and there do not exist unique and compelling factual circumstances establishing a non-negligent failure to file a timely appeal.

OPINION

This matter involves an appeal from a civil penalty assessment issued to Appellant Robert S. Weaver by the Department of Environmental Protection ("DEP") pursuant to the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. § 6021.101 *et seq.* (the "Storage Tank Act"). Presently before the Board is DEP's motion to dismiss (*i.e.* to quash) the appeal for lack of jurisdiction; the motion is supported by the Affidavit of Norman D. Templin, an Environmental Protection Compliance Specialist employed by DEP, various exhibits accompanying the Affidavit, and Appellant's responses to interrogatories. DEP contends that the Board lacks jurisdiction over this matter because the Notice of Appeal was

untimely filed, and there are no legitimate grounds for a *nunc pro tunc* appeal. Appellant, appearing *pro se*, filed a one-page letter in response to the motion. Mr. Weaver does not dispute any of the factual assertions in DEP's motion papers, nor does he contest DEP's legal arguments. Instead, Appellant admitted to the late filing, requested leniency, and stated that it was a very busy work time for him when he received notice of DEP's action so that he did not realize the 30-day deadline for filing his notice of appeal had passed until it was too late. (App. Brf. at 1). Appellant also made reference to settlement discussions with DEP and then reiterated a request for special consideration. *Id.*

I. Factual Background

The material facts are undisputed. Appellant resides at 44 Truce Road, New Providence, Pennsylvania, and is an individual who owns and operated a 2,000-gallon regulated gasoline underground storage tank system located at his residence (the "UST System"). Pursuant to regulations implementing the Storage Tank Act, by no later than December 22, 1998, existing underground storage tank systems had to comply with performance standards for new underground storage tank systems, meet certain upgrading requirements, or be closed in accordance with applicable closure requirements. *See* 25 Pa. Code § 245.422(a); 35 P.S. § 6021.501.[1] There is no dispute that, as an existing underground storage tank system which does not fall into any statutory or regulatory exception, Appellant's UST System was subject to the requirements imposed by § 245.422(a). *See* 25 Pa. Code §§ 245.403; 245.1.

On March 5, 2000, Ryan Kostival, a DEP Water Quality Specialist, conducted a site inspection of the UST System. The inspection revealed that the UST System was not in

[1] Section 245.422(a) states in pertinent part: "By December 22, 1998, existing underground storage tank systems shall comply with one of the following requirements: (1) New underground storage tank system performance standards under § 245.421 (relating to performance standards for new underground storage tank systems). (2) The upgrading requirements in subsections (b)-(d). (3) Closure requirements under §§ 245.451-245.455 (relating to out-of-service underground storage tank systems and closure) . . . ." 25 Pa. Code § 245.422(a).

compliance with the performance standards set forth in § 245.422(a). Specifically, the UST System did not meet standards related to corrosion, spill, and overfill protection. Appellant had thus been operating the UST System for nearly fifteen months without complying with the performance standards imposed by § 245.422(a). At the time of the inspection, Mr. Kostival informed Mr. Weaver's daughter, Dawn Weaver, that the UST System would have to be placed into temporary closure in accordance with applicable regulations. Appellant subsequently placed the UST System into temporary closure and submitted an amended registration form to DEP showing the change in status. On March 30, 2000, Kostival returned to Appellant's residence and confirmed that Appellant had emptied the UST System and placed it into temporary closure. *See* Templin Affidavit, at ¶¶ 1-8.

Following its March 2000 inspections, DEP determined that Appellant's failure to comply with the performance standard requirements in § 245.422 by the December 1998 deadline constituted a violation of the Storage Tank Act, *see* 35 P.S. §§ 6021.1310, 6021.1304, and subjected Appellant to civil penalty liability for each violation, *see* 35 P.S. § 6021.1307.[2] DEP subsequently issued an Assessment of Civil Penalty to Appellant on October 5, 2000, in the amount of $6,000 (the "ACP"). The ACP was sent via certified mail to Appellant's residence on October 5, 2000, and was delivered to Appellant's residence on October 7, 2000. Appellant's daughter, Dawn Weaver, signed the certified mail receipt as both "addressee" and "agent." Templin Affidavit, at ¶¶ 9-13 and attached exhibits A and B.

On November 15, 2000, thirty-nine days after delivery of the ACP to Appellant's

[2] Section 1310 of the Storage Tank Act states in pertinent part: "It shall be unlawful to fail to comply with . . . any of the provisions of this act or rules and regulations adopted hereunder . . . or to cause a public nuisance . . . ." 35 P.S. § 6021.1310. A violation of the Storage Tank Act or of any regulation adopted implementing the Act "shall constitute a public nuisance." 35 P.S. § 1304. Pursuant to Section 1307, DEP may assess a civil penalty of up to $10,000 per day for each violation of an applicable regulation implementing the Storage Tank Act. Each violation of an applicable regulation, and each day of violation, "shall constitute a separate violation" subject to a civil penalty. 35 P.S. § 6021.1307.

residence, DEP's Environmental Cleanup Program, Southcentral Region office, received a one-page handwritten letter from Appellant addressed to DEP which stated his intention to appeal the ACP. The letter was postmarked November 14, 2000, and contained a check for $6,000 which Appellant's letter indicated that he wanted held in escrow. DEP counsel telephoned Appellant and informed him that an appeal of the ACP must be filed with the Board, as clearly stated on the ACP itself, and that payments of the penalty to be held in escrow must similarly be sent to the Board. Appellant requested that his $6,000 check be returned to him, and DEP counsel sent a letter on November 17, 2000 memorializing his conversation with Appellant and returning the check. Templin Affidavit, at ¶¶ 14-15 and exhibits C-F.

Appellant then filed a Notice of Appeal with the Board via telefax on November 17, 2000, forty-one days after delivery of the ACP to Appellant's residence. The Notice of Appeal states that the ACP was received by Appellant's daughter but Appellant "was not available to read it for awhile," and the attached letter filed with the Notice of Appeal includes a paragraph which states: "I'm sorry about the timing of this—I by mistake mailed the check and notice of appeal to the wrong place." *See* Notice of Appeal, Dkt. No. 2000-242-C.

II. Discussion

The Board will grant a motion to dismiss where there are no material facts in dispute and the moving party is 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 may be decided on the facts of record without a hearing." *Grimaud v. DER*, 638 A.2d 299, 303 (Pa. Cmwlth. 1994); *see also Falcon Oil Company v. DER*, 609 A.2d 876 (Pa. Cmwlth. 1992).

The failure to timely appeal an administrative agency's action is a jurisdictional defect which mandates the quashing of the appeal. *Falcon Oil Company*, 609 A.2d at 878; *Cadogan Tp. Board of Supervisors v. DER*, 549 A.2d 1363, 1364 (Pa. Cmwlth. 1988); *Dellinger v. DEP*,

2000 EHB 976, 980. Moreover, "the time for taking an appeal cannot be extended as a matter of grace or mere indulgence." *Bass v. Commonwealth*, 485 Pa. 256, 259 (1979); *see also Rostosky v. DER*, 364 A.2d 761, 763 (Pa. Cmwlth. 1976) ("Where a statute has fixed the time within which an appeal may be taken, we cannot extend such time as a matter of indulgence."). Nor can the Board disregard the defect, *see* 25 Pa. Code § 1021.4, and grant an extension of time "in the interests of justice." *See, e.g., West Caln Tp. v. DER*, 595 A.2d 702, 705-06 (Pa. Cmwlth. 1991). Thus, the Board has no power to extend the time limit for filing an appeal. *Rostosky*, 364 A.2d at 764; 25 Pa. Code § 1021.17.

Under certain exceptional circumstances, an appeal may however be filed *nunc pro tunc*. 25 Pa. Code § 1021.53(f).[3] Negligence on the part of an appellant is not justification for a *nunc pro tunc* appeal. *See, e.g., Bass*, 485 Pa. at 259; *Cadogan Tp.*, 549 A.2d at 1364. Rather, it is well established that, in administrative actions, appeals *nunc pro tunc* will be permitted only where there is a showing of fraud, breakdown in the administrative process, or unique and compelling factual circumstances establishing a non-negligent failure to file a timely appeal. *See, e.g., Grimaud*, 638 A.2d at 303-04; *Ziccardi v. DEP*, 1997 EHB 1, 6-8. Mistakenly mailing a notice of appeal to DEP instead of to the Board; being in the midst of attempts to negotiate a settlement with DEP; or failing to understand the relevant legal processes, are not sufficient grounds for allowing a *nunc pro tunc* appeal. *See Falcon Oil Company*, 609 A.2d at 878-79; *Broscious v. DEP*, 1999 EHB 383, 385; *Johnston Laboratories, Inc. v DEP*, 1998 EHB 695, 697; *Maddock v. DEP*, EHB Dkt. No. 2001-183-L, slip op. at 3 (Opinion issued October 19, 2001).

Pursuant to the applicable Board Rule, Appellant was required to properly file his appeal with the Board within 30 days after receiving written notice of the DEP action at issue—*viz.*, the

[3] "The Board upon written request and for good cause shown may grant leave for the filing of an appeal nunc pro tunc, the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in courts of common pleas in this Commonwealth." 25 Pa. Code § 102.53(f).

ACP issued by DEP to Appellant on October 5, 2000. 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. *State Farm Mutual Automobile Ins. Co. v. Schultz*, 421 A.2d 1224, 1227 (Pa. Super. 1980) ("Timely filing means filing at the designated place within the designated time."); *Taylor v. DER*, 1992 EHB 257, 259; *McClure v. DER*, 1992 EHB 212, 215.

Appellant's appeal was not timely filed. The ACP was delivered to Appellant's residence on October 7, 2000, as is evident from the certified mail return receipt signed for by a member of Appellant's family. Appellant does not dispute that the ACP was delivered to his residence on October 7, 2000, nor does he contend that acceptance of the certified mail delivery by his daughter interfered with his receipt of the ACP.[4] These circumstances are sufficient to demonstrate notice of the ACP to Appellant as of October 7, 2000. *See, e.g., Milford Township Board of Supervisors v. DER*, 644 A.2d 217, 219 (Pa. Cmwlth. 1994); *Davis Coal v. DER*, 1990 EHB 1355, 1356-57 (certified mail receipt signed for by family member sufficient to demonstrate notice of department action on date indicated on receipt).[5] In any event, Appellant has admitted that his appeal was not timely filed. In his letter responding to the Motion, Appellant asked the Board to forgive the "late filing" and stated that he did not realize the 30-day

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[4] *See* DEP Brf. at Att. 4 (Appellant's responses to DEP interrogatory concerning date on which Appellant received notice of the ACP); *see also* Notice of Appeal. Notably, Mr. Kostival's communication with Appellant's daughter during his first inspection in March 2000 concerning the necessity for temporary closure of the UST System resulted, very shortly thereafter, in Appellant closing the UST System and filing an amended registration with DEP. Evidently, Appellant's daughter was capable of informing Appellant about important communications from DEP regarding the UST System, and in fact had actually done so prior to delivery of the ACP to Appellant's residence.

[5] As explained by Commonwealth Court in the *Milford* case:

> Constitutionally adequate notice of administrative action is notice which is reasonably calculated to apprise 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.

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

deadline had passed until it was too late. (App. Brf. at 1). Similarly, in his Notice of Appeal, Mr. Weaver acknowledged the lateness of the filing ("I'm sorry about the timing of this") and offered the mistaken mailing of his letter to DEP (also not sent or received until after the appeal deadline) as an excuse for the late filing with the Board. The appeal was not received by the Board until November 17, 2000, forty-one days after Appellant received notice of DEP's action and eleven days beyond the 30-day deadline. Thus, we are compelled to quash the appeal for lack of jurisdiction unless Appellant has shown adequate grounds for a *nunc pro tunc* appeal.

There is no evidence of fraud here. In fact, though DEP was under no obligation to do so, DEP counsel assisted Appellant to file his appeal with the Board after a DEP regional office received Mr. Weaver's letter indicating his desire to appeal the ACP. *See Falcon Oil Company*, 609 A.2d at 878-79 (DEP had no obligation to ascertain whether appellant had appropriately filed the notice of appeal with the Board). Nor is there any allegation of a breakdown in the Board's administrative processes. The only issue is whether Appellant has demonstrated "unique and compelling factual circumstances establishing a non-negligent failure to file a timely appeal." *Grimaud*, 638 A.2d at 303-04. Mistakenly attempting to file a notice of appeal with DEP, rather than the Board, is not a sufficient ground for allowing a *nunc pro tunc* appeal; in any event, Appellant's letter to DEP was sent after the filing deadline. Similarly, although Appellant makes reference to attempts to settle with DEP, ongoing settlement discussions with DEP do not excuse a late filing of an appeal.

The only other reason offered by Appellant is that October is a very busy time for him because of "Fall harvest" and that he did not realize that the 30-day deadline had passed until it was too late. (App. Brf. at 1). We are constrained to conclude that Appellant has not demonstrated grounds for a *nunc pro tunc* appeal. Busyness cannot be considered a "unique and

compelling" factual circumstance, and Appellant's failure to focus on the Civil Penalty Assessment in a timely fashion, because he was busy with his work, does not establish a "non-negligent failure to file a timely appeal." *Cf. Bass*, 458 Pa. at 259 (sudden serious illness of secretary in charge of appeal filings and office double-check system constituted sufficient ground); *Walker v. Unemployment Compensation Board of Review*, 461 A.2d 346 (Pa. Cmwlth. 1983) (appellant did not become aware of adverse determination of unemployment compensation authorities until appeal period had expired as a result of failure of post office to forward notice of action to him); *Tony Grande, Inc. v. Workmen's Compensation Appeal Board (Rodriguez)*, 455 A.2d 299 (Pa. Cmwlth. 1983) (sudden hospitalization of counsel). Accordingly, we will quash the appeal for lack of jurisdiction.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

ROBERT S. WEAVER	:	
	:	
v.	:	EHB Docket No. 2000-242-C
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 14th day of March, 2002, it is hereby ordered as follows:

1. The Department of Environmental Protection's Motion to Dismiss is granted;

2. The appeal at EHB Docket No. 2000-242-C is dismissed.

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: March 14, 2002

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

For the Commonwealth, DEP:
Craig S. Lambeth, Esquire
Southcentral Regional Counsel

For Appellant:
Robert S. Weaver
44 Truce Road
New Providence, PA 17560-9673

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JOHN M. RIDDLE, JR.	:
	:
v.	:
	: **EHB Docket No. 98-142-MG**
COMMOWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HEPBURNIA COAL COMPANY, Permittee	: **(consolidated with 2000-001-MG)**
	:
	: **Issued: March 25, 2002**
	:

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis:

The Board dismisses two appeals from the Department's approval of two Stage I bond releases for property owned by the appellant. The Department's conclusion that the first bond release area was properly contoured and had adequate drainage controls was supported by the evidence. The failure to give landowners, other than the Appellant, written notice of the bond release application was harmless error because they had actual notice.

The Board also finds that the appellant failed to adduce any evidence of any ongoing violations of the Surface Mining Act, the regulations thereunder, or the permit on the second bond release area. Therefore the Department's conclusion that the criteria for Stage I bond release on the second parcel of property had been met was appropriate.

INTRODUCTION

Before the Board are two appeals of Stage I bond releases for parcels of property mined by Hepburnia Coal Company. Each appeal was filed by John M. Riddle, Jr., who owns an interest in the land. The first appeal, docketed at 98-142-MG, was filed on August 8, 1998, and objects to the Department's bond release approval for an eight acre parcel. The second appeal, docketed at 2000-001-MG, was filed on January 4, 2000, and objects to a bond release approval on a different parcel of 62.9 acres.[1]

A hearing on the merits on both appeals was held on October 23-25, 2001 before Administrative Law Judge George J. Miller. Although the Department and Hepburnia were represented by counsel, Mr. Riddle chose to represent himself. At the request of Mr. Riddle the evidence was heard for each bond release separately. The Board first heard evidence concerning the bond release at EHB Docket No. 98-142-MG and the parcel was referred to as Bond Release Area No. 1. Immediately following, the Board heard the evidence relating to EHB Docket No. 2000-001-MG and that parcel was referred to as Bond Release Area No. 2.

All the parties filed proposed findings of fact, conclusions of law and legal memoranda. The record consists of a transcript of 530 pages and 12 exhibits relating to Bond Release Area No. 1, and 18 exhibits relating to Bond Release Area No. 2. After a full and complete review, we make the following:

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[1] These matters were consolidated on November 30, 2000.

FINDINGS OF FACT

1. The Appellant, John M. Riddle, Jr., owns an interest land located in New Washington Borough, Clearfield County where Hepburnia Coal Company conducted mining operations under Permit No. 17950105.

2. The Department is the agency with the duty and authority to administer and enforce the Surface Mining Conservation and Reclamation Act (Surface Mining Act)[2] and the regulations promulgated thereunder.

BOND RELEASE AREA NO. 1
EHB Docket No. 98-142

3. On April 27, 1998, Hepburnia submitted a completion report and applied for Stage I bond release on eight acres of the permitted area. This area is referred to as Bond Release Area No. 1 in this proceeding.

4. This property is owned jointly by Mr. Riddle, his brother Thomas M. Riddle, James E. Riddle, and his cousins Charles and Susan Lind. (Riddle, N.T. 63; *see also* stipulation, N.T. 66)

Approximate Original Contour

5. Most of Bond Release Area No. 1 had been mined before Hepburnia began its operations. (Riddle, N.T. 88)

6. Nancy Reig is an inspector supervisor at the Department's Hawk Run district mining office. She has worked for the Department in its mining program for 29 years and has held her current position for seven years. (Reig, N.T. 102-103)

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[2] Act of May 31, 1945, P.L. 1198, *as amended,* 52 P.S. §§ 1396.1- 1396.31.

7. Before Hepburnia's mining operation, there was a haul road along the top of some old spoil, across Bond Release Area No. 1. Mr. Riddle used this road to access the northwest corner of his property. (Riddle, N.T. 29-31; Ex. A-2)

8. After the reclamation performed by Hepburnia, Mr. Riddle testified that the area is steep and limits access to the northwest corner. He must now use a road located at the edge of Bond Release Area No. 1, which was constructed by Hepburnia. (Riddle, N.T. 51-52, 81, 84-85)

9. Nancy Reig inspected Bond Release Area No. 1 on June 29, 1998. (Reig, N.T. 103, 114; Ex. C-3)

10. Ms. Reig walked the whole bond release area to determine whether it blended well. She also observed the topography of an adjacent area north of Bond Release Area No. 1 which had been previously mined but was unaffected by Hepburnia. (Reig, N.T. 118)

11. The adjacent area to the north was fairly steep. To the east there was evidence of a nearly vertical highwall. (Reig, N.T. 119-20)

12. Bond Release Area No. 1 was steep and vegetated. (Reig, N.T. 118)

13. By comparing Bond Release Area No. 1 with the contour of the surrounding areas, she concluded that it had been regraded to approximate original contour. (Reig, N.T. 120)

14. A Department engineer also took slope measurements of Bond Release Area No. 1 and the surrounding area on September 29, 1999. (Reig, N.T. 123-24; Ex. A-1)

15. The slope measurements at two points in the adjacent unaffected area were 16.9°. From that point moving south across Bond Release Area No. 1 in 50-foot

increments, the slope measurements were 18.6°; 20°; 21.9°; 18°; 13.9° and 12.2°. (Ex. A-1; Reig, N.T. 125-26;Varner, 368-69[3])

16. Ms. Reig did not believe that 21.9° of slope was too steep, given the fact that the area had been affected and then reaffected by mining. (Reig, N.T. 127)

17. These measurements did not change Ms. Reig's conclusion that the bond release area blended well with the adjacent areas that had been unaffected by Hepburnia. She believed the contouring and drainage patterns were consistent between affected and unaffected areas. (Reig, N.T. 128)

18. Ms. Reig had not been on the site before Hepburnia's mining activities. Before her June inspection, she had been on the site perhaps one other time. (Reig, N.T. 159)

19. David Stonebraker, a mine inspector in the Department's Hawk Run office, is the regular inspector for the Riddle property. He has inspected the Hepburnia operation there, including Bond Release Area No. 1, once a month since its inception. (Stonebraker, N.T. 201)

20. Mr. Stonebraker had been to the site before Hepburnia began mining it. (Stonebraker, N.T. 202)

21. He agreed with Ms. Reig that the area had been regraded to approximate original contour. (Stonebraker, N.T. 205)

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[3] The original measurement were taken in percent, rather than degrees. Mr. Varner's testimony provided the formula for converting the percentage measurements into degrees, which is 1.8 x X°= Y%. Although he was able to make approximate mathematical conversions in his head, the Board has used a calculator for more precision in our findings of fact.

22. He described the access road going to the northwest. On the left side of the road there was an old highwall that had sloughed off to a very steep hill. There were some large conifer trees on it and some thick underbrush. (Stonebraker, N.T. 202, 208)

23. To the right of the road, there was an old highwall and old spoil 50 to 100 feet from the road. (Stonebraker, N.T. 202)

24. The area where the road was located was fairly flat; the road ran across some old spoil. (Stonebraker, N.T. 204)

25. He described other areas as being rather steep. (Stonebraker, N.T. 202-204; Ex. A-2)

26. Hepburnia took a cut which included the road and filled it in when they reclaimed the area. The access road which crossed Bond Release Area No. 1 is no longer in existence. (Stonebraker, N.T. 208)

27. Using a topographic map dated 1959, Mr. Riddle calculated a slope measurement of 14^{o} in an area that he believed to be within Bond Release Area No. 1. However, he could not pinpoint on a more recent map where his slope measurement was taken. (Riddle, N.T. 42-43; 71-73; Ex. A-5)

28. Mr. Riddle believes that the area does not meet approximate original contour because there is no longer an area through Bond Release Area No. 1 which is flat enough for a road, and he now has to use the road which is around the edge of Bond Release Area No. 1. (Riddle, N.T. 51-52; *see also* Ex. A-2 and Riddle, N.T. 84)

29. The post-mining land use for Bond Release Area No. 1 is forestland. (Stonebraker, N.T. 204)

Drainage Controls

30. During her June inspection, Ms. Reig also observed the drainage controls for Bond Release Area No. 1. (Reig, N.T. 128)

31. The only drainage control located on Bond Release Area No. 1 is a drainage ditch designated as ditch C-1. It runs across the bond release area into a sediment pond designated as Pond A. Pond A is located on the permit site, but is not within Bond Release Area No. 1. (Reig, N.T. 129; Ex. C-4)

32. Other drainage controls which control runoff from Bond Release Area No. 1 are located on adjacent parcels. (Reig, N.T. 128)

33. Accordingly, during her inspection Ms. Reig inspected not only ditch C-1, but also the adjacent sedimentation ponds and collection ditches in order to determine that they would adequately collect runoff from Bond Release Area No. 1. (Reig, N.T. 128-29)

34. At the time of her inspection, Ms. Reig did not observe any evidence of erosion or sedimentation problems on Bond Release Area No. 1. (Reig, N.T. 129)

35. However, she concluded that the ditch should be extended along the perimeter of the affected area so that it could collect runoff from a larger portion of Bond Release Area No. 1. (Reig, N.T. 129-31; Ex. C-3)

36. Ms. Reig's June inspection was a complete inspection of the mine site, and included both the bond release area and areas where active mining was taking place. (Reig, N.T. 130)

37. In addition to observing the condition of the ditch on Bond Release Area No. 1, there was also a ditch on the active portion of the permit site, outside of the bond release area, which needed to be regraded. (Reig, N.T. 130)

38. Ms. Reig held approval of the completion report until the additional ditch work and regrading could be accomplished. (Reig, N.T. 131)

39. The bond release area was again inspected on July 2, 1998. (Reig, N.T. 131-32)

40. The drainage ditch on Bond Release Area No. 1 had been extended and regraded as she requested in June. (Reig, N.T. 133)

41. The ditch had not yet been planted, but the contouring had not changed and it was acting as an appropriate drainage control. Therefore, she approved Hepburnia's bond release request, but did not lift the notice of violation noted in her inspection report until the planting was finished. (Reig, N.T. 133-34; Ex. C-5)

42. She also observed the ditches in the active mining area. Hepburnia was in the process of regrading them, but they had not been planted and stabilized. (Reig, N.T. 133)

43. Although Mr. Riddle provided photographic evidence which he believed showed that the ditch was overflowing in August, 2001, he conceded that the condition has since been corrected by Hepburnia. (Riddle, N.T. 61-62; Ex. A-7)

44. The drainage ditch on Bond Release Area No. 1 begins part way up the slope and slopes downward toward Pond A. A portion of the bond release area is located downslope of the ditch. (Reig, N.T. 135-36, 195; Ex. C-4)

45. The ditch had to be designed in this manner so that it had enough slope for runoff to drain into Pond A. (Reig, N.T. 136; *see also* Stonebraker 210)

46. Special Condition 19 of the permit, which precludes spoil from being placed below a collection ditch, only applies during the active mining phase of an area. After

mining is completed the spoil is used to reclaim the area. (Reig, N.T. 137, 139; *see also* Varner, N.T. 381-82)

47. There is no spoil located below the collection ditch because mining has been completed and spoil exists only during mining. (Reig, N.T. 195)

48. There is no regulation or permit condition which requires a drainage ditch to enclose the entire bond release area. (Reig, N.T. 197)

49. The acreage below the collection ditch was stable and had no problems with erosion, therefore another collection ditch was unnecessary, would cause further disturbance and may be harmful. (Reig, N.T. 198)

50. No one testified that they had observed any erosion problems in the area since the bond has been released. (Reig, N.T. 135-36; Stonebraker, N.T. 205; Riddle, N.T. 227-28)

Notice

51. The Department notified Mr. Riddle of receipt of the application for Stage I Bond Release for Bond Release Area No. 1 by letter dated May 19, 1998. (Ex. C-1; Reig, N.T. 110-12)

52. After Mr. Riddle received notice of the bond release request, but before he filed his notice of appeal, Mr. Riddle notified the other landowners of the existence of the bond release request. (Riddle, N.T. 64-65)

53. He also discussed the fact that he intended to appeal the bond release request with the other landowners. (Riddle, N.T. 64-65)

BOND RELEASE AREA NO. 2
EHB Docket No. 2001-001-MG

Mr. Riddle's notice of appeal from the bond release of Bond Release Area No. 2 set forth 50 objections to the Department's action. A number of these objections were dismissed by the Board by granting summary judgment to Hepburnia.[4] Others were voluntarily withdrawn by the Appellant at a pre-hearing conference held May 24, 2001, and during the hearing in October. A final objection, relating to brush piles on the property, was settled by the parties and withdrawn by letter dated February 25, 2002.

Although consolidated by the Board, the appeal of Bond Release Area No. 2 was treated as a separate matter at the hearing. The Board ordered the parties to submit separate exhibits and separate findings of fact and legal discussion in case the two appeals needed to be unconsolidated at some point. Each of the parties also used new numbers for their proposed findings relative to Bond Release Area No. 2, and the Board will do so as well. Since the exhibits were separately numbered as well, the exhibits for Bond Release Area No. 2 will be designated as follows: The Appellant's exhibits as "*A-__; the Department's as "*C-__"; and Hepburnia's as "*P-__."

1. The Appellant, John M. Riddle, Jr., owns an interest land located in New Washington Borough, Clearfield County where Hepburnia Coal Company conducted mining operations under Permit No. 17950105.

2. Bond Release Area No. 2 consists of 62.9 acres. (Stonebraker, N.T. 401)

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[4] *Riddle v. DEP*, EHB Docket No. 98-142-MG (consolidated)(Opinion issued April 30, 2001).

3. The Department is the agency with the duty and authority to administer and enforce the Surface Mining Conservation and Reclamation Act (Surface Mining Act)[5] and the regulations promulgated thereunder.

4. David Stonebraker, a mine inspector in the Department's Hawk Run office, is the regular inspector for the Riddle property. He has been a mine inspector for the Department for 12 1/2 years. (Stonebraker, N.T. 393)

Holes in the Bond Release Area

5. Holes have developed from time to time in the bond release area. (Riddle, N.T. 247, 255; Ex. *A-1)

6. These holes are caused by water which drains from a pond onto the ground in the vicinity of the newly backfilled highwall. (Stonebraker, N.T. 417-18)

7. Mr. Riddle believes that the water is washing away fine material which was placed on top of porous material and is thereby causing the holes to develop. (Riddle, N.T. 254)

8. The pond is off the bond release area. It is located above a highwall and discharges over the edge. (Stonebraker, N.T. 417-18)

9. These holes developed after the approval of the bond release. (Stonebraker, N.T. 417)

10. The photographs of holes presented by the Appellant were taken in April, 2000. (Ex. *A-1)

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[5] Act of May 31, 1945, P.L. 1198, *as amended,* 52 P.S. §§ 1396.1- 1396.31.

11. Gary Potter is an engineer for Hepburnia Coal Company. He has made repairs on holes in the area three or four times. He repaired the holes by filling them in with rocks and dirt and planting vegetation to stabilize the area. (Potter, N.T. 501, 503)

12. He visited the bond release area several days before the hearing and did not observe any holes. (Potter, N.T. 504)

13. It has been nearly a year since he has seen a hole. (Potter, N.T. 504)

14. Hepburnia will be responsible for repairing any holes that develop until final bond release, approximately three years. (Stonebraker, N.T. 467)

Intermittent Stream

15. Before Hepburnia's mining activities there was an intermittent stream located through Bond Release Area No. 2. (Riddle, N.T. 258; Ex. *C-2)

16. This stream ran from the pond located off of the bond release area which has caused the holes to develop as described above. (Stonebraker, N.T. 447)

17. It would flow during heavy rains, but was totally dry during the hot months. (Stonebraker, N.T. 442)

18. There were no barriers to mining placed in this area. (Stonebraker, N.T. 422; Ex. *C-2)

19. John Varner is the Chief of Permit and Technical Services for the Department's Hawk Run office. (N.T. 364)

20. During the review for Hepburnia's permit application for mining in the area, both the Department and the Pennsylvania Fish and Boat Commission conducted field reviews, which included analyzing the waterways on the site. (Varner, N.T. 372-74)

21. The Department did not receive any information from the Fish Commission indicating that the stream was an intermittent stream in need of a barrier to mining. (Varner, N.T. 374)

22. It is not a violation of the Department's regulations for water to drain onto the ground. (Varner, N.T. 384)

Water Supplies

23. Michael Smith is the district manager for the Department's Hawk Run district office. He is a professional geologist and has been employed by the Department for 20 years. (Smith, N.T. 346-47)

24. Mr. Smith was accepted by the Board as an expert in geology and hydrogeology. (N.T. 349)

25. The three springs on the bond release area are not water supplies.

a) One spring, designated as MP-9, is a natural spring.

b) Another, MP-10 is also a natural spring located at an abandoned farmstead. It is designated as a potential replacement supply for some hunting camps.

c) The third, MP-26 used to be used by the Riddle household, but is used no longer.

(Smith, N.T. 350-52)

26. Hepburnia replaced a water supply for the Dixon family. That water supply is not located within Bond Release Area No. 2. (Stonebraker, N.T. 423; Ex. *A-2)

27. There is no evidence that any of the springs have been affected by mining adversely or otherwise.

Handling of Soil

28. James Fetterman is a surface mining inspector for the Department. He has held that position for ten years. He has received training from the U.S. Office of Surface Mining on the topic of soil conservation and revegetation. It is an important aspect of his job duties to be able to identify soils that might be moved and disturbed during surface mining. (N.T. 332, 334-35)

29. Although there was an area to the south that had never been mined and had plenty of top soil, most of Bond Release Area No. 2 had been previously affected by mining and had very little top soil. (Stonebraker, N.T. 399)

30. In July 1998, Mr. Fetterman responded to a complaint from Mr. Riddle that topsoil was not being properly preserved by Hepburnia, but was being buried at the site. (Fetterman, N.T. 333)

31. Mr. Riddle directed Mr. Fetterman to two piles of material near the area where Hepburnia was actively mining. (Fetterman, N.T. 333-34)

32. This material was not topsoil. One pile was a combination of a gray clay and a red iron-laden clay, while the other pile was a dark clay. (Fetterman, N.T. 333-34, 338-39; Ex. *C-1)

33. This material was unsuitable for surface use or revegetation. It could not be left on the surface because nothing would grow in it. (Fetterman, N.T. 334; Ex. *C-1)

34. Mr. Fetterman also observed that Hepburnia was piling the "best available material" for later use on the regraded area. (Fetterman, N.T. 338)

35. Mr. Fetterman concluded that what topsoil had existed on the site had been saved and was being potted back on the reclaimed area to be spread. The material that

Mr. Riddle was concerned about being buried was not topsoil or any other material capable of supporting vegetative growth. (Fetterman, N.T. 342-43)

State Route 3016

36. Daniel Wright is the Assistant County Maintenance Manager for the Pennsylvania Department of Transportation (DOT) in Clearfield County. (N.T. 317)

37. His responsibilities include the review of roadways for safety issues and scheduling repairs for unsafe conditions. (Wright, N.T. 317-18)

38. State Route 3016 (SR 3016) is in the vicinity of the bond release area, just south of the permit boundary. (Wright, N.T. 319; Ex. *C-2)

39. The portion of the bond release area that is near SR 3016 is a steep hill that slopes down toward the southern permit boundary and toward SR 3016. (Stonebraker, N.T. 410)

40. Historically, there have been problems with washouts affecting the shoulder of SR 3016, from the hill leading down to the road. (Wright, N.T. 325)

41. Hepburnia constructed an earthen berm on the edge of the affected area to help protect SR 3016. (Stonebraker, N.T. 446)

42. The berm was necessary because the area below the sediment ditch is too low to direct water into the pond. It is used to direct runoff below the ditch. (Potter, N.T. 505-06)

43. In June 1999, before the bond release for Bond Release Area No.2, a very heavy rainstorm occurred in the vicinity of the mine site. (Wright, N.T. 319-20; Stonebraker, N.T. 406)

44. Mr. Wright was called to observe debris on the roadway which indicated that water had washed across the road. (Wright, N.T. 319-22)

45. At the time he inspected the washout there was no water across the roadway. (Wright, N.T. 320)

46. According to Mr. Wright's observations the runoff had originated from different sources. Some had come from a breach in the berm and collection ditch located in the southern portion of Bond Release Area No. 2. Some had come from a washout in the shoulder area along SR 3016 further up the road from the bond release area. (Wright, N.T. 320-21)

47. Mr. Stonebraker also inspected the site because he was told that there had been a rainstorm that exceeded the Department's 24-hour/10-year rain event standard. (Stonebraker, N.T. 406-08)

48. A 24-hour/10-year rain event is beyond the limit that erosion and sedimentation controls on surface mine sites are required to hold. (Stonebraker, N.T. 406)

49. At the time he arrived, DOT was already repairing the breach in the ditch along side of the road. (Stonebraker, N.T. 406-08)

50. The breach in the berm was repaired with hay bales. (Wright, N.T. 322; Stonebraker, N.T. 411)

51. Because of the severity of the rainstorm, the Department took no compliance action, but ordered Hepburnia to make repairs. (Stonebraker, N.T. 410)

52. Both Mr. Wright and Mr. Stonebraker felt that the repair work done by Hepburnia in June 1999 on the collection ditch and berm in the vicinity of SR 3016 was adequate. (Wright, N.T. 322; Stonebraker, N.T. 411)

53. In the summer of 2001, there was another breach which required repair. At that time Mr. Wright, while inspecting the site, did not observe an abundance of standing water or runoff from the permit area. (Wright, N.T. 322)

54. Hepburnia's berm had been breached where it had been repaired with hay bales in June 1999. The hay bales had rotted. (Wright, N.T. 322; Stonebraker, N.T. 411)

55. The Department also inspected the site. Mr. Stonebraker found no evidence that water had come out of the collection ditch on the bond release area. He also observed no signs of erosion on the site. (Stonebraker, N.T. 413; 471)

56. At the time the Department and DOT inspected the site, Hepburnia had temporarily repaired the breach in the berm with new hay bales. (Stonebraker, N.T. 413)

57. The Department required Hepburnia to more permanently stabilize the area. Hepburnia used a dozer to dig a sedimentation sump in the vicinity of the breach, stabilized it with rock, added several two-inch pipes to relieve pressure in times of excessive rain, and placed hay bales below the pipes' discharge points to prevent runoff from the discharge. (Stonebraker, N.T. 414)

58. Mr. Wright visited the site to observe the construction and concluded that the repair met DOT standards. (Wright, N.T. 324)

59. This type of problem is not uncommon on a site at this stage of reclamation because the vegetation has not yet matured. (Stonebraker, N.T. 415-16)

60. These repairs are deemed adequate by the Department until they fail. (Stonebraker, N.T. 471)

61. In the event that another breach occurs from the sedimentation controls, the Department will take corrective action. (Stonebraker, N.T. 415)

Use of Unbonded Roads

62. In August 1999, Hepburnia needed to do some work for Mr. Riddle in the northern portion of Bond Release Area No. 2. Mr. Stonebraker gave them permission to use an old logging road to tram a dozer to where the work needed to be done. This road was on the permit area, but was not bonded. (Stonebraker, N.T. 427)

63. In response to a complaint by Mr. Riddle, Mr. Stonebraker inspected the site on August 12, 1999. He wrote a notice of violation to Hepburnia, instructing them to stop using the unbonded logging road. (Stonebraker, N.T. 428; Ex. *C-10)

64. Mr. Stonebraker lifted the notice of violation on August 24, 1999, after determining that Hepburnia was no longer using the logging road and that they had repaired the area damaged by the tramming. (Stonebraker, N.T. 428-29; Ex. *C-10)

65. On October 21, 1999, Mr. Stonebraker responded to another complaint by Mr. Riddle that Hepburnia was using another unbonded access road. (Stonebraker, N.T. 430)

66. Mr. Stonebraker wrote another notice of violation ordering Hepburnia to stop using the second access road. That notice of violation was also lifted after Mr. Stonebraker determined that Hepburnia was no longer using the road to haul equipment. (Stonebraker, N.T. 430-31; Ex. *C-10)

67. With the exception of common use and personal use vehicles, which Mr. Riddle agreed could use the second access road, Hepburnia has not used any unbonded access roads to haul equipment since the time that the notices of violation were issued. (Stonebraker, N.T. 430-31)

The Upper Kittanning Seam

68. The following seams of coal existed on Bond Release Area No. 2, beginning with the seam closest to the surface and continuing down in elevation: Upper Freeport, Lower Freeport, Lower Freeport Split, and Upper Kittanning, or C prime. (Stonebraker, N.T. 432-33)[6]

69. Although Hepburnia was authorized to mine the Upper Kittanning coal seam in some areas of the mine site, it was not authorized to take the Upper Kittanning on a portion of Bond Release Area No. 2. (Stonebraker, N.T. 449)

70. Mr. Riddle and Hepburnia had many discussions concerning the mining of the Upper Kittanning seam on Bond Release Area No. 2. (Riddle, N.T. 308-09)

71. Mr. Stonebraker was present one day during active mining when the issue of mining the "lower seam" was discussed between Mr. Riddle and Hepburnia. (Stonebraker, N.T. 433-34)

72. That day Hepburnia mined a test pit from the lower seam. Mr. Stonebraker could not identify whether the lower seam was the Lower Freeport Split or the Upper Kittanning seam of coal. (Stonebraker, N.T. 434-35)

73. However, he later reviewed the drill logs and was able to determine that the coal taken from the test pit was the Lower Freeport Split, a seam that Hepburnia was authorized to mine. (Stonebraker, N.T. 435, 444)

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[6] A transcription error exists on page 433, line 10. It reads "upper Freeport" but should read "Upper Kittanning."

74. At the time Mr. Stonebraker observed the lower seam being mined, he was not aware that Hepburnia was not authorized to mine the Upper Kittanning seam at that location. (Stonebraker, N.T. 436)

DISCUSSION

In both of these appeals from the Department's actions approving a Stage I bond release for the two Riddle parcels, it is the Appellant, Mr. Riddle, who bears the burden of proof.[7] That is, he must demonstrate that the evidence produced at the hearing shows that the Department erred in its conclusion that Hepburnia met the criteria for Stage I bond release as stated in the Surface Mining Act[8] and the regulations.[9]

Our review of the Department's decision is *de novo*.[10] Therefore the Board will base its decision on the evidence adduced at the hearing, and not solely upon the facts which were considered by the Department.[11] Accordingly, we turn our consideration to the issues raised in each appeal, beginning with Bond Release Area No. 1.

BOND RELEASE AREA NO. 1

The Appellant raised three objections to the approval of Stage I bond release for Bond Release Area No. 1: (1) The area did not meet approximate original contour; (2) drainage controls were inadequate; and (3) the other landowners were not properly

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[7] 25 Pa. Code § 1021.101(a); *Wayne v. DEP*, 2000 EHB 888.

[8] Surface Mining Conservation & Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§ 1396.1 – 1396.31.

[9] *Wayne v. DEP*, 2000 EHB 888.

[10] *Warren Sand & Gravel Co. v. Department of Environmental Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975).

[11] *Smedley v. DEP*, EHB Docket No. 97-253-K (Adjudication issued February 8, 2001).

notified of Hepburnia's intent to seek bond release. We will address each objection in order.[12]

Approximate original contour

The Appellant has two main complaints relative to the contouring of the reclaimed area. One, there is an area which he believes is too steep. And two, a road which accessed another portion of his property no longer exists where it was located before Hepburnia began mining.

We explained the concept of "approximate original contour" in *Riddle v. DEP*,[13] as follows:

> "Approximate original contour" is not explicitly defined in the regulations. However, guidance can be drawn from the definition of "contouring" in the definition section of the mining regulations:
>
> > Reclamation of the land affected to approximate original contour so that it closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain with no highwall, spoil piles or depressions to accumulate water with adequate provision for drainage.
>
> 25 Pa. Code § 87.1. Further guidance for defining "approximate original contour" can be found in the Department's backfilling regulations. For instance, final graded slopes need not be uniform, but must "approximate the general nature of the premining topography." 25 Pa. Code § 87.144(b). The emphasis of the regulations is blending the land surface with the surrounding properties and removing impediments to its post-mining land use.[14]

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[12] For a complete overview of the requirements of Stage I bond release, see our summary judgment opinions in these appeals at *Riddle v. DEP,* EHB Docket No. 98-142-MG (consolidated)(Opinion issued April 16, 2001)(relating to Bond Release Area No. 1), and *Riddle v. DEP,* EHB Docket No. 98-142-MG (consolidated)(Opinion issued April 30, 2001)(relating to Bond Release Area No. 2).

[13] EHB Docket No. 98-142-MG(consolidated)(Opinion issued April 16, 2001).

[14] *Id.,* Slip op. at 3.

This concept of "blending" with the surrounding area was very evident in Nancy Reig's testimony. Although she consulted topographic maps to get an idea of what the contour of the landscape may have been before any mining occurred on the site, that information was of limited use because the area had been affected by mining before Hepburnia's activity.[15] Therefore she walked the bond release area and compared it to adjacent areas that were unaffected by Hepburnia.[16] She testified that the area to the north of Bond Release Area No. 1 was fairly steep and that to the east there was evidence of a nearly vertical highwall.[17] Although she described Bond Release Area No. 1 as "steep," she felt that it was not inconsistent with the topography of the adjacent areas and did not disturb the drainage pattern.[18] Accordingly, she concluded that Bond Release Area No. 1 was graded to approximate original contour.[19]

David Stonebraker, the regular inspector for the Hepburnia site, agreed with her conclusion.[20] He had seen the site before Hepburnia began mining.[21] Except for the area where the old road was located, it was steep in many areas.[22] He agreed with Ms. Reig's conclusion that the site was reclaimed to approximate original contour.[23]

The Appellant argues that a slope measured by the Department is steeper than 20° and therefore constitutes a "steep slope" as defined by the Department's regulations. Section 87.1 defines a "steep slope" as "a slope of more than 20° or such lesser slope as

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[15] N.T. 123.
[16] N.T. 118.
[17] N.T. 119-20.
[18] N.T. 128.
[19] N.T. 120.
[20] N.T. 209.
[21] N.T. 202.
[22] N.T. 202-04.
[23] N.T. 209.

may be designated by the Department after consideration of soil, climate and other characteristics of the region."[24] We do not believe that, in this case, the presence of a slope which measures slightly more than 20° invalidates the Department's conclusion that Bond Release Area No. 1 is reclaimed to its approximate original contour.

In September 1999 an engineer from the Department took eight slope measurements in response to the Appellant's complaint that the bond release area was not regraded to approximate original contour.[25] The measurements were taken at 50-foot intervals. Six were taken on Bond Release Area No.1 and two were taken on the adjacent area. The steep slope referenced by the Appellant was a 21.9° slope. The slope 50 feet to the north of this measurement was 20° and 100 feet north, the slope was 18.6°. Moving south from the steep slope, the measurements 50 and 100 feet were 18° and 13.9°, respectively.[26] Ms. Reig testified that these measurements did not change her opinion that the bond release area was graded to approximate original contour, because it blended well with the adjacent area that had been unaffected by Hepburnia's mining. Further the drainage and contour patterns were consistent. Given the fact that the area had been affected by mining and then reaffected by mining, she did not believe that this slope was too steep.[27]

We believe the Department's conclusion concerning the adequacy of the contouring on Bond Release Area No. 1 is appropriate. First, the Appellant did not contest the accuracy of the measurements, nor did he present expert testimony to rebut

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[24] 25 Pa. Code § 87.1.
[25] Ex. A-1; N.T. 123-24.
[26] Ex. A-1.
[27] N.T. 127-28.

Ms. Reig's expert opinion that the presence of the steep slope did not invalidate the conclusion that the bond release area met approximate original contour.

Second, there is nothing in 25 Pa. Code § 86.174(a),[28] setting forth the standards for Stage I bond release, which states that the presence of a steep slope *alone* means that an area can not be considered to be regraded to approximate original contour. Certainly if an area is steep before mining, the regulation would permit it to be returned to its steep condition after mining. The definition of approximate original contour provided in Section 87.1 emphasizes blending and "general surface configuration." The term "steep slope" is used in regulations which refer to active mining not reclamation. If the EQB, the body which promulgates the regulations of the Department, intended "steep slope" to have significance to Stage I bond release, it would have included the term in those regulations as well.

Third, there is no evidence that the presence of the steep slope interferes with the post-mining land use which was designated for Bond Release Area No. 1. The post-mining land use for Bond Release Area No. 1 is "forestland."[29] Forestland is defined by the regulations as "[l]and used for the long-term production of wood, wood fiber or wood-derived products; watershed protection; site-stabilization and for the production, protection and management of species of fish and wildlife. . . . "[30] There is nothing in the

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[28] Section 86.174(a) provides:

> When the entire permit area or portion of a permit area has been backfilled or regraded to the approximate original contour or approved alternative, and when drainage controls have been installed in accordance with the approved reclamation plan, Stage I reclamation standards have been met.

[29] N.T. 204.

[30] 25 Pa. Code § 87.1 (defining "land use").

record to suggest that the property can not be used for those purposes due to the relatively small portion of the area which can be defined as a "steep slope."

The Appellant also complains that a road which used to run through Bond Release Area No. 1 was backfilled and the new road which Hepburnia built is difficult to drive on in wet weather. Although the Appellant may have a private complaint with Hepburnia, the relocation of the road does not impact the Department's judgment concerning the reclamation of the area to approximate original contour. The regulations only require the property to be returned to its "approximate" contouring so that the topography closely matches the "general surface configuration" and compliments the drainage pattern on the site.[31] There is no requirement that a specific feature be replaced, particularly a man-made feature that does not significantly contribute to the property's use as forestland.

It is clear from the hearing that the Appellant is unhappy with the appearance of his property after Hepburnia concluded its activities there. But there is no requirement that land affected by mining be returned to its exact topography. It is the role of the Department to ensure that the regulations protecting the environment are complied with. It is not responsible for regulating the private relationship between a property owner and a mining operator.[32]

Drainage Controls

The Appellant next contends that the Department's approval of Stage I bond release was in error because the drainage ditch on Bond Release Area No. 1 does not encircle the entire area, but leaves a portion of property downslope from the ditch. We

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[31] 25 Pa. Code § 86.174(a).

[32] *See Zook v. DEP*, EHB Docket No. 2000-153-R (Opinion issued July 10, 2001).

find no violation of the permit or regulations, nor was any evidence of erosion or other drainage problem on the downslope side of the collection ditch presented.

The drainage ditch on Bond Release Area No. 1 begins part way up the slope and slopes downward toward a sedimentation pond located in the active mining area.[33] Therefore a portion of the bond release area is located downslope of the ditch. Nancy Reig testified at length concerning her inspection and approval of the drainage controls for Bond Release Area No. 1. She also testified that it would not be possible for the drainage ditch to be located at the edge of Bond Release Area No. 1 because runoff would not drain properly into a sedimentation pond.[34] She further testified that there was no spoil deposited downslope of the ditch.[35] The downslope area was stable and had no problems with erosion. Significantly, it was her opinion that placing another ditch in this area would be more harmful than beneficial.[36]

The Appellant contends that spoil was placed below the ditch by Hepburnia, contravening Special Permit Condition 19. That condition precludes the placement of spoil below ditches. However, Department staff testified that the condition only applies during active mining and not after reclamation when spoil has been used to regrade the property.[37] Further, as stated above, the area is stable and has no erosion problems.

The only evidence of a potential problem with the collection ditch was photographic evidence of the ditch overflowing in August 2001.[38] The Appellant,

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[33] N.T. 135-36.
[34] N.T. 136.
[35] N.T. 195.
[36] N.T. 198.
[37] N.T. 137, 139, 381-82.
[38] Ex. A-7.

however, testified that Hepburnia had corrected the problem. Therefore, there is no impediment to Stage I bond release.[39]

We find that there is no evidence that the drainage controls located on Bond Release Area No. 1 do not control runoff from the site. Accordingly, the Department did not err in concluding that the drainage controls were adequate for the purposes of Stage I bond release.

Notice

The Appellant finally argues that that the Department erred by approving the bond release because the other landowners of the bond release area were not notified.[40] The Department contends that since the Appellant himself received notice of the intended bond release, he is not harmed by the lack of notice to the other landowners.

There is no dispute that the Appellant is not the sole owner of the site, but holds title jointly, along with his brothers, Thomas Riddle and James Riddle and cousins, Mr. and Mrs. Charles Lind. There is also no dispute that the Appellant's brother and cousins did not receive written notice from Hepburnia that it intended to file a bond release application. However, the Appellant also testified that before he filed his appeal, he told the Riddles and the Linds about the bond release application.[41] He also discussed his decision to file an appeal on his own behalf.[42] Therefore the Riddles and the Linds had actual notice of the bond release application and could have filed their own appeal to protect their interests. In view of these circumstances, it would be inappropriate to nullify

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[39] *Lucchino v. DEP*, 1999 EHB 214; *Lucchino v. DEP*, 1999 EHB 473.
[40] *See* 25 Pa. Code § 86.171(a)(2).
[41] N.T. 64-65.
[42] N.T. 64-65.

the Department's action based on this procedural defect.[43] The Appellant presented no testimony that the failure to notify other owners affected him adversely in any way.

To conclude, we find that the Appellant failed to demonstrate that the Department's action in approving Stage I bond release for Bond Release Area No. 1 was inappropriate. We therefore dismiss his appeal relative to Bond Release Area No. 1.

BOND RELEASE AREA NO. 2

The Department also approved a Stage I bond release for another parcel of land of which the Appellant is a joint owner. He does not object to the contouring of the site, but raises several other objections concerning Hepburnia's compliance with other regulations. As we held in our summary judgment opinion, the Department is required to consider whether a permittee has complied with the Act, the relevant regulations, reclamation plan and conditions of the permit before approving a bond release.[44] Of the original 50 objections raised in the Appellant's notice of appeal, nine remain for our consideration, the others having been either dismissed, withdrawn, or settled. Those objections are: (1) drainage controls are insufficient to protect SR 3016 which borders the bond release area; (2) holes have developed in the bond release area; (3) an "intermittent stream" no longer flows; (4) water supplies have been substantially affected; (5) topsoil was not properly preserved during mining; (6) unbonded roads were used by Hepburnia;

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[43] *Giordano v. DEP*, EHB Docket No. 99-204-L (Adjudication issued August 22, 2001). However, as Judge Myers observed, notice, especially when explicitly required by the regulations, is "too important to be left to the discretion of the applicant without any but the most cursory [Department] oversight." *Hanslovan v. DER,* 1992 EHB 1011. Therefore we caution the parties that the Board may be inclined to take a different view in the future.

[44] *Riddle v. DEP*, EHB Docket No. 98-142-MG (consolidated)(Opinion issued April 29, 2001); 25 Pa. Code § 86.171(f).

(7) Hepburnia mined a seam of coal it was not permitted to; (8) Hepburnia mined off the bonded area; and (9) timber was inappropriately removed.

Although the Appellant mentions these last two objections in his post-hearing brief, he presented no admissible evidence to support those claims at the hearing, made no argument that the Board made a specific legal error in excluding the evidence he did attempt to offer,[45] and proposed no other factual findings or legal argument to support his claims. We therefore deem these objections to be waived.[46]

We will address the seven remaining objections in order. We find that the Appellant presented no evidence of any ongoing violation of the Surface Mining Act, its regulations or any other law that would necessitate the reversal of the Department's approval of the bond release for Bond Release Area No. 2.

State Route 3016

The Appellant makes a collection of arguments in support of his position that the erosion controls on the bond release area are not adequate to protect State Route 3016 (SR 3016), a road adjacent to Bond Release Area No. 2. The factual support for his view that they are inadequate is two rain events where the berm was breached and water washed onto the road. Both of these rain events were unusually heavy storms.[47]

The Appellant first argues that the Department should have issued an enforcement order after the second breach in 2001. The Department's failure to issue an enforcement

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[45] *See People United to Save Homes v. DEP*, 1999 EHB 914 (to preserve objections to evidentiary rulings made during the hearing, a party may not simply make a general reference to those rulings, but must provide specific citations to the transcript and to any legal precedent on which he bases its objections).

[46] 25 Pa. Code § 1021.116(c); *Patti v. DEP*, 1999 EHB 610. (Any arguments not raised in a post-hearing brief are deemed waived.)

[47] N.T. 406.

order has no relevance to whether the bond should be released. We note that the Department ordered Hepburnia to repair the berm and further stabilize the area. The effectiveness of the Department's choice of action is evidenced by the fact that Hepburnia did in fact repair and stabilize the area promptly without further action by the Department. We find no error.[48]

The Appellant also suggests that the ditch and berm are not engineered properly and that building the ditch in a different place would better prevent runoff. However, the Appellant did not provide any evidence in the record which supports his position that there is a superior manner of dealing with the runoff from the area. On the contrary, both Mr. Stonebraker and Mr. Wright of DOT testified that they were satisfied with Hepburnia's erosion controls in the bond release area.[49] Further both breaches were caused by heavy rainstorms and there is no evidence that the erosion controls do not prevent runoff during "average" rain events. As of the date of the hearing, the controls had not failed. The drainage controls in the bond release area appear to be adequate.

Subsidence Holes

The Appellant next argues that holes have developed on the bond release area. He contends that the situation creates a threat of pollution because water is running through "toxic material" and that the construction of a channel would solve the problem. The Department counters that the holes did not appear until after bond release and that they have been adequately repaired by Hepburnia. We agree with the Department.

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[48] Generally speaking, the choice of enforcement tool by the Department is a matter of prosecutorial discretion and is not "second guessed" by the Board absent unusual circumstances. *See Westvaco Corp. v. DEP*, 1997 EHB 275.

[49] N.T. 471, 324; *see also* N.T. 505-06.

It is obvious that subsidence holes in a bond release area would provide a basis for the Department to disapprove an application for bond release. Here, however, the holes have been repaired. Gary Potter testified that he had not seen a hole on the site for nearly a year, and he had checked the site a few days before the hearing.[50] Mr. Stonebraker testified that if holes form again, Hepburnia will be ordered to repair them.[51]

The Appellant contends that the water is running through toxic material and creating a threat of pollution. However, he presented absolutely no evidence to support this claim. He also contends that the construction of a channel would prevent holes from forming. There is also no evidence in the record that the area is so unstable that Hepburnia's repairs are inappropriate. The fact that no holes have formed in nearly a year[52] suggests to us that Hepburnia's choice of repair for the holes is adequate. We find no basis for invalidating the Department's approval of the bond release.

"Intermittent Stream"

At the hearing the Appellant noted the location of an intermittent stream which ran from a pond across the bond release area.[53] This is the same pond from which water poured onto the ground causing the subsidence holes discussed above. The only argument the Appellant makes in his brief is that without the channel to catch water from the pond, water is seeping into the backfilled area and therefore Hepburnia should remove the pond.

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[50] N.T. 501, 503.
[51] N.T. 467.
[52] N.T. 504.
[53] N.T. 258; Ex. *C-2.

First, the pond is not located on the bond release area and whether it should be removed or not was not an issue the Department needed to consider in approving the release of the bond for Bond Release Area No. 2. Second, the Appellant does not argue that any law or regulation has been violated which the Department should have considered before approving the bond release.[54] There is no Department regulation which precludes water from draining onto the ground.[55]

Hepburnia was authorized to mine in the area of the channel. Moreover, the Department offered evidence that at the time the permit application was under consideration, the area was inspected by both the Department and the Fish Commission. Neither inspection revealed the existence of any stream which should have been protected from mining.[56] Again we find no basis for invalidating the Department's approval of the bond release.

Water Supplies

The Appellant contends that water supplies in Bond Release Area No. 2 have been "substantially affected." The only evidence he adduced in support of that contention is the fact that Hepburnia replaced a water supply for the Dixon family[57] and that there are three springs located on the bond release area. Voluntarily replacing a water supply which is not even located on the bond release area hardly constitutes a violation of the regulations. Nor does it suggest that the hydrogeologic balance of the bond release area has been adversely affected to the extent that the approval of the bond release request by

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[54] N.T. 422.

[55] N.T. 384.

[56] N.T. 374. The issuance of Hepburnia's permit was never appealed by the Appellant or any other party.

[57] N.T. 423.

the Department was inappropriate. Although the Appellant identified three springs on the property, he presented no evidence that any of these springs had been affected by mining, adversely or otherwise.[58] We can not identify any violation of a regulation, law or permit condition. Therefore the Board has no basis upon which to conclude that the Department's action approving bond release was anything but proper.

Top Soil

As the Appellant correctly points out, a mine operator is required to conserve topsoil for use as the final surface layer.[59] Therefore failing to properly save topsoil may provide a basis for disapproving a Stage I bond release even though the actual replacement of topsoil is only relevant at the later stages of bond release.[60] However, the Appellant presented no evidence that Hepburnia failed to properly preserve topsoil. The only evidence presented by the Appellant was photos of two piles of dirt which he contended were topsoil that should have been preserved. However, the Department's witness, James Fetterman, testified that when he saw the material at the site he determined that it was not topsoil and was not suitable as a surface layer during reclamation.[61] Although Mr. Fetterman performed no soil tests, he is required to be able to identify soils as part of his job.[62] Moreover, the Appellant presented no scientific evidence that Mr. Fetterman's conclusion concerning the soil was in error. Therefore we find that there is no evidence on the record that Hepburnia was not properly preserving

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[58]Since the Appellant bore the burden of proof, the Department had no responsibility to prove that the water supplies were not affected by mining. 25 Pa. Code § 1021.101(a).

[59] 25 Pa. Code § 87.97.

[60] *See Riddle*, slip op. 5-6 (Opinion issued April 29, 2001).

[61] N.T. 333-34.

[62] N.T. 334-35.

topsoil as required by the regulations. Since there is no evidence that Hepburnia was not complying with the regulations concerning topsoil, the Department's decision to approve the bond release was not in error.

Use of Unbonded Haul Roads

There is no dispute that Hepburnia used two unbonded haul roads without being permitted to do so. However, the evidence is that the Department wrote notices of violation for Hepburnia's use of the roads, ordered Hepburnia to repair damage caused by their use of the roads, and that Hepburnia has not used either road since, except as permitted by the Appellant.[63] Accordingly, there is no uncorrected violation of the regulations and therefore no basis to reverse the Department's approval of the bond release.

Unpermitted Seam of Coal

The Appellant argues that Hepburnia mined the Upper Kittanning or C prime coal in an area that it was not permitted to do so. Yet the record is devoid of any evidence that Hepburnia mined a coal seam in violation of its permit. Although mining the Upper Kittanning in Bond Release Area No. 2 was certainly much discussed by the Appellant and Hepburnia,[64] the only evidence on record concerning the identity of the coal seam is Mr. Stonebraker's testimony that the results of a test pit drilled by Hepburnia revealed that coal from the pit was from the Lower Freeport Split and not the Upper Kittanning.[65] Therefore we must conclude that there is no evidence of a violation of the Surface

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[63] N.T. 427-31.

[64] A dispute concerning this seam is currently a topic of civil litigation between Mr. Riddle and Hepburnia.

[65] N.T. 435, 444.

Mining Act, the regulations or Hepburnia's permit which would indicate that the Department's approval of Stage I bond release was inappropriate.[66]

In sum, there is no evidence that the conditions for Stage I bond release found in 25 Pa. Code § 86.174 have not been met on Bond Release Area No. 2. Nor is there any evidence that Hepburnia is in violation of the Surface Mining Act, regulations or permit conditions on Bond Release Area No. 2. Therefore, the Department's approval of Stage I bond release was appropriate.

CONCLUSIONS OF LAW
Bond Release Area No. 1

1. The Appellant bears the burden of proof. 25 Pa. Code § 1021.101(a).

2. Bond Release Area No. 1 meets approximate original contour. 25 Pa. Code § 86.174(a); 25 Pa. Code § 87.1.

3. The erosion and sedimentation controls installed on Bond Release Area No. 1 are adequate. 25 Pa. Code § 86.174(a).

4. Since other landowners of Bond Release Area No. 1 received actual notice of the application for bond release, the failure to provide written notice was harmless error.

5. The Department's approval of Stage I bond release for Bond Release Area No. 1 was appropriate. 25 Pa. Code § 86.174.

CONCLUSIONS OF LAW
Bond Release Area No. 2

1. The Appellant bears the burden of proving that the approval of Stage I bond release for Bond Release Area No. 2 was inappropriate.

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[66] The Appellant suggests in his post-hearing brief that he is concerned about the effect of mining this lower seam of coal on water in the area, but he presented no evidence on this topic at the hearing.

2. Bond Release Area No. 2 meet the standards for Stage I bond release. 25 Pa. Code § 86.174(a).

3. There is no evidence of an uncorrected violation of the Surface Mining Act, the regulations promulgated thereunder or the conditions of the permit on Bond Release Area No. 2. 25 Pa. Code § 86.171(f).

4. The Department's approval of Stage I bond release for Bond Release Area No. 2 is appropriate. 25 Pa. Code §§ 86.174(a); 86.171(f).

We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN M. RIDDLE, JR.	:
	:
v.	:
	: **EHB Docket No. 98-142-MG**
COMMOWEALTH OF PENNSYLVANIA,	: **(consolidated with 2000-001-MG)**
DEPARTMENT OF ENVIRONMENTAL	:
PROTECTION and HEPBURNIA COAL	:
COMPANY	:

ORDER

AND NOW, this 25th day of March, 2002, the above-captioned appeals are hereby **DISMISSED**.

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. 98-142-MG
(consolidated with 2000-001-MG)

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **March 25, 2002**

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JOHN M. RIDDLE, JR.	:
	:
v.	:
	: **EHB Docket No. 2000-230-MG**
COMMOWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HEPBURNIA COAL COMPANY	: **Issued: March 25, 2002**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis:

A Department motion for summary judgment is granted in part and denied in part. The Board grants summary judgment with respect to certain objections to the Department's renewal of a surface mining permit based on administrative finality as a result of the Appellant's failure to raise those claims at the time of original permit issuance, the absence of legally cognizable claims, the absence of any requirement for a public hearing to consider objections to permit renewal and the attorney-client privilege. The motion is denied with respect to the Department's claim that the Appellant's failure to object to the original issuance of the permit bars him now from contending that the Department's renewal of the permit was improper in absence of a consent signed by all surface mining owners.

BACKGROUND

This appeal is from the renewal on September 28, 2000 by the Department of Environmental Protection (Department) of a permit issued to Hepburnia Coal Company

(Hepburnia) for continued surface mining activities in New Washington Borough and Chest Township, Clearfield County. The Appellant, John M. Riddle, Jr., is one of four owners of a portion of the property that was subject to the permit as originally issued.

The Department's action in renewing the permit was subject to a special condition prohibiting additional mining on the property owned by Appellant and four others in the permit area (the Riddle property) until Hepburnia obtains a Supplemental C authorizing mining signed by all of the owners of this property and corrects the ownership information for the Riddle property on their permit maps. This Supplemental C authorization for mining on the Riddle property was signed only by the Appellant when the permit was originally issued.

This appeal is one of several appeals before the Board in which the Appellant has contested the Department's action with respect to Hepburnia's mining activities under the permit issued by the Department. In EHB Docket No. 98-142-MG (consolidated with 2000-001-MG) the Appellant challenged the Department's approval of Stage I bond releases for two separate bond release areas located on the Riddle property. A hearing on the merits of those appeals has been held. In both of those appeals the Appellant challenged the Department's action in originally issuing the permit on November 8, 1995 based on the failure of all of the owners of the Riddle property to sign the Supplemental C authorization for mining. The Appellant filed no appeal from the original issuance of the permit.

In these previous proceedings, the Board issued a partial summary judgment against the Appellant with respect to issues that he failed to raise when the permit was issued originally, including the failure of all owners to sign the Supplemental C authorization. The Board's order also precluded the Appellant from raising some specific objections with respect to the Stage I

bond release, some of which are objections that the Appellant has repeated in this appeal.

The Department's pending motion for partial summary judgment seeks a judgment dismissing some of the objections in the notice of appeal primarily on the ground that the principle of administrative finality bars relitigation of these issues now and because some objections fail to state legally cognizable claims.

OPINION

The grant of summary judgment is proper under Rule 1035.2 of the Pennsylvania Rules of Civil Procedure whenever (1) there is no genuine issue of material fact that could be established by additional discovery or expert report, or, (2) after completion of discovery relevant to the motion, the party opposing the motion who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.[1] The grant of summary judgment is warranted only in a clear case, and the record must be viewed in the light most favorable to the non-moving party resolving all doubts regarding the existence of a genuine issue of material fact against the grant of summary judgment.[2]

The Department's Motion

The Department's motion is based in principal part on the affidavit of John Varner, the Department's permit chief in its Hawk Run District Mining Office. The facts set forth in the Department's motion and that affidavit summarize the facts relating to both the original

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[1] *Jones v. SEPTA,* 772 A.2d 435 (Pa. 2001); *Schreck v. Department of Transportation,* 749 A. 2d 1041 (Pa. Cmwlth. 2000).

[2] *Young v. Department of Transportation,* 744 A.2d 1276 (Pa. 2000); *County of Adams v. DEP,* 687 A.2d 1222 (Pa. Cmwlth. 1997).

application and the renewal application.

Original Application. The original permit application was received on March 30, 1995 for authorization to conduct surface mining operations on properties in New Washington Borough, Newburg Borough and Chest Township, Clearfield County, including the Riddle property. Module 5 to that application indicated that John M. Riddle was the owner of the Riddle property, that Hepburnia had a lease to enter the Riddle property and mine coal. The Department also reviewed a Supplemental C submitted by Hepburnia signed only by John M. Riddle, but not by any other persons. According to the Varner affidavit, the Department had no reason to believe that there were any other owners of the Riddle property.

The Department's review of relevant maps, the bonds and other required information indicated to the Department that the permit should be issued. After an opportunity for public comment was given, the Department issued the permit on November 8, 1995. The Department published appropriate public notice of issuance of the permit in the *Pennsylvania Bulletin* on December 9, 1995. The Board received no appeal of the Department's issuance of the permit.

Renewal Application. The Department received this application for renewal of the permit on May 10, 2000. The Appellant filed written objections to the renewal of the permit with the Department. These objections, attached to the Varner affidavit as an exhibit, included a restatement of objections that are the subject of the previous appeals including his objections to the failure of Supplemental C to be signed by all owners of the Riddle property. Following a conference with the Appellant where he objected to the renewal of the permit because all owners of the Riddle property had not signed the required consent, the Department determined that Hepburnia did not desire to mine any more of the Riddle property.

On September 28, 2000, the Department determined that the application for renewal met the requirements of the Department's regulations at 25 Pa. Code § 86.55 and decided to renew the permit subject to the special condition that no mining of the Riddle property could be conducted until Hepburnia obtained a new Supplemental C signed and executed by all property owners and amended the application to show all property owners.

The Department's motion also seeks dismissal of other objections in the notice of appeal which are identical to those dismissed by the Board's prior rulings or which the Department believes do not state legally cognizable objections. These objections are discussed below.

The Appellant's Response

The Appellant's response to the motion expresses disagreement with many statements in the motion or states that the Appellant does not know whether the statement is true or not. It does claim that the Department did not do a good job in determining whether there were other owners of the Riddle property. It states that the Appellant was not aware of the original issuance of the permit and did not see the notice in the *Pennsylvania Bulletin* because he was traveling and the other property owners did not know of the issuance of the permit The response also contains the argument that since renewal is a new and different matter, he is not bound by the Board's determinations in the prior cases or by his failure to appeal the original issuance of the permit with respect to deficiencies in the Supplemental C. It states that there are many disputed material facts with respect to the Varner affidavit and statements in the Department's motion, but does not specify what these disputes are in many instances.

In paragraph 45 of the Appellant's answer, he argues that under the Department's regulations at 25 Pa. Code § 86.55 the permit could not be renewed because of the failure of

Hepburnia to update the ownership information with respect to the Riddle property "so that all surface owners are shown and given proper notification as required by the regulations so any objection a property owner may have can be addressed by the Department." A similar argument appears in other paragraphs of the answer.[3] The Appellant's response also refers to some confusion as to which special condition the Department applied to its renewal action. He also complains of the conduct by Department personnel and what he believes to be inappropriate assertions of the attorney-client privilege. In response to many paragraphs of the Department's motion the Appellant simply says "No response required at this time."

Objections Based on Supplemental C

The Department's motion seeks judgment as to objections 4-6, 8 and 9-10 of the notice of appeal which assert that the Supplemental C was not used for the purpose intended, was only signed by one property owner, was used in lieu of a lease, and all property owners were not correctly listed in the application and the permit. The Department says that because these issues were not raised at the time the permit was originally issued, the Appellant is barred from raising them now by reason of the principle of administrative finality. The Appellant contends, however, that administrative finality cannot bar his objections based on the impropriety of the Supplemental C because renewal of the permit raises different issues so that he is entitled to attack the Department's renewal of the permit now.

The Board has held in the Appellant's appeals from the Department's actions relating to bond release that the Appellant is barred from raising his claims relating to the absence of the signatures of all property owners in the Supplemental C form. In the case of the renewal of the

[3] *See, e.g.,* par. 51.

permit, however, information as to the complete ownership of the Riddle property is relevant to the propriety of the Department's action in *renewing* the permit. While the Department's regulations at 25 Pa. Code § 86.55(a) states that a valid, existing permit issued by the Department will carry with it the presumption of successive renewals upon expiration of the term of the permit, subsection (d) of that regulation makes applications for renewal subject to the ownership and control information required by 25 Pa. Code § 86.62, relating to identification of interests.[4] That regulation requires that the application must provide the names and addresses of every legal or equitable owner of record of the coal to be mined and areas to be affected by surface operations and facilities including legal and equitable owners of the surface area within the proposed permit area.[5]

We therefore deny the Department's motion for summary judgment on objections 4-6, 8 and 9-10 relating to the Supplemental C form and the listing of property owners. The doctrine of administrative finality has no application where the issues raised are raised in a different proceeding in which new facts are relevant to the propriety of the Department's action. In *Bethlehem Steel Corp. v. Department of Environmental Resources,*[6] the Commonwealth Court held that administrative finality did not bar the appellant from pursuing an appeal from denial of a variance application, where the application for a variance was a different matter based on different facts than was involved in the Department's previous determination.

The Department was not authorized to renew the permit with respect to the Riddle property in absence of a consent to mine from all property owners. It is clear as a matter of fact

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[4] 25 Pa. Code § 86.55(d).
[5] 25 Pa. Code § 86.62(a)(2)(ii).

that the Department became aware of the existence of other owners of the Riddle property before it approved renewal of the permit.[7] It is equally clear as a matter of law that the Department may not authorize surface mining on a property without the consent of the surface owners.[8] Therefore the renewal application materials do not comply with the Department's regulations with respect to ownership information. Accordingly, the Department's renewal of the permit with this knowledge is not justified by the failure of the owners of the Riddle property to object to the initial issuance of the permit.

The question remains, however, as to whether the Appellant or other surface owners were adversely affected by the Department's action. The Department's renewal expressly prohibits mining on the Riddle property until the consent of all property owners is obtained. All of these property owners were given notice of the Department's action in renewing the permit, but only the Appellant filed an appeal with this Board. Accordingly, a hearing on the merits of the Appellant's claim is required to determine whether the Department's action in renewing the permit for mining on other properties should be set aside for failure to comply with its regulations concerning ownership of the Riddle property. This violation of the Department's regulations with respect to the Riddle property may well be harmless error as far as the rights of the owners of the Riddle property are concerned.

Other Objections

The Department properly contends that objections 11 and 15-16 cannot be raised in this

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[6] 309 A.2d 1383 (Pa. Cmwlth. 1978).

[7] Varner Affidavit pars. 29-30.

[8] *Empire Coal Mining & Development, Inc. v. Department of Environmental Resources*, 678 A.2d 1218 (Pa. Cmwlth. 1996).

appeal because identical objections were dismissed by the Board by its April 30, 2001 Opinion and Order granting summary judgment in the appeal docketed at EHB Docket No. 2001-001.[9] Objections 15 and 16 claim that the bonding areas or mining increments are not contiguous. Since we dismissed identical objections to these in our April 30th Opinion and Order, we will not consider them in this appeal because the claims involved in Objections 15 and 16 raise no new facts that would justify a reconsideration of these objections in this appeal. Objection 11 complains that the Department failed to respond to service requests or complaints concerning problems with mining. As we determined with respect to an identical objection in our Opinion and Order, Objection 11 does not state a legally cognizable claim. We will dismiss this objection for this same, additional reason.

The Department states in paragraph 53 of its motion that Objections 1 and 2 (as they relate to Special Conditions 1-12, 14-18 and 20-23 of the SMP) should be dismissed for failure to state a legally cognizable claim. Objection 1 alleges that "the Department did not fulfill their obligation under the law to protect the property owner's rights." The Department says that this objection is too general to be considered and that even on deposition the Appellant was not able to specify any facts on which this claim was based. The Appellant's response states only that he cannot determine how Objection 1 relates to the Special Conditions.

Objection 1 will be dismissed because the Appellant has the burden of proof and is obliged in responding to a motion for summary judgment to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to

[9] *Riddle v. DEP,* EHB Docket No. 98-142-MG (consolidated) (Opinion issued April 30, 2001).

a jury.[10] The Appellant has not presented any such evidence in his answer. Accordingly, the Department's motion will be granted as to Objection 1.[11] We note that the Appellant has persisted in representing himself in these appeals without counsel contrary to the Board's recommendation that he retain counsel.

Objection 2 states that Special Conditions in the permit were not enforced. The Department's motion in paragraphs 57-61 states that the Appellant has acknowledged on deposition that he has no evidence to support this claim. The Appellant's response to the Department's motion fails to present any evidence to support his claim as required by the rules relating to summary judgment. Accordingly Objection 2 will also be dismissed for the reasons set forth above with respect to Objection 1. Objection 18 states that "mining" as used in the Department's letter is not defined. The Department says this is not a legally cognizable objection because it is a discovery matter and the Department has given a definition of this term in discovery. The Appellant's response to the Department's motion states only that no response is required at this time and requests that the objection be maintained in the event the meaning of this term should become relevant. We agree with the Department that this is not a legally cognizable claim and will dismiss this objection. Of course, should the meaning of "mining" become relevant to any issue to be considered in the hearing on the merits, the Board will consider the contentions of the parties as to the meaning of that term.

The Department's motion at paragraphs 65-71 states that Objections 3, 20-21 and 32 all relate to the manner in which the Department held a public meeting regarding the permit

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[10] Pa. R.C.P. No. 1035.3.

[11] *Yourshaw v. DEP,* 1998 EHB 819. *Cf. Yourshaw v. DEP*, 1998 EHB 1063.

renewal. It states that in response to the Appellant's request for a public hearing the Department held an informal public conference as required by the Department's regulations at 25 Pa. Code § 86.55. The Department further states that there is no regulatory requirement that the Department hold a public hearing rather than such a public informal conference and that there is no relevant difference between the two with respect to the Appellant's right to participate. The Appellant's response to the motion is to disagree with some of these statements because he cannot determine the accuracy of these statements, to state that the Department has never discussed the renewal of the permit to his satisfaction, to state that he believes Objection 20 to have been removed, and to state that these objections should be retained since the Appellant has not received a satisfactory explanation of these objections.

We will dismiss these objections as not stating legally cognizable claims. There is no legal requirement that the Department hold a public hearing at the Appellant's request as distinguished from an informal public conference. The Appellant has referred us to no such legal requirement, and on a motion for summary judgment he has the burden to present evidence to indicate that there is such a requirement. Nor is the Department bound to give explanations for its actions that are satisfactory to the Appellant. The Department's response in its motion for summary judgment to these objections is a satisfactory explanation and we adopt them as reasons for dismissing these objections as a failure to state a legally cognizable claim.

Objections 22 to 25 state that the Appellant was not informed of the legal advice given to the Department as a result of his request that he be informed of any discussions regarding the permit renewal. He also claims that the advice given by Department lawyers that affects a property owner's rights cannot be privileged because, under this circumstance, the owner is also

a client but the Appellant was not treated as such. The Department says that this is not a legally cognizable claim because advice given by Department counsel to the Department operating personnel is privileged as a matter of law.

We will grant the Department's motion with respect to Objections 22-25. Only the Department is the client with respect to advice given it by Department legal counsel and communications between Department legal counsel and Department decisionmakers giving legal advice concerning Department decisions are governed by the attorney-client privilege.[12]

Accordingly, we enter the following

[12] *Sedat, Inc. v. Department of Environmental Resources*, 641 A.2d 1243, 1244-46 (Pa. Cmwlth. 1994); *Defense Logistics Agency v. DEP,* 2000 EHB 1218, 1220-21.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN M. RIDDLE, JR.	:	
	:	
v.	:	
	:	**EHB Docket No. 2000-230-MG**
COMMOWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HEPBURNIA COAL COMPANY	:	

ORDER

AND NOW, this 25th day of March, 2002, IT IS HEREBY ORDERED as follows:

1. The Department's motion for summary judgment with respect to Objections 4-6 and 9-10 is **DENIED**. The hearing on the merits concerning these objections will deal with whether or not the Appellant and other owners of the Riddle property were adversely affected by the Department's action or whether these objections address only a harmless error.

2. The Department's motion for summary judgment with respect to Objections 1, 2, 3, 11, 15,16, 18, and 20-25 is **GRANTED** and these objections are dismissed.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 2000-230-MG

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: March 25, 2002

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

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