Environmental Hearing Board

Adjudications and Opinions

2010
VOLUME II

COMMONWEALTH OF PENNSYLVANIA
Thomas W. Renwand, Chairman and Chief Judge

JUDGES

OF THE

ENVIRONMENTAL HEARING BOARD

2010

Chairman and Chief Judge	Thomas W. Renwand
Judge	Michelle A. Coleman
Judge	Bernard A. Labuskes, Jr.
Judge	Michael L. Krancer
Judge	Richard P. Mather, Sr.
Acting Secretary	Maryanne Wesdock

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 2010.

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

SUBJECT MATTER INDEX – 2010 EHB DECISIONS

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ACTING SECRETARY TO THE BOARD

GSP MANAGEMENT COMPANY	:	
	:	
v.	:	**EHB Docket No. 2008-250-L**
	:	**(Consolidated with 2008-274-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	**Issued: June 7, 2010**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board upholds the Department's denial of an application for an amendment to a water supply permit because the application did not contain the necessary information required by the regulations. The Board also finds, however, that the Department has failed to meet its burden of proving that it was reasonable to issue a compliance order directing the supplier to submit an improved application.

FINDINGS OF FACT

1. Frank Perano owns the public water system that serves the Tiadaghton View Mobile Home Park located in Upper Fairfield Township, Lycoming County. (Joint Stipulation Paragraphs ("Stip.") 1, 6.)

2. GSP Management Company ("GSP") is a registered fictitious name for Frank Perano. (Stip. 6.)

3. The public water system serving the park has approximately 34 service connections on approximately 43 lots and serves approximately 80 individuals year-round. (Stip. 2.)

4. The park is served by three wells numbered 1, 2, and 3. (Notes of Transcript page ("T.") 162-63.)

5. In the fall of 2007, the public water supply wells serving the mobile home park failed to produce adequate yield. (Stip. 9.)

6. GSP conducted an investigation which found that the park's Well No. 2, the primary well that supplied water for the park, was not producing sufficient water. (T. 13, 168.)

7. Because of the water shortage at the park, the Department of Environmental Protection (the "Department") issued an emergency permit authorizing bulk hauling of finished water from the Montoursville Borough Water Company to the park. (Stip. 15; T. 13, 169, 326, 400; Department Exhibit No. ("DEP Ex.") 45.)

8. GSP, acting through its consultants, sent a proposal to the Department to deepen Well No. 2. (Stip. 11; T. 214, 218; Appellant's Exhibit Nos. ("A. Ex.") 3-6.)

9. On November 21, 2007, the Department issued a public water supply emergency permit ("Park Emergency Permit") to GSP authorizing the deepening of Well No. 2. (Stip. 16.)

10. The Department did not require GSP to obtain a construction permit before permitting it to deepen Well No. 2. (T. 300-01, 415.)

11. The Department issued the emergency permit without requiring GSP to do any aquifer testing or new-source sampling. (T. 389.)

12. The Department allowed GSP to deepen Well No. 2 without requiring it to comply with the regulatory requirements that would ordinarily apply to a new source. (T. 389.)

13. The Department allowed GSP to deepen Well No. 2 based upon submissions from GSP's consultants that included a description of proposed well deepening work ("the Work Plan"), a letter from David Graham, P.G., one of GSP's consultants regarding his recommendations for development of a supply source, and specifications for deepening the well (the "Well Rehabilitation Specifications"). (Stip. 11; A. Ex. 6.)

14. The Work Plan stated, *inter alia*, that Swank's Well Drilling would be contracted to deepen the well; that the drilling, the 48-hour drawdown pumping test, and sampling would be performed in accordance with attached specifications; and that samples would be taken by Steve Gilbert and tested by Seewald Laboratories. (Stip. 13; A. Ex. 5, 7.)

15. The Well Rehabilitation Specifications provide for a 48-hour aquifer test satisfying the following requirements:

a. It must utilize a pump capacity at least 1.5 times the yield anticipated and must provide for continuous pumping for at least 48 hours;

b. It must provide data concerning test pump capacity – head characteristics; static water level; depth of test pump setting; and time of starting and ending of test cycle;

c. It must provide recordings and graphic evaluations of the pumping rates; pumping water levels; drawdown; and water recovery rates and levels; and

d. At the end of the 48-hour test period, samples of water must be collected for quality determination.

(A. Ex. 3.)

16. The Well Rehabilitation Specifications further state, under "Samples and Records," that:

a. During drilling and completion of the well, a detailed log or completion form is to be completed and returned to the Department pursuant to Chapter 109 of the Department's regulations; and

b. Formation samples must be maintained and turned over to the water system owner.

(A. Ex. 3.)

17. The Well Rehabilitation Specifications also required a log containing detailed information about the well's construction and the drawdown results of the 48-hour test. (A. Ex. 3.)

18. Special Condition A of the Park Emergency Permit required GSP to submit a full permit application for the deepening of Well No. 2 within 120 days from the issuance of the emergency permit. (Stip. 17, 19; A. Ex. 9.)

19. Special Condition A of the Park Emergency Permit required that GSP submit a new permit application for the Well No. 2 deepening to the Department as required under Chapter 109, Subchapter E, Subsections 109.501 and 109.503. (Stip. 19; A. Ex. 9.)

20. Special Condition A also stated that the permit application would be considered a "minor amendment" if: 1) no change in treatment was required, and 2) the permitted yield of Well No. 2 was not increased above the previously permitted yield of 16 gallons per minute. (Stip. 17; A. Ex. 9.)

21. The Department has allowed GSP to operate pursuant to the emergency permit for approximately two and one-half years. (T. 422-24.)

22. Special Condition B of the Park Emergency Permit required GSP to sample water from Well No. 2 for eight parameters, and those sample results when completed were to be submitted to the Department for review and approval before using the well on an emergency basis. (Stip. 18; T. 310, 416-17; A. Ex. 9.)

23. The eight parameters set forth in Special Condition B were pH, specific conductance, iron, manganese, nitrate, sodium, total coliform and fecal coliform. The

Department did not require any other new-source sampling before the deepening and use of Well No. 2. (T. 124, 302, 424-25; A. Ex. 9.)

24. The Emergency Permit provided that GSP would be required to perform a 48-hour aquifer test on Well No. 2 in order to obtain a minor amendment to its existing water supply permit for the well. The testing was not required to operate pursuant to the Emergency Permit. (A. Ex. 3, 9.)

25. GSP has not performed a 48-hour test on Well No. 2. (Stip. 48; T. 53.)

26. GSP has not conducted new-source sampling on the water being drawn from deepened Well No. 2. (T. 464.)

27. No party appealed the Park Emergency Permit to the Environmental Hearing Board. (Stip. 20.)

28. The drilling of Well No. 2 was completed on December 27, 2007. Well No. 2 was drilled to a depth of 400 feet from its original depth of about 136 feet. (Stip. 21; T. 318; DEP Ex. 67.) No other changes were made to Well No. 2. (Stip. 22.)

29. An additional water-bearing zone was encountered at approximately 157 feet, and a smaller water zone was detected at 398 feet. (T. 305, 321; DEP Ex. 61.)

30. By e-mail dated January 11, 2008, David Graham (GSP's consultant) asked Anthony Mattucci of the Department about the requirements in the Park Emergency Permit. In the e-mail, Graham indicated that GSP did not wish to increase the withdrawal rate beyond the 16 gallons then permitted. Taking that into account, Graham asked whether any additional work was needed beyond submissions made in connection with obtaining the Park Emergency Permit and the minor amendment to the water supply permit itself. (Stip. 23.)

31. Mattucci responded that the Department's requirements were outlined in the special conditions of the Park Emergency Permit. (Stip. 24; DEP Ex. 25.)

32. GSP submitted sample results for the previously identified eight parameters from Well No. 2 to the Department on or about January 25, 2008. (Stip. 27; T. 301, 310-12, 464; A. Ex. 12.)

33. By letter dated January 28, 2008, the Department approved use of Well No. 2 on an emergency basis. (A. Ex. 13.)

34. The letter stated in part:

> On November 21, 2007, the Department issued the emergency permit to Tiadaghton View Mobile Home Park for the rehabilitation of Well No. 2. The well was subsequently deepened and samples were collected by your water system operator and submitted to the Department in accordance with Special Condition B. of the emergency permit. The sample results were reviewed and the source may now be used on an emergency basis. Please keep in mind that the emergency permit requires the submittal of a complete permit application (modules, hydrogeology report, engineers report, seals, etc.) by March 21, 2008. The Public Water Supply Permit application will require additional testing and must address the source construction, source quality and quantity, pumping system, and treatment.

(Stip. 28; A. Ex. 13.)

35. Various correspondence and communications ensued between GSP (through its consultants) and the Department regarding the specific requirements of the 48-hour aquifer test. (T. 255, 324; DEP Ex. 26-27, 29.)

36. GSP took the position that the Department was demanding more than what was specified in the Work Plan submitted in connection with the Emergency Permit and the permit itself, particularly by requesting a "hydrogeology report." (T. 19-20, 59, 94, 179, 223, 373-74; A. Ex. 15.)

37. The Department modified the requirements of the hydrogeological report that would normally be required for a new source by agreeing that the 48-hour test was essentially a

test to determine the yield the well could sustain during drought conditions, and it would be necessary to collect the samples for new-source parameters at the end of the test to determine the quality of the water when the well was stressed. Many of the other aspects of a standard hydrogeological test were waived. (T. 252, 330, 351, 448, 501; DEP Ex. 29.)

38. After deepening the well, GSP refused to perform a 48-hour test, citing a concern that the Department would not accept the results of the 48-hour test outlined in the Well Rehabilitation Specifications and, if GSP performed the pump test, it would need to conduct another test as part of a "hydrogeology report." (T. 21-23, 61-62, 100; A. Ex. 15.)

39. By letter dated February 4, 2008, Graham (GSP's consultant) proposed modifications regarding the aquifer testing that would normally apply as outlined in the Department's Public Water Supply Manual. (Stip. 29; T. 57; DEP Ex. 29.) The Department found the modifications to be acceptable. (Stip. 41; T. 462-63; A. Ex. 23.)

40. GSP retained Graham to work with the Department to obtain the necessary permits. (T. 76-78.)

41. James Cieri, another of GSP's consultants, sent an e-mail dated March 3, 2008 to the Department indicating that the pumping test for Tiadaghton View was postponed. (DEP Ex. 31.)

42. Pursuant to Condition A of the Emergency Permit, GSP submitted a permit amendment application to the Department in March 2008. (Stip. 32; A. Ex. 9, 17.)

43. GSP indicated that the permitted yield of Well No. 2 would not exceed the previously permitted yield of 16 gallons per minute. (Stip. 33, 37; A. Ex. 17.)

44. In a letter to GSP dated March 11, 2008, the Department advised GSP that its application for a minor amendment was administratively complete. (Stip. 34; A. Ex. 18.)

45. The park's three wells have been operating since the fall of 2008. The wells are all set to come on at the same time and all three have been operating consistently. The park does not rely exclusively on Well No. 2. All three wells pump to a main building, and then go out to the distribution system. (Stip. 49; T. 187-88.)

46. With a deeper aquifer, the potential exists to find water of a different quality than in shallower aquifers. (T. 128, 239, 244, 264-65, 304-05, 343-44, 382.)

47. If Well No. 2 pumped water from the furthest reaches of the aquifer, which could occur during drought conditions, the quality of the water could be different from the water near the bore hole. (T. 102-03, 128, 239, 244, 264-67.)

48. The Department reviewed GSP's permit amendment application and found it to be deficient. Specifically, it noted in a March 18, 2008 technical deficiency letter that a quantity and quality determination had not been made for deepened Well No. 2. Mattucci noted that a 48-hour yield test needed to be conducted, and new-source sampling needed to be performed. (Stip. 35; T. 445-46; A. Ex. 19.)

49. In addition to addressing GSP's failure to perform a 48-hour test and new-source sampling, the March 18, 2008 deficiency letter indicated that certain well and well cap specifications were needed, provisions needed to be made for periodic measurement of water levels in the completed well, and if a new pump was being proposed, the specifications for that pump needed to be submitted. (Stip. 36; A. Ex. 19.)

50. In response, GSP sent a letter dated April 15, 2008 to the Department stating that a hydrogeological report was not being prepared because aquifer testing was not required for a minor permit amendment. (A. Ex. 20.)

51. GSP submitted an engineer's report dated April 2008 concerning the existing water supply facilities, and a letter dated March 28, 2008 from Swank and Son Well Drilling and Pump Company as part of its response to the March 18, 2008 technical deficiency letter. The letter contained information about specifications for a new pump, pitless adapter, and the well cap for Well No. 2. (Stip. 38.)

52. On June 25, 2008, the Department indicated once again that the previously submitted aquifer testing procedure, dated February 4, 2008, was acceptable for meeting the requirements of the hydrogeological report. (Stip. 41; T. 456-60.) GSP, however, responded that it did not want to do any further testing. (T. 460-61.)

53. After the June 25, 2008 meeting, the Department sent a pre-denial letter dated June 26, 2008 to GSP, which again explained to GSP that a hydrogeological report needed to be submitted with complete new-source sampling results. It advised GSP again that the previous aquifer testing procedure that had been submitted on February 4, 2008, was acceptable. (Stip. 38-41; T. 462-63; A. Ex. 23.) By letter dated July 10, 2008, GSP refused to submit any further information. (A. Ex. 24.)

54. The Department denied GSP's permit amendment application by letter dated July 25, 2008. (Stip. 43.)

55. The July 25, 2008 letter once again reiterated that GSP needed to conduct a 48-hour aquifer test and submit a hydrogeological report with complete new-source sampling results in accordance with the testing procedure that was submitted on February 4, 2008. (A. Ex. 26.)

56. On August 14, 2008, the Department issued an order directing GSP to perform the aquifer test and new-source sampling. (Stip. 44, 45; T. 466.)

57. The 2008 order directs GSP to complete the 48-hour aquifer test by following GSP's November 5, 2007 submission as modified by GSP's February 4, 2008 submission, both of which were prepared by GSP and both which were already approved by the Department, and to conduct new-source sampling. (A. Ex. 27.)

58. Under Paragraph C of the 2008 Order, the Department also directed GSP to submit a new permit application within 90 days. The 90-day time frame was selected because there were only two items left for the complete permit application and the technical review for all the other items was completed and resolved. (Stip. 46; T. 470-71; A. Ex. 27.)

59. The Department agreed to consider the new permit amendment application a minor permit amendment in order to save GSP the $750 application fee that is required for a major amendment provided no change in treatment was required. (T. 313.)

60. The Department throughout its dealing with GSP on this matter has confusingly referred to the aquifer test that it has required as, among other things, a "48-hour yield test," "48-hour aquifer test," "48-hour pump test," "48-hour pumping test," "48-hour aquifer test," and a "dependable yield evaluation." (A. Ex. 23, 26, 27; T. 31, 36, 98, 99, 147-48, 227, 231, 269, 357-58, 367-68, 498; DEP Pre-Hearing Memorandum at 18.)

61. There is no credible record evidence that GSP's well deepening project is similar to other projects reviewed by the Department, or that the Department has treated similar projects differently.

62. The area around Well No. 2 has had normal precipitation and normal recharge during the more than two years since Well No. 2 went back into production. (T. 235.)

63. Well No. 2 has been in production since January 2008 and is pumping at the average rate of six or seven gallons per minute. (T. 41.)

64. There is no credible record support for GSP's assertion that the Department's actions in this case are part of a "statewide campaign of harassment" against all parks the Department associated with Perano or GSP.

DISCUSSION

We have before us two closely related appeals relating to the water supply well designated as Well No. 2 at GSP's Tiadaghton View Mobile Home Park in Upper Fairfield Township, Lycoming County. GSP found that Well No. 2, together with its other two wells, was not able to supply enough water to its eighty residents in the fall of 2007. Although GSP was able to contract the services of a bulk water hauler to meet its residents' needs in the short term, GSP proposed to deepen Well No. 2 as a more permanent solution to the park's water shortage. The Department accepted GSP's proposal and issued GSP an emergency permit authorizing the use of a deepened well indefinitely, the only conditions being that GSP was required to sample the water for eight parameters before serving water, and it was required to submit an application for an amendment to GSP's pre-existing water supply permit for the well. The permit amendment, if granted, would authorize the long-term use of the deepened well. The Department indicated that the application was to include additional water-quality sampling and the results of a 48-hour aquifer test of some kind.

GSP drilled the well deeper on December 27, 2007, tested for eight parameters, and started serving water from the well soon thereafter. GSP has been using the well to serve water to the park's residents ever since pursuant to no authority other than the emergency permit, which the Department has never terminated. The water has not been fully tested and no 48-hour aquifer test was ever performed. Although GSP submitted an application for a minor amendment, it refused to perform an aquifer test or conduct new-source sampling as part of that

application. Therefore, seven months after the well went into operation, the Department denied GSP's application for a minor amendment, which GSP appealed at Docket No. 2008-250-L. In August 2008, the Department ordered GSP to submit a better permit application. GSP's appeal from that order is docketed at No. 2008-274-L. GSP bears the burden of proof in its appeal from the permit denial and the Department bears the burden of proof in GSP's appeal from the order. 25 Pa. Code §1021.122. We find that neither party has met its burden in this case.

The Permit Denial

GSP argues that the Department erred by denying its permit application for a minor amendment to its water supply permit. It asks us to issue an order directing the Department to issue the permit forthwith. The Department counters that GSP has yet to supply the information necessary to support such a permit amendment.

There is no dispute that GSP is required to obtain a permit amendment to operate Well No. 2 on a long-term basis. Deepening the well from about 136 feet to about 400 feet constitutes a "substantial modification" of a system, which requires a permit amendment. 35 P.S. §721.7(a); 25 Pa. Code §§109.1, 109.501(b), and 109.503(b).[1] The Department has broad authority to require a water supplier such as GSP to submit information the Department deems necessary to evaluate whether safe water is being supplied to consumers. 35 P.S. §§721.2(b), 721.7(j), 721.5(e); 25 Pa. Code §109.4.

Instead of arguing about whether a permit amendment is required, the parties disagree about what information GSP may or should be required to submit in order to obtain the necessary

[1] A substantial modification may be permitted pursuant to a major permit amendment or a minor permit amendment depending upon its complexity. 25 Pa. Code §109.503(b)(3). The Department advised GSP that it would treat its amendment as a minor amendment. The distinction has no significance relating to the issues in dispute. For example, whether a hydrogeological report or new-source sampling are required does not turn on whether it is a major or minor amendment.

permit amendment. To be precise, the parties dispute whether GSP must or should be required to perform a 48-hour pumping test and new-source sampling in addition to the information that it has already submitted. GSP's argues that the Department *cannot* require any additional information because the deepened well is not a new source and/or because the Department is "bound by the permit conditions that it agreed to" when it issued the emergency permit. Second, even if the Department can require additional information, it *should* not require additional information because the deepened well has been producing an adequate quantity of water with no known quality problems for two and one-half years. Third, if the Department is going to require additional information, it should tell GSP exactly what must be done and guarantee that nothing else will be required. All three arguments fail.

GSP does not refer us to any statutory, regulatory, or case-law support for its contention that the deepened Well No. 2 is anything other than a new source. Indeed, it is worth noting at the outset that GSP's post-hearing briefs do not contain citations to legal authority that support *any* of its arguments. Our rules require that arguments cite to supporting legal authority. 25 Pa. Code §1021.131(a). No party should depend upon the Board to perform its legal research. Rather than refer us to any legal support, GSP contends that deepened Well No. 2 is not a new source because water from the deepened well "is the same as the water coming from Well No. 2 before it was deepened because the water in the deepened well was only 22 feet away and the test results were coming back nearly the same for before and after deepening." (GSP Brief at 38.) It also argues that the Department "has never treated a well rehabilitation as the development of a new source."

Section 109.1 of the applicable regulations defines a "source" as "[t]he place from which water for a public water system originates or is derived, including, but not limited to, a well,

spring, stream, reservoir, pond, lake or interconnection." 25 Pa. Code §109.1. A "new source" is "[a] source of water supply that is not covered by a valid permit under... 35 P.S. §§ 711-716 (repealed) or under this chapter as a regular source of supply for the public water system." *Id.*

The regulations contain an extensive list of parameters that must be sampled to determine whether a new source is safe for public consumption. 25 Pa. Code §109.503(a). GSP has not sampled the water from the deepened well for all of these parameters, so there is no record support for its statement that the water from the deepened well "is the same as the water coming from Well No. 2 before it was deepened." In fact, GSP has not referred us to any specific sampling results to back up its statement that the water is "the same." GSP's engineering expert, James Cieri, was rather vague about the issue. (T. 118, 128.) GSP's hydrogeology expert, David Graham, conceded that he could not testify with a reasonable degree of certainty that water quality from the deepened well is of the same quality as water from the old well. (T. 244.) In fact, he acknowledged that the water quality could be different. (T. 264-65.) At this point, nobody knows.

GSP does not explain its statement that the water in the deepened well "is only 22 feet away." We suspect that GSP is referring to the fact that a new water-bearing zone was encountered at about 157 feet below the surface in the new well and the original well was only 136 feet deep. However, there is no evidence that the water-bearing zone or zones in the old well were at 136 feet. There may also be at least one other, deeper water-bearing zone in the new well. (T. 321; A. Ex. 11.) In any event, it is undisputed that it is not unusual for water quality to change with depth. (T. 304-05, 343-44.) One cannot simply assume that water from a well that is now 400 feet deep is of the same quality as water from the well when it was only 136 feet deep.

Equally without record support is GSP's assertion that the Department "has always treated a well rehabilitation as an existing source." GSP does not explain the relevance of this point. Of course, the regulatory criteria are what matter, not what the Department has "always done." The testimony of GSP's expert that the Department's Northeast Regional Office did not require aquifer testing for one other well deepening hardly supports a contention that the Department has "always treated a well rehabilitation as an existing source." We also have virtually no information regarding this other alleged situation. We do not know whether that project and GSP's well deepening involve similar facts and circumstances. Still further, the fact that the Department acted differently in a similar situation in another region, even if proven, does not suggest that the Department acted incorrectly here as opposed to there. This vague reference to another project has no probative value. GSP has not articulated an equal protection claim, but even if it had, it has not shown that similarly situated persons have been treated differently for no legitimate reason. *See generally UMCO v. DEP*, 2007 EHB 215, 218, *aff'd*, 938 A.2d 530 (Pa. Cmwlth. 2007), *app. denied*, 951 A.2d 1168 (Pa. 2008), *cert. denied*, 129 S. Ct. 640 (2008). To the extent GSP suggests that the Department's choices here were part of a "statewide campaign of harassment," the record here, if anything, shows that the Department has bent over backwards to accommodate GSP, not harass it.

GSP next argues that the Department *cannot* require additional testing because the Department is "bound by the permit terms that it agreed to" when it issued the emergency permit. Again, GSP cites no authority for this proposition. It makes no attempt to frame its argument in terms of estoppel, laches, vested rights, contract, or any other recognizable legal principle.

The Department is not "bound" by the terms of the emergency permit, even as to the emergency permit. The Department has the authority to modify, suspend, or revoke that permit as circumstances and the public health and safety warrant. 35 P.S. §721.7. GSP's arguments that the Department may not "alter" or "evade" the terms of the permit are simply incorrect. GSP's flawed reasoning is further exacerbated by its incorrect presumption that the terms of the temporary emergency permit or the Department's actions in connection with granting that permit somehow constrain the scope of the information the Department can require in reviewing GSP's application for a permit amendment. The emergency permit and the minor amendment to the water supply permit are two entirely separate actions. The emergency permit is just what it says: a *temporary* permit issued for the sole purpose of alleviating an emergency loss of supply. 35 P.S. §721.2(b)(2). Emergency permits are limited to exceptional circumstances. Very few regulatory criteria are specified for emergency permits. 25 Pa. Code §109.506. A different and much more extensive set of regulations applies to long-term drinking water supply permits and amendments thereto. 25 Pa. Code §109.503. The Department's review of an application for a minor amendment to a drinking water permit must be performed in accordance with applicable laws that relate to such permits, not the terms of a previously issued, temporary, emergency permit, even if both permits relate to the same source.

Even assuming *arguendo* that there was some legal ground to support GSP's reliance on the terms of the emergency permit as a basis for restricting the information that the Department may require for a regular permit application, the emergency permit that GSP received does not provide factual support for its position. The emergency permit on its face expressly provides that GSP must submit a new permit application to the Department "as required under Chapter 109, Subchapter E, Subsections 109.501 and 109.503." (Stip. 19; Ex. A-9.)

GSP argues that, even if the emergency permit does not itself constrain the Department's review of its application for a minor amendment, the Department is "bound" by statements it made during the course of its review of the emergency permit application. Once again, GSP offers no legal support for its theory. Estoppel (or GSP's estoppel-like theory) only lies against the government when it is exercising its police powers under narrowly defined circumstances that GSP has not shown to be present here. *Attawheed Foundation v. DEP*, 2004 EHB 858, 879 *aff'd*, 162 C.D. 2005 (Pa. Cmwlth., November 3, 2005); *Reinert v. DEP*, 1997 EHB 401, 414-15. Employees of the Department may not make commitments that jeopardize the health and safety of the park's residents.

Also, once again, the facts do not support GSP's argument. Our review of the record shows that the Department did not waive compliance with new-source sampling when it issued the emergency permit. (T. 303, 389, 393, 414, 416, 420, 425.) GSP's post-hearing brief is full of allegations about what it and its consultants "assumed," "intended," or "believed," but there is no credible record evidence that the Department made any "commitments" or promises other than its repeated statement that GSP's testing as described in its submittal of February 8, 2008 was acceptable.[2]

GSP's next argument – that no further information should be required because the well has been operating without incident for two and one-half years – is particularly devoid of merit. The fact that the Department has impermissibly allowed GSP to operate the well for the better part of two and one-half years without a proper permit does not vest GSP with the right to

[2] GSP's testimony that it did not approve Graham's letter of February 4, 2008 is neither here nor there. GSP hired Graham to represent it in working with the Department to obtain the necessary permits. GSP never disavowed the letter. GSP relied on Graham as its expert witness. Whether the letter was authorized or not, it shows that nothing had been written in stone even as late as February 8, 2008. It also renders GSP's claim that it does not know what it is supposed to do to obtain a permit less than credible.

operate a well of unknown quality and reliability in perpetuity without a proper permit. Furthermore, once again, there is no record support for the contention. We do not know what the quality of the water is that is coming from the well with respect to many key parameters, so the two and one-half years of operation tells us nothing about quality. As to quantity, when GSP's expert was asked, "Do you have enough information to say whether well number two can reliably produce water during a drought?" he answered "No." (T. 247.) The record supports this concession. Drought conditions have not obtained during the last two and one-half years in the area of the park. (T. 246-47.) In addition, water from Well No. 2 is combined with water from two other wells at the park to supply water and no separate analysis of Well No. 2's reliability has been done. (Stip. 49; T. 247-48.)

Finally, GSP appears to argue that, if the Department is going to require more information, the Department should tell GSP exactly what will guarantee that it will receive a permit without needing to do any further work. GSP complains, with some justification, that the Department has been less than precise in the words that it has used to describe the 48-hour pumping test that GSP must perform as part of its application for a minor permit amendment. A lack of precision in naming the test, however, hardly justifies GSP's refusal to perform *any* testing. It also does not follow from the Department's lack of clarity in expression that GSP should be issued a permit having conducted no testing at all. The Department has repeatedly told GSP that GSP's February 4, 2008 proposal is likely to be acceptable. The permit application process is not a contractual negotiation. And it is not for the Department to define with perfect precision, in advance, every detail of what will pass as an acceptable test. The Department certainly should not be guaranteeing anything at this stage. It is GSP's responsibility, if it still wants a permit, to show that Well No. 2 can be counted on to reliably yield safe drinking water.

At the end of the day, whether GSP is issued a permit turns on compliance with the law, not the Department's employees' remarks.[3]

In summary, GSP's arguments in support of its contention that the Department erred when it denied GSP's permit application have no support in law or in fact. Its request that we order the Department to issue the permit amendment based on GSP's existing application has no merit and its appeal from the permit denial must be dismissed.

The Order

The Department issued an emergency permit to GSP when the existence of a true emergency is debatable at best. The Department acknowledges that it issued the permit at least in part to save GSP the expense of hauling treated water to the park. (Department Brief at 48.) The permit is illegal on its face because it is not limited in duration as *required* by the regulations. 25 Pa. Code §109.506.[4] The emergency permit authorized the long-term use of a new source without compliance with the applicable new source regulations. The Department has now allowed that source to be used for two and one-half years. The Department's approach in this case has turned the whole notion of permitting new sources on its head. Instead of ensuring that a source is reliable and safe and *then* allowing it to be used to serve the public, in this case it was drill first and ask questions later.

In order to justify its actions, the Department points to the order that is the subject of this appeal, which requires to GSP to perform after-the-fact tests on the well. The Department bears

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[3] GSP overemphasizes the significance of the Department's terminology. The regulations control, not the Department's remarks. Although the regulations require a "hydrogeological report," 25 Pa. Code §109.503(a)(1)(iii), the Department may circumscribe the contents of the report for wells that produce less than 100,000 gallons per day, 25 Pa. Code §109.503(a)(1)(iii)(B). GSP's contention that the Department has confused matters by demanding a "hydrogeologic report" is somewhat disingenuous. To say that a hydrogeological report is required does not really say anything in and of itself about what will be required for a source producing under 100,000 gallons per day.

[4] The Department claims that the permit was limited in duration. This is simply not true. The permit has no expiration date and it is still in effect.

the burden of proving that the order embodies a reasonable exercise of the Department's discretion. *Carroll Township v. DEP*, 2009 EHB 401, 406; *Schaffer v. DEP*, 2006 EHB 1013, 1025; 25 Pa. Code § 1021.122(b). The Department has failed to satisfy that burden.

Initially, we are not aware of any authority or any precedent for an order stating that a party *must* pursue a permit application for a particular source of drinking water. The Department refers us to none. Ordinarily, if the Department is not satisfied with a permit application, it denies the application. It does not *order* the person to submit a better application. It is very unusual to see the Department attempting to compel a person to engage in a permitted activity. As this case illustrates, the idea of forcing a party to obtain a permit against its will would seem to virtually guarantee an exercise in frustration.

Assuming, *arguendo*, that there might be a situation where a public water supplier could be compelled to pursue permitting of a particular source if there are no other alternatives and the public health is threatened in the absence of the use of that source, the Department has made no such showing that such a situation presented itself here. The Department has failed to justify or explain in any way why it believes that it is better to continue to serve the residents of Tiadaghton View water of unknown reliability and unknown quality indefinitely than it is to serve them approved water from other available sources. There is no evidence, for example, that Tiadaghton View's other wells are inadequate under the non-drought conditions currently in place, or that water that is known to be safe cannot be hauled to the site, or that water from Well No. 2 cannot be tested expeditiously *before* its continued use, or that there are no other sources of acceptable water other than untested Well No. 2 water.

The Department's order does little more than perpetuate and legitimize the Department's error in issuing an emergency permit with no expiration date. Although the emergency permit is

not itself the subject of these appeals, the order is. The order is premised on the indefinite continuation of the emergency permit. The order creates a false impression that the Department is enforcing the law when in fact the order has accomplished nothing new and is mere surplusage. The emergency permit is still in force and it already contained a requirement to obtain a proper permit. If the Department is not satisfied with GSP's operation pursuant to an emergency permit, it should take action with respect to *that* permit. If that permit requires the submission of an application for a long-term permit and the permittee chooses not to submit an acceptable application, the appropriate remedy is to revoke the emergency permit, not issue an order insisting that an improved permit application be submitted. This is not a case of the Department exercising its discretion to select among reasonable remedies. This is a case of the Department failing to justify the remedy that it did select.

Furthermore, although GSP failed to prove that *no* testing is needed, the Department has failed to carry its burden of proving that the particular testing specified in the order is reasonable and appropriate. As the record now stands, we are not in a position to endorse any particular testing protocols. Although GSP failed to show that *no* testing is required, the Department failed to show that any one variant of such a test is an appropriate choice. The Department qualified Anthony Mattuci as an expert witness, but it never asked him for any expert opinions, let alone opinions expressed to a reasonable degree of scientific certainty. We have no credible record evidence from any witness that the testing as set forth in the order is scientifically reasonable, sufficient, and/or necessary to show that the well is safe and reliable. Lacking any expert testimony of its own, the Department attempts to rely on the testimony of GSP's expert, David Graham. However, Graham testified that a 48-hour test is "probably" not necessary to ensure adequate yield, and he disclaimed any opinion on water quality issues. (T. 234-35, 244-45.)

The Department argues that Well No. 2 needs to be put under stress and the quality of its water must be tested under such conditions, but it has allowed the well to be used every day for more than two years. If such testing is really necessary, why issue an emergency permit in the first place? Why issue an emergency permit with no termination date? Why allow the well to be used for two and one-half years without such testing? Why take no steps whatsoever to enforce the order? The only answer on the existing record is that the Department did not want to appear to be "vindictive." (DEP Brief at 51 n. 3.)[5] Meanwhile, it is, perhaps, naïve to expect GSP to vigorously pursue another permit when the Department by its actions has signaled that an emergency permit is good enough.

The regulations on their face require new-source sampling. 25 Pa. Code §109.503(a). That requirement cannot be waived. Since that sampling has never been performed, Well No. 2 should not be operating. The regulations, however, do not specify when or under what conditions such sampling must be conducted. The existing record does not support the Department's position that such sampling must be performed at the conclusion of a 48-hour test. We hasten to add that it does not refute it either. Similarly, there is no record explanation to support a scaled-down hydrogeological report. The Department offered nothing to support its decision regarding the details of the report.

In short, the Department has failed to meet its burden of proving that its order reflects a reasonable exercise of its enforcement discretion or that it is an appropriate response to the situation at Tiadaghton View. Therefore, GSP's appeal from that order must be sustained.

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[5] The Department does not explain what it would do if the results of a 48-hour test suggest that Well No. 2 would not have an adequate yield in a drought, which, perhaps begs the question why the test is necessary.

CONCLUSIONS OF LAW

1. GSP has the burden of proof with regard to the denial of the permit amendment application, 25 Pa. Code §1021.122(c)(1), and the Department has the burden of proof with regard to the administrative order, 25 Pa. Code §1021.122(b)(4).

2. GSP is a public water supplier subject to the requirements of the Pennsylvania Safe Drinking Water Act ("SDWA"), 35 P.S. §721.1 *et seq.* and the regulations promulgated thereunder. 35 P.S. §721.3; 25 Pa. Code §109.1. As the permittee of a public water system, GSP is required to comply with the law as it relates to public water supplies. *Rhodes v. DEP*, 2009 EHB 599; 25 Pa. Code §109.4.

3. 25 Pa. Code §109.506(a) of the Department's regulations provides in part as follows:

> In emergency circumstances, the Department may issue permits for construction, operation, or modifications to a public water system as the Department determines may be necessary to assure that potable drinking water is available to the public. Emergency permits shall be limited in duration and at the Department's discretion be conditioned on additional monitoring, reporting and implementation of appropriate emergency response measures. The Department may revoke an emergency permit if it finds the public water system is not complying with drinking water standards or the terms or the conditions of the permit.

4. 25 Pa. Code §109.503(a) provides as follows:

> An application for a public water system construction permit shall be submitted in writing on forms provided by the Department and shall be accompanied by plans, specifications, engineer's report, water quality analyses and other data, information or documentation reasonably necessary to enable the Department to determine compliance with the act and this chapter. The Department shall make available to the applicant the Public Water Supply Manual...which contains acceptable design standards and technical guidance.

5. For new sources that are wells, the application must include a "hydrogeological report prepared and signed by a professional geologist...describing the geology of the

area...[and other information]. At the discretion of the Department, these requirements may be altered for a proposed well...that will be pumping less than or yielding less than 100,000 gallons per day." 25 Pa. Code §109.503(a)(1)(iii)(A).

6. Pursuant to 35 P.S. §721.7(a), it is "unlawful for any person to construct, operate or substantially modify a community water system without first having received a written permit from the department. A substantial modification is one which may affect the quality or quantity of water served to the public or may be prejudicial to the public health or safety." *See* 25 Pa. Code §§109.501(b) and 109.503(b). Once modified, the facility may not be operated without an amended operation permit from the Department under Section 109.504 of the Department's rules and regulations. 25 Pa. Code § 109.504.

7. 25 Pa. Code § 109.503(b)(3) provides as follows:

> The Department determines whether a particular modification is a substantial modification and requires the construction permit to be amended under paragraph (1) or (2). A substantial modification is a modification which may affect the quality of quantity of water served to the public or may be prejudicial to the public health or safety. The Department's determination of whether the substantial modification is a major change or a minor change will include consideration of the expected amount of staff time required to review and process the proposal, the magnitude and complexity of the proposed change and the compliance history of the public water system.

8. Well No. 2 was substantially modified when it was deepened.

9. The water that it is being served from deepened Well No. 2 is coming from a new source. Section 109.1 of the Department's rules and regulations, 25 Pa. Code §109.1, defines a new source in part as "[a] source of water supply that is not covered by a valid permit under...35 P.S. §§ 711-716 (repealed) or under this chapter as a regular source of supply for the public water system."

10. 25 Pa. Code §109.602(a) provides in part that "[a] public water system shall be designed to provide an adequate and reliable quantity and quality of water to the public." 25 Pa. Code § 109.602(b) provides in relevant part that "[d]esigns of public water facilities shall conform to accepted standards of engineering and design in the water supply industry and shall provide protection from failures of source, treatment, equipment, structures or power supply."

11. Raw water quality criteria for new sources must be tested for several parameters listed at 25 Pa. Code §109.503(a)(1)(iii)(B).

12. The Department did not err when it denied GSP's application for an amendment to its permit.

13. The Department abused its discretion by issuing GSP an order to submit a more complete permit application while leaving an illegal emergency permit with no limit duration in place, indefinitely.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GSP MANAGEMENT COMPANY	:	
	:	
v.	:	**EHB Docket No. 2008-250-L**
	:	**(Consolidated with 2008-274-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 7th day of June, 2010, it is hereby ordered as follows:

1. GSP's appeal docketed at EHB Docket No. 2008-250-L from the Department's denial of its application for a minor amendment to its water supply permit is **dismissed**, and

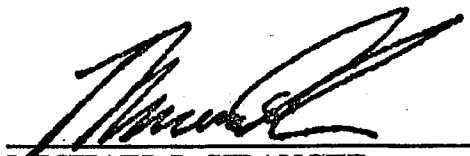
2. GSP's appeal docketed at EHB Docket No. 2008-274-L from the Department's compliance order is **sustained**. The order is hereby rescinded.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge



MICHAEL L. KRANCER
Judge

RICHARD P. MATHER, SR.
Judge

DATED: June 7, 2010

c: **DEP, Bureau of Litigation:**
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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2009-014-CP-M**
DAVID WEISZER	:	**Issued: June 9, 2010**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Richard P. Mather, Sr., Judge

Synopsis

The Department filed a Complaint for Civil Penalties seeking to impose civil penalties on an individual for violations of the Clean Streams Law at a Pennsylvania corporation's poultry processing facility. The Board grants the Department's Motion for Summary Judgment that the Department filed on the issue of liability because the Defendant failed to respond to the Department's motion as required by the Board's Rules.

OPINION

On January 29, 2009, the Department of Environmental Protection (the "Department") filed a Complaint for Assessment of Civil Penalties ("Complaint") against David Weiszer (the "Defendant") for violations of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. § 691.1 *et seq.* (the "Clean Streams Law" or the "Law"), arising out of activities that occurred at G&G Poultry Incorporated's plant at 1100 Lincoln Road, Birdsboro, Berks County, Pennsylvania. G&G Poultry Incorporated ("G&G Poultry") is a Pennsylvania

corporation, and the complaint alleges that the Defendant was the operator of G&G Poultry's plant. *See* Paragraphs 3 and 6 of Complaint. The Complaint asserts that inspections on numerous days showed that the Defendant allowed numerous unpermitted discharges of industrial waste to an unnamed tributary of the Schuylkill River resulting in pollution to the waters of the Commonwealth. In addition, the Complaint asserts that the Defendant failed to notify the Department of the unpermitted discharges in violation of the Department's regulations at 25 Pa. Code § 91.33(a). On April 6, 2009, the Defendant filed Defendant's Response to Plaintiff's Complaint for Assessment of Civil Penalties.[1] The Defendant's Response included New Matter that the Board later struck by Order dated May 29, 2009. The Defendant's Response also admitted, denied or otherwise responded to the factual allegations in the Department's Complaint.

The Complaint contained three counts to impose civil penalties on the Defendant:

Count I – alleged violations of Sections 301 and 307(a) of the Clean Streams Law, 35 P.S. §§ 691.301 and 691.307(a), involving unpermitted discharges of industrial waste into the waters of the Commonwealth;

Count II – alleged violations of Sections 401 and 611 of the Clean Streams Law, 35 P.S. §§ 691.401 and 691.611, involving pollution of the waters of the Commonwealth; and

Count III – alleged violations of the Department's regulations at 25 Pa. Code § 91.33(a) involving failure to report "incidents causing or threatening pollution" to the Department.

[1] At this initial stage of the litigation, the Defendant was represented by counsel. Defendant's counsel subsequently filed a Petition to Withdraw Representation that the Board granted by Order dated July 15, 2009. The Defendant is currently appearing before the Board on his own behalf consistent with the Board's rule at § 1021.21(a).

The Defendant's Response to the Complaint requested, *inter alia*, that Counts I, II and III "be stricken as the amount assessed is excessive and unreasonable and is an abuse of discretion and an abuse of governmental authority."

Department's Motion for Summary Judgment

On November 2, 2009, the Department filed a Motion for Summary Judgment ("Motion") on the issue of liability against the Defendant.[2] The Department's Motion and Memorandum of Law in Support of the Motion ("Memorandum of Law") seek to establish liability under Counts I, II and III of the Complaint. At the time the Department filed the Motion, the Defendant was appearing before the Board on his own behalf. The Defendant did not file a Response to the Department's Motion.

Standards for Granting a Motion for Summary Judgment

As a general rule, the Board may grant a motion for summary judgment where the pleadings, depositions, answers to interrogatories and admissions, together with any supporting affidavits, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as matter of law. 25 Pa. Code § 1021.94a(1); *Angela Cres Trust of June 25, 1998 v. DEP*, 2007 EHB 111, 114; *Snyder Bros., Inc. v. DEP*, 2006 EHB 978, 980. "The record is to be viewed in the light most favorable to the nonmoving party, and all doubts as to the presence of a genuine issue of material fact must be resolved against the moving party." *Albright v. Abington Mem'l Hosp.*, 696 A.2d 1159, 1165 (Pa. 1997). "[S]ummary judgment is granted only in the clearest of cases, where the right is clear and free from doubt...." *Lyman v. Boonin*, 635 A.2d 1029, 1032 (Pa. 1993). The granting of summary judgment is appropriate

[2] If the Board grants the Department's Motion, the Board would still need to hold a trial to resolve the issue of the amount of the civil penalty. 25 Pa. Code § 1021.75.

when a limited set of material facts are truly undisputed and the appeal presents a clear question of law. *Bertothy v. DEP*, 2007 EHB at 254, 255; *CAUSE v. DEP*, 2007 EHB 101, 106.

In its Motion and Memorandum of Law, the Department asserts that the Department served Requests for Admission and Interrogatories ("Requests for Admission") upon the Defendant on or about August 28, 2009. Because the Defendant failed to respond to these Requests for Admission, under Rule 4014 of the Pennsylvania Rule of Civil Procedure, the Requests for Admission are deemed admitted and any matter admitted under Rule 4014 is conclusively established. Pa.R.C.P. 4014(b) and (d). The Department also asserts, that the Defendant's admissions conclusively establish the violations of the Clean Streams Law, including regulations promulgated thereunder, set forth in Counts I, II and III of the Complaint and the Defendant's liability for these violations.

In addition, under the Board's rules, summary judgment may be entered against a party who fails to respond to a summary judgment motion. 25 Pa. Code § 1021.94a(k). *See Theodore Koch, P.E., S.E.O. v. DEP*, EHB Docket No. 2009-027-L (Opinion and Order dated February 9, 2010); *Robert and Lydia Thornberry v. DEP*, EHB Docket No. 2008-328-R (Opinion and Order dated February 9, 2010). The Defendant did not file a response to the Department's motion for summary judgment. The Defendant's failure to respond to the Department's motion provides a basis to grant the Department's motion. The Board relies upon the Defendant's failure to respond to the Department's motion and the Board's Rules to grant the Department's motion for summary judgment to resolve the liability issue associated with the assessment of civil penalties.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2009-014-CP-M**
DAVID WEISZER	:	

ORDER

AND NOW, this 9th day of June, 2010, it is hereby **ORDERED** that the Department's Motion for Summary Judgment is **granted**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

MICHAEL L. KRANCER
Judge

Richard P. Mather Sr.

RICHARD P. MATHER, SR.
Judge

DATED: June 9, 2010

c: **DEP Bureau of Litigation:**
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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

JOHN and CYNTHIA McGINNIS	:	
	:	
v.	:	**EHB Docket No. 2007-197-R**
	:	**(Consolidated with 2007-228-R**
COMMONWEALTH OF PENNSYLVANIA,	:	**and 2008-190)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and EIGHTY-FOUR MINING,	:	
INC., Permittee	:	**Issued: June 9, 2010**

OPINION AND ORDER ON VARIOUS PREHEARING MOTIONS

By: Thomas W. Renwand, Chairman and Chief Judge

Synopsis:

The Pennsylvania Environmental Hearing Board, for the most part, grants the Pennsylvania Department of Environmental Protection's Motion in Limine to exclude four out of five expert witnesses and nineteen fact witnesses. The Board is taking this extraordinary step because these witnesses were not identified in discovery and to allow these witnesses to testify at this late date would severely prejudice the mining company and the Pennsylvania Department of Environmental Protection. In this consolidated appeal, the main issues properly before the Board are whether the Appellants' pond was damaged by the mining, whether the pond supports its premining uses and whether the Department made the correct calculation of a bond to guarantee payment of increased operation and maintenance costs of the replacement water well that the mining company drilled.

Introduction

Presently before the Pennsylvania Environmental Hearing Board are several prehearing motions filed by the Pennsylvania Department of Environmental Protection and Eighty-Four Mining, Inc. The parties' final briefs were received on May 19, 2010. Trial in this matter is scheduled to begin on June 22, 2010. We will first address the Department's Motion in Limine which seeks to exclude the many fact and expert witnesses who were never identified by the Appellants during discovery.

This consolidated appeal involves three appeals filed by John and Cynthia McGinnis. The first two were filed in 2007 and the third in 2008. Mr. and Mrs. McGinnis chose to represent themselves rather than hire an attorney during the entire time discovery took place. The Board at an in person status conference held early in this matter strongly recommended to Appellants that they obtain legal counsel. However, they chose not to do so until after a dispositive motion was filed.

The McGinnis property is located over Mine 84, an underground coal mine located in Washington County and operated by Eighty-Four Mining Company. The Appellants' property was undermined in 2004. Following the mining, the McGinnis' submitted a claim that their property had been damaged, and following an investigation, the Department issued an Order to the mining company, on July 5, 2007 finding that the structures on the property and septic system had been damaged by mine subsidence. The Department found that the pond had not been damaged by mine subsidence. The Department's Order directed Eighty-Four Mining Company to repair the damage or compensate Mr. and Mrs. McGinnis in the amount of $506,041. Eighty-Four Mining Company did not appeal the Department's Order.

Mr. and Mrs. McGinnis' first appeal challenged Paragraph K of the Department's July 5,

2007 Order that the pond had not been damaged by subsidence. Following the filing of the first Appeal, the Department continued to evaluate the McGinnis claim as it related to the pond and specifically whether the premining uses of the pond had been maintained. The second McGinnis Appeal challenged the Department's conclusion set forth in its letter of September 17, 2007 that the premining uses of the pond were intact.

In response to Mr. and Mrs. McGinnis complaint that their domestic water well had been affected by mining, the mining company drilled a new well that the Department determined was adequate in quantity and quality for the purposes served by the original well. Because the new well cost more to operate than the original well, the Department issued a bond demand letter on May 15, 2008 directing the mining company to post a bond in the amount of $34,434.66 to guarantee payment to the Appellants of the increased annual operation and maintenance costs. Mr. and Mrs. McGinnis filed their third appeal to this final action of the Department.

By Orders dated November 13, 2007 and July 15, 2008, we consolidated all three appeals at Docket No. 2007-197-R. From August 6, 2007 to April 16, 2009 Mr. and Mrs. McGinnis proceeded *pro se*. Counsel entered her appearance on their behalf on April 16, 2009.

Discovery had been over for quite some time and no attempt was made to reopen discovery. In August 2009 we scheduled the appeal for trial to begin on January 27, 2010. Thereafter, we conducted a settlement conference on December 7, 2009 which was unsuccessful in resolving the case. Following the settlement conference, we issued an Order on December 16, 2009 postponing the trial until June 22, 2010.

On December 3, 2009, which was shortly before Appellants' Prehearing Memorandum was due on December 22, 2009, Appellants served Supplemental Responses to various Interrogatories.

This was almost a year after the close of discovery. This was followed shortly thereafter by the filing of their Prehearing Memorandum.

In their earlier discovery where the Appellants identified Mr. McGinnis as their only fact witness, they now listed another twenty witnesses. In addition, where before they identified representatives of the Department and the mining company or its consultants as expert witnesses and Microbac Laboratory and Al's Water Service they now listed new experts. At best the written reports submitted by the experts do not provide all of the information required by the discovery rules applicable to experts. Moreover, some of their experts have not prepared expert reports or complete answers to expert interrogatories.

Most importantly, the Appellants have identified only two issues, which both the Department and Eighty-Four Mining Company argue are now raised for the first time. Those issues are first whether a loss of property value resulting from damage to the groundwater table caused by long wall mining can be remedied through an action brought before the Environmental Hearing Board. The second issue was whether the future sale of a large farm property as small parcels of farm land is a "reasonably foreseeable use."

The Department points out that during the course of discovery set forth by our Orders, both the Department and mining company served four sets of written requests on Appellants. They also deposed both Appellants. They asked for detailed information, including expert information, regarding the consolidated appeals.

As for fact witnesses, Mr. McGinnis consistently responded that he was the only fact witness. As for experts, Mr. McGinnis responded during the discovery period that he had no experts of his own but instead that he would rely upon individuals who were Department employees, consultants

retained by the mining company, and representatives of Microbac Laboratory and Al's Water Service. As to none of these individuals did Appellants submit an expert report or provide any of the information requested by the discovery requests including the experts' subject matter, the substance of the facts and opinions as to which the experts will testify, and other relevant information.

Appellants filed a Prehearing Memorandum wherein they propose to call five expert witnesses and twenty-one fact witnesses. The Department's Motion argues that they are severely prejudiced by these eleventh hour radical changes in the Appellant's case. In response, Appellants argue that the parties should have realized that Mr. and Mrs. McGinnis were *pro se* Appellants during the discovery period and they should be afforded an opportunity to supplement their discovery responses after they have retained counsel. They also argue that they will consent to the Department and Eighty-Four deposing or interviewing these witnesses so as to better understand their testimony.

Discovery before the Pennsylvania Environmental Hearing Board is governed by our Rules of Practice and Procedure in conjunction with the Pennsylvania Rules of Civil Procedure. *See* 25 Pa. Code Section 1021.102(a). Full disclosure of a party's case underlies the discovery process. *Pennsylvania Trout v. DEP*, 2003 EHB 652, 657. The main purposes of discovery are so all sides can accumulate information and evidence, plan trial strategy, and discover the strong points and weaknesses of their respective positions. *DEP v. Neville Chemical Company*, 2004 EHB 744, 746.

As we have stated before and emphasize again now, it is very important to the integrity of the litigation process that the deadlines we set are viewed as meaningful and important. Parties have a right to rely on our Orders and the deadlines they impose. Likewise, and most importantly, they have a right to rely on a party's discovery responses and deposition testimony in preparing for trial. *American Iron Oxide Company v. DEP*, 2005 EHB 779, 784.

While we certainly acknowledge and realize that normally parties may supplement their discovery answers and identify late discovered witnesses we do not believe that what happened in this case is part of that normal litigation process. Not only are these late additions extremely prejudicial to the Department and Eighty-Four Mining Company they also strain at the fabric and integrity of the litigation process before the Board. This is not the addition of one or two witnesses but a radical change in the scope and tenure of Appellants' case which totally is at odds with their discovery responses. We are now faced with the dilemma of reopening discovery and forcing the two innocent parties to incur delay in addition to what would likely be thousands of dollars in fees and costs to reopen discovery or exclude many witnesses from testifying.

The Board has earlier warned parties that "at some point even consideration of the pubic interest in informed environmental decision making may need to give way to addressing ongoing disregard for the Board" our deadlines and our Orders. *BP Products North America, Inc. v. DEP*, 2007 EHB 93, 97. That day has arrived.

Appellants could have easily identified these witnesses years ago if they had not taken such a cavalier attitude toward their discovery obligations. The fact that they chose not to obtain counsel until after discovery was concluded is not a valid excuse for not treating the discovery process with proper attention and diligence. Moreover, by making a mockery of the discovery process, Appellants can not now, at this late date, expect the Board to ignore these serious lapses and penalize the Department and Eighty-Four Mining Company by requiring them to spend thousands of dollars to depose witnesses long known by Appellants but just identified at the eleventh hour.

In addition, the listing of new experts expounding new theories is especially egregious. Most of the experts have not filed proper expert reports or answered expert interrogatories. Again,

Appellants ask us to ignore these violations of the Rules regarding expert witnesses.[1]

We realize that excluding most of Appellants' witnesses is a drastic step and one that we do not take lightly. However, we are mindful that "a fundamental purpose of the discovery rules is to prevent surprise and unfairness and to allow a fair trial on the merits." *Maddock v. DEP*, 2001 EHB 834, 835. As we have stated numerous times – the discovery process is not a game. Parties are obligated to provide all discoverable information within thirty days. If their answers are not complete a party is required to set forth information then available to it. *American Iron Oxide Company v. DEP*, 2005 EHB 779, 782-783.

If we would do what Appellants suggest and force the mining company and the Department to spend the final days before trial deposing witnesses and searching for their own witnesses to respond to their new theories we will be telling not only Appellants but all litigants that our deadlines do not have to be followed and it does not matter what information you present in discovery as you can radically change everything at the eleventh hour and the Board will endorse this flagrant violation of our Rules and the Pennsylvania Rules of Civil Procedure and allow you to proceed. This we will not do.

Let us be crystal clear. The integrity of the process requires that all parties, whether represented by counsel or not, respond to discovery requests in good faith. Opposing parties have a right to rely on their discovery responses and plan their trial strategy accordingly. Therefore, we will issue an Order prohibiting the Appellants from calling any witnesses other than Mr. and Mrs. McGinnis as fact witnesses. After careful review we will also allow Appellants to call Mr. Norm Humes. Although Mr. Humes did not file a proper expert report his cost estimate to repair the pond

[1] We recognize that Appellants' counsel, who was not retained until nearly two years after the first appeal was filed,

appears to be sufficiently detailed so as to not cause prejudice to the opposing parties. The Appellants' failure to disclose is particularly egregious with regard to the expert witnesses because of the special rules that apply to expert witnesses. It is unacceptable to allow a litigant to present an expert witness whose identity and opinions have not been properly disclosed during discovery. *Rural Area Concerned Citizens v. DEP*, EHB Docket No. 2008-327-R. (Opinion and Order issued on April 27, 2010)

In light of our ruling on the Motion in Limine, we need not decide the other Motions as Appellants do not have the necessary expert testimony to support these theories even if they were viable. The main issues in this consolidated case are whether the Appellants' pond was damaged by the mining, whether the pond supports its premining uses, and whether the Department made the correct calculation of a bond to guarantee payment of increased operation and maintenance costs on the replacement water well drilled by Eighty-Four Mining Company.

---

was placed in a very difficult position by the previous actions of her clients.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN and CYNTHIA McGINNIS	:	
	:	
v.	:	**EHB Docket No. 2007-197-R**
	:	**(Consolidated with 2007-228-R**
COMMONWEALTH OF PENNSYLVANIA,	:	**and 2008-190)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and EIGHTY-FOUR MINING,	:	
INC., Permittee	:	

ORDER

AND NOW, this 9th day of June, 2010, after review of the various prehearing motions filed by Eighty-Four Mining Company and the Pennsylvania Department of Environmental Protection and the Response of the Appellants, it is ordered as follows:

1) The Department's Motion in Limine to exclude certain witnesses and evidence is **GRANTED** in the following respects:
    a) Mr. and Mrs. McGinnis may testify as fact witnesses.
    b) All other fact witnesses listed by Appellants are excluded and prohibited from testifying because they were not properly identified in discovery.
    c) Mr. Norm Humes of Elizabeth Equipment Services may testify regarding his estimate to repair the pond.

d) All other expert witnesses listed by Appellants are excluded and prohibited from testifying because they were either not properly identified and/or did not provide adequate expert reports.

2) The main issues in the consolidated case are whether the Appellants' pond was damaged by the mining, whether the pond supports its premining uses, and whether the Department made the correct calculation of a bond to guarantee payment of increased operation and maintenance costs on the replacement water well that the mining company drilled.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

MICHAEL L. KRANCER
Judge

Richard P. Mather Sr.

RICHARD P. MATHER, SR.
Judge

DATED: June 9, 2010

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

RURAL AREA CONCERNED CITIZENS	:	
	:	
v.	:	**EHB Docket No. 2008-327-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BULLSKIN STONE & LIME, LLC, Permittee	:	**Issued: June 10, 2010**

OPINION AND ORDER ON APPELLANT'S MOTION IN LIMINE

By: Thomas W. Renwand, Chairman and Chief Judge

Synopsis:

This Opinion is issued in support of a previous Order issued by the Board in this matter. The Department is not precluded by the doctrine of administrative finality from asserting that surface water and groundwater in the area of a non-coal mine site will not be degraded by mining, even though it reached a contrary conclusion during its review of another permit application. The other application was filed by a different mining company and was filed more than 20 years ago. The doctrine of administrative finality has no application where the issues are raised in a different proceeding in which new facts are relevant to the propriety of the Department's action.

OPINION

This matter involves an appeal by the Rural Area Concerned Citizens (Appellant) from the issuance of a permit by the Department of Environmental Protection (Department) to Bullskin Stone & Lime, LLC (Bullskin) for the operation of a small non-coal mine. It is the contention of the Appellant that the permit application did not contain sufficient information for the Department to determine whether environmental harm or a public nuisance was likely to occur at the proposed mine.

Several pre-hearing motions filed by Bullskin and the Department have been ruled on in this matter. This Opinion addresses a Motion in Limine filed by the Appellant which seeks to preclude the Department from asserting that surface water and groundwater in the area will not be degraded by mining on the site. On May 4, 2010, the Board issued an Order denying the motion. This Opinion is issued in support of the Order. At the center of the Appellant's argument is a mine drainage permit application that was filed in the 1980's by another mining company, Soberdash Coal Company, on the same site for which the current permit was issued. The Department denied the permit application in 1983. One of the reasons for the denial was because the strata at the site, coupled with the geologic and hydrologic conditions, "indicate a relatively high potential for poor quality post-mining discharges." (Appellant's Motion, Ex. 5) The Appellant argues that the doctrine of administrative finality should be applied to the Department's earlier decision to preclude it from now arguing that mining at the site will not result in poor quality post-mining discharges.

The doctrine of administrative finality has historically been applied against appellants, barring them from collaterally attacking an action of the Department that could have been appealed

at an earlier time but was not. The Commonwealth Court in *Department of Environmental Resources v. Wheeling Pittsburgh Steel Corp.*, 348 A.2d 765 (Pa. Cmwlth. 1975), explained the policy behind the doctrine as follows:

> We agree that an aggrieved party has no duty to appeal but disagree that upon failure to do so, the party so aggrieved preserves to some indefinite future time in some indefinite future proceedings the right to contest an unappealed order. To conclude otherwise, would postpone indefinitely the vitality of administrative orders and frustrate the orderly operations of administrative law.

Id. at 767.

The Appellant makes the argument that the doctrine should apply equally to the Commonwealth. The Appellant asserts that where the Department makes a finding that an activity has the potential to pollute the resources of the Commonwealth, it should be bound by that decision so that successive applicants cannot come before different personnel at the Department and seek to obtain results contrary to prior permit decisions.

The Department argues that applying administrative finality to actions of the Department, as the Appellant proposes, would not foster the purposes and goals of administrative finality which, as stated by the Commonwealth Court in *Wheeling Pittsburgh*, include the orderly operation of administrative law. Applying administrative finality in this fashion, asserts the Department, would prevent it from reviewing new permit applications in accordance with the law and regulations and affording the regulated community the right to participate in the process, including the right to challenge the Department's final action on their permit application.

We decline at this time to answer the broad question of whether administrative finality may ever be asserted against the Department. We do find, however, that the circumstances of this case do

not warrant it. The Department decision on which the Appellant relies is nearly 30 years old and pertains to an application filed by a different mining company than the permittee in this case. According to the Department, Bullskin's proposed operation is factually different than the earlier proposed Soberdash operation. As the Board held in *Riddle v. DEP*, 2002 EHB 321, 327, *citing Bethlehem Steel Corp. v. Department of Environmental Resources*, 309 A.2d 1383 (Pa. Cmwlth. 1978), "[t]he 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." Although the doctrine of administrative finality was being directed against an appellant in *Riddle*, the same reasoning applies here where the doctrine is being asserted against the Department.

Although we are denying the Appellant's Motion in Limine, nothing precludes it from presenting testimony or other evidence at trial in support of its argument that the Department's findings during its review of the Soberdash application should have been followed in this case. Likewise, the Department and Bullskin are free to present evidence countering that argument.

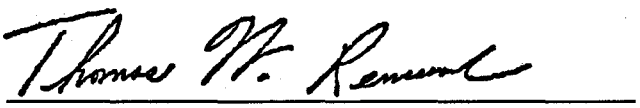
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RURAL AREA CONCERNED CITIZENS	:	
	:	
v.	:	**EHB Docket No. 2008-327-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BULLSKIN STONE & LIME, LLC, Permittee	:	

ORDER

AND NOW, this 10th day of June 2010, we issue this Opinion in support of our Order of May 4, 2010 ***denying*** the Appellant's Motion in Limine.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

DATED: June 10, 2010

See following page for service listing

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

KENNETH AND KIM JONES	:	
	:	
v.	:	**EHB Docket No. 2007-281-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOL PENNSYLVANIA COAL CO., LLC, Intervenor	:	**Issued: June 11, 2010**

OPINION AND ORDER ON PARTIES' STIPULATION OF FINAL ORDER

By: Thomas W. Renwand, Chairman and Chief Judge

Synopsis:

The Board certifies its earlier Adjudication in this matter as a Final Order, allowing the permittee to proceed with an appeal to the Commonwealth Court. The appellants' Petition for Attorney's Fees is stayed pending a ruling by the Commonwealth Court on Consol's appeal.

OPINION

On October 6, 2009, the Board issued an Adjudication in this matter which held that the Department of Environmental Protection's (Department) investigation of a water loss complaint filed by Kenneth and Kim Jones (the Jones) should have included two springs, designated as S1 and S2, located on their property. The Board remanded the matter to the Department to make a determination as to whether the water loss had been caused by mining activities conducted by Consol Pennsylvania Coal Company (Consol). On January 4, 2010, the Department filed with the Board a

report that included its findings in response to the Board's October 6, 2009 Adjudication. The Department found that Consol was responsible for the water loss and was required to provide a permanent water replacement supply for the Jones.

Following issuance of the Board's Adjudication, but prior to the Department's release of its report, Consol filed a Petition for Review of the Board's decision with the Commonwealth Court. The Court quashed the petition on the basis that the Board's decision was interlocutory since the matter had been remanded to the Department. Also during this interim period, the Jones filed a Petition for Attorney's Fees which was stayed by the Board pending a ruling by the Commonwealth Court on Consol's Petition for Review.

On March 8, 2010, the parties filed a Joint Stipulation with the Board which reserved Consol's right to appeal the issues set forth in its earlier Petition for Review filed with the Commonwealth Court. On May 13, 2010, Consol submitted a "Final Order" for the Board's signature which would allow Consol to proceed with its appeal.

The Board hereby reaffirms its Adjudication of October 6, 2009 granting the Jones' appeal with respect to Springs S1 and S2. The Board continues to stay the Jones' Petition for Attorney's Fees pending a ruling by the Commonweath Court on Consol's appeal. Following a ruling by the Commonwealth Court on Consol's appeal, the Board will rule on the Jones' Petition for Attorney's Fees.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KENNETH AND KIM JONES	:	
	:	
v.	:	**EHB Docket No. 2007-281-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and CONSOL	:	
PENNSYLVANIA COAL CO., LLC, Intervenor	:	

ORDER

AND NOW, this 11th day of June, 2010, the Board issues the following Final Order:

Whereby, the Department has completed the investigation required by the Board's order of October 6, 2009 as to whether Consol's mining activities caused damage to Springs S1 and S2, and has found that Consol is responsible for the water loss in Springs S1 and S2; and

Whereby, the parties have entered into a Joint Stipulation filed with this Board relating to the provision of a replacement water supply for said springs and for the payment of appropriate operation and maintenance costs related thereto (subject to Consol's right to contest the Board's conclusion that the Jones' water loss claim for Springs S1 and S2 should have been investigated by the Department);

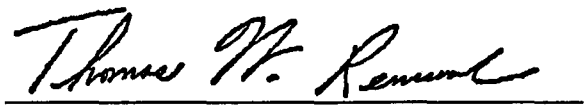
NOW THEREFORE, the Board holds as follows:

1) The Board reaffirms its order of October 6, 2009 sustaining the Jones' appeal with respect to Springs S1 and S2 for the reasons set forth in its Adjudication dated October 6, 2009.

2) The Board certifies its Adjudication of October 6, 2009 as being a Final Order.

3) The Board stays the Jones' Petition for Attorney's Fees pending a ruling on Consol's appeal to the Commonwealth Court. At such time as the Commonwealth Court rules on Consol's Petition for Review, the Board shall then consider the Jones' Petition for Attorney's Fees.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

DATED: June 11, 2010

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

GREGG McQUEEN and MARY McQUEEN	:	
	:	
v.	:	**EHB Docket No. 2008-291-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and McVILLE MINING COMPANY, and ROSEBUD MINING COMPANY, Permittees	:	**Issued: June 15, 2010**

OPINION AND ORDER
GRANTING IN PART AND DENYING IN PART
APPELLANTS' FIRST MOTION TO COMPEL

By: Thomas W. Renwand, Chairman and Chief Judge

Synopsis:

In an appeal regarding mine subsidence damage to Appellants' property the Pennsylvania Environmental Hearing Board denies a Motion to Compel seeking all mine subsidence claims concerning the Permittee's mine. Such a request is not likely to lead to the discovery of admissible evidence. The Board does grant the Motion to Compel seeking information as to whether the mining company has ever hired any contractor to perform foundation and footer repair. We will limit the inquiry as to any work performed over the past seven years.

OPINION

Presently before the Pennsylvania Environmental Hearing Board is Appellants' First Motion to Compel. Appellants seek to compel answers to several interrogatories which seek information

from the Permittee mining company concerning other mine subsidence claims regarding the same mine involved in this matter, the education and experience of a contractor retained by the mining company who provided an estimate of repair costs in this matter, and whether the mining company has ever hired "any contractor to perform foundation and footer repair or replacement at any time."

The McQueens filed a mine subsidence claim regarding damage allegedly stemming from mining performed by the Permittee, Rosebud Mining Company. The Pennsylvania Department of Environmental Protection investigated the claims and concluded that Rosebud Mining Company's mining operations resulted in mine subsidence damage to Appellants' home.

The major issues in this appeal concern the costs of repair and a dispute concerning what is necessary to stabilize and secure the footers and foundation of the home. The parties are far apart as to what will be required to repair the mine subsidence damage.

The Appellants' Motion to Compel was filed on May 31, 2010. Rosebud Mining Company filed its Answer to Appellants' First Motion to Compel on June 11, 2010. This matter is now ripe for decision.

Discovery before the Pennsylvania Environmental Hearing Board is governed by our Rules of Practice and Procedure together with the Pennsylvania Rules of Civil Procedure. *See* 25 Pa. Code Section 1021.102(a). Therefore, unlike most Pennsylvania administrative tribunals the broad discovery rules applicable to actions in the Pennsylvania Courts of Common Pleas are applicable. Full disclosure of a party's case underlies the discovery process before the Board. *Pennsylvania Trout v. DEP*, 2003 EHB 652, 657. The main purposes of discovery are so all sides can accumulate information and evidence, plan trial strategy, and discover the strong points and weaknesses of their

respective positions. *DEP v. Neville Chemical Company*, 2004 EHB 744, 746. It is the Pennsylvania Environmental Hearing Board's responsibility and duty to oversee discovery and pretrial proceedings. *Cappelli v. DEP and Maple Creek Mining, Inc.*, 2006 EHB 426, 427.

We now turn to the Motion to Compel. Following a careful review, we find that the discovery of other claims regarding mine subsidence not involving the Appellants but involving Rosebud's mine is not likely to lead to the discovery of admissible evidence in this case. The repair of homes damaged by mine subsidence is an individual matter. The wholesale search and production of damages to other homes and how they were repaired strikes us as having no relevance to the damages suffered by the McQueens. Moreover, allowing such large scale production of such information could constitute harassment and would greatly add to the costs of litigation with no discernable benefit to anyone. We will therefore deny the Motion to Compel seeking this information.

Appellants also seek information concerning the educational background and experience of the contractor identified by Rosebud Mining Company who prepared an estimate for the cost of repairs to the McQueen home. Rosebud Mining Company indicated that it did not have this information but that Appellants have scheduled the contractor's deposition and could inquire into the subject matter at that time. We find this resolution satisfactory under the circumstances.

Finally, the McQueens seek to discover whether Rosebud Mining Company has ever hired a contractor to perform foundation and footer repairs. We think this request is narrow enough that it may lead to the discovery of admissible evidence and we will grant the motion to compel. However, Rosebud Mining is only required to answer the interrogatory by identifying the contractor and

producing any repair estimates. We will also limit the inquiry to any work done over the past seven years.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GREGG McQUEEN and MARY McQUEEN	:	
	:	
v.	:	**EHB Docket No. 2008-291-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and McVILLE MINING COMPANY and ROSEBUD MINING COMPANY, Permittees	:	

ORDER

AND NOW, this 15th day of June, 2010, following review of the Appellants' Motion to Compel and the Pemrittee's Answer, it is ordered as follows:

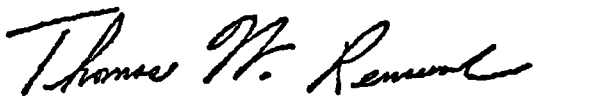
1) The Motion to Compel additional answers to Interrogatories 2, 4, 5, 6, 7, and 10 is **DENIED**.

2) The Motion to Compel a more complete answer to Interrogatory Number 11 is **GRANTED** as follows:

   a) On or before **June 30, 2010** Rosebud Mining shall file a supplemental answer to Appellants' Interrogatory Number 11 answering whether it has ever hired a contractor in the past seven years regarding the Clementine Mine to perform foundation and footer repair caused by mine subsidence.

   b) If so, Rosebud Mining Company shall identify the contractor or contractors and produce any repair estimates.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

DATED: June 15, 2010

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

BERT E. LANGILLE, SR.	:	
	:	
v.	:	**EHB Docket No. 2009-144-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 12, 2010**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Richard P. Mather, Sr., Judge

Synopsis

The Board grants the Department's motion for summary judgment in the appeal of a land owner from an administrative order that was issued to the landowner. The order requires the payment of unpaid tank registration fees, the closure of an underground storage tank by a certified tank handler, the submittal of a completed closure report, and the payment of a civil penalty in the amount of $11,500. The Appellant failed to file any responses to discovery requests or the present motion. Therefore, the motion for summary judgment is granted in accordance with the Board's rules of procedure and the appeal is dismissed.

OPINION

Before the Board is a motion for summary judgment or in the alternative a motion to compel filed by the Department of Environmental Protection ("the Department") on May 14, 2010. By way of background, the Appellant, Bert E. Langille, Sr. owns property located at 40 Beehn Road, Dreher

Township, Wayne County.[1] The Appellant's property is registered with the Department as a regulated underground storage tank facility ("Langille property"). A 3,000-gallon underground storage tank used to store diesel fuel was located on the property.

The Department states that it advised Langille that the tank did not meet the Department's technical standards relating to spill, overfill and corrosion protection and would need to be closed by a Department-certified tank handler. Subsequently, on February 7, 2007, the Department sent the Appellant a notice of non-compliance related to the tank's deficiencies. The Department informed the Appellant that he was considered the "owner" of the tank under Section 103 of the Storage Tank Act, 35 P.S. § 6021.103, and that he had the responsibility to remove from service any regulated storage tank system. Additionally, the Department advised the Appellant that removal of the tank needed to be conducted by a certified tank handler.

On April 11, 2007, the Department conducted an inspection of the Langille property and determined that the tank was still present. On November 6, 2007, the Appellant informed the Department that he planned to have the tank drained and that he intended to remove the tank himself. The Department once again informed the Appellant that a Department-certified tank handler must remove the tank.

On November 8, 2007, the Department sent Langille a second notice of non-compliance. Once again, the Department advised Langille that he was considered the "owner" of the tank, that he had the responsibility to remove the tank, and that removal of the tank needed to be conducted by a certified tank handler. In addition, the notice of non-compliance requested that Langille provide the Department with documentation that the tank was drained to less than one inch of product.

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[1] This factual recitation is adopted from the Department's verified and uncontested statement of undisputed

On April 15, 2008, the Department sent Langille a notice of proposed assessment that requested that by May 7, 2008, Langille provide documentation necessary to resolve all violations or that he attend a May 7, 2008 administrative conference. Langille failed to provide the documentation and did not attend the administrative conference. Subsequently, during an April 14, 2009 site visit, the Department was informed that Langille, who is not a Department-certified tank handler, removed the tank himself and that no one with the required certification oversaw the removal. On October 14, 2009, the Department issued an administrative order to Langille that is the subject of the present appeal. That administrative order, issued under the authority of the Storage Tank Act and the Administrative Code, required the payment of unpaid tank registration fees, closure of the underground tank by a certified tank handler, the submission of a completed closure report, and a payment of a civil penalty in the amount of $11,500.[2]

In his notice of appeal, the Appellant objected to the administrative order stating, *inter alia*, that a third party installed the tank and only because the third party was bankrupt did the Department hold him responsible. He also stated that he was qualified to remove the tank and that he did not have the finances to hire an outside contractor. Finally, Appellant argued that civil penalties were

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material facts accompanying its motion for summary judgment.

[2] The nature of the Department's action that Appellant challenged is somewhat unclear. The document is titled an "Administrative Order" and it includes some traditional elements of an administrative order, but it also includes more. The order directs payment of unpaid storage tank registration fees and the payment (and possible assessment) of civil penalties. The Department's Brief in Support of Motion for Summary Judgment attempts to clarify the nature of its action by describing it as the "Department's Administrative Order *and Assessment of Civil Penalties*." Brief at page 10 (emphasis added). But this description only serves to further complicate matters because an appeal of a civil penalty assessment requires consideration of prepayment of civil penalties under the Storage Tank Act, which did not occur here. *See* 35 P.S. § 6021.1307. Since the Appellant did not respond to the Department's motion for summary judgment and this is the sole basis for the Board's order dismissing the appeal, the Board takes no position on the nature of the Department's Administrative Order. The Department may need to address this consideration if it decides to take further action to enforce it at some point in the future.

not justified because the tank was in good condition when it was removed. Appellant did not serve nor respond to any discovery in this matter.

In its motion for summary judgment, the Department states that requests for admission, interrogatories, and production of documents were served upon the Appellant on March 22, 2010. Because the Appellant failed to respond to those discovery requests, under Rule 4014 of the Pennsylvania Rule of Civil Procedure, the requests for admission are deemed admitted and any matter admitted under Rule 4014 is conclusively established. Pa.R.C.P. 4014(b) and (d).

The Department's motion further asserts that a landowner that has an underground storage tank is subject to the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 168, *as amended*, 35 P.S. § 6021.101 and the regulations promulgated thereunder at 25 Pa. Code Chapter 245. Therefore, the Department concludes that the Storage Tank Act and the regulations promulgated thereunder require the Appellant to pay for the tank to be handled and removed by a certified tank handler. 25 Pa. Code § 245.21(a). In addition, the Department asserts that registration fees, in the amount of $1,000, are owed pursuant to 25 Pa. Code § 245.42(b) and civil penalties may be assessed for non-compliance of the Act. 35 P.S. § 6021.1307. The Appellant did not respond to the Department's motion for summary judgment within the time period established by the Board's rules at 25 Pa. Code § 1021.94a.

Summary judgment motions before the Board are governed by 25 Pa. Code § 1021.94a. That rule requires that a party opposing a motion for summary judgment must file a response within thirty days of the date of service of the motion. 25 Pa. Code § 1021.94a(f). Importantly, subsection (h) of the rule provides the Board with the express authority to enter judgment against a party who has

failed to respond to a motion for summary judgment. 25 Pa. Code § 1021.94a(h). The Board has exercised this authority on many occasions when no responses have been filed. *See J&D Holdings v. DEP*, 2009 EHB 15; *Lucas v. DEP*, 2005 EHB 913; *Steinman Hauling v. DEP*, 2004 EHB 846. The Commonwealth Court has approved this practice and held that the Board has the authority to grant summary judgment where an appellant, without explanation, has failed to respond. *Kockems v. DEP*, 701 A.2d 281, 283 (Pa. Cmwlth. 1997).

Here, the Department filed its motion for summary judgment with the Board on May 14, 2010. The certificate of service indicates that the motion was served on the Appellant by first class mail. Accordingly, the Appellant's response was due by June 17, 2010. 25 Pa. Code § 1021.35. To date, we have received neither a response, nor any explanation for the Appellant's failure to respond. Indeed, after filing his appeal the Appellant has shown no indication of an interest or a willingness to pursue his appeal or comply with applicable Board rules. Therefore, we will grant the Department's motion for summary judgment.[3]

Accordingly, we issue the following Order.

[3] The Department's motion to compel is moot as a result of this ruling.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BERT E. LANGILLE, SR.	:	
	:	
v.	:	**EHB Docket No. 2009-144-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 12th day of July, 2010, the motion for summary judgment filed by the Department of Environmental Protection in the above-captioned matter is hereby **GRANTED** and the appeal of Bert E. Langille, Sr. is **DISMISSED**. The Department's motion to compel is moot.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

MICHAEL L. KRANCER
Judge

RICHARD P. MATHER, SR.
Judge

DATED: July 12, 2010

c: **DEP, Bureau of Litigation**
Attention: Connie E. Luckadoo

For the Commonwealth of PA, DEP:
Michael T. Ferrence, Esquire
Office of the Chief Counsel – Northeast Region

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

DELORES LOVE	:	
	:	
v.	:	**EHB Docket No. 2010-031-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOLIDATION COAL COMPANY, Intervenor	:	**Issued: July 12, 2010**

OPINION AND ORDER
ON MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Department's refusal to process a mine subsidence claim because of a pre-mining agreement is an appealable action. The Board is unable to conclude in the context of a motion to dismiss that an appeal from the Department's refusal is entirely barred by earlier Departmental decisions regarding related claims.

OPINION

Delores Love ("Love") occupies a home that is located above Consolidation Coal Company's ("Consol's") now closed Dillsworth mine in Jefferson Township, Greene County. Prior to mining, Consol and Love entered into a pre-mining agreement dated May 25, 2000. On September 2, 2003, Love filed a mine subsidence damage claim with the Department of Environmental Protection (the "Department") alleging that Consol's mining damaged her home.

By letter dated October 28, 2003, the Department informed Love that it would not process her claim because of the pre-mining agreement.

Approximately six years later, on November 15, 2009, Love filed another subsidence damage claim with the Department. The 2009 claim was identical in substance to the claim that she filed in September 2003. The Department responded in a letter dated December 4, 2009 that the 2009 claim "cannot be processed due to a pre-mining agreement entered into on May 25, 2000 between Mrs. Love and Consolidation Coal Company." Love did not appeal either the 2003 or 2009 letters.

Afterwards, the Department received additional letters from Love's attorney and Consol's attorney. Generally, Love's attorney argued that her claim was not barred because the pre-mining agreement had expired and because the agreement was inconsistent with current law. In response to this correspondence, a Department letter dated February 22, 2010 once again reiterated to Love that the Department would not process her claim because of the pre-mining agreement. The February 2010 letter is the only letter that Love appealed and it is the subject of this appeal.

Consol has moved to dismiss this appeal, arguing that the Department's refusal to process Love's claim is not an appealable action or, if it is, this appeal is barred by the administrative finality of the Department's 2003 and 2009 actions. The Department in its "response" to Consol's motion among other things agreed that administrative finality should be applied. Love responded to the administrative finality argument by contending that the 2003 decision was correct at the time it was made, but due to changes in fact and law the pre-mining agreement no longer barred the claim.

It is well-settled that a party may not use an appeal from a later DEP action as a vehicle for reviewing or collaterally attacking the appropriateness of a prior Department action. *See Grimaud v. DEP*, 638 A.2d 299, 303 (Pa. Cmwlth. 1994) (citing *Fuller v. DEP*, 599 A.2d 248 (Pa. Cmwlth. 1991)); *Wheatland Tube v. DEP*, 2004 EHB 131, 134. Allowing a Department action to be challenged at some undefined time in the future would "postpone indefinitely the vitality of administrative orders and frustrate the orderly operation of administrative law." *DER v. Wheeling Pittsburgh Steel Co.*, 348 A.2d 765, 767 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977); *see also PUSH v. DEP*, 1996 EHB 1428, 1432. "[O]ne who fails to exhaust his statutory remedies may not thereafter raise an issue which could have and should have been raised in the proceeding afforded by the statutory remedy." *Wheeling Pittsburgh Steel Co.*, 348 A.2d at 767.

It is easy to understand why Consol and the Department would at first blush believe that Love's appeal from the 2010 letter is barred by the doctrine of administrative finality. After all, the subsidence damage claim filed by Love in November 2009 is identical to the claim she filed in September 2003. The two claims used identical wording to describe the alleged damage to the property. This is not a case of new subsidence damages manifesting after the initial determination, but rather, the exact same claim filed at a later date. The Department's responses to each of the claims have been substantially consistent. In regard to the 2003 claim, the Department replied that "the Department cannot process your claim due to the pre-mining agreement between yourself and Consolidation Coal Company." Similarly, in a letter responding to the November 2009 claim, the Department stated that the claim "cannot be processed due to a pre-mining agreement entered into on May 25, 2000 between Mrs. Love and Consolidation Coal Company." The Department once again repeated the same response in the February 2010 letter,

albeit in greater detail, stating, in part, that "because of the existing Subsidence Agreement, the Department is unable to process Ms. Love's claim."

Of course, administrative finality by definition only applies to *final* actions that a party could have appealed. The 2003 determination constituted such a final action. Love could have appealed the Department's rejection of her claim in 2003. Whether the Department's 2009 letter constituted a final action is not as clear. The facts must be viewed in light most favorable to the non-moving party (Love) when reviewing a motion to dismiss. *Perano, supra; Wilson v. DEP*, EHB Docket No. 2009-024-L, slip op. at 2 (Opinion and Order issued March 23, 2010); *Jackson v. DEP*, EHB Docket No. 2009-073-M, slip op. at 2 (Opinion and Order issued April 6, 2010); *Cooley, et al. v. DEP*, 2004 EHB 554, 558. The correspondence between the Department and Love immediately following the 2009 letter might suggest that the 2009 letter was not intended as a final action. Indeed, the February 22, 2010 letter under appeal on its face states that it is to be considered the Department's response to the November 19, 2009 damage claim. The letter goes on for the first time to provide some explanation for the Department's decision beyond the mere existence of a pre-mining agreement. Under these circumstances we are unable to conclude as a matter of law in the context of a motion to dismiss that the 2009 letter bars or limits the appeal from the 2010 letter.

Consol's assertion that all of these "refusal to process" letters constitute unreviewable exercises of prosecutorial discretion is incorrect. Unlike the noncoal water-loss situation at issue in *DEP v. Schneiderwind*, 867 A.2s 724 (Pa. Cmwlth. 2005), Love's claims were filed under the Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. § 1406.1 *et seq*. That statute and the regulations promulgated thereunder create a detailed claims procedure for subsidence damages that *require* the Department to rule on claims one way or the other. 52 P.S. § 1406.5e;

25 Pa. Code § 89.143a. The Department's denial or failure to respond to a subsidence claim cannot fairly be characterized as the type of prosecutorial decision that is immune from Board review.

The Department agrees that its letters did not constitute unreviewable exercises of prosecutorial discretion. However, the Department contends that its letters are unappealable because they have done nothing more than advise Love of the Department's interpretation of the law. This contention is incorrect. The letters denied Love's subsidence claims and clearly and adversely affected her property rights, thereby giving rise to a right to file appeals from the Department's actions. 35 P.S. § 7514(c); 25 Pa. Code § 1021.2(a).

The Department further contends that there is nothing to review here because it had a mandatory duty to refuse to process the claims. This contention is also incorrect. Both discretionary and mandatory actions of the Department are reviewable by this Board. *Warren Sand & Gravel Co. v. DER*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975). In truth, as noted above, the Department had a mandatory duty to process the claims, not to refuse to do so. Clearly, it complied with that duty. The Department's characterization of its actions as refusals to process Love's claims is very misleading. The Department unquestionably processed Love's claims, and based upon that processing, it denied them. At the risk of being overly semantical, when the Department receives a claim, reviews it, and decides what to do with it, it has "processed" the claim. There is nothing in the Subsidence Act that authorizes the Department to ignore claims and throw them in the trash without considering them. It is true that the Department did not look into geology, but it did look into the pre-mining agreement. Even if its analysis in 2003 (which analysis was not explained in the letter) consisted of nothing more than a

determination that an agreement existed, the Department still may be said to have made a decision based upon its view of the merits of the situation.

To the extent the Department argues that the mere existence of *any* pre-mining agreement automatically precludes it from acting further on a subsidence claim, it is also incorrect. In order to trump the Department-managed claims procedure, an agreement, among other things, must be "voluntary." 52 P.S. § 1406.5f. It must clearly state what rights are created by the statute. *Id.* The landowner must expressly acknowledge the release from liability as consideration for the alternate remedies provided in the agreement. *Id.* The remedies provided in the agreement "shall be no less than those necessary to compensate the owner of a building for the reasonable cost of its repair or the reasonable cost of its replacement where the damages are irreparable." *Id.*

For all of these reasons, it is clear that Love could have appealed the 2003 determination.[1] Our inquiry does not end there, however, for administrative finality is far from an absolute bar of appeals from serial Department actions involving a particular person, site or subject. Indeed, just the other day we held that finality may not apply where the facts that are relevant to assessing the proprietary of the Department's later action are dramatically new and different from the facts that were relevant to assessing the propriety of the Department's earlier action. *Rural Area Concerned Citizens v. DEP*, EHB Docket No. 2008-327-R (Opinion issued June 10, 2010) (doctrine does not apply in an appeal of small noncoal permit as a result of the Department's denial 30 years earlier of another company's mine drainage permit application for the same site). Administrative finality has limited effect where the Department is charged with periodic re-evaluation of, *e.g.*, a permit. *See, e.g., Wheatland Tube v. DEP*, 2004 EHB 131, 133, *Solebury Twp. v. DEP*, 2004 EHB 95, 113-14; *Tinicum Township v. DEP*, 2002 EHB 822, 835-

[1] For these same reasons, we reject the argument that the 2010 letter was not an appealable action.

36. We also very recently held that administrative finality does not necessarily act as a complete bar where a statute creates a special process for re-examining a prior decision upon request if a party utilizes appropriate procedures. *Perano v. DEP*, EHB Docket No. 2009-119-L (Opinion and Order, May 26, 2010).

The doctrine of administrative finality is often confusing and unnecessary. As we explained in *Winegardner v. DEP*, 2002 EHB 790:

> Administrative finality is essentially the administrative-law version of res judicata. The doctrine operates to preclude a collateral attack on an action where a party could have appealed the action, but chose not to do so. *Moosic Lakes Club v. DEP*, EHB Docket No. 2000-183-MG, slip op. at 11 (April 9, 2002), *citing DER v. Wheeling Pittsburgh Steel Corp.*, 348 A.2d 765, 767 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977). Among other prerequisites, it would appear that the doctrine only applies if a person could have, but did not, appeal the prior Department action. *DEP v. Peters Township Sanitary Authority*, 767 A.2d 601, 603 (Pa. Cmwlth. 2001) (doctrine of administrative finality precludes a collateral attack of an administrative action *where the party aggrieved by that action* foregoes his statutory appeal remedy); *Moosic Lakes*, slip op. at 11 ("Clearly the Appellant was aware of the provisions of [the earlier action] and had objections to it.")....
>
> Furthermore, administrative finality traditionally applies when the administrative agency takes two or more sequential actions that essentially involve the same thing. *See, e.g., Peters Township*, 767 A.2d at 604 (doctrine applied because Department limited allowable interest award in earlier determination). Thus, in *Perkasie Borough Authority, supra*, issued today, we hold that a challenge based upon a planning decision that a sewer facility is needed is foreclosed in a later appeal from the Part II/Water Quality Management Permit issued for that facility. *See also Toro Development Co. v. DER*, 425 A.2d 1163, 1168 (Pa. Cmwlth. 1981) (an appeal of the permit for a trunk sewer line was not an occasion to re-review an approved plan to direct sewage in a certain way)....
>
> If we focus on fundamentals, as opposed to administrative finality, which can at times confuse rather than clarify the issue, prescribing the appropriate scope of this appeal is not all that

> complicated. Our role is necessarily circumscribed by the Department action that has been appealed. 35 P.S. 7514 (defining Board's jurisdiction). Our responsibility is limited to reviewing the propriety of *that action*. We may not use an appeal from one Departmental action as a vehicle for reviewing the propriety of prior Departmental actions. *See Grimaud v. DEP*, 638 A/2d 299, 303 (Pa. Cmwlth. 1994), *citing Fuller v. DEP*, 599 A.2d 248 (Pa. Cmwlth. 1991) (a party's appeal of one permit does not allow it to raise issues related to permits for which it filed no appeals). It follows that only objections that relate to the propriety of the action under appeal are directly relevant. Objections to a different Departmental action are beside the point of our inquiry. *Accord, Perkasie Borough Authority*, slip op. at 18.
>
> Reviewing the propriety of the separate Departmental action is futile because we can only offer relief with respect to the Departmental under appeal. We cannot, for example, reverse, revise, remand, or do anything regarding the Department's historical actions in approving or disapproving prior sewage plan updates or revisions in an appeal from the latest plan update. We can only take action with regard to that latest update....We emphasize that there are no categorical answers to the question of when prior determinations can be reopened. The result of each case "is heavily dependent upon its procedural posture, its specific factual and legal background and the nature of the arguments made by the parties." *Perkasie Borough Authority*, slip op. at 10.

Winegardner, 2002 EHB at 792-94. We applied these principles recently in *Perano, supra*, where we held that an appeal from a letter requesting a permit modification is not necessarily barred by the administrative finality of the underlying permit, but the scope of our review would be strictly limited to the precise action being appealed, namely, the modification request, not the underlying permit.

Applying these principles here, it is beyond dispute that Love may not use the 2010 denial letter as a vehicle for attacking the decision in 2003 to deny (i.e. "refuse to process") her claim. It does not matter whether the Department's decision was right or wrong; it is now beyond cavil. The question, then, is whether there is anything left to decide in this case in reviewing the 2010 claim denial in light of the *res judicata* effect of the 2003 letter. Love argues

that the pre-mining agreement or at least the specified term of the agreement is void as a result of changes in the law. She also argues that her claims were entitled to renewed consideration in light of the purported expiration of the agreement, even though the damages occurred during the specified term of the contract.[2] She claims that these arguments could not possibly have been made at the time of the original claim. The parties delve into the merits of these arguments in their briefs, but we will not do so here. Whether the arguments eventually turn out to be far-fetched, meritorious, or somewhere in between, they do not appear to be a collateral attack on the 2003 determination. That is enough for those particular objections to survive a motion to dismiss based upon administrative finality.

Accordingly, we issue the Order that follows.

[2] It is interesting to note that the Department actually considered this argument in advance of the 2010 letter and concluded that it "does not agree with Consol's position that the Agreement expired and Ms. Love cannot obtain relief under it."

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DELORES LOVE	:	
	:	
v.	:	**EHB Docket No. 2010-031-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOLIDATION COAL COMPANY, Intervenor	:	

ORDER

AND NOW, this 12th day of July, 2010, it is hereby ordered as follows:

1. Consol's motion to dismiss is **denied**; and

2. Love's motion to amend her appeal to include specific objections is **granted**.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: July 12, 2010

c: **DEP, Bureau of Litigation:**
Attention: Connie Luckadoo

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

LJF, INC.	:	
	:	
v.	:	**EHB Docket No. 2010-003-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 15, 2010**

OPINION AND ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

By Richard P. Mather, Sr., Judge

Synopsis

The Board grants the Department's unopposed motion for partial summary judgment and establishes liability for the Appellant's violations of the Solid Waste Management Act. The Appellant failed to respond to the present motion, and therefore the motion is granted in accordance with the Board's Rules. A hearing will be scheduled on the reasonableness of the civil penalty assessed by the Department.

OPINION

Before the Board is a motion for partial summary judgment filed by the Department of Environmental Protection ("the Department") on May 19, 2010. The motion seeks judgment on the issue of liability against the Appellant, LJF Inc., ("LJF") for violations of the Solid Waste Management Act. 35 P.S. § 6018.101 *et seq*. The Appellant is a Pennsylvania corporation located at

1223 Parks Road, Irvona, Clearfield County.[1] The Appellant, in the course of its business, uses tractors and trailers to transport and collect solid waste.

On November 4, 2009, the Department inspected two of LJF's vehicles before their contents were deposited. The vehicles were transporting contaminated soil and were inspected within the Veolia Greentree Landfill, which is located in Fox Township, Elk County. The Department determined that both vehicles were leaking; causing the contaminated soil they were transporting to be released. Specifically, one of the vehicles was leaking from the rear of the trailer at the door seal while the other vehicle was leaking from the tailgate of the trailer. Consequently, the Department issued LJF a notice of violation.

On December 11, 2009, the Department issued an assessment of civil penalty to LJF for transporting residual contaminated soil in two vehicles that were not leak proof. According to the Department, the leaking of the waste violated the Solid Waste Management Act and its regulations. 35 P.S. § 6018.303 and 25 Pa. Code § 299.213(c). A total civil penalty in the amount of $2,000 was assessed, representing a penalty of $1,000 per vehicle. In its notice of appeal, LJF objected to the civil penalty arguing that the leaks were discovered on a permitted landfill site and that there was no proof that any leakage occurred elsewhere.

The Department's motion for partial summary judgment requests the Board to establish the Appellant's liability. In its motion, the Department argues that there is no question that the Appellant transported residual waste to the landfill and, although the vehicles were inspected while awaiting disposal in the landfill, both vehicles nevertheless leaked outside the permitted area during transportation. Accordingly, the Department argues it may assess civil penalties under the Solid

[1] The factual recitation has been adopted, in part, from the Department's unopposed and verified statement of

Waste Management Act. 35 P.S. § 6018.605. The Department, however, leaves the issue of the reasonableness of the assessed civil penalty to the Board for another day. The Appellant did not respond to the Department's motion for summary judgment within the time period established by the Board's rules. 25 Pa. Code § 1021.94a.

A summary judgment motion before the Board is governed by 25 Pa. Code § 1021.94a. That Rule requires that a party opposing a motion for summary judgment file within thirty days "a brief containing a responding statement either admitting or denying or disputing each of the facts in the movant's statement and a discussion of the legal argument in opposition to the motion." 25 Pa. Code § 1021.94a(f). Importantly, subsection (h) of the rule allows the Board to grant summary judgment against parties that fail to respond to the motion within the time required. 25 Pa. Code § 1021.94a(h). The Board has exercised this authority on many occasions. *See Weiszer v. DEP*, EHB Docket No. 2009-014-CP-M (Opinion and Order dated June 9, 2010); *Schiberl v. DEP*, 2009 EHB 44. The Commonwealth Court has approved this practice and held that the Board has the authority to grant summary judgment where an appellant, without explanation, has failed to respond. *Kockems v. DEP*, 701 A.2d 281, 283 (Pa. Cmwlth. 1997).

Here, the Department filed its motion for partial summary judgment with the Board on May 19, 2010. The certificate of service indicates that the motion was served on the Appellant by first class mail. Accordingly, the Appellant's response was due by June 21, 2010. 25 Pa. Code § 1021.35. To date, we have received neither a response, nor any explanation for the Appellant's failure to respond. Therefore, we will grant the Department's motion and establish LFJ's liability under the Solid Waste Management Act. Because the Department has only moved for summary

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undisputed material facts accompanying its motion for summary judgment.

judgment on liability, we will set a hearing to take evidence on the reasonableness of the civil penalty assessed by the Department.

Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LJF, INC.	:	
	:	
v.	:	**EHB Docket No. 2010-003-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 15th day of July, 2010, the motion for partial summary judgment filed by the Department of Environmental Protection in the above-captioned matter is hereby **GRANTED**. The Appellant violated the Solid Waste management Act as set forth in the Department's assessment of civil penalty. A hearing will be scheduled to receive evidence regarding the reasonableness of the civil penalty assessed by the Department.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

MICHAEL L. KRANCER
Judge

RICHARD P. MATHER, SR.
Judge

DATED: July 15, 2010

c: **DEP, Bureau of Litigation**
Attention: Connie Luckadoo

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

CMV SEWAGE COMPANY, INC.	:	
	:	
v.	:	
	:	**EHB Docket No. 2009-105-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and NORTH CODORUS TOWNSHIP and NORTH CORDORUS TOWNSHIP SEWER AUTHORITY, Intervenors	:	**Issued: July 22, 2010**

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies motions for summary judgment because material factual disputes remain in the case. Whether an alternative sewerage facility is "available" and "more suitable" so as to require a permittee to cease discharging sewage under the terms of an NPDES permit is heavily case-specific and fact-dependent.

OPINION

This appeal concerns a permit condition included in permits issued to CMV Sewage Company, Inc. ("CMV") by the Department of Environmental Protection (the "Department") for CMV's sewer plant serving the Colonial Crossings development in York County. The permit condition at issue reads as follows:

> This permit authorizes the discharge of treated sewage until such time as facilities for conveyance and treatment *at a more suitable location* are installed and are capable of receiving and treating the

> permittee's sewage. Such facilities must be in accordance with the applicable municipal official plan adopted pursuant to Section 5 of the Pennsylvania Sewage Facilities Act, the Act of January 24, 1956, P.L. 1535, as amended. When such municipal sewerage facilities become *available*, the permittee shall provide for the conveyance of the sewage to these sewerage facilities, abandon the use of the sewage treatment plant thereby terminating the discharge authorized by this permit, and notify the Department accordingly. This permit shall then, upon notice from the Department, terminate and become null and void, and shall be relinquished to the Department.

(NPDES Permit Part C.I.D (emphases added).) Thus, the permit sets forth three basic conditions precedent to the obligation to cease discharging:

1. Alternate facilities for conveyance and treatment must be installed and capable of receiving and treating the permittee's sewage; i.e., must be "available";

2. The alternate facilities must be at a "more suitable location"; and

3. The alternate facilities must be "in accordance with" applicable official plans.

Based upon the permit condition, the Department has informed CMV that its NPDES permit will not be renewed because, in its view, the North Codorus Township Sewer Authority's system is now available, more suitable, and in accordance with North Codorus Township's Official Plan. The Intervenors support this position. CMV disagrees, arguing that the Sewer Authority's system is not "legally available" because the Pennsylvania Public Utility Commission ("PUC") disapproved the terms pursuant to which CMV proposed to abandon service. The parties have moved for summary judgment, but those motions must be denied because material factual disputes remain in this case.

Whether a facility at a "more suitable location" is "available" is heavily case-specific and fact-dependent. Of course, capacity must be available in the proposed system, but beyond that, no one factor is necessarily dispositive. Physical proximity is obviously relevant but it is not

necessarily dispositive. The ability to engineer a connection is obviously relevant. Although economic factors are often not relevant in Board cases, the language of the permit condition all but compels us to consider such factors in determining whether an alternative facility is "available" and "more suitable." *Whitemarsh Disposal Corp. v. DEP*, 2000 EHB 300, 329-37.

We do not agree with the Department that PUC regulatory requirements must be ignored when assessing availability. Rather, every effort should be made to reconcile those requirements with environmental requirements if possible. We are not as yet convinced that the PUC's rejection of the *particulars* of CMV's abandonment in this case is irreconcilable with CMV's obligation to cease discharging. As the permittee, CMV has an obligation to make every reasonable, good faith effort to comply with all legal requirements that apply to its operation. The existing record does not support a finding that it has fulfilled that obligation. Along the same lines, if an agreement is necessary to effect a transfer--and all of the parties here seem to agree that one is--it may also be worth considering whether the operators of the two systems are being reasonable in negotiating the terms of that agreement.

Whether a "*more* suitable" facility is "available" seems to invite a comparison that could turn on environmental considerations, including not only the relative impact on receiving streams, but the compliance history of the respective facilities as well. CMV's permit condition on its face makes it clear that the proposed alternate facility must be "in accordance with" the municipality's Official 537 Plan, but we are not willing to adopt the Department's position that an alternative facility is automatically "more suitable" if local planning contemplates connection to that facility.[1] We are also not willing to rule out, at least at this stage, the possible relevance of the various parties' justifiable reliance on past events and commitments. We might want to

[1] By way of illustration, imagine that the proposed alternative facility has available capacity but it also has horrendous ongoing compliance problems.

consider how the alternative system came to be available. There may be other factors that do not come immediately to mind, but the point is that each case will turn on its unique facts and circumstances, which will normally make summary judgment in a disputed case regarding the implementation of this permit condition unavailable.

We think this case-specific examination is preferable to the various absolutist positions that the parties advocate in their briefs. For example, although this Board has recognized that the Commonwealth has a strong policy in favor of consolidating and centralizing sewage treatment, that policy is not absolute. *Interstate Traveler's Services v. DER*, 1981 EHB 187, 192 ("As a matter of policy, *all things being equal*, the Board would *prefer* to have sewage given secondary treatment at a newly constructed municipal plant"; and "DER has the authority to order, *under proper circumstances*, a consolidation...." (emphases added.)) *See also Whitemarsh*, 2000 EHB 338. By the same token, the PUC's ruling in the matter related to this case is far from dispositive of CMV's need to cease its discharge prior to the expiration of its permit, let alone once its permit expires. *See, e.g., Whitemarsh, supra* (upholding order requiring haulage if rerouting not completed with reasonable dispatch). In light of our need to examine *all* of the facts and circumstances surrounding this situation, it is evident that we are simply not in a position to adjudicate this matter in the context of the parties' summary judgment motions.

The parties devote considerable but relatively unnecessary attention in their briefs to the application of administrative finality in this case. As we recently repeated, that doctrine as often as not clouds rather than clarifies how the Board should address a problem before it. *See Delores Love v. DEP*, EHB Docket No. 2010-031-L (Opinion and Order, July 12, 2010). We view it as obvious and undisputed that CMV cannot challenge the inclusion of the permit condition in its permits in this appeal. *Whitemarsh, supra.* CMV can, however, challenge the Department's

interpretation and implementation of that condition in the context of the Department's decision not to renew CMV's permit. *Id.* Stated another way, the question before us in this case is not whether CMV must shut down when a facility at a more suitable location becomes available. CMV's plant was always intended to be a temporary facility and it will need to shut down.[2] The question before us is whether that time has come, *i.e.*, whether a more suitable facility is now *in fact* available. The answer to that question is the subject of considerable dispute.

Accordingly, we issue the Order that follows.

[2] The PUC did not hold otherwise.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CMV SEWAGE COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 2009-105-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and NORTH CODORUS TOWNSHIP and NORTH CORDORUS TOWNSHIP SEWER AUTHORITY, Intervenors	:	

ORDER

AND NOW, this 22nd day of July, 2010, it is hereby ordered that the motions for summary judgment of the Department of Environmental Protection, CMV, and Intervenors are **denied.**

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: July 22, 2010

c: **DEP, Bureau of Litigation:**
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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

SAMUEL L. SMITH	:	
	:	
v.	:	**EHB Docket No. 2009-156-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 30, 2010**

OPINION AND ORDER ON MOTION FOR SANCTIONS

By Michelle A. Coleman, Judge

Synopsis: The Board grants the Department's unopposed Motion for Sanctions because the Appellant has failed to comply with Board orders and rules, indicating a lack of intent to pursue his appeal.

OPINION

Before the Board is the Department's Motion for Sanctions to dismiss the appeal filed by Samuel L. Smith (Appellant or Smith) for failing to comply with a Board order. Smith, a *pro se* appellant, filed his appeal on December 2, 2009 objecting to the Department of Environmental Protection's (Department) November 3, 2009 letter that denied the Appellant's proposed sewage facilities planning module for a new land development.

The Department served its first set of interrogatories and first request for production of documents on January 5, 2010. Smith never responded to the Department's discovery requests. The Department sent a letter on March 1, 2010 to Smith regarding his intention to pursue his appeal. The Department did not receive any follow-up correspondence, or answers to its

discovery requests, prompting the Department to file a motion to compel on March 11, 2010. Smith never responded to the Department's motion and the Board issued an order dated March 31, 2010 requiring Smith to provide responses to the Department's discovery requests on or before April 11, 2010.

On May 3, 2010, the Department filed a motion for a teleconference, with no response from Smith. Then the Department filed this Motion for Sanctions on May 26, 2010 to dismiss Smith's appeal for failing to comply with the Board's March 31, 2010 order. Smith never filed a response. On June 22, 2010, the Board issued a rule to show cause on Smith to provide a response as to why his appeal should not be dismissed. The rule was returnable to the Board on or before July 12, 2010. Smith never responded.

The Board has the power to impose sanctions, including dismissal of an appeal, for failure to comply with Board orders and rules. 25 Pa. Code § 1021.161; *KH Real Estate, LLC v. DEP*, EHB Docket No. 2009-004-R (Opinion & Order issued March 4, 2010); *Martin, et. al. v. DEP*, 1997 EHB 158. A sanction that results in dismissal is justified where a party fails to comply with Board orders and rules indicating a lack of intent to pursue its appeal. *KH Real Estate, LLC*, EHB Docket No. 2009-004-R (Opinion & Order March 4, 2010), slip. op. 2; *Miles v. DEP*, 2009 EHB 179; *Bishop v. DEP*, 2009 EHB 259; *Pearson v. DEP*, 2009 EHB 628; *RJ Rhodes Transit, Inc. v. DEP*, 2007 EHB 260; *Swistock v. DEP*, 2006 EHB 398; *Sri Venkateswara Temple v. DEP*, 2005 EHB 54.

Smith failed to comply with Board orders on March 31, 2010 and June 22, 2010, as well as failed to file responses to the Department's motions on March 11, 2010, May 3, 2010 and May 26, 2010; we therefore grant the Department's motion for sanctions and dismiss the appeal. We enter the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SAMUEL L. SMITH	:	
	:	
v.	:	**EHB Docket No. 2009-156-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

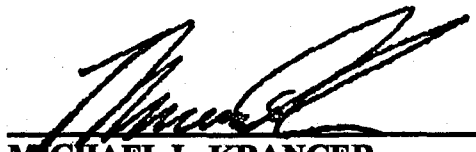
AND NOW, this 30th day of July, 2010, it is HEREBY ORDERED that the Department's Motion for Sanctions is granted and this appeal is **dismissed**. The Department's motion for extension of Prehearing Order No. 1 is **moot**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge



MICHAEL L. KRANCER
Judge

RICHARD P. MATHER, SR.
Judge

c: **DEP Bureau of Litigation**
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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

CECIL TOWNSHIP MUNICIPAL AUTHORITY and MARIAN J. FLEEHER	:	
v.	:	**EHB Docket No. 2009-123-R (Consolidated with 2009-124-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 16, 2010**

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

By: Thomas W. Renwand, Chairman and Chief Judge

Synopsis:

The Pennsylvania Environmental Hearing Board grants in part the Pennsylvania Department of Environmental Protection's Motion to Compel. Parties are required to respond to discovery within 30 days and this also includes expert discovery. Parties can not wait until the filing of pre-hearing memorandum to provide this information when it is requested in discovery. The Board grants in part and denies in part the Motion to Compel pertaining to specific discovery requests. Answers to discovery requests should be verified pursuant to the Pennsylvania Rules of Civil Procedure.

OPINION

Presently before the Pennsylvania Environmental Hearing Board is the Department of Environmental Protection's Motion to Compel Responses to Discovery from Appellant Marian J. Fleeher. The Department contends that certain responses to the Department's First Set of Interrogatories and its First Request for Production of Documents are incomplete.

The Department's discovery requests were originally served on January 22, 2010. Following receipt of Appellant Fleeher's responses counsel had numerous telephone conversations and additional information was provided. Nevertheless, the Department contends that they are entitled to more complete answers to certain interrogatories and that additional documents responsive to their Document Request No. 1 need to be produced. Appellant Fleeher filed no response to the Department's Motion to Compel. Since the Motion to Compel was filed with the Board on July 26, 2010, the matter is ripe for decision.

Discovery before the Pennsylvania Environmental Hearing Board is governed by our Rules of Practice and Procedure together with the Pennsylvania Rules of Civil Procedure. *See* 25 Pa. Code Section 1021.102(a). *McQueen v. DEP* and *McVille Mining Company*, EHB Docket No. 2008-291-R, (*slip op.* issued June 16, 2010) at page 2. Therefore, the broad discovery rules applicable to actions in the Pennsylvania Courts of Common Pleas are applicable to actions before the Board. Full disclosure of a party's case underlies our discovery process. *Pennsylvania Trout v. DEP*, 2003 EHB 652, 657. The main purposes of discovery are so all sides can accumulate information and evidence, plan trial strategy, and

discover the strong points and weaknesses of their respective positions. *DEP v. Neville Chemical Company*, 2004 EHB 744, 746. It is the Pennsylvania Environmental Hearing Board's responsibility and duty to oversee discovery and pretrial proceedings. *Cappelli v. DEP and Maple Creek Mining, Inc.*, 2006 EHB 426, 427.

Interrogatories Numbers 6 and 7 relate to expert testimony. However before focusing directly on these interrogatories we will first, once again, take this opportunity to clear up any misconceptions about Board Rule 1021.101(a) dealing with pre-hearing procedure. That Rule reads in relevant part as follows:

Upon the filing of an appeal, the Board will issue a pre-hearing order among other things, that:

1) ***All*** discovery shall be completed no later than 180 days from the date of the pre-hearing order.

2) The service of a report of an expert together with a statement of qualifications may be substituted for an answer to expert interrogatories.

25 Pa. Code § 1021.101(a)(1) and (2) (*emphasis added*).

Under a prior version of the Rule, discovery was segregated into fact discovery and expert discovery. The discovery period ran for 90 days and during this timeframe all requests for discovery – both expert and non-expert – were to be served. However, the response times differed depending on whether the request was for expert or non-expert discovery. *Non-expert discovery* followed the Pennsylvania Rules of Civil Procedure and required answers to be served within 30 days of service of the discovery request. However, responses to *expert*

discovery were not required to be served until 150 days after issuance of Pre-Hearing Order No. 1.

The Rule was revised in 2005 to require that answers to ***all*** forms of discovery – both expert and non-expert – would be due 30 days after service of the discovery request. In other words, there is no longer a special timeframe for responding to expert discovery. The revision to the Rule was adopted in response to complaints from Appellants that they had been unable to obtain information regarding the basis for the Department's action in the early stages of discovery because it often fell into the category of expert discovery and, therefore, did not have to be produced until after the close of the discovery period. The new Rule allows parties to obtain expert information earlier in the discovery process. *Preamble to EHB Proposed Rulemaking* 106-8, 35 Pa.B. 2107 *et seq.* Of course, if circumstances warrant, the Board can always extend the time for a party to produce answers to expert discovery.

Even though our Rule was revised in 2005, the Board still sees a number of cases where parties believe that they do not have to provide answers to expert discovery until the filing of the pre-hearing memorandum. Let us be perfectly clear: Answers to expert discovery, which may include expert reports or answers to expert interrogatories, are due 30 days after service of the discovery request unless extended by the Board. Waiting to provide this information until the filing of the pre-hearing memorandum is a violation of the Board's Rules of Practice and Procedure and the Pennsylvania Rules of Civil Procedure on discovery.

We will grant the Motion to Compel regarding Interrogatory Number 6. What is requested is in accordance with Pennsylvania Rule of Civil Procedure 4003.5(a) (1) (a) and (b). Of course, Appellant may substitute properly written expert report(s) in place of its answer.

We will deny the Motion to Compel as to Interrogatory Number 7 as we do not believe this information is required under the discovery rule.

We believe the Department is entitled to more complete answers to the following interrogatories: 13(c) (pertaining to the identification of documents that supports the statement in Paragraph 3(m) of the Notice of Appeal); 17(c) (pertaining to financial records that are evidently maintained by someone other than Appellant Fleeher. Appellant Fleeher shall renew her efforts to obtain these documents.); 33(a) (Appellant shall specifically state whether the effluent tests identified in Interrogatory 33 are tests of the final effluent from the Fleeher STP or constituted process control testing of wastewater within the Plant); and 33(d) (pertaining to documents supporting its answer). We will deny the Department's Motion to Compel as to Interrogatory Number 33(e) as that Interrogatory was not attached to the Department's Motion to Compel. We will grant the Department's Request that the Appellant make any documents identified in its answers to interrogatories available to the Department so that the Department may inspect and copy the documents.

In addition, Appellant Fleeher shall file an appropriate verification for any supplemental answers filed including for her previous supplemental answers.

We will issue an Order accordingly.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CECIL TOWNSHIP MUNICIPAL AUTHORITY and MARIAN J. FLEEHER	:	
v.	:	**EHB Docket No. 2009-123-R**
	:	**(Consolidated with 2009-124-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 16th day of August, 2010, following review of the Department's Motion to Compel and noting that no Response to the Motion to Compel was filed by Appellant Fleeher, it is ordered as follows:

1) The Motion to Compel is **GRANTED IN PART** and **DENIED IN PART**.

2) The Motion to Compel is **DENIED** as regards to Interrogatory Numbers 7 and 33(e).

3) On or before **September 18, 2010**, Appellant Fleeher shall serve properly verified supplemental answers to Interrogatory Numbers 6, 13(c), 17(c), 33(a), and 33(d).

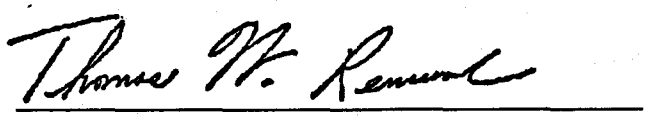
4) On or before **September 18, 2010**, Appellant Fleeher shall file an

appropriate verification in support of supplemental answers to interrogatories including any previously filed.

5) ***Discovery*** shall be completed by **October 29, 2010.**

6) ***Dispositive motions***, if any, shall be filed on or before **November 19, 2010.**

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

DATED: August 16, 2010

c: **Attention: Connie E. Luckadoo**
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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2009-132-CP-R**
TECH LOGISTICS CORPORATION D/b/a SYSTEMS LOGISTICS	:	**Issued: August 17, 2010**

OPINION AND ORDER ON MOTION TO COMPEL ANSWERS TO DISCOVERY

By: Thomas W. Renwand, Chairman and Chief Judge

Synopsis:

The Pennsylvania Environmental Hearing Board grants the Pennsylvania Department of Environmental Protection's Motion to Compel Answers to Discovery. Defendant failed to file any responses to the Department's discovery nor did it file a response to the Motion to Compel.

OPINION

Presently before the Board is the Department's Motion to Compel Answers to the Department's First Set of Interrogatories and First Request for Production of Documents.

This action stems from a complaint for civil penalties against the Defendant for alleged violations of the Clean Streams Law stemming from the spill of motor oil into waters of the Commonwealth. Defendant filed a detailed Answer in which it strongly disputes both the Department's allegations of liability and damages.

On March 10, 2010 the Department served its First Set of Interrogatories and Request for Production of Documents on Defendant, Tech Logistics Corporation (Tech Logistics). Following two written extensions granted by Department Counsel and evidently several phone calls, the Department filed its Motion to Compel. Defendant has not filed any answers or responses to the discovery. We granted Tech Logistics' Motion for an Extension of Time to Respond to the Motion to Compel. Our Order granting the extension allowed Defendant until August 9, 2010 to file a Response to the Department's Motion to Compel. No Response was filed by Defendant.

We grant the Department's Motion to Compel Answers to Discovery. Discovery before the Pennsylvania Environmental Hearing Board is governed by our Rules of Practice and Procedure together with the Pennsylvania Rules of Civil Procedure. *See* 25 Pa. Code Section 1021.102(a). *McQueen v. DEP and McVille Mining Company*, EHB Docket No. 2008-291-R (*slip. op.*, issued June 16, 2010) at page 2. Therefore, the broad discovery rules applicable to actions in the Pennsylvania Courts of Common Pleas are applicable to actions before the Board. Full disclosure of a party's case underlies our discovery process. *Pennsylvania Trout v. DEP*, 2003 EHB 652, 657. The main purposes of discovery are so all sides can accumulate information and evidence, plan trial strategy, and discover the strong points and weaknesses of their respective positions. *DEP v.*

Neville Chemical Company, 2004 EHB 744, 746. It is the Pennsylvania Environmental Hearing Board's responsibility and duty to oversee discovery and pretrial proceedings. *Cappelli v. DEP and Maple Creek Mining, Inc.*, 2006 EHB 426, 427.

We will issue an Order granting the Department's Motion and directing compliance on or before September 7, 2010.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA,: DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2009-132-CP-R**
TECH LOGISTICS CORPORATION d/b/a SYSTEMS LOGISTICS	:	

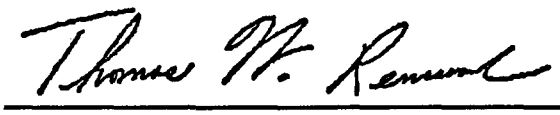
ORDER

AND NOW, this 17th day of August 2010, upon consideration of the Department of Environmental Protection's Motion to Compel Answers to Discovery and no Response being filed by Defendant, it is ordered as follows:

1) The Department's Motion to Compel is **GRANTED**.
2) Defendant shall serve ***full and complete answers*** to the Department's First Set of Interrogatories without objections other than for privileged information on or before **September 7, 2010**.
3) The Defendant, on or before **September 7, 2010**, shall make available for copying any documents responsive to the Department's Request for Production of Documents.
4) The discovery deadline is extended. ***All discovery*** shall be completed by **October 29, 2010**.

5) Counsel shall file a ***joint status report*** with the Board on or before **September 21, 2010.**

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

DATED: August 17, 2010

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

JAMES J. KUZEMCHAK	:	
	:	
v.	:	**EHB Docket No. 2009-114-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMFIRE MINING COMPANY, LLC, Permittee	:	**Issued: August 18, 2010**

OPINION AND ORDER ON PERMITTEE'S MOTION FOR SUMMARY JUDGMENT

By: Thomas W. Renwand, Chairman and Chief Judge

Synopsis:

The Pennsylvania Environmental Hearing Board grants the Permittee's Motion for Summary Judgment based on the doctrine of collateral estoppel. Where the controlling issue in the case before the Board was decided following a trial in the Court of Common Pleas and affirmed by the Pennsylvania Superior Court the collateral estoppel doctrine prevents any further litigation on the issue.

Introduction

Presently before the Pennsylvania Environmental Hearing Board is the Permitee Amfire Mining Company, LLC's (Amfire Mining) Motion for Summary Judgment. The

Pennsylvania Department of Environmental Protection issued an underground coal mining permit to Amfire Mining on July 24, 2009. The permit location is in Indiana County, Pennsylvania. An appeal was filed with the Board to the issuance of the permit by Appellant James J. Kuzemchak. Mr. Kuzemchak claims a 1/45th interest in property that he asserts contains the Amfire mining permit location, called the Barrett Mine. The sole basis of Mr. Kuzemchak's appeal involves his alleged ownership interest in the property. Mr. Kuzemchak objected to the issuance of the permit because he claimed he owned a 1/45th interest in the property in question, and he had not consented to the proposed mining activity as an owner of the property. Based on his property interest, Mr. Kuzemchak filed a declaratory judgment action in the Indiana Court of Common Pleas. After a trial, the Court of Common Pleas denied Mr. Kuzemchak's claim and entered a verdict against him by Opinion and Order of Court dated June 25, 2008.

Mr. Kuzemchak appealed the verdict to the Pennsylvania Superior Court. On May 17, 2010, the Pennsylvania Superior Court issued a Memorandum Opinion affirming the decision of the trial court dismissed Mr. Kuzemchak's appeal.

> Specifically, Appellant did not establish he had property in Buffington Township, that the coal mining was on his property, or that he had mining rights in the property. .. Accordingly, we affirm.

Kuzemchak v. DLR Mining, AmfireMining Company, et. al., Docket No. 105 WDA 2009, (Pa. Superior Ct.). (*Slip op.* issued May 17, 2010) at page 8.

Mr. Kuzemchak has not appealed the Pennsylvania Superior Court decision.

Therefore, the decision is final.

Collateral Estoppel

Amfire Mining argues that the Common Pleas decision, affirmed by the Pennsylvania Superior Court, which denied Mr. Kuzemchak's property claim to the Barrett Mine, is final and determined under the doctrine on collateral estoppel. We agree. The doctrine of collateral estoppel, or issue preclusion, apply when:

> (1) The issued decided in the prior action is identical to the one presented in the action in which the doctrine is asserted;
>
> (2) The prior action resulted in a final judgment on the merits;
>
> (3) The party against whom collateral estoppel is asserted was a party to the prior action, or is in privity with a part to the prior action;
>
> (4) The party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action; and
>
> (5) The determination in the prior proceeding was essential to the judgment

See e.g. Office of Disciplinary Counsel v. Kiesewetter, 889 A.2d 47, 50-51 (Pa. 2005); *Church of God Home, Inc. v. Department of Public Welfare*, 977 A.2d 591, 593 (Pa. Cmwlth. 2009); *Employers Mutual Casualty Co. v. Boiler Erection and Repair Co.* 964 A.2d 381, 394 (Pa. Super. 2008).

The collateral estoppel criteria set forth above are clearly met as to Kuzemchak's

permit appeal before the Pennsylvania Environmental Hearing Board.

(1) The issue decided in the Declaratory Judgment Action is identical to the one presented by Kuzemchak in his permit appeal (i.e., whether he owns, or whether he can establish that he owns, a 1/45th interest in the property where the mine portal area is located);

(2) The Declaratory Judgment Action has resulted in final judgment on the merits;

(3) The party against whom collateral estoppel is asserted, Mr. Kuzemchak, was a party to the prior action;

(4) Mr. Kuzemchak had a full and fair opportunity to litigate the issue in the Declaratory Judgment Action; and

(5) The determination in the Declaratory Judgment Action that Mr. Kuzemchak could not prove his case was not only essential to the judgment against him, it was the sole basis for the judgment.

Because this case involves an objection to the issuance of a mining permit and is before the Environmental Hearing Board, as opposed to a civil claim in State Court, the cases could be considered as involving different causes of action. However, for collateral estoppel to apply, the causes of action need not be the same. *Matternas v. Stehman*, 642 A.2d 1120 (Pa.Super. 1994); *Thompson v. Karastan Rug Mills*, 323 A.2d 341 (Pa.Super. 1974). The main issues in each case, whether Mr. Kuzemchak has a 1/45th interest in property which contains the Amfire Mine location, are identical. Therefore, all of the elements are therefore met in Mr. Kuzemchak's present appeal before the Board. *Jefferson County Commissioners v. DEP*, 1999 EHB 601.

Mr. Kuzemchak therefore is precluded from asserting an interest in the property based on the decision of the Indiana Court of Common Pleas which was affirmed by the Pennsylvania Superior Court. We will issue an order dismissing Mr. Kuzemchak's appeal to the permit.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAMES J. KUZEMCHAK	:	
	:	
v.	:	**EHB Docket No. 2009-114-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMFIRE MINING COMPANY, LLC, Permittee	:	

ORDER

AND NOW, this 18th day of August, 2010, following review of the Permittee's Motion for Summary Judgment and the papers filed by all the parties, it is ordered as follows:

1) The Permittee's Motion for Summary Judgment is **GRANTED** based on the doctrine of collateral estoppel.

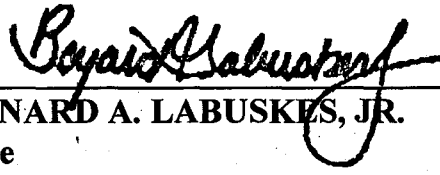
2) The Appellant's Appeal is ***DISMISSED***.

ENVIRONMENTAL HEARING BOARD

Thomas W. Renwand

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

MICHAEL L. KRANCER
Judge

RICHARD P. MATHER, SR.
Judge

DATED: August 18, 2010

c: **Attention: Connie E. Luckadoo**
Litigation Support Unit

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

HATFIELD TOWNSHIP MUNICIPAL AUTHORITY, et al.	:	
v.	:	**EHB Docket No 2004-046-L (Consolidated with 2004-045-L and 2004-112-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 25, 2010**

OPINION AND ORDER ON APPELLANTS' PETITION FOR ATTORNEYS' FEES

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a petition for attorneys' fees and costs under Section 307(b) of the Clean Streams Law. The Board finds that fees are not warranted largely because the petitioners' appeals have failed to achieve any lasting success or materially advance the goals of the Clean Streams Law.

FINDINGS OF FACT

Stipulated Facts

1. On December 5, 2003, the Department of Environmental Protection ("Department") submitted to the Environmental Protection Agency ("EPA") for its review and approval a Total Maximum Daily Load Assessment ("TMDL") for the Neshaminy Creek Watershed ("Neshaminy TMDL"). (Joint Stipulation ("Stip.") 3.)

2. On December 9, 2003, EPA approved the Neshaminy TMDL. (Stip. 4.)

3. On February 25, 2004, the Borough of Lansdale ("Lansdale") filed a Notice of Appeal of the TMDL with this Board. The appeal was docketed at 2004-045-K ("Lansdale Appeal"). (Stip. 5.)

4. On February 25, 2004, Hatfield Township Municipal Authority, Horsham Water & Sewer Authority, Bucks County Water & Sewer Authority, Warrington Township Water & Sewer Department, and Warwick Township Water & Sewer Authority (collectively, "Hatfield Appellants") filed a Notice of Appeal of the TMDL with the Board. The appeal was docketed at 2004-046-K ("Hatfield Appeal"). (Stip. 6.)

5. On March 15, 2004, Lansdale filed an Amended Notice of Appeal. (Stip. 7.)

6. On March 17, 2004, the Hatfield Appellants filed an Amended Notice of Appeal. (Stip. 8.)

7. Lansdale served initial discovery on April 13, 2004. (Stip. 9.)

8. On April 14, 2004, the Department, the Hatfield Appellants and Lansdale met to fulfill the Board's requirement stated in its Order of February 27, 2004 that the parties meet within 45 days of issuance of the Order to discuss settlement. (Stip. 10.)

9. The Hatfield Appellants served initial discovery on the Department on April 19, 2004. (Stip. 11.)

10. By Order dated April 14, 2004, the Lansdale and Hatfield Appeals were consolidated at EHB Docket No. 2004-046-K. (Stip. 12.)

11. On May 12, 2004, Chalfont-New Britain Joint Sewage Authority ("Chalfont-New Britain") filed an appeal of the TMDL. The appeal was docketed at 2004-112-K ("Chalfont-New Britain Appeal"). (Stip. 13.)

12. On May 12, 2004, the Department served discovery. (Stip. 14.)

13. During an early meeting with Lansdale and the Hatfield Appellants, a representative of the Department stated that phosphorus reductions contemplated in the TMDL were likely to become more stringent in the future, either as a result of numeric nutrient water quality standards on which the Department was currently working, or as a result of modifications to the waste load allocations in a subsequent or revised TMDL, if after implementation of the current TMDL, it was determined the impairments in the watershed had not fully been addressed. (Stip. 15.)

14. By Order dated June 16, 2004, the Chalfont-New Britain Appeal was also consolidated at EHB Docket No. 2004-046-K. (Stip. 16.)

15. In late May 2004, in the course of responding to Lansdale and the Hatfield Appellants' discovery, the Department determined that one of the variables in the model used in the TMDL, the k_7 value (i.e., the "k-rate"), had not been set appropriately. (Stip. 17.)

16. The "k-rate" was a variable and calibration parameter in the model that measured the phosphorus loss rate. (Stip. 18.)

17. On June 8, 2004, the Department met with the Hatfield Appellants and Lansdale. Chalfont-New Britain did not attend this meeting. The Department informed the Hatfield Appellants and Lansdale of the modeling error involving the k-rate and of the Department's intention to revise the TMDL to correct this error. The Department explained to the Hatfield Appellants and Lansdale what the Department believed would be the schedule for moving forward with the development of the revision to the TMDL, a process that the Department estimated would take approximately six months. (Stip. 19.)

18. On June 14, 2004, all parties but Chalfont-New Britain participated in a conference call with Judge Michael L. Krancer of this Board. The participating parties discussed

a stay of the litigation until the TMDL revision process could be completed, which at that time was envisioned as concluding in January 2005. (Stip. 20.)

19. On July 6, 2004, the Board issued an Order which stated that "the Department and Appellants shall meet during this stay, and in advance of the issuance of the revised TMDL, to discuss the revision of the TMDL... and to make reasonable efforts to resolve disputed issues." (Stip. 21.)

20. The Department, Lansdale, and the Hatfield Appellants' technical and legal representatives met regarding the TMDL revision process and the model to be used for the revised TMDL on July 7, 2004. (Stip. 22.)

21. The Department, Lansdale, and the Hatfield Appellants' technical and legal representatives met again on September 15, 2004. (Stip. 23.)

22. On September 24, 2004, counsel for Department sent an e-mail to counsel for Chalfont-New Britain which read, in part: "The Department did a document production, in which I believe you were invited to participate, although you have not filed any discovery requests. Since then the consultants for the parties have exchanged information with respect to the model, first in a technical meeting on July 7, 2004 which you were invited to attend, and since that meeting, by telephone and by e-mail, and the Department's consultants at Penn State have provided a revised version of the model. The parties who have been discussing these issues anticipate that there will be field data generated, as well as additional revision to the model." (Stip. 24.)

23. On October 12, 2004, a conference call was held among the parties. On this call, the Department informed the parties that the model's flows were in line but that the velocities and depths (used to calculate the flows) were in need of further refinement since the velocities

affected the k-rate. The Department's contractor subsequently revised the slopes in the model based on map assessments. (Stip. 25.)

24. On October 22, 2004, the Department sent Appellants a revised model. (Stip. 26.)

25. On October 25, 2004, counsel for the Department sent an e-mail to Appellants in which the Department offered the Appellants the opportunity to provide feedback on the current revision of the model and on any other issues set forth in the appeals prior to publication of a revised Neshaminy TMDL. (Stip. 27.)

26. On November 1, 2004, the Department sent Appellants, in response to their request for the model results and effluent concentrations, a table of different effluent concentrations and flow scenarios. (Stip. 28.)

27. On November 15, 2004, the Department informed the Board that the Department was ready to move forward with publication of a revised TMDL but was affording the Appellants an opportunity to meet prior to finalizing the revision. (Stip. 29.)

28. By e-mail dated November 19, 2004, the Department provided Appellants with the wasteload allocations that the Department anticipated would be proposed in the revised TMDL. These were effluent concentration of 0.5 mg/L total phosphorus ("TP"), which was more stringent than the original TMDL's level of 0.8 mg/L TP. (Stip. 30.)

29. On November 22, 2004, Lansdale and the Hatfield Appellants met with the Department to discuss the planned revisions to the Neshaminy TMDL, at which Lansdale and the Hatfield Appellants provided the Department with additional comments. (Stip. 31.)

30. On December 2 and December 8, 2004, the Department provided additional information to Appellants in response to questions raised at the November 22, 2004 meeting. (Stip. 32.)

31. On December 15, 2004, the Department informed the Board: "The Department now believes it is in a position to begin drafting the revised TMDL." (Stip. 33.)

32. By letter dated February 3, 2005, the Department provided the Hatfield Appellants and Lansdale with a draft settlement document. (Stip. 34.)

33. On February 8, 2005, Lansdale and the Hatfield Appellants met with the Department. At this meeting, the Department reiterated the information and the offer of settlement from the February 3, 2005 letter. Appellants informed the Department that they preferred to seek a stay of the current litigation from the Board. (Stip. 35.)

34. An in-person status conference with Judge Krancer was requested by the Hatfield Appellants and Lansdale. Although the Department did not agree with these Appellants' approach, the Department did not oppose the request. The conference occurred on April 15, 2005. At that conference, Appellants raised concerns with respect to administrative finality associated with the Department's proposal, given what they characterized as the Department's unwillingness to withdraw the TMDL. The Department presented its position that it did not agree with these concerns and that it did not have the power to unilaterally withdraw the TMDL absent EPA's approval. The Hatfield Appellants and Lansdale presented their position, arguing instead for a dismissal of the litigation without prejudice. The Board entered an Order on April 18, 2005 continuing the stay. (Stip. 36.)

35. On December 15, 2005, the Department submitted a status report to the Board indicating that the data analysis from three rounds of sampling in the Neshaminy watershed over the summer of 2005 was not complete and that the Department would be moving forward with the remaining steps leading to an amendment of the Neshaminy TMDL. (Stip. 37.)

36. The Department provided Appellants with that data analysis ("the Hunter Carrick

report") on January 5, 2006. (Stip. 38.)

37. In a January 27, 2006 email, the Department indicated that new model runs for the amended Neshaminy TMDL were in the process of being completed and that the Department intended to share those results with the Appellants when they were ready. (Stip. 39.)

38. On February 1, 2006, Lansdale and the Hatfield Appellants requested that the Department provide the raw data from the Hunter Carrick report, the new modeling data, and information about any additional work being conducted on Neshaminy TMDL. (Stip. 40.)

39. On February 1, 2006, the Department provided Lansdale with the raw data. On February 3, 2006, the Department provided the Hatfield Appellants with raw data and provided the new modeling data to the Hatfield Appellants and to Lansdale. (Stip. 41.)

40. On April 11, 2006, Lansdale and the Hatfield Appellants met with the Department and requested additional data, which the Department provided. (Stip. 42.)

41. On June 15, 2006, the Department submitted a status report to the Board indicating that a draft Neshaminy TMDL amendment was circulating internally. (Stip. 43.)

42. On June 28, 2006, a status conference call was held with Judge Krancer. (Stip. 44.)

43. On June 29, 2006, the Board entered an order vacating the stay and establishing a discovery, pre-trial submission, and trial schedule. (Stip. 45.)

44. Following the lifting of the stay, the parties had additional discussions regarding resolution of the matter. (Stip. 46.)

45. On August 11, 2006, another conference call was held with Judge Krancer, following which Judge Krancer stayed all proceedings in order to allow the TMDL revision and comment process to be completed. (Stip. 47.)

46. The Department released the draft amendment to the Neshaminy TMDL for public comment on August 26, 2006. The public comment period ran until October 25, 2006. (Stip. 48.)

47. On August 18, 2007, the Department published a notice of proposed withdrawal of the nutrient portion of the Neshaminy TMDL, subject to EPA approval. (Stip. 49.)

48. By letter dated September 6, 2007, the Department submitted to EPA for its approval the Department's rationale document for the proposed withdrawal of the nutrient portion of the Neshaminy TMDL. (Stip. 50.)

49. On February 5, 2008, the Department received written approval from EPA, dated January 31, 2008, of the proposed withdrawal of the nutrient portion of the Neshaminy TMDL. (Stip. 51.)

50. On April 5, 2008, the Department published notice of its withdrawal of the nutrient portion of the Neshaminy TMDL. (Stip. 52.)

51. Subsequently, the parties negotiated the terms of a stipulation of settlement. (Stip. 53.)

52. On October 17, 2008, the parties submitted a stipulation of settlement to the Board. (Stip. 54.)

53. On October 20, 2008, the Board entered an order of dismissal. (Stip. 55.)

54. On November 17, 2009, Chalfont-New Britain filed an application for attorneys' fees and costs. (Stip. 56.)

55. On November 19, 2009, Lansdale filed an application for attorneys' fees and costs. (Stip. 57.)

56. On November 19, 2009, the Hatfield Appellants filed an application for attorneys'

fees and costs. (Stip. 58.)

57. The costs and fees incurred in the instant appeals of the TMDL by Lansdale and the Hatfield Appellants, prior to the filing of their fee petitions, are $287,245.27, and $239,243.00 respectively. (Stip. 59.)

58. No replacement nutrient TMDL for the Neshaminy Creek has been established. (Stip. 60.)

59. At the April 14, 2004 meeting between the Department and the Hatfield Appellants and Lansdale, the Department provided these Appellants the option of the stipulation pursuant to which these Appellants would agree to a dismissal of their appeals and pursuant to which the Department would agree not to object to these Appellants raising issues similar to those raised in the underlying Neshaminy Creek TMDL appeal in any appeal of the 2003 Nesahminy Creek TMDL, any future Neshaminy Creek TMDL, or in any appeal of the permit issued by the Department containing phosphorus limits derived from any such TMDLs. This option was not reduced to writing. (Supplemental Joint Stipulation ("Supp. Stip." 1(a).)

60. In response to the Department's proposal, Appellants raised what they believed were significant concerns including, *inter alia*, that if they withdrew or otherwise agreed to a dismissal of their appeal as suggested by the Department: (i) the Board may not have jurisdiction to hear an appeal of a TMDL at permit issuance and (ii) the doctrine of administrative finality could restrict Appellants' ability to raise similar issues in such future proceedings. (Supp. Stip. 1(a).)

61. At the June 8, 2004 meeting between the Department and the Hatfield Appellants and Lansdale, the Department again verbally provided these Appellants the option of a stipulation as described above. The Department would not agree to commit, in writing, not to

issue new or modified NPDES permits to the Appellants based on the Neshaminy TMDL, as part of this stipulation. The Department did not agree to withdraw the Neshaminy TMDL. (Supp. Stip. 1(b).)

62. In response, these Appellants raised concerns similar to those referenced above. (Supp. Stip. 1(b).)

63. During the pendency of the appeal, Chalfont-New Britain was a member of the "PA Periphyton Coalition" represented by John Hall & Associates, which was attempting to work with the Department and the EPA respecting the development of a new TMDL for the Neshaminy. (Stipulation Between DEP and Chalfont-New Britain ("CNB Stip.") 3.)

64. In the August 18, 2007, edition of the Pennsylvania Bulletin, the DEP published the following Public Notice:

PUBLIC NOTICE

Department of Environmental Protection to Withdraw the Nutrient TMDLs for Neshaminy Creek Watershed

Department of Environmental Protection (Department) intends to withdraw, subject to United States Environmental Protection Agency (EPA) approval, the established nutrient Total Maximum Daily Loads (TMDLs) for the Neshaminy Creek Watershed. The Department developed, and EPA approved, nutrient TMDLs for the Neshaminy Creek Watershed on December 9, 2003. EPA proposes to establish, by June 30, 2008, TMDLs to replace the withdrawn TMDLs. The revised TMDLs will be based on an additional scientific evaluation of the nutrient-algal growth relationship as well as additional water quality modeling evaluations.

The Rationale for Withdrawal document can be accessed at www.dep.state.pa.us, DEP keyword: TMDL. Select Neshaminy Creek TMDL by name.

Direct any questions about the Neshaminy Creek TMDL withdrawal to Bill Brown at (717) 783-2951 or willbrown@state.pa.us.

[Pa.B. Doc. No. 07-1482. Filed for public inspection August 17, 2007, 9:00 a.m.]

65. The costs incurred by Chalfont-New Britain as of January 31, 2009 respecting the appeal of the TMDL totaled $26,815.45 in attorneys' fees and $394.12 in costs. (CNB Stip. 5.)

66. Settlement discussions did take place between Chalfont-New Britain and the Department, as evidenced by the July 12, 2006, August 3, 2006, August 3, 2006 and August 6, 2006 e-mails. (CNB Stip. 6.)

Additional Findings

67. The Appellants are political subdivisions that own and operate publicly owned sewage treatment works ("POTWs") in the Neshaminy Creek watershed. (Notes of Transcript ("T.") 24-25, 28, 184-85.)

68. In 1996, the Commonwealth listed the Neshaminy Creek and its tributaries as impaired waters pursuant to Section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d). The cause was identified as, *inter alia*, nutrients. (Hatfield Exhibit ("H. Ex.") 2 (pp. TL-1, 2).)

69. The 1996 303(d) List was included as part of an attachment to a federal Consent Decree entered in *American Littoral Society, et al. v. U.S. Environmental Protection Agency, et al.*, Civ. No. 96-489 (E.D. Pa.)("Consent Decree"), to which neither the Department nor the Appellants were parties. (H. Ex. 1.)

70. The Consent Decree sets forth a schedule pursuant to which EPA was to ensure that TMDLs were established in Pennsylvania for waters listed on the 1996 303(d) List. Paragraph 15 of the Consent Decree provides that EPA was to ensure that TMDLs were established for the Neshaminy Creek and its tributaries by 2007. (H. Ex. 1.)

71. A TMDL is a planning document that outlines a pollutant budget for a watershed. A TMDL itself does not immediately impose requirements on permittees until it is implemented through some separate process, such as the NPDES permitting process. (T. 272.)

72. The Neshaminy TMDL developed by the Department and approved by EPA in 2003 set forth the pollutant budget for the Neshaminy Creek watershed for total phosphorus ("TP") and allocated a portion of that allowable load to the point source dischargers in the watershed. (T. 272.)

73. The Neshaminy TMDL set a goal of 20 percent reduction in TP, measured at the mouth of the watershed. This goal translated to wasteload allocations ("WLAs") to point sources of 1.0 mg/L TP as a monthly average at existing flows and 0.8 mg/L TP at full permitted capacity. (T. 277-78.)

74. The Appellants' existing NPDES permits contained phosphorus limits of 2 mg/L, so the reduction to 0.8 mg/L could be equated to a 60 percent reduction in permit limits. (T. 26, 56.)

75. In response to the proposed TMDL, in their notices of appeal, and throughout these proceedings the Appellants have consistantly expressed the concern that the TMDL should be scientifically sound and that permit limits based upon the TMDL should not be subject to revision in short order, *i.e.*, they should be "noniterative." (T. 31-33, 40, 65, 96-98; H. Ex. 8, 60; L. Ex. 6.)

76. Making changes to a POTW to meet more stringent limits can be expensive, and the Appellants' primary goal has been to avoid additional and/or unnecessary expense. (T. 22-35, 57-62, 94-100, 253-55; H. Ex. 60; L. Ex. 5, 62.)

77. The discovery that the Appellants served on the Department sought information on the modeling used by the Department to develop the TMDL, including the k-rate, but it did not identify any specific problem with the Department's modeling methodology, largely because the Appellants did not know what the methodology was at that time. (T. 36, 47, 52, 65-72, 86,

89, 123-25; H. Ex. 10; L. Ex. 7.)

78. The model used by the Department inaccurately had phosphorus loss increasing with increased flow whereas phosphorus loss actually decreases with increased flow (because there is less time for natural conditions to reduce phosphorus levels). (T. 277-83; DEP Ex. 31, 32.)

79. Prior to and aside from further study done in response to the Appellants' appeals, the Department did not have a complete, independent understanding of the modeling used to develop the TMDL. (T. 342-44.)

80. Following the June 8, 2004 meeting at which the Department informed the Appellants of the modeling error and its intention to prepare a revised TMDL, and at which the Department repeated its settlement offer suggesting that the litigation be terminated without prejudice, and prior to April 5, 2008 when the Department published notice of withdrawal of the TMDL, the following activities and events took place:

a. The parties engaged in settlement discussions under the auspices and direction of this Board (Stip. 19-21, 29, 33-37, 43-47; Supp. Stip. 1(b); T. 40, 69, 83-84, 125-27, 156-57, 161, 163, 174-75, 225, 243, 259, 265, 292-94, 309-12; DEP Ex. 11-12);

b. The Appellants provided technical input and comment as the Department moved forward with preparation of a replacement TMDL (Stip. 22-24, 27-28, 31; T. 34-35, 47, 68, 72-74, 128, 131-33, 141-42, 178-79, 294-98, 301; H. Ex. 15-16; DEP Ex. 10-11; L. Ex. 12);

c. The Department worked independently and together with the Appellants with the goal of issuing a revised TMDL (Stip. 25-26, 30, 32, 38-42; T. 72-80, 129, 136-142, 177, 301-04, 358-59; L. Ex. 12-14, 23);

d. The Department made several revisions during the review process (T. 294-98,

304, DEP Ex. 10);

e. The Department in an email to EPA stated: "We are in the process of revising the Neshaminy TMDL *as a result of* the appeal for that TMDL" (T. 209; L. Ex. 25) (emphasis added);

f. EPA informed the Department that it *preferred* that the Commonwealth submit a replacement TMDL to EPA for approval rather than simply withdraw the TMDL without a replacement in place (T. 224-25; 264-65);

g. The Department had a reasonable, good faith belief that it should cooperate with EPA before withdrawing the TMDL that EPA had approved (T. 311-12; L. Ex. 44);

h. While in the process of drafting the revised Neshaminy TMDL, the Department learned that the EPA was nearing completion of a TMDL for the nearby Skippack Creek watershed (T. 226, 304-05);

i. The Skippack TMDL used a different methodology and a different endpoint determination than that which had been employed in the original Neshaminy TMDL as well as in the work-in-progress revision to the Neshaminy TMDL (T. 226-27, 304-06);

j. The Department did not issue modified NPDES permits to the Appellants (T. 50-51, 103-04, 214);

k. The Department ultimately did not adopt any of the proposed revisions discussed with the Appellants (T. 304, 310);

l. On August 26, 2006, the Department published a draft revised TMDL for the Neshaminy Creek that abandoned the methodology on which it previously relied and used the methodology that was used for the TMDL in the Skippack Creek watershed, the Department's stated goal being that the TMDLs for the two watersheds that are adjacent to one another should

be "consistent" (Stip. 48; T. 80, 142-44, 305-12);

m. Most of the Appellants, among others, provided continuing input regarding the draft revised TMDL, commenting that they did not agree with the revised TMDL (T. 80-82, 312-17, 364; H. Ex. 48; L. Ex. 30, DEP Ex. 18-23);

n. The Department became aware, during the public comment period, by virtue of comments received from Hatfield and the Pennsylvania-Periphyton Coalition, that one of the equations upon which EPA had relied in establishing the Skippack TMDL, the Dodds equation, had been revised pursuant to an erratum ("Dodds erratum") published *via* journal website in April 2006 and in hardcopy in July 2006. This equation also was the underlying equation that the Department was proposing to use to develop the endpoint in the revisions to the Neshaminy TMDL (T. 229-31, 317-19; H. Ex. 48; DEP Ex. 24);

o. The Dodds erratum indicated to EPA that the endpoint in the Skippack TMDL was incorrect. EPA concluded that the best course of action was to withdraw the nutrient portion of the Skippack TMDL (T. 231-32, 318-19);

p. Because the Neshaminy TMDL revisions were based on the same equations used in the Skippack TMDL, the Department abandoned its efforts to revise the Neshaminy TMDL and proposed to the EPA a withdrawal of both the August 26, 2006 draft revision to the Neshaminy TMDL and, subject to EPA approval, the nutrient portion of the Neshaminy TMDL itself (T. 229-33, 319; H. Ex. 51);

q. On September 27, 2007, EPA sent the Department notice of EPA's withdrawal of the nutrient portion of the Skippack TMDL and attached EPA's rationale document which stated, in part, that this withdrawal was prompted by "scientific developments subsequent to April 2005" (T. 232-33; DEP Ex. 25);

r. The rationale document continues by explaining that the Dodds equation was modified after the Skippack TMDL was established by the EPA and that "based on a review of scientific developments, existing data and other studies, EPA believes that the TP endpoint selected for these nutrient TMDLs is not sufficient to attain and maintain existing water quality standards and water uses" (T. 233; DEP Ex. 25);

s. In requesting that the Department be allowed to withdraw the nutrient portion of the Neshaminy TMDL, the Department essentially copied the EPA's rational document for the Skippack nutrient TMDL withdrawal (T. 234-35, 320-24; DEP Ex. 26; H. Ex. 55);

81. On April 5, 2008, the Department published notice of its withdrawal of the nutrient portion of the TMDL. The notice stated in part: "While the TMDLs represent the best interpretation of the narrative criteria available at the time, more recent intensive studies of Pennsylvania waters and an exhaustive scientific literature [review] conducted by EPA as part of the Skippack Creek TMDL Withdrawal Rational indicate that allowable TP is much lower than the levels required by the TMDLs.... EPA will establish the nutrient TMDLs for Neshaminy Creek." (Stip. 52; T. 328-29; DEP Ex. 28.)

82. The Appellants' efforts in connection with their appeals were a substantial factor in bringing about the Department's voluntary decision to withdraw the nutrient portion of the TMDL. (FOF 1-80(s)).

83. Hatfield has moved to amend its petition for attorneys' fees and costs bringing the total amount as of April 30, 2010 to $388,068.53. (Hatfield Supplemental Motion filed May 14, 2010.)

84. Lansdale has moved to amend its petition for attorneys' fees and costs bringing the total amount as of March 31, 2010 to $527,611.78 (Lansdale Motion to Amend its Petition

filed May 17, 2010.)

85. Chalfont has moved to amend its petition for attorneys' fees and costs bringing the total amount as of April 30, 2010 to $93,935.45, which brings the total fees requested by the petitioners in these consolidated appeals to just over one million dollars. (Chalfont Second Supplemental Motion to Amend filed May 18, 2010.)

86. The Neshaminy Creek remains listed as impaired for nutrients. (T. 311.)

87. To date, no replacement nutrient TMDL for the Neshaminy Creek has been established. (Stip. 60; T. 362.)

DISCUSSION

Section 307(b) of the Clean Streams Law, 35 P.S. § 691.307(b), authorizes this Board in its discretion to order the payment of costs and attorneys' fees that we determine to have been reasonably incurred by a party in proceedings pursuant to the Act. The Board may award costs and attorneys' fees under Section 307(b) solely on the basis of a finding of bad faith or vexatious conduct that is supported by the record. *Solebury Township v. DEP*, 928 A.2d 990 (Pa. 2007). In the absence of bad faith or vexatious conduct, in order to be eligible for an award of attorneys' fees under Section 307(b), a party must first satisfy three criteria:

1. The applicant must show that the Department provided some of the benefit sought in the appeal;

2. The applicant must show that the appeal stated a genuine claim, *i.e.*, one that was at least colorable, not frivolous, unreasonable or groundless; and

3. The applicant must show that its appeal was a substantial or significant cause of the Department's action providing relief.

See Lower Salford Township Authority v. DEP, 2009 EHB 633, 638 ("*Lower Salford*"); *Solebury Township v. DEP*, 2008 EHB 658, *reconsideration denied*, 2008 EHB 718 ("*Solebury*").

Several principles guide our application of these eligibility criteria. Those principles include:

1. A formal judgment, adjudication, or Board-approved settlement agreement is not a prerequisite to an award of fees. *Lower Salford*, 2008 EHB at 638-39; *Solebury*, 2008 EHB at 672.

2. The Board is not required to hold a hearing on every fee petition. *Lower Salford* (Opinion and Order Denying Reconsideration, January 5, 2010). *Accord, UMCO Energy, Inc. v. DEP*, 2009 EHB 24.

3. Even in those cases where we determine that a hearing is necessary to resolve genuine, material issues of disputed fact, we will not hold mini-trials on the merits of the underlying appeal. *Lower Salford*, 2009 EHB at 642-43; *Solebury*, 2008 EHB at 675. It is enough that the applicant's claim was colorable.

4. "The important point is that the agency changes its conduct at least in part as a result of the appeal. The appeal caused the change, not necessarily the 'merits' of the appeal. Causation is key; motive is not." *Solebury*, 2008 EHB at 675-76.

5. Fees incurred in successfully pursuing fees ("fees on fees") are generally recoverable. *Solebury*, 2008 EHB at 725.

The fact that a party is *eligible* to receive reimbursement of some of its fees will rarely end our inquiry. The Supreme Court in *Solebury Township* repeatedly emphasized that the Board has "broad discretion" to award attorneys' fees in appropriate proceedings. 928 A.2d at 1003-05; *see also Lucchino v. DEP*, 809 A.2d 264, 285 (Pa. 2002) ("[S]ection 307 of the CSL clearly vests broad discretion in the EHB to award costs and counsel fees."). Thus, we may decide that an award of fees is inappropriate even if a party satisfies the eligibility criteria. In other circumstances, we may decide that particular fees should be disallowed, or that an across-the-board percentage reduction is appropriate. *See, e.g., Solebury*; *Pine Creek Watershed Ass'n v. DEP*, 2008 EHB 237 and 2008 EHB 705. In determining the *amount* of fees to be awarded, we will consider such factors as the following:

1. The degree of success;

2. The extent to which the litigation brought about the favorable result;

3. The fee applicant's contribution in bringing about the favorable result;

4. The extent to which the favorable result matches the relief sought;

5. Whether the appeal involved multiple statutes;

6. Whether litigation fees overlap fees unrelated to the litigation itself;

7. How the parties conducted themselves in the litigation, including but not limited to whether reasonable settlement offers were made, accepted, or rejected.

8. The size, complexity, importance, and profile of the case;

9. The degree of responsibility incurred and risk undertaken; and

10. The reasonableness of the hours billed and rates charged.

Lower Salford, slip op. at 9; *Solebury*, 2008 EHB at 673-74; *Pine Creek, supra.* In the final analysis, any amount of fees that we award must be consistent with the aims and purposes of the Clean Streams Law. *Solebury*, 2008 EHB at 674-75 and 681.

The parties raise a couple of preliminary issues that we do not need to resolve. We will assume without deciding for current purposes only that a TMDL is an appealable action. We will also assume that an award of fees pursuant to Section 307 is available in an appeal from a TMDL.

Our review of the factual record does not support the Appellants' assertion that the Department acted in bad faith or engaged in vexatious conduct. Such activity generally includes actions designed primarily to harass, embarrass, or annoy, or fraudulent, dishonest, or corrupt behavior. *See Thunberg v. Strause*, 682 A.2d 295, 299-300 (Pa. 1996); *Township of South Strabane v. Piechnick*, 686 A.2d 1297, 1301 (Pa. 1996)(fee award reversed where there was no

indication that allegedly vexatious conduct was based on anything other than good faith misunderstanding and interpretation of obligations); *Lucchino v. DEP*, 1998 EHB 1056, 1073-74.

The main thrust of the Appellants' argument regarding bad faith is that, as a result of the Department's repeated refusal to withdraw the flawed Neshaminy TMDL, the Appellants were forced into lengthy and expensive litigation. The Appellants contend that the Department acted in bad faith by taking the allegedly invalid position that the Department could not unilaterally withdraw the Neshaminy TMDL without the approval of the EPA and yet it did not actively seek that approval.

We do not think that the Department suffered through years of settlement discussions, litigation activity, and TMDL revisions primarily to harass, embarrass, or annoy the Appellants. Similarly, whether the Department's views were right or wrong regarding its ability to withdraw the TMDL without EPA approval, there is absolutely no evidence that fraud, dishonesty, or corruption informed its actions. The Department's decision not to push the envelope after being told that EPA would prefer that it not withdraw the TMDL without having a replacement in place strikes us as an admirable example of cooperative governance and federalism between agencies with overlapping responsibilities. It also does not strike us as bad policy or judgment to resist withdrawing a TMDL until a replacement was ready to go simply to appease the Appellants. The Department acted closely and forthrightly with the Appellants from the time it discovered the first modeling error and for years thereafter in response to their input. It repeatedly attempted to terminate the litigation without prejudice before this Board without success. As

soon as it became clear that EPA would approve a withdrawal without a replacement and that no replacement was in sight, the Department effected the withdrawal with reasonable dispatch.[1]

Turning to the eligibility criteria that apply in the absence of bad faith, it is clear that the Appellants' appeals stated genuine claims, i.e., were at least colorable and not frivolous, unreasonable, or groundless. The Appellants had legitimate objections and legitimate concerns, at least some of which ultimately proved to have considerable merit, as demonstrated by the Department's ill-fated attempts to revise the TMDL.

Whether the Department provided some of the benefit sought in the appeals is less clear. It is true that the Appellants sought and obtained some temporary relief from the nutrient portion of the TMDL. After all, there is currently no TMDL in place and the Appellants' permit limits have not been changed. Accordingly, the expense of rebuilding and/or operating their plants to meet new permit limits has been deferred. However, although the details at this point may be a matter of speculation, there is little doubt that a replacement TMDL will eventually be promulgated for the Neshaminy Creek due to its impaired status. The Appellants do not contend otherwise. Indeed, they point proudly to the fact that they face "no lowered phosphorus limits *for the time being*." (emphasis added) (Lansdale Brief at p. 32.) More litigation will undoubtedly follow. The respite that the Appellants have achieved is, at best, almost certainly temporary. A temporary success generally does not merit a fee award. *Kwalwasser v. DER*, 569 A.2d 422, 424 (Pa. Cmwlth. 1990).

The Appellants repeatedly say that they are not opposed to a TMDL that will result in more stringent permit limits. Rather, they say that they simply want a scientifically valid, noniterative TMDL. Putting the believability of this claim aside, it is once again clear that they

[1] We also reject any notion that the Appellants acted in bad faith or unreasonably prolonged the litigation or adopted unreasonable settlement positions.

have not achieved the goal as they themselves have articulated it. Again, to use Lansdale's own words, "Discovery of an error is not the 'evolution of science'." No "scientifically valid" TMDL is currently in place.

Regarding the stated goal of a "noniterative" TMDL, that goal does not strike us as particularly worthy in the context of a fee petition under the Clean Streams Law. Permits and TMDLs by their very nature are *supposed* to be iterative. Any attempt to freeze the process is not particularly consistent with the goal of the Clean Streams Law that there be steady improvement to the waters of the Commonwealth. 35 P.S. § 691.4(3). The Department must constantly be open to new developments. That is one reason why permits have a defined term. And one need only look to the dizzying pace of the Department's and EPA's efforts to promulgate a TMDL in this case to gauge the merits of the Appellants' stated fear that their permits could be revised again in a mere few years if the elusive TMDL is ever subsequently revised.

Thus, we do not view the temporary reprieve that the Appellants are enjoying as a result of their litigation as the "total victory" that they proclaim. Nor do we accept it as the sort of "benefit" that supports a fee award. However, for the sake of creating a complete record, we will assume *arguendo* that "the Department has provided some of the benefit sought in the appeal." (quoting *Lower Salford, supra.*) With that assumption in mind, we do believe that the Appellants have shown that their appeals were a substantial or significant cause of the Department's action providing relief. The Department admitted as much. Jenifer Fields, Water Program Manager, in an email to EPA wrote, "We are in the process of revising the Neshaminy TMDL *as a result of* the appeal for that TMDL." (emphasis added) (FOF 80(e)). The parties have also stipulated that the Department discovered the first modeling error (the k-rate issue) "in the course of responding

to the Borough and Hatfield Appellants' discovery," which asked questions regarding the Department's modeling, including the k-rate. (FOF 15.) Not surprisingly, the Department employee who initially discovered the k-rate error hedged on whether the Appellants' discovery requests caused his discovery (T. 290-92), but the coincidence in timing, while not dispositive, certainly has some probative value. The Department has not suggested any reason why its employees would have gone back and revisited the k-rate for a TMDL that had already been approved but for the Appellants' appeals.

We think, perhaps, that too much has been made of the k-rate discovery. That discovery certainly started the ball rolling, but the TMDL was actually not withdrawn until four years later. During that time, the Appellants identified and raised several other problems with the models and the Department's approach. For example, they pointed out the fact that the model did not take nonpoint sources into account, that it did not adequately account for the effects of algae, and that it was not based on site-specific data. Over time, the Department acknowledged the validity of many of the Appellants' concerns. It agreed that the Appellants' input and collaborative efforts contributed to continuing refinement of the modeling. (FOF 80(b)-80(d)).

The Department itself never appeared to attain a full and complete understanding of the modeling underlying the TMDL. (T. 304.) After years of attempting to develop an acceptable model, the Department abandoned the effort, which in turn necessitated a withdrawal of the TMDL. The Department argues that its original modeling efforts were "defensible," but the truth of the matter is that it just gave up. We are convinced that it would never have gotten to that point had it not been for the Appellants' appeals.

The Department adds that it changed course because of its view that the TMDLs for Skippack and Neshaminy should be "consistent." It never explained, however, why such

"consistency" is important. To the contrary, it could not explain the relative merits of each approach. (T. 306.) We believe that the switch to a new method was as much or more a result of frustration with the existing model as a desire for "consistency."

The Department reminds us that it proposed a revised Neshaminy TMDL based on the methodology that EPA used for the Skippack TMDL. When that methodology also turned out to be flawed, the Department also withdrew its proposed revised Neshaminy TMDL. But the favorable result that is pertinent to the Appellants' fee petition is the withdrawal of the actual TMDL that was issued and appealed in 2004. The Department did not withdraw *that* TMDL as a result of flaws in the Skippack methodology. It withdrew that TMDL because of unresolved flaws in the Neshaminy methodology that clearly came to light as a result of the Appellants' appeals.[2] The fact that the methodology underlying the Skippack TMDL and the proposed *revised* Neshaminy TMDL also proved to be doomed is not particularly relevant.

Thus, although the Appellants had genuine claims and their appeals brought about a reprieve, the temporary, negational character of that so-called benefit militates against an award of fees. Assuming, however, that the Appellants have met the criteria for being eligible for fees, that eligibility does not translate into entitlement. Lansdale in its brief says:

> [A]fter a four-and-a-half-year appeal and hundreds of thousands of dollars in costs and fees, the Department has not advanced the goals of the Clean Streams Law at all. There is still no TMDL established for Neshaminy Creek, and none appears to be forthcoming.

(Brief at 30.) Sadly, we believe that exactly the same thing can be said of the Appellants' efforts. The question in fee litigation is not whether *the Department* has advanced the goals of the Clean Streams Law; it is whether the Appellants should be rewarded because *they* have.

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[2] The Department eventually acknowledged that any attempt to develop a Neshaminy TMDL would "exceed ... the Department's resources and capacities and expertise in modeling and other factors." (T. 330.)

Lansdale notes that this litigation "has resulted in an enormous waste of taxpayer resources." It says that this is a case of "litigation that turned futile." Lansdale points out, correctly, that nothing has been done to improve the watershed involved. Five years of litigation has proven to be "pointless." We do not believe that attorneys' fees should be awarded in pointless, futile litigation that has not advanced the goals of the Clean Streams Law, has not improved the watershed involved, and has resulted in an enormous waste of taxpayer resources. When considering a fee application, at the end of the day, we must ask what of value has been accomplished as a result of the appeals. Clearly in this case, next to nothing.

The Clean Streams Law authorized this Board to award fees in recognition of the fact that appeals are often essential to the effectuation of fundamental public policies embodied in the Clean Streams Law, and that without some mechanism authorizing the award of attorneys' fees, appeals to effectuate such policies will, as a practical matter, frequently be infeasible. *Solebury*, 2008 EHB at 674; *see also Solebury*, 928 A.2d at 1002 (citing *Graham v. Daimler-Chrysler Corp.*, 101 P.3d 140, 149 (Cal. 2004)). If the purpose of fee-shifting in EHB appeals is to see that public policies are advanced through the correction of Departmental errors, it is only appropriate that we consider the extent to which an appeal effectuated such policies when we consider whether to award fees. *Solebury*, 2008 EHB at 674; *see also Krebbs v. United Refining Co.*, 893 A.2d 776, 788 (Pa. Super. 2006) (award of fees should be made in a manner consistent with the aims and purposes of the statute), and *Id.* at 791 (court should assess whether the award will promote the purposes of the Act); *Krassnoski v. Rosey*, 684 A.2d 635, 639 (Pa. Super. 1996) (court should consider whether an award of fees would promote the purposes of the specific statute involved).

The declaration of policy in the Clean Streams Law reads:

(1) Clean, unpolluted streams are absolutely essential if Pennsylvania is to attract new manufacturing industries and to develop Pennsylvania's full share of the tourist industry;

(2) Clean, unpolluted water is absolutely essential if Pennsylvanians are to have adequate out of door recreational facilities in the decades ahead;

(3) It is the objective of the Clean Streams Law not only to prevent further pollution of the waters of the Commonwealth, but also to reclaim and restore to a clean, unpolluted condition every stream in Pennsylvania that is presently polluted;

(4) The prevention and elimination of water pollution is recognized as being directly related to the economic future of the Commonwealth; and

(5) The achievement of the objective herein set forth requires a comprehensive program of watershed management and control.

35 P.S. § 691.4. The Appellants' appeals have not done anything to "restore to a clean, unpolluted condition every stream in Pennsylvania that is presently polluted" or materially advanced any of these other goals. *See Solebury*, 2008 EHB at 681. ("The appeals have not served to protect or enhance the quality of the Commonwealth's waters. The appeals have not resulted in any actual improvements to or protection of waterways. The appeals have not resulted in improved standards, regulations, permits or procedures.").

To the extent this litigation has benefited the Appellants and their ratepayers by achieving a temporary delay in revised permit limits, it is appropriate that they should be the ones to bear the costs of the appeals. We see no great benefit to the public at large that would justify the taxpayers of the Commonwealth as a whole picking up the Appellants' one-million-dollar tab. While there is no doubt that Section 307 allows for recovery of fees to those litigants whose interests might be seen as economic as well as those whose interests might be seen as more purely environmental, this is not an appropriate case for an award to these Appellants for the reasons we have already discussed at length.

Fee awards are meant to encourage certain behavior. While we are not critical of what transpired in these appeals, we are also hesitant to encourage this approach to litigation in the future. The Board favors settlements that protect the parties' interests but that also result in withdrawal of appeals without prejudice; *i.e.*, our so-called *Homes-of-Distinction* settlements. The Appellants say that such a settlement might not have protected them against a third-party's assertion of administrative finality. We do not disagree that continuing the litigation might have given the Appellants a better bargaining position going forward, and delaying an appeal to the permit stage (if that is what the Department proposed) is arguably a less effective point to try and go back and criticize the TMDL. Whether these considerations are valid or not, however, continuing the litigation was a tactical choice that the Commonwealth's taxpayers should not be required to subsidize.

CONCLUSIONS OF LAW

1. The Board has broad discretion to award attorneys' fees under Section 307 of the Clean Streams Law, 35 P.S. § 691.307.

2. The Board may, in its discretion, and when supported by the record, award attorneys' fees under Section 307 of the Clean Streams Law solely on the basis of a finding of bad faith or vexatious conduct. *Solebury Township*, 928 A.2d at 1005.

3. A formal judgment on the merits or a Board-approved settlement agreement is not a prerequisite to an award of fees. The Board may also consider the extent to which the applicant attained the practical relief it sought. *Solebury Township*, 928 A.2d at 1004.

4. When no judgment on the merits is reached or a Board-approved settlement is entered, the Board may award some or all of the costs and attorneys' fees reasonably incurred in

proceedings pursuant to the Clean Streams Law to a prevailing party who participates in those proceedings if the proceedings caused the Department to alter its behavior. The fee applicant must be said to have prevailed in the sense that it achieved a favorable result and its success to some extent can be tied to its appeal. The Board will bring its reasoned discretion to bear by applying these criteria flexibly and fairly, keeping in mind the purposes underlying the fee-shifting provision in particular and the Clean Streams Law in general.

5. An award of attorneys' fees will depend upon several considerations, no one of which will be dispositive, including what the party accomplished, the extent to which the litigation brought about the accomplishment, the particular party's role in the process, and the extent to which the accomplishment matches the relief sought by the fee applicant.

6. The Board will consider whether an appeal involved multiple statutes and whether litigation fees overlap fees unrelated to the litigation itself. We will also consider how the parties conducted themselves in the litigation, the size, complexity, importance, and profile of the case, the degree of responsibility incurred and risk undertaken, and the reasonableness of the hours billed and the rates charged.

7. The Clean Streams Law authorizes this Board to award fees in recognition of the fact that appeals are often essential to the effectuation of fundamental public policies embodied in the Clean Streams Law, and that without some mechanism authorizing the award of attorneys' fees, appeals to effectuate such policies will as a practical matter frequently be infeasible. *See Solebury*, 928 A.2d at 1002 (*citing Graham*, 101 P.3d at 149). If the purpose of fee shifting in EHB appeals is to see that public policies are effectuated through the correction of Departmental errors, it is only appropriate that we consider the extent to which an appeal effectuated such policies when we consider whether to award fees.

8. Fee applicants need not prove that it was the strength of the applicants' arguments that brought about the favorable outcome.

9. In addition to the favorability of the outcome to the Appellants, we will also consider the extent to which the outcome advances the goals of the Clean Streams Law.

10. The appeals were a significant factor in causing the Department to withdraw the TMDL.

11. The Board in the exercise of its broad discretion denies the Appellants' petitions for fees and costs, primarily because an award would not be consistent with the aims and purposes of the Clean Streams Law.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HATFIELD TOWNSHIP MUNICIPAL AUTHORITY, et al.	:	
v.	:	**EHB Docket No 2004-046-L (Consolidated with 2004-045-L and 2004-112-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 25th day of August, 2010, it is hereby ordered that the petitions for fees and costs under Section 307(b) of the Clean Streams Law are **denied**. The Appellants' motions to amend their fee petitions are denied as moot.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

MICHAEL L. KRANCER
Judge

Judge Richard P. Mather, Sr. is recused and did not participate in this decision.

DATED: August 25, 2010

c: **DEP, Bureau of Litigation:**
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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

TRI-COUNTY LANDFILL, INC.	:	
	:	
v.	:	**EHB Docket No. 2010-073-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 25, 2010**

OPINION AND ORDER
ON PETITION TO INTERVENE

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants the petition to intervene of an open-air retail outlet mall located approximately one mile from a proposed landfill expansion. The Board finds that the petitioner satisfied its burden of demonstrating a substantial, direct and immediate interest in the outcome of the appeal.

OPINION

On August 4, 2010, Grove City Factory Shops Limited Partnership ("Petitioner" or "GCFS") petitioned to intervene in the appeal by Tri-County Landfill, Inc. of the Department's decision to suspend review of a National Pollution Discharge Elimination System ("NPDES") permit application and an air plan approval permit application submitted by the Appellant ancillary to its solid waste permit application for a proposed landfill expansion in Mercer County, Pennsylvania.

By way of background, the proposed landfill expansion is located at the site of a landfill

previously operated by Tri-County Industries, Inc. in Liberty and Pine Townships, Mercer County. (Petition ¶¶ 7, 21.a.) Pursuant to a consent order and adjudication between Tri-County Industries and the Department, the site ceased accepting solid waste on September 1, 1990 and the Department approved a closure order for the landfill. (Petition ¶¶ 21.c, 21.d.) In July 2004, the Appellant submitted a municipal waste landfill permit application for the expansion of the municipal waste landfill located at the site. (Petition ¶ 6.) Additionally, Tri-County submitted to the Department two permit applications ancillary to the municipal waste management permit. Specifically, on November 12, 2009, Tri-County submitted an air plan approval permit application ("plan approval permit") for a flare and fugitive dust emissions from the site as well as an application for an NPDES permit authorizing the discharge of treated wastewater into a stream located in Liberty Township. (Petition ¶ 17.) The Pine Township supervisors responded to both applications by letters dated December 9, 2009 and January 11, 2010. In these letters, the supervisors noted that unresolved zoning conflicts existed regarding the proposed landfill expansion, specifically noting the unresolved issue of whether the proposed landfill expansion requires a variance under the Pine Township Zoning Ordinance. (Petition ¶ 26.) As a result, the Department, in letters dated May 3 and May 10, 2010, suspended its review of the plan approval permit application and the NPDES permit application, respectively. Those letters state:

> The Department has completed our recent review in regard to consideration of local comprehensive plans and zoning ordinances with respect to the implementation of Acts 67, 68 and 127 of 2000 in the administration of the Department's program to avoid or minimize conflict with local land use decisions. Based on that review, the Department has recognized a conflict between the submitted project described in your application and Pine Township local zoning laws. The Department will not continue with its review of your application until it receives satisfactory evidence that this conflict has been resolved with Pine Township.

In determining the applicability of Acts 67, 68 and 127, ("Act 67/68") the Department

consulted its guidance document titled *Policy for Consideration of Local Comprehensive Plans and Zoning Ordinances in DEP Review of Permits for Facilities and Infrastructure*, Document No. 0120200001, dated August 19, 2009. This document reflects the Department's implementation of Act 67/68 which amended the Pennsylvania Municipalities Planning Code, 53 P.S. § 10101 *et seq*. Generally speaking, the purpose of Act 67/68 is to avoid or minimize conflicts between the Department's permitting decisions and local land use in order to advance sound land-use planning. The Act states that a state agency can consider or rely upon comprehensive plans and zoning ordinances when reviewing applications for permitting infrastructure or facilities. 56 P.S. § 11105.

On June 2, 2010, Tri-County filed a Notice of Appeal with the Board in which it asserted that the Department's determination that Act 67/68 applied to applications pertaining to the re-permitting of the Tri-County Landfill and the resulting suspension of permit review were erroneous, unlawful and an abuse of discretion. Tri-County argues, *inter alia*, that Act 67/68 is inapplicable in the context of re-permitting an existing landfill.

The Petitioner, GCFS, owns the Prime Outlets at Grove City, an open-air retail outlet mall located in Springfield Township, Mercer County, approximately one mile from the site of the proposed landfill boundary. (Petition ¶ 1.) The outlet center opened in 1994 and, according to the Petitioner, is a major commercial presence in Mercer County and is recognized as the primary commercial draw in the Wolf Creek Slippery Rock Council of Governments region of Mercer County, attracting approximately six million patrons annually. (Petition ¶¶ 2, 3.) The Petitioner further asserts that GCFS employs or facilitates employment of approximately 1,500 people associated with the outlet center or its merchants. (Petition ¶ 4.) The Petitioner believes that the proposed landfill will render the outlet less attractive to customers as a result of odors

generated from spilled waste and leachate handling facilities and less accessible as a result of increased traffic congestion from truck traffic associated with the landfill. (Petition ¶¶ 10-14.) The Petitioner further contends that intervention is warranted because a grant of appeal, or implementation of a consent order and agreement between the Department and Tri-County, would effectively decide the zoning dispute between Tri-County and Pine Township. Thus, in the Petitioner's view, Tri-County would be able to obtain a permit from the Department without first demonstrating that it is authorized to locate the proposed landfill expansion at the site, effectively turning the Department into a body that resolves zoning disputes and preventing GCFS its opportunity to participate in proceedings before the Pine Township Hearing Board and the Liberty Township Board of Supervisors. (Petition ¶¶ 32, 33.) In other words, the Petitioner fears that a grant of the appeal would effectively preclude its ability to present evidence adverse to the proposed landfill expansion before the proper tribunals in the resolution of the zoning dispute.

The Appellant opposes the petition. The Appellant argues that, contrary to the Petitioner's assertion, the Department would not be required to, and in fact lacks the authority to, resolve the zoning dispute between Pine Township and Tri-County, thus rendering the Petitioner's concerns in this regard unwarranted. Moreover, the Appellant argues that the Petitioner's interests in this appeal are not substantial enough to warrant intervention. Tri-County argues that the Petitioners have no interest in the resolution of what it characterizes as the narrow issue in this appeal, namely the propriety of the Department's decision to suspend its review of the permit applications. It cites several Board cases and a Commonwealth Court case for the proposition that "mere ownership of property is not sufficient to establish a sufficiently interested party." It also cites *Joseph J. Brunner, Inc. v. DEP*, 2003 EHB 186, in arguing that

mere economic interest in the legal outcome of the appeal does not warrant intervention. The Department has not filed a response to the petition and therefore presumably does not oppose the petition.

The Board's governing statute and rules do not make it difficult to intervene in a pending matter. ("Any interested party may intervene in any matter before the board." 35 P.S. § 7514 (e), and *see generally* 25 Pa. Code § 1021.81 (Board rules for intervention)). A person or entity seeking to intervene must have an interest that is "substantial, direct and immediate." *Elser v. DEP*, 2007 EHB 771, 772; *Borough of Glendon v. DEP*, 603 A.2d 226, 233 (Pa. Cmwlth. 1992). "We will allow a party to intervene where 'the person or entity seeking intervention will either gain or loose by direct operation of the Board's ultimate determination.'" *CMV Sewage Co. v. DEP*, EHB Docket No. 2009-105-L (Feb. 17, 2010); *Sechan Limestone Indus., Inc. v. DEP*, 2003 EHB 810, 812.

Without making any determination on the validity of the underlying appeal,[1] we find the Petitioner satisfies the requirements for intervention in this appeal. We are not persuaded by the Appellant's argument that the Petitioner lacks sufficient interest in this appeal because the Petitioner is, in the Appellant's view, merely a nearby property owner that only has a general economic interest in the outcome of the appeal. Although ownership of land near or adjoining a proposed landfill expansion is not enough to automatically grant the owner intervenor status, it is nevertheless a probative factor that can and should be considered by the Board. Indeed, although we agree that Petitioner's proximity to the site in question is not dispositive to the petition, it nevertheless weighs in the Petitioner's favor. Likewise, although mere economic interest may not be enough to grant intervention, it is also a factor that the Board can and should consider. In

[1] Currently pending before the Board is the Department's motion to dismiss arguing for dismissal on the grounds that the Board lacks jurisdiction because the suspension of a permit review is not a final, appealable action.

Brunner, we denied the petition for intervention in an appeal by a landfill operator of the Department's decision requiring the operator to pay a $4/ton disposal fee on slag waste used as landfill cover. United States Steel Corporation petitioned to intervene on the grounds that it had an economic interest in the outcome of the appeal because its slag would be less attractive as cover material if landfill operators had to pay fees to use it. In denying the petition, we found that, although the petitioner might have a general economic interest in the legal issue presented in the appeal, it nevertheless failed to establish any connection between itself and the appellant or the appellant's landfill that was the subject of the appeal. Here, the Petitioners have demonstrated that they could be affected by the landfill expansion that is the subject of this appeal. An open-air outlet located approximately one mile from a proposed landfill or proposed landfill expansion will almost certainly be affected to some extent by the presence of such an operation. The success and profitability of the outlet center is dependant on its ability to attract customers. The Petitioner's concerns about increased traffic congestion and odor are valid because some degree of both are inevitably associated with landfill operations and the presence of either could decrease the desirability or accessibility of the outlet. The Appellant's argument that the Petitioner has no interest in the issue here, namely whether the Department properly suspended review of the permit applications, is not persuasive because, practically speaking, a grant of this appeal could place the Department in a position that would require action on the permitting of the proposed landfill expansion that, as just noted, could adversely affect the outlet.

We also cannot overlook GCFS's economic importance in the region. The Petitioner emphasizes that the outlet is a major economic driver in the region both by attracting out-of-region customers and by providing jobs. The outcome of this appeal could impact the Petitioner's ability to and interest in continuing to contribute to the economic vitality of the

region. All these factors suggest that the Petitioner's interest in this appeal is "substantial, direct and immediate."

We recognize that the Petitioner also has an interest in the underlying zoning dispute, taking the position that the Appellant should not be issued a variance or other land use approvals necessary for the proposed landfill expansion. For the purposes of this petition, however, we do not believe it necessary to comment further regarding the interplay between the Department's decisions and their effect on local zoning proceedings. In the end, we cannot question the Petitioner's substantial economic interest in the outcome of this appeal. The Petitioner's interest in guarding against the potentially adverse economic consequences of the proposed landfill certainly rises above the general interest of the ordinary citizen.

Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TRI-COUNTY LANDFILL, INC.	:	
	:	
v.	:	**EHB Docket No. 2010-073-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 25th day of August, 2010, it is hereby ordered that Grove City Factory Shops Limited Partnership's petition to intervene is hereby **granted**. The new caption, which should be reflected on all future filings with the Board, shall be as follows:

TRI-COUNTY LANDFILL, INC.	:	
	:	
v.	:	**EHB Docket No. 2010-073-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GROVE CITY FACTORY SHOPS LIMITED PARTNERSHIP, Intervenor	:	

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: August 25, 2010

c: **DEP, Bureau of Litigation:**
Attention: Connie Luckadoo

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	**EHB Docket No. 2009-169-CP-M**
v.	:	
	:	**Issued: August 26, 2010**
H. RICHARD AND HELEN WOLF	:	

OPINION AND ORDER
ON MOTION FOR DEFAULT JUDGMENT

By Richard P. Mather, Sr., Judge

Synopsis:

The Board grants the Department's Motion for Default Judgment for the Defendants' failure to file an answer to the Department's complaint. Under the Board's Rules at 25 Pa. Code § 1021.76a, the Board enters judgment as to liability and assesses a civil penalty in the amount requested by the Department.

OPINION

On December 17, 2009 the Department of Environmental Protection ("Department") filed a Complaint for Assessment of Civil Penalties with the Board against H. Richard and Helen Wolf ("Defendants" or "Wolfs") for alleged violations of the Dam Safety and Encroachments Act, 52 P.S. §§ 693.1-693.27 ("DSEA"). Since the Department filed the Complaint the Defendants have not filed an answer to the Complaint prompting the Department to file this Motion for Default Judgment ("Motion") requesting the Board to establish liability and enter the requested civil penalty against the Wolfs. The Wolfs have also failed to respond to the

Department's Motion, and under the Board's Rules the Board will deem a party's failure to respond to a motion as an admission of all facts in the motion for the purpose of addressing the motion. 25 Pa. Code § 1021.91(f).

Factual Background

The Wolfs own property in Manns Choice, Pennsylvania adjacent to Manns Choice Wastewater Treatment Plant and bordered by the PA Turnpike to the north at the Raystown Branch of the Juniata River in Harrison and Napier Township, Bedford County ("Site"). On March 25, 2003 the Department issued a General Permit (GP-08-05-02-105) for a temporary bridge at the Site for water obstruction over the Raystown Branch of the Juniata River, the bridge was not to be existence for more than seven consecutive days. After inspections the Department determined that the Wolfs failed to comply with the terms of the General Permit and required the removal of the temporary bridge. Subsequently, on April 22, 2004, the Department issued the Wolfs a Water Obstructions & Encroachment Permit ("E05-303 Permit") to construct and maintain a permanent bridge.

The Department inspected the Site on July 1, 2009 after receiving a complaint that a dilapidated bridge was a possible safety hazard to anyone navigating the Raystown Branch of the Juniata River. The inspection revealed that the Defendants failed to install or maintain the bridge in accordance with the E05-303 Permit. On September 23, 2009 the Department issued an Enforcement Order ("Enforcement Order") to the Wolfs to comply with the terms of the E05-303 Permit. The Wolfs have not complied with the Enforcement Order and the Department subsequently filed this Complaint for civil penalties.

The Complaint was filed on December 17, 2009 and contains three counts: count one is for failing to install the bridge in accordance with the E05-303 Permit; count two is for failing to

maintain the bridge constructed across the Juniata River; and count three is for failing to comply with the Department's Enforcement Order. *See* 32 P.S. §§ 693.13; 693.18. The Complaint requests the Board to assess civil penalties in the amount of $8,000 for violations of the DSEA, as well as a $100 penalty for each day of continued violation of the Defendants' failure to comply with the Enforcement Order.

Procedural Background

Our Rules provide that answers to complaints shall be filed with the Board within 30 days after the date of service of the complaint. 25 Pa. Code § 1021.74. After the Defendants failed to respond within the thirty day time period, the Department filed a praecipe for entry of judgment by default on March 8, 2010. However, the Department discovered that it failed to attach the notice of a right to respond to the Complaint, as required by our Rules.[1] The Department corrected its error and on May 5, 2010 filed the notice of a right to respond. Since the Complaint, as originally filed, was not in conformance with our Rules, the Defendants had thirty days from May 5, 2010 to file an answer to the Complaint.

After the thirty days had passed for filing an answer to the Complaint, the Department re-filed a notice of praecipe for entry of judgment by default for failure to plead on June 10, 2010. The praecipe informed the Defendants that they had failed to take action to defend against the Complaint and had ten days to act or judgment may be entered against them. The Wolfs took no action to defend against the Complaint and the Department filed this Motion on July 8, 2010.

Default Judgment, 25 Pa. Code § 1021.76a

This Motion is the first under our new rule on default judgment. The Board's recently

[1] The Board's Rules require that a complaint include a notice to the Defendants to respond or defend against the complaint. *See* 25 Pa. Code § 1021.71(a) (. . . the Department may commence the action by filing a complaint . . . and a notice of right to respond. . . .); *see also* 25 Pa. Code § 1021.71(d) (the notice of a right to respond shall conform to the following: "if you wish to defend against the claims set forth in the following pages, you must take

adopted Rule on "entry of default judgment" in its entirety provides:

> (a) The Board, on motion of the plaintiff, may enter default judgment against the defendant for failure to file within the required time an answer to a complaint that contains a notice to defend.
>
> (b) The motion for default judgment must contain a certification that the plaintiff served on the defendant a notice of intention to seek default judgment after the date on which the answer to the complaint was due and at least 10 days prior to filing the motion.
>
> (c) The filing of an answer to the complaint by the defendant prior to the filing of a motion for default judgment by the plaintiff shall correct the default.
>
> (d) When a default judgment is entered in a matter involving a complaint for civil penalties, the Board may assess civil penalties in the amount of the plaintiff's claim or may assess the amount of the penalty following an evidentiary hearing, as directed by the Board, at which the issues shall be limited to the amount of the civil penalties.

25 Pa. Code § 1021.76a.[2]

Prior to enactment of Section 1021.76a, the Board entertained motions for entry of default judgment under Section 1021.74(d) relating to "answers to complaints" and Section 1021.161 relating to "sanctions". Section 1021.74(d) provides that "a defendant failing to file an answer within the prescribed time shall be deemed in default and, upon motion made, all relevant facts in the complaint may be deemed admitted." Section 1021.161 provides that "the Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure . The sanctions may include . . . entering adjudication against the offending party." Both of these sections remain in force today. Under operation of just Sections 1021.74(d) and 1021.161 we would sanction the defaulting party by entering judgment as to liability, and as for the amount of the civil penalty, we would have scheduled a hearing to determine the appropriate

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action within thirty (30) days after this complaint and notice are served . . . .").

amount. *See DEP v. Danfelt & Giordano*, 2009 EHB 459; *DEP v. Wes Tate*, 2009 EHB 295; *DEP v. Dennis S. Sabot*, 2008 EHB 20; *DEP v. John P. Pecora, et al.*, 2007 EHB 125; *DER v. Allegro Oil and Gas Co.*, 1991 EHB 34; *DER v. Marileno, Corp.*, 1989 EHB 206; *DER v. Canada-PA, Ltd.*, 1987 EHB 177.

Prior to the promulgation of Section 1021.76a the Board questioned whether it had the authority to enter default judgment as to both liability and assess the amount of civil penalties without a hearing. As Judge Labuskes wrote in *DEP v. Sabot*:

> [o]ur existing rules arguably would permit us to enter a default adjudication in this case against Sabot for the amount of the civil penalties requested by the Department in its complaint. Any doubt regarding our authority in this regard will be eliminated if a proposed rule currently making its way through the Board's regulatory review process is finalized.

2008 EHB 20, 21. That rule has been finalized and adopted as Section 1021.76a. Now with Section 1021.76a removing any existing doubt, the Board is authorized to "assess civil penalties in the amount of the plaintiff's claim" without holding a hearing.

Discussion of Department's Motion

The Department's Motion asks the Board to enter judgment by default against the Defendants as to liability and damages for Count 1 and Count 2. As for Count 3 the Department is only seeking judgment as to liability, not damages since the Department is also seeking, in a separate action, before the Commonwealth Court to judicially enforce its Enforcement Order and to assess civil penalties for failing to comply with the Enforcement Order (Count 3).

The Motion outlines the failures of the Defendants, and these failures are admissions by operation of the Board's Rules because the Defendants have failed to respond to the Motion. *See* 25 Pa. Code § 1021.91(f). The Defendants have failed to file an answer to the Complaint and a

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[2] The provisions of this § 1021.76a adopted October 16, 2009, effective October 17, 2009, 39 Pa.B. 6035.

response to this Motion; they have failed to install the bridge in accordance with the E05-303 Permit; they have failed to maintain the bridge constructed across the Juniata River; and, they have failed to comply with the Department's Enforcement Order. In addition, they have taken no steps, whatsoever, to defend against the claims the Department has propounded in its Complaint, nor have they taken any steps to defend against the amount of the civil penalties the Department seeks in its Complaint. Under operation of the old rules these circumstances would clearly warrant us to enter judgment as to liability; however, the Board is now authorized under our new rule to also enter judgment as to the amount of the civil penalty in appropriate situations. This is one of those situations.

After reviewing the Complaint and Motion before us and the total disregard by the Defendants to defend against either, we have no problem entering judgment as to liability and as to the amount of the civil penalties. Given the Defendants' complete lack of involvement thus far, a hearing is not necessary to determine the appropriate amount of the civil penalty. The amounts of the civil penalties that the Department has proposed in this case appear to be reasonable and appropriate for the violations of the law that are admitted by Defendants by operation of the Board's Rules, and we have not received any indication from the Defendants to suggest otherwise. The Wolfs have had numerous opportunities to defend against the Complaint and to participate in proceedings before the Board, but chose not to do so, offering no defense as to the allegations or reasonableness of the proposed civil penalty. We therefore, find that judgment is entered against the Wolfs for all three counts set forth in the Complaint and assess a civil penalty for Counts 1 and 2 in the amount of $8,000. We enter the following Order.

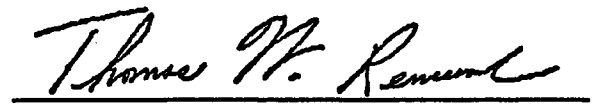
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	**EHB Docket No. 2009-169-CP-M**
v.	:	
H. RICHARD AND HELEN WOLF	:	

ORDER

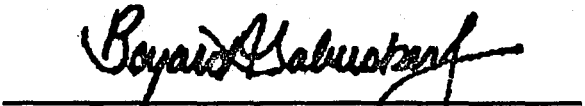
AND NOW, this 26th day of August, 2010, upon consideration that, DEP filed a Complaint for Assessment of Civil Penalties against Defendants for violations of the Dam Safety and Encroachments Act, 52 P.S. §§ 693.1-693.27 and the Clean Streams Law, 35 P.S. §§ 691.1, *et. seq.*, and thereafter the Defendants failed to file an answer to the Complaint. The DEP has filed a Motion for Default Judgment as to liability and the amount of the penalty under 25 Pa. Code § 1021.76a, and the Defendants have failed to file a response to that Motion. The penalty amount proposed in Counts 1 and 2 of the Complaint and Motion of $8,000 is reasonable and appropriate for the violations of the law that are deemed admitted by Defendants by operation of the Board's Rules, and it is hereby ordered that pursuant to 25 Pa. Code § 1021.76a that the Department's Motion for Default Judgment is **granted**. The relevant facts set forth in the Complaint and Motion are deemed admitted and liability under Counts 1, 2 and 3 is established. A civil penalty in the amount of $8,000 is assessed against the Defendants for Counts 1 and 2.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

MICHAEL L. KRANCER
Judge

RICHARD P. MATHER, SR.
Judge

DATED: August 26, 2010

c: **DEP, Bureau of Litigation:**
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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

S.H.C., INC., **Appellant**	:	
v.	:	
	:	**EHB Docket No. 2008-159-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, **Appellee**	:	**Issued: August 31, 2010**

ADJUDICATION

By Michael L. Krancer, Judge

Synopsis

The Board sustains the Department's disapproval of a land use development Module providing for use of on-lot sewage disposal. The Board finds that the Department's approach in analyzing this Module and denying it using its Mass Balance Equation (MBE) was appropriate. The Board also finds that the Department's numerical inputs to its MBE were all appropriate and reasonable under the circumstance and well supported by the evidence. In addition, certain so-called "mitigating factors" (such as "change in land use" and various County drinking well regulations and standards) that the Appellant insisted that the Department refused to take into account and that it insists require that the Module be approved were rightfully not treated by the Department as requiring approval of the Module. The Department did not violate the "binding norm" rule by applying policy and guidance as regulation. Finally, the Department did not violate the Appellant's constitutional rights nor did its action constitute a regulatory taking.

Introduction

In a nutshell, this case is about the Mass Balance Equation (MBE) and the inputs thereto that Pennsylvania Department of Environmental Protection (DEP or Department) used in the MBE to analyze this proposed land development Module under the Sewage Facilities Act, 35 P.S. §§ 750.1- 750.20 (SFA or Act 537) and the regulations promulgated thereunder. The Department's application of the MBE and its use of the various variables it used as inputs resulted in the denial of the proposed Module. The Appellant thinks that the Department should have used: (1) other inputs to its MBE and/or; (2) a different version or iteration of the MBE, namely the "Hantzche & Finnemore" (H & F) MBE and/or the federal Environmental Protection Agency's (EPA) MBE. After a thorough analysis of all the evidence in this case we conclude that DEP's use of its MBE in this case to analyze the proposed Module for this site is appropriate and that the inputs DEP used in this case to analyze the proposed Module for this site are appropriate. Certainly, it cannot be said based on the evidence that the Department abused its discretion or committed error by declining to accept one of Appellant's proposed alternative MBE versions or one or more of Appellant's proposed alternative inputs. Nor did DEP make any other error in its approach to this case which would require reversal or remand.

FINDINGS OF FACT

Factual Background

1. The Commonwealth of Pennsylvania, Department of Environmental Protection is the Commonwealth agency charged with the duty and the responsibility to administer The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended,* 35 P.S. §§ 691.1-691.1001 (Clean Streams Law or CSL); the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, *as amended*, 35 P.S. §§ 750.1-750.20 ("Sewage Facilities Act" or "Act 537"); Section

1917-A of the Administrative Code of 1929, Act of April 9, P.L. 177, *as amended*, 71 P.S. §§ 510-517 ("Administrative Code") and the rules and regulations promulgated thereunder. Stip. ¶ 1.[1]

2. S.H.C., Inc. (SHC or Appellant) is a land and home building development company and has a principal place of business of 300 S. Pennell Road, Suite 400, Glen Riddle, Pennsylvania, 19063. Stip. ¶ 2.

3. SHC is the developer of the Lewis Tract, a 13-lot proposed residential subdivision on a 16.60 acre tract located on the northwest corner of Wilson Mill and Reedville Roads in East Nottingham Township, Chester County, PA ("the Site" or "the Lewis Tract"). Stip. ¶ 3.

4. The Lewis Tract had been farmed for decades. Tr. 415.[2]

5. It had been farmed for corn, and for the last few years, for soybeans and alfalfa. Tr. 22.

6. Nitrate-nitrogen producing chemical fertilizers and/or animal manures were used at the Site during agricultural production. There is no documentation concerning the amounts, frequency of application or kinds of fertilizers which were used at the Site. Stip. ¶ 48.

7. There was, and currently is, no nutrient management plan for the Site. Tr. 415.

8. Topography and surface water drainage at the Site are typical of the Piedmont Region of Chester County, particularly the Piedmont Upland. Stip. ¶ 4.

9. The Site of the proposed development ranges from approximately 515 feet above mean sea level to a low of approximately 465 feet above mean sea level. Stip. ¶ 5.

10. The Site encompasses parts of two localized watersheds. Stip. Ex. 80; Stip. ¶ 6.

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[1] Citations to "Stip." refers to the parties' Stipulations of Fact filed on August 25, 2009. Citations to "Stip. Ex." refers to the parties' stipulated trial exhibits. Citations to "SHC Ex." refers to SHC's trial exhibits. Citations to "DEP Ex." refers to DEP's trial exhibits.

[2] Citations to "Tr." refers to the trial transcript.

11. The majority of surface water at the Site flows from the south to the north where it ultimately discharges to an unnamed tributary to Big Elk Creek. (Approximately 13.8 acres of the 16.6 acre Site are located within this watershed). Stip. ¶ 7.

12. Once the development of the Site begins, the property will not be used for agriculture any longer and will be devoted solely to residential purposes. Stip. ¶ 8.

12.A. Soil test pit profiles and percolation testing to confirm the general soil suitability for on-lot wastewater systems have been completed. Stip. ¶ 9.

13. The soils are categorized as "residual soils" which are those formed in place by the direct physical and chemical weathering of the underlying rocks. Stip. ¶ 10.

14. Beneath the completely weathered soils, a zone of partially decomposed bedrock, called saprolite, is present. Stip. ¶ 11.

15. The bedrock beneath the saprolite is the Wissahickon Formation, oligoclase-mica schist. Stip. ¶ 12.

16. Chester County Health Department's present well permitting program requires that potable water supply wells be encased to bedrock. Stip. ¶ 13.

17. Groundwater in the deeper competent bedrock, which is obtained from recharge of groundwater stored in the overlying soil and saprolite, flows in secondary porosity planes found in fractures, faults, joints, and/or bedding planes. Stip. ¶ 14.

18. SHC worked with East Nottingham Township to prepare the planning module which is the subject of this litigation. Stip. ¶ 15.

19. In SHC's planning module, it proposed to develop 13 new residential single-family building lots plus one existing house that will remain. Stip. ¶ 16.

20. No lot will be smaller than one acre. The lots range from 1.0 to 1.48 acres. Stip. ¶ 17.

21. Each proposed lot is to be served by an individual potable supply well which will be drilled and permitted in accordance with the rules and regulations of the Chester County Health Department. Stip. ¶ 18; Tr. 186.

22. Each proposed lot will have a conventional septic tank and drain field. Stip. ¶ 19.

23. On January 28, 2003, the Department received from Brandywine Valley Engineers, Inc. an application for sewage facilities planning modules for the Lewis Tract Subdivision. In response to this application, by letter dated February 24, 2003, the Department forwarded to Brandywine the sewage planning module forms. Stip. ¶ 20.

24. On or about February 17, 2004, the Department received from East Nottingham Township a sewage planning module for the Lewis Tract. Stip. ¶ 21.

25. In February 2004, Elizabeth Mahoney, formerly a Department Sewage Planning Specialist, was assigned to coordinate the Department's review of the Township's planning module. Subsequently, in December, 2007, Ms. Mahoney was promoted to the position of Sewage Planning Supervisor. Stip. ¶ 22.

26. On February 24, 2004, the Department issued a letter in response to the planning module received from the Township. The letter indicated several required items missing from the submission. Stip. ¶ 23.

27. On April 1, 2005, the Township re-submitted its planning module for the Lewis Tract and by April 8, 2005 ("the 2005 planning module"), the Department determined that it was administratively complete and began the technical review. The 2005 planning module was assigned Identification Code No. 1-159922-455-2. Stip. ¶ 24.

28. Clinton Cleaver was the Sewage Planning Supervisor who supervised Ms. Mahoney's technical review of the 2005 planning module. Stip. ¶ 25.

29. Peter Evans, a Department Professional Geologist, was assigned to participate in the technical review of the 2005 planning module. Stip. ¶ 26.

30. Keith Dudley, the Chief of the Department's Municipal Planning and Finance Division, supervised Mr. Cleaver's and Mr. Evans's work related to the technical review of the 2005 planning module. Stip. ¶ 27.

31. Jenifer Fields, Program Manager of the Department's Water Management Program, supervised Mr. Dudley's work regarding the technical review of the 2005 planning module. Stip. ¶ 28.

32. The Department performed a technical review of the 2005 planning module and based on the comments of the Chester County Health Department, which were submitted as part of the planning module, the Department determined that water supplies within 1/4 mile of the Site had levels of nitrate-nitrogen in excess of 5 parts per million ("ppm"). Stip. ¶ 29.

33. SHC and the Township did not include the preliminary hydrogeologic report with the 2005 planning module. Stip. ¶ 30.

34. On May 6, 2005, the Department issued a technical review letter, which required the submission of a preliminary hydrogeological evaluation by SHC Stip. ¶ 31.

35. SHC and the Township did not submit a preliminary hydrogeologic report in response to the Department's May 6, 2005 deficiency letter. Stip. ¶ 32.

36. By letter dated September 1, 2005, the Department denied approval of SHC and the Township's 2005 planning module. Stip. ¶ 33.

37. On September 28, 2005, SHC appealed the Department's denial before the Environmental Hearing Board ("the Board"), which docketed the appeal at No. 2005-286-MG. Stip. ¶ 34.

38. On or about February 17, 2006, Walter B. Satterthwaite Associates (presently known as Brickhouse Environmental Consultants) submitted a preliminary hydrogeologic report to the Department. On March 14, 2006, the Department notified SHC and Satterthwaite Associates of deficiencies in the report. Stip. ¶ 35.

39. On February 27, 2006, Brickhouse Environmental submitted a preliminary hydrogeologic investigation report to the Department. Stip. ¶ 36.

40. The hydrogeologic investigation report was submitted to East Nottingham Township. Stip. ¶ 37.

41. East Nottingham Township submitted a revised planning module to the Department. Stip. ¶ 38.

42. SHC withdrew and discontinued its appeal of the 2005 planning module on March 13, 2007. By Order dated March 26, 2007, the Board closed the docket and discontinued the appeal. Stip. ¶ 39.

43. On June 20, 2007, the Department received a second planning module for development of the Lewis Tract Subdivision including a preliminary hydrogeologic report. The 2007 planning module was assigned a new Identification Code No. 1-5922-455a-2. Stip. ¶ 40.

44. On July 11, 2007, the Department sent SHC and the Township a letter. The letter identified the Department's administrative review comments pertaining to the Township's and SHC's use of outdated forms, the Township's and SHC's submission of an expired municipal

resolution of adoption and these parties' failures to provide public notice of the new planning module submission, among other things. Stip. ¶ 41.

45. Brickhouse Environmental Consultants and Engineers, on behalf of SHC, responded to the Department's administrative review letter in a letter dated September 12, 2007 and submitted certain information to address some of the deficiencies. The Department and SHC met and negotiated regarding certain comments on November 5, 2007. On December 19, 2007, the Township submitted a revised planning module for the Site. Stip. ¶ 42.

46. On January 2, 2008, the Department sent to the Township a second administrative review letter which indicated that the Township and developer had not addressed the development's impact on certain species and resources and that further information was required from the Pennsylvania Fish and Boat Commission and the U.S. Fish and Wildlife Service. Stip. ¶ 43.

47. On January 25, 2008, the Township submitted the additional information to address the concerns in the Department's January 2, 2008 letter. Upon receipt of this information, the Department began its technical review of the planning module. Stip. ¶ 44.

48. Ms. Mahoney, Sewage Planning Specialist Supervisor, was assigned to coordinate the Department's review of the 2007 planning module. Mr. Keith Dudley supervised Ms. Mahoney's work regarding the 2007 planning module. Additionally, Mr. Evans was assigned to review the preliminary hydrogeologic report which was submitted with the 2007 planning module. His work was supervised by Mr. Dudley. Ms. Fields supervised Mr. Dudley's work regarding review of the 2007 planning module. Stip. ¶ 45.

49. During its review, the Department considered the requirements of 25 Pa. Code § 71.61(c), which states that an official plan revision should select an alternative which is

supported by documentation and which assures the long term sanitary collection, treatment and disposal of sewage. Stip. ¶ 46.

50. During its review of the 2007 planning module preliminary hydrogeological study, the Department considered 25 Pa. Code § 71.62(c)(2)(iii), which states that a "preliminary hydrogeologic evaluation is required when the use of subsurface soil absorption is proposed and . . . [t]he Department has documented that the quality of water supplies within 1/4 mile of the proposed Site exceed five parts per million (ppm) nitrate-nitrogen." Stip. ¶ 47.

51. Soil characteristics at the Site vary. Stip. ¶ 49.

52. During its review of the 2007 planning module preliminary hydrogeological study, the Department considered Section (3) of 25 Pa. Code 71.62(c)(3), which states:

> (3) A preliminary hydrogeologic evaluation shall include as a minimum, in map and narrative report form:
>
> (i) The topographic location of the proposed systems in relation to groundwater or surface water flow, or both.
>
> (ii) Estimated wastewater dispersion plume using an average daily flow of 262.5 gallons per equivalent dwelling unit per day or other flow supported by documentation.
>
> (iii) Identification and location of existing and potential groundwater uses in the estimated area of impacted groundwater.

Stip. ¶ 50.

53. During its review of the 2007 planning module including its preliminary hydrogeological study, the Department considered 25 Pa. Code § 71.52 (***Content requirements - new land development revisions.***), including Section (b) of this regulation, which states: "The Department may require additional information which is necessary for adequate review of the proposal." Stip. ¶ 51.

54. The Department uses an MBE to evaluate post-development nitrate-nitrogen levels in a preliminary hydrogeologic study. Stip. ¶ 52.

55. On January 29, 2008, the revised planning module was determined to be administratively complete by the Department. Stip. ¶ 53.

56. After Mr. Evans reviewed the preliminary hydrogeologic report submitted with the 2007 planning module, he submitted to Ms. Mahoney through Mr. Dudley, a March 14, 2008 memorandum which outlined his comments regarding the report. Stip. ¶ 54.

57. In his March 14, 2008 memorandum, Mr. Evans indicated that he was unable to confirm the suitability of the Lewis Tract for on-lot septic systems. Stip. ¶ 55.

58. On March 28, 2008, the Department, by a letter addressed to Ms. Patricia Brady of East Nottingham Township, denied the 2007 planning module and stated the reasons for the denial in its letter (the "Denial Letter"). Stip. ¶ 56. In part, the Department's letter states:

> The submitted preliminary hydrogeological evaluation does not conform to the Department's Policy and Procedure for conducting these studies.
>
> More specifically, the submitted evaluation did not include data regarding a site-specific groundwater sample to determine background aquifer nitrate-nitrogen concentrations and it did not include a nitrate-nitrogen dispersion plume evaluation that conforms to current Department Policy and Procedure. In addition, the Department's Policy and Procedure does not recognize the elimination of the nitrogen load due to changes in land use. Finally, the Chester County Health Department's well permitting program is not a mitigating factor for projected adverse impact on existing or potential water supplies.

Stip. Ex. 1.

59. The relevant policies and procedures identified by the Department used in its review of the Lewis Tract Site include:

a) Impact of the Use of Subsurface Disposal Systems on Groundwater Nitrate Nitrogen Levels (the "2003 Policy"), DEP Doc. # 362-2207-004 (Dec. 29, 2007, edits made Aug. 27, 2002 and March 31, 2003) [produced in response to SHC's Request for Admissions; identified as policy that Lewis Tract Subdivision did not comply with in Deposition of Peter Evans at 118:3-119:3; 150:5-11; 151:20-152:2; 153:19-154:156:4]; and

b) Policy and Procedure: Wastewater Discharges to Ground Water: Individual and Community On-Lot Disposal Systems (July 9, 1982) ("1982 Policy") [identified as a policy applicable to the Lewis Tract Subdivision in Deposition of Frederick Cleaver at 61:22-64:4; identified as policy that Lewis Tract Subdivision did not comply with in Deposition of Peter Evans at 118:3-119:3; 122:6-13; 153:19-154:1; 154:6-10].

Stip. ¶ 57.

60. The Department's 2003 Policy includes the following disclaimer:

> The policies and procedures outlined in this guidance are intended to supplement existing requirements. Nothing in the policies or procedures shall affect regulatory requirements.
>
> The policies and procedures herein are not an adjudication or regulation. There is no intent on the part of DEP to give these rules that weight or deference. This document establishes the framework with which DEP will exercise its administrative discretion in the future. DEP reserves the discretion to deviate from this policy statement if circumstances warrant.

DEP Ex. 24, p. 1.

61. If the planning module submitted by East Nottingham Township had complied with the Department's requirements regarding the hydrogeologic investigation and demonstrated post development nitrate-nitrogen levels below the maximum contaminant level for drinking water, the Department would have approved it during the 2008 technical review. Stip. ¶ 58.

62. A Pre-Trial Conference was conducted on October 19, 2009 before the presiding Judge. EHB Docket, Order dated Oct. 15, 2009.

63. After the conference, SHC agreed to perform on-site well sampling. EHB Docket, SHC Status Report, Nov. 4, 2009.

64. Weather conditions did not permit the testing when it was originally scheduled. EHB Docket, Joint Status Report dated Feb. 1, 2010. Water samples were obtained on January 21, 2010. *Id.*

65. Brickhouse prepared a detailed Addendum Report based on the new water samples and it was hand delivered to the Department on February 16, 2010. EHB Docket, Status Report dated March 8, 2010; Stip. Ex. 83.

66. On March 15, 2010, the Department issued a second denial letter. DEP Ex. 54. The Department concluded that the use of on-lot sewage treatment and disposal systems on the Lewis Tract "will result in an unacceptable risk to existing or potential water supplies and is therefore inconsistent with Section 3 of the Pennsylvania Sewage Facilities Act and the Clean Streams Law." *Id.* The second denial letter also stated that the Department would approve the planning module if SHC agreed to install Orenco AdvanTex systems on the Site's 2.8 acre drainage basin and "[f]or the remaining lots, . . . to permit the installation of an NSF 40 aerobic treatment unit, a Nitrex filter, and a standard drain field on each lot." *Id.*

67. The Board's decision in *Lipton v. DEP*, EHB Docket No. 2007-260-MG, was handed down on May 20, 2008, after the Department issued the Denial Letter. The Department did not require and SHC did not provide in the 2007 planning module and preliminary hydrogeological study, an antidegradation analysis of the impact of the Lewis Tract on surface water quality in the unnamed tributaries to Big Elk Creek. Big Elk Creek is classified as a high quality, trout stocking fishery in 25 Pa. Code § 93.9. *See* 25 Pa. Code § 93.4c.; Stip. ¶ 60.

68. The Department stipulated that the planning module satisfies the Department's antidegradation requirements. Tr. 403-04.

69. The November 2007 planning module (identified as SHC Ex. 18) is admissible before the Board for all purposes. Stip. ¶ 61.

70. The Department stipulated that the only component of the planning module application that does not meet its regulatory requirements is the Preliminary Hydrogeologic Report. Stip. ¶ 58.

The Trial and The Witnesses

71. A total of nine trial days were held at which 10 witnesses, five of which were qualified as experts, testified generating a transcript of 1,842 pages and over 200 exhibits and the presiding judge at the trial is the author of this opinion. Tr. 1-1842.

The following witnesses testified on behalf of SHC, Inc.:

Scott Cannon

72. Mr. Cannon is the president of SHC, Inc. Tr. 14.

Paul White (expert witness)

73. Mr. White (White) is a licensed professional geologist and the managing partner of Brickhouse Environmeal Consultants and Engineers, which prepared certain planning module submissions for SHC, Inc. Tr. 118, 124.

74. White is a Pennsylvania and Delaware-licensed professional geologist and managing partner with Brickhouse Environmental. Tr. 118.

75. White was qualified by the Board as an expert in geology, hydrogeology, nitrate MBEs, and the impact of fertilizer and substances containing nitrates on water and in the environment. Tr. 160, 166-69.

76. White has prepared several papers on septic waste, septic tanks, and nitrates. Stip. Ex. 55; Tr. 120.

77. White has conducted approximately thirty-five hydrogeologic studies regarding wastewater that were submitted to the Department. Tr. 123, 135.

78. Many of the studies included the evaluation of a site for the use of on-lot septic systems. Tr. 152-53.

79. White has conducted many hydrogeologic investigations, including both preliminary and detailed investigations. Tr. 122.

80. White has been involved in approximately fifteen detailed hydrogeologic assessments relating to wastewater, but has completed hundreds of detailed hydrogeologic investigations in other contexts during the course of his career, as well, including non-coal surface mines, landfills, contaminant releases, solvents in groundwater, and gasoline in groundwater. Tr. 131.

81. White is very familiar with the nitrate MBE. Tr. 132.

82. He has been using the equation for approximately ten years, and it is critical to his business. Tr. 133.

83. He has been involved in approximately twenty wastewater projects in which the equation has been used. Tr. 134.

84. Additionally, he has used the same type of equation in other contexts, including the analysis of contaminant plumes. Tr. 134-35.

85. The nitrate MBE is a mathematical formula used to determine the concentration of nitrate in water. Tr. 133, 190.

86. White's work has involved projects to determine what happens to nitrogen in the environment. Tr. 138.

87. White is familiar with the Department's septic tank permitting process, and has been actively involved in the process. Tr. 136-37.

88. White has studied the environmental impact of the conversion of land from agriculture to other uses, and has been involved in a two-year, first-of-its-kind study to address changes in water quality based on changes in land use. Tr. 138, 162-63.

89. White is familiar with the Chester County Health Department regulations, and deals with them on a regular basis. Tr. 139.

90. White is also familiar with the Department's antidegradation requirements. Tr. 139-40.

91. White is working with employees of the Department to develop a draft methodology on how the antidegradation requirements apply in the context of a wastewater analysis. Tr. 140-41.

92. He was also appointed to a committee that developed the Department's stormwater best management practice manual. Tr. 145.

Albert Jarrett, PhD (expert witness)

93. Dr. Albert Jarrett (Dr. Jarrett) is a Professor of Agricultural Engineering at Penn State University. Dr. Jarrett reviewed certain information relating to SHC's planning module submissions. Tr. 538.

94. Dr. Jarrett received a Bachelor's degree, a Master's degree, and a PhD in agricultural engineering from Penn State University. Tr. 538.

95. Dr. Jarrett is a professional engineer and a registered surveyor. Tr. 539.

96. Dr. Jarrett prepared virtually all of his own textbooks because the field of agricultural engineering is relatively small. Tr. 540.

97. Dr. Jarrett has written approximately fifty peer-reviewed articles and hundreds of other articles regarding agricultural and biological engineering. Tr. 541.

98. Dr. Jarrett is designated as the on-lot sewage specialist for the Commonwealth of Pennsylvania, and has regularly presented and taught on the topic. Tr. 542, 549.

99. Dr. Jarrett is also Penn State's on-lot sewage specialist, and has taught numerous students who have gone on to become sewage enforcement officers. Tr. 550.

100. Dr. Jarrett has taught courses regarding the nitrogen cycle for years. Tr. 549.

101. Dr. Jarrett has had significant teaching and research experience regarding nutrient management plans. Tr. 543, 549.

102. Nitrate is water soluble and moves with water. Tr. 557, 1754; SHC Ex. 45, p. 4-5.

103. When a farmer uses a "nutrient management plan," he applies only as much nitrogen to a field as the crop needs and after the crop is harvested and removed, all of the nitrogen applied to the field is removed. Tr. 565-67.

104. Some farmers over-fertilize, which leaves excess nitrogen in the soil. Tr. 567-68.

105. Dr. Jarrett was qualified by the Board as an expert in agricultural and biological engineering, nutrient management plans, and what happens to waste materials as they enter and exit septic tanks into the environment, and the transformation of nitrogen into its various forms. SHC Exs. 52, 53; Tr. 552, 554-55.

Ronald Ragan

106. Mr. Ragan is a licensed professional engineer and consultant for East Nottingham Township. Tr. 638.

The following witnesses testified on behalf of DEP:

Elizabeth Mahoney

107. Ms. Mahoney is a sewage planning specialist supervisor in the Municipal Planning and Finance Section of the Department's Southeast Regional Office. Tr. 716.

108. Ms. Mahoney reviewed the Module. Tr. 721.

109. Ms. Mahoney accepted the review performed by Evans and incorporated the substantive portion of Evans' review memorandum into the March 28, 2008 denial letter. Tr. 727, 729. She drafted that denial letter for Jenifer Fields' signature. Tr. 726, 730-31.

110. Ms. Mahoney was the signatory of the March 28, 2008 denial letter and the March 15, 2010 denial letter. Tr. 728-29; DEP Ex. 54.

Peter Evans (expert witness on particular topics)

111. Peter Evans (Mr. Evans) is a licensed professional geologist in the Department's Municipal Planning and Finance Section of the Department's Southeast Regional Office. Tr. 1124.

112. Mr. Evans reviewed the hydrogeologic reports related to all of SHC's planning module submissions. Tr. 1193.

113. He has a Bachelor of Science degree in geo-science from Penn State University. Tr. 1123-24, 1139.

114. He has worked as a hydrogeologist for the Department since 1990. Tr. 1125.

115. To become a licensed professional geologist, Mr. Evans has taken courses in hydrogeology and geology. Tr. 1167.

116. He has also had both formal and informal training within the Department related to his position as a hydrogeologist. Tr. 1126.

117. As a part of his on-the-job training, Mr. Evans has participated in extensive discussions concerning how to review a hydrogeologic study. He also helped prepare certain teaching materials for his session. Tr. 1126.

118. Mr. Evans was involved in the preparation of the Department's *Manual for the Land Application of Treat Sewage and Industrial Wastewater* dated August 1993. This publication pertained to the permitting of large-volume wastewater treatment systems including siting criteria and how to evaluate them from a geological perspective as well as a soil perspective. The issues in this manual are relevant to both smaller and larger systems. The manual was published by the Department after going through a public notice and comment period. Tr. 1134.

119. Mr. Evans primarily reviews the hydrogeologic studies related to planning modules. Tr. 1128.

120. In his career, he has reviewed over 200 hydrogeologic studies related to planning modules. Tr. 1128.

121. Mr. Evans' positions with the Department have required a working knowledge of the MBE and all of its variables. Tr. 1169.

122. Mr. Evans has been working with the MBE since 1989. Tr. 1174.

123. Mr. Evans was qualified as an expert in the areas of geology, hydrogeology, the evaluation of preliminary hydrogeologic reports and the Department's MBE calculation. Mr. Evans was also qualified as an expert for the purposes of his review of SHC's supplemented preliminary hydrogeologic report. Tr. 1181.

Keith Dudley (expert witness on a particular topics)

124. Mr. Dudley is the chief of the Municipal Planning and Finance Section of the Department's Southeast Regional Office. Tr. 734.

125. Mr. Dudley supervised Mr. Evans' review of the hydeogeologic reports related to all of SHC's planning module submissions. Tr. 734-35.

126. Mr. Dudley is a licensed professional engineer in Pennsylvania and is a Certified Sewage Enforcement Officer in Pennsylvania. Tr. 854.

127. Mr. Dudley also passed all five proctored wastewater treatment plant operator examinations. Tr. 853-54.

128. Mr. Dudley has worked as a Sanitary Engineer 1, 2, 3 and 4 and presently, works as an environmental engineer group manager in the Department's Water Management Program. Tr. 856.

129. He has written NPDES permits that authorize the discharge of wastewater to surface water; he has reviewed water quality management permits for the design of sewage conveyance and collection facilities; and he has worked on permits for land application sewage disposal facilities, including large-volume spray irrigation sewage treatment works. Tr. 857.

130. Because Mr. Dudley is a Certified Sewage Enforcement Officer, he also has experience with the design criteria of 25 Pa. Code Chapter 73 and has issued water quality management permits for individual residences that involve advanced treatment systems, such as the Orenco system or other aerobic treatment works. Tr. 857-58.

131. Most of the advanced treatment permits issued by Mr. Dudley have been for the repair of malfunctioning on-lot septic systems. Tr. 858.

132. Mr. Dudley has reviewed numerous approval letters authorizing the construction and planning of subdivisions using on-lot septic systems. *Id.*

133. As a Section Chief, Mr. Dudley supervises four engineers who review sewage treatment plant permit applications. He has a thorough understanding of biological nutrient removal and reduction, also known as denitrification. Tr. 860.

134. The same concepts that apply for denitrification in large municipal treatment plants also apply to individual residential on-lot septic systems. Tr. 861.

135. Mr. Dudley has attended a course run by the Pennsylvania State Township Association of Township Supervisors related to the Orenco denitrification system and he has attended training by Orenco, the company which manufactures this technology. Tr. 862-63.

136. Mr. Dudley was qualified as an expert in the engineering of denitrification technology, the permitting of large-volume and on-lot system denitrification technology, and the engineering of the Orenco and Nitrex denitrification systems. Tr. 865, 1472-73.

Walter Grube, PhD (expert witness)

137. Dr. Walter Grube (Dr. Gube) is a certified professional soil scientist in the Municipal Planning and Finance Section of the Department's Southeast Regional Office. Tr. 910, 914.

138. Dr. Grube reviewed the expert soil science reports and certain portions of SHC's planning module submissions. Tr. 958-59.

139. Dr. Grube has a Bachelor of Science degree in agricultural and biological chemistry, a Master of Science in agronomy and a PhD in soil chemistry and plant physiology. Tr. 909-10.

140. Dr. Grube is also a Certified Sewage Enforcement Officer, and a Certified Professional Soil Scientist. Tr. 910.

141. As a Certified Professional Soil Scientist, Dr. Grube has had extensive education and experience related to soil science, including the disciplines of soil chemistry, soil characterization, soil morphology, soil microbiology, and soil physics. Tr. 911.

142. Dr. Grube's responsibilities as a Department soil scientist include the review of the soils aspects of planning modules as well as NPDES permit applications. Tr. 912.

143. Dr. Grube conducts site-specific soil condition evaluations related to his review of planning modules. He accompanies a planning module applicant or his/her consultant and witnesses soil evaluations in the field. Tr. 921.

144. Dr. Grube has been involved in the review of the soil aspects of at least fifty planning modules. Tr. 921.

145. Dr. Grube has been involved in the training of Sewage Enforcement Officers outside of the Department. Tr. 926-27.

146. Most of the planning modules that Dr. Grube reviewed from Chester County involved sites with nitrate-nitrogen contamination. The number of these planning modules could be as many as forty. Tr. 935.

147. Dr. Grube was qualified as an expert in agronomy, soil chemistry, the behavior of nitrate-nitrogen in soil, the evaluation of soils for on-lot septic systems, soil science, and the evaluation of soil data in sewage facilities planning modules. Tr. 956.

148. Dr. Grube became acquainted with the Lewis Tract based on his review of several expert reports and other documents which were provided to him by his supervisor. His document review included Dr. Jarrett's expert report (Stip. Ex. 58) and Power Point presentation, and soils information in SHC's 2003 planning module. Tr. 958-59.

John Diehl

149. Mr. Diehl is the Chief of the Act 537 Management Section of the Department's Central Office. Mr. Diehl is responsible for oversight and development of the Department's policy guidance and regulations related to the Sewage Facilities Program. Tr. 660.

James Novinger

150. Mr. Novinger is a Water Program Specialist in the Act 537 Management Section of the Department's Central Office. Tr. 690.

151. Mr. Novinger drafts and edits policies related to the Sewage Facilities Program. Tr. 691-92.

The Mass Balance Equation(s) (MBE) and Inputs Therto

152. The nitrate MBE the Department uses is a mathematical model that yields an average concentration of nitrogen-nitrate beneath the area being modeled. It models, based on present conditions at the site currently, what the overall nitrate concentrations post-development would be. Tr. 1374-76; Stip. Ex. 61.

153. The MBE shows what the impact will be of the proposed development and the discharge from the various individual on-lot septic systems on overall groundwater quality at the site. Tr. 1216.

154. The Department will disapprove any project where the result of the running of the MBE results in a predicted addition of nitrate to groundwater of over 10 mg/L which is the primary drinking water standard for public drinking water supplies. Tr. 776.

155. The MBE considers the amount of effluent (the material that leaves the septic tank) flow and the concentration of nitrate in the effluent flow in conjunction with the recharge flow (from rainfall) and the concentration of nitrate in the recharge flow to determine the amount of nitrate (measured in mg/L) that will be added to groundwater after installation and use of the septic system. Tr. 133, 1169, 1218.

156. In mathematical terms, the MBE that the Department used here to analyze this Module is expressed as follows:

$$\frac{(Cp \times Qp) + (Cgw \times Qr)}{(Qp + Qr)} = Cmix$$

Cmix = nitrate concentration in groundwater after installation of septic tank (measured in mg/L)

Cp = nitrate concentration in percolate wastewater (measured in mg/L)

Qp = volume of percolate wastewater (measured in g/d)

Cgw = nitrate concentration in groundwater from shallow aquifer site-spefic wells (measured in mg/L)

Qr = volume of precipitation recharge (measured in g/d)

Stip. Ex. 61.

157. The Department disapproves a proposed Module if the nitrate MBE results in a nitrate in groundwater figure of over 10 mg/L. Tr. 776.

158. In this case, the Department used the following numerical inputs for the MBE in reviewing the SHC Module:

- 45 mg/L nitrate concentration in percolate wastewater (*i.e.*, effluent) (Cp);
- 262.5 g/d for effluent flow (*i.e.*, percolate wastewater) (Qp)
- 10.2 mg/L nitrate concentration in groundwater (Cgw)
- 1,250 g/d recharge flow (Qr).

DEP Ex. 63.

159. Using the Department's MBE and the inputs just mentioned, the result was greater than 10 mg/L for Cmix so the Module was denied. DEP Ex. 54.

160. The Department actually did two separate MBE calculations for this Site: one for a 13.8 acre portion where 10 prospective homes would be located and a second for a 2.8 acre portion where 3 prospective homes would be located. The reason for this dual approach is that

the site contains a groundwater divide, a condition where the groundwater moves in two different directions. So to determine the average nitrate-nitrogen concentrations in groundwater, the Department examined each of the two sections and performed the MBE calculation for each. Tr. 1255-57; DEP Ex. 60, 63.

161. For both parcels the end result was greater than 10 mg/L. For the 13.8 acre portion the MBE result was 15.32 mg/L and for the 2.8 acre portion the MBE result was 14.44 mg/L. DEP Ex. 63.

162. There is no dispute about the last number, the Qr number, as SHC and the Department agree with the use of 1,250 g/d for that number. So the contest here is about the other three inputs. SHC Post-Trial Brief, p. 5.

163. SHC contends that:

> The following "inputs" in the calculation of the nitrate mass balance equation are more reasonable and are supported by science: 196 g/d effluent flow; 30 mg/L nitrate concentration in effluent beneath the drain field...and 1.83 mg/L nitrate concentration in recharge. (S.H.C. Ex. 138; S.H.C. Ex. 139; Tr. 1630.) Using S.H.C.'s inputs to solve the equation, the S.H.C. planning module would not have been disapproved because the predicted addition of nitrate to groundwater is 5.7 mg/L. (S.H.C. Ex. 139).

SHC Post-Trial Brief at 3.

164. SHC also says that other versions of the MBE are more appropriate to use than the one DEP used here and that use of those versions would have resulted in approval of the Module. SHC Post-Trial Brief, p. 87.

165. The H & F equation is mathematically stated as follows:

$$\frac{(Qe \times Ce) + (Qr \times Cr)}{(Qe + Qr)} = Cmix$$

SHC Post-Trial Brief, p. 28.

166. In the H & F version of the MBE, the nitrate concentration in percolate wastewater (the 45 mg/L in the DEP's MBE stated above) assumes that the concentration of nitrate in wastewater will range from 30 to 50 mg/L, with 40 mg/L being typical. Tr. 212.

167. That concentration is multiplied by an assumed flow of 150 g/d. Tr. 211.

168. The H & F MBE includes a consideration that rainfall has a concentration of nitrate of 1 mg/L. Tr. 197-98, 219-20.

169. That concentration is multiplied by the recharge rate from rainfall that is typical for the area around the Site, which is 1,250 g/d per acre. Tr. 214.

170. The H & F MBE contains another significant difference from the MBE that DEP used here as well. The H & F MBE contains an extra component to account for denitrification. Tr. 195.

171. Denitrification is chemical process or reaction that results in the loss of nitrogen. Tr. 195-96.

172. Specifically, it is the loss of two oxygen molecules that were tied to a nitrogen molecule forming a nitrate ion which converts to either nitrogen gas or nitrous oxide which vaporized into the air. Tr. 985.

173. The Department's equation does not account for denitrification. Tr. 196, 507-08.

174. The EPA MBE is stated mathematically this way:

$$\frac{(Qp \times Cp) + (Qgw \times Cgw)}{(Qp + Qgw)} = Cmix$$

Stip. Ex. 83; SHC Ex. 122; SHC Post-Trial Brief p. 29.

175. Cmix is the concentration of consitutent in mixture (mg/L)(recharge, septic and groundwater); Cp is the concentration of constituent in percolate in mg/L (rainfall recharge + septic from literature); Qp is flow of percolate in GPD (40-60 GPD/person + precipitation

recharge); Cgw is concentration of constituent in groundwater in mg/L (from a detailed hydrogeologic study); and Qgw is flow of groundwater beneath the site in GPD (from a detailed hydrogeologic study). SHC Ex. 123.

176. The new component in the EPA MBE is that it considers the concentration in the groundwater and it also includes consideration of the flow of groundwater *underneath* the site. Tr. 226-27.

177. The EPA MBE also includes an input for gradient and the hydraulic conductivity of the aquifer. Tr. 203.

178. The third input includes an estimate of the volume of flow of groundwater under the site. Tr. 203.

45 Mg/L Input (Cp)

179. The 45 mg/L figure comes from the Department's Policy entitled, *Impact of the Use of Subsurface Disposal Systems on Groundwater Nitrate-nitrogen Levels*. DEP Ex. 24; Stip. Ex. 3, p. 6.

180. Mr. Evans did refer to other sources in his review of this aspect of the Module such as the 1980 EPA Manual and the 2002 EPA Manual update to determine that the DEP Policy's figure of 45 mg/L was appropriate in this case. Tr. 1251.

181. He also very credibly explained why he did not allow for the 25% discount for denitrification that Mr. White had proposed and which is the seminal difference between the MBE that DEP applied here and the H & F MBE. Tr. 1252, 1356-57.

182. The "environments favoring denitrification are limited." Tr. 1356-57.

183. This is actually from the 2002 EPA Manual which Mr. Evans reviewed in connection with his review of this proposed Module. Tr. 1253, 1356-57; Stip Ex. 45, p. 4-5.

184. The Manual states, "[b]ecause nitrate is highly soluble and environments favoring denitrification in subsoil are limited, little removal occurs." Stip. Ex. 45, p. 4-5.

185. This statement from the Manual is quite applicable to the Lewis Tract. FOFs. 186-189.

186. For dentirification to occur, anerobic soils, *i.e.*, oxygen deficient soils must be present. Tr. 1060, 1111, 1763.

187. The soils at the Lewis Tract are predominantly "well drained" which means "that water flows reasonably freely through the soil, through the entire depth, which means there is significant pore space for water to flow through, which means that the pore space is also available to air and the oxygen in the air." Tr. 1068, 1762.

188. There would be an aerated or oxygen rich zone throughout all of these soils and no opportunity for the microorganisms which denitrify to thrive. *Id.*

189. Denitrification "really can't occur" or if it would occur it would be "a very small fraction" at the Lewis Tract. Tr. 1065.

190. Appellants' own two experts disagreed between each other regarding which number to use for this input to the MBE. While Mr. White opined that DEP should use 30 mg/L, Dr. Jarrett disagreed with Mr. White and said it should be 38 mg/L. Tr. 275-276, 281, 597-98, 600, 623-27, 1620-23, 1630; SHC Ex. 54, p. 26-27; SHC Post-Trial Brief, p. 3, 49, 89; SHC Ex. 138, 139

191. Dr. Jarrett freely admitted that the DEP's 45 mg/L number is reasonable. Tr. 630.

192. The basis for Dr. Jarrett's 38 mg/L figure was a mathematical calculation with several inputs including his supposition that 25% of the nitrogen exiting a septic tank is going to come

out as organic nitrogen. The remaining 75% comes out as ammonium nitrogen. Tr. 597, 600, 623, 625, 626-27; SHC Ex. 54, p. 26-27.

193. The 25% figure is important to the calculation of the 38 mg/L final number because if that percentage were to be higher, then the final number for concentration would be lower than 38 mg/L and if the percentage were lower than 25% then the final number for concentration would be higher than 38 mg/L. Tr. 623.

194. Dr. Jarrett, however, testified that the 25% number he used for this critical input to his calculation was an "assumption" and that number could be lower or it could be higher and it could even be non-existent. Tr. 622, 623, 624.

195. He said that number could be "all over the place" and that "I like twenty-five percent, and talking me into fifteen or even thirty-five or forty percent may not be that difficult" and "I chose a number so that I could show the calculation." Tr. 626.

196. When asked what is your level of confidence in the twenty-five percent number, Dr. Jarrett answered, "fifty percent. Not real high. Not real high confidence, because of the variability." Tr. 636.

197. Dr. Jarrett's "opinion" on this topic and the ultimate conclusion which is built upon this input that the concentration of effluent in the wastewater from on-lot systems is 38 mg/L cannot and should not be credited. FOFs 192-197.

198. Mr. White was evasive on this question on cross-examination. Tr. 442-444.

199. The EPA 2002 Manual relied upon in part by Mr. White cites a study that shows variability in the range of nitrate concentrations in percolate water from sewage systems of between 21 mg/L and 108 mg/L. Tr. 442.

200. The H & F article relied upon by Mr. White notes that total nitrogen concentration in septic tanks can vary from 25 mg/L to as much as 100 mg/L.

201. Mr. White, again begrudgingly, admitted that he himself has done no laboratory studies at any time of nitrate concentrations in sewage effluent discharged from household septic systems. Tr. 444.

202. The Delaware Valley College study, propounded by SHC to refute the 45 mg/L figure, was actually supportive thereof. SHC Ex. 104.

203. The chart presented representing the Delaware Valley College study is skewed because the chart highlights median values for nitrate-nitrogen while "you really should look at the mean numbers provided in the graph." Tr. 1431.

204. If you do that then the graphs show that "by the time the system had matured or had been operating for a couple of years, the nitrate-nitrogen concentrations at the four-foot level were basically [45 mg/L.]". Tr. 1432.

205. Mr. White's 30 mg/L also includes a 25% discount factor for denitrification. Tr. 426; SHC Ex. 109.

206. Twenty five percent (25%) is the absolute top of the range of possible denitrification values from the range of possible magnitudes of denitrification from 0% to 25% reflected on the graph on SHC Ex. 109. Tr. 426.

207. Mr. White admitted that denitrification can be 0%. Tr. 426.

208. He also admitted that the EPA manuals on this subject have been inconsistent. Tr. 502.

209. Mr. White admitted that there are researchers and people involved in this chemistry who believe that you just should not include denitrification because it is not readily determinable

or, put another way, some scientists in the field say that DEP's use of 45 mg/L which reflects no discount for denitrification is the "way to do it." Tr. 502, 504.

210. Mr. White admitted that soils here are well drained. Tr. 1760.

211. He also said that you need soils to be in anerobic condition for denitrification to occur and it is true that the soils at this Site would not very often be in an anerobic condition. *Id.*

212. Based on all of these factors, we do not deem Mr. White's number of 30 mg/L to be credible.

Wastewater Flow: 262.5 GPU/EDU (Qp)

213. 25 Pa. Code § 62.71 states that a hydogeologic study is to include "an estimated wastewater plume using an average daily flow of 262.5 gallons per equivalent dwelling unit per day or other flow supported by documentation." 25 Pa. Code § 62.71(c)(3)(ii).

214. That is where the Department got the 262.5 figure that it used for this input to the MBE. The figure is based on a census data of 3.5 persons in a household using 75 gallons per day. Tr. 222, 1245-50.

215. The regulation allows another flow number to be used instead of 262.5 if such other flow is supported by documentation. 25 Pa. Code § 62.71(c)(3)(ii).

216. SHC did not support its propounded flow rate of 196 GPD/EDU by sufficient credible relevant documentation. Infra.

217. SHC propounds the 2000 report entitled "Sewage Flow Analysis For Pennsylvania Homebuilders Association" by Mavickar Environmental Consultants (the Homebuilders Association Study) as requiring the use of its flow rate. SHC Ex. 127, p. 16-18; Tr. 1350-51.

218. SHC also propounds the 1980 EPA Manual (SHC Ex. 125) that it says shows effluent flow figures ranging from 132 g/d to 210 g/d are required to be used in the application of the MBE to this case. SHC Ex. 125.

219. SHC also propounded the H & F Report. Tr. 211, 287.

220. The Homebuilders Association Study does not include East Nottingham Township in its study area. Tr. 432.

221. The H & F Report figure for flow is based on three towns in California. Tr. 421-22.

222. SHC itself prompted some fits and starts with regard to its proposal of and DEP's review of a possible alternative number to the 262.5 g/d figure. Stip. Exs. 10, 11.

223. The initial version of the Module submitted in February 2006 proposed an alternative number for the daily flow, then the subsequent amended version, submitted in January 2007, adopted the 262.5 g/d figure. Stip. Exs. 10, 11.

224. Then in the third version of the submission, SHC once again proposed another number for daily flow. Tr. 1245, Stip. Ex. 83.

225. So, at least for some period of time, SHC was not even asking for a figure other then the 262.5 GPD/EDU. Tr. 1200, 1245; Stip. Exs. 10, 11, 83.

226. Mr. Evans did review the Homebuilders Association Study as part of his review of the Module. Tr. 1199, 1200, 1245.

227. A crux of the Homebuilders Association Study was its finding, based on census data, that the average number of persons per household is 2.7 compared to the Department's assumption of 3.5 persons per household. Mr. Evans saw this in the Homebuilders Association Study so he himself looked at census data to check this out. Tr. 1199, 1339.

228. He found that the census does not have a specific category for the types of residences that would be located on this Site. So he looked for categories that would fit best and he found one for people who own their own home and one for people who have children under 18. He averaged those two categories and came up with 3.49 persons per household as opposed to the 2.7 persons per household figure in the Homebuilders Association Study. Tr. 1199.

229. Mr. Evans also relied on the 2002 EPA Study for guidance on this question. Tr. 1344-45; 1351.

230. SHC's alternative documentation is not convincing as demonstrating SHC's numbers of 56 gpd/person and 196 gpd/EDU.

231. The EPA guidance says that average daily flows can range from 57.3 to 73 gpd/person, or 65.9 to 76.6 gpd/person, or 26.1 to 85.2 gpd/person or 57.1 to 83.5 gpd/person. Stip Ex. 45 at 3.3.

232. The Homebuilders Association Study reported several numbers well above the 56 gpd/person propounded by SHC and flow numbers well in excess of the DEP's figure of 262.5 gpd/EDU as well. Specifically, the Allegheny Joint Sewage Authority: 98.71 gpd/person and 345.48 gpd/EDU; the Clearwater Road Treatment Plant in Derry Township: 76.3 gdp/person and 267.05 gpd/EDU; and New Swickly Township Municipal Authority: 79 gpd/person and 276 gpd/EDU. DEP Ex. 46; Stip. Ex. 49.

On-Site Sampling and the 10.2 mg/L Figure (Ggw)

233. Site-specific groundwater sampling data is important for measuring nitrate concentration of nitrate-nitrogen in precipitation recharge/background because each site is different and each site has a unique history. Tr. 1422

234. In addition, there may be differences in geology that impacts groundwater quality and characteristics. Tr. 1277, 1422-23.

235. Without site-specific data, says Mr. Evans, there would be no way to know the nitrate concentration levels beneath any particular site. Tr. 1422.

236. Each individual site would have its own unique history regarding the historical application of fertilizers and farming practices. Tr. 1277.

237. On-site well sampling data is more accurate and more applicable to the review of a particular Module than is off-site well sampling data.. Tr. 1422, 1277.

238. For these reasons, the Department used the on-site groundwater sampling data of 10.8 mg/L and 7.56 mg/L for Cr in its MBE. DEP Ex. 63.

239. At first, SHC refused to do any on-site sampling whatsoever. The March 28, 2008 "denial letter" states that the Module was denied, in part, because there was no data regarding site specific groundwater samples to determine background aquifer nitrate-nitrogen concentrations." Stip Ex. 1.

240. SHC eventually did do on-site shallow acquifer testing, and based on those results, the Department maintained its denial of the proposed Module via letter to SHC dated March 15, 2010. DEP Ex. 54.

The So-Called "Five Year Rule (Mineralization)/The "Ghost-Farmer"

241. Under Dr. Jarrett's supposed "five year rule", after nitrogen is added to the soil, most will have converted to nitrate within 3 years and all nitrogen that is available to convert to nitrate will have converted within 5 years, leaving nothing left to convert after the fifth year. Tr. 586-87, 590, 593.

242. Dr. Grube personally observed soybean cuttings or residue on the ground at the Lewis Tract when he visited there on January 20, 2010. Tr. 945, 962, 973.

243. Dr. Grube took photographs of the Site that day which bears that out. DEP Ex. 59.

244. These cuttings would constitute a continuing source of nitrogen to the soil even after farming and fertilization had ceased. Tr. 970-71, 975-76, 1032-33.

245. The decay of the existing in-place root systems of the soybeans as another on-going contributor of nitrogen as those roots decay. Tr. 1032-33; 1091-92.

246. These root nodules are particularly robust sources of nitrogen because the roots are basically a "nitrogen producing factory" that acts as the distributor of nitrogen to the rest of the plant. Tr. 1092.

247. These decaying roots would contribute a substantial amount of nitrogen that would oxidize into nitrate and be susceptible to downward leaching into the groundwater and downward long after farming and the application of fertilizer had ceased. Tr. 1094-95.

248. Mr. White admitted that he does not know how long it takes those root systems to decay. Tr. 1676-77, 1741-42.

249. The first soil level, *i.e.*, the plow layer, or the A horizon is rich in organic material and is where the major root zone is located. Tr. 998-1003; DEP Exs. 37, 37A.

250. Then, below that is the B horizon or subsoil. Plant roots will extend into the B horizon but become more sparse with depth. Tr. 1002-03.

251. Below the B horizon is parent material. Tr. 1003; DEP Exs. 37, 37A.

252. The "mineralization" or operation of the "five year rule" is limited in focus from the surface of the soil to the bottom of the B horizon. Tr. 981.

253. What the so-called "five year rule" does not consider is what is happening with respect to nitrate, or nitrogen contained or dissolved in groundwater, that is moving in the part of the soil column below the first five or so feet down to the water column. The five year rule, even if it were to be credited, only deals with the question of what nitrate is present in the top level of soil which is available for leaching or dissolving in groundwater. It does not deal with the question of what happens with respect to nitrate that has been dissolved in the groundwater, which is wont to do, and is traveling with that groundwater. FOFs 249-252.

254. Nitrate-nitrogen, which as already mentioned, is very soluble in water, will percolate downward and/or laterally with the movement of the groundwater. DEP Ex. 45, p. 4-5; Tr. 557, 1754.

255. There is communication between the upper and lower acquifers through fractures in the bedrock and groundwater containing dissolved nitrate-nitrogen will flow with any groundwater that finds its way from the upper to the lower acquifer. Tr. 405-06, 451, 1223-24.

256. Dr. Jarrett admitted that movement of water in this regard would be very slow. Tr. 635-36.

257. Mr. White admitted that contaminated groundwater will continue to feed the fractures in the bedrock beneath the Lewis Tract for many years to come. Tr. 451.

258. Mr. White admitted that soil permeability data for this site would help answer this question of the rate of movement of water through the soil but we have no information or data in this case at all on the permeability rate of the soils at the Lewis Tract or the rate at which groundwater with nitrate dissolved therein would travel down to the groundwater table. Tr. 1756-57.

Land Use Change From Agricultural To Residential

259. The Brickhouse Consultants Study entitled "The Long-Term Effects of On-Lot Sewer Systems on Groundwater Quality, an Empirical Analysis" (Brickhouse Study) seemed to be the cornerstone of SHC's argument on this question. SHC Ex. 51, Addendum; Tr. 301-02.

260. The bottom line of this study, says Mr. White, is that it empirically shows that "the change in land use is critical" and, as the hypothesis is stated in the Study, "in subdivisions where pre-development land use is dominated by agricultural use, concentrations were predicted to remain stable or decrease slightly from the 5-10 mg/L range to the 3 to 8 mg/L range." Tr. 1772; SHC Ex. 51, Addendum, p. 5.

261. The Brickhouse Study is the first of its kind in Pennsylvania. Tr. 163, 1647.

262. The Brickhouse Study was funded by the Homebuilders Association of Southeastern Pennsylvania. Tr. 150.

263. SHC is in the homebuilding business. Stip. ¶ 2.

264. The Brickhouse Study has not been peer reviewed yet nor has it been published in any professional journal. Tr. 146-49.

265. It has not even been submitted to any journal for publication yet. Tr. 162.

266. It is being prepared for submission to a professional journal, *i.e.*, *Groundwater* Magazine, but he said "whether they accept it, I don't know." *Id.*

267. Mr. Evans reviewed the Brickhouse Study as part of his review of this Module. Tr. 1273-83.

268. Mr. Evans explained cogently and credibly why he could not rely on the Brickhouse Study as definitively requiring approval of the Module. Tr. 1274-1283.

269. The Brickhouse Study did not have plotting of septic systems and no plotting of wells and made no attempt to map nitrate-nitrogen dispersion plumes on the existing sites. Tr. 1274.

270. The Brickhouse Study only contained, basically, two data points: the initial sampling events when a well was first drilled and the second sampling event in 2006. *Id.* This is not significant enough to show trends. *Id.*

271. Also, the Brickhouse Study contained only partial data. There were a total of 297 lots in the approximately seven subdivisions cited in the Study. Of those 297 lots only 165 lots had data from the pre-development era. Only 70 wells had data from the post-development time frame. Only 49 lots had well data from both pre- and post-development times. So there is data from the initial well drilling and the 2006 sampling event from only 49 of those 297 lots. Stip. Ex. 83, Figure 5; SHC Ex. 51; Tr. 455, 458, 490-91.

272. Some well nitrate-nitrogen levels went down over time and some went up as well. Tr. 315-316; SHC Ex. 91.

273. The Brickhouse Study's conclusions state that some wells had nitrate concentrations rise and some had them fall. SHC Ex. 51, Addendum, p. 27-28.

274. In fact, "[s]everal instances of relatively sharp increases in nitrate concentrations were observed in particular wells." At the same time, "there were just as many instances of relatively sharp decreases". SHC Ex. 51 Addendum, p. 27-28.

275. Of the 49 lots for which there is data, 15 lots showed increases in nitrate contamination. Tr. 462.

276. The Heritage Valley development is not hydrogeologically connected to the Lewis Tract. Tr. 1274; 1278.

277. The data from Heritage Valley seems incomplete with many lots having no data for current levels of nitrate. SHC Ex. 82.

278. There were only 13 of a total of 61 lots that have full data sets of pre-development and 2006 well sampling data. *Id.*

279. A majority of the wells that do have the two data points and are presented from the Heritage Valley development, *i.e.*, 7 of 13, showed increases in nitrate contamination. Tr. 461-62; SHC Exs. 91, 110.

The 10 mg/L Threshold

280. The Chester County Health Department (CCHD) measures the water that comes out of the drinking water well as against a 10 mg/L standard. Tr. 409.

281. The Department Policy, *Impact of the Use of Subsurface Disposal Systems on Groundwater Nitrate-nitrogen Levels*, notes adverse effect in infants drinking water having greater than 10 ppm nitrate-nitrogen. DEP Ex. 24; Stip. Ex. 3.

282. The Department's regulations specifically tell the Department to consider whether the proposed Module furthers the policies established in the CSL. 25 Pa. Code § 71.32(d)(3).

283. While the two acquifers are physically separated, they are not completely isolated from each other. Groundwater can and would move in fractures which are literally openings in the bedrock from the upper saprolite acquifer to the lower drinking water acquifer. Tr. 405-06, 451, 1223-24.

284. Mr. White agreed that this sort of communication happens. Tr. 405-06, 451.

285. Mr. White also admitted that it would take "many decades" for the existing nitrate contamination in the saprolite acquifer to attenuate. Tr. 451.

286. As groundwater infiltrates through the saprolite acquifer it will start picking up nitrate-nitrogen contamination as it moves through the groundwater and down through the fractures. Tr. 1221.

287. Nitrate is very soluble in water, or dissolves easily in water, it is highly soluble...it wants to move with the water. Tr. 1754.

288. When the nitrate dissolves in the groundwater, it will travel along with that groundwater at the same rate the groundwater travels. Tr. 1592.

Chester County Health Department Well Regulations

289. The CCHD drinking well regulations provide that prior to receiving a Certificate of Occupancy, the individual drinking water well for the house must be tested to ensure that the water meets drinking water standards. Tr. 647; Stip. Ex. 6, p. 22.

290. The standard that must be met is 10 mg/L. CCHD Regulations, § 501.14.2.2; Tr. 409; SHC Post-Trial Brief, p. 136 n. 11.

291. If the water does not meet that standard, the CCHD will not issue a Certificate of Occupancy and the residence cannot be legally occupied. Tr. 648-49.

292. Mr. White personally has no idea whether the CCHD enforces the well regulations. Tr. 453.

Chester County Health Department Well Casing Rules

293. A well casing is a solid steel casing that extends from the land surface or above to about five feet down into rock. Tr. 1232; Stip. Ex. 75.

294. The purpose of the casing is to minimize communication between the well and the shallow portions of the acquifer and to maintain the structural integrity of the well. Tr. 1226.

295. The wells are also grouted the purpose of which is to lower the risk that surface water might enter the well column. Tr. 1379; *see also* Tr. 349-53.

296. The bottom of the well is open and neither the casing nor grout prevents contamination from entering the well from beneath. Tr. 349-53, 1379.

297. Well casings and grout lowers the risk of infiltration. Tr. 1429.

298. Contaminated groundwater that finds its way through the fractures in the bedrock can enter into the lower water supply acquifer and be pulled into the well below the casing. Tr. 1379.

299. A well casing and grouting have no preventative attributes or capabilities with respect to this avenue. Tr. 1379.

300. In two specific instances where wells drilled in conformance with CCHD well casing rules, the wells became contaminated. Tr. 1233-34.

301. A well located at 210 Wilson Road, which is adjacent to the Lewis Tract, drilled in 1999 showed a nitrate-nitrogen contamination level of 18.4 mg/L. Tr. 1232-33; DEP Ex. 56.

302. A well serving 214 Wilson Mill Road, also adjacent to the Lewis Tract, was drilled in 1998 and showed a nitrate-nitrogen level of 8.5 mg/L. Tr. 1233-34.

303. That same well at 214 Wilson Mill Road was sampled on two separate occasions in 2008 and 2009 and showed a nitrate-nitrogen level of 14.72 mg/L and 14.01 mg/L respectively. Tr. 1233-34.

304. The SHC Addendum to its Hydrogeological Investigation Report dated March 12, 2010 states that, "[d]ue to the random nature of Nitrate concentrations in individual supply wells, there is roughly a 10% chance that a particular well will contain Nitrate exceeding the 10 mg/L maximum contaminant level." SHC Ex. 108, p. 9; Tr. 463.

Overarching Argument Regarding Policy or Guidance As Regulation.

305. The 2003 Policy, the one at the heart of this case covering the MBE and its application, clearly states that,

> [n]othing in the policies or procedures shall affect regulatory requirements....The policies and procedures herein are not an adjudication or a regulation. There is no intent on the part of DEP to give these rules that weight or deference. This document establishes the framework with which DEP will exercise its administrative discretion in the future. DEP reserves the discretion to deviate from this policy statement if circumstances warrant.

Stip. Ex. 57, p. 1.

306. The regional staff has flexibility to interpret guidance for a particular case since no two cases are exactly alike and because each site has is physically unique, there can be deviation from a policy where appropriate. Tr. 671, 675.

307. The regional staff can deviate from the policies at issue in this case. Tr. 693, 702.

308. Mr. Evans demonstrated that he knew very well the difference between a regulation and a policy, specifically, the regulations and policies pertaining to this case. Tr. 1207.

309. This particular Module was the first time a proponent of a development had wanted to use inputs to the MBE that were different than the inputs that the Department used here. Tr. 1192.

310. He, Mr. Evans, made it clear that he understands that he can deviate from policy where it is appropriate, based on site-specific data or some assurance that the deviation is supported in the literature. Tr. 1201.

Alternative Practical Methods Of Sewage Disposal Available Here

311. The Department has stated that it would approve the Module if the applicant would use either the Orenco or the Nitrex system of denitrification. DEP Ex. 54.

312. Orenco is a passive filter proceeded by an aerobic treatment unit capable of denitrification. There is a nitrifying unit that provides an anoxic environment and a filter that provides a carbon source. The microbes need this carbon source for energy. The microbes do the denitrification. Tr. 863-64; SHC Ex. 130.

313. There is a dual chamber septic tank. The primary chamber settles out the majority of sewage sludge. Then the clarified effluent goes into the second chamber and is pumped over the proprietary cloth media. Microbes within that media provide nitrification and denitrification. Tr. 873-74; SHC Ex. 130.

314. The Orenco system has successfully completed the Commonwealth's Technology Verification Protocol (TVP) and has been approved to perform denitrification in effluent to 20 mg/L total nitrogen. Tr. 862; SHC Ex. 130.

315. It has been approved as viable by an independent testing agency, the National Sanitation Foundation. Tr. 861; Ex. SHC 130.

316. The system has been granted ten to fifteen permits already in Pennsylvania to address the rehabilitation of existing failing septic systems. Tr. 862.

317. Several other states including Massachusetts, Delaware, Oregon, and Rhode Island have also approved the Orenco system. SHC Exs. 132, 133, 134, 135, 137.

318. The system is agile as it can be used with any manufacturer's on-lot septic system. Tr. 873.

319. The Nitrex system has not yet completed TVP testing but the Department, based on the approvals issued in other states is willing to issue a water quality permit for that technology. DEP Ex. 54; Tr. 864.

320. Nitrex involves a filter that provides a carbon source which, in turn, provides for denitrification. Tr. 864.

321. Some of the other states including Massachusetts, Delaware, Oregon, Rhode Island have approved the use of this system. SHC Exs. 132, 133, 134, 135, 137.

322. We conclude that, based on Mr. Dudley's testimony, the systems do provide an alternative means of sewage disposal that can be used here.

323. Orenco would cost $14,000 to $17,000 per lot and the drainage system would be another $3,000 to $10,000 to install. Tr. 877, 1500.

324. The Nitrex system manufacturer's recommended allowance for the cost of the system is approximately $4,000 per lot installed. Tr. 1551-52; SHC Ex. 131.

325. After adding the cost of the septic drain fields, the total cost, including operation and maintenance for the first two years would be $30,000 to $35,000. *Id.*

326. After the first two years, it would cost $2,500 for operation and maintenance. Tr. 1552.

Constitutional Arguments

Disparate Treatment

327. The pre-development nitrate-nitrogen concentration levels at the Woods at Nottingham was below the 10 mg/L figure. Tr. 360.

328. SHC did not prove that DEP's system of enforcement or application of the law had a "discriminatory effect" and was "motivated by a discriminatory purpose."

Regulatory Taking

329. Whether SHC has an ownership interest in the Lewis Tract is not clear and not proven by the evidence. Tr. 20-21; Stip. Ex. 12 (noting County Officials certifications to the Module for the site that the "applicant" is Scott Cannon and the "owner" is Willard and Carol Lewis).

330. Mr. Cannon did refer in his testimony to having signed at some point in time what he called an agreement of sale with Mr. and Mrs. Lewis but it is unclear, because it is not in evidence, what the exact nature and provisions of this document might be or whether it even is still in existence. Tr. 22.

331. SHC did not provide any evidence at all of what supposed diminished value it sees as having occurred here.

332. There are alternative sewage disposal systems that could be used here that would result in the Department's approval of the Module. DEP Ex. 54.

333. The Department will approve the Module with the use of the Orenco and/or Nitrex systems. DEP Ex. 54.

334. The property can be developed by SHC immediately with the use of the Orenco and/or Nitrex systems. DEP Ex. 54.

335. The property may, perhaps, be developed by SHC in the future if on-site levels of nitrate contamination become lower in conformance with the hypotheses of SHC's case as propounded by Dr. Jarrett's "five year rule" and Mr. White's Brickhouse Study.

Procedural Due Process

336. The Board's scope of review is *de novo* review.

337. SHC was presented with a full opportunity to engage in the process before the Board which comprises a full due process proceeding with full pre-trial litigation discovery rights to SHC and a full due process trial. EHB Docket; Tr. 1-1842.

338. The trial in this case was extremely robust and comprehensive comprising nine days with 1,842 pages of transcript and over 200 exhibits. SHC Post-Trial Brief, p. 88, n. 4. Tr. 1-1842.

Concluding Findings of Fact Based On The Entirety of the Evidence

339. The Department's action in employing the MBE that it did in this case was demonstrated to have been, and we find it also to have been, correct, reasonable and appropriate and in conformance with law.

340. The Department's action in employing the inputs that it did in this case was demonstrated to have been, and we find it also to have been, correct, reasonable and appropriate and in conformance with law.

341. The Department's use of on-site well samples for analysis of this Module was demonstrated to have been and we find it also to have been correct, reasonable and appropriate and in conformance with law.

342. The Department's analysis of this Module did not involve the elevation or arrogation of policy to the status of regulation.

343. The Department's analysis of the question of "land use change" was correct, reasonable, appropriate and in conformance with law and it was not required to have approved the Module based on theory of "land use change".

344. The Department's analysis of the CCHD regulations on drinking water from wells and well casings was correct, reasonable and appropriate and in conformance with law and it was

not required to have approved the Module on the basis of the CCHD well regulations or its well casing regulations.

345. The Appellant failed to carry its burden of proof.

346. The Department succeeded in convincing the Board that, to the extent its decisions in reviewing this Module were based on policy and procedures, its actions in this regard were correct, reasonable and appropriate.

DISCUSSION

Factual Background

For the factual background of this matter we refer the reader to the Findings of Fact, especially the "Factual Background" section of the Findings of Fact.

Scope of Review and Burden of Proof

Our scope of review was stated well in *Smedley v. DEP*, 2001 EHB 131 as follows:

> The Board conducts its [trials] *de novo*. We must fully consider the case anew and we are not bound by prior determinations made by DEP. Indeed, we are charged to redecide the case based on our *de novo* scope of review. The Commonwealth Court has stated that '*de novo* review involves full consideration of the case anew. The [EHB], as reviewing body, is substituted for the prior decision maker, [the Department], and redecides the case." *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *O'Reilly v. DEP*, [2001 EHB 19, 32]. Rather than deferring in any way to findings of fact made by the Department, the Board makes its own factual findings, findings based solely on the evidence of record in the case before it. *See, e.g., Westinghouse Electric Corporation v. DEP*, 1999 EHB 98, 120 n. 19.

Id. at 156. So the Board will determine, on a clean slate, based on the evidence presented to us, whether the Department's action under review is correct, reasonable and appropriate and otherwise in conformance with the law.

This being an appeal of the Department's denial of a Module, SHC bears the burden of proof to establish its case by a preponderance of the evidence. 25 Pa. Code § 1021.122(c)(1).

SHC acknowledges this. SHC Post-Trial Brief, p. 81, 139. SHC adds a wrinkle to this that has to it a ring of "burden shifting". It says that the Department, as an administrative agency asserting its decision based on "policy and procedures", has the burden to convince the Board that its interpretation of the statute or regulation as embodied in the policy and/or procedure it seeks to enforce is correct. SHC Post-Trial Brief, p. 81 (*citing Borough of Bedford v. DEP*, 972 A.2d 53, 61 (Pa. Cmwlth. 2009)). Interestingly and surprisingly, the Department does not respond to this particular argument.

We do not think that the Commonwealth Court in *Borough of Bedford* meant in any way to change the usual burden of proof. We do not think that the language SHC cites from the opinion does that at all. Moreover, this appeal does not raise an issue regarding the interpretation of the language of an ambiguous statute or regulation. Finally, we do not think that the citation to *Borough of Bedford* makes the point that Appellant asserts because the procedural posture of that case was merely the dismissal of DEP's motion for summary relief on the substance of the matter at issue. *Borough of Bedford, 972 A.2d* at 57, 69. In any event, as will be evident from our discussion throughout this Adjudication, we believe that this is not merely a case where the Appellant has failed to carry the burden of proof. On the contrary, we conclude that the Department has demonstrated and affirmatively proved, by a wide margin, much greater even than a preponderance of the evidence, that it acted properly and correctly where it acted and, also, that it acted properly and correctly where it declined to accept Appellant's various theories and approaches. So, even if for the sake of argument we were to grant SHC's premise about the *Borough of Bedford* case, the Department's actions here were appropriate.

The Mass Balance Equation(s) (MBE) and Inputs Thereto

The nitrate MBE the Department uses is a mathematical model that yields an average concentration of nitrogen-nitrate beneath the area being modeled. It models, based on present conditions, what the overall nitrate concentrations post-development would be. Tr. 1374-76; Stip. Ex. 61. In other words, it shows, based on present conditions, what the impact will be of the proposed development and the discharge from the various individual on-lot septic systems on overall groundwater quality at the site. Tr. 1216. The Department will disapprove any project where the result of the running of the MBE results in a predicted addition of nitrate to groundwater of over 10 mg/L which is the primary drinking water standard for public drinking water supplies. Tr. 776.

The MBE considers the amount of effluent flow (the material that leaves the septic tank) and the concentration of nitrate in the effluent flow in conjunction with the recharge flow (from rainfall) and the concentration of nitrate in the recharge flow to determine the amount of nitrate (measured in mg/L) that will be added to groundwater after installation and use of the septic system. Tr. 133, 1169, 1218. In mathematical terms, the MBE that the Department used here to analyze this Module is expressed as follows:

$$\frac{(Cp \times Qp) + (Cgw \times Qr)}{(Qp + Qr)} = Cmix$$

Cmix = nitrate concentration in groundwater after installation of septic tank (measured in mg/L)

Cp = nitrate concentration in percolate wastewater (measured in mg/L)

Qp = volume of percolate wastewater (measured in g/d)

Cgw = nitrate concentration in groundwater from shallow aquifer site-specific wells (measured in mg/L)

Qr = volume of precipitation recharge (measured in g/d)

Stip. Ex. 61. As stated above, the Department disapproves a proposed Module if the nitrate mass balance equation results in a nitrate concentration in groundwater figure of over 10 mg/L. Tr. 776. In this case, the Department used the following numerical inputs for the MBE in reviewing the SHC Module:

- 45 mg/L nitrate concentration in percolate wastewater (*i.e.*, effluent) (Cp)
- 262.5 g/d for effluent flow (*i.e.*, percolate wastewater) (Qp)
- 10.2 mg/l nitrate concentration in groundwater (Cgw)
- 1,250 g/d recharge flow (Qr).

Using the Department's MBE and the inputs just mentioned the result was greater than 10 mg/L for Cmix so the Module was denied. The Department actually did two separate MBE calculations for this site: one for a 13.8 acre portion where ten prospective homes would be located and a second for a 2.8 acre portion where three prospective homes would be located. The reason for this dual approach is that the Site contains a groundwater divide, a condition where the groundwater moves in two different directions. In order to determine the average nitrate-nitrogen concentrations in groundwater, the Department examined each of the two sections and performed the MBE calculation for each. Tr. 1256-57; DEP Ex. 63. For both parcels, the end result was greater than 10 mg/L. For the 13.8 acre portion, the MBE result was 15.32 mg/L and for the 2.8 acre portion the MBE result was 14.44 mg/L. DEP Ex. 63.

There is no dispute about the Qr number, as SHC and the Department agree with the use of 1,250 g/d for that number. SHC Post-Trial Brief, p. 5.[3] So the contest here is about the other three inputs which will be discussed individually below.

[3] Actually, DEP used 1,025 in its review of the Module but, at trial, advanced another number, namely, 1,250. SHC agrees with either, or both, so there is no dispute in this case about the Qr parameter.

SHC puts the issue squarely when it says in its post-trial brief that:

> The following "inputs" in the calculation of the nitrate mass balance equation are more reasonable and are supported by science: 196 g/d effluent flow; 30 mg/L nitrate concentration in effluent beneath the drain field...and 1.83 mg/L nitrate concentration in recharge. (S.H.C. Ex. 138; S.H.C. Ex. 139; Tr. 1630.) Using S.H.C.'s inputs to solve the equation, the S.H.C. planning module would not have been disapproved because the predicted addition of nitrate to groundwater is 5.7 mg/L. (S.H.C. Ex. 139).

SHC Post-Trial Brief, p. 3.

SHC also says that other versions of the MBE are more appropriate to use than the one DEP used here and the use of those versions would have resulted in approval of the Module. SHC Post-Trial Brief, p. 128-29 Specifically, there is the H & F MBE and the EPA MBE. The H & F equation is mathematically stated as follows:

$$\frac{(Qe \times Ce) + (Qr \times Cr)}{(Qe + Qr)} = Cmix$$

SHC Post-Trial Brief, p. 28. In the H & F version of the MBE, the nitrate concentration in percolate wastewater (the 45 mg/L in the DEP's MBE stated above) assumes that the concentration of nitrate in wastewater will range from 30 to 50 mg/L, with 40 mg/L being typical. Tr. 212. That concentration is multiplied by an assumed flow of 150 g/d. Tr. 211, 287. The H & F MBE includes a consideration that rainfall has a concentration of nitrate of 1 mg/L. Tr. 197-98, 219-20. That concentration is multiplied by the recharge rate from rainfall that is typical for the area around the Site, which is 1,250 g/d per acre. Tr. 214.

The H & F MBE contains another significant difference from the MBE that DEP used. The H & F MBE contains an extra component to account for denitrification. Tr. 195. Denitrification is a chemical process or reaction that results in the loss of nitrogen. Tr. 195-96. Specifically, it is the loss of two oxygen molecules which were tied to a nitrogen molecule forming a nitrate ion that converts to either nitrogen gas or nitrous oxide that vaporizes into the

air. Tr. 985. That nitrogen-nitrate is not available to dissolve in the water or to find its way into the groundwater and is, basically, removed from consideration as a potential water contaminant. *Id.* The Department's equation does not account for denitrification. Tr. 196, 507-08.

The EPA MBE is stated mathematically this way:

$$\frac{(Qp \times Cp) + (Qgw \times Cgw)}{(Qp + Qgw)} = Cmix$$

Stip. Ex. 83; SHC Ex. 122; SHC Post-Trial Brief, p. 29. Cmix is the concentration of constituent in the mixture (mg/L)(recharge, septic and groundwater); Cp is the concentration of constituent in percolate in mg/L (rainfall recharge + septic from literature); Qp is flow of percolate in GPD (40-60 GPD/person + precipitation recharge); Cgw is concentration of constituent in groundwater in mg/L (from a detailed hydrogeologic study); and Qgw is flow of groundwater beneath the site in GPD (from a detailed hydrogeologic study). SHC Ex. 123. The new component in the EPA MBE is that it considers the concentration in the groundwater and it also includes consideration of the flow of groundwater *underneath* the site. Tr. 226-27. The EPA MBE also includes an input for gradient and hydraulic conductivity of the aquifer. Tr. 203. The third input includes an estimate of the volume of flow of groundwater under the site. Tr. 203.

45 Mg/L Input (Cp)

This input reflects nitrate concentration in septic system effluent. SHC points out that the 45 mg/L figure comes from the Department's Policy entitled, *Impact of the Use of Subsurface Disposal Systems on Groundwater Nitrate-nitrogen Levels*. DEP Ex. 24; Stip. Ex. 3 at p. 6. We heard the two SHC experts at trial propose two different figures for this input to the equation. Mr. White said that this input should be 30 mg/L and Dr. Jarrett said that this input should be 38 mg/L.

Appellant's own expert, Dr. Jarrett, admitted that the 45 mg/L figure is reasonable. He testified that, "[s]o the forty-five [from the DEP Policy] is, I'll say, a reasonable average, a reasonable value that captures the performance of maybe a majority of septic tanks." Tr. 630. It is not very often that you have an opposing expert providing such an unequivocal endorsement of the DEP's own position. That really should be the end of our discussion demonstrating the reasonableness and credibility of the DEP's use of 45 mg/L. Nevertheless, we will say a bit more because there are other reasons why neither Mr. White's 30 mg/L nor Dr. Jarrett's 38 mg/L, are credible and that DEP's use of 45 mg/L is credible.

Mr. White's suggested figure of 30 mg/L incorporates a 25% discount factor for denitrification. Tr. 276, 426; SHC Ex. 109. However, 25% is the absolute top of the range of possible denitrification values that range from 0% to 25% and is reflected on the graph in SHC Ex. 109. Tr. 426. Mr. White himself, however, seemed skittish about denitrification. He admitted that denitrification can be 0%. Tr. 426. He also admitted the EPA manuals on this subject have been inconsistent. Tr. 502. He said that, "[f]rankly, [there are] researchers and people involved in this chemistry who believe that you just shouldn't include denitrification...because it's not readily determinable." Tr. 502, 504. In other words, there are some scientists in the field who would say that DEP's use of 45 mg/L, which reflects no discount for denitrification is, as Mr. White said, "the way to do it." Tr. 504.

As Dr. Grube testified, for dentirification to occur, anerobic soils, *i.e.*, oxygen deficient soils, must be present. Tr. 1065, 1111. Mr. White agreed with this too--you need anerobic soils for dentrification to occur. Tr. 1763. However, the soils at the Lewis Tract are predominantly "well drained" which means "that water flows reasonably freely through the soil, through the entire depth, which means there is significant pore space for water to flow through, which means

that the pore space is also available to air and the oxygen in the air." Tr. 1068. Mr. White also agrees that the soils in this area are well drained. Tr. 1762. So, says Dr. Grube, "you would have an aerated or oxygen rich zone throughout all of these soils and no opportunity for the microorganisms which denitrify to thrive." Tr. 1068. In conclusion, dentification "really can't occur" or if it would occur it would be "a very small fraction" at the Lewis Tract. Tr. 1065. We find Dr. Grube's testimony on this subject robust and eminently credible.

Mr. Evans of DEP did a very cogent and credible job explaining how he determined to use the 45 mg/L figure for this input to the MBE and why he could not accept Mr. White's proposed 30 mg/L figure. Tr. 1250-52. He explained that he referred to sources such as the 1980 EPA Manual and the 2002 EPA Manual update to determine that the DEP Policy's figure of 45 mg/L was appropriate in this case. Tr. 1251.

He also very credibly explained why he did not allow for the 25% discount for denitrification that Mr. White had proposed and which is the critical difference between the MBE that DEP applied here and the H & F MBE. Tr. 1252, 1356-57. He said, quite correctly as it turns out, "the environments favoring denitrification are limited." Tr. 1356-57. This is actually from the 2002 EPA Manual that Mr. Evans reviewed in connection with his review of this proposed Module. Tr. 1253, 1356-57, Stip. Ex. 45, p. 4-5. The Manual states, "[b]ecause nitrate is highly soluble and environments favoring denitrification in subsoil are limited, little removal occurs." Stip. Ex. 45, p. 4-5. This recitation turns out to be correct and quite applicable to the Lewis Tract.

Mr. White was evasive on this question on cross-examination, which is itself a signal that Department counsel had hit a raw nerve and a good point, and his testimony has to be seen as begrudgingly admitting that the EPA 2002 Manual cites a study that shows variability in the

range of nitrate concentrations in percolate water from sewage systems of between 21 mg/L and 108 mg/L. Tr. 442. Again being uncomfortable and evasive, Mr. White admitted on cross-examination that the H & F Article similarly notes that total nitrogen concentration in septic tanks can vary from 25 mg/L to as much as 100 mg/L. Mr. White, again begrudgingly, admitted that he himself has conducted no laboratory studies at any time of nitrate concentrations in sewage effluent discharged from household septic systems. Tr. 444.[4]

Based on all this testimony, we find that Mr. Evans was quite correct to not have applied a diminution or discount factor to the 45 mg/L figure for denitrification. Put another way, we cannot find fault with or take issue with Mr. Evans's conclusion here that denitrification is not something that can be counted on with respect to the Lewis Site analysis.

Dr. Jarrett's testimony on the 38 mg/L was infected with a foundational flaw rendering it completely incredible and lacking in the basic standards for expert testimony. The basis for Dr. Jarrett's 38 mg/L figure was a mathematical calculation with several inputs including his supposition that 25% of the nitrogen exiting a septic tank is going to come out as organic nitrogen. The remaining 75% comes out as ammonium nitrogen. Tr. 597, 600, 623, 625, 626-27; SHC Ex. 54 p. 26-27. The 25% figure is important to the calculation of the 38 mg/L final number because if that percentage were to be higher, then the final number for concentration would be lower than 38 mg/L. Conversely, if the percentage were lower than 25%, then the final number for concentration would be higher than 38 mg/L. Tr. 623. Dr. Jarrett, however, testified that the 25% number he used for this critical input to his calculation was an "assumption" and that number could be lower or it could be higher or it could even be non-existent. Tr. 622, 623, 624. Indeed, he said that number could be "all over the place" and that "I like twenty-five

[4] The presiding Judge actually interjected at this point to observe and at the same time send a message that Department's counsel was asking simple questions that could and should be answered with a "yes" or a "no" and that is not how the witness was responding. Tr. 445.

percent, and talking me into fifteen or even thirty-five or forty percent may not be that difficult" and "I chose a number so that I could show the calculation." Tr. 626. Then, when his own counsel asked him on re-direct examination what is your level of confidence in the twenty-five percent number, Dr. Jarrett stunned the courtroom by answering, "fifty percent. Not real high. Not real high confidence, because of the variability." Tr. 636. We cannot be expected to have any greater confidence level in Dr. Jarrett's opinion than does Dr. Jarrett himself. So we must conclude that Dr. Jarrett's "opinion" on this topic and the ultimate conclusion which is built upon this input that the concentration of effluent in the wastewater from on-lot systems is 38 mg/L cannot and should not be credited.

Mr. Evans also testified, we think persuasively, that the Delaware Valley College study, propounded by SHC to refute the 45 mg/L figure, was actually supportive thereof. He pointed out why SHC Ex. 104, the chart of the Delaware Valley College study, is skewed. He explained that the chart highlights median values for nitrate-nitrogen while "you really should look at the mean numbers provided in the graph." Tr. 1431. If you do that then the graphs show that "by the time the system had matured or had been operating for a couple of years, the nitrate-nitrogen concentrations at the four-foot level were basically [45 mg/L.]". Tr. 1432. We credit Mr. Evans' testimony on this.

In this particular site, as we have discussed earlier, the case for any denitrification occurring is very weak. Mr. White admitted that Dr. Grube's analysis was basically correct. He admitted that the soils at the Site are well drained. Tr. 1760. He also said that the soils need to be in an anerobic condition for denitrification to occur and it is true that the soils at this Site would not very often be in an anerobic condition. *Id.* So it seems to us that any discount for denitrification at this site would be unwarranted and unsupported and, certainly, Mr. White's

discount at the very top of the range of possible dentrification factors is far from being credible. In any event, based on all of these factors, we do not deem Mr. White's number of 30 mg/L to be credible. We also see Mr. White's testimony as bolstering, reinforcing and confirming the propriety of Mr. Evans judgment that denitrification is not something that can be counted on to occur at the Lewis Tract in any measurable degree and thus his declination to build in a "discount" for denitrification to the 45 mg/L number. This is also a refutation of the propriety in this particular case of using the H & F MBE whose central feature is a denitrification component.

Appellants failed in all respects to demonstrate that DEP's use of 45 mg/L was incorrect or to prove that any other number should be used in this case. In fact, we find that the Department successfully demonstrated that the 45 mg/L figure for this input is reasonable and correct.

Wastewater Flow: 262.5 GPU/EDU (Qp)

The relevant regulation, 25 Pa. Code § 62.71, states that a hydogeologic study is to include "an estimated wastewater plume using an average daily flow of 262.5 gallons per equivalent dwelling unit per day or other flow supported by documentation." 25 Pa. Code § 62.71(c)(3)(ii). The Department got the 262.5 figure from that regulation for this input into the MBE. The figure is based on census data of 3.5 persons in a household using 75 gallons per day. Tr. 222, 1245-50. SHC is quite correct that while the Department's regulation allows another flow number to be used instead of 262.5, it does not *require* that another number be used. The burden is on the proponent to show by documentation that another number should be used.

SHC contends that the Department was obligated to have accepted another number that is lower, *i.e.*, 196 GPD/EDU, because the lower number was, in this case, "supported by documentation." SHC contends that it demonstrated to the Department that a 196 GPD/EDU

figure should have been used based on the 2000 Homebuilders Association Study. SHC Ex. 127, p. 16-18; Tr. 1346-47. SHC also contends that it demonstrated through the 1980 EPA Manual (SHC Ex. 125) that effluent flow figures ranging from 132 g/d to 210 g/d are required to be used in the application of the MBE to this case. SHC also relies upon the H & F Report that uses a flow figure of 150 g/d. Tr. 211, 287. We reject SHC's contentions in this regard.

We begin by noting that the Homebuilders Association Study, although touted by SHC as involving data from over a million households and five community wastewater systems in southeastern Pennsylvania, did not include East Nottingham Township in its study area. Tr. 432. In addition, the H & F Report figure for flow is based on 3 towns in California. Tr. 421-22. Therefore, these two reports are not necessarily directly applicable or on point.

In addition, we cannot help but note that the Homebuilders Association Study was, as its name so states, done for the Pennsylvania Homebuilders Association. SHC is, of course, in the homebuilding business. Mr. Cannon, the president of SHC, was president of the Pennsylvania Homebuilders Association in 2004 and he is still a current member. Tr. 18. So the Homebuilders Association Study on this topic does not generate from, nor is it propounded from, a completely detached and disinterested sponsor.

We next reject the notion that DEP automatically erred and we must overturn its decision and remand it for further review because it allegedly did not even consider the Home Builders Association Study during its review of the Module. SHC Post-Trial Brief at p. 119 (*citing Heritage Building Group, Inc. v. DEP*, 2007 EHB 302, 321) (Department's denial of a private request under Act 537 remanded where DEP failed to consider all the evidence). The facts do not bear this out. First, as background, SHC itself prompted some fits and starts with regard to its proposal of and DEP's review of a possible alternative number to the 262.5 g/d figure. The

initial version of the Module submitted in February 2006 proposed an alternative number for the daily flow, then the subsequent amended version, submitted in January 2007, adopted the 262.5 g/d figure. This prompted Mr. Evans's observations at trial that, at least for a while, "it was no longer an issue in my review" and "the issue disappeared and there was no reason to pursue that anymore." Tr. 1200, 1245; Stip. Exs. 10, 11, 83. Then in the third version of the submission, SHC once again proposed another number for daily flow. Tr. 1245; Stip. Ex. 83. In any event, Mr. Evans did testify that, at least at first, he did not have a copy of the Homebuilders Association Study because the applicant did not submit it. Tr. 1200, 1339. He did ask for a copy, however, and obtained a copy of the Homebuilders Association Study and Mr. Evans did review it in the course of his review of the Module. Tr. 1199, 1200, 1245.

Mr. Evans's explanation of why he maintained the use of the 262.5 flow rate in this case was thoughtful, persuasive and credible. A crux of the Homebuilders Association Study was its finding, based on census data, that the average number of persons per household is 2.7 compared to the Department's assumption of 3.5 persons per household. Mr. Evans explained that he saw this figure in the Homebuilders Association Study so he looked at census data to verify. Tr. 1199, 1339. He found that the census does not have a specific category for the types of residences that would be located on this Site. He then looked for categories that would best fit and he found one category for people who own their own home and one for people who have children under 18. Tr. 1199. He averaged those two figures and came up with 3.49 persons per household as opposed to the 2.7 persons per household figure in the Homebuilders Association Study. *Id.*

Moreover, the Homebuilders Association Study reported several numbers well above the 56 gpd/person propounded by SHC and flow numbers well in excess of the DEP's figure of

262.5 gpd/EDU, as well. Specifically, the Allegheny Joint Sewage Authority: 98.71 gpd/person and 345.48 gpd/EDU; the Clearwater Road Treatment Plant in Derry Township: 76.3 gdp/person and 267.05 gpd/EDU; and New Swickly Township Municipal Authority: 79 gpd/person and 276 gpd/EDU. DEP Ex. 46; Stip. Ex. 49. Likewise, the EPA guidance says that average daily flows can range from 57.3 to 73 gpd/person, or 65.9 to 76.6 gpd/person, or 26.1 to 85.2 gpd/person or 57.1 to 83.5 gpd/person. Stip Ex. 45 at 3.3. Given this, the Homebuilders Association Study can hardly be considered strong support for the use of 56 gpd/person.

Mr. Evans was confronted on cross-examination by selected parts and selected numbers from the 1980 EPA Manual and calculations made based on those selected numbers which yielded a number less than 262.5. Mr. Evans said, in response, that he relied on the 2002 EPA Study for guidance on this question. Tr. 1341-51.

Mr. Evans approach to this is quite credible. SHC's alternative documentation was, at the end of the day, not convincing to us either as demonstrating the applicability or the propriety of SHC's alternative figures for wastewater flow. While it is certainly possible to posit other numbers, as SHC has done here, using selected inputs from other reports, this does not amount to demonstrating that DEP committed error when it decided to use the 262.5 GPD/EDU number.

On-Site Sampling and the 10.2 mg/L Figure (Ggw)

This figure is the concentration of nitrate from on-site shallow groundwater samples. The essence of Appellant's argument here is that it was error for DEP to use the 10.2 mg/L figure derived from the on-site sampling of the upper saprolite acquifer in this case. Appellants assert that the Department's definition of "on-site", meaning within the actual boundaries of the Lewis Tract itself, is too narrow. The sampling data from wells are in proximity to the site, in the same

watershed or within 1/4 mile of the site.[5] In addition, the Appellant argues that limiting the sample data to the shallow acquifer that had the average of 10.2 mg/L DEP used as the input to the MBE here, instead of also including the deep drinking water acquifer, which had an average nitrate level of 5.26 mg/L, was not appropriate.

At first, SHC refused to do any on-site sampling whatsoever. The March 28, 2008 "denial letter" states that the Module was denied, in part, because there was no data "regarding a site specific groundwater sample to determine background aquifer nitrate-nitrogen concentrations." Stip Ex. 1. SHC was ready to come to trial without having done any on-site well water testing in an attempt to prove through litigation that on-site testing was not necessary and, indeed, would be inappropriate. *See* SHC Pre-Hearing Memorandum filed July 31, 2009, pp. 10, 23 (Facts In Dispute Nos. 32, 33; Legal Issues In Dispute No. 21). SHC's position was that drinking water well samples from areas in proximity to the proposed development are sufficient to determine the approvability of the proposed Module and that to require on-site shallow unconfined acquifer well testing is unnecessary, illegal and error. However, after a pre-trial conference held on October 19, 2009, SHC decided that it would conduct the on-site shallow acquifer testing and it subsequently did so. Based on those results, the Department maintained its denial of the proposed Module via letter to SHC dated March 15, 2010. DEP Ex. 54.

Mr. Evans testified that the site-specific groundwater sampling data is important for measuring nitrate concentration of nitrate-nitrogen in precipitation recharge/background because each site is different and each site has a unique history. In addition, there may be differences in geology that impact groundwater quality and characteristics. Without site-specific data, says Mr.

[5] The 1/4 mile distance is significant says Appellant because, "it is important to remember what triggers a preliminary hydrogeological evaluation in the first place under 25 Pa. Code § 71.62(c)(2)(iii) —a Department-documented water supply within 1/4 mile of the proposed site that exceeds a nitrate concentration of 5 mg/L.

Evans, there would be no way to know the nitrate concentration levels beneath any particular site. Tr. 1422. In addition, each individual site would have its own unique history regarding the historical application of fertilizers and farming practices. Tr. 1277. We credit Mr. Evans testimony in that regard. For these reasons, the Department did not err when it used the on-site groundwater sampling data of 10.8 mg/L and 7.56 mg/L for Cr in its MBE. DEP Ex. 63.

This is not the first time the Board has seen this challenge to the use of on-site sampling to determine this input for the MBE. In *Oley Township v. DEP*, 1997 EHB 660, we noted:

> Much of the controversy surrounding the mass balance equation of the Carlyle Gray Report involves the figure used for the background concentration for the site. The background concentration used by Carlyle Gray and accepted by the Department was derived from data adduced from samples taken by two wells located on the site of the proposed subdivision. Both Dr. Richenderfer and Dr. Triegel testified that a more accurate background concentration should be derived by using water samples from surrounding wells. When sample results from other wells in the area are used a much higher background concentration is derived.
>
> We find that the Department did not abuse its discretion in relying on the background concentration figure which used only the sample results from the site itself. Mr. Sigouin testified that on-site data is more accurate than averaging samples from other wells. First, the sample data from the wells surrounding the site was highly variable and appeared to be affected by activities of the property owners. Second, off-site data only provides an estimate of the water quality on-site. Third, averaging off-site wells is scientifically unsound because the background figure can be skewed by either including or excluding samples from surrounding wells. At most, the off-site data supported the necessity for performing a preliminary hydrogeological analysis of the proposed subdivision.

Id. at 687-88. The same is true here as Mr. Evans testified, *i.e.*, in that on-site data is more accurate and applicable. In this case, that fact is also attested to by the Brickhouse Study which shows that data from other sites is variable, inconclusive and does not tell one much about the Lewis Tract. We will discuss the Brickhouse Study in more detail below in our discussion of the question of land use change from agricultural to residential. *See infra*, "**Land Use Change From Agricultural To Residential**."

The Appellant criticizes and distinguishes the *Oley Township* case in its post-trial brief by saying that, in *Oley Township*, no evidence providing a scientific basis for the appellant's objection to the DEP's MBE was presented during the one-day trial whereas, here, a nine-day trial was held with 10 witnesses comprising 1,842 pages of testimony and approximately 200 exhibits. SHC Post-Trial Brief, p. 88 n.4. Actually, we respectfully disagree that there was "no evidence" in *Oley Township* as it looks more to us like insufficient evidence or not enough credible evidence. That is the case here too. In addition, while Appellant is almost uniformly critical of the *Oley Township* case and its potential relevance here, it does urge upon us one affirmative teaching from the case, namely, "[t]he Department should be aware that [*Oley Township*] is not a 'one-size-fits- all opinion. In fact, the Board in *Oley Township* cautioned future litigants that "[d]ecisions with respect to on-lot sewage disposal systems are necessarily site specific and have less precedential value as a result." SHC Post-Trial Reply Brief, p. 13 (*quoting Oley Township*, 1997 EHB 689 n.5). That is precisely the lesson that the Department applied here, *i.e.*, that decisions with respect to on-lot sewage systems are necessarily site specific. Thus, to have site-specific data for such decisions is clearly reasonable.

The So-Called "Five Year Rule" (Mineralization)/The "Ghost-Farmer"

The Department is criticized for not taking into account the so-called "five year rule" propounded by Dr. Jarrett. Under Dr. Jarrett's supposed "five year rule", after nitrogen is added to the soil, most will have converted to nitrate within 3 years and all nitrogen that is available to convert to nitrate will have converted within 5 years, leaving nothing left to convert after the fifth year. Tr. 586-87, 590, 593. In other words, pursuant to this "mineralization" process, any fertilizer that has been applied can no longer contribute nitrate into the environment beyond the fifth year. To not take this into account, says SHC, is equivalent to saying that a "ghost farmer"

continues to apply yearly doses of fertilizer on the land, even after such fertilization has in fact stopped.

However, Dr. Grube testified that he personally observed soybean cuttings or residue on the ground at the Lewis Tract when he visited there on January 20, 2010. Tr. 945, 962, 973. We admitted into evidence photographs that Dr. Grube took that day which bears that out. DEP Ex. 59. According to Dr. Grube, these cuttings would constitute a continuing source of nitrogen to the soil even after farming and fertilization had ceased. Tr. 970-71; 975-76; 1032-33.[6] Dr. Grube also testified about the decay of the existing in-place root systems of the soybeans as another on-going contributor of nitrogen as those roots decay. Tr. 1032-33; 1091-92. These root nodules are particularly robust sources of nitrogen content because the roots are basically a "nitrogen producing factory" which acts as the distributor of nitrogen to the rest of the plant. Tr. 1092. These decaying roots would contribute a substantial amount of nitrogen that would oxidize into nitrate and be susceptible to downward leaching into the groundwater and downward long after farming and the application of fertilizer had ceased. Tr. 1095. Again, being somewhat fractious and stubborn about it, Mr. White finally admitted that he does not know how long it takes those root systems to decay. Tr. 1676-77; 1741-42. This is not a surprise since Mr. White is a hydrogeologist, not an agronomist. We credit Dr. Grube's observations and his opinions based thereon.

What the so-called "five year rule" does not consider is what is happening with respect to nitrate, or nitrogen contained or dissolved in groundwater, which is moving in the part of the soil

[6] SHC in its Post-Trial Reply brief argues that the court sustained an objection on this line of questioning about the presence of soybean cuttings being a continuing source of nitrogen contamination. SHC Post-Trial Reply Brief, p. 10 *citing* Tr. 1028. The objection, however, was sustained to the question to Dr. Grube about whether this would lead to presence of nitrate in the groundwater, not the basic questions about whether the presence of the cuttings on the soil would be a continuing source of nitrates on and in the soils. The bottom line is that Dr. Grube's testimony here undermines the so-called "five-year rule" since there is indeed a continuing source of nitrogen on and/or in the soil even after the farming has ceased.

column below the first five or so feet down to the water column. The five year rule, even if it were to be credited, only deals with the question of what nitrate is present in the top level of soil which is available for leaching or dissolving in groundwater. It does address the question of what happens with respect to nitrate that has been dissolved in the groundwater, which is wont to do, and is traveling with that groundwater.

As Dr. Grube testified, the first soil level, *i.e.*, the plow layer, or the A horizon, is rich in organic material and is where the major root zone is located. Tr. 998-1003; DEP Exs. 37, 37A. Below that is the B horizon or subsoil. Plant roots will extend into the B horizon but become more sparse with depth. *Id.* Below the B horizon is parent material. *Id.*; DEP Exs. 37, 37A. The five year rule or mineralization, to the extent it occurs, is occurring in the limited area from the surface of the soil to the bottom of the B horizon. Tr. 981. Nitrate-nitrogen, which as already mentioned, is very soluble in water, will percolate downward and/or laterally with the movement of the groundwater. Stip. Ex. 45, p. 4-5; Tr. 557, 1754.

As mentioned earlier, there is communication between the upper and lower acquifers through fractures in the bedrock and groundwater in which nitrate-nitrogen has dissolved, which it readily does, will flow with any groundwater that finds its way from the upper to the lower acquifer. The five year rule says nothing about what happens to nitrate-nitrogen that has become dissolved in groundwater and is moving in the vadose zone and/or downward through the rest of the soil column through groundwater. The five year rule says nothing about when that nitrate contamination actually gets to groundwater, especially through fractures to the deep drinking water aquifer. SHC has no account for that gap. Dr. Jarrett did not account for it and Mr. White, likewise, did not and could not. Indeed, their testimony underscored the problem. Dr. Jarrett, the champion of the five year rule, admitted that movement of water in this regard

would be very slow. Tr. 635-36. Mr. White admitted that contaminated groundwater will continue to feed the fractures in the bedrock beneath the Lewis Tract for many years to come. Tr. 451. Mr. White admitted that soil permeability data for this Site would help answer the question of the rate of movement of water through the soil but we have no information or data in this case at all on the permeability rate of the soils at the Lewis Tract or the rate at which groundwater with nitrate dissolved therein would travel down to the groundwater table. Tr. 1756-57.

Land Use Change From Agricultural To Residential

SHC argues that land use change from agricultural to residential means that there will be a decline in nitrate-nitrogen levels over time and that the Department erred by not recognizing and relying on this supposed fact in its review of this Module. This is because, for among other reasons, the farmer is no longer farming the Site and, ergo, no longer applying fertilizer to the land. This point seems related to some degree to the "five year rule" and the "mystery" or "ghost farmer" point which we have already discussed in the immediately preceding section.

First, we note that the evidence does not necessarily show that the nitrate loading or levels will actually decrease over time in all cases after the land use changes from agricultural to residential. Tr. 1006-07. Also, Mr. Evans testified that a change in land use from agricultural to residential could change nitrogen levels in groundwater "for better or for worse" depending on how the farmer had farmed the site. Tr. 1374. As he put it, "in actual fact, a housing development can, in fact, ultimately increase nitrate-nitrogen concentrations in groundwater." Tr. 1374. We credit Mr. Evans's testimony on this. Also, as we will discuss shortly, SHC's own data on this topic is not definitive.

Accordingly, we have somewhat of a mixed bag on this particular question and we do not credit the assumption that a change in land use from agricultural to residential automatically results in a lowering of nitrate levels in the groundwater. In fact, at this Site where fertilization has supposedly stopped for five years, one has to wonder why elevated levels of nitrate in the shallow acquifer are still being detected if the five year rule worked.

In any case, even if we did completely accept SHC's contention, the point misses the mark. SHC's argument that the "Department sticks with the assumption that the nitrate concentration will remain static in perpetuity" is simply not accurate, as a legal matter or as a factual matter. SHC Post-Trial Brief, p. 125. The Board dealt with and dispatched this same argument in *Logue v. DEP*, 1996 EHB 1483, noting that even if there was such a decrease in nitrate levels in groundwater over time, the post-development nitrate-nitrogen level may exceed appropriate levels for a number of years. *Id.* at 1491-92. This notion was captured quite persuasively by Mr. Evans when he testified that the Department does not guess about what might happen in the future with respect to nitrate levels; rather, it looks at the situation on the ground today. Tr. 1374. He then said that,

> [n]ow, ultimately, if nitrate concentrations do decrease in groundwater [over time] we are more than happy to go back and look at it again. [But] [b]ecause we have no idea what the time frame is in terms of moving nitrate to groundwater, our basic assumption for now, the nitrate-nitrogen concentration reflects what is coming in based on what has occurred in the past and we do not know when the change of land use will actually, in fact, be reflected in groundwater.

Tr. 1374. We find this approach and this viewpoint to be eminently reasonable.

The Brickhouse Study seemed to be the cornerstone of SHC's argument on this question. SHC Ex. 51, Addendum; Tr. 301-02. The bottom line of this study, according to Mr. White, is that it shows empirically that "the change in land use is critical" and, as the hypothesis is stated

in the Study, "in subdivisions where pre-development land use is dominated by agricultural use, concentrations were predicted to remain stable or decrease slightly from the 5-10 mg/L range to the 3 to 8 mg/L range." Tr. 1772; SHC Ex. 51, Addendum, p. 5.

Again, we cannot help but note that the Brickhouse Study was funded by the Homebuilders Association of Southeastern Pennsylvania. Tr. 150. SHC is in the homebuilding business. Thus, the Brickhouse Study was not generated nor sponsored by a detached disinterested source. More on point is that the Brickhouse Study has not at this time been accepted in the scientific community. It has not yet been peer reviewed yet. In fact, it has not yet even been submitted, let alone published, in any professional journal. Tr. 146-49, 162. Mr. White said that it is being prepared for submission to a professional journal, *i.e.*, *Groundwater* Magazine, but he continued "whether they accept it, I don't know." *Id.*

In one sense you might say that the Brickhouse Study was subject to peer review. It was reviewed by Mr. Evans and he concluded that the Brickhouse Study did not command that this Module be approved. Tr. 1273-1283. We agree. Mr. Evans explained cogently and credibly why he could not rely on the Brickhouse Study as definitively requiring approval of the Module. Tr. 1274-83. The Brickhouse Study does not contain a plotting of septic systems or plotting of wells, and no attempt was made to map nitrate-nitrogen dispersion plumes on the existing sites. Tr. 1274. The Brickhouse Study only contained, basically, two data points: the initial sampling events when the a well was first drilled and the second sampling event in 2006. *Id.* This is not significant enough to show trends. *Id.* Also, the Study contained only partial data. There were a total of 297 lots in the approximately seven subdivisions cited in the Study. Of those 297 lots only 165 lots had data from the pre-development era. Only 70 wells had data from the post-development time frame. And only 49 had well data from both pre-and post-development times.

So there is data from the initial well drilling and the 2006 sampling event from only 49 of those 297 lots. Stip. Ex. 83 Figure 5; SHC Ex. 51; Tr. 455, 458, 490-91.

Mr. White also told us that some well nitrate-nitrogen levels went down over time while others went up. Tr. 315-16; SHC Ex. 91. Likewise, the Study's conclusions state that some wells had nitrate concentrations rise and some had them fall. SHC Ex. 51 Addendum, p. 27-28. In fact, "[s]everal instances of relatively sharp increases in nitrate concentrations were observed in particular wells." At the same time, "there were just as many instances of relatively sharp decreases". SHC Ex. 51, Addendum, p. 27-28. Of the 49 lots for which there is data, 15 lots showed increases in nitrate contamination. Tr. 462. It is difficult to see, then, how the Study is able to conclude that "the data collected supported the study hypothesis." SHC Ex. 51, Addendum, p. 28. That will be an interesting subject for discussion and treatment in the eventual peer review of the Brickhouse Study.

SHC propounds the Study's data on Heritage Valley development as paradigmatic and particularly persuasive for its case. But the Heritage Valley development is not hydrogeologically connected to the Lewis Tract. Tr. 1274; 1278. The data from Heritage Valley seems incomplete with many lots having no data for current levels of nitrate. SHC Ex. 82. This was noted by Mr. Evans. Tr. 1279-81. From his review there were only 13 of a total of 61 lots that have full data sets of pre-development and 2006 well sampling data. *Id.* Our review of SHC's Exhibit 82 confirms that Mr. Evans appears to be correct on this although the precise number of lots is not definitive. From the exhibit, Mr. Evans's number of 61 seems about right. Regardless of the missing data from Heritage Valley, the data that is reported is troublesome and seems counter to Mr. White's hypothesis. A majority of the wells that do have the two data

points and are presented from the Heritage Valley development, *i.e.*, 7 of 13, showed increases in nitrate contamination. Tr. 461-62; SHC Exs. SHC 91, 110.

Perhaps the Brickhouse Study is a good start on developing initial empirical information on the question it purports to study. Basically, though, it is just a newborn in terms of scientific research: fresh off the press in 2007 and not even peer reviewed yet. Moreover, the Study is not only brand new, it is a first. The subject of the Study and its overarching hypothesis has never before been the subject of empirical scientific study. Mr. White told us that one of the reasons they did the Study is because "there was a lack of data in the published world that actually looked at changes in water quality in existing subdivisions where they were using on-lot wastewater systems and private supply wells." Tr. 163. SHC's counsel emphasized that this Study is the first study of its kind to have ever been undertaken in Pennsylvania. Tr. 1647. The Brickhouse Study can hardly, at this point in time, be deemed to require that the Module should have been approved by DEP and it does not strike us, after hearing testimony about it from both sides, to do so today. We are not able, right now, to give the Brickhouse Study the game changing impact that SHC advocates.

The 10 mg/L Threshold

SHC argues that the Department's adherence to the 10 mg/L as the demarcation point in the MBE exercise for approval or disapproval of a Module for on-lot sewage systems is itself unlawful. SHC points out that this threshold is not to be found in the Sewage Facilities Act or its regulations. However, 10 mg/L is the primary drinking water standard for public water supplies under the federal Safe Drinking Water Act and its regulations, 40 CFR § 141.11(d), which are incorporated into Pennsylvania law at 25 Pa. Code § 109.202(a)(2). The important points from SHC's perspective are that the 10 mg/L threshold applies to "public drinking water

systems" and not to individual on-site drinking water wells. SHC points out that there are no federal or state standards for individual drinking water wells. In addition, state law allows community water systems to have up to 20 mg/L of nitrate. So, the argument goes, the Department is not allowed to use the 10 mg/L number as the cut-off for analysis of Modules under the SFA.

We must reject this argument. First, the argument is a bit incongruous in light of SHC's reliance elsewhere in support of its case on the CCHD drinking water well regulations. These regulations set a threshold limit of 10 mg/L for nitrate concentration for individual and semi-public water supplies. CCHD Regulations, § 501.14.2.2. SHC recognizes this tension because it makes the point in its post-trial brief that the 10 mg/L limit is an "out of the faucet" limit as opposed to the limit the Department is applying with respect to the MBE analysis. We fail to see how the incongruity is resolved by that attempted rehabilitation. The CCHD measures the water that comes out of the drinking water well against the 10 mg/L standard. The water that comes out of the drinking water well is, in effect, the water that the person will drink. It is the water "that comes out of the faucet" as far as the drinking water consuming homeowner is concerned.

There is legal authority for DEP to determine a criterion for use in its MBE analysis. The Clean Streams Law defines pollution as "contamination of any waters of the Commonwealth such as will...render such waters harmful, detrimental or injurious to public health, safety or welfare." 35 P.S. § 691.1. The CSL further provides that the "discharge of sewage or industrial waste or any substance into the waters of the Commonwealth, which causes or contributes to pollution...or creates a danger of such pollution is hereby declared not be a reasonable or natural use of such waters, to be against public policy and to be a public nuisance." 35 P.S. § 691.3. It also provides that, "it shall be unlawful for any person to put or place into any water of the

Commonwealth any substance of any kind or character which results in pollution." *Id.* The CSL further provides that, "[t]he department shall determine when a discharge constitutes pollution, as herein defined, and shall establish standards whereby and wherefrom it can be ascertained and determined whether any such discharge does or does not constitute pollution as herein defined." 35 P.S. § 691.3. Nitrates in the water are a pollutant under the CSL definition of "pollutant". *Logue v. DEP*, 1996 EHB 1483, 1490. Also, the Department Policy, *Impact of the Use of Subsurface Disposal Systems on Groundwater Nitrate-nitrogen Levels*, notes adverse effects in infants drinking water having greater than 10 ppm nitrate-nitrogen. DEP Ex. 24; Stip. Ex. 3. The Department's regulations specifically tell the Department to consider whether the proposed Module furthers the policies established in the CSL. 25 Pa. Code § 71.32(d)(3).

SHC's argument, as well as other points it makes, is reliant on its contention that there is a "hydraulic separation" between the shallow saprolite acquifer and the lower drinking water acquifer." SHC Post-Trial Brief, p. 55-56. SHC says that, "put simply, the water quality in the saprolite acquifer does not represent the quality of drinking water in the lower bedrock acquifer. SHC Post-Trial Brief, p. 126-27. While the two acquifers are physically separated, they are not as completely isolated from each other as SHC would have us think.

As Mr. Evans testified, groundwater can and would move in fractures which are literally openings in the bedrock from the upper saprolite acquifer to the lower drinking water acquifer. Tr. 1223-1224. Mr. White agreed that this sort of communication happens. Tr. 451. Mr. White also admitted that it would take "many decades" for the existing nitrate contamination in the saprolite acquifer to attenuate. Tr. 405-406, 451. In addition, as groundwater infiltrates through the saprolite acquifer it will start picking up nitrate-nitrogen contamination as it moves through the groundwater and down through the fractures. Tr. 1221. As Mr. White also testified, nitrate

is very soluble in water, or dissolves easily in water. As he put it, "nitrate is highly soluble...it wants to move with the water." Tr. 1754. Dr. Jarrett agreed. Tr. 557. When the nitrate dissolves in the groundwater, it will travel along with that groundwater at the same rate the groundwater travels. Tr. 1592. These combination of factors are very important because it means that nitrate contaminated groundwater can and will communicate from the upper saprolite acquifer to the lower bedrock acquifer. Tr. 405-06, 451, 1223-24, 1592.

Given all of this we cannot conclude that DEP acted out of bounds by using the 10 mg/L as the criteria for the MBE analysis which is the exact same number that the CCHD, much revered by SHC, has picked. The use of this criteria is a reasonable exercise of the Department's authority under the CSL to protect the groundwater on and in the vicinity of the Lewis Tract. Also, given the communication between the shallow and deep acquifer, it is a reasonable exercise of the Department's authority to protect drinking water. Moreover, to the extent that the Department concluded under 25 Pa. Code § 71.32(d)(3) that this project would not only fail to further the policies of the CSL but, in fact, would be counter to those policies because nitrates in the shallow acquifer would exceed 10 mg/L, we cannot disagree with that logic.

Chester County Health Department Well Regulations

SHC argues that the CCHD permitting regulations for drinking water wells are required to be considered by DEP as a mitigating factor and DEP's failure to do so is unreasonable and unlawful. Those regulations provide that, prior to receiving a Certificate of Occupancy, the individual drinking water well for the house must be tested to ensure that the water meets drinking water standards. Tr. 647; Stip. Ex. 6, p. 22. The standard that must be met is 10 mg/L. CCHD Regulations, § 501.14.2.2; Tr. 409; SHC Post-Trial Brief, p. 136 n. 11. If the water does

not meet that standard, the CCHD will not issue a Certificate of Occupancy and the residence cannot be legally occupied. Tr. 648-49.

Mr. White, the SHC expert witness, testified that he personally had no idea whether the CCHD enforces its well regulations. Tr. 453. Also, to require the Department to approve the project on the basis of this supposed mitigation factor, even if it did work as a mitigating factor, would put the Department and the public it protects in the wrong position to each other from where they ought to be under the Sewage Facilities Act and the Clean Streams Law. It would, in essence, require the Department to decline to perform its duty or to abdicate its duty under those laws to other entities or to require that members of the public be told they are on their own to fend for themselves with respect to these matters, neither of which it can or ought to do.

Chester County Health Department Well Casing Rules

SHC argues that the CCHD requirement that drinking water wells be cased is a "mitigating factor" the Department inappropriately ignored. SHC argues that well casings lower the risk of drinking water becoming contaminated. SHC Post-Trial Brief, p. 5; Tr. 1429.

A well casing is a solid steel casing that extends from the land surface or above to about five feet down into rock. Tr. 1232; Stip. Ex. 75. The purpose of the casing is to minimize communication between the well and the shallow portions of the acquifer and to maintain the structural integrity of the well. Tr. 1226. The wells are also grouted in order lower the risk that surface water might enter the well column. Tr. 1379; *See also* Tr. 349-53. Importantly, however, the bottom of the well is open and neither the casing, nor grouting, prevents contamination from entering the well from beneath. Tr. 1379. The casings have no preventative attributes or capabilities with respect to this avenue. *Id.*

It is true that well casings and grouting lowers the risk of infiltration, Mr. Evans admitted that straightforwardly. Tr. 1429. But the question remains: what about contaminated groundwater that finds its way through fractures into the drinking water acquifer and then below the casing of the well which is then pulled up from there into the well? The Department actually offered evidence of two specific instances where wells drilled in conformance with CCHD well casing regulations became contaminated. A well located at 210 Wilson Road, which is adjacent to the Lewis Tract, drilled in 1999 showed a nitrate-nitrogen contamination level of 18.4 mg/L. Tr. 1233. A well serving 214 Wilson Mill Road, also adjacent to the Lewis Tract, was drilled in 1998 and showed a nitrate-nitrogen level of 8.5 mg/L. That same well, when sampled on two separate occasions in 2008 and 2009 showed a nitrate-nitrogen level of 14.72 mg/L and 14.01 mg/L respectively. Tr. 1233-34.

Random Nature of Nitrate Contamination In Drinking Wells

One final, but important, note. SHC's own investigation of the Site development Module states that nitrate contamination of drinking water wells at a potential future development here would be a real possibility. SHC's Addendum to its Hydrogeological Investigation Report dated March 12, 2010 states that, "[d]ue to the random nature of nitrate concentrations in individual supply wells, there is roughly a 10% chance that a particular well will contain nitrate exceeding the 10 mg/L maximum contaminant level." SHC Ex. 108, p. 9; Tr. 463. As SHC points out in its Post-Trial Reply Brief, this particular statement was written as an observation with respect to White's previous study of pre- and post-development nitrate levels in wells. However, at trial, Mr. White testified, as we see it, that this would also apply to the Lewis Tract development in particular. Tr. 463. Mr. White did state that this fact is not due to the construction of this development *per se*, but rather it is a statistical estimate based on the overall distribution of

nitrate in the acquifer. *Id.* This point undermines the notions that "mineralization", the "five year rule", changes in land use, the CCHD well regulations, or the well casing requirements provide any sort of "silver bullet" that protects against or prevents well water contamination or that requires that this Module be approved.

Overarching Argument Regarding Policy or Guidance As Regulation

An overarching theme of SHC's case which permeates its attacks on almost every separate component of the DEP's decision-making process is that the Department, at every turn, unlawfully applied guidance or policy as a "binding norm". SHC contends that the Department will never consider change in land use, it will never consider the CCHD regulations, it always applies the MBE in its current form, it always applies the various inputs we have discussed, and so on. Appellant claims that applying policy as a "binding norm" comes into play for: (1) DEP's use of its MBE; (2) DEP's input of 45 mg/L in the MBE; (3) DEP's declination to consider change in land use as a credit in the MBE analysis; and (4) its requirement for site-specific data for the determination of the background levels of nitrate contamination.

Based on our point-by-point discussion of the steps DEP took in its analysis and our findings regarding the MBE the Department used, as well as the inputs it used, and the Department's handling of SHC's other points, DEP's action was entirely appropriate. The question is not what the Department never does or what it always does. The question we have dealt with here is whether the Department's action in this case, namely its application of its version of the MBE with the inputs that it used, is appropriate and lawful; and, whether what the Department's declined to do in this case, namely, to consider land use change and the CCHD regulations as required mitigating factors, was appropriate and lawful. Based on our discussion up to this point, we conclude that what the Department did do in this case and what it did not do

in this case was appropriate and lawful. In fact, its actions and its declinations are fully and affirmatively sustainable by the evidence we have credited.

SHC's claim that the Department applied policy as a regulation fails factually, as well. The 2003 Policy, the one at the heart of this case covering the MBE and its application, clearly states that,

> [n]othing in the policies or procedures shall affect regulatory requirements....The policies and procedures herein are not an adjudication or a regulation. There is no intent on the part of DEP to give these rules that weight or deference. This document establishes the framework with which DEP will exercise its administrative discretion in the future. DEP reserves the discretion to deviate from this policy statement if circumstances warrant.

Stip. Ex. 57, p. 1. All DEP witnesses, including Mr. Evans, the chief reviewer of the Module, showed that they fully understood what this means and did not act to the contrary. Mr. Diehl testified that there is latitude at the regional staff level to interpret guidance for a particular case since no two cases are exactly alike. Because each site is physically unique, there can be deviation from a policy where appropriate. Tr. 671, 675. Mr. Novinger also testified the regional staff can deviate from the policies in question here. Tr. 693, 702. Mr. Evans demonstrated that he knew very well the difference between a regulation and a policy. Tr. 1207. He made it clear to us that he understands that he can deviate from policy where it is appropriate, based on site-specific data or some assurance that the deviation is supported in the literature. Tr. 1201.

SHC makes much of the fact that, with respect to the MBE and the inputs the Department used in this case, Mr. Evans "has never deviated from using any of his preferred inputs" and that "he has never recommended a project for disapproval." SHC Post-Trial Brief, p. 3. These facts might be true but this is not a fair point. Tr. 1131-32, 1192, 1308-09. This particular Module was the first time Mr. Evans had seen a proponent of a development want to use inputs to the

MBE that were different than the inputs which the Department used here. Tr. 1192. It cannot be said that DEP's historical application of policy and guidance, from which it had never before been asked to deviate from, establishes an improper arrow of policy and guidance into "binding norm" regulation. That simply does not make sense. Again, these facts show even more clearly that the question is whether, in this case, for this site, and this proposed Module--did DEP act correctly in doing what it did? Again, also, the answer is no.

Alternative Practical Methods Of Sewage Disposal Available Here

The Department has stated that it would approve the Module if the applicant would use either the Orenco or Nitrex system of denitrification. DEP Ex. 54. We are persuaded that these systems do provide an alternative means of sewage disposal that can be used here. Mr. Dudley testified about these systems and we credit his testimony. He told us that the Orenco system is a passive filter followed by an aerobic treatment unit capable of denitrification. There is a nitrifying unit that provides an anoxic environment and a filter that provides a carbon source. The microbes need this carbon source for energy in order to do the dentrification. Tr. 863-64; SHC Ex. 130. There is a dual chamber septic tank. The primary chamber settles out the majority of sewage sludge. Then the clarified effluent goes into the second chamber and is pumped over the proprietary cloth media. Microbes within that media provide nitrification and denitrification. Tr. 873-74; SHC Ex. 130. The Orenco system has successfully completed the Commonwealth's Technology Verification Protocol and has been approved to perform denitrification in effluent to 20 mg/L total nitrogen. Tr. 862; SHC Ex. 130. It has been approved as viable by the National Sanitation Foundation, an independent testing agency. Tr. 861; SHC Ex. 130. The system has been granted ten to fifteen permits already in Pennsylvania, for the

repair of existing failing septic systems. Tr. 862. The system is agile as it can be used with any manufacturer's on-lot septic system. Tr. 873.

The Nitrex system has not yet completed TVP testing but Mr. Dudley said that based on the approvals issued in other states "we are willing to issue a water quality permit for that technology." DEP Ex. 54; Tr. 864. Basically, Nitrex involves a filter that provides a carbon source which, in turn, provides for denitrification. Tr. 864. Several other states including Massachusetts, Delaware, Oregon, and Rhode Island have approved the use of this system. SHC Exs. 132, 133, 134, 135, 137.

SHC is wrong when it argues that DEP acted improperly because it "considered some mitigating factors,"- namely Orenco and Nitrex systems, "but ignored others", like the CCHD regulations and change in land use. SHC Post-Trial Brief, p. 133. We have already discussed SHC's theories on the CCHD regulations and change in land use and found DEP's treatment of those two issues as correct, rational and lawful. SHC's characterization of Orenco and Nitrex systems as "mitigating factors" is off base. Orenco and Nitrex are not "mitigating factors" as such. Rather, they are alternative practical methods of sewage treatment which would permit Appellant to continue to pursue residential development of the property with alternative sewage disposal systems. The Department has unequivocally stated that it would approve the proposed Module with the use of the Orenco and Nitrex systems, if SHC agreed to use these alternatives for sewage treatment. DEP. Ex. 54; SHC Post-Trial Brief, p. 17.

SHC's main problem with these systems is the cost. Orenco would cost $14,000 to $17,000 per lot and the drainage system would cost another $3,000 to $10,000 to install. Tr. 877, 1500. The Nitrex system manufacturer recommends an allowance of approximately $4,000 per lot installed. Tr. 1551-52; SHC Ex. 131. After adding the cost of the septic drain fields, the

total cost, including operation and maintenance for the first two years would be $30,000 to $35,000. *Id.* After the first two years, it would cost $2,500 for operation and maintenance. Tr. 1552. We do not think that this cost information is relevant to the questions of whether these systems can work, which we find they can. We think that SHC would likely, as a business matter, include these costs into the price of the homes although that really does not matter for this analysis. Also, SHC has made a choice here. SHC was well aware that its project would be approved if it used these systems. It chose to refuse that avenue and, instead, to go to all out war in litigation and gamble on total victory in court. SHC must live with that choice.

Constitutional Arguments

Disparate Treatment

SHC argues that since the Department approved a Module for the Woods at Nottingham, a neighboring residential subdivision, that the Department is guilty of unlawful and unconstitutional discrimination in not approving this Module. We respectfully disagree. This site is different from the Woods at Nottingham. The pre-development nitrate-nitrogen concentration levels at the Woods at Nottingham were below the 10 mg/L figure. Tr. 360. The Lewis Tract decision, not the Woods at Nottingham decision, is on trial here. As discussed fully already, that decision passes muster. Moreover, even if the Woods at Nottingham was similar, it is not enough for one to just point out that similarly situated parties have been treated dissimilarly. *See UMCO Energy, Inc. v. DEP*, 938 A.2d 530, 539 (Pa. Cmwlth. 2007). Rather, SHC must prove that DEP's system of enforcement or application of the law had a "discriminatory effect" and was "motivated by a discriminatory purpose." *Id.* (*citing Correll v. Department of Transportation, Bureau of Driver Licensing*, 726 A.2d 427, 431 (Pa. Cmwlth. 1999)). SHC has not proved that at all.

Regulatory Taking

SHC argues that DEP's denial of the proposed Module results in a regulatory taking because it renders the land "worthless as development land", thus significantly devaluing the land without just compensation. SHC Post-Trial Brief, p. 137. First, we question whether this claim can be asserted by SHC. It appears that the Lewis Tract is property owned by Willard and Carol Lewis, not by SHC. Tr. 20-21; Stip. Ex. 12 (noting County Official's certifications to the Module for the Site that the "applicant" is Scott Cannon and the "owner" is Willard and Carol Lewis). Mr. Cannon did refer in his testimony to having signed at some point in time what he called an agreement of sale with Mr. and Mrs. Lewis but that document is not in evidence and it is unclear what the exact nature and provisions of this document might be or whether it even is still in existence and the document is not in evidence. Tr. 22. Suffice it to say that there does not seem to be evidence which would clearly establish that SHC is the right party to be making a takings claim with respect to the Lewis Tract. *See Palm Corporation v. Pennsylvania Department of Transportation*, 688 A.2d 251, 254 (Pa. Cmwlth. 1997)(right to compensation for eminent domain belongs solely to the owner of the property at the time of the taking); *Ramey Borough v. DEP*, 327 A.2d 647, 650 (Pa. Cmwlth. 1974)(whatever remedies there are for a taking are personal to the property owner and are not appropriately asserted by a third party without any interest in the property), *aff'd, Ramey Borough v. DEP*, 351 A.2d 613 (Pa. 1976). Also, SHC did not provide any evidence at all of what supposed diminished value it sees as having occurred here.

In any event, even if SHC had a fully jelled capacity to make a takings claim, that claim is not viable. The Board had this to say about such a claim in the *Logue* case,

> We find that at least two of these alternatives are practical methods of sewage treatment and would permit Appellant to continue to pursue residential

> development of the property with alternative sewage disposal systems. While the required use of these alternate systems may reduce the sale value of the property, the Department's requirement designed to promote the availability of safe drinking water cannot be viewed as a 'taking.'

Logue v. DEP, 1996 EHB 1493, 1495. We find the same can be said here in light of the Orenco and Nitrex sewage disposal alternatives. Also, DEP is not saying to SHC that it can never develop the land. On the contrary, it is saying one of three things: (1) it cannot be developed now as an on-lot sewage disposal development; and/or (2) it can be developed now with the Orenco and/or Nitrex systems for sewage disposal and; (3) if on-site levels of nitrate are lower in the future, you may then develop the land with on-lot systems. With respect to the last item, if the five year rule were to operate as Dr. Jarrett says it will, then that day may be quite close since fertilizer has not been used on the site for about five years now.

Procedural Due Process

SHC's procedural due process violation claim is related to its overarching "binding norm" argument. SHC claims that it has been denied procedural due process because the Department's review of the Module gave its policies and procedures the effect of binding law. Under the circumstances here and in light of the findings we have made, this argument does not work for several reasons. First, we have found that the Department's action in this case for this site and this Module is perfectly appropriate. The Board approached this case, as we do with all the cases that come to us under the Environmental Hearing Board Act-- with *de novo* review. Our findings have come after a full due process proceeding with full pre-trial litigation discovery rights to SHC. Also, as SHC mentions when emphasizing how robust this trial was as compared to the puny one in *Oley Township*, this was a nine-day trial with 1,842 pages of transcript and over 200 exhibits. SHC Post-Trial Brief, p. 88, n. 4. Second, one must wonder what the remedy and the result might be even if we were to find that the Department in its review of the Module

somehow committed a procedural due process error. We would remand to the DEP for "further action consistent with this opinion." But we have concluded here that everything DEP did at its level, based on our review, was proper, lawful and correct. DEP would then, presumably, re-deny the proposed Module on the very same bases that it has already specified which, now, have been endorsed by the Board in this decision. To undertake such exercises would be to the delight of those who need no further confirmation of Mr. Bumble's lament in *Oliver Twist* that "the law is a ass—an idiot." Charles Dickens, *Oliver Twist*, Dover Publication, Inc., Chapter 51, p. 333 (2002).

Conclusion

Based on the foregoing discussion, we find that the Department committed no error and its denial of the Module will be sustained and the appeal will be dismissed. In fact, this is not a case where the appellant merely failed to carry its burden to prove its case by a preponderance of the evidence and therefore the Department wins. We think based on the evidence that the Department, in fact, demonstrated and affirmatively proved by a wide margin, much greater even than a preponderance of the evidence, that it acted properly and correctly where it acted and, also, that it acted correctly where it declined to accept Appellant's various theories and invitations or demands based on those theories to have acted.

CONCLUSIONS OF LAW

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

2. The Board's scope of review is *de novo*. *Smedley v. DEP*, 2001 EHB 131.

3. SHC, as the appellant of the Department's action, bears the burden of proof and must show by a preponderance of the evidence, whether the Department's action under review is

correct, reasonable and appropriate and otherwise in conformance with law. 25 Pa. Code § 1021.122(c)(1); *Smedley v. DEP*, 2001 EHB 131.

4. Nitrate-nitrogen contamination is a "pollutant" pursuant to the Clean Streams Law, 35 P.S. § 691.1; *Logue v. DEP*, 1996 EHB 1483, 1490.

5. The Department's action in employing the MBE that it did in this case was demonstrated to have been, and we find it also to have been, correct, reasonable and appropriate and in conformance with law.

6. The Department's action in employing the inputs that it did in this case was demonstrated to have been, and we find it also to have been, correct, reasonable and appropriate and in conformance with law.

7. The Department's action in employing the 10 mg/L as the demarcation point in its MBE analysis in this case was demonstrated to have been, and we find it also to have been, correct, reasonable and appropriate and in conformance with law.

8. The Department's use on-site well samples for analysis of this Module was demonstrated to have been, and we find it also to have been, correct, reasonable and appropriate and in conformance with law.

9. The Department's analysis of this Module did not involve the elevation or arrogation of policy to the status of regulation.

10. The Department was not required to have approved the Module based on theory of "land use change" or "mineralization" or the so-called "five year rule."

11. The Department was not required to have approved the Module on the basis of the Chester County Health Department well regulations or its well casing regulations.

12. The Department's action in denying this Module did not constitute unconstitutional disparate treatment, regulatory taking or a violation of procedural or substantive due process.

13. The Department's denial of this Module was demonstrated to have been and we also find to have been correct, reasonable and appropriate and in conformance with law.

14. The Appellant failed to carry its burden of proof.

15. The Department succeeded in convincing the Board that, to the extent its decisions in reviewing this Module were based on policy and procedures, its actions in this regard were correct, reasonable and appropriate.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

S.H.C., INC., **Appellant,**	:	
v.	:	
	:	**EHB Docket No. 2008-159-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, **Appellee**	:	

ORDER

AND NOW, this 31st day of August, 2010, it is hereby ordered that this appeal is **dismissed.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

MICHAEL L. KRANCER
Judge

Richard P. Mather Sr.

RICHARD P. MATHER, SR.
Judge

DATED: August 31, 2010

c: **DEP, Bureau of Litigation:**
Attention: Connie Luckadoo

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

S.H.C., INC.	:	
	:	
v.	:	**EHB Docket No. 2008-159-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER CORRECTING TYPOGRAPHICAL ERRORS IN ADJUDICATION

AND NOW, this 7th day of September, 2010, upon review of the Adjudication in this matter issued on August 31, 2010, the following errata are hereby noted and corrected:

1. Page 20, Finding of Fact 137, the reference to "Dr. Gube" is amended to read "Dr. Grube."
2. Page 30, Finding of Fact 213, the reference to "25 Pa. Code § 62.71" is amended to read "25 Pa. Code § 71.62(c)(3)(ii)."
3. Page 30, Findings of Fact 213 and 215, the references to "25 Pa. Code § 62.71(c)(3)(ii)" are amended to read "25 Pa. Code § 71.62(c)(3)(ii)."
4. Page 31, Finding of Fact 225, "then" is amended to read "than".
5. Page 32, Finding of Fact 232 and page 59, line 3, the references to "Swickly" are amended to read "Sewickley".
6. Pages 34, Finding of Fact 246 and page 63, line 11, the references to "nitrogen producing factory" are amended to read "nitrogen extraction factory".
7. Page 56, line 12, the reference to "25 Pa. Code § 62.71" is amended to read "25 Pa. Code § 71.62."

8. Page 56, line 14-15, the reference to "25 Pa. Code § 62.71(c)(3)(ii)" is amended to read "25 Pa. Code § 71.62(c)(3)(ii)."

9. Page 77, line 3, the word "arrow" is amended to read "arrogation."

10. Page 77, line 6, the word "no" is amended to read "yes."

11. Page 80, line 10, delete the phrase "and the document is not in evidence."

12. Page 83, Conclusion of Law 8, "use on-site" is amended to read "use of on-site".

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Judge

DATED: September 7, 2010

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

NORTHAMPTON TOWNSHIP AND NORTHAMPTON, BUCKS COUNTY MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2008-184-L (Consolidated with 2008-186-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 1, 2010**

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies motions for summary judgment in appeals from an order directing a municipality to implement its official sewage facilities plan because genuine disputed issues of material fact remain.

OPINION

These consolidated appeals were filed by Northampton Township (the "Township") and the Northampton, Bucks County Municipal Authority (the "Authority") from an order of the Department of Environmental Protection (the "Department") to the Township directing it to implement its official sewage facilities plan. In an earlier Opinion in this matter, *Northampton Township, et al. v. DEP*, 2008 EHB 563, we described the extremely limited scope of our review in this case. *See also Northampton Township, et al. v. DEP*, 2008 EHB 473 (Opinion and Order denying petition for supersedeas). Because the order under appeal does nothing other than

require the Township do what it committed to do in its official plan, and because that plan – adopted in 1997 – is not the subject of this appeal, our scope of review is limited to issues specific to the order itself. The plan cannot be challenged in an appeal requiring its implementation. *Id.*, 2008 EHB at 475; *Carroll Township v. DER*, 409 A.2d 1378, 1381 (Pa. Cmwlth. 1980). This concept is merely one manifestation of the even more fundamental principle that a party may not challenge one Department action by appealing another action. *Winegardner v. DEP*, 2002 EHB 790, 793. The continuing challenge in this case, then, is to decide which issues raised in these appeals are truly unique to the order as distinguished from those attacks that are really nothing more than belated objections to the plan itself.

Needless to say, with our scope of review so narrowly circumscribed, there is not much left to decide in this case. The Township and the Authority have filed motions for summary judgment asking us to rule in their favor on one issue that they contend is properly before us; namely, the extent to which the Department can order the *Township* to comply with its own plan by installing the sewers provided for in that plan when it is the *Authority* that allegedly has the exclusive right to install those sewers. The Appellants contend that the Department cannot order the Township to comply with its plan because the Township itself cannot install the sewers, and the Department cannot order the Authority to comply with the Township's plan because it is not the Authority's plan. In other words, the Department is in a Catch-22 situation. It is in effect powerless to act. The Township's plan is essentially an unenforceable document.

Our first difficulty with the Appellants' position is that we are not confident that the argument relates as it must to the order rather than the plan. It is true that we said in our earlier opinion denying a motion to dismiss that the "contention about the order being issued to the wrong party does not implicate anything in the plan and it is also an appropriate area of inquiry."

2008 EHB at 570. Now that the issue has been fleshed out in the parties' motions for summary judgment, however, we are not so sure. The Township in its plan stated: "Implementation of the public sewage facility alternative planned herein shall be carried out by the NBCMA [Northampton, Bucks County Municipal Authority]." If the Authority is not the proper party to expand its sewer system as expressly set forth in the plan, the Township would not have put it in the plan and the Authority could have appealed the Department's approval of the plan back in 1997.

Putting that issue aside for the moment, the Appellants' argument is premised on the contention that the Authority has the *exclusive* right to construct and operate sewer systems within the Township's geographical area. They argue that this exclusive right means that the Township lacks the legal right to provide sewer services within the Township. They assert very little factual grounds for this argument, and no legal authority. The Authority does refer us to its Articles of Incorporation (Exhibit D to the motion), but nowhere in that document do we see the grant of any exclusive rights. Perhaps we are missing something. A hearing may help us better understand the factual predicate and legal support for the Appellants' claim.

The Township concedes that it has the ability to dissolve the Authority if the Authority does not cooperate with the Township in assisting the Township to meet its obligation to comply with its plan. The Township argues that dissolution of the Authority "would be an extreme measure by the Township and not something that would be undertaken lightly." We agree, but interference with the Township's legal obligations might not only justify but require such extreme measures, depending upon all of the circumstances. Again, a hearing may help us flesh out this issue. For these two reasons alone, we find ourselves in agreement with the

Department's contention that the issuance of summary judgment in this case would not be appropriate.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NORTHAMPTON TOWNSHIP AND NORTHAMPTON, BUCKS COUNTY, MUNICIPAL AUTHORITY	:	
	:	**EHB Docket No. 2008-184-L**
v.	:	**(Consolidated with 2008-186-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 1st day of September, 2010, it is hereby ordered that the motions for summary judgment of Northampton Township and Northampton, Bucks County Municipal Authority are **denied**.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: September 1, 2010

c: **DEP, Bureau of Litigation:**
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TELFORD BOROUGH AUTHORITY, BOROUGH OF WEST CHESTER, WEST GOSHEN SEWER AUTHORITY, LOWER PAXTON TOWNSHIP, HOME BUILDERS ASSOCIATION OF METROPOLITAN HARRISBURG, THE HARRISBURG AUTHORITY, and THE CITY OF HARRISBURG	:	
v.	:	**EHB Docket No. 2010-111-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 7, 2010**

OPINION AND ORDER GRANTING MOTION TO DISMISS

By Michael L. Krancer, Judge

Synopsis:

The Board dismisses a Notice of Appeal from a letter of DEP on the grounds that the letter is not an appealable action.

Factual and Legal Background

This is an appeal from a DEP letter dated June 14, 2010 (DEP Letter) written by Deputy Secretary John Hines that states, in full, as follows,

> I am responding to your letter of June 10, 2010.
>
> As you are aware, the Indian, Goose and Paxton Total Maximum Daily Loads (TMDLs) were developed by the United States Environmental Protection Agency (EPA) and not by the Department of Environmental Protection (DEP). Nonetheless, the TMDLs have been

> appealed to the Environmental Hearing Board (EHB) by the entities that you represent as well as by other parties.
>
> DEP continues to believe that the appropriate forum for your concerns about the validity of the TMDLs is in Federal Court. The EHB granted a stay to afford time for Appellants to pursue a federal appeal. It is the Federal Court's prerogative, and not DEP's, to judge the propriety of EPA's actions.

Notice of Appeal (NOA), Attachment A.

The reference in the DEP Letter to the TMDLs having been appealed to the Board refers to the pending cases before us involving the substantive challenge to the TMDLs themselves. EHB Docket Nos. 2008-265-K, 2008-272-K and 2008-273-K. As we described in our Order dated August 24, 2010 denying Appellants' motion to consolidate this case with those other three cases, the other cases pose the question whether the TMDLs themselves are state action or federal action, while this case, on the other hand, poses the different question of whether the DEP Letter constitutes an appealable action. Substantively, the two matters are different as well. The other cases deal with the substantive challenge to the TMDL while the DEP Letter deals with state's Clean Water Act Section 303(d) List. While the two may be related in that being on the Section 303(d) list is the operative event providing for the development of a TMDL, they are not the same.

The DEP Letter responds to a lengthy letter to DEP Secretary Hanger and DEP Deputy Secretary Hines, that is actually dated June 9, 2010. The gist of the June 9, 2010 letter is to repeat a request made in a letter dated November 9, 2009 to Mr. Hines that DEP amend its Section 303(d) list to delete Indian, Goose and Paxton Creek as being impaired waters with respect to nutrients. NOA, Attachments B and C. The Appellants refer to the letters as their "de-listing request" and that their appeal is an appeal "of the

Department's decision to deny its de-listing request." Appellants' Memorandum Of Law In Support of Their Response To Department's Motion To Dismiss (Reply Brief), pp. 2, 3. The June 9, 2010 letter from Appellants concludes by stating, "[i]f responses are not promptly received, the Appellants will have no other option but to treat the Department's repeated failure to respond as an affirmative denial of the outstanding requests and to take action necessary to protect their municipal interests. We trust that DEP will not allow this to occur." NOA, Attachment C. The DEP Letter followed and then this appeal of the DEP Letter.

The Section 303(d) list is a creature of the federal Clean Water Act. Under the federal Clean Water Act each state is required to compile its own list of impaired waters and to submit that list to EPA every two years for EPA's review and approval. 33 U.S.C. § 1313(d). As we described it in *Lower Salford Township, et al. v. DEP*, 2005 EHB 854,

> Section 303(d) of the CWA, 33 U.S.C. § 1313(d), requires states to identify and prioritize those water bodies within their boundaries for which applicable technology-based effluent limitations or other pollution control mechanisms required by the CWA are not stringent enough to achieve water quality standards applicable to such water bodies. These are so-called Section 303(d) Lists. States are required to send their respective Section 303(d) Lists to EPA for review and approval.

Id. at 855-56. As Appellants point out, the Department is charged with evaluating and revising its Section 303(d) list every two years. 40 CFR § 130.7(d).

Discussion

As we recently set forth in *Perano v. DEP*, EHB Docket No. 2009-119-L (Opinion and Order issued May 26, 2010),

> The determination of whether a particular Department action is reviewable must be done on a case-by-case basis. *Jackson v. DEP*, EHB Docket No. 2009-073-M, slip op. at 6 (Opinion and Order issued April 6, 2010); *Langeloth Metallurgical Co.*, 2007 EHB at 376; *Borough of Kutztown v.*

> *DEP*, 2001 EHB 1115, 1121; *Ford City v. DER*, 1991 EHB 169, 172. To determine whether a certain action is appealable, we will consider the specific wording of the communication, its purpose and intent, the practical impact of the communication, its apparent finality, the regulatory context, and the relief which the Board can provide. [citations omitted]

Perano, slip op. at 7. Under these standards, the Letter is not appealable.

Appellants say that discovery is necessary and that the matter is premature to deal with on a motion to dismiss. We disagree. We are fully able to deal with this motion on the record as is and upon the briefs of the parties. Appellants seem to suggest that no motion to dismiss based on jurisdiction is ever ripe for disposition without discovery. This is obviously not so. They cite to *Stern v. DEP*, 2001 EHB 628, as exemplary, but in that case the motion was a motion to dismiss, or in the alternative, for summary judgment and it was not brought until after discovery had closed.

The DEP Letter on its face is purely descriptive and not proscriptive. The letter imposes no mandatory requirements or duties upon Appellants. No rights or obligations have been imposed or created by the letter. The DEP Letter merely states a fact, *i.e.*, the TMDLs have been appealed to the Board, and an opinion, *i.e.*, the Department continues to believe that the appropriate forum to determine the validity of the TMDLs is in federal court.

The DEP Letter does not "deny" anything. It does not "deny" Appellants' purported request that the Department reconsider nutrient impairment determinations for Goose, Indian, and Paxton Creeks. Appellants concede as much in their Notice of Appeal that states that the Department "has failed to respond to, or even acknowledge, the Appellants' request [that it reconsider nutrient impairment determinations]." Notice of Appeal, ¶ 11.

This de-listing request of Appellants' is not subject to any statutory or regulatory authority and imposes no duty upon the Department. This case is very different, then, from the cases cited by Appellants where the law creates a structure of request accompanied by mandatory duty to grant or deny the request. For example, in the NPDES permit forum, regulations provide for a permittee to make a request that its permit be modified. *See Perano v. DEP, supra.* Likewise, under the Sewage Facilities Act, a private party may make a "private request" with the Department requesting that the Department order a municipality to revise its official sewage plan. 35 P.S. § 750.5(b), 25 Pa. Code § 71.14. There is no such structure with respect to a request that the Department reconsider a nutrient impairment determination. Indeed, the contrary is true with respect to the states' development of its list of impaired waters. As we pointed out before, federal law provides for a process of biennial submission by the states for EPA review and approval of the states' respective Section 303(d) lists. 40 CFR § 130.7(d). The Department's *Draft Integrated Water Quality Report for 2010*, which is attached as an exhibit to Appellants' Reply Brief, sums it up well by saying that "[w]aterbody assessment is a continuous process." Reply Brief, p. 10, n. 7 and Attachment 1. So the law sets out a system of continuous review and re-review of Section 303(d) lists with a periodical deliverable every two years.

Appellants say that DEP routinely engages in listing and de-listing determinations before, during and after TMDL action. That is certainly right in line with the process and practice that we just described and that Appellants point out in their reference to the Department's *Draft Integrated Water Quality Report for 2010.* While it is conceivable or even routine practice that DEP may choose to re-review a particular waterway's

presence on the Section 303(d) list at any time and/or propose to take a particular waterway off the Section 303(d) list at any time, the Appellants' attempt to construct a mandatory review and response at their demanded time and with their demanded deadline, an "alternative private letter request process" as DEP labels it, is antithetical to the statutory and regulatory structure.

The Appellants seem to see it this way also. Besides the references in their Reply Brief to DEP routinely engaging in listing and de-listing and their quote from the Department's *Draft Integrated Water Quality Report for 2010* that "waterbody assessment is a continuous process", their letter dated November 9, 2009 says that a state "is free" to subsequently modify its Section 303(d) list and that "there is nothing that prevents an agency from removing the water body from the state's impaired list or 'de-listing' a water for a particular pollutant." NOA, Attachment C. There is no compulsion or requirement, though, that the state act at the time demanded and with a deadline imposed by third parties.

It is in this context also that it can be readily seen why the Appellants worded the last two sentences of their June 9, 2010 letter the way they did. But, parties cannot create appealable actions by sending letters to DEP that say that "[i]f responses are not promptly received, [we] will have no other option but to treat the Department's repeated failure to respond as an affirmative denial of the outstanding requests and to take action necessary to protect their municipal interests" and then appealing when a response is received, or where a response is not received for that matter. The conclusion of the letter is simply a rather transparent attempt to manufacture jurisdiction where none exists.

The DEP Letter also has no direct, immediate adverse impact on Appellants. Even if the Letter were considered a denial of a request to reconsider the listing of the subject waterways, the mere listing, or de-listing, of a waterway from a state's Section 303(d) list has no immediate adverse impact. In fact, a state's Section 303(d) list submitted to the EPA would not appear to be a final disposition of even what is on the list since, once submitted, it is for the EPA to pass upon the propriety of the list. *Monongahela Power Company v. Division of Environmental Protection*, 567 S.E.2d 629, 638 (W. Va 2002). The *Monongahela* court went on to say that the submission of the Section 303(d) list by the state is merely a recommendation that has no force and effect until approved by EPA and that it is EPA, not the state environmental agency, that issues the order, that constitutes the final disposition of the matter. *Id.*

Even if the state's listing as such of a waterway on the state's Section 303(d) list were construed as a purely state action we still do not see that the state's mere listing or de-listing of a waterway on the Section 303(d) list creates any immediate duties or liabilities which would be the key to appealability to the Board. This principle was most recently restated by the Commonwealth Court in affirming this Board's decision on the point in *Pickford v. DEP*, 967 A.2d 414, 420 (Pa. Cmwlth. 2008) (DEP letter not appealable because the letter did not affect Pickford's personal or property rights). As the Missouri Supreme Court observed in *Missouri Soybean Association v. Missouri Clean Water Commission*, 102 S.W.3d 10 (Mo. 2003) with respect to listing on the Section 303(d) list,

> The State's impaired waters list requires no change in the appellants' conduct. It does not command them to do anything, nor refrain from doing anything. As explained earlier, no rights or obligations have been created. And, with nothing to comply with, there are no possible

> penalties for noncompliance. There are many steps remaining before the appellants may be required to alter their conduct. As explained earlier, controls to decrease water pollution will not come into play, if at all, until after TMDL's are developed and implemented.

Id. at 49-50. The same is true here.

Appellants claim that listing on the Section 303(d) list in and of itself requires them to "greatly improve plant performance and are prohibited from expanding operations so long as the listings are in place." Reply Brief, p. 16. This would not seem to be borne out by the federal regulation they cite, 40 C.F.R. § 122.44(d), nor the cases they cite for this proposition.[1] 40 C.F.R. § 122.44 is entitled "[e]stablishing limitations, standards, and other permit conditions applicable to State NPDES programs". As the title suggests, this regulation sets forth certain conditions that apply to NPDES permits and NPDES permitting. It does not provide that listing on the 303(d) list requires plant upgrades. Both cases cited by Appellants were NPDES permit appeal cases. The *Community For A Better Environment v. State Water Resources Control Board*, 109 Cal. App. 4th 1089 (Cal. Ct. App. 2003), was an appeal of an amended permit for the facility involved there. The case of *In Re Alexandria Lake Area Sanitary District*, 763 N.W.2d 303 (Minn. 2009), likewise, dealt with an appeal of the Minnesota environmental agency's reissuance of a permit. The Court held in that context that 40 C.F.R. § 122.44(d)(1)(vi)(A) provided the authority to the Minnesota environmental agency to reissue the permit.

Appellants also make a vague claim that, per 40 C.F.R. § 122.4(d), until a stream is de-listed any discharger (or potential discharger) upstream of Goose, Indian, and

[1] 40 C.F.R. § 122.44 is incorporated by reference into Pennsylvania regulation at 25 Pa. Code § 92.2(b)(14).

Paxton Creek are also regulated and that this "affects local growth".[2] Reply Brief, p. 16. We do not see how the claim Appellants make follows from the regulation they cite. 40 C.F.R. § 122.4(d) provides that no NPDES permit can be issued "when the imposition of conditions of the permit do not provide for compliance with the applicable requirements of the CWA, or regulations promulgated under the CWA." 40 C.F.R. § 122.4(d). The regulation, again, deals with NPDES permitting, specifically when an NPDES permit cannot be issued. The section does not even prohibit outright the issuance of any permits; it only prohibits the issuance of one when permit conditions would not be adequate to provide for compliance with the CWA. The denial of an NPDES permit under 40 C.F.R. § 122.4(d), which would certainly be an appealable action, is not what this case is. In addition, these Appellants could not assert the rights of others, *i.e.*, upstream dischargers and potential dischargers (whatever and whoever a "potential discharger" might be), even if those other parties had such rights to assert.

Finally, it is worth noting that even if Appellants were to hit the proverbial home run and succeed in forcing the removal of these waterways from the state's impaired waters list, this does not mean that the TMDLs that are the core of their challenge would necessarily thereby immediately be gone as they assert. The very recent case of *Anacostia Riverkeeper v. Jackson*, 2010 U.S. Dist. LEXIS 51440 (D.D.C., May 25, 2010), although not directly on point since it dealt with a substantive challenge to TMDLs and not to the Section 303(b) list, is illustrative and instructive. In that case the appellants were successful in their challenge to the merits of the TMDLs at issue and the Court decided that the TMDLs were invalid and must, therefore, be vacated. However,

[2] 40 C.F.R. § 122.4 is incorporated by reference into Pennsylvania regulation at 25 Pa. Code § 92.2(b)(2).

the Court decided that it would grant EPA's request for a stay of *vacatur* of the invalid TMDLs until January 1, 2017 because "neither the Court, nor the parties, wants the District of Columbia waters at issue in this action to go without pollutant limits while EPA develops new pollutant limits, which will obviously take some time." *Id.* at 15.

Conclusion

For the reasons we have discussed, we will grant the Department's Motion to Dismiss. An appropriate Order consistent with this Opinion follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TELFORD BOROUGH AUTHORITY, BOROUGH OF WEST CHESTER, WEST GOSHEN SEWER AUTHORITY, LOWER PAXTON TOWNSHIP, HOME BUILDERS ASSOCIATION OF METROPOLITAN HARRISBURG, THE HARRISBURG AUTHORITY, and THE CITY OF HARRISBURG	:	
v.	:	**EHB Docket No. 2010-111-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER GRANTING MOTION TO DISMISS

AND NOW, this 7th day of September, 2010, IT IS HEREBY ORDERED that the Department of Environmental Protection's Motion To Dismiss this appeal is **granted** and this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

MICHAEL L. KRANCER
Judge

Judge Richard P. Mather, Sr., recused himself and did not participate in this matter.

DATED: September 7, 2010

c: **DEP, Bureau of Litigation:**
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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

CMV SEWAGE COMPANY, INC.	:	
	:	
v.	:	
	:	**EHB Docket No. 2009-105-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and NORTH CODORUS TOWNSHIP and NORTH CORDORUS TOWNSHIP SEWER AUTHORITY, Intervenors	:	**Issued: September 8, 2010**

OPINION IN SUPPORT OF ORDER GRANTING MOTION IN LIMINE

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants a motion in limine precluding the testimony of two expert witnesses who were identified for the first time in the Appellant's pre-hearing memorandum filed approximately three weeks prior to the hearing on the merits. The Board finds that the identification of the expert witnesses at this late stage in the proceedings is prejudicial to the Department and the Intervenors.

OPINION

This appeal concerns a permit condition included in permits issued to CMV Sewage Company, Inc. ("CMV") by the Department of Environmental Protection (the "Department") for CMV's sewer plant serving the Colonial Crossings development in York County. The permit condition at issue reads as follows:

> This permit authorizes the discharge of treated sewage until such time as facilities for conveyance and treatment *at a more suitable location* are installed and are capable of receiving and treating the permittee's sewage. Such facilities must be in accordance with the applicable municipal official plan adopted pursuant to Section 5 of the Pennsylvania Sewage Facilities Act, the Act of January 24, 1956, P.L. 1535, as amended. When such municipal sewerage facilities become *available*, the permittee shall provide for the conveyance of the sewage to these sewerage facilities, abandon the use of the sewage treatment plant thereby terminating the discharge authorized by this permit, and notify the Department accordingly. This permit shall then, upon notice from the Department, terminate and become null and void, and shall be relinquished to the Department.

(NPDES Permit Part C.I.D (emphases added).) Thus, the permit sets forth three basic conditions precedent to the obligation to cease discharging:

1. Alternate facilities for conveyance and treatment must be installed and capable of receiving and treating the permittee's sewage; i.e., must be "available";

2. The alternate facilities must be at a "more suitable location"; and

3. The alternate facilities must be "in accordance with" applicable official plans.

Based upon the permit condition, the Department on July 7, 2009 denied CMV's application for renewal of its NPDES permit because, in its view, the North Codorus Township Sewer Authority's system is now available, more suitable, and in accordance with North Codorus Township's Official Plan. The Intervenors, North Codorus Township and the North Codorus Township Sewer Authority, support this position. CMV disagrees, arguing among other things that the Sewer Authority's system is not "legally available" because the Pennsylvania Public Utility Commission ("PUC") disapproved the terms pursuant to which CMV proposed to abandon service. As we said in our recent Opinion and Order on Motions for Summary Judgment (issued July 22, 2010), determining whether a facility at a "more suitable

location" is "available" and "in accordance with" applicable plans is heavily case-specific and fact-dependent.

CMV appealed the Department's denial of its reissuance application on August 5, 2009. We initially gave the parties until February 3, 2010 to complete discovery. After some additional extensions at the parties' request, we extended the deadline further until the total period for discovery eventually exceeded 250 days. The Department served written discovery on CMV on March 5, 2010. CMV responded to the Department's standard expert interrogatories by stating that it had not yet identified its expert witnesses, but that it would supplement its interrogatory responses in accordance with the Pennsylvania Rules of Civil Procedure. In fact, CMV never supplemented its responses. On Friday, August 13, one year after the appeal was filed, four months after discovery closed, and three weeks before the hearing on the merits, CMV filed its pre-hearing memorandum, which for the first and only time identified two expert witnesses that it proposed to call in its case in chief. The experts had never been previously identified.

CMV's pre-hearing memorandum identified Paul DeAngelo as an expert in biology and provided a one-paragraph summary of his proposed testimony. The memo also identified James Holley, who CMV retained

> as an expert in Civil Engineering, Sewage Facilities Collection and Treatment, Act 537 Planning, Water Distribution, Storage and Treatment, Subdivisions/Land Development Planning, DEP Sewage Planning Modules, and Municipal Projects. Mr. Holley will testify regarding the development, maintenance, and operations of the CMV sewage treatment plant, the level and nature of treatment achieved at the CMV facility, permitting of the CMV facility, and the associated Act 537 planning modules associated with the plant. He also will testify concerning the CMV facility being an environmentally-preferable facility and more suitable facility over the Township's facility.

(Appellant's Pre-Hearing Memorandum, p. 17.) CMV did not list DeAngelo or Holley as fact witnesses. CMV did not provide expert reports with its pre-hearing memorandum. CMV eventually provided an incomplete expert report for DeAngelo on August 26, approximately two weeks before the hearing, and promised to provide a report for Holley sometime during the week prior to the hearing.

The Department and Intervenors filed a joint motion in limine asking us to preclude DeAngelo and Holley from testifying at the hearing scheduled to begin next week. They complain mightily about the late notice and object to the postponement of the hearing as a way of curing the prejudice they have suffered as a result of CMV's late disclosure.

CMV in response argues that it told the Department and Intervenors at a deposition in May that it planned to call as yet unidentified expert witnesses. It characterizes DeAngelo's testimony as "rebuttal testimony." It says that the Intervenors are familiar with the Holley firm. It says it used its "best efforts" to identify experts, but concedes that it did not retain them until August. It says that it was focused on settlement, and it argues that our Opinion denying summary judgment made it even clearer that it would need expert testimony. It says that the experts' testimony will help clarify important issues. Finally, it argues that it has the most to lose in the event of continuance because its permit expires in November and yet CMV is willing to agree to a postponement. It attached a partial expert report for DeAngelo to its response and promised to provide a report for Holley in the middle of the following week, i.e., a few days before the hearing. It also filed a "supplemental pre-hearing memorandum" on August 26, which adds a paragraph to the description of Holley's testimony and lists Holley and DeAngelo in the alternative as fact witnesses. We granted the motion in limine by Order dated August 31, 2010. This Opinion is submitted in support of that Order.

With a few exceptions, discovery proceedings before the Board are governed by the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102. Full disclosure of a party's case underlies the discovery process. *Pennsylvania Trout v. DEP*, 2003 EHB 652, 657. We recently clarified our pre-hearing procedures regarding discovery by explaining that Rule 1021.101(a) makes clear that answers to *all* forms of discovery, expert and non-expert, are due 30 days after service of the discovery request. 25 Pa. Code 1021.101(a); *Cecil Township Municipal Auth. v. DEP*, EHB Docket No. 2009-123-R (Opinion and Order, August 16, 2010), *slip op.* at 4; *Rural Area Concerned Citizens v. DEP*, EHB Docket No. 2008-327-R (Opinion and Order, April 27, 2010), *slip op.* at 6. In other words, there is no extended or separate timeframe for responding to expert discovery.

By disclosing its experts this late in the game, CMV has without a doubt violated our pre-hearing procedures and well-established Board precedent. Identification of expert witnesses at such a late stage defeats the purpose of discovery which is to prevent surprise and unfairness and to allow a fair hearing on the merits. *Rural Area Concerned Citizens v. DEP*, *supra*, *slip op.* at 5 (citing *Maddock v. DEP*, 2001 EHB 834). As we stated in *Rural Area Concerned Citizens*, "this Board has consistently held that expert witnesses, along with their qualifications, opinions and bases for the opinions, must be provided in response to discovery inquires." *Slip op.* at 3 (citing *Midway Sewerage Auth. v. DER*, 1991 EHB 1445 and *Chernicky Coal Co. v. DER*, 1985 EHB 360).

Disclosure of witnesses is arguably the most important obligation that arises in the course of discovery. In fact, with respect to expert witnesses, the Rules of Civil Procedure specifically provide:

> An expert witness whose identity is not disclosed in compliance with subdivision (a)(1) of this rule shall not be permitted to testify

> on behalf of the defaulting party at the trial of the action. However, if the failure to disclose the identity of the witness is the result of extenuating circumstances beyond the control of the defaulting party, the court may grant a continuance or other appropriate relief.

Pa.R.Civ.P. 4003.5(b). With respect to all other witnesses the rules similarly provide:

> A witness whose identity has not been revealed as provided in this chapter shall not be permitted to testify on behalf of the defaulting party at the trial of the action. However, if the failure to disclose the identity of the witness is the result of extenuating circumstances beyond the control of the defaulting party, the court may grant a continuance or other appropriate relief.

Pa.R.Civ.P. 4019(i). These rules as written would suggest that we *must* not allow DeAngelo or Holley to testify unless there are extenuating circumstances beyond the control of the defaulting party, CMV. Notwithstanding the mandatory language of the rules, the courts and this Board have traditionally taken a less Draconian approach that considers, among other things, the prejudice caused to each party by allowing or excluding the testimony and the extent to which the prejudice can be cured. *Rhodes and Valley Run Water Co. v. DEP*, 2009 EHB 237; *DEP v. Angino*, 2006 EHB 278.

None of CMV's reasons for its late disclosure rise to the level of justifiable extenuating circumstances beyond its control or otherwise excuse its conduct. Informing opposing counsel at a deposition on May 26 that CMV would be offering unidentified expert testimony at some undisclosed time is obviously not helpful. Parties should not have to guess or predict at who might testify at trial or what that testimony might entail. *Rural Area Concerned Citizens, supra, slip op.* at 5. CMV is incorrect in suggesting that DeAngelo would present "rebuttal evidence." As we explained in *Rhodes, supra*,

> Rebuttal is the evidence presented by the party who had the initial burden of production and who presented the first case in chief. If either party wishes to have a witness testify in that party's *case in*

> *chief*, the rules of prehearing disclosure apply to that witness. It is as simple as that.

2009 EHB at 244. Here, CMV bears the burdens of production and proof. DeAngelo would have needed to be called in CMV's case in chief, not in "rebuttal." Arguing that the Intervenors should have some familiarity with the firm that employs one of the experts falls far short of meaningful disclosure. CMV in no sense can be said to have used its "best efforts" when it allowed months to go by without supplementing its discovery responses. Contrary to CMV's suggestion, working toward a settlement and preparing for litigation are not mutually exclusive activities over the course of a year, particularly where, as here, a hearing to be held in September was scheduled in April.

The submission of an incomplete expert report for DeAngelo approximately two weeks before the hearing and promising to supply a report for Holley approximately two business *days* before the hearing obviously do not cure the prejudice caused by CMV's late disclosure. CMV points out that the experts would testify regarding issues of central importance in the case, but that only accentuates the prejudice that CMV has brought upon the Intervenors and the Department. Expecting the Intervenors and the Department to prepare to cross-examine these witnesses and elicit direct testimony of their own witnesses in response to this new evidence in the days remaining before the hearing is simply out of the question. This is a clear case of trial by ambush. Prejudice to the opposing parties is self-evident.

The question, then, is what to do about it. At times, the Board has found it appropriate to postpone hearings to allow the prejudiced party time to conduct additional discovery. *See, e.g., Rural Area Concerned Citizens, supra*; *UMCO v. DEP*, 2005 EHB 546. Here, however, the Department and Intervenors have consistently opposed any further delays in this appeal, arguing that they require expeditious resolution due to limited resources and limited time. In their

petition to intervene, the Intervenors alleged by sworn verification that, as a result of loss of revenue to the Authority being caused in part by the failure of CMV to connect, the "Authority is unable to fully meet its bond obligations in 2010, and expects a shortfall in excess of $500,000 for which the Township is a guarantor." The Intervenors further alleged: "In the event the Authority is unable to meet its bond obligations, the Township as a Guarantor, with its taxing ability, will be obligated to make payments." In opposition to one of CMV's extension requests, the Intervenors argued that the Township was experiencing financial hardship every day that the Colonial Crossings development was not connected to its system, which they said was built with the expectation that the development would connect when the lines were made available. The Intervenors submitted a sworn affidavit that averred, in part, as follows:

> 2. North Codorus Township Sewer Authority relied upon written and oral representations by CMV and its principles and prior PA DEP approvals in designing and constructing the Authority's wastewater treatment plant.
>
> 3. Due to CMV's failure and refusal to connect its existing and future development units currently connected to the private CMV wastewater treatment plant to the North Codorus Authority treatment plant, the Authority was forced to raise its sewer rates to $1,000.00 per year, from $800.00 per year. The Authority Board does not believe that the public system customers can handle a more significant rate increase at this time.
>
> 4. Due to CMV's failure and refusal to connect its existing development units currently connected to the private CMV wastewater treatment plant to the North Codorus Township Authority treatment plant, the Authority is projected to have approximately a $450,000 budget shortfall as of the fall of 2010. Without additional customers, the budget shortfall is projected to increase after 2010.
>
> 5. Due to CMV's failure and refusal to connect its existing development units currently connected to the private CMV wastewater treatment plant to the North Codorus Township Authority treatment plant, the Authority and Township are considering a short term loan to fund certain necessary expenses until the matter is resolved through the courts and before the Environmental Hearing Board.

6. North Codorus Township cannot allow this matter to languish in the litigation process through a second extension of time for discovery. Time is of the essence for these public entities and the customers of the North Codorus Township Sewer Authority need resolution of these issues.

The Intervenors argue that the Township will need to determine in the next month or so "whether they must raise property taxes throughout North Codorus Township in 2011 to service debt resulting from issues in [this appeal]." Although CMV has argued that the Intervenors' financial straights are not relevant to the merits, they have never denied that the Intervenors are suffering the hardships alleged, and we have no reason to discredit the Intervenors' contentions. The Department and Intervenors add that further delay in this appeal could affect related litigation in York County and before the Commonwealth Court. Again, CMV does not dispute this contention. Of course, a postponement will cause all of the parties to incur additional expense. CMV states that it would not oppose postponing the hearing and asserts that it will suffer the most harm from any delay because its permit will not be renewed in November and it faces possible sanction from the PUC if it is not able to, among other things, negotiate an acceptable transfer arrangement before its permit expires. All that this proves is that *everyone* will be harmed by delay. We also see it to be very much in the public interest to get this unsettled situation resolved as quickly as possible, not only for the parties but for their various ratepayers and taxpayers as well.

Thus, we are faced with a situation where CMV has committed a serious discovery violation, the non-defaulting parties will suffer obvious prejudice, and postponement is not an acceptable option for curing the default. Our only recourse at this point is to exclude the testimony. While we are mindful that the exclusion of these expert witnesses' testimony is a serious step, we are equally mindful of the need to enforce our discovery rules and our orders

and ensure that all litigants before the Board are treated fairly. To that end, the Board has previously excluded proposed expert witnesses where the identity and nature of the proposed experts was not revealed until very late in the process or the opposing party was otherwise prejudiced by the late disclosure of such experts. For example, in *McGinnis v. DEP,* EHB Docket No. 2007-197-R (Opinion and Order, June 9, 2010), the appellants did not identify experts in response to expert discovery during the designated discovery period. Instead, the appellants identified several expert witnesses for the first time in their pre-hearing memorandum, which was filed approximately one month before the hearing. Some of the experts did not prepare expert reports or complete answers to expert interrogatories. Noting that further delay would force the innocent parties to incur additional financial burdens while enabling the appellants to make "a mockery of the discovery process," we precluded most of the expert witnesses from testifying, finding that such late-stage identification of expert witnesses was "extremely prejudicial" and also strained "the fabric and integrity of the litigation process before the Board." *Slip op.* at 5-6; *see also DEP v. Land Tech Engineering*, 2000 EHB 1133 (precluding expert testimony where the offering party failed to provide complete responses to expert interrogatories in defiance of Board orders); *Midway Sewerage Auth. v. DEP*, 1990 EHB 1554 (precluding an expert from testifying because he was not identified until one month before the hearing and no extenuating circumstances existed to justify "the failure to disclose this witness until the last possible moment").

Although precluding DeAngelo's and Holley's expert testimony is a serious step, the impact on CMV's case might not be as significant as first it might appear. As its Plan B, CMV has asked for permission to present the testimony of DeAngelo and Holley as "fact witnesses." While DeAngelo's testimony cannot be legitimately classified as "factual testimony," we will

allow Holley to testify as to factual matters in lieu of a previously identified engineer in Holley's firm. We suspect that the factual testimony will cover a significant majority of what Holley's testimony would have been absent our Order. Neither the Department nor the Intervenors have listed an engineering expert in their pre-hearing memoranda. As to DeAngelo, the impact of the various sewer plants on the receiving streams' fauna might not, at least preliminarily, figure to be a deciding factor in this case, particularly because there is no comparative information being presented by the Department regarding the impact of the Authority's plant on its receiving stream, and because CMV's plant appears to be meeting its permit limits. The impact of CMV's plant may not prove to be a basis for ceasing the discharge, and the absence of an impact may not prove to be a basis for allowing the discharge to continue.

A copy of the Order issued on August 31, 2010 is attached.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: September 8, 2010

c: **DEP, Bureau of Litigation:**
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MARYANNE WESDOCK
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CMV SEWAGE COMPANY, INC.	:	
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v.	:	
	:	**EHB Docket No. 2009-105-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and NORTH CODORUS TOWNSHIP and NORTH CORDORUS TOWNSHIP SEWER AUTHORITY, Intervenors	:	

ORDER

AND NOW, this 31st day of August, 2010, it is hereby ordered that the motion in limine of the Department of Environmental Protection and Intervenors is **granted**. The Appellant is precluded from calling Paul J. DeAngelo and James R. Holley as expert witnesses at the hearing on the merits. An opinion in support of this order will follow.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: August 31, 2010

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

JAMES E. BARCHIK	:	
	:	
v.	:	**EHB Docket No. 2010-108-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 10, 2010**

OPINION AND ORDER ON MOTION TO QUASH APPEAL AND PETITION FOR ALLOWANCE OF APPEAL *NUNC PRO TUNC*

By Michael L. Krancer, Judge

Synopsis:

The Board dismisses as untimely an appeal of a Department Order dated November 20, 2009 which Appellant admits was left on his porch on December 8, 2009 and was in his possession in January 2010. The Board also denies Appellant's request that the appeal be allowed *nunc pro tunc* as there are no grounds therefor.

OPINION

Introduction

Before the Board is the Department's Motion to Quash Appeal (Motion) of James E. Barchik (Mr. Barchik or Appellant) for untimely filing of his Notice of Appeal (NOA) beyond the Board's thirty day appeal period. We will consider the Motion a motion to dismiss. Also before us is the Appellant's Petition To Appeal *Nunc Pro Tunc* (Petition).

Factual & Procedural Background

The Order appealed from is dated November 20, 2009. The appeal was filed on July 9,

2009. The Order relates to Appellant's property located in Fairmont Township, Luzerne County which crosses over into Benton Township, Columbia County (Site). In short the Order states that a series of 28 dams with attendant encroachments had been illegally constructed across the East Branch Raven Creek on Appellant's property. These activities, the Order states, violate the Dam Safety and Encroachments Act, 32 P.S. §§ 693.1-693.27 and the Clean Streams Law, 35 P.S. §§ 691.1-691.1001, and the respective regulations promulgated under each act. The Order requires Mr. Barchik to, among other things, retain a qualified environmental consultant who shall design a plan to remove the dams and restore the affected segment of the stream.

Appellant's NOA and the Petition were both filed on July 9, 2010, seven and a half months after the date of the Order. The NOA states that "order was left on Barchik's porch in December of 2009 while he was out of town. He does not recall precisely when he found the Order and accompanying documents." NOA ¶ 2(d). In the Petition, Barchik states that the Order was indeed left on Mr. Barchik's porch on December 8, 2009 but that it sat unread and unanswered because he, Mr. Barchik, lives alone and uses a different entry and exit from his house through a garage. Petition ¶ 3. In addition, on or about December 15, 2010 he traveled out of state during the Holiday Season. *Id.* ¶ 4. Mr. Barchik, though, admits that he was in possession of the Order by January 2010 as the Petition goes on to state that he was prevented from acting on the Order "*until January 2010* when he reasonably expected that he would be unable to take an appeal from or otherwise challenge the Order because thirty (30) days had lapsed from December 8, 2009." *Id.* ¶ 6 (emphasis added).

On February 10, 2010 DEP filed a Petition to Compel Compliance with its Order in the Common Pleas Court of Columbia County. DEP Motion ¶ 5. That case bears Columbia County Common Pleas Court Docket No. 2010-CV-227. As evidenced by the Luzerne County

Sheriff's Department return of service, which was provided to us as Exhibit A to DEP's Reply to Appellant's Response to the Motion (DEP Reply), the Sheriff effectuated personal service upon Barchik of the DEP Petition to Compel Compliance with its Order at 12:35 p.m. on March 16, 2010. Not surprisingly, the November 20, 2009 DEP Order was the proverbial, and in this case literal, "Exhibit A" to the DEP Petition which was served. DEP Reply ¶ 1. Three days later, on March 19, 2010, counsel for Mr. Barchik, a different one that is counsel for him now, entered an appearance on behalf of Mr. Barchik in the Common Pleas Court action. DEP Reply, Ex. B. The Common Pleas Court action has been stayed by that Court pending the outcome of the Environmental Hearing Board litigation.

DEP's Motion was filed with us on August 10, 2010. DEP points out in the Motion that on June 21, 2010, in the course of the Common Pleas Court litigation, Barchik filed a stipulation which states "it is herewith STIPULATED that Respondent James E. Barchik received the November 20, 2009 Administrative Order of the Department on December 8, 2009." *Id.* Ex. B. Two weeks after DEP filed the instant Motion, which refers to and attaches a copy of that Stipulation, Barchik filed on August 23, 2010, a Praecipe with the Common Pleas Court to withdraw the Stipulation just mentioned. Appellant's Response to Motion to Quash Appeal, Ex. A. Neither the Stipulation nor the Praecipe to withdraw it are factors in our analysis. However, it is clearly no mere coincidence that Barchik sought to take back the Stipulation two weeks after DEP filed the Motion now before us which refers to and attaches a copy of the Stipulation.

Discussion

Under our Rules, for an appeal to be timely, it must be field "within 30 days after [the person] has received written notice of the action." 25 Pa. Code § 1021.52(a)(1). There is obviously no question that the appeal was untimely filed having been filed seven months after the

Order was left on Barchik's porch, six months after he admits it was in his possession and three and a half months after the Sheriff's return of service in the Common Pleas lawsuit to enforce compliance with the Order shows that the Sheriff effectuated personal service of that suit upon Barchik. The Appellant does not and cannot dispute these facts or that, therefore, his appeal was untimely.

It is also very clear that Barchik's request that his appeal be allowed *nunc pro tunc* must be denied. For an appeal to be allowed *nunc pro tunc* the Appellant must show "good cause." 25 Pa. Code § 1021.53a. As we stated in *Eljen v. DEP*, 2005 EHB 918,

> The Pennsylvania Supreme Court provided guidance on when an appeal *nunc pro tunc* is appropriate in *Bass v. Commonwealth, 401 A.2d 1133 (Pa. 1979),* noting that "the time for taking an appeal cannot be extended as a matter of grace or mere indulgence." *Id. at 1135.* An appeal *nunc pro tunc* is appropriate when "there is fraud or a breakdown in the court's operation [or] there is a non-negligent failure to file a timely appeal which was corrected within a very short time, during which any prejudice to the other side of the controversy would necessarily be minimal." *Id. at 1135-36. See also, e.g., Greenridge Reclamation LLC v. DEP,* EHB Docket No. 2005-053-L (Opinion issued April 21, 2005) (and cases cited therein); *Pedler v. DEP,* 2004 EHB 852, 854 (quoting *Bass*); *Dellinger v. DEP,* 2000 EHB 976, 982 (quoting *Bass*).

Id. at 933. It is clear here that Barchik's case is not even close on any of these criteria.

First, there was no breakdown in this court's operation at all. Barchik does not seem to contend that there was. He does state in the Petition that there was a breakdown in the DEP's operations in that DEP failed to "properly instruct [Mr. Barchik] as to what constitutes a qualified environmental consultant, as required by the Order". Petition ¶ 7. We do not even see that this can accurately be characterized as a breakdown of DEP's operations but, even if it were, it is not a breakdown of the court's operations.

Second, there is no non-negligent failure to file a timely appeal. We have stated in the past that there must be "unique and compelling factual circumstances establishing a non-

negligent failure to file a timely appeal." *Robinson Coal v. DEP*, 2007 EHB 139, 145, *citing Falcon Oil Company v. DER*, 609 A.2d 876, 878 (Pa. Cmwlth. 1992); *see also Grimaud v. DER*, 638 A.2d 299 (Pa. Cmwlth. 1994); *Bass v. Commonwealth*, 401 A.2d 1133, 1135 (Pa. 1979); *Martz v. DEP*, 2005 EHB 349, 350; *American States Insurance Co. v. DER*, 1990 EHB 338. Barchik admits that in January 2010 he came into possession of the Order. Also, obviously, by sometime after February 10, 2010 when DEP filed the Common Pleas lawsuit, and certainly by no later than March 16, 2010, when the Sheriff personally served that suit on Mr. Barchik, Mr. Barchik had written notice of the Order and was in possession of the Order. There is nary an excuse offered at all let alone one presenting unique or compelling facts establishing non-negligent failure to file a timely appeal.

Third, what we just discussed about the absence of non-negligent failure to file a timely appeal also shows that Barchik did not correct the failure in a short time. Mr. Barchik had many bites at this apple. He could have and should have filed the appeal in January 2010 when he said he came into possession of the Order. In February 2010 DEP knocked him over the head with a Common Pleas Court lawsuit seeking enforcement of the Order. As noted earlier, Barchik received personal service of that lawsuit on March 16, 2010. He could have and should have filed then. It is quite unfathomable why or how an appeal that could have and should have been filed in January 2010, or at the latest on April 16, 2010, was not filed until July 9, 2010. We need not speculate whether or not a petition for *nunc pro tunc* which might have been filed at any of those earlier times would have been successful or whether the appeal filed at one of those earlier times might have been deemed to have been timely filed outright without being treated *nunc pro tunc*. We do think, in that regard, that simply leaving an Order on someone's porch without taking any other steps such as effectuating personal service or mailing a copy return

receipt requested to ensure that the person obtains possession of the Order and to document for the record when he obtained possession of the Order is unwise and very bad practice. The next case probably will not have an associated Common Pleas court lawsuit with a neatly wrapped return of personal service from the County Sheriff. The time line in this case, however, shows beyond question that, for present purposes, a July 9, 2010 filing of the NOA is not a non-negligent failure to timely appeal nor is it a correction in a short time.

In conclusion, this appeal was filed late and there are no grounds for allowing it *nunc pro tunc* which means we have no jurisdiction and mandates that we dismiss the appeal. *See Falcon Oil Company v. DER*, 609 A.2d 876, 878 (Pa. Cmwlth. 1992); *Burnside v. DEP*, 2002 EHB 700.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAMES E. BARCHIK	:	
	:	
v.	:	**EHB Docket No. 2010-108-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

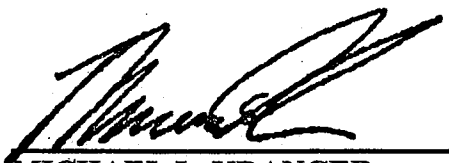
AND NOW, this 10th day of September, 2010, IT IS HEREBY ORDERED that the Department of Environmental Protection's Motion To Quash this appeal is **granted** and the Appellant's Petition to Appeal *Nunc Pro Tunc* is **denied**. This appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge



MICHAEL L. KRANCER
Judge

RICHARD P. MATHER, SR.
Judge

DATED: September 10, 2010

c: **DEP Bureau of Litigation:**
Attention: Connie Luckadoo

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

TRI-COUNTY LANDFILL, INC.	:	
	:	
v.	:	**EHB Docket No. 2010-073-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GROVE CITY FACTORY SHOPS LIMITED PARTNERSHIP, Intervenor	:	**Issued: September 17, 2010**

OPINION AND ORDER
ON MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

An appeal from Department letters informing the permit applicant that the Department suspended its permit reviews pursuant to Act 67/68 because of unresolved zoning conflicts is dismissed because the decision is not a final, appealable decision but is one of many interlocutory decisions the Department will make during the process of reviewing permit applications.

OPINION

This appeal involves a proposed landfill expansion located in Liberty and Pine Townships, Mercer County. In July 2004, Tri-County Landfill, Inc. ("Tri-County") submitted to the Department of Environmental Protection (the "Department") a municipal waste landfill permit application for the expansion of a municipal waste landfill. Additionally, Tri-County

submitted to the Department two permit applications ancillary to the municipal waste permit. Specifically, Tri-County submitted an air plan approval permit application ("plan approval permit") for a flare and for fugitive dust emissions from the site and an application for an NPDES permit authorizing the discharge of treated wastewater into a stream located in Liberty Township. The Pine Township Supervisors commented on both applications by letters dated December 9, 2009 and January 11, 2010. The Supervisors noted that unresolved zoning conflicts existed regarding the proposed landfill expansion, specifically noting an unresolved issue of whether the proposed landfill expansion requires a variance under the Pine Township Zoning Ordinance. As a result, the Department, in letters dated May 3 and May 6, 2010, suspended its review of the plan approval permit application and the NPDES permit application, respectively. Those letters state:

> The Department has completed our recent review in regard to consideration of local comprehensive plans and zoning ordinances with respect to the implementation of Acts 67, 68 and 127 of 2000 in the administration of the Department's program to avoid or minimize conflict with local land use decisions. Based on that review, the Department has recognized a conflict between the submitted project described in your application and Pine Township local zoning laws. The Department will not continue with its review of your application until it receives satisfactory evidence that this conflict has been resolved with Pine Township.

On June 2, 2010, Tri-County filed a notice of appeal with the Board. Tri-County asks us to overturn the Department's determination that Acts 67, 68 and 127 ("Act 67/68") apply to Tri-County's permit applications and its suspension of permit review, and require the Department to proceed with review of Tri-County's permit applications.[1] The Department has filed a motion to

[1] Act 67/68 refers to the Act of June 23, 2000, P.L. 495, amending the Municipalities Planning Code, Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§ 10101-11202, by, in relevant part, adding provisions providing that the Department may consider compliance with local zoning ordinances and county comprehensive plans in its permit review process. The relevant section here provides:

> (a) Where municipalities have adopted a county plan or a multimunicipal plan is adopted

dismiss arguing that the Board lacks jurisdiction to hear the appeal because the decision to suspend review of permit applications is not a final, appealable action.[2] The Intervenor supports this position.[3]

The Department refers us to *HJH, LLC v. DEP*, 949 A.2d 350 (Pa. Cmwlth. 2008). In that case, HJH appealed the Department's decision to suspend its review of a permit application for a proposed municipal waste transfer station. The suspension resulted from the Department's Act 67/68 review of a potential conflict between the proposed project and the local land use regulations. The Commonwealth Court held:

> [T]he Department has not yet taken any appealable action. Act 67/68 review is one small part of a much more complex review of a permit application. The Department has neither approved Petitioner's permit application nor denied it; it has simply suspended technical review of the permit application until such time as the land use conflict is resolved. Such suspension does not constitute an appealable action because it does not affect any of the Petitioner's rights or privileges. Petitioner will not be aggrieved until the Department takes a final action on its permit application.

Id. at 353.

> under this article and the participating municipalities have conformed their local plans and ordinances to the county or multimunicipal plan by implementing cooperative agreements and adopting appropriate resolutions and ordinances, the following shall apply:
>
> (2) State agencies shall consider and may rely upon comprehensive plans and zoning ordinances when reviewing applications for the funding or permitting of infrastructure or facilities.

[2] We are receptive to 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. *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Michael Butler v. DEP*, 2008 EHB 118, 119; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1281. Motions to dismiss will be granted only when a matter is free from doubt. *Northampton Township, et al. v. DEP*, 2008 EHB 563, 570; *Emerald Mine Resources, LP v. DEP*, 2007 EHB 611, 612; *Kennedy v. DEP*, 2007 EHB 511. The Board evaluates motions to dismiss in the light most favorable to the non-moving party. *Cooley, et al. v. DEP*, 2004 EHB 554, 558; *Neville Chem. Co. v. DEP*, 2003 EHB 530, 531.

[3] Two other parties, Citizens' Environmental Association of the Slippery Rock Area ("CEASRA") and Pine Township, have moved to intervene in this appeal. Given our disposition of the Department's motion to dismiss, these petitions are being denied as moot.

We agree that *HJH* is directly on point. There, as here, the Department suspended its permit review pursuant to Act 67/68 as a result of perceived zoning conflicts. The Commonwealth Court unequivocally held that the decision to suspend a permit review does not constitute a final, appealable action. The Board has long recognized that it only has jurisdiction over a *final* decision. 35 P.S. § 7514(a); 25 Pa.Code § 1021.2; *Kennedy v. DEP*, 2007 EHB 511, 512; *PEACE v. DEP*, 2000 EHB 1, 2; *Phoenix Resources, Inc. v. DER*, 1991 EHB 1681. We have consistently held that we will not review the many interim decisions made by the Department during the processing of a permit application. The Board previously explained:

> [I]t was never intended that the Board would have jurisdiction to review the many provisional, interlocutory 'decisions' made by [the Department] during the processing of an application. It is not that these 'decisions' can have no effect on personal or property rights, privileges, immunities, duties, liabilities or obligations; it is that they are transitory in nature, often undefined, frequently unwritten. Board review of these matters would open the door to a proliferation of appeals challenging every step of [the Department's review] . . . process before final action has been taken. Such appeals would bring inevitable delay to the system and involve the Board in piecemeal adjudication of complex, integrated issues. We have refused to enter that quagmire in the past . . . and see no sound reason for entering it now.

Central Blair County Sanitary Authority v. DEP, 1998 EHB 643, 646 (quoting *Phoenix Resources, Inc. v. DER*, 1991 EHB 1681, 1684). The Board then observed:

> Indeed, the Department's review process always involves a certain amount of interplay between the Department and the person who has submitted the application to the Department. *New Hanover Corporation v. DER*, 1989 EHB 1075. Therefore, until the Department has approved or disapproved the application, the Board will not intrude upon the review process.

Id.; *see also Corco Chemical Corp. v. DEP*, 2005 EHB 733, 740; *County of Berks v. DEP*, 2003 EHB 77, 87 n. 5; *Smithtown Creek Watershed Assoc. v. DEP*, 2002 EHB 713, 717; *United Refining Co. v. DEP*, 2000 EHB 132, 133 ("[a]ny number of decisions during a permit review could have costly, real world consequences, but this Board will not review them in a piecemeal

fashion."); *County of Dauphin v. DEP*, 1997 EHB 29, 33; *Svonavec, Inc. v. DEP*, 1997 EHB 537, 541-42; *Epstein v. DER*, 1994 EHB 1471, 1475; *County of Clarion v. DER*, 1993 EHB 573, 576; *New Hanover Corp. v. DER*, 1989 EHB 1075, 1077.

Tri-County tries to distinguish *HJH* factually, noting that the letters suspending review in *HJH* contained additional information beyond that which was included in the Department's May 3 and 6 letters to Tri-County, such as factors the Department considered in making its determination, express mention of a multi-municipal land use plan, and express mention that the proposed transfer station site was not a permitted use under the local zoning ordinances. The May 3 and 6 letters, by contrast, did not contain such particularities. We do not find these discrepancies in the content of the letters to have any bearing whatsoever on our determination of the issue here, namely, whether this appeal involves a final, appealable action. At the end of the day, the amount of detail or explanation set forth in the letters suspending review does not change the fact that the letters do nothing more than suspend review, which is a non-final action.

Tri-County, quite creatively, also tries to avoid *HJH* by arguing that this appeal challenges not just the Department's decision to suspend permit review pursuant to Act 67/68, but also the Department's "initial determination" that the statutory perquisites regarding the applicability of the Acts have been satisfied. For example, in its memorandum of law attached to its response to the Department's motion to dismiss, Tri-County concedes that "[u]nder *HJH*, TCL cannot ask this Board to review DEP's discretionary decision to suspend its review of TCL's permit applications. DEP's initial determination that the Acts apply is the only action available which TCL can ask this Board to review." We reject this attempt to bifurcate the Department's decision process as much too metaphysical, just as we have in several cases in the

past. The Department's "initial determination," if we can call it that, is not an action, let alone a final action. As we explained in *Felix Dam Preservation Ass'n v. DEP*, 2000 EHB 409,

> [W]e recognize that our jurisdiction does not attach to the metaphysical status of DEP's "decision". A decision which is not manifested in any way or not carried out in any way is not appealable. *DER v. New Enterprises Stone & Lime Co.*, 359 A.2d 845, 847 (Pa. Cmwlth. 1975). As the Board very recently said in *Protect Environment and Children Everywhere* ("*PEACE*") *v. DEP*, [2000 EHB 1], a case involving whether DEP's publication for a Request For Proposals for a reclamation project was an appealable action:
>
> > An internal decision to pursue a particular course of action is not enough. Thus, for example, it is the issuance of a compliance order, not a decision to issue the compliance order that is appealable. Perhaps more closely analogous to the situation here, a Department letter stating that it is considering the possibility of taking enforcement action is not in and of itself appealable. *See E.P. Bender Coal v. DER*, 1991 EHB 790, 798-99; *Percival v. DER*, 1990 EHB 1077, 1107-08 (Department letters discussing, among other things, the possibility of future enforcement are not appealable actions); *see also Lower Providence Township Municipal Authority v. DEP*, 1996 EHB 1139, 1140-41 and *M. W. Farmer Co. v. DER*, 1995 EHB 29, 30, (stating that a notice of violation containing a list of violations, the mention of the possibility of future enforcement actions or the procedure necessary to achieve compliance is not an appealable action).
>
> *PEACE*, [2000 EHB 1, 3].
>
> * * *
>
> DEP's bare decision to remove the Dam affects no rights of the Appellants in a manner cognizable for jurisdiction of the Board. No matter how disturbing or distressing the decision of DEP may be to the Appellants, the decision in and of itself has no impact on their rights and liabilities.

Id. at 425-26 (footnote omitted).

When the Department takes final permitting action, there may be other issues lurking of which we are not aware. It is imperative that the Board exercise appropriate judicial restraint and wait to review all of those issues at once, or not at all. *United Refining Company, supra.* To do otherwise "would needlessly draw us into the controversy, complicating and delaying the ultimate decision" of the Department. *County of Berks, supra*, n. 5 (citing *Smithtown Creek*

Watershed Assoc., 2002 EHB at 718). *Accord, HJH, supra* at 353.[4]

Accordingly, we issue the following Order.

[4] Tri-County has asked us to strike the Department's and the Intervenor's reply briefs because they attach factual material in violation of 25 Pa. Code § 1021.94(d) and because they delve into the merits of the Department's action. Tri-County's request is well taken. Section 1021.94(d) of our rules requires that an affidavit or other document relied upon in support of a dispositive motion must be filed at the same time as the motion "or it will not be considered by the Board in ruling thereon." We also have no reason to address the merits of this appeal beyond the jurisdictional issue raised in the Department's motion. Accordingly, we have not considered the factual material filed together with or referenced in the reply briefs in any way in reaching our conclusion today.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TRI-COUNTY LANDFILL, INC.	:	
	:	
v.	:	**EHB Docket No. 2010-073-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GROVE CITY FACTORY SHOPS LIMITED PARTNERSHIP, Intervenor	:	

ORDER

AND NOW, this 17th day of September, 2010, it is hereby ordered as follows:

1. The Department of Environmental Protection's motion to dismiss is hereby **granted**. This appeal is **dismissed**;
2. Tri-County's motion to strike reply briefs is **granted** to the extent those briefs attach or rely upon factual material; and
3. The petitions of Citizens' Environmental Association of the Slippery Rock Area and Pine Township to intervene are **denied** as moot.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

MICHAEL L. KRANCER
Judge

Judge Richard P. Mather, Sr. is recused and did not participate in this decision.

DATED: September 17, 2010

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

DAMASCUS CITIZENS FOR SUSTAINABILITY, INC.	:	
v.	:	**EHB Docket No. 2010-074-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEWFIELD APPALACHIA PA, LLC, Permittee	:	**Issued: September 20, 2010**

OPINION AND ORDER
ON MOTIONS TO DISMISS

By Richard P. Mather, Sr., Judge

Synopsis

The Board grants the Department's and Permittee's unopposed motions to dismiss the appeal of the Department's issuance of an oil and gas well permit where the appeal was filed more than 30 days after the Appellant received actual notice of the issuance of the permit.

OPINION

On April 29, 2010, the Department of Environmental Protection (the "Department") issued Well Permit Number 37-127-20012 ("Well Permit") to Newfield Appalachia PA, LLC ("Newfield"). On June 4, 2010, Damascus Citizens for Sustainability, Inc. ("Damascus") filed a notice of appeal with the Environmental Hearing Board appealing the issuance of the Well

Permit.[1] According to the notice of appeal, Damascus received notice of the Department's issuance of the Well Permit on May 4, 2010.

The Department and Newfield filed separate but nearly identical motions to dismiss arguing that Damascus, having received notice of the Department's action on May 4, 2010, was required by the Board's rules to file a notice of appeal by no later than June 3, 2010.[2] The Department and Newfield argue that the Board does not have jurisdiction to hear this appeal because it was filed on June 4, 2010, one day beyond the June 3 deadline.

Damascus has not responded to either motion within 30 days of service and has yet to file any response as of the date of this Opinion. Thus, the Board deems all properly pleaded and supported facts in the Department's motion to be true. 25 Pa. Code § 1021.91(f); *Tanner v. DEP*, 2006 EHB 468, 469; *Gary Berkley Trucking, Inc. v. DEP*, 2006 EHB 330, 332.

Rule 1021.52 provides that:

> (1) The person to whom the action of the Department is directed or issued shall file its appeal with the Board within 30 days after it has received written notice of the action.
>
> (2) Any other person aggrieved by an action of the Department shall file its appeal with the Board within one of the following:
>
> > (i) Thirty days after the notice of the action has been published in the *Pennsylvania Bulletin*.

---

[1] This appeal is related to several other appeals currently pending before the Board and docketed at 2010-072-M, 2010-076-M, 2010-078-M, 2010-100-M, and 2010-102-M. This is the only appeal among these related appeals in which the issue of timeliness of the appeal has been raised.

[2] We are receptive to 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. *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Michael Butler v. DEP*, 2008 EHB 118, 119; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1281. Motions to dismiss will be granted only when a matter is free from doubt. *Northampton Township, et al. v. DEP*, 2008 EHB 563, 570; *Emerald Mine Resources, LP v. DEP*, 2007 EHB 611, 612; *Kennedy v. DEP*, 2007 EHB 511. The Board evaluates motions to dismiss in the light most favorable to the non-moving party. *Cooley, et al. v. DEP*, 2004 EHB 554, 558; *Neville Chem. Co. v. DEP*, 2003 EHB 530, 531.

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

25 Pa. Code § 1021.52. Because this is a third-party appeal and the issuance of a Well Permit is not an action published in the *Pennsylvania Bulletin*, the applicable rule is 1021.52(2)(ii), which provides 30 days to file an appeal from the day of actual notice of the Department's action. The notice of appeal states "we received notice of the Department action on May 4, 2010 through the Department's eNOTICE system." Thus, the 30 day period for filing an appeal began running on May 4. The Board computes time in accordance with the general rules of administrative practice and procedure. 1 Pa. Code § 31.1; 1 Pa. Code § 31.12. In doing so, time shall be computed to exclude the first day but include the last. 1 Pa. Code § 31.12 ; *York Resources Corp. v. DER,* 1985 EHB 899, 901. Therefore, the 30 day deadline for filing an appeal expired on Thursday, June 3, 2010, making the appeal filed on Friday, June 4, 2010 untimely.[3]

Pennsylvania courts have long held that the failure to timely appeal an administrative agency's action is a jurisdictional defect which mandates the quashing of the appeal. *See Falcon Oil Co., Inc. v. DER*, 609 A.2d 876, 878 (Pa. Cmwlth. 1992); *Cadogan Township Board of Supervisors v. DER*, 549 A.2d 1363, 1364 (Pa. Cmwlth. 1988); *Pennsylvania Game Comm'n v. DER*, 509 A.2d 877, 886 (Pa. Cmwlth. 1986), *aff'd,* 555 A.2d 812 (Pa. 1989); *GEC Enterprises, Inc. v. DEP*, EHB Docket No. 2009-171-M (Opinion and Order issued April 13, 2010); *Weaver v. DEP*, 2002 EHB 273, 276; *Dellinger v. DEP*, 2000 EHB 976, 980. Untimely appeals are granted very little leniency by the court. *See Bass v. Commonwealth,* 401 A.2d 1133, 1135 (Pa.

[3] Under certain exceptional circumstances, the Board's rules provide that an appeal may be filed *nunc pro tunc* beyond the normal 30 day appeal period. 25 Pa. Code § 1021.53a. 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., Grimaund v. DER*, 638 A.2d 299, 303-04 (Pa. Cmwlth. 1994); *Weaver*, 2002 EHB at 279; *Ziccardi v. DEP*, 1997 EHB 1, 6-8. Because the Appellants failed to respond to the Permittee's and the Department's motions, it follows that the Appellants have not asserted any grounds for a *nunc pro tunc* appeal and the Board will not consider this issue further.

1979) ("[T]he time for taking an appeal cannot be extended as a matter of grace or mere indulgence."); *Rostosky v. DER*, 364 A.2d 761, 763 (Pa. Cmwlth. 1976) ("Where a statute has a fixed time within which an appeal may be taken, we cannot extend such time as a matter of indulgence.") Moreover, the Board is not permitted to disregard such a defect and grant an extension of time "in the interests of justice." *See West Caln Township v. DER*, 595 A.2d 702, 705-06 (Pa. Cmwlth. 1991); *Weaver*, 2002 EHB at 277. Accordingly, the untimeliness of the appeal, although only slightly overdue, deprives the Board of jurisdiction over the appeal and operates as a waiver of all legal rights to contest the violation or the penalty amount. *See, e.g., Spencer v. DEP*, 2008 EHB 573, 575 (appeal dismissed because it was filed one day too late); *Pedler v. DEP*, 2004 EHB 852, 854 (same); *GEC Enterprises, Inc., supra* (appeal dismissed because it was filed 33 days after receipt of a civil penalty assessment); *Tanner*, 2006 EHB at 469 (dismissing an appeal of a compliance order where the appeal was filed 32 days after receipt of the order); *Martz v. DEP*, 2005 EHB 349, 350 (dismissing an appeal of an enforcement order where the appeal was filed 41 days after the issuance of the order); *Weaver*, 2002 EHB at 279 (dismissing an appeal where appeal was filed 41 days after the delivery of a civil penalty assessment to the appellant's residence). Likewise, this appeal must also be dismissed even though the uncontested record before the Board establishes that the appeal was filed only one day late.

Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAMASCUS CITIZENS FOR SUSTAINABILITY, INC.	:	
v.	:	**EHB Docket No. 2010-074-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEWFIELD APPALACHIA PA, LLC, Permittee	:	

ORDER

AND NOW, this 20th day of September, 2010, it is hereby ordered that the Department of Environmental Protection's and Permittee's motions to dismiss are **granted**. This appeal is **dismissed.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

MICHAEL L. KRANCER
Judge

Richard P. Mather Sr.

RICHARD P. MATHER, SR.
Judge

DATED: September 20, 2010

c: **Department Litigation:**
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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

BOYERTOWN SANITARY DISPOSAL COMPANY, INC. and WARREN K. FRAME	:	
v.	:	**EHB Docket No. 2008-046-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 27, 2010**

ADJUDICATION

By Michael L. Krancer, Judge

Synopsis

The Board upholds a penalty assessment under the Solid Waste Management Act, 35 P.S. §§ 6018.101-6018.1003, of $350,000, plus $4,982.40 which was the cost of Department personnel working on the case, against a corporation for violations related to the operation of a landfill. The Board, however, does not include in the assessment the addition thereto of the amount of $19,483 which is the unpaid balance of a previous penalty assessment as the Department did not meet its burden to prove that this practice is legal or appropriate. Moreover, the Board does not assess the President of the corporation with personal, joint and several liability for the entire amount of the penalty under either of the theories proposed by the Department: (1) administrative finality or (2) the "participation theory," as the Department did not carry its burden to prove that either of these theories operate to impose liability for the entire amount of the penalty assessment on the corporation's President. The Board does uphold the

penalty assessment as to the President, however, under the "participation theory," in an amount of $10,000 for an affirmative violation. The President is, thus, individually, jointly and severally liable with the corporation for $10,000 of the penalty assessment.

FINDINGS OF FACT

Based upon the testimony taken and exhibits admitted into evidence at the two day trial held in this case on May 4 and 5, 2010 we find the following facts:

Parties and Historical Background

1. Appellant, Boyertown Sanitary Disposal Company, Inc. (BSD), is a Pennsylvania corporation with a business address of 300 Merkel Road, Gilbertsville (Douglass Township), Montgomery County, Pennsylvania, 19343.

2. Warren Frame (Frame) is an individual also with an address of 300 Merkel Road, Gilbertsville (Douglass Township), Montgomery County, Pennsylvania, 19343.

3. Appellee is the Department of Environmental Protection (Department or DEP), the agency charged with administration and enforcement of the Solid Waste Management Act, 35 P.S. §§ 6018.101-6018.1003 (Act or Solid Waste Management Act or SWMA); the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, 35 P.S. §§ 691.1 *et seq.*, as amended (CSL); and Section 1917-A of the Administrative Code of 1929, the Act of April 9, 1929, P.L. 177, as amended (Administrative Code).

4. Boyertown Landfill (Site) is a solid waste disposal facility at 300 Merkel Road, Douglass Township, Montgomery County, Pennsylvania, which was under Department permits in 1976 and 1979. D-3. (the designation "D" refers to Department trial exhibits).

5. The activities covered by the Department's penalty assessment under appeal in this case relate to 20 inspections of the Site performed from January 9, 1998 through April 18, 2007

and about 54 separate violations over that time frame. Notice of Appeal (NOA); D-6.

6. Frame is, and has always been, the sole shareholder, CEO and President of BSD. D-2, p. 20; D-4; Tr. 244-45, 265. ("Tr." refers to the trial transcript in this case).

7. Frame was at the landfill every afternoon and on Saturday and Sunday from 2000 to 2005. Tr. 239-40.

8. For the past three years Frame has been at the landfill "full-time". Tr. 239.

9. Frame was the individual in charge of the day-to-day operation of the landfill from August 1984 to at least March 1997. D-2, p. 20; D-4; Tr. 265.

10. Frame purchased the Site individually in 1979, and arranged for reissuance of its operating permit under the SWMA to BSD in 1981; it expired in 1986, and since the landfill had not been given a requested expansion, it was considered "closed"; *i.e.*, it was not allowed to accept any more waste. D-2, pp. 13-14, 30, 33, 37; D-3.

11. At various times from at least 1980 through 1986, both "municipal" and "hazardous" waste as defined in the SWMA and the regulations promulgated thereunder were disposed of at the Site and the Site was a hazardous waste disposal facility, regulated as such, for both Pennsylvania and federal purposes. D-2, p. 24; Tr. 77-78, 100, 134.

12. The Site's leachate collection system sends raw (untreated) leachate to an onsite lagoon. From there the leachate goes to an onsite wastewater treatment plant (WWTP), which, in turn, pumps treated leachate to two adjacent lagoons. The treated leachate was supposed to be discharged into the sewer collection system of the Berks-Mont Municipal Authority (BMMA) and further treated at BMMA upon prepayment to BMMA. S-1, S-2, D-2, Tr. 32, 229-235. (The designation "S" refers to stipulated exhibits).

13. The raw leachate lagoon is located about fifty feet from Minister Creek. S-2; Tr. 32-

33.

14. Also on the Site there are: buildings, and a trailer, which would be rented out to various businesses; an area sometimes used for storage of trash rolloff dumpsters; and an area sometimes used by Waste Management, Inc. under lease from BSD for processing of source separated recyclables. S-1; Tr. 30-33.

15. The Site abuts residential developments to the south and the northeast. S-1, S-2; Tr. 33-34.

16. Department inspections of the Site on March 8 and 17, 1995 revealed that BSD failed to maintain two feet of freeboard in the raw leachate lagoon to prevent any overtopping of the dike by overfilling, wave action or a storm. BSD failed to maintain and monitor leachate collection, removal, and the treatment system to prevent excess accumulation of leachate in the system. This is a violation of 25 Pa. Code §§ 265.222 and 265.310(c)(3). D-4; Notice of Appeal, Attachment A, Exhibit A and p. 2, Paragraphs G and H of Exhibit B.

17. On March 22, 1995 the Department issued to BSD only, not Frame, a field Compliance Order (1995 Order) under the SWMA, the CSL and the Administrative Code concerning the unpermitted discharge of leachate from the raw leachate surface impoundment. The 1995 Order required BSD, but not Frame, to, *inter alia*, achieve and maintain a minimum freeboard of two feet in the raw, untreated hazardous waste leachate surface impoundment. The Department's 1995 Order was neither appealed nor complied with. D-4; NOA Attachment A, Exhibit A and p. 2, Paragraphs G and H of Exhibit B.

18. Department inspections of the Site on April 3, 13 and 25, May 8 and 17, and October 20 and 23, 1995, as well as February 14, May 2 and September 13, 1996, revealed that BSD continued to fail to maintain two feet of freeboard in the raw leachate lagoon to prevent any

overtopping of the dike by overfilling, wave action or a storm, and that BSD failed to maintain and monitor leachate collection, removal, and the treatment system to prevent excess accumulation of leachate in the system. D-4; NOA Attachment A, Exhibit A and p. 2, Paragraphs G, H, J and O of Exhibit B.

19. Department inspections of the Site on October 20 and 23, 1995, as well as February 14, May 2 and September 13, 1996 revealed that BSD had spilled oil from an oil-hauling tanker truck onto the soil of the Site and thence into Minister Creek, and left the oil-contaminated soil in place and open to the elements, thus discharging and threatening to discharge an "industrial waste" and/or "other pollutant" into a water of the Commonwealth. D-4; NOA Attachment A, Exhibit A and p. 2, Paragraphs M and N of Exhibit B.

20. Department inspections of the Site on October 20 and 23, 1995, as well as February 14, May 2 and September 13, 1996 revealed that BSD had excavated a hole in the "final cover" landfill cap and into the disposed waste, had spread the resultant excavated waste unprotected onto the Site and was recirculating leachate back into the landfill. BSD continued the recirculation, and left the waste from both the recirculation pit and the excavated waste open to the elements. D-4; NOA Attachment A, Exhibit A and p. 2, Paragraph L of Exhibit B.

21. Department inspections of the Site on October 20 and 23, 1995, as well as February 14, May 2 and September 13, 1996 revealed that BSD had not conducted the mandatory quarterly and annual groundwater monitoring at the Site, from the first quarter of 1994 through and including the third quarter of 1996. D-4; NOA Attachment A, Exhibit A and p. 2, Paragraph K of Exhibit B.

22. On March 25, 1997 the Department issued a Compliance Order (1997 Order), this time specifically to both BSD and Frame, requiring them to:

a. Immediately cease the recirculation of landfill leachate back into the landfill.

b. Achieve and maintain a minimum freeboard of two feet in the raw, untreated hazardous waste leachate surface impoundment, not later than April 25, 1997.

c. Resume groundwater monitoring for all parameters described in Form 19 "Municipal Waste Landfill Quarterly and Annual Water Quality Analyses" and continue the groundwater monitoring on a quarterly basis, not later than April 27, 1997.

d. Submit a plan for the repair of the landfill cap in the two areas which were damaged as a result of the construction of recirculation pits, and repair them not later than June 13, 1997.

e. Determine the cyanide levels of the treated leachate and develop a plan to reduce the level of cyanide to the allowable limit that the BMMA could accept, not later than April 25, 1997; and Inspect the three leachate impoundments and the leachate collection system to determine their integrity, not later than April 25, 1997.

D-4; NOA, Attachment A, Exhibit A; p. 2, Paragraphs G, H and I of NOA Attachment A, Exhibit B; and pp. 3-4, Paragraphs 1 - 6 of NOA Attachment A, Exhibit B.

23. In conjunction with the 1997 Order the Department also assessed a civil penalty upon "Boyertown and/or Frame" of twenty-three thousand dollars ($23,000) for the violations described in the Order. The Department's 1997 Order and Civil Penalty Assessment was not appealed. To date, only $3,157 has been paid on this penalty leaving an unpaid balance of $19,843. D-4; and p. 4, Paragraph 8 of NOA Attachment A, Exhibit B.

Inspection Reports and Violations Associated With This Penalty Assessment

24. On at least January 9, 1998 BSD failed to collect and handle its leachate by direct

discharge into a publicly-owned wastewater treatment facility, a violation of 25 Pa. Code § 273.272; allowed leachate, a polluting substance, to discharge to Minister Creek, a water of the Commonwealth, a violation of 25 Pa. Code § 273.241; and disposed of waste materials on the landfill after the expiration of its permit, a violation of 25 Pa. Code § 271.111(c). D-1, Inspection Report ("IR") 1/13/98, pp. 2-3; D-4 and p. 1, NOA Attachment A, Exhibit C.

25. In January 1998, the Department filed in Commonwealth Court a Petition to Enforce the 1997 Order against both Frame and BSD. Frame and BSD agreed to entry by the Commonwealth Court of a March 11, 1998 Court Order (1998 Court Order). The 1998 Court Order orders BSD and Frame to, among other things: (1) hire within 20 days a consultant to assess the Site, and within 40 days have the consultant submit to the Department an assessment of the Site's leachate collection, gas management, leachate treatment, and groundwater monitoring systems; (2) have the consultant submit recommendations and schedules for correction of noncompliant and/or environmentally harmful aspects of those systems not later than June 30, 1998; (3) account for the fate of the oil-contaminated soil; (4) assess the impaired cap; (5) carry out the consultant's recommendations as approved by the Department; and (6) effect immediately the resumption of leachate disposal at the BMMA. Tr. 42-43; D-4 and pp. 1-4 of NOA Attachment A, Exhibit C.

26. Department inspections on April 27, May 27, July 7, July 21, October 15 and December 10, 1998, and January 20, February 17, April 30, and June 3, 1999 revealed that BSD continued to: fail properly to collect and dispose of leachate; allow leachate contamination of surface water; and dispose of waste materials (from the excavated area used for recirculation, and the oil-contaminated soil) on the landfill after its permit expired. Each of the inspections also showed that all violations from the previous inspections still existed at the landfill. D-1.

27. The matters outlined in the inspection reports just discussed are substantive violations of the SWMA regulations and thus of the SWMA also. D-1.

28. Department inspections on July 6 and 29, September 15 and 29, and October 27, 1999 revealed that BSD continued to: fail properly to collect and dispose of leachate; allow leachate contamination of surface water; and dispose of waste materials (from the excavated area used for recirculation, and the oil-contaminated soil) on the landfill after its permit expired. Each of the four July and September inspections showed that all previous violations continued to exist at the facility. The report of the October 27, 1999 inspection states, "... most technical issues remain unaddressed....", and refers specifically to lack of leachate control and continuing unpermitted waste disposal. D-1.

29. The matters outlined in the inspection reports just discussed are substantive violations of the SWMA regulations and thus of the SWMA also. D-1.

30. Department inspections on September 11, 2000, and January 31 and April 16, 2001 revealed that BSD continued to fail to: maintain a final cover cap over the entire surface of each final lift, covering all areas where waste is disposed; properly monitor and control gas generated by the landfill; and maintain sufficient structural integrity to prevent failure of municipal waste surface impoundments (the leachate lagoons) contrary to 25 Pa. Code § 285.123(5). The inspections of January 31 and April 16, 2001 also show that all previous violations continued to exist at the facility. D-1, IRs 9/12/00, p. 2; 2/1/01, p. 2; and 4/16/01, p. 2.

31. The matters outlined in the inspection reports just discussed are substantive violations of the SWMA regulations and thus of the SWMA also. D-1.

32. In addition, in about 1999 or 2000 the dumping of approximately ten loads of waste from the demolition of cypress-wood mushroom houses occurred at the site. Tr. 34, 36.

33. The mushroom house demolition waste was a serious concern to the Department because, as Mr. France testified, the wood was stained and there was spent mushroom material therein which raises the specter of there being pesticides and herbicides present. Tr. 36.

34. An excavator and a tub grinder were rented for six days at a cost of $22,000.00 which ground some land clearing, grubbing and excavating waste (stumps and brush) with the unlawfully disposed of mushroom house demolition waste, and the ground material was spread on the Site. Tr. 258-59, 266-269, 271.

35. In or about 1998 or 1999, BSD, in compliance with the 1998 Court Order, hired a consulting firm, Martin and Martin, Inc., to evaluate the Site. Among the items in the resultant report were findings that: one treated leachate impoundment was leaking at the rate of 920 gallons per day, and the other at 330 gallons per day; attempts to patch the leaks failed. D-5.

36. The draft Martin and Martin Report, dated March 29, 2010, contains an assessment of AGES which has this to say about the gas management system at the Site, "[t]he gas management system is in place but not operational. The metal building which houses the gas burner and blower unit has deteriorated and collapsed. The burner itself still discharges gas when its flow control valve is opened. The electricity has been turned off to the blower unit and auto ignitor." D-5, Attachment 9, p. 3.

37. Because the Site is regulated as a hazardous waste management facility, there is a federal requirement that at least every three years BSD conduct a Comprehensive Management Evaluation (CME) of the Site under the scrutiny of the Department. Tr. 78, 100, 106, 178-180.

38. A significant component of the CME is an inspection of the Site's groundwater monitoring system, including a comprehensive round of groundwater sampling, carried out by the regulatee (or most commonly, an outside consultant paid by the regulatee). Tr. 78, 100, 179-

180.

39. Due to the ongoing failure of BSD carry out its responsibilities at the Site, especially with regard to groundwater monitoring, in 2004 and again in 2005, the Department paid for a consultant to perform CMEs at the site at a cost each year to the Department of $26,000 for the groundwater sampling. Tr. 91-92, 179-180.

40. An estimate of the cost to replace the leaky liners in the treated leachate impoundments is $50,000.00. Tr. 49.

41. Department inspections on August 14, 2001, March 28 and July 25, 2002, and February 25, and November 19, 2003 revealed that BSD continued: to fail to achieve and maintain long term integrity of closed portions of the site; to fail to repair the leachate impoundment liners; to fail to maintain the gas collection system; and to maintain the unpermitted disposal of mixed demolition waste (from demolition of mushroom houses) and land clearing and excavation waste (stumps and brush) on the Site. D-1.

42. The matters outlined in the inspection reports just discussed are substantive violations of the SWMA regulations and thus of the SWMA also. D-1.

43. Department inspections on May 21 and June 26, 2003 revealed continued unpermitted disposal of mixed demolition waste (from demolition of mushroom houses) and excavation waste (stumps and brush). Tr. 34, 62; D-1, IRs 5/23/03, p. 2; 6/27/03, p. 1.

44. The matters outlined in the inspection reports just discussed are substantive violations of the SWMA regulations and thus of the SWMA also. D-1.

45. On September 9, 2004 the Department addressed a Compliance Order to "Warren Frame, Kenneth Frame and Boyertown Sanitary Landfill" (2004 Order) under the SWMA, the CSL and the Administrative Code, ordering BSD, but not Frame, to immediately cease accepting

at the Site waste from land clearing, grubbing and excavation activities. The Order further required that BSD, but not Frame, to remove such waste and to submit documentation regarding its proper and legal disposal. The Order was not appealed. Tr. 34; D-4.

46. The 2004 Order states in the caption that the name and title of the person served is "Warren Frame, President, BSDCI". *Id.*

47. Department inspections on October 22, November 16, and December 9, 2004 and January 4, 2005 revealed continued unpermitted disposal of mixed demolition waste and land-clearing, grubbing and excavation. D-1 p. 2, "Corrective Action Required"; D-1, IRs 10/29/04, p. 1; 11/17/04, p. 2; 12/9/04, p. 1; 1/6/05, p. 1.

48. The matters outlined in the inspection reports just discussed are substantive violations of the SWMA regulations and thus of the SWMA also. D-1.

49. Department inspections on July 21, 2006 and April 18, 2007 revealed: failure to repair the leachate impoundment liners, continued failure to conduct groundwater monitoring, and failure to maintain the gas collection system.

50. The matters outlined in the inspection reports just discussed are substantive violations of the SWMA regulations and thus of the SWMA also. D-1.

The Bond

51. There was a $900,000 collateral bond under the SWMA in place for the Site, and at several times BSD and/or Frame informally suggested that the Department allow a draw down or liquidation of a portion of the bond for operation and maintenance and/or post closure care at the site. Tr. 48-49, 53, 57-58, 194.

52. A bond can be treated in one of three ways. First, if there is non-compliance the Department can declare the entire amount forfeited. In such case the funds are deposited into the

Solid Waste Abatement Fund for use at the covered site. Second, if there is full compliance, the bond can be released in full at the end of the post-closure period. Third, the bond may be partially released where the permittee demonstrates that the amount necessary has diminished and that the amount remaining on the bond after partial release is sufficient to achieve full closure. Tr. 202-205; *See also* 35 P.S. § 6018.505(b); 25 Pa. Code §§ 264a.168, 271.342; 25 Pa. Code §§ 264a.165, 271.341; 25 Pa. Code §§ 264a.165, 271.341.

The Penalty Matrix and the Department's Calculation of the Penalty

53. Jonathan Bower, who has been with the Department's Southeast Regional Waste Management program for six years, is the compliance specialist who drafted the penalty assessment and calculated the penalty. Tr. 116-117.

54. Mr. Bower, in calculating the penalty assessed, worked from the Department's policy document on calculation of civil penalties; that document applies the factors the Department is to consider in imposing a penalty under Section 605 of the SWMA. A-3; Tr. 117. (the designation "A" refers to Appellants' trial exhibits).

55. In applying the penalty policy, Mr. Bower used a "penalty matrix", which lists the various statutory factors and recommends a range of dollar amounts for assessment of penalties from the maximum statutorily allowed penalties of $25,000 per violation per day. D-6; A-3; Tr. 118-119.

56. The penalty matrix for this assessment covers 20 inspections of the Site performed from January 9, 1998 through April 18, 2007 and about 54 separate violations over that time frame. D-6.

57. Mr. Bower viewed the "severity" of the violations he was considering to be "moderate", based on factors listed in the policy, such as moderate contamination of surface

water, the need for the Department to intervene to control leachate-borne landfill gas as it moved toward adjoining homes, and the types and quantities of waste involved in the violations. A-3; Tr. 122.

58. Mr. Bower viewed the "willfulness" of the violations he was considering to be "reckless", based on factors listed in the policy, such as BSD and Frame's awareness of their obligations and the harm that could accrue from failing to carry them out, and the number of Department inspections and enforcement actions. A-3; Tr. 122.

59. For each of the violations and each factor within the daily penalty, Mr. Bower used the lowest point of the policy's recommended penalty range: $5,000 each for willfulness and for severity, totaling $10,000 per violation. A-3; D-6; Tr. 123.

60. The penalty policy's next lowest category of severity, "low", and the next lowest category of willfulness, "negligent", each range up to a high of $5,000. A-3; Tr. 119, 125-126.

61. Bower did a rough calculation based on the number of violations and the penalty calculated that way of $890,000 did not seem reasonable. Tr. 119, 125.

62. In Mr. Bower's calculation he decided to make the assessment based on the number of days of violation, not based on each individual violation. A-3; Tr. 119.

63. This brought the base penalty, without considering costs to the Department and "other relevant factors", to $350,000, a figure he viewed as reasonable. A-3; Tr. 118-119, 124-25, 141.

64. Mr. Bower then added $4,982.40 for Department costs for the time of nonlegal staff working on the case, based on hours spent and compensation for each individual. A-3; D-6; Tr. 125.

65. Mr. Bower then considered as an "other relevant factor" the fact that $19,843 of the unappealed civil penalty assessed in 1997 had never been paid so he added that unpaid balance

amount to the total penalty. A-3; D-6; Tr. 125.

66. This brought the total penalty assessed to $374,825 which is the sum of the base penalty of $350,000 plus $4,982 for Department personnel plus the $19,843 unpaid balance of the 1997 Order penalty.

67. Mr. Bower's total penalty figure did not take into account savings to the violator that were achieved by non-compliance. D-6; Tr. 141.

DISCUSSION

Burden of Proof and Nature of Our Review

The Department bears the burden of proof in an appeal from a civil penalty assessment. 25 Pa. Code § 1021.122(b)(1). The Department must show by a preponderance of the evidence that: (1) the violations that lead to the assessment in fact occurred; (2) the imposed penalty is lawful under applicable law; and (3) that the penalty was a reasonable and appropriate exercise of the agency's discretion. *Thomas Gordon v. DEP*, 2007 EHB 268; *Clearview Land Development v. DEP*, 2003 EHB 398; *Stine Farms and Recycling, Inc. v. DEP*, 2001 EHB 796; *Farmer v. DEP*, 2001 EHB 271.

However, as for the nature of our review, we note, as did Judge Labuskes writing for the Board very recently in *Thebes v. DEP*, EHB Docket No. 2007-144-L (Adjudication issued May 13, 2010), that,

> When reviewing a civil penalty assessment, 'we do not start from scratch by selecting what penalty we might independently believe to be appropriate. Rather we review the Department's predetermined amount for reasonableness.' *DEP v. Angino,* 2007 EHB 175, 202, (citing *Stine Farms and Recycling, Inc. v. DEP,* 2001 EHB 796, 812), *aff'd,* 664 *C.D. 2007* (Pa. Cmwlth., June 26, 2008). To conduct such a review, we must determine whether there is a reasonable fit between each violation and the amount of the penalty assessed. *F.R. & S., Inc. v. DEP, 761 A.2d 634, 639 (Pa. Cmwlth. 2000); Frisch v. DER,* 1994 EHB 1226; *Eureka Stone Quarry v. DEP,* 2007 EHB 419, 449, *aff'd,* 1656 *C.D. 2007* (Pa. Cmwlth., September 12, 2008).

Thebes v. DEP, *supra*, slip op. at 29.

In this case the Department assessed civil penalties against BSD and Frame individually for five major categories of violations: (1) failure to perform required monthly and annual groundwater monitoring; (2) failure to repair or replace the leachate lagoon liners; (3) failure to properly operate gas monitoring systems; (4) illegal storage of land clearing, grubbing and excavation waste; and (5) illegally accepting waste from the demolition of mushroom houses. The Department's civil penalty matrix shows that it considered 20 separate inspections over a period of January 1998 through April 2007 in assessing the penalty of $350,000 to which the other items mentioned before, $4,982 for Department personnel costs, and the $19,483 unpaid balance on the previous penalty, were added to arrive at a total amount of $374,825.

Appellants claim that the penalty amount is unreasonable. They also argue that Frame, individually, should not be liable for the penalty amount. Simply put, Appellants argue as follows with respect to each category of violation: (1) BSD had no funds to perform the groundwater monitoring; (2) BSD had no funds to repair or replace the leachate lagoon liners; (3) the Department is incorrect that the gas monitoring system was not functioning properly; (4) the land clearing waste was brought onto the Site when it was legal to do so and it could not be removed because BSD had no funds to remove it; (5) some other parties, unrelated to BSD or Frame, were cited with violations for having sent the mushroom house demolition waste to the site. In addition, Appellants argue that the penalty is too high because there had been requests over the years to use funds from the collateral closure bond to pay for items such as groundwater monitoring and new lagoon liners.

Liability As To BSD

We, of course, are not bound by the Department's civil penalty matrix or Mr. Bower's

application thereof. As the Board stated in *Thebes*,

> ...our task is not review the Department's civil penalty matrix. The matrix is a guidance document which may be a useful tool to Department personnel, but it is not binding on the Department or the Board. *DEP v. Kennedy,* 2007 EHB 15, 25; *DEP v. Hostetler,* 2006 EHB 359. Instead, the SWMA requires that the Department and this Board consider the factors set out in the statute and its regulations, including "the willfulness of the violation, damage to the environment, cost of restoration and abatement, savings to the violator and other relevant factors." *Schiberl v. DEP, supra, (citing 35 P.S. § 6018.605). See also, 25 Pa. Code § 271.412* (listing factors).

Thebes, supra, slip op. at 38-39. With respect to BSD, we find that the penalty assessed of $350,000 is a "reasonable fit" and should be upheld. The addition thereto of $4,982 attributable to costs of Department personnel time working on this matter is reasonable as well.

BSD does not really contest the violations as such. The closest it comes to doing so is with regard to the gas monitoring violations. For those it says that the Department was on-site when there were no gas emissions and, thus, no flaring of gas to observe. We are convinced, however, that the Department proved that there were violations related to the insufficiency of the gas collection and monitoring system. The AGES report which is part of the Martin and Martin Site evaluation that is quoted in Finding of Fact No. 36 is enough to show that.

Instead, the main counter BSD interposes is excuse as opposed to denial. The excuse being that compliance was not possible because there were no funds to comply. Appellant has not provided us with any case law which supports a conclusion that the responsible party, in this case BSD, is absolved from responsibility for penalty assessments because it did not have funds to comply at the time compliance was required. We agree with the Department's observation in its one-page reply letter to BSD's post-trial brief, that the one case BSD does cite, *DER v. Pennsylvania Power Company*, 416 A.2d 995 (Pa. 1980), does not make the point BSD asserts and, if anything can be gleaned from that case for application here, it seems more supportive of

the opposite proposition. We are not going to engage here in an extended discussion or analysis of that issue because the parties have not briefed it fully and this would not be the case to dilate on that subject. Suffice it to say that BSD has not persuaded us in this case that financial inability to undertake a regulatory requirement by a corporation at the time it is required is a solid defense to civil penalties that are later imposed for the failure to comply.

We do not accept BSD's view that the penalty amount should be diminished because the Appellants had requested in the past that amounts from the landfill's collateral bond be released to cover paying for groundwater monitoring and new lagoon liners. This argument is a *non-sequitur*. A penalized party's historical request to use some bond money to cover the cost of mandated activities which it fails to perform is not a listed factor to be considered in assessing the civil penalty for the party's failure to perform those activities. *See* 35 P.S. § 6018.605 (listing relevant factors). Also, Appellants fundamentally misconstrue the function and capabilities of a collateral bond for a landfill. A collateral bond establishes a funding mechanism to assure closure of a landfill when operators become unwilling or unable to perform their responsibility to do so. 35 P.S. § 6018.505; 25 Pa. Code § 264a.160. We have not been sufficiently shown that there is such a thing as "drawing down" or liquidating part of a bond to pay for various things a landfill needs to do during its operational or post-operational life. Appellants have not shown us that this approach to a bond is legally permissible.

James Wentzel, DEP's Regional Environmental Manager for Waste Management explained very credibly at trial how a bond functions and how it can be used. A bond can be treated in one of three ways. First, if there is non-compliance the Department can declare the entire amount forfeited. In such case the funds are deposited into the Solid Waste Abatement Fund for use at the covered site. 35 P.S. § 6018.505(b); 25 Pa. Code §§ 264a.168, 271.342.

Second, if there is full compliance, the bond can be released in full at the end of the post-closure period. 25 Pa. Code §§ 264a.165, 271.341. Third, the bond may be partially released where the permittee demonstrates that the amount necessary has diminished and that the amount remaining on the bond after partial release is sufficient to achieve full closure. 25 Pa. Code §§ 264a.165, 271.341.

The Department, in fact, did declare the bond forfeited on March 2, 2010 and that action was the subject of a now withdrawn appeal. EHB Docket No. 2010-037. It is not for us, or for BSD, to now look back in history and say that the Department should have forfeited the bond at some point in the past before it decided to assess a civil penalty. That is beside the point. As a purely legal matter, the Department's choice to not declare the bond forfeited at some point in the past, or its decision to declare the bond forfeited for that matter, is not grounds for any diminution in the penalty amount. Section 605 of the SWMA specifically provides that the Department may assess a civil penalty "in addition to proceeding under any other remedy available at law or in equity for a violation of any provision of this act." 35 P.S. §§ 6018.605. In addition, Section 607 of the SWMA specifically provides that the Department may pursue cumulative remedies. 35 P.S. §§ 6018.607. Judge Labuskes has an excellent discussion of these provisions in the same context in *Thebes* which is equally applicable here. *Thebes v. DEP*, *supra*, slip op. at 33-34. Besides the technical legal factors just discussed, it just does not make any sense to use a collateral closure bond in the manner BSD suggests.

In this case we have a series of multiple violations over a long period of time. There are about 54 separate violations over an almost 10 year time period. We also have actual impairment of the environment. There was a discharge of leachate to Minister Creek. The mushroom house demolition waste was of particularly serious concern to the Department

because, as Mr. France testified, the wood was stained wood and there was spent mushroom within the material which raises the specter of there being pesticides and herbicides present. This was a willful violation. Furthermore, the amount of that material, ten truckloads, is quite substantial. Also, as we have noted, the Department has proved the violations regarding the gas management system.

The penalty amount is not excessive in any sense. The penalty which could have been assessed is in the neighborhood of $890,000 or considerably higher when one considers that the Solid Waste Management Act allows the imposition of penalties of $25,000 per day per violation. 35 P.S. § 6018.605. The penalty that was assessed was $350,000 plus $4,982 for Department personnel time on the case. In assessing this penalty, the Department did not assess for every individual violation but, instead, calculated penalty amounts for each separate day it found multiple violations. In addition, the Department did not compute a component in the penalty for economic benefit, *i.e.*, savings, to the violator on account of non-compliance. The record is sufficient to make us comfortable that the penalty assessed along with the amount for Department personnel time on the case is a "reasonable fit" as to BSD and will be upheld.

The amount of $19,843 tacked on to this penalty assessment, however, representing the unpaid balance from the 1997 Order is another matter. The Department says this is appropriate under the "other relevant factors" category. We are not familiar with this practice and the Department did not substantiate that the practice is supported by the SWMA, the regulations, or Board or Commonwealth Court precedent. Since the Department has not carried its burden with regard to this component of the assessment we will not sustain this aspect of the assessment.

Frame's Individual Liability

The Department asserts that Frame is individually liable, presumably jointly and

severally with BSD, for the entire penalty amounts. We disagree. Based on the facts in the record and the briefing, we do not find that the Department sustained its burden on this point either factually or legally.

The Department's reliance on the theory of administrative finality to pin blanket individual liability upon Frame is not well taken nor is it well fleshed out. The Department devotes only a single paragraph of argument in its brief on this subject most of which is a quote from the seminal case of *DER v. Wheeling Pittsburgh Steel Corp.*, 348 A.2d 765 (Pa. Cmwlth. 1975), setting forth the general formulation of the doctrine of administrative finality.

We do not see how the facts bear out the Department's position or how administrative finality fits here. Actually, the record shows that the Department was inconsistent over the years in identifying who was the respondent to its orders and who was actually ordered to do anything. The March 1995 Order was not directed to Frame at all. The 2004 Order does name Warren Frame under the heading for "operator name" but the caption further states that Frame is being served in this capacity as President of BSD. Also, the operative provisions of that 2004 Order are quite specific in requiring only BSD, not Frame, to take action.

The 1997 Order, which was directed to Frame and BSD and unappealed involved some matters which do not seem relevant now such as analytical testing of leachate, doing inspections of the lagoons, leachate recirculation, and maintaining freeboard in the lagoon. The Department does not clearly explain exactly how the specific matters treated in the 1997 Order translate directly into this case for application of administrative finality here. The heart of the 1997 Order was the direction to resume groundwater monitoring and pay the penalty of $23,000. We will discuss the groundwater monitoring issue in more detail later. But even the penalty provision of the 1997 Order is not clear. The 1997 Order says that "Boyertown *and/or* Frame" shall pay the

penalty. (emphasis added).

The bottom line is that we are left with too many questions to be able to impose blanket liability on Frame individually on the basis of administrative finality.

The Department relies most heavily on the "participation theory" to establish liability against Frame. Under the "participation theory", says the Department, Frame is liable for BSD's bad acts in which he, Frame, "actively takes part." DEP Post-Trial Brief, p. 25. Frame's counsel's basic point is that the "participation theory" should not be applied here because the matters for which DEP is assessing a penalty are acts of omission versus acts of commission.

Frame's counsel has a point here. Much of the conduct about which the Department complains is not in the form of affirmative bad acts of BSD, but BSD's failure to act. For example, DEP says that Frame is liable for failure to continue to conduct groundwater monitoring, failure to repair or replace the lagoon liners, and failure to remove the mixed demolition/land clearing waste. Indeed, assigning personal liability to Frame would actually contradict DEP's own formulation of the test it seeks to apply because that test, by its terms, requires affirmative action, *i.e.*, that the individual "actively" takes part in the violations.

We do not think that this case is the appropriate one to engage in a lengthy discussion of the "participation theory" or try to establish any useful precedent with regard to that theory since the parties simply have not tried or briefed the question sufficiently. Our own research into the topic reveals that the Commonwealth Court has had this to say quite recently on the subject,

> Under the 'participation theory,' the court imposes liability on the participating individual as an actor, not as an owner. [citation omitted]. To impose liability under the participation theory, a plaintiff must establish the individual engaged in misfeasance. The individual cannot be held personally liable for 'nonfeasance', *i.e.*, the omission of an act which a person ought to do.

Commonwealth v. Snyder, 977 A.2d 28, 39 (Pa. Cmwlth. 2008), *citing Shay v. Flight C*

Helicopter Services, Inc., 822 A.2d 1, 20 (Pa. Super 2003). *See also Parker Oil Company v. Mico Petro and Heating Oil*, 979 A.2d 854 (Pa. Super. 2009).

Suffice it to say that we think that Appellant's counsel raises a good point, our own research shows that the point has support from Commonwealth Court precedent, and we do not believe that the Department, who has the burden to prove, both factually and legally, that the "participation theory" applies, has satisfied its burden to show that the "participation theory" applies to render Frame, as an individual, jointly and severally liable for the entire amount of the penalty.

However, the bringing on the landfill of the mushroom house demolition waste is clearly an affirmative act in which Frame did actively participate. This was a willful violation and the fact that unrelated third parties were subjected to enforcement action for that activity does not immunize Frame nor diminish Frame's responsibility. In addition, as mentioned already, there is considerable concern about the nature of this material as a danger to the environment if improperly disposed of, as it was here, and there was a very substantial amount of this material--ten truckloads. Thus, it is appropriate to charge Frame personally with liability for penalties associated with that activity.

The record is hazy on exactly when that material was brought onto the Site. Also, it appears that DEP continued to assign penalty amounts for that violation over the various inspections, presumably on the theory that the violation continued at each inspection event. The DEP's penalty matrix is simply not very clear. It appears that the demolition and the land clearing waste matters, along with the other violations found at these inspections, is assessed a fine of $10,000 per inspection event over the period of May 21, 2003 to April 26, 2006. It appears that the demolition waste and the land clearing waste were treated together and not

differentiated and also there appears to be no breakdown on the matrix of a fine assessment associated with any of these inspections specifically for the demolition waste or the land clearing waste. In any event, we believe that the assessment, to the extent it imposes personal, and joint and several liability upon Frame, is reasonable to the extent it imposes such liability upon him of $10,000 for the event of having the mushroom demolition waste brought onto the site.[1] Put another way, Frame is personally liable, jointly and severally, for $10,000 of the total amount of the penalty assessed in this case.

CONCLUSIONS OF LAW

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

2. The Department bears the burden of proof when it assesses a civil penalty. 25 Pa. Code § 1021.122(1).

3. The Department may assess a penalty of up to $ 25,000 per day per violation of any provision of the Solid Waste Management Act or its regulations. 35 P.S. § 6018.605.

4. In assessing a civil penalty, the Department must consider the willfulness of the violation, severity of the violation, damage to the environment, cost of restoration and abatement, and other relevant factors. 35 P.S. § 6018.605; 25 Pa. Code § 271.412.

5. The Board must determine whether the penalty amount is a reasonable fit for the violations based on the statutory and regulatory factors.

[1] The recirculation of leachate through the landfill would be an act of commission rather than omission as well. Appellants admit this in their Post-Trial Brief when it is stated that, "it is acknowledged that the activities of Frame in actively recirculating the leachate through the landfill would constitute acts of commission, rather than omission, which could properly result in the assessment of a civil penalty against Frame because of his direct violation of the regulations." Appellants' Post-Trial Brief, p. 8. However, these recirculation events took place in 1995 and 1996 which is before the time frame covered by the assessment at issue in this case.

6. The Department carried its burden to show that the penalty amount of $350,000 plus the $4,982 for Department personnel is a reasonable fit as to BSD.

7. The Department did not carry its burden to prove that the tacking on of $19,843, which is an unpaid balance from a previous penalty assessment, was legal or appropriate.

8. The Department did not carry its burden to prove, either factually or legally, that the doctrine of administrative finality applies in this case to render Frame personally liable, jointly and severally, for the entire amount of the penalty.

9. The Department did not carry its burden to prove either factually or legally that the "participation theory" applies to render Frame personally liable, jointly and severally, for the entire amount of the penalty.

10. Frame is personally liable, jointly and severally, for $10,000 of the assessed penalty due to his affirmative willful participation in the violation of having mushroom house demolition waste brought onto the site.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOYERTOWN SANITARY DISPOSAL COMPANY, INC. and WARREN K. FRAME	:	
v.	:	**EHB Docket No. 2008-046-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

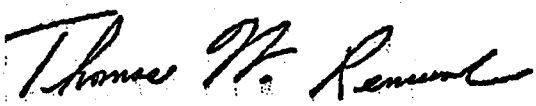
AND NOW, this 27th day of September, 2010, it is hereby ordered as follows:

1. The Department's assessment of a civil penalty of $350,000, plus $4,982 for Department personnel time against BSD (BSD only, not Frame), is upheld as lawful and reasonable;

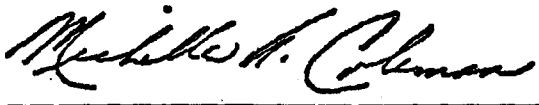
2. The Department's assessment of $19,843 as part of its penalty is disallowed; and

3. Frame is responsible personally and jointly and severally for $10,000 of the total penalty assessment.

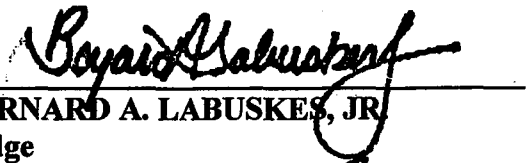
ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

MICHAEL L. KRANCER
Judge

RICHARD P. MATHER, SR.
Judge

DATED: September 27, 2010

c: **DEP, Bureau of Litigation:**
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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

HANOVER TOWNSHIP, WASHINGTON COUNTY	:	
v.	:	**EHB Docket No. 2010-067-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 29, 2010**

OPINION AND ORDER ON MOTION TO DISMISS

By Thomas W. Renwand, Chairman and Chief Judge

Synopsis: The Pennsylvania Environmental Hearing Board grants the Pennsylvania Department of Environmental Protection's Motion to Dismiss the appeal of an Administrative Order where the appeal was filed more than thirty days after the Appellant received the Administrative Order.

OPINION

Presently before the Pennsylvania Environmental Hearing Board (Board) is the Pennsylvania Department of Environmental Protection's (Department) Motion to Dismiss. The Department contends that it served by fax a copy of the Administrative Order to the Appellant, Hanover Township, on April 14, 2010. The Department argues that the Board lacks jurisdiction over this appeal because Hanover Township did not file its appeal with the Board until May 20, 2010.

The Administrative Order, among other things, directed Hanover Township to begin

construction of an earlier approved sewerage project within ninety days. In addition to faxing the Order to Hanover Township, the Department also served it by certified mail and hand delivery. According to Hanover Township, the service by certified mail and hand delivery was not effectuated until April 23, 2010 at the earliest.

25 Pa. Code Section 1021.52 provides as follows:

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

The Department contends that Hanover Township received the fax copy of the Administrative Order on April 14, 2010. If the Department is correct, then the 30 day period for filing an appeal would begin to run on that date. As Judge Mather recently pointed out in *Damascus Citizens for Sustainability, Inc. v. DEP & Newfield Appalachia PA, LLC*, EHB Docket No. 2010-074-M (Opinion and Order issued on September 20, 2010), *slip op.* at 3, the Board computes time "in accordance with the general rules of administrative practice and procedure. 1 Pa. Code Section 31.1; 1 Pa. Code Section 31.12; *York Resources Corp. v. DER*, 1985 EHB 899, 901." Therefore, if April 14, 2010 is the applicable starting date then the last day for Hanover Township to timely file an appeal would be Friday, May 14, 2010.

Motions to Dismiss will be granted where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Damascus Citizens for Sustainability, supra; Blue Marsh Labs, Inc. v. DEP*, 2008 EHB 306, 307; *Michael Butler v. DEP*, 2008 EHB 118, 119; *Borough of Chambersburg v. DEP*, 199 EHB 921, 925; *Smedley v.DEP*, 1998 EHB 1281. Motions to dismiss will be granted only when a matter is free from doubt. *Northampton Township et al. v. DEP*, 2008 EHB 563, 570; *Emerald Mine Resources, LP v.DEP*, 2007 EHB 611, 612; *Kennedy v. DEP*, 2007 EHB 511. Moreover, the Environmental Hearing Board views

motions to dismiss in the light most favorable to the non-moving party. *Cooley, et al. v. DEP*, 2004 EHB 554, 558; *Neville Chemical Co., v. DEP*, 2003 EHB 530, 531.

With these legal principles in mind, we turn to Hanover Township's response. Hanover Township contends in its Answer and New Matter to the Motion to Dismiss and in its Memorandum of Law in Opposition to the Motion to Dismiss that 1) there is no evidence that the Administrative Order was served on it by fax on April 14, 2010; 2) Hanover Township was served by certified mail and personal service by the Department on or after April 23, 2010 and that is the date that should be considered; 3) even though the copy of the Administrative Order that Hanover Township attached to its Notice of Appeal has a fax transmittal date of April 14, 2010 on each page Hanover Township contends it did not come into possession of this copy of the Administrative Order until it was served by other means as set forth above; 4) the township secretary was retiring and was not working at the time of the fax transmittal; and 5) even though the Department contends that one of the Township Supervisors discussed the Order with a Department official on April 16, 2010 there is no evidence that the Supervisor had a copy of the Order that was allegedly served on the Township and he was not talking to the Department in an official capacity.

After carefully reviewing the Department's Answer to Hanover Township's New Matter and the Department's Reply Memorandum of Law and looking at all the facts in the light most favorable to Hanover Township, we believe it is indisputable that Hanover Township did in fact receive a faxed copy of the Administrative Order on April 14, 2010. What we find most convincing are the minutes of the Hanover Township Board of Supervisors meeting of April 15, 2010, May 7, 2010, and May 20, 2010 which were attached as Exhibits to the Department's Answer to New Matter. The Department obtained copies of the minutes from Hanover

Township's website. The minutes of the Supervisors Meeting of April 15, 2010 document a detailed discussion of the Department's Administrative Order. In fact the minutes themselves refer to the "DEP Administrative Order." Minutes, April 15, 2010, page 2. The minutes summarize the important sections of the Order including the language that "any person aggrieved by this action may file an appeal within thirty days of receipt of this action." Minutes, April 15, 2010, page 3. According to the minutes, Hanover Township's Solicitor and attorney in this case, was also present and "recommended they vote to appeal the decision to avoid calling a special meeting as there is only thirty days to appeal." Minutes, April 15, 2010, page 3. The Township Supervisors voted 2-2 to appeal the Administrative Order. Since there was no majority vote a special meeting was held on May 7, 2010 where all 5 Supervisors were present and voted 3-2 to appeal the Order.

In light of the detailed discussion of the Department's Administrative Order at the public meeting of Hanover Township on April 15, 2010 as set forth in Hanover Township's minutes, we are free from doubt that Hanover Township was served by fax with a copy of the Department's Order on April 14, 2010. Notwithstanding Hanover Township's Response to the contrary, there is no issue of material fact concerning the Township's receipt of the Administrative Order on April 14, 2010, based upon the detailed minutes of the Hanover Township Supervisors' meeting on April 15, 2010 at which the Supervisors discussed the receipt of the Administrative Order and ultimately voted on whether to file an appeal of the Order with the Board. Therefore, the last day for Hanover Township to file a timely appeal to the Order was May 14, 2010. Since the Notice of Appeal was not filed until May 20, 2010 it was untimely and is a fatal jurisdictional defect which mandates the dismissal of the Appeal. *See Falcon Oil Co., Inc. v. DER*, 609 A.2d 876, 878 (Pa. Cmwlth. 1992); *Cadogan Township Board of Supervisors v.*

DER, 549 A.2d 1363, 1364 (Pa. Cmwlth. 1988); *Pennsylvania Game Commission v. DER*, 509 A2d877, 886 (Pa. Cmwlth. 1986), *aff'd*, 555 A.2d 812 (Pa. 1989); *GEC Enterprises, Inc. v. DEP*, EHB Docket No. 2009-171-M (Opinion and Order issued April 13, 2010); *Damascus Citizens for Sustainability, supra*. In addition, the fact that the Department provided written notice to Appellant by other means (certified mail and personal service) does not negate the original written notice which was effectuated on April 14, 2010. Once an entity receives written notice of the Department action directed to it, the appeal clock begins to run. It is not stopped, tolled, or restarted by further service of the Administrative Order.

We will issue an Order accordingly.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HANOVER TOWNSHIP, WASHINGTON COUNTY	:	
v.	:	**EHB Docket No. 2010-067-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 29th day of September, 2010, it is ordered as follows:

1) The Pennsylvania Department of Environmental Protection's Motion to Dismiss is *granted.*

2) Appellant Hanover Township's Notice of Appeal was filed more than 30 days after written service of the Administrative Order.

3) The Board lacks jurisdiction over the Appeal based on the Appellant's failure to file its Notice of Appeal within 30 days of written notice of the Department's Administrative Order.

4) The Appeal is *dismissed.*

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

MICHAEL L. KRANCER
Judge

RICHARD P. MATHER, SR.
Judge

DATED: September 29, 2010

c: **DEP Bureau of Litigation:**
Attention: Connie Luckadoo, Library

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

NEW HANOVER TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2010-063-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GIBRALTAR ROCK, INC., Permittee	:	**Issued: October 15, 2010**

OPINION AND ORDER ON MOTION TO DISMISS

By Richard P. Mather, Sr., Judge

Synopsis

The Board denies the Permittee's motion to dismiss. The Permittee has failed to sustain its burden of showing that the appeal of an NPDES permit extension is moot as a result of the passage of Act 46, which automatically extends certain permits. Act 46, by its express terms, is not applicable to the NPDES permit at issue here because the NPDES permit was issued pursuant to a federally-delegated permitting program that includes requirements governing permit renewals and permit terms. Additionally, the Permittee has failed to sustain its burden of showing there are no material facts in dispute regarding compliance with special permit conditions, the non-compliance of which is the basis of appeal.

OPINION

This appeal involves Noncoal Surface Mining Permit No. 46030301 issued by the Department of Environmental Protection (the "Department") on April 15, 2005, to Gibraltar

Rock, Inc. ("Gibraltar") for a proposed quarrying operation in New Hanover Township ("Township"). On that same day, the Department issued a correction and addendum to the permit that renewed and extended Gibraltar's NPDES Permit No. PA0224308 for an additional five years ("Addendum"). On May 14, 2010, the Township filed a notice of appeal with the Board. The notice of appeal claims that Gibraltar was noncompliant with certain special conditions set forth in the Permit and therefore the Department erred in issuing the Addendum in light of the Limits of Authorization clause in the Permit which states, in relevant part:

> The permittee's failure to comply with the laws of the Commonwealth and the rules and regulations of the Department regarding noncoal mining activities, or *failure to comply with the terms and conditions of this permit*, may result in an enforcement action, in permit termination, suspension, revocation and reissuance, or *in denial of a permit renewal application*....

(Emphasis added). The special conditions at issue required Gibraltar to obtain land development approval from the Township regarding the quarry and required the installation of piezometers and wiers (stream monitoring devices) in a timely fashion. The notice of appeal asserts that neither condition has been satisfied.

Gibraltar filed a motion to dismiss the appeal setting forth three arguments for dismissal. First, Gibraltar argues that Act No. 46 of 2010 ("Act 46") (which amends the Act of April 9, 1929 (P.L. 343, No. 176), known as the Fiscal Code, by adding the Act of July 6, 2010 (P.L.__, Act. No. 46)), recently signed into law on July 6, 2010, renders the appeal moot because the Act automatically extends Gibraltar's NPDES Permit by operation of law without any action required by the Department.[1] Gibraltar argues that pursuant to Section 1602 of the Act, the extension applies to state permits issued under the Federal Water Pollution Control Act including

[1] Act 46 is aimed at providing some relief to the building industry impacted by the economic downturn by automatically renewing certain permits, particularly those issued for residential or commercial development purposes.

Gibraltar's NPDES Permit that is the subject of this appeal, and therefore the action taken by the Department in issuing the Addendum was unnecessary and moot because the Permit is automatically extended.[2] Gibraltar next argues that the alleged noncompliance with Special Conditions No. 26 and 27, requiring the installation of weirs and piezometers, is also misplaced because Gibraltar requested and received from the Department an extension of time to install this equipment. That extension carried through April 15, 2010 and, thus, Gibraltar argues it was not in violation of those conditions on the day the Addendum was issued. Lastly, Gibraltar cites Board case law and argues that the appeal should be dismissed because the Board lacks jurisdiction to consider local zoning ordinances and, moreover, the Department is not permitted to consider local ordinances in determining whether or not to extend Gibraltar's NPDES Permit. In Gibraltar's view, this renders the Township's objection to the Permit extension on the grounds of non-compliance with local zoning and land development ordinances, as required by Special Conditions No. 3 and 4, misplaced and erroneous.

The Township and Department both responded to the motion. The Department, in its response, asserts that Gibraltar erred in arguing that Act 46 is applicable to Gibraltar's NPDES Permit. The Department argues that the Act, by its own express terms, does not apply to any approval, including an NPDES permit approval, issued to comply with federal law or any requirements that are necessary to retain federal delegation to the Commonwealth of the authority to implement a federal law or program. The Department otherwise agrees with Gibraltar's motion that the Department acted in accordance with applicable statutes and regulations when it renewed Gibraltar's NPDES Permit.

---

[2] Section 1602 of the Act is a definitional section that defines "approval" as "a government agency approval, agreement, permit, including other authorization or decision" relating to "the federal Water Pollution Control Act (62 Stat. 1155, 33 U.S.C. § 1251 *et seq.*), to the extent the Commonwealth has been empowered to administer, approve or otherwise authorize activities under that Act." Section 1602-I(II)(Z.7).

The Township's response does not specifically argue that Act 46 is inapplicable here, but rather argues that because the Act was just recently signed into law, this is a matter of first impression and thus dismissal would be improper under our standard because the matter, in so far as we are determining the Act's applicability to NPDES permits, is not free from doubt. The Township further argues that the appeal should not be dismissed because there are questions regarding whether Gibraltar was, in fact, in compliance with the aforementioned special conditions in the NPDES permit. Specifically, the Township argues that Gibraltar's actions in taking steps to activate the quarry operation without the requisite zoning approvals despite the condition requiring that "there shall be no mining activities within the light or heavy industrial zones unless approved by [the Township] or a subsequent court decision" constitutes a violation of that permit condition. The Township does not directly address Gibraltar's arguments regarding the alleged extension of time given to comply with the special conditions requiring the installation of the stream monitoring devices. The Township does note, however, that as of the date of its response on August 27, 2010, Gibraltar has yet to comply with these permit conditions. The Township also did not address Gibraltar's argument that the Department is not permitted to consider local ordinances in determining whether to extend Gibraltar's NPDES Permit. For the reasons set forth below, we will deny the motion to dismiss.

Gibraltar has the difficult burden of showing there are no material facts in dispute, that the matter is otherwise free from doubt, and it is entitled to judgment as a matter of law. *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Michael Butler v. DEP*, 2008 EHB 118, 119; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1281; *Northampton Township, et al. v. DEP*, 2008 EHB 563, 570; *Emerald Mine Resources, LP v. DEP*, 2007 EHB 611, 612; *Kennedy v. DEP*, 2007 EHB 511. For the purposes of this motion,

any questions or unresolved issues should be resolved in favor of the non-moving party (the Township). *Cooley, et al. v. DEP*, 2004 EHB 554, 558; *Neville Chem. Co. v. DEP*, 2003 EHB 530, 531.

Act 46 is not applicable to and does not automatically extend Gibraltar's NPDES Permit without any action required by the Department notwithstanding the definition of "approval" in Section 1602. Section 1606-I of Act 46 provides:

> (A) Exceptions.—This Article shall not apply to any of the following:
>
> (1) An approval issued to comply with federal law, the duration or terms of expiration of which is specified or determined by federal law.

Furthermore, Section 1608-I provides:

> (A) Construction.—Nothing in this Article shall be construed to modify any requirement of law that is necessary to retain federal delegation to, or assumption by, the Commonwealth of the authority to implement a federal law or program.

The federal NPDES permitting regulations mandate the duration of NDPES permits, including those issued by states under approved state programs. *See* 40 C.F.R. §§ 122.6, 122.46 and 123.25. The Department's NPDES regulations contain the same mandated requirements concerning the duration of permits. 25 Pa. Code § 92.9. Therefore, Act 46 does not apply to a Department-issued NPDES permit, which is mandated under the Federal Clean Water Act, but administered by the Department. Sections 1606-I (A)(1) and 1608-I (A) exclude Gibraltar's NPDES Permit from coverage under Act 46. The Department agrees with this interpretation of Act 46, and it has adopted a formal interpretation of Act 46 concerning its applicability to NPDES permits. The Notice of Applicability published by the Department in the *Pennsylvania Bulletin* on August 7, 2010 states "[A]ct 46 does not extend any of the NPDES permits administered by the Department or County Conservation Districts, including those for construction activities...." 40 Pa. B. 4458. We believe that the Department's interpretation is

consistent with the language in Section 1606-I and 1608-I and are inclined to defer to the Department's interpretation. *See, e.g., Eagle Envtl. II, L.P. v. DEP*, 884 A.2d 867, 878 (Pa. 2005); *Winslow-Quattlebaum v. Maryland Ins. Group*, 752 A.2d 878, 881 (Pa. 2000) ("It is well settled that when the courts of this Commonwealth are faced with interpreting statutory language, they afford great deference to the interpretation rendered by the administrative agency overseeing the implementation of such legislation."). Accordingly, the automatic renewal provisions of Act 46 are not applicable to Department issued NPDES permits.

Turning to the Gibraltar's remaining arguments, we can find no reason to dismiss the appeal under any other argument. Gibraltar's argument that Special Conditions 26 and 27 (requiring the installation of stream monitoring devices by a certain time) were not violated because the Department granted an extension to comply with these conditions does not, by itself, merit dismissal. Gibraltar attaches to its motion a letter from the Department dated March 1, 2010, granting Gibraltar an extension until May 1, 2010 to install the required stream monitoring devices. Thus, at the time the Addendum was issued on April 15, 2010, this extension was in effect. Under the extension, Gibraltar was not in violation with these conditions on that day. The Township, without directly addressing this issue, does note however that it believes that Gibraltar was nevertheless noncompliant with the conditions as of the date of its response filed on August 27, 2010. Because the Township has not directly addressed the issue of the extension and because Gibraltar has not addressed its alleged on-going noncompliance with this permit condition, we think the record needs to be fleshed out further on this issue. Based on this limited record, we are unable to conclude as a matter of law whether or not the Department erred in issuing the Addendum and therefore dismissal is not warranted on this basis.

Lastly, Gibraltar's remaining arguments that the Board lacks jurisdiction to consider local

zoning ordinances and that the Department is precluded from considering local ordinances also do not warrant dismissal of the appeal. Gibraltar argues that because the Department is precluded from taking into account local zoning when making permitting decisions, the Department did not err in issuing the Addendum even if Gibraltar was noncompliant with the special conditions regarding local zoning. In support of its argument, Gibraltar cites *Brewster v. DEP*, 2008 EHB 523, which quotes earlier Board decisions that state "This Board repeatedly has held that it does not have jurisdiction to consider local zoning ordinances . . . and that the Department's permitting decisions are not *required to* take into account local zoning." (quoting *Fontaine v. DEP*, 1996 EHB 1333, 1353) (emphasis added). We disagree with Gibraltar's argument and find its reliance on *Brewster* to be misplaced. First, in *Brewster*, the Board was not reviewing or otherwise considering local zoning ordinances. The issue in *Brewster* was whether a Montgomery County Court of Common Pleas' order that allowed blasting to occur within 225 feet of a residence overrode a Department regulation that prohibited blasting within 300 feet of a residence. In *Brewster*, the Board granted the supersedeas of a Department letter that allowed blasting in violation of its regulation that was based in part on the court order. Here, we are reviewing the Department's action of issuing the Addendum and there is no assertion that the Department's action violates its regulations and is based on an inconsistent court order of the local common pleas court. Second, the language that Gibraltar quotes in *Brewster* from the 1996 *Fontaine* decision merely states that the Department was not *required* to take local zoning into account. In 2000, state law was changed and there are certain instances now where the Department *is* required to take local zoning into consideration in a permitting context.[3] Thus, here again, we are left with some uncertainty as to whether the Department

[3] In the land use context, for example, the Act of June 23, 2000, P.L. 495, (Act 67/68) provides that the Department must consider compliance with local zoning ordinances and county comprehensive plans in

properly considered Gibraltar's inability to obtain certain local zoning approvals when issuing the Addendum. We therefore refuse to dismiss the appeal on this ground at this preliminary stage of the appeal.

Accordingly, we issue the following Order.

---

its permit review process under certain circumstances. The relevant section provides:

> (a) Where municipalities have adopted a county plan or a multimunicipal plan is adopted under this article and the participating municipalities have conformed their local plans and ordinances to the county or multimunicipal plan by implementing cooperative agreements and adopting appropriate resolutions and ordinances, the following shall apply:
>
> . . .
>
> (2) State agencies shall consider and may rely upon comprehensive plans and zoning ordinances when reviewing applications for the funding or permitting of infrastructure or facilities.

53 P.S. § 11105(a)(2). *See also Tri-County Landfill, Inc. v. DEP*, EHB Docket No. 2010-073-L (Opinion and Order issued August 25, 2010) (interpreting Act 67/68); *Epstein v. DEP*, EHB Docket No. 2008-319-L (Opinion and Order issued April 30, 2010) (same); *County of Berks v. DEP*, 2005 EHB 233, 245 ("The Acts 67 and 68 amendments ... require the Department to consider local zoning and land use when reviewing permit applications....")

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NEW HANOVER TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2010-063-M**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and GIBRALTAR ROCK, INC.,	:	
Permittee	:	

ORDER

AND NOW, this 15th day of October, 2010, it is hereby ordered that the Permittee's motion to dismiss is **denied.**

ENVIRONMENTAL HEARING BOARD

Richard P. Mather Sr.

RICHARD P. MATHER, SR.
Judge

DATED: October 15, 2010

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

CHRIN BROTHERS, INC.	:	
	:	
v.	:	**EHB Docket No. 2010-010-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 20, 2010**

OPINION AND ORDER ON MOTIONS TO QUASH OR FOR PROTECTIVE ORDER

By Richard P. Mather, Sr., Judge

Synopsis

The Board grants the motions to quash or for protective orders where the subpoenas and deposition notices were issued to numerous non-party individuals in connection with an appeal of a civil penalty assessment involving, *inter alia*, unnamed citizen odor complaints and alleged odor violations at a landfill. The requesting party failed to show that the need for the requested information, including membership lists for citizens' groups, clearly outweighs the chilling effect such disclosure would have on the members' First Amendment rights of association. Moreover, since the Department has kept the names of persons who complained to the Department about odors at the landfill confidential, the Appellant's apparent attempt to subpoena many of the members of a local citizens' group in order to ascertain the identities and motives of the individuals who complained about landfill odors can be construed as a fishing expedition that is strongly discouraged by the Board.

OPINION

This matter involves an appeal from a civil penalty assessment of $186,750 against Chrin Brothers, Inc. ("Chrin") for alleged violations of the Solid Waste Management Act ("SWMA") and Municipal Waste Regulations and the Air Pollution Control Act ("APCA") and Air Resources Regulations at the Chrin Brothers Sanitary Landfill ("Landfill") in Williams Township, Northampton County. Some of the violations relate to off-site odors allegedly emanating from the Landfill. The Department determined there were odor violations after receiving approximately 19 complaints from citizens over a 12-day period regarding Landfill-related odors. The assessment alleges, *inter alia*,[1] that Chrin failed to implement its Nuisance Minimization and Control Plan ("NMCP") to control or minimize odors constituting a public nuisance in violation of applicable regulatory requirements and permit conditions. Chrin appealed the assessment.

On or about September 3, 2010, Chrin issued numerous subpoenas and deposition notices to non-party individuals requiring those individuals to be deposed at the offices of Drinker, Biddle and Reath, LLP in Berwyn, Pennsylvania. All the subpoenas required the named individuals to bring with them to the deposition the following items pertaining to the period January 1, 2007 to the present:

1. All documents relating to the Committee to Save Williams Township and/or the

[1] The assessment also cites the following waste management violations against Chrin: failure to implement and operate its approved NMCP to minimize and control conditions which create odors; failure to ensure that the intermediate cover material meets performance standards so as to prevent odors and other nuisances; and failure to conduct gas recovery according to its approved monitoring and control plan.

Additionally, the assessment cites the following air quality violations: failure to operate the landfill gas collection system at an efficiency of at least 70% on various occasions; failure to take timely corrective actions to re-monitor locations on the landfill in a timely fashion where recorded methane concentrations were found to be equal to or greater than 500 ppm above background levels; and failure to submit a timely request for a third extension of a plan approval.

Landfill Action Committee, the groups' membership, fundraising, bank accounts, articles of incorporation, by-laws, tax returns, agendas and minutes of meetings;

2. All documents including electronic or other correspondence, relating to meetings with DEP regarding Chrin Brothers Sanitary Landfill or Chrin Brothers, Inc.;

3. All documents, including electronic or other correspondence, relating to phone calls, to the Pennsylvania Department of Environmental Protection ("DEP") regarding Chrin Brothers Sanitary Landfill or Chrin Brothers, Inc.;

4. Phone records, calendars, and downloads of any electronic versions of same relating to any meetings or phone calls to DEP regarding Chrin Brothers Sanitary Landfill or Chrin Brothers, Inc.; and

5. All documents, including all emails, relating to Chrin Brothers Sanitary Landfill, Chrin Brothers, Inc., odors, complaints to DEP, complaints to the United States Environmental Protection Agency, complaints to elected officials of any kind (federal, state, local).

According to Chrin, 13 non-party individuals received subpoenas and deposition notices. Eventually, 12 of the non-party individuals who were served with these subpoenas and deposition notices moved to have those subpoenas and notices quashed. On September 15, 2010, a motion to quash was filed on behalf of Aileen Viscomi regarding a deposition scheduled for September 20. On September 17, the Board received a motion to quash subpoena or for a protective order for 10 additional non-party individuals[2] for depositions scheduled for September 23, 2010. Lastly, on September 22, the Board received a third motion to quash the subpoena and deposition notice of Christa Wallo, scheduled to take place on September 27, 2010.[3] Many of the Movants appear to be members of or participants in an organization known as Citizens to Save Williams Township ("CSWT").

Following conference calls on September 17 and 21 with the parties and attorneys for the

[2] Those individuals are Vincent Foglia, Katherine and Robert Lilly, Carol Lytwyn, Daniel Cwynar, James Diedzic, Faye Boylan, Donna Helbing, Jennifer Petrozzo, and Roberta Purdee (collectively, "Foglia Movants").

[3] The motion was filed *pro se* by Christa Wallo on behalf of herself.

Movants,[4] the Board issued orders postponing the Movants' depositions until responses to the motions could be filed and the Board resolves the motions. On September 23, the Department and Chrin filed responses to the motions.

The three motions to quash assert basically the same arguments. The Movants argue that they do not have any personal knowledge concerning the Department's issuance of a civil penalty assessment. In addition, the Movants also believe that the "copious documentation" they would be required to bring with them represents an unreasonable annoyance, embarrassment, oppression, burden or expense and is otherwise irrelevant to the matter of Chrin's appeal of a civil penalty assessment. They further believe that the subpoenas and deposition notices serve no purpose other than harassment and retaliation for opposition to the Landfill and that upholding the subpoenas would have a chilling effect on citizens' right to complain to the Department concerning odors from the Landfill. Lastly, the Movants believe that the subpoenas and deposition notices constitute nothing more than a "fishing expedition" for any information to be used in related litigation against the Movants. In the event the subpoenas are not quashed, the Foglia Movants request, in the alternative, a protective order limiting the number of Movants to be deposed and limiting the scope of questioning at the deposition and documents sought by the subpoena to only those questions or documents that involve issues to which the deponent has any personal involvement in the enforcement proceedings brought by the Department against Chrin. The Foglia Movants also request that the depositions be taken at a more convenient location in Williams Township, thus alleviating the burden and costs of traveling more than 65 miles to Berwyn, Pennsylvania.

In its response to the motions and notwithstanding the Movants' assertions that they have no personal knowledge concerning the Department's decision to issue the civil penalty

[4] *Pro se* Movant Christa Wallo was not a party to the conference calls.

assessment under appeal, Chrin contends that the movants have personal knowledge regarding the odor complaints that form the basis of a portion of the penalty assessment. Chrin denies that it is seeking to annoy or harass the Movants and believes that the depositions and subpoenaed documents will likely lead to admissible evidence relating to the Chrin's defense of the assessment. If permitted, Chrin would seek to depose the Movants to discover information relating to:

> (1) any odor complaints they made against the Landfill during 2007, 2008, and 2009; (2) their personal knowledge regarding odor complaints made on those dates for which DEP assessed penalties in the Civil Penalty Assessment; (3) actions they have taken, individually and as members of [CSWT], to encourage others to report any and all odors to DEP and attribute them to the Landfill; (4) their knowledge regarding the Department's decision to assess civil penalties against Chrin based on alleged off-site odors; and (5) their knowledge and personal experience regarding the manner in which DEP responds to an off-site odor complaint.

Chrin intends to defend against the assessment on the grounds that (1) a small group of individuals affiliated with the Landfill Action Committee ("LAC") and/or CSWT are responsible for the vast majority of odor complaints alleged by the Department, (2) the vast majority of the odor complaints were not confirmed, and (3) the nature and number of the odor complaints are over-inflated. In Chrin's view, it is necessary to depose the Movants regarding their personal knowledge in any of these issues in order to develop and establish its defenses.

Similarly, Chrin contends that the subpoenaed documents are necessary to establish its defenses. For example, Chrin seeks the membership lists of the LAC and CSWT to establish that a very small number of members are responsible for making the vast majority of the alleged odor complaints. Moreover, Chrin believes that documents related to fundraising, bank accounts, and tax returns are necessary to determine whether LAC or CSWT have accepted contributions from its competitors. Chrin also seeks to review the groups' articles of incorporation, by-laws,

agendas and minutes of meetings, all of which, Chrin believes, are necessary to determine whether the Department's reliance on odor complaints in assessing the civil penalty was arbitrary, capricious, and otherwise contrary to law.

The Department filed a separate response to the motions. Although the Department indicated that it deferred to the Movants' arguments against the subpoenas and notices for deposition, the Department made a few somewhat surprising and inconsistent statements. First, the Department clearly stated that it wants the Board to honor its decision to keep the names of the odor complainants confidential. Second, the Department also stated that "Not all of the citizens listed in the subpoenas filed odor complaints on those 12 days [listed in the assessment]." It is surprising and somewhat inconsistent that the Department collectively identified some but "not all" of the citizens named in the subpoenas as odor complainants on the dates listed in the assessment, while in the same response the Department argues it wants the Board to keep the identities of odor complainants confidential.[5] Finally, the Department indicated that it "is not opposed to the scope or taking of depositions," if the depositions are focused on the observations of the Movants concerning the Landfill. It is confusing and somewhat inconsistent for the Department to request for the continued confidentiality of the complainants' identities while, at the same time, not opposing depositions that are limited in scope to the observations of the Movants, particularly regarding odors.[6] If the subpoenas and notices of deposition are upheld, even for the limited scope suggested by the Department, the identity of the Movants who were odor complainants on the 12 days in question will be

[5] The Department's collective disclosure about some but "not all" of the persons listed in the subpoenas also appears to be inconsistent with the Movants' collective statements that none of them had any knowledge regarding the Department's decision to assess civil penalties and suggests that some persons are confused or mistaken.

[6] Perhaps the Department is only concerned whether *it* discloses the identity of confidential odor complainants, and it does not oppose the depositions of individuals who will be compelled to self-disclose their identity during a deposition.

disclosed.

Discovery in proceedings before this Board is generally governed by the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). A party may obtain discovery regarding any matter, not privileged, which is related to the subject matter of the pending litigation so long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Pa. R.Civ.P. 4003.2. *See Solebury Township v. DEP*, 2007 EHB 325, 327 ("As a general rule, the Board is liberal in allowing discovery which is either directly related to the contentions raised in the appeal or is likely to lead to admissible evidence that is related to the contentions raised in the appeal.") The Board is charged with overseeing ongoing discovery between the parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required. *DEP v. Neville Chemical Company*, 2005 EHB 1, 3-4. Among other things, the Board may issue a protective order when appropriate to protect a person from unreasonable annoyance, embarrassment, oppression, burden, or expense. Pa. R.Civ.P. 4012.

We will grant the motions to quash for the reasons set forth below. Chrin identifies two general purposes for its discovery requests that the Movants oppose. First, Chrin has a more narrow purpose to learn more about the specific odor complaints listed in the civil penalty assessment that prompted the Department's inspections and ultimately the civil penalty assessment. This will allow Chrin to better prepare a defense for the alleged odor-related violations on these specific dates. Second, Chrin has a broader purpose to support its claim that there is a concerted effort or campaign on the part of a few individuals and organizations to encourage odor complaints against the Landfill to pressure the Department to take action against

the landfill, such as the civil penalty assessment under appeal before the Board. The Board will address each general aspect of Chrin's discovery requests separately.

The civil penalty assessment asserts that the Department received 19 complaints about odors from the Landfill over a 12 day period in 2008 and 2009. The odor complaints on these dates prompted the Department to undertake further investigation and inspection that resulted in the Department's decision to assess civil penalties for various violations of legal requirements including those to minimize or control odors from the Landfill. Chrin asked the Department for its records concerning these citizens' odor complaints during discovery, and the Department provided Chrin with copies of the various citizen complaint forms. The Department, however, redacted the names and addresses of the individuals to maintain the confidentiality of the citizens who made odor complaints on those dates listed in the civil penalty assessment. The Department continues to request that the Board maintain the confidentiality of the identities of the citizens who made the odor complaints.

Rather than directly challenging the Department's decision to maintain the confidentiality of the citizens who made the odor complaints on the dates listed in the assessment, Chrin has attempted to discover the identity of the odor complainants in a more roundabout manner by issuing subpoenas and notices of depositions to 13 individuals who Chrin believes are likely to have submitted complaints to the Department on the dates in question based on Chrin's own investigation.[7] Notwithstanding Chrin's investigation and documentation that are described or contained in its response and attachments, only the Department and the actual complainants know who made the odor complaints to the Department on the dates listed in the assessment, and the Department is not willing to disclose the identities of these individuals.

[7] Chrin has not filed any motions to compel the Department to identify the complainants whose names and addresses were redacted.

In light of the Department's decision to withhold the names of the odor complainants, the Board will grant the Movants' motion to quash. The Board would, however, allow Chrin to depose an individual who was identified as a person who made an odor complaint to the Department on the dates listed in the assessment, but, as stated, the Department has not identified who made these odor complaints, and the Movants assert that they have no personal knowledge concerning the basis for the Department civil penalty assessment.[8] The Board will not allow Chrin to cast its discovery net broadly in hopes that it catches someone who made an odor complaint on one or more of the dates in question. It is a "fishing expedition" to try to learn the identity of persons who made odor complaints to the Department on the dates listed in the assessment by directing subpoenas and notices of depositions to numerous non-party individuals who Chrin believes are members of a small group opposed to the expansion of the Landfill and, in Chrin's opinion, are most likely to have made the odor complaints on the dates in question. The Board strongly discourages such fishing expeditions.

Without the Department's disclosure of the identities of the individuals who made the odor complaints on the dates in question, the Department must rely on unnamed citizens' odor complaints. The individuals who made the odor complaints and who remain unnamed obviously can not be witnesses to provide evidence concerning their odor complaints. The Movants will also not be available as witnesses based upon their assertions that they had no contact with or participated in the investigation and enforcement action brought by the Department. The Commonwealth Court and the Board have previously recognized the limited probative value of unnamed citizens' odor complaints in the context of evaluating malodor violations under the Department's air quality regulations at 25 Pa. Code §§ 121.1 and 123.31. *See Franklin Plastics*

[8] The Department's response suggests that some but "not all" of the Movants may have made odor complaints on the dates listed in the assessment, but the Department's response does not identify which of the Movants may have made odor complaints.

Corp. v. DER, 657 A.2d 100, 102-03 (Pa. Cmwlth. 1994) (Unnamed citizens complaints are only probative of the history of prior complaints). The Board has not yet addressed the quantum of proof necessary for the Department to establish a violation of 25 Pa. Code §§ 273.218 (b) or (c), although the issue was discussed by the Board in *Empire Sanitary Landfill, Inc. v. DER*, 1994 EHB 30. *See also Frank DePaulo and Martin Desousa v. DEP*, 1997 EHB 137, 145 (discussion of quantum of proof necessary to establish a violation of 25 Pa. Code § 123.31(b)).

Turning now to a discussion of the broader purpose of Chrin's discovery requests, the Board finds that Chrin has not met its burden to demonstrate the need for the information that it requested. Here, Chrin has requested that the Movants produce all documents relating to two local public advocacy groups, including membership lists, financial records and minutes of meetings, that Chrin asserts are opposed to the Landfill. In addition, Chrin has requested that the Movants produce all documents related to all meetings with the Department regarding Chrin, all telephone calls to the Department regarding Chrin and all documents including complaints to the Department, the U.S. Environmental Protection Agency, or elected officials of any kind (federal, state, or local). The scope of Chrin's document requests is very broad and the requests implicate rights of the Movants that raise important issues that the Board needs to address.

We have previously held that the burden is on the requesting party to show that the need for information of the type requested here clearly outweighs the chilling effect such disclosure would have on the First Amendment right of association.[9] *Hanson Aggregates et al. v. DEP*, 2002 EHB 953, 960 and 2003 EHB 1, 6 (precluding disclosure of membership lists where requesting party failed to make a showing that the need for such information clearly out weighed the chilling effect of disclosure of said information); *see also Northampton Township v. DEP*,

[9] Aspects of Chrin's discovery request also implicate the Movants' right to contact or petition the local, state and federal government about their grievances, which raises similar Constitutional concerns.

2009 EHB 202, 206 (citing *Hanson* and granting motion to quash the subpoenas of individual members of citizens' groups where the party seeking to take the depositions provided no meaningful explanation why the information sought in the depositions might lead to admissible evidence and noting concerns regarding the chilling effect on the individuals' right of association). Chrin has failed to show that its need for the information sought from the Movants clearly outweighs our First Amendment concerns. Chrin attempts to show that such information is necessary to establish its aforementioned defenses, however we are not convinced that the information required for Chrin's defenses must necessarily come from these particular non-party individuals. It appears as though Chrin, in an effort to obtain the identities and motives of the complainants, has simply subpoenaed all or most of the members of CSWT. Again, this appears to be exactly the type of "fishing expedition" that the Board strongly discourages. *See Foundation Coal Resources Coal, et al. v. DEP*, 2007 EHB 46, 50.

It bears emphasizing that this is an appeal of *the Department's* finding of odor violations and its penalty assessment under the SWMA and/or the APCA, not the Movants' supposed motivations to identify such violations. Regardless of the Movants' motivations or collective efforts, the appeal before the Board will focus on whether the Department can meet its burden to establish that Chrin violated applicable legal requirements concerning odors on the dates listed in this civil penalty assessment.

If the Department had identified the persons who made odor complaints on the dates in question in this appeal, Chrin would have a right to depose and otherwise conduct reasonable discovery regarding those individuals and their observations. However, we would be inclined to limit the scope of those depositions to whatever personal knowledge the complainant may have

regarding odors from the Landfill.[10] We would also limit the scope of the subpoena to include only documents relating to those odor complaints regarding the Landfill. Documents such as membership lists would be excluded because Chrin has failed to identify a compelling need to outweigh the potential chilling effect on the citizens' ability to voice their concerns. *Hanson Aggregates*, 2002 EHB at 960 (citing *NAACP v. Alabama*, 357 U.S. 449 (1958) (finding that "disclosure of [membership lists] could have a chilling effect on the First Amendment rights of [the group's] membership"). We would similarly exclude documents relating to CSWT's fundraising information, bank account information, corporate records, tax returns, meeting minutes and agendas, and documents related to any phone calls by the Movants to the Department regarding Chrin Brothers. Such requests are not only unduly burdensome but we also fail to see at this point how these documents are at all relevant to *the Department's* finding of odor violations under the SWMA and/or the APCA.

Accordingly, we issue the following Order.

[10] We are also sensitive to the Movants' request to relocate any depositions to a more convenient location. The Board generally encourages parties to consider convenience when requiring non-party individuals to travel for depositions. Because we are granting the motions to quash, however, it is not necessary to resolve this issue at this point.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CHRIN BROTHERS, INC.	:	
	:	
v.	:	**EHB Docket No. 2010-010-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 20th day of October, 2010, it is hereby ordered that the motions to quash or for a protective order are **granted**.

ENVIRONMENTAL HEARING BOARD

Richard P. Mather Sr.

RICHARD P. MATHER, SR.
Judge

DATED: October 20, 2010

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

MONROE COUNTY MUNICIPAL WASTE MANAGEMENT AUTHORITY	:	
v.	:	**EHB Docket No. 2010-050- C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 26, 2010**

OPINION AND ORDER
ON PETITION TO INTERVENE

By Michelle A. Coleman, Judge

Synopsis:

The Board grants a petitioner's request to intervene, but limits the issues the petitioner may pursue to those directly related to the subject matter of the appeal.

OPINION

Before the Board is Pennsylvania Waste Industries Association's ("PWIA") Petition to Intervene ("Petition") in the above appeal filed by Monroe County Municipal Waste Management Authority ("Authority" or "Appellant"). The Appellant opposes PWIA's Petition on the grounds that PWIA is seeking to challenge issues that are not a part of this appeal. The Department of Environmental Protection ("DEP" or "Department") does not oppose the Petition.

The Authority appeals the Department's March 17, 2010 determination that the 1998 Monroe County Municipal Waste Management Plan ("1998 Plan") has expired and requires that the plan to be updated to meet municipal waste planning requirements. The Appellant states in its

Notice of Appeal that the 1998 Plan was approved by the DEP on November 20, 1998 and would expire in ten years. The Appellant also claims that it submitted a new waste management plan in 2006 ("2006 Plan Revision") prior to the ten year expiration. The Department, however, sent a letter dated March 17, 2010 stating that the 1998 Plan has expired and that the Appellant needed to update its plan to meet Act 101 planning requirements for the next ten years.

PWIA seeks to intervene claiming the following: individual members of PWIA are disposal facilities under the 1998 Plan that Department claims has expired (Petition, ¶ 4); PWIA was unaware of the 2006 plan update submitted to DEP and the Authority did not follow the procedures governing plan revisions, particularly the public participation requirements (Petition, ¶¶ 8, 9); PWIA individual members are parties to contracts that may be void *ab initio* since those contracts are based on the 1998 Plan that has expired or the 2006 Plan that has not yet been approved by DEP (Petition, ¶ 11); and, the Authority required PWIA members to agree to collect a County Administrative Fee/Municipal Waste System Fee (Petition, ¶ 7). Specifically, PWIA states that it would offer evidence or legal arguments to the following issues: (1) validity of the 1998 Plan; (2) validity of the 2006 Proposed Plan Revision; (3) legality of the PWIA Disposal Contracts: (4) legality of the County Administrative Fee/Municipal Waste System Fee. (Petition, ¶ 13).

The Board's Rules provide that "[a] person may petition the Board to intervene in any pending matter prior to the initial presentation of evidence." 25 Pa. Code § 1021.81(a); 35 P.S. § 7514 (e). A person or entity seeking to intervene must have an interest that is "substantial, direct and immediate" and that interest must be sufficiently related in some way to the subject-matter of the Department actions being appealed. *Elser v. DEP*, 2007 EHB 771, 772; *Brunner v. DEP*, 2003 EHB 186; *Borough of Glendon v. DEP*, 603 A.2d 226, 233 (Pa. Cmwlth. 1992). "We will

allow a party to intervene where 'the person or entity seeking intervention will either gain or loose by direct operation of the Board's ultimate determination.'" *Tri-County Landfill, Inc. v. DEP*, EHB Docket No. 2010-073-L (August 25, 2010); *CMV Sewage Co. v. DEP*, EHB Docket No. 2009-105-L (Feb. 17, 2010); *see also Jefferson County v. DEP*, 703 A.2d 1063, 1065 n. 2 (Pa. Cmwlth. 1997); *Wheelabrator Pottstown, Inc. v. DER,* 607 A.2d 874, 876 (Pa. Cmwlth. 1992); *Sechan Limestone Indus., Inc. v. DEP*, 2003 EHB 810, 812; *Wurth v. DEP,* 1998 EHB 1319, 1322-23.

1998 Plan

PWIA contends in its Petition that it seeks to challenge the validity of the 1998 Plan. The Appellant asserts that the Board is unable to entertain that challenge. We agree with the Appellant. Objections that relate to the action under appeal are relevant, whereas objections to a different Department action are beyond the Board's inquiry. *Weingartner v. DEP,* 2002 EHB 790, 793. A challenge of the 1998 Plan's validity is a separate action from that being challenged here, which is whether the Department erred when it determined that the 1998 Plan has expired.

Additionally, any challenge to the validity of the 1998 Plan is not reviewable by the Board because it is untimely and barred by administrative finality. "The purpose of the doctrine of administrative finality is to preclude a collateral attack where a party could have appealed an administrative action, but chose not to do so." *Moosic Lakes Club v. DEP*, 2002 EHB 396, 406. As stated in *Department of Environmental Resources v. Wheeling Pittsburgh Steel Corp.*,

> We agree that an aggrieved party has no duty to appeal but disagree that upon failure to do so, the party so aggrieved preserves to some indefinite future time in some indefinite future proceedings the right to contest an unappealed order. To conclude otherwise would postpone indefinitely the vitality of administrative orders and frustrate the orderly operations of administrative law. Thus, where a party fails to appeal a particular action of the Department, he or she cannot raise issues in a later appeal that

> could have and should have been raised in the appeal of the earlier action.

348 A.2d 765, 767 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977); *see also Fuller v. Department of Environmental Resources*, 599 A.2d 248 (Pa. Cmwlth. 1991); *Pennsylvania Game Commission v. Department of Environmental Resources*, 509 A.2d 877 (Pa. Cmwlth. 1986), *affirmed*, 555 A.2d 812 (Pa. 1989); *Veolia ES Greentree Landfill v. DEP, 2007 EHB 399.* Thus, the Board does not have jurisdiction to entertain any challenges to the validity of the 1998 Plan, in fact that type of challenge should have been appealed to the Board in 1998, not 2010.

If PWIA were granted intervention into this appeal it would not be on the basis of challenging the 1998 Plan, but on the issue of whether or not that Plan has expired. PWIA individual members are disposal facilities under the 1998 Plan and arguably could stand to gain or lose an interest by the Board's ultimate decision on whether or not the 1998 Plan has expired. As Judge Labuskes noted in a recent Opinion "[t]he Board's governing statute and rules do not make it difficult to intervene in a pending matter." *Tri-County Landfill, Inc. v. DEP*, EHB Docket No. 2010-073-L (August 25, 2010), slip op. 5. For that reason we find that PWIA does have a substantial interest in the subject matter of the appeal.

2006 Plan Revision

PWIA also seeks to intervene to challenge the validity of the 2006 Plan Revision because it was unaware that the 2006 Plan Revision had been submitted to DEP, arguing the Appellant did not follow the procedures governing plan revisions (particularly the public participation requirements). The Appellant opposes that claim stating that it is simply seeking to have the Board determine whether the Department's letter under appeal was in error based on the submission of the 2006 Plan Revision. It is not asking the Board to make any finding on the validity of the 2006 Plan Revision because the Department has not taken any action with respect

to plan. The Board finds that a challenge to the validity of the 2006 Plan Revision is not ripe for the Board's review.

The Commonwealth Court in its decision in *Gardner* stated that ripeness insists on a concrete context, such as a final agency action, so that the courts can properly exercise their function. *Gardner v. DER*, 658 A.2d 440 (Pa. Cmwlth. 1995). As Judge Labuskes wrote in *Tilden Township v. DEP*, 2009 EHB 452, "[r]ipeness refers to the preference of courts to avoid getting involved in hypoplastic disagreements where important issues . . . have not been 'adequately developed' for judicial review." *Tilden Township*, 2009 EHB at 454-55, *citing Borough of Bedford v. DEP*, 972 A.2d 53, 58-59 (Pa. Cmwlth. 2009); *Gardner v. DER*, 658 A.2d 440, 444 (Pa. Cmwlth. 1995). Since the Department has not acted on the 2006 Plan Revision it is not reviewable by the Board at this time.

Disposal Contracts and County Administrative Fees

PWIA seeks to challenge contracts entered between members of PWIA and the Authority. PWIA also seeks to challenge the Authority's requirement that PWIA members agree to collect a County Administrative Fee/Municipal Waste System Fee. The Board's jurisdiction is limited to final actions by the Department and there has been no Department action alleged in the Petition with respect to these matters. *See* 35 P.S. § 7514. Therefore, the validity of the disposal contracts being challenged are not under the jurisdiction of the Board.

In conclusion, the Appellant claims that the appeal is limited to whether the Department erred in its March 17, 2010 letter finding that the 1998 Plan has expired prior to any decision on the 2006 Plan Revision. In light of the forgoing, PWIA cannot challenge the validity of the 1998 Plan because it is administratively final; it cannot challenge the 2006 Plan Revision because the Department has not taken any action and it is not ripe for review; and, it cannot challenge the

disposal contracts and fee agreements because the Board lacks jurisdiction to hear that challenge because it does not involve any Department action. Since PWIA individual members are disposal facilities affected by the 1998 Plan, the Board finds that PWIA would stand to gain or lose by a Board decision on whether or not the 1998 Plan has in fact expired. The Board has the discretion to limit the issues an intervenor may pursue. *See Salvatore Pileggi v. DEP*, EHB Docket No. 2009-044-C (Opinion & Order issued May 24, 2010). Therefore, we will grant PWIA's Petition and limit its participation to the subject matter of the appeal, specifically the March 17, 2010 letter determining that the 1998 Plan is expired, all other issues presented in its Petition are excluded.

This Opinion is in support of the Board's Order dated October 25, 2010 granting PWIA's Petition to Intervene, but as explained in this Opinion and by the following Order that intervention is limited.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MONROE COUNTY MUNICIPAL WASTE MANAGEMENT AUTHORITY	:	
v.	:	**EHB Docket No. 2010-050- C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 26th day of October, 2010, it is hereby ordered that Pennsylvania Waste Industries Association's ("PWIA") petition to intervene is **granted in part**. PWIA'S participation as an Intervenor is limited to presenting evidence and argument related to Appellant's appeal of the Department's determination that the 1998 Plan is expired.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Judge

DATED: October 26, 2010

c: **DEP Bureau of Litigation:**
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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

PATRICIA A. WILSON AND PAUL I. GUEST, JR.	:	
v.	:	**EHB Docket No. 2009-024-L (Consolidated with 2009-026-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEWTOWN TOWNSHIP, Permittee and BPG ENTITIES, THE ROUSE GROUP DEVELOPMENT COMPANY, LLC, and ASHFORD LAND COMPANY, L.P., Intervenors	:	**Issued: November 1, 2010**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board rescinds the Department's approval of a municipality's Act 537 Plan Update because the evidence developed by the Board at its *de novo* hearing revealed that the municipality was not committed to implementing the Update at the time of the Department's action.

FINDINGS OF FACT

1. The Department of Environmental Protection (the "Department") is the administrative agency vested with the authority to administer and enforce the Sewage Facilities Act, 35 P.S. §§ 750.1 *et seq.*, and the rules and regulations promulgated thereunder. (Joint Stipulation of the Parties Paragraph ("Stip.") a.)

2. Newtown Township, Delaware County (the "Township") is a second class township that obtained the Department's approval of the Act 537 Plan Update that is the subject of these consolidated appeals on February 6, 2009 (the "2009 Update"). (Stip. b, e.)

3. The Appellant, Patricia A. Wilson, is a resident of the Township.

4. The Appellant, Paul I. Guest, Jr. is also a resident of the Township. (Guest and Wilson shall hereinafter be collectively referred to as "Guest" unless specifically indicated otherwise.) (Notes of Transcript, May 10, 2010 Hearing in Guest appeal p. (hereinafter "Guest T.") 35, 39, 42.)

5. The Intervenor, BPG Entities ("BPG"), consists of a group of entities including BPG Real Estate Investors-Straw Party-1, L.P., BPG Real Estate Investors-Straw Party-2, L.P., Campus Investors Office B, L.P., Campus Investors 25, L.P., Campus Investors I Building, L.P., Campus Investors H Building, L.P., Campus Investors D Building, L.P., Campus Investors Cottages, L.P., Campus Investors Office 2B, L.P., Ellis Preserve Owners Association, Inc., Kelly Preserve Owners Association, Inc., Cottages at Ellis Owners Association, Inc., Gerber/Management Campus, LLC, Berwind Property Group, Ltd., Executive Benefit Partnership Campus, L.P., Management Partnership-Benefit, Ellis Acquisition, L.P., as tenant in common who are the owners of 219 acres of partially developed property in Newtown Township, Delaware County, bounded on the north by Goshen Road, on the south by West Chester Pike, and on the east by Route 252. BPG desires to further develop its property. (Stip. d.)

6. Intervenors, The Rouse Group Development Company, LLC and Ashford Land Company, L.P. (hereinafter collectively "Rouse" unless otherwise noted) own and otherwise

have an interest in a 432-acre site in the Township that they wish to develop. (Guest T. 7; Rouse Ex. 1, 2.)

7. The 2009 Update revised the Township's Act 537 Plan that previously had been approved by the Department on August 29, 2002 (the "2002 Plan"). (Stip. f; Notes of Transcript, February 18-19, 2010 Hearing in the Wilson appeal p. ("T.") 251; DEP Ex. 3.)

8. The 2009 Update relates to the Crum Creek watershed in the northwest portion of the Township. (Stip. e.)

9. The Township submitted the 2009 Update to the Department for approval on May 21, 2007. (T. 243; DEP Ex. 2, 9.)

10. The 2009 Plan Update provides that flow from the Crum Creek basin will be conveyed via infrastructure operated by the Central Delaware County Authority ("CDCA") to the DELCORA sewage treatment plant. (T. 244, 247, 254.)

11. The 2009 Update provided that *all* properties in an area designated as the sewer service area in the planning documents will be required to connect to public sewers no later than February 28, 2012. (T. 37, 52, 93; DEP Ex. 1, 2, 9.)

12. The 2009 Update specified that homes in the Echo Valley and Florida Park neighborhoods within the designated sewer service area would be served by low-pressure (as opposed to gravity) sewers. (T. 38, 49, 51, 81, 140; DEP Ex. 1, 2, 9; Wilson Ex. 62.)

13. A low-pressure system involves the use of force mains and generally requires each homeowner to install a grinder pump. (T. 52.)

14. The Township adopted Resolution 2007-12, titled "Resolution for Adoption of Act 537 Plan Update," on July 9, 2007, which reads in relevant part as follows:

> NOW, THEREFORE, BE IT RESOLVED that the Board of Supervisors of the Township of Newtown hereby adopt and submit

> to the Department of Environmental Protection for its approval as a revision to the "Official Plan" of the municipality, the above referenced Facility Plan. The municipality hereby assures the Department of the complete and timely implementation of the said plan as required by law.

(DEP Ex. 5.)

15. The Township submitted Resolution 2007-12 to the Department on July 18, 2007. (DEP Ex. 9.)

16. The Department requires that a municipality commit to implementing all, not just part, of a plan update before approving it. (Guest T. 27, 73-74.)

17. The Department accepted the Township's resolution as evidence of the Township's commitment to implement the 2009 Update. (Guest T. 57.)

18. The Department reviewers believed that the Township would implement the 2009 Update when they approved it. (T. 314.)

19. The Township held a public meeting on December 2, 2008 (before the plan approval on February 6, 2009) at which the Township announced that no decision had been made about whether the Township really intended to use a low-pressure system. (T. 106-08, 130-32.)

20. The Township held another public meeting on February 18, 2009, less than two weeks after the Department approved the plan update, at which the Township's representatives repeated that the Township had an open mind on a low-pressure system, and in fact, that no decision had been made whether or not to provide sewers to portions of the designated sewer service area. (T. 82-85, 130-32.)

21. On March 26, 2009, a few weeks after the 2009 Update was approved, the Township finalized Ordinance 2009-01, which provides that properties in the designated sewer service area with on-lot systems will not be required to connect to public sewers unless the

Township notifies a property owner that its on-lot system is malfunctioning. (Stip. u.; T. 53-55, 168-71, 181, 290-92; Wilson Ex. 3.)

22. Ordinance 2009-01 directly contradicts the 2009 Update. (T. 291-92.)

23. Whether or not a homeowner with an on-lot system will be required to connect to public sewers and whether the homeowner will be required to install a grinder pump are very important issues to the Appellants as homeowners. (Guest T. 38.)

24. On October 31, 2009, Township Supervisor Catania stated as follows:

> Sue, the current 537 plan will be amended to accommodate decisions, which will be made shortly, regarding the flow path to the cdca. Direction of flow from bpg pump station, capacity of the implements etc, echo valley sewering, episcopal's flow and rouse's flow will all be and are now being considered in the calculations. At some point those initial decisions will be made which will cause changes to the current 537, which is basically now a place holder. For some unknown reason to me some people think the current 537 plan has more significance. I feel with these decisions that are pending are more important than dissecting the current filed plan. I hope I have been clear in my explanation.

(Guest Ex. 1.)

25. On December 7, 2009, the Township's Board of Supervisors directed its engineers to prepare a new plan update to replace the 2009 Update. (Stip. q.)

26. In mid-December, 2009, the Department became aware that the Township did not intend to completely implement the 2009 Update. (T. 79, 273.)

27. The Department thereafter took enforcement action against the Township designed to force the Township to adopt a plan that comports with the Township's true intentions by entering into a Consent Order and Agreement ("COA") with the Township on January 28, 2010. (T. 187-88, 274-75; DEP Ex. 18.)

28. The COA provides that the Township had decided to not fully implement the 2009 Update and it requires the Township to submit a revised plan. (Stip. t; T. 274-76; Guest T. 27; DEP Ex. 18.)

29. The Township lacked the requisite commitment to fully implement the 2009 Update before the Department approved it. (Stip. t; Guest T. 26-27; Findings of Fact ("FOFs") 1-28.)

30. The Township still intends to incorporate some aspects of the 2009 Update into its latest update, which is currently under review by the Department. (T. 51; Guest T. 27, 72.)

DISCUSSION

The Department should not approve a municipality's sewage facility planning action unless the municipality is able and committed to implementing the planning action under review. As we said in an earlier Opinion in this case,

> The pertinent regulation, 25 Pa. Code § 71.32(d)(4), provides that, in approving or disapproving an official plan, "the Department will consider ... (4)[w]hether the official plan or official plan revision is able to be implemented". Also, 25 Pa. Code § 71.31(f) specifies that: "[t]he municipality shall adopt the official plan by resolution, with specific reference to the alternatives of choice and a commitment to implement the plan within the time limits established in an implementation schedule." These provisions taken together suggest that the Department should not approve a make-believe plan. Rather, its approval depends on a showing that the municipality is in fact *able* and *committed* to implementing its plan update.

Guest v. DEP, slip op. at 2-3 (Opinion and Order issued April 1, 2010).

The Department does not deny that it must ensure that a plan update *can* and *will* be implemented. With respect to the municipality's commitment, the Department contends instead that it was entitled to rely upon the Township's resolution adopting the 2009 Update, which read as follows:

> NOW, THEREFORE, BE IT RESOLVED that the Board of Supervisors of the Township of Newtown hereby adopt and submit to the Department of Environmental Protection for its approval as a revision to the "Official Plan" of the municipality, the above-referenced Facility Plan. The municipality hereby assures the Department of the complete and timely implementation of the said plan as required by law.

Resolution 2007-12 (DEP. Ex. 5.) We do not disagree. The Department does not have the resources or the obligation to look behind a municipality's promise in every case, and there was nothing to suggest that the Township's commitment was less than genuine in this case. The Department witness testified that she believed the Township when it said it would implement its plan and there is no reason to conclude that her belief was unreasonable at the time. However, this Board is charged with making a *de novo* determination of whether the Department's action is lawful, reasonable, and *supported by the facts*. *Smedley v. DEP*, 2001 EHB 131, 156-60. "Rather than deferring in any way to findings of fact made by the Department, the Board makes its own factual findings, findings based solely on the evidence of record in the case before it." *Id.*, 2001 EHB at 156; *see also Warren Sand & Gravel Co. v. DER*, 341 A.2d 558, 565 (Pa. Cmwlth. 1975). Our review of the record has made it abundantly clear that the Township was not in fact committed to implementing the 2009 Update at the time of the Department's action. While the Township's Resolution suggests that the Township may very well have been committed to implementing the 2009 Update back in 2007 when the Resolution passed, that commitment had faded away by the time the Department got around to approving the Update on February 6, 2009.

The Township's commitment to implement the 2009 Update eroded over time in several respects, but it is clear that its equivocation on at least two important points extends back to the time of the Department's approval. First, although the Township committed in its 2009 Update

to require *all* properties located in the designated sewer service area to be connected to public sewers, the Township actually had no such intention at the time of the approval. Secondly, although the Township committed in its Update to using low-pressure sewers for the Echo Valley and Florida Park neighborhoods, the Township's true intentions regarding such systems were very much in doubt at the time of the Update's approval.

The Township has revealed its lack of commitment in several ways. It was clear even before the Department approved the Update that the Township was not committed to a low-pressure system. At a public meeting on December 2, 2008, the Township encountered considerable resistance from its residents to a low-pressure system. As a result of that meeting, the Township "changed its mind" (T. 131) and decided to reconsider the issue. Apparently unaware of this development, the Department approved the 2009 Update, which provided for a low-pressure system, on February 6, 2009. Immediately thereafter, the Township held another meeting on February 18. At that meeting, the Township's supervisors confirmed that the Township remained undecided about the type of sewer service to be used, and, in fact, stated that they had not decided whether any sewers would be required at all. (T. 82-85, 107, 130-32.)

The Department argues that the Township's public meetings are an excellent example of a municipality working to keep its residents informed. It argues that a municipality is entitled to seek input from its residents. We certainly agree, but the Department seems to have missed Guest's point. Neither the Department nor the Township explain why the Township was seeking additional public input at a time when the Township had already committed to the Department to implement certain fundamental planning choices such as mandatory hookups and a low-pressure system. As Guest correctly points out, either the Township officials were lying or they were no

longer committed to the 2009 Update as written and approved. We, like Guest, chose the latter, which has been borne out by subsequent events.

The Department adds that it was not aware of the meetings. That is unfortunate. Had it been made aware, it might have realized that the Township's earlier commitment to certain planning options was no longer extant. But, again, that misses the point. The Township meetings are not relevant because they show what the Department knew; they are relevant because, as revealed during the course of our *de novo* review, they provide compelling evidence of the Township's true intentions.

The Township's earlier statements were also confirmed when, on March 26, 2009, a few weeks after the Update was approved, the Township finalized Ordinance 2009-01. In direct contradiction to the 2009 Update, the Ordinance provides that properties in the designated sewer service area will not be required to connect to public sewers unless the Township notifies a property owner that its on-lot system is malfunctioning. (Wilson Ex. 3.) The Township's manager confirmed the Township's intentions as follows:

> Q: Does Newtown Township have an ordinance that requires homes to connect to a public sewer system?
> A: I guess – are you referring to the one ordinance that was done?
> Q: Yes.
> A: Ok. That if – and this was done per request of the residents. We did an ordinance and basically what it states is if your system is functioning you don't have to tap in or tie in. At the time that – you know, if it is in disrepair at the time you must tie in.

(T. 168.)

* * *

> Q: Now, Mr. Sheldrake, you just testified that – is it true that this ordinance says that homes do not have to connect until they receive notice that would indicate the on-lot disposal system is malfunctioning? Is that the intent of the ordinance?
> A: Yes. I would say yes.

Q: Now, the plan that the DEP approved February 6 of '09 requires every home to connect by February 28, 2012.
A: Right.
Q: Is it your testimony that in accordance with this ordinance you would not make homes connect?
A: Not if their systems are functioning.

(T. 169.)

* * *

Q: Mr. Sheldrake, in accordance with the ordinance that is Exhibit 3 is your testimony that you as the chief enforcement officer of Newtown Township are not going to require homes to connect to their sewer system if their on-site system is functioning? (Witness peruses document.)
A: Yes.
Q: So, Mr. Sheldrake, even though the approved plan requires all properties to be connected by February 28, 2012, your testimony is you are not going to make them connect if their systems function, is that correct?
A: That's correct. Because of the economic times and to help the residents.

(T. 171.)

* * *

Q: When does a homeowner get to know if they have to connect?
A: The intent of the township is what was written in this ordinance. And I hope the DEP would back us up with this because Newtown Township does not want to hurt the residents.

(T. 181.)

The Department's primary reviewer later confirmed the obvious point that that the Ordinance is not consistent with the approved 2009 Update. (T. 291.)

Subsequent events removed all doubt that the Township had no intention of implementing the 2009 Update. Among other things, by the time of our *de novo* hearing, the Township and the Department had entered into a COA that provided on its face that "[t]he Township does not intend to fully implement its 2009 Plan...." (DEP Ex. 18 ¶ JJ.) The COA ordered the Township to submit for approval a new plan update that comports with its actual intentions before August 12, 2010, and we are informed that the Township has done so. The COA was not entered into to reflect a contemporaneous change in the Township's intentions.

The Township's intentions were not new: the Township had not been committed to its own plan update since at least December 2008. Rather, the COA was entered into on the eve of trial in a failed attempt to render this appeal moot. (T. 187-88.)

Although we have focused on the two most glaring examples, the disconnect between the 2009 Update and the Township's true intentions does not end there. For example, the Update indicates that a property known as Melmark will be serviced by sewers. The Township's engineer, however, conceded that the Township does not intend to connect Melmark. (T. 86-88.) The Department even as late as the trial in this matter does not appear to have been aware of this change. (T. 57.)

One will search the record in vain for any evidence from the Township that successfully rebutted Guest's claim that the Township was not committed to implementing the 2009 Update at the time of the Department's approval. Indeed, it must be said that we were left with the impression during these proceedings that the Township had something less than a firm grasp on what it was committing to even at the time of the Resolution. When Township witnesses were pushed on whether a certain area would be sewered, answers tended to be vague and nonresponsive. (*See, e.g.*, T. 86-88, 181-83, 292-93.) There are errors in flow calculations (T. 91-92, 97-98, 322-24), and commitments of more capacity than the Township may now have or have a reasonable ability to acquire (T. 111, 121-29; Wilson Ex. 75, 76). Without an understanding of these basic matters, there was no meeting of the minds, if you will, and the Township's purported commitment appears to have been illusory.

The Department and Intervenors have repeatedly stated that a 537 Plan is a living, malleable document that must be revised on a regular basis to reflect changing circumstances. Although that is true, a 537 Plan should also mean something. Plans are, of course, open to

updates and revisions based upon circumstances that change *after* the plan is in place, but a Township's plan must at the very least be an accurate representation of the Township's intent at the time it is approved. Where, as here, the plan has gone stale during the review period, it should not be approved. The 2009 Update has not reflected the Township's true intentions since the day it was approved. Events that occurred and statements made after the approval simply confirm that fact.

The Department and the Intervenors have raised several arguments in the nature of affirmative defenses.[1] Although the Wilson and Guest appeals have been consolidated, they insist that the Board lacks jurisdiction in the Wilson appeal to adjudicate whether the Township was committed to implementing the 2009 Update because Wilson did not specifically raise that issue in her *pro se* notice of appeal.[2] The Department concedes, however, that Guest specifically raised this precise issue in his appeal. The first sentence of the first objection in his appeal reads: "Newtown Township is not committed to the implementation of the approved plan as it represented in section 3 of the application." Accordingly, it appears that the Department's objection is purely one of academic interest and we will not address it further.

The Department continues to argue as it has in pre-hearing motions that this appeal should be dismissed as moot. It argues that Guest has admitted that the matter is moot, but that argument is based upon interpretations of Guest's statements that we believe to have been taken out of context. It argues that a new plan update is "imminent." We are aware that the Township has submitted to the Department a new plan update, but as we previously explained, *Guest v. DEP* (Opinion and Order issued March 23, 2010), the details of any new plan are still unknown

[1] The Township did not file its own briefs but it did by letter join in the Department's arguments.
[2] The appellees do not and cannot argue that Wilson's appeal must be dismissed in its entirety. Wilson raised several issues in her notice of appeal that were the subject of active dispute through and including post-hearing briefing, but we have no need to address those issues in this Adjudication because of our finding that the Township was not committed to implementing the 2009 Update.

at this point. The new plan remains under review by the Department and, in any event, is not a part of the record in this appeal. We have been told that at least some of the concepts in the 2009 Update will remain intact (FOF 30), and if we were to dismiss this appeal as moot, the Department (and others) would surely argue that any future challenge to those concepts would be barred by the doctrine of administrative finality. By overturning the Department's approval of the 2009 Update, we ensure that an invalid and inaccurate plan will not act as a collateral bar to any future challenges. We also prevent an invalid plan from remaining in place during the time it takes to finalize a new update.[3] Thus, the Department is incorrect in arguing that we are not in a position to award meaningful relief.

The Department frets that the Township will plunge into a state of "literal sewage planning chaos" if we rescind the 2009 Update, which will have the effect of reinstating the 2002 Plan. The Department characterizes the 2002 Plan as inadequate, infeasible, and all-around unacceptable.[4] It suggests that developments approved after the 2002 Plan but presumably before the 2009 Update would be in "jeopardy." The Intervenors echo these concerns.

We see no merit in these prophecies of doom. As Guest correctly point out, it makes no practical difference whether the 2002 Plan is revived or the 2009 Update remains in place while the Department completes its review of the Township's new update. Neither version of the plan is acceptable and everyone agrees that neither will be implemented in its current form. The Department and the Township have entered into a COA that places the Township on a legally binding and enforceable schedule to further revise its plan. The Township in fact submitted a new update to the Department in August that is currently under review. The 2002 Plan, which the Department concedes contains the foundation for further planning, coupled with the COA

[3] Recall that it took almost two years to finalize the last update.

[4] It is not clear why the Department believes that it is entitled to attack the 2002 Plan, but Guest is precluded from doing so because of administrative finality.

and the certainty of a newly revised plan being in place in the future, hardly strikes us as "literal sewage planning chaos." Furthermore, any developments approved after the 2002 Plan but before the 2009 Update should be able to stand on the 2002 Plan or they should not have been approved in the first place. Rescinding the 2009 Update does not create a new reality; if anything, it comports the Township's planning documents with the reality that already exists.

The Department argues that this Board lacks jurisdiction to hear these appeals because Guest failed to exhaust his administrative remedy of submitting a private request. The Department is referring to a citizen's right to request the Department to order a municipality to revise its official plan if the citizen can show the official plan "is not being implemented or is inadequate to meet the [citizen's] sewage disposal needs." Section 5(b) of the Sewage Facilities Act, 35 P.S. § 750.5(b). The problem with the Department's argument is that a private request presupposes that there is an approved official plan in place. Obviously, the Department may only order a municipality to revise a plan (in response to a private request or otherwise) if there is a plan in place to revise. Here, there is no approved plan in place with respect to Guest because his appeal prevented the plan from being final as to him. 35 P.S. § 7514(c). Furthermore, Guest has attacked the plan itself, not its implementation. His objection is not that the plan is not being implemented; rather, he objects that the plan update in its entirety should never have been approved in the first place. The Department's argument taken to its logical extreme is that its approval of planning actions cannot be appealed, but that is simply not the case. Guest has pursued the appropriate administrative remedy in this appeal.

Without conceding that the Department erred, BPG argues that the Department's approval of the 2009 Update almost two years after it was submitted without requiring a new Township resolution was at most harmless error and will become a moot point as a result of the

new plan update being reviewed pursuant to the COA. We addressed the mootness issue above. As to the claim of harmless error, we do not think that the Department necessarily erred by relying upon a stale resolution when it completed its review and approved the 2009 Update, but a new resolution might have gone a long way in rebutting Guest's claim that the Township was no longer committed to implementing its own plan when the Department approved it. We would add that a municipality's commitment to implement its plan in no way should be thought of as a harmless or trivial concern.

The parties argue at length about whether the 2009 Update could have been implemented had the Township been committed to doing so, but that argument is pointless in light of the Township's lack of commitment. All of the other arguments regarding the merits of the 2009 Update fall by the wayside as well. We simply cannot endorse the 2009 Update, regardless of its merits, as a result of the Township's demonstrated lack of commitment to implement it.

CONCLUSIONS OF LAW

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

2. The Appellants Wilson and Guest bear the burden of proof.

3. The Board is charged with making a *de novo* determination of whether the Department's action is lawful, reasonable, and supported by the facts. *Smedley v. DEP*, 2001 EHB 131, 156-60.

4. The Department should not approve a municipality's Act 537 Plan unless the municipality is able and committed to implementing its plan or plan update. *See* 25 Pa. Code § 71.32(d)(4) and 25 Pa. Code § 71.31(f).

5. A municipality's Act 537 Plan must, at the very least, reflect an accurate representation of the municipality's intent at the time the Plan is approved by the Department.

6. Our *de novo* review demonstrates that Newtown Township was not committed to implementing the 2009 Update at the time of the Department's approval of the Update. Therefore, the Department's approval of the Update cannot be sustained by this Board.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PATRICIA A. WILSON AND PAUL I. GUEST, JR.	:	
	:	
v.	:	**EHB Docket No. 2009-024-L**
	:	**(Consolidated with 2009-026-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEWTOWN TOWNSHIP, Permittee and BPG ENTITIES, THE ROUSE GROUP DEVELOPMENT COMPANY, LLC, and ASHFORD LAND COMPANY, L.P., Intervenors	:	

ORDER

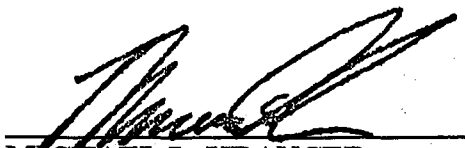
AND NOW, this 1st day of November, 2010, it is hereby ordered that these appeals are **sustained**. The Department's February 6, 2009 approval of the Township's 2009 Update is hereby rescinded.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge



MICHAEL L. KRANCER
Judge

RICHARD P. MATHER, SR.
Judge

DATED: November 1, 2010

c: **DEP, Bureau of Litigation:**
Attention: Connie Luckadoo

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MARYANNE WESDOCK, ESQUIRE
ACTING SECRETARY TO THE BOARD

PINE CREEK VALLEY WATERSHED ASSOCIATION, INC.	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, DISTRICT TOWNSHIP SUPERVISORS, Permittee, and JEFFREY LIPTON, Intervenor	:	**EHB Docket No. 2009-168-K**
	:	**Issued: November 5, 2010**

OPINION AND ORDER GRANTING JOINT MOTION FOR A CONTINUANCE

By Michael L. Krancer, Judge

Synopsis:

The Board hesitantly grants a Joint Motion for Continuance. This case underscores why we need a Board Rule which allows a case to be dismissed, with judgment for the Appellant, where the Intervenor-beneficiary of the Department's action abandons the defense of its own permit.

Opinion

Before us is the Department's and the Township's Joint Motion for a Continuance of the trial in this matter. Both the Joint Motion and Pine Creek's response was filed late in the day on Thursday, November 4, 2010. The Joint Motion requests that the Board "consider this Motion on an expedited basis" which we do. We will grant the Joint Motion.

This case was filed in December 2009 and is now ripe for trial which is scheduled to start in ten days. Appellant is ready for trial, wants to go to trial and opposes the continuance. We read the Joint Motion to say that neither the Township nor the Department are ready for trial because,

basically, each of them thought the Intervenors would be doing the work to be prepared for trial but, low and behold, no Intervenor has done any work. Indeed, it is true that, at this point in time, intervenor status for three erstwhile Intervenors was revoked by our Order for their inaction and inattention to the case and the only remaining Intervenor has been barred by Order, for the same reasons, from presenting any evidence at trial. None of the Intervenors followed basic Board rules throughout the course of this litigation. They failed to comply with the rules requiring expert opinions and materials to be shared during discovery and the rule requiring the filing of a pre-trial memorandum. Accordingly, as just mentioned, the three Intervenors had their intervenor status revoked and the only remaining Intervenor , Mr. Lipton, is now barred by normal operation of the Board Rules and by sanction Order of the Board from presenting any evidence at trial. *See* Board Order dated October 25, 2010.

The Department and the Township say they are, in essence, innocent victims of the Intervenor's lack of diligence. But, the Intervenor, the Department and the Township are bound together, voluntarily or otherwise, in the fraternal bond of being on the same side of the caption; all defending the Department's action. The Joint Motion rings a bit in tone and substance like a pre-emptive cry of "am I my brother's keeper?" It would only be fair to the extent Intervenors' default and abandonment of the case has created difficulties for the defense of the case or made that defense problematic, that it be the Department and the Township, as fellow co-parties defending the action, bear the price of such mal-preparation on Intervenors' part. This situation did not occur all of a sudden out of the blue. Apparently Intervenors never submitted substantive expert reports or responses to expert discovery by the deadline for discovery that all the parties agreed to--August 13, 2010. In its September 14, 2010 status report Pine Creek reported that "the Department has requested that [Pine Creek] not take any legal action at this time while the Department considers its position in

light of the apparent inability of Intervenor to proceed in the matter." So, during the critical time, the Township and the Department watched their co-party brother in litigation get further and further behind and "in the hole" so to speak with respect to trial preparation. This situation, while certainly daunting right now for the Department and Township, cannot be said to be in any way the fault of Appellant. It would not be unreasonable at all to say that it would be unfair to make Appellant bear that cost by our calling a "time-out" now and letting the Department and the Township "regroup" and send in another play.

Also, we might say that if the Township and the Department are so fearful of what might be wrought by this trial starting in ten days, both the Township and the Department have it in their power to decide to settle this case and avoid a trial. Presumably, the Township and the Department have certain reasons for their decisions that they either cannot or will not settle the case prior to trial. We have always thought, by the way, that, most of the time, "can't means won't". But, regardless of what we or anyone else might think of the reasons for Township's and the Department's decisions to not settle the case, it is a fact that it is their decisions to say "no" and those decisions are what has rendered the trial, as of this date, still necessary in order to deal with this case. Under these circumstances, it would not be unreasonable to say that it is they who must bear the burden, risks and responsibility for those decisions and that it would be unfair in the extreme to enable them to evade those burdens, risks and responsibilities and export them to Appellant.

But, on the other hand, the situation is more complex and multi-layered and there are reasons that we ought not to insist that this particular trial begin on November 15th. There is no construction taking place on the site right now and none is planned for anytime very soon. So the *status quo* will be maintained for at least a few months at the site. Appellant's counsel did tell us during the status

conference call the other day that there would be no environmental harm in our granting of a continuance of the trial.

There are other considerations relating to expenditure of private and public resources, both present and future, which point to us not having this trial right now. We have two DEP lawyers assigned to this case and we would have numerous DEP witnesses being prepared for testifying and then testifying. All the citizens of Pennsylvania would have to pay for this trial of what looks right now like, because of its posture, would end up being a waste of public resources to try. What is even worse is that we might very well be compounding that cost because, if Appellant wins the trial, it will argue that it is entitled to attorneys' fees and costs under Section 307(b) of the Clean Streams Law. So the expenditure of Appellant's resources and, *ergo*, the cost to borne by the taxpayers from the public treasury would be getting bigger every minute of trial. The "meter would be running" so to speak on the claim for attorneys' fees against the public treasury.

It goes even deeper than that in terms of costs and expenditure of resources. We would have taxpayers paying with pubic funds and with public employee time for what is in reality a private interest litigation. It is the private individuals who own the property and want to develop it or have it developed for them who are the beneficiaries of the Department's action in this case. But they have neglected to or refused to participate and have stepped away saying, in essence, "you, DEP and Township, do it for me". If we were to insist that this case try right now, we would have the taxpayers of the Commonwealth and the taxpayers of District Township funding a private interest litigation. A private financial interest litigation to boot. It is the private parties who would have and enjoy the value of the possible homes that might be built here and who would enjoy the potential upside of that investment. The private beneficiaries of the DEP action would be getting a "free ride" of the litigation at taxpayer expense and then getting the asset resultant from the litigation if the case

were won by DEP and the Township. The Commonwealth should not be in the business of litigating for the short and long term financial interests of private parties.

So, at the end of the day, what we have here is simply a horrible situation for everyone. By "everyone", as I have explained, I mean not just the parties in this case but every citizen of Pennsylvania who would have to pay for this litigation and who would have to fund the free ride that the beneficiaries of the DEP action would be receiving. Our existing Rules have no mechanism to deal with this situation. **They should**. This case underscores, in my view, why we need a Rule which would allow, under appropriate circumstances, a case to be dismissed, with judgment for the Appellant, where the Intervenor-beneficiary of the Department's action abandons the defense of its own permit. I urge our Environmental Hearing Board Rules Committee to take on this issue at its next meeting which, coincidentally, is scheduled for November 15, 2010, the same day this trial was supposed to start. Frankly, I think it is a better expenditure of public and private resources to start the process of tackling this sort of issue there than it would be to insist that we commence this trial on November 15th.

For all of these reasons we will grant the continuance. We will determine later exactly how long the continuance will be. We also will condition the continuance on being notified by DEP and the Township that they will agree to the entry of a Temporary Supersedeas, if necessary, of the Department's action in this matter so that the *status quo* is maintained at the site. Obviously, an important consideration in our difficult decision here is that the *status quo* at the site will be maintained and that there will be no physical impact on the environment during this "time-out".

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PINE CREEK VALLEY WATERSHED ASSOCIATION, INC.	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, DISTRICT TOWNSHIP SUPERVISORS, Permittee, and JEFFREY LIPTON, Intervenor	:	**EHB Docket No. 2009-168-K**

ORDER

AND NOW, this 5th day of November, 2010, upon consideration of the Joint Motion of District Township and the Department for a continuance of the trial in this matter, and Pine Creek Valley Watershed Association's response thereto, it is hereby ordered that the Joint Motion is **GRANTED with the proviso mentioned in the Opinion regarding the Department's and the Township's agreeing to the entry of a consensual supersedeas if necessary.** We will issue a separate Order canceling the pre-trial conference and the trial which is scheduled to start on November 15, 2010. That Order will also convene a status conference call for the purpose of determining what to do next and when.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Judge

DATED: November 5, 2010

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

DAVID DOBBIN :
:
v. : **EHB Docket No. 2010-035-M**
:
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION : **Issued: November 9, 2010**
:

OPINION AND ORDER ON MOTION TO DISMISS

By Richard P. Mather, Sr., Judge

Synopsis

The Board dismisses an appeal of emails sent from the Department of Environmental Protection because the emails are not appealable. The emails, which describe the outcome of an investigation of the appellant's complaint, finding no violations and closing the complaint file, constitute an exercise of the Department's prosecutorial discretion and are not final, appealable actions.

OPINION

The Appellant, David Dobbin, filed several complaints with the Department of Environmental Protection (the "Department") regarding alleged violations involving construction at West Chester East High School. Following an investigation, the Department responded to the complaints via emails and telephone calls. On March 29, 2010, Mr. Dobbin filed an appeal with the Board regarding Department emails advising Mr. Dobbin that no violations had occurred at the construction site in question and that the Department will not pursue any enforcement action.

The Department has moved to dismiss the appeal.

By way of further background, Mr. Dobbin owns property abutting West Chester East High School in Goshen Township, Chester County. The land on which the High School is located is owned by West Chester Area School District ("WCASD"). According to Mr. Dobbin's complaints, which are attached to his notice of appeal, on July 28 and 29, 2009, WCASD dug a trench for a water filtration system on a portion of its property that borders Mr. Dobbin's property. While digging, a water pipe broke resulting in standing water on Mr. Dobbin's property. On August 30, 2009, the Department received a complaint from Mr. Dobbin stating that he believes there are wetlands that are being impacted by the water emitted from the broken pipe. In response to the complaint, a Department biologist inspected the site in question and concluded that there were no jurisdictional wetlands on the site due to the absence of wetland plants despite the presence of standing water. The Department biologist further concluded that because there were no jurisdictional wetlands on the site, no violations of 25 Pa. Code Chapter 105 had occurred. The Department's findings were relayed to Mr. Dobbin via telephone on September 4 and 9, 2009 and the Department closed the file on September 9, 2009.

On September 21, 2009, Mr. Dobbin submitted a second complaint to the Department regarding the same broken pipe at issue in the first complaint. The second complaint further alleged that the WCASD brought in additional stone and dug a trench to alleviate the problem, but these measures failed to correct the problem and in fact made the problem worse. The Department closed the case on September 21, 2009, noting in its Response Information report that:

> The area in question was inspected on 9/2/2009 as a response to complaint 266014. The results of that inspection were reported to Mr. David Dobbin on 9/4 and 9/9 by phone, and are reiterated below.

> No Jurisdictional Wetlands were found in the area. This determination conflicts with that reported by Mr. Dobbin. The Department makes wetland determinations according to the "1987 Corps of Engineers Wetland Delineation Manual (Technical Report Y-87-1)", as required by Section 105.451(c) of the Pennsylvania Code.
>
> The 1987 Manual requires that three characteristics be present for an area to be declared Jurisdictional Wetlands: 1. surface water or signs thereof; 2. a preponderance of wetland plant species; 3. hydric soils. Although surface water was present on the site, no wetland plant species were present nor hydric soils. Therefore, according to the 1987 Manual, Jurisdictional Wetlands are not present, and the Department has no jurisdiction over the area under Chapter 105 of the PA Code, Dam Safety and Waterway Management.
>
> No violation of Chapter 105 of the PA Code was observed at the site. This case is closed as of today, 9/21/2009.

On September 30, 2009, Mr. Dobbin filed a third complaint related to the same issues in the first two complaints and providing additional details regarding his allegations. In this complaint, Mr. Dobbin alleges that a backhoe operator operating on behalf of the WCASD hit and broke a pipe "resulting in many gallons of water entering the trench." Mr. Dobbin claimed there was standing water in the area even after five dry days, as well as root damage to a tall tree and other possible water damage to his property and the property of his neighbors. The Department responded by way of email dated November 4, 2009, stating that: "In regards to the subject of the complaint, please be advised that the Department does not have jurisdiction over this matter and we regret that we cannot get further involved."

Finally, on February 26, 2010, Mr. Dobbin filed a fourth complaint acknowledging the Department's November 4, 2009 email and, "as a result" of that email, providing further information including (1) allegations that West Goshen Township violated its Stormwater Management Ordinance because it failed to correct the alleged violations and (2) documents uncovered by the Appellant indicate that wetlands do exist on the site in question and the

complained of activities are affecting the wetlands.[1] On March 3, 2010, the Department responded via email to Mr. Dobbin in which the Department biologist stated:

> I can only address your second complaint dealing with wetlands. Pennsylvania has adopted the use of the 1987 Corps of Engineers Wetland Delineation Manual (Technical Report-Y-87-1) to identify wetlands (PA Code Section 105.451(c)). That manual requires that three characteristics be present in order that an area be declared jurisdictional wetlands. Those three characteristics are:
> 1. A preponderance of wetland plants.
> 2. Hydric soils.
> 3. Evidence of surface hydrology.
>
> Mr. Smith's findings of: oxidized roots channels, saturated soil, a sulfurous odor observed within the soil sample, matted vegetation, and water marks are all evidence of surface hydrology. Oxidized roots channels may also be used to determine the presence of hydric soils.
>
> Nevertheless, the findings of Mr. Smith as reported by you do not refute my finding that there was no preponderance of wetland plants in the East High School area in question. The lack of a preponderance of wetland plants alone required a finding of "No Wetlands" since all three characteristics must be present for a finding of "Jurisdictional Wetlands."
>
> Therefore, I determined that there were no "Jurisdictional Wetlands" and no violations of Chapter 105 of the PA Code.

As in any appeal, it is important to define exactly what is being appealed. *Carroll Township v. DEP*, 2009 EHB 401, 406; *Winegartner v. DEP*, 2002 EHB 790. The notice of appeal form that Mr. Dobbin completed asks him to, under section 2 "subject of your appeal," identify the "action of the Department for which review is sought" and requires that a copy of that action be attached. Under that portion, Mr. Dobbin states:

> Wetland / Stormwater Complaint: No Jurisdictional Wetlands were found / No

[1] Mr. Dobbin attached 51 pages to his notice of appeal in a single attachment. Among those pages is a single unsigned, undated page, which is not addressed to anyone, and states "the soils in these wetlands are characterized in Appendix A, Table 1. Oxidized root channels, saturated soils, and a sulfurous odor observed within the soil sample indicated the presence of wetland hydrologic conditions. Additional evidence of wetland hydrology included matted vegetation, drainage patterns, sediment deposits and water marks." The source of this document is unclear. Although Mr. Dobbin claims that this was taken from a public record on file with West Goshen Township and was submitted by the ELA Group, Inc., we are unable to independently verify the nature or source of this document.

> Violation of Chapter 105 of the Pa Code Stormwater response was: Please be advised that the Department does not have jurisdiction over this matter and we regret that we can not get further involved. See attached emails.

This language appears to be largely taken from and partially quoting the Department's email to Mr. Dobbin dated November 4, 2009 responding to his third complaint. Among other things, a copy of that email is attached to the notice of appeal. However, where Mr. Dobbin is required to indicate in the notice of appeal the date he received the Department action being appealed, he typed "March 3, 2010 see email." A copy of the March 3, 2010 is also attached to the notice of appeal. Although it remains somewhat unclear, we will assume that Mr. Dobbin is appealing both the email dated November 4, 2009 and the email dated March 3, 2010 because both are referenced in the notice of appeal and both are attached to the notice of appeal.

The Department has moved to dismiss this appeal on several grounds. First, the Department argues that the emails are not appealable actions, and thus the Board does not have jurisdiction over this appeal. The Department argues that the Board has jurisdiction over actions which either impose obligations on a putative appellant or directly constrain their activities. In the Department's view, the emails are not "actions," because they do not direct Mr. Dobbin to do anything or directly constrain him from doing anything. Rather, they are merely a way of communicating to Mr. Dobbin that there are no violations present at the site in question.

The Department next argues for dismissal on the grounds that the Board lacks jurisdiction because the emails are unappealable exercises of the Department's prosecutorial discretion. The Department cites Board caselaw that states that the Board will not review a decision of the Department to decline to take enforcement action because it is the Department, not the Board, that has the legislative authority to decide whether to pursue enforcement against violators.

Lastly, the Department argues that the Board lacks jurisdiction because the appeal of the November 4, 2009 email, filed on March 29, 2010, is untimely as it is beyond the 30-day period for an appeal as required under our rules.

Mr. Dobbin filed a one-page response to the Department's motion. In his response, Mr. Dobbin reiterates that the area in question is a jurisdictional wetland because it is classified as such in a document obtained from the Recorder of Deeds in Chester County.[2] Mr. Dobbin further asserts that the digging of a trench for a water filtration system and the violations of the Stormwater Management Ordinance are not merely allegations, but they are facts. Mr. Dobbin also provides that, after the Department sent him the November 4, 2009 email stating that the Department does not have jurisdiction over the matter, he met with West Goshen Township officials to discuss possible violations of the Stormwater Management Ordinance and, following those meetings, the officials chose not to enforce the ordinance. Mr. Dobbin does not address any of the Department's jurisdictional arguments related to timeliness or prosecutorial discretion.

We are receptive to 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. *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Michael Butler v. DEP*, 2008 EHB 118, 119; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1281. Motions to dismiss will be granted only when a matter is free from doubt. *Northampton Township, et al. v. DEP*, 2008 EHB 563, 570; *Emerald Mine Resources, LP v. DEP*, 2007 EHB 611, 612; *Kennedy v. DEP*, 2007 EHB 511. The Board evaluates motions to dismiss in the light most favorable to the non-moving party. *Cooley, et al. v. DEP,* 2004 EHB 554, 558; *Neville Chem. Co. v. DEP*, 2003 EHB 530, 531. We will dismiss the appeal for the following reasons.

[2] Mr. Dobbin appears to be referencing the same document referenced in his fourth complaint, a document allegedly submitted by ELA Group, Inc., but he fails to clarify this point and no documents are attached to his response that would support this supposition.

We agree with the Department that the Board does not have jurisdiction over the emails in question. The extent of the Board's jurisdiction is set forth in the Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, as amended, 35 P.S. §§ 7511 *et seq.* (the EHB Act). Pursuant to the EHB Act "The Board has the power and duty to hold hearings and issue adjudications under [the provisions of the Administrative Agency Law relating to practice and procedure of Commonwealth agencies, 2 Pa.C.S. § 501 *et seq.*] on orders, permits, licenses or decisions of [DEP]." 35 P.S. § 7514(a). The EHB Act also provides that "no action of the [DEP] adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board...." 35 P.S. § 7514(c). The Board's regulations implementing the EHB Act define "action" to mean: "An order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification." 25 Pa. Code § 1021.2(a). Thus, the EHB Act expressly grants the Board jurisdiction over the Department's "orders, permits, licenses or decisions," 35 P.S. § 7514(a), as well as any Department action "adversely affecting" a person's "personal or property rights, privileges, immunities, duties, liabilities or obligations." 35 P.S. § 7514(c); 25 Pa. Code § 1021.2(a).

A review of the caselaw reveals certain principles which guide the determination of whether a particular Department action is appealable. Although formulation of a strict rule is not possible and the "determination must be made on a case-by-case basis," *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121, the Board has articulated certain factors which should be considered. These include: the specific wording of the communication; its purpose and intent; the practical impact of the communication; its apparent finality; the regulatory context; and, the

relief which the Board can provide. *See Borough of Kutztown*, 2001 EHB at 1121-24; *Donny Beaver v. DEP*, 2002 EHB 666, 672-73.

Here, the Department's emails served no other purpose than to inform Mr. Dobbin that (1) its investigation revealed no jurisdictional wetlands at the site, (2) the Department therefore does not have jurisdiction over the matter and, as a result (3) the Department will not pursue any enforcement action. It is well-settled that letters and emails that merely describe the outcome of a Department investigation in response to a third-party complaint and report that the Department will not pursue enforcement action are generally not appealable absent unusual circumstances. As we explained more fully in *Ballas v. DEP*:

> A letter from the Department may under some circumstances constitute an appealable action. *Middle Creek Bible Conference, Inc., v. DER*, 645 A.2d 295, 300 (Pa. Cmwlth. 1994); *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121. Where, however, a letter does no more than describe the outcome of the Department's investigation of a third-party complaint and reports that the Department will not pursue enforcement action against the object of the complaint, the letter is generally not appealable absent a claim of bias or corruption or perhaps other unusual circumstances. *DEP v. Schneiderwind*, 867 A.2d 724, 727 (Pa. Cmwlth. 2005); *Law v. DEP*, 2008 EHB 213, 216-18, *aff'd*, 1071 C.D. 2008 (Pa. Cmwlth., January 23, 2009). *See also, Mystic Brooke Development v. DEP*, EHB Docket No. 2009-016-L, slip op. at 3 (Opinion and Order issued June 16, 2009) ("[T]his Board will not interfere with the Department's exercise of its prosecutorial discretion. . . . This Board has no authority to order the Department to take enforcement action against [the permittee]."); *Koken v. One Beacon Insurance Co.*, 911 A.2d 1021, 1031 (Pa. Cmwlth. 2007) ("The discretion involved in subjective assessment of the strength of a given claim and whether the best allocation of resources are spent on enforcement may not be compelled, and is not subject to judicial review, because such actions are not adjudicatory in nature.")

2009 EHB 652 , 653.

In *Law v. DEP*, 2008 EHB 213, *aff'd*, 1071 C.D. 2008 (Pa. Cmwlth., January 23, 2009), the Board dismissed the appeal of a Department email that stated that, following an investigation of the appellant's complaint, there were no violations of the Department's regulations and the

Department was closing its file on the matter. The Board explained that the Department, not the Board, has the legislative authority to decide whether to pursue enforcement action against violators and thus Departmental decisions made in this context will generally remain undisturbed. Likewise, in *Schneiderwind v. DEP*, 867 A.2d 724 (Pa. Cmwlth. 2005), a citizen filed a complaint with the Department asserting that the Department and Delaware Valley Concrete had diminished the water supply to his farm. Following an investigation, the Department sent a letter refusing to prosecute the claim. The Board sustained the appeals. The Commonwealth Court reversed the Board reasoning that that "[t]he Department's election to not proceed on Schneiderwind's complaint opened the door to his commencement of a civil action. . . . Thus, it did not decide his claim or deprive him of a remedy or avenue of redress; it merely notified Schneiderwind of the Department's discretionary refusal to prosecute the claim on his behalf." *Id.* at 726.

Law and *Schneiderwind* are directly on point. Here too we are faced with emails that do nothing more than describe the outcome of the Department's investigation of third-party complaints and report that the Department will not pursue enforcement action against the object of the complaint.[3] The emails in question are an exercise of the Department's enforcement discretion and, as we have repeatedly held, the Board has no authority to order or direct the Department to take enforcement action and we can therefore dismiss the appeal on this basis. *Schneiderwind, supra*; *Ballas, supra; Mystic Brooke Development v. DEP*, 2009 EHB 302, 304.

We also agree with the Department that the Board does not have jurisdiction in this matter because emails or letters of this nature do not constitute a final action of the Department. 35 P.S. § 7514(a); 25 Pa.Code § 1021.2; *Kennedy v. DEP*, 2007 EHB 511, 512 ("The Board only

[3] Although we might review such emails where bias or corruption is alleged by the appellant, no such allegations were made here.

has jurisdiction to review final actions of the Department"); *PEACE v. DEP*, 2000 EHB 1, 2; *Phoenix Resources, Inc. v. DER*, 1991 EHB 1681. Under section 1021.2, the Board only has jurisdiction to review the emails in question if the emails constitute an "action" that affect Mr. Dobbin's personal or property rights, immunities, duties, liability or obligations. 25 Pa. Code § 1021.2. These emails do none of the above. The emails do not require or instruct Mr. Dobbin to take any particular action. Nor do they instruct him to refrain from taking any action. Nor do they deprive him of any other remedy or avenue of redress.[4] The emails represent communications between the Department and a complainant that merely inform the complainant that no action will be undertaken by the Department. This is not the type of final action that would confer jurisdiction to the Board. Indeed, the Board has found that we are without jurisdiction over Department communications that arguably do more to affect the parties than the emails at issue here. For example, we have held that a Department letter stating that it is considering the possibility of taking future enforcement action is not in and of itself appealable. *See E.P. Bender Coal v. DER,* 1991 EHB 790, 798-99; *Percival v. DER,* 1990 EHB 1077, 1107-08 (Department letters discussing, among other things, the possibility of future enforcement are not appealable actions); *see also Lower Providence Township Municipal Authority v. DEP,* 1996 EHB 1139, 1140-41 and *M. W. Farmer Co. v. DER,* 1995 EHB 29, 30, (stating that a notice of violation containing a list of violations, the mention of the possibility of future enforcement actions or the procedure necessary to achieve compliance is not an appealable action). The emails here do not even contemplate any future enforcement action; they merely state that the Department, upon finding no violations after an investigation, will pursue *no* action. It naturally follows that we do not have jurisdiction to review these emails.

[4] Nothing in the Board's decision precludes Mr. Dobbin from pursuing any civil remedy he believes he is entitled to in an appropriate forum or from pursuing a citizen's suit under any applicable state environmental statute for violations of the statute that Mr. Dobbin believes have occurred.

Although we are able to dismiss this appeal based solely on the reasons above, we will, to be thorough, also address the Department's timeliness argument. As mentioned, the subject of this appeal appears to be both the November 4, 2009 and March 3, 2010 emails. Rule 1021.52 provides that:

> (1) The person to whom the action of the Department is directed or issued shall file its appeal with the Board within 30 days after it has received written notice of the action.
>
> (2) Any other person aggrieved by an action of the Department shall file its appeal with the Board within one of the following:
>
> (i) Thirty days after the notice of the action has been published in the *Pennsylvania Bulletin.*
>
> (ii) Thirty days after actual notice of the action if the notice of the action is not published in the *Pennsylvania Bulletin.*

25 Pa. Code § 1021.52.

Mr. Dobbin filed his appeal on March 29, 2010, long after the expiration of the 30-day period for an appeal of the November 4, 2010 email. Although the March 29, 2010 appeal falls within 30 days of the March 3, 2010 email, we would nevertheless find the appeal to have been untimely because the March 3 email is a response to Mr. Dobbin's fourth complaint which, in essence, merely requested that the Department reconsider its decision not to pursue enforcement action, a decision previously conveyed in the November 4 email. The Department refused to reconsider and did not change its initial determination. We were presented with similar facts in *Eljen Corp. v. DEP*, 2005 EHB 918. There, the Department issued an initial letter denying the appellant's proposal to designate its on-lot waster treatment system for use as an alternate technology for sewage treatment. The appellant requested that the Department reconsider its decision. Approximately eight months later, the Department issued another letter that merely reiterated and referred to the initial letter. Judge Krancer, writing for the Board, dismissed the

appeal after determining that the first letter, not the second, constituted the final, appealable action and the appeal was filed well beyond 30 days from the appellant's receipt of the first letter. As stated by Judge Krancer:

> [W]e also conclude that the letter from counsel for the Department to counsel for Eljen dated July 19, 2005 does not present an appealable action with respect to the Department's decision to deny the Eljen application under ESG. That letter simply restates what had already happened months before, i.e., Eljen's application was denied. [footnote omitted] The letter contains no current decision, it merely refers to the November 23, 2004 Letter and the decision embodied in that letter and provides the Department's interpretation of Eljen's appeal rights, which by July 19, 2005 had expired. The July 19, 2005 Letter presents no decision to appeal nor does it resurrect the decision already made for an opportunity to appeal now.
>
> Thus, we have answered the seminal question Eljen posed in its brief. The final action of the Department from which Eljen had the opportunity and the obligation to appeal came no later than the November 23, 2004 Letter. Having failed to file an appeal within the 30 day time period, the Departmental action denying Eljen's application for its In-Drain System for qualification as an alternate system under ESG is final as to Eljen and not subject to appeal now. 35 P.S. § 7514(c); 25 Pa. Code § 1021.52(a). Moreover, of course, the July 19, 2005 Letter is not an appealable action.

Eljen, 2005 EHB at 932-33. From this, we conclude that an appellant is not entitled to an additional 30 days to file an appeal simply because another complaint is filed that, in essence, requests that the Department reconsider its decision made in response to an earlier, practically identical complaint lodged by the same complainant. Accordingly, if we were to find the Department's emails to be final, appealable actions (which we did not), we would dismiss the appeal of the November 4, 2009 email and the March 3, 2010 email as being untimely because the time for filing an appeal would have expired on December 4, 2009, or 30 days from the November 4, 2009 email.[5] A holding to the contrary would allow an appellant to reset the 30 day limit for filing an appeal simply by requesting the Department reconsider its previous

[5] Under certain exceptional circumstances, the Board's rules provide that an appeal may be filed *nunc pro tunc* beyond the normal 30 day appeal period. 25 Pa. Code § 1021.53a. However, the Appellant has not asserted any grounds for a *nunc pro tunc* appeal and the Board will not consider this issue further.

decision. This would render the 30 day rule meaningless and appeals could be filed months or even years after the action under appeal was received by the appellant, a notion which is completely at odds with the doctrine of administrative finality.

Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAVID DOBBIN	:	
	:	
v.	:	**EHB Docket No. 2010-035-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 9th day of November, 2010, it is hereby ordered that the Department's motion to dismiss is **granted**. The appeal is **dismissed.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

MICHAEL L. KRANCER
Judge

RICHARD P. MATHER, SR.
Judge

DATED: November 9, 2010

c: **DEP, Bureau of Litigation:**
Attention: Connie Luckadoo

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Office of Chief Counsel – Southeast Region

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

MARY E. COLLIER AND RONALD M. COLLIER	:	
v.	:	**EHB Docket No. 2010-034-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARK M. STEPHENSON, Permittee	:	**Issued: November 16, 2010**

OPINION AND ORDER ON MOTION FOR EXTENSION

By: Thomas W. Renwand, Chairman and Chief Judge

Synopsis:

The Board grants a 31 day extension to file dispositive motions after concluding that no party will suffer prejudice nor will the extension delay the trial of the case. Moreover, a party is not prohibited from filing its dispositive motion prior to the extension date.

Discussion:

Presently before the Pennsylvania Environmental Hearing Board is the Pennsylvania Department of Environmental Protection's Motion for Extension of Time for Filing Dispositive Motions. The extension is strongly opposed by Appellants.

Appellants have filed a 63 paragraph Notice of Appeal claiming a water loss to their

property in Indiana County allegedly stemming from oil and gas drilling by the Permittee. There is also related litigation in the Court of Common Pleas of Indiana County. The instant appeal before the Environmental Hearing Board was filed on March 25, 2010.

During a prehearing conference with counsel on June 25, 2010 counsel indicated that a dispositive motion might resolve some or all of the issues before the Board. Subsequently, at the request of the parties, the Board extended the filing dates for dispositive motions to November 19, 2010. No hearing has been scheduled but the Board has indicated that we would like to try this case in the late Spring of 2011.

On November 15, 2010 the Department filed a Motion for Extension for Filing Dispositive Motions. The Department seeks to extend the filing date to December 20, 2010. The Department indicates that it needs additional time because of the "recent loss of support staff, unexpected work load responsibilities of Department counsel, and illness of Department counsel...." Motion for Extension, paragraph 3. The Department contends that no party will be prejudiced by the extension of time to file dispositive motions.

Appellants oppose the Motion for Extension contending that they will indeed be prejudiced. They claim that a further extension will push back the dates for the hearing and "result in further delay in the restoration and/or replacement of the Collier Water Supply." Appellants' Response to Motion for Extension, paragraph 6. They also argue that the extension puts the filing of dispositive motions shortly before Christmas which they contend is an inappropriate time to file such motions. In addition, Appellants' counsel must file a

pre-trial statement on or before December 6, 2010 in another case in the Allegheny County Court of Common Pleas and has a Florida vacation planned from December 8 to 15, 2010 "so any further extension will be burdensome to Appellants." Finally, counsel for Appellants indicates that he is ready to file Appellants' Motion for Partial Summary Judgment on or before November 19, 2010.

It is the Board's responsibility to regulate prehearing discovery and the filing of dispositive motions. *See* 25 Pa. Code Section 1021.102(a); *McQueen v. DEP & McVille Mining Company*, EHB Docket No. 2008-291-R (*slip opinion* issued June 16, 2010) at page 2. In carrying out this responsibility we are aware of the need to move cases to conclusion while at the same time giving the parties adequate time to prepare their respective cases which not only includes trial but motions which may result in the narrowing of issues at trial. *Cappelli v. DEP & Maple Creek Mining, Inc.*, 2006 EHB 426, 427. In this appeal, which was filed in late March 2010, the Department has requested a short extension brought about by circumstances not within counsel's control. We fail to see any prejudice to Appellants as the case has not yet been scheduled for trial and the requested extension should not impact a late spring trial.

Counsel for Appellants indicates that he is prepared to file his dispositive motion by November 19, 2010. Our extending the filing date in no way prevents counsel from filing his motion any time before the due date. We fail to see under these circumstances how an extension of the due date prejudices Appellants. They can file their dispositive motion this

week. The fact that the Department and/or Permittee will have an additional month to file their motions should in no way impact Appellants or their counsel in their other obligations such as filing a pre-trial statement in Common Pleas Court or journeying to Florida in mid-December. The Appellants will have 30 days to file a Response to the Motion for Summary Judgment which will not start to run until after counsel concludes these earlier obligations (assuming the motions are filed around December 20, 2010). Moreover, if we denied the Department's Motion and granted Appellants' request and the Department filed its dispositive motion on November 19, 2010 (the current deadline), then the Appellants' response would be due on December 20, 2010, which in light of their previous statements and obligations would seem to complicate rather than simplify their situation. As we have previously lamented, the practice of law today is filled with way too much stress. This does not benefit the Board, counsel and their clients, or the public. The development of email, cell phones, faxes, efiling, and other modern telecommunications has transformed the practice of law in many positive ways. However, it is important to realize and appreciate that although decisions should be made in a timely fashion the most important point is that the right decision should always be reached. Many times our decisions are based on the well reasoned arguments of counsel set forth in their written filings. These arguments are best developed when counsel have the necessary time to complete their best work. Tribunals and attorneys do not help alleviate this stress when they operate like firemen speeding to an emergency with lights on and sirens blazing. There is no legal fire here requiring the denial of the

Department's motion seeking a short extension of time. Instead, we should strive for calm well reasoned and fully developed legal arguments within the time constraints of our Rules in all but those truly unique and exceedingly rare circumstances where time, indeed, is of the essence. *Angela Cres Trust of June 25, 1998 v. DEP & Millcreek Township*, 2009 EHB 184, 187.

An appropriate Order will be issued.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARY E. COLLIER AND RONALD M. COLLIER	:	
	:	
v.	:	**EHB Docket No. 2010-034-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARK M. STEPHENSON, Permittee	:	

ORDER

AND NOW, this 16th day of November, 2010, following review of the Department's Motion for Extension of Time for Filing Dispositive Motions and the Appellants' Response Opposing the Motion for Extension of Time, it is ordered as follows:

1) The Motion for Extension of Time is **granted.**

2) The parties may file dispositive motions on or before **December 20, 2010.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

DATED: November 16, 2010

c: DEP Bureau of Litigation:
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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

PA WASTE, LLC	:	
	:	
v.	:	**EHB Docket No. 2008-249-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CLEARFIELD COUNTY, Intervenor	:	**Issued: November 19, 2010**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board holds that the Department erred by subjecting the Appellant's application to operate a new landfill to a "suitability analysis" separate from the comprehensive environmental assessment.

Introduction

The controlling issue in this appeal is whether the Department of Environmental Protection (the "Department") correctly applied certain statutory and regulatory provisions in its review and subsequent denial of PA Waste, LLC's ("PA Waste's") application for a permit for a proposed landfill in Boggs Township, Clearfield County. The statutory provision in question is Section 507(a) of the Municipal Waste Planning, Recycling and Waste Reduction Act ("Act 101"), which reads as follows:

> (a) Limitation on permit issuance – After the date of submission to the Department of all executed ordinances, contracts, or other requirements under

> section 513, the Department shall not issue any permit, or any permit that results in additional capacity, for a municipal waste landfill or resource recovery facility under the Solid Waste Management Act, in the County 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:
>
> (i) The proposed facility will not interfere with implementation of the approved plan.
> (ii) The proposed facility will not interfere with municipal waste collection, storage, transportation, processing or disposal in the host county.
> (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). PA Waste's proposed facility is not provided for in Clearfield County's plan, so only Section 507(a)(2) applies.[1] There has been no showing or contention that PA Waste's facility will interfere with Clearfield County's implementation of its plan or with municipal waste collection, storage, transportation, processing, or disposal in Clearfield County, so Sections 507(a)(2)(i) and 507(a)(2)(ii) are not at issue. Thus, the only statutory provision of immediate concern is Subsection (a)(2)(iii), which requires that the proposed location of the facility be at least as suitable as alternative locations giving consideration to environmental and economic factors.

The operative regulation, 25 Pa. Code § 273.139(b)(2) and (c), used to require an applicant to provide the following information:

> (2) If the proposed facility is not provided for in the approved host county plan:

[1] As we discussed in an earlier opinion in this matter, Clearfield County's decision to exclude PA Waste's facility from the County's plan is not a Departmental action reviewable by this Board in this appeal from the Department's denial of PA Waste's permit application. *PA Waste v. DEP*, EHB Docket No. 2008-249-L (Opinion and Order, February 22, 2010).

(i) A detailed explanation of whether the proposed facility will interfere with implementation of the approved plan.

(ii) A detailed explanation of whether the proposed facility will interfere with municipal waste collection, storage, transportation, processing or disposal in the host county.

(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 or a reasonable expansion of an existing 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 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 each 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).

Subsection (c) was deleted in 2000 and replaced with the following new Subsection (2)(iii):

(iii) A detailed response to objection, if any, filed by the governing body of the host county within 60 days of the written notice under section 504 of the act (35 P.S. § 6018.504).

30 Pa. B. 6685 (December 23, 2000).

FINDINGS OF FACT

1. PA Waste, LLC ("PA Waste") is a Pennsylvania limited liability company, with its principal place of business at 175 Bustleton Pike, Feasterville, Bucks County, PA 19053. (PA Waste Exhibit ("PA Waste Ex.") T; Joint Stipulation, Paragraph ("Stip.") 6.)

2. The Department of Environmental Protection (the "Department") is an agency of the Commonwealth with the duty to administer and enforce the Solid Waste Management Act

("SWMA"), 35 P.S. § 6018.101 *et seq.*, the Municipal Waste Planning, Recycling and Waste Reduction Act ("Act 101"), 53 P.S. § 4001.101 *et seq.*, and the regulations promulgated thereunder.

3. On September 25, 2006, PA Waste submitted a municipal waste landfill permit application to the Department to build and operate a new landfill to be known as the Camp Hope Run Landfill in Boggs Township, Clearfield County. (Stip. 8, 9; Notes of Transcript page ("T.") 249.) (Clearfield County is an Intervenor in this appeal.)

4. Following a Local Municipal Involvement Process meeting held on January 11, 2007, PA Waste's application was deemed to be administratively complete and the Department's review process began on February 21, 2007. (Stip. 11, 15.)

5. PA Waste's proposed landfill is not provided for in the Clearfield County solid waste management plan prepared and maintained pursuant to Section 501 of Act 101, 53 P.S. § 4000.501.[2] (T. 68-69, 272; PA Waste Ex. B.)

6. Clearfield County has not provided for the Camp Hope Run Landfill in the county's solid waste management plan and will not consider doing so until the facility obtains a permit from the Department. (T. 144, 147-48, 153, 216, 234; PA Waste Ex. C, F, G, H, GG.)

7. Because PA Waste's proposed landfill is not in Clearfield County's solid waste management plan, the Department required PA Waste to perform a separate environmental siting analysis, a.k.a. "suitability analysis," as part of its permit application. (T. 54-57, 325.)

8. Notwithstanding the repeal of 25 Pa. Code § 273.139(c), Form 46 of the Department's application materials, entitled "Relationship to County Plan," specifically required PA Waste to perform an environmental siting analysis. (T. 80, 273-74; PA Waste Ex. FF.)

[2] Every county in Pennsylvania is required to adopt a municipal waste management plan for municipal waste generated within its borders. 53 P.S. § 4000.501. Among many other things, the plan may designate approved disposal sites for the county's waste. 53 P.S. § 4000.303.

9. PA Waste's initial permit application did not include a suitability analysis, which, given the landfill's exclusion from the County's plan, caused the Department to issue PA Waste a technical deficiency letter on April 12, 2007. (PA Waste Ex. B.)

10. The technical deficiency letter read in part as follows:

> In regard to the Act 101 issue, the application does not include a demonstration that the proposed facility is provided for in the host county plan; consequently, in order to comply with Act 101, Section 507, 53 P.S. 4000.507(a)(2) and 25 Pa. Code Section 273.139, the applicant must demonstrate: (1) that the proposed facility will not interfere with implementation of Clearfield County's approved Act 101 plan; (2) that the facility will not interfere with municipal waste collection, storage, transportation, processing or disposal in Clearfield County; and (3) that the proposed location of the facility is at least as suitable as alternative locations giving consideration to the environmental and economic factors.
>
> With respect to the site-suitability analysis required by 53 P.S. 4000.507(a)(2)(iii), it is requested that you provide the following information:
>
> 1. Identify the source of waste expected to be disposed at the proposed facility (by PA county or if out-of-state, then by that State and the specific county or counties); the quantity of waste expected from each source; the basis for the facility's expectation, e.g., signed contracts; designation in a state or county plan and, whether the expected waste is part of the existing waste flow in the source county or will come from future increased waste generation;
> 2. For existing waste flow that the proposed facility expects to redirect to its new facility, the applicant must provide the current disposal locations for that waste; the remaining capacity for any landfills where that existing waste is currently being disposed; and whether those current disposal locations are designated in the host county plan;
> 3. The applicant must also provide an analysis explaining why its proposed facility is more suitable for disposal of this existing waste than the current disposal locations.[3] The analysis must identify the environmental impacts resulting from redirecting existing waste to the new facility, and why redirecting the waste will be more (or less) protective of the environment than using the current disposal locations. For example, will redirecting waste to the new facility improve waste reduction, recycling, or other waste management programs in the source county? Will redirecting the waste reduce (air, land or water) pollution? The analysis must also examine economic factors and must explain how redirecting the waste to the

[3] *N.B.* Section 507 requires that the *location* of the proposed facility be *at least as suitable* as alternative locations. 53 P.S. § 4000.507(a)(2)(iii).

proposed facility will be more (or less) economically efficient than using the current facilities;

4. For expected waste from increased future generation, the applicant should explain why facilities currently receiving waste from the source county, or facilities already designated in the source county plan, are less suitable to receive the increased waste than the applicant's proposed facility;[4]
5. Finally, transportation distances and potential disposal facilities between the source county and the proposed facility should also be compared. For example, if the proposed facility is planning on receiving waste from Pittsburgh or New York City, the applicant must explain why its proposed facility is a more suitable disposal location than other potential disposal facilities situated between Pittsburgh and the proposed facility's location.[5] Again, the analysis must examine all relevant environmental and economic factors, such as increased pollution from vehicles, increased potential for highway accidents, increased costs for roadway repairs, or increased energy usage.

11. The Department required PA Waste to conduct its suitability analysis as a separate, preliminary phase of the application process. (T. 314, 381, 423-24.)

12. PA Waste and the Department participated in several meetings and discussions on how PA Waste could attempt to meet the requirements of the Department's suitability analysis. (T. 83, 115, 139, 167, 172, 375, 387, 511, 560, 562; PA Waste Ex. E.)

13. Under protest, PA Waste submitted information to the Department in an attempt to satisfy the Department's suitability analysis as described in its technical deficiency letter. (T. 231, 343, 512; PA Waste Ex. I, J; DEP Ex. H.)

14. Upon review of the new information, the Department remained dissatisfied that PA Waste had adequately documented that its proposed facility was at least as suitable as existing facilities. (T. 536-37.)

15. The Department sent PA Waste a second technical deficiency letter on February 28, 2008, which read in part as follows:

[4] See footnote 3.
[5] See footnote 3.

> 2. [Y]our response did not provide sufficient information to address this issue. Overall your suitability analysis for each facility was not detailed or quantified, and the analysis omitted key facts which are necessary for the Department to make a determination on compliance with the statutory and regulatory requirements. In addition, your response relies heavily on the fact that PA Waste has filed requests with Clearfield County seeking inclusion of the proposed facility as a designated disposal facility in the county plan.

(PA Waste Ex. K.)

16. After another meeting, PA Waste, again under protest, sent additional information to the Department in an effort to meet the Department's suitability analysis. (T. 101-02, 104, 183, 324, 343, 429, 474; PA Waste Ex. L, M, N, O; DEP Ex. P, Q.)

17. The Department denied PA Waste's permit application on July 11, 2008. (Pa. Waste Ex. A.)

18. The sole basis for the Department's denial of PA Waste's permit application was its finding that PA Waste failed to satisfy the separate suitability analysis that the Department determined was required by Section 507(a)(2)(iii) of Act 101. (T. 151, 274-75, 288, 338, 388, 517; App. Ex. A.)

19. The Department's denial letter provided in part as follows:

> Following DEP's review of the Permit Application, including PA Waste's responses in both of DEP's technical deficiency letters, DEP has made the determination that the Permit Application does not adequately address the requirements of Section 507 of Act 101, 53 P.S. § 4000.507. As you are aware, because of PA Waste's proposed facility is not included in the host county's Act 101 plan, according to Section 507(a) of Act 101, DEP shall not issue any permit for a municipal waste landfill unless PA Waste demonstrates to DEP's satisfaction that the proposed facility meets all of the requirements in Section 507(a)(2) of Act 101. 35 P.S. § 4000.507(a)(2). These requirements include a demonstration by PA Waste that the "proposed location of the facility is at least as suitable as alternative locations giving consideration to environmental and economic factors." Briefly stated, DEP interprets this statutory provision as requiring an applicant to identify the sources and quantity of waste expected to be disposed at its facility, and to identify the current disposal locations for this expected waste. The applicant must then demonstrate that its proposed landfill location is at least as suitable, environmentally and economically, as the current

> disposal locations for this expected waste. The applicant must also examine available alternative disposal facilities located between the source of the expected waste and the applicant's proposed facility, and demonstrate that the proposed facility is at least as suitable, environmentally and economically, as the available disposal locations. Applying this statutory requirement to PA Waste's submissions, DEP has determined that PA Waste's application has not demonstrated that the location of its proposed facility is at least as suitable as alternative locations for disposal of waste that the facility proposes to accept.

(PA Waste Ex. A.)

20. The denial letter went on to criticize PA Waste's conclusion that its proposed facility would be at least as suitable as several other Pennsylvania landfills for a waste stream identified by PA Waste originating in New York City based on such factors as available capacity, tipping fees, and distance from the source. (PA Waste Ex. A.)

21. The denial letter does not refer to 25 Pa. Code § 273.139 and instead appears to rely exclusively upon Section 507 of Act 101. (PA Waste Ex. A.)

22. In the absence of any formal or informal guidelines, standards, or procedures, Department employees in response to PA Waste's application for the first time "got together and came up with criteria that we thought would meet what site suitability was, protective of the environment and economic and environmental impact." (T. 339. *See also* T. 167, 272, 277-78, 316, 325-26, 329, 333-34, 337-39, 359, 388, 397, 400-01, 405, 472-73.)

23. In reviewing PA Waste's application, the Department relied upon the criteria that had been deleted from 25 Pa. Code § 273.139 (e.g. transportation distances and associated impacts). (T. 268, 273-74, 279, 299-300, 339; PA Waste Ex. A.)

24. Among other things, the Department considered the relative tipping fees at various landfills in assessing PA Waste's proposed landfill's "economic suitability." (T. 368-69; PA Waste Ex. A.)

25. The Department evaluated the economic and environmental impact of trucking waste to the PA Waste facility as part of its suitability analysis, but gave little or no attention to other harms and benefits of the facility. (T. 310-11, 361-62, 368, 459-60, 553, 557-58.)

26. In denying PA Waste's application, the Department relied on this Board's discussion of the repealed version of 25 Pa. Code § 273.139 in *Jefferson County Commissioners, et al. v. DEP*, (*"Leatherwood"*) 2002 EHB 132, *aff'd*, 819 A.2d 604 (Pa. Cmwlth. 2003). (T. 167, 280, 338, 346-47, 361-63, 388-89.)

27. Had the permit denial not occurred as a result of the Department's separate suitability analysis, the permit application review process would have moved on to an environmental assessment including a harms/benefits analysis. (T. 54, 122, 151.)

28. Among many other things, the Department's application forms for Phase I regarding the environmental assessment require an applicant to evaluate issues related to the transportation of waste to the proposed facility. (T. 81.)

29. The sort of environmental and economic factors that the Department considered here in a separate suitability analysis would normally have been part of the harms/benefits analysis if the facility had been included in the County's plan. (T. 401-02.)

DISCUSSION

This case requires us to decide whether the Department has applied Section 507(a) of Act 101 and the regulations promulgated thereunder correctly in the Department's review and subsequent denial of PA Waste's permit application. PA Waste argues that the Department erred by, in effect, relying upon a repealed version of 25 Pa. Code § 273.139, one of the regulations that implement Section 507. We agree. The Department erred by subjecting PA Waste to a

separate "suitability analysis" in this case when the regulation as revised eliminated that test as a stand-alone requirement.

The operative regulation, 25 Pa. Code § 273.139, quoted at the beginning of this Adjudication, formerly required an applicant in the difficult position of proposing a facility not provided for in the host county's solid waste management plan to perform an environmental siting analysis. (The parties have taken to calling this analysis the "suitability analysis.") Among other things, that analysis needed to include a discussion of the environmental assessment criteria in Section 271.127. Section 271.127 sets forth a detailed process that requires an applicant to show that the benefits of a project clearly outweigh those harms that cannot be mitigated. *See generally, Eagle Environmental II, L.P. v. DEP*, 584 A.2d 494 (Pa. 2005).

In response to Governor Ridge's Executive Order 1996-1, the Environmental Quality Board ("EQB") reevaluated all of the existing regulations, including Section 273.139, to determine whether they were more stringent than federal requirements and whether they were unnecessary or redundant. In response to that charge, the EQB found that the suitability analysis was redundant. It, therefore, proposed to delete the suitability analysis required under Section 273.139(c). In a clear expression of regulatory intent, the EQB explained:

> Under the proposed regulations, the suitability analysis will be satisfied by the environmental assessment performed under §§ 271.127 and 271.201(a)(4).

28 Pa. B. 4319 (August 29, 1998). The proposal passed muster, the repeal of Subsection (c) was finalized, and the requirement to perform a separate environmental siting analysis was deleted. 30 Pa. B. 6685 (December 23, 2000).

Even in the absence of this unequivocal expression of the EQB's intent, it is a fundamental rule of statutory and regulatory construction that a change in language indicates a

change in intent. *CSC Enterprises v. State Police*, 782 A.2d 57, 63 (Pa. Cmwlth. 2001). Administrative agencies are no more free to ignore their regulations than are persons sought to be regulated. *Teledyne Columbia-Summerhill Carnegie v. UCBR*, 634 A.2d 665, 668 (Pa. Cmwlth. 1993); *SmithKline Beckman Corp. v. Commonwealth*, 482 A.2d 1344, 1353 (Pa. Cmwlth. 1984), *aff'd*, 498 A.2d 374 (Pa. 1985); *Municipal Authority of Union Township v. DEP*, 2002 EHB 50, 61. The Department simply ignored the significant change in the regulatory language in this case. The Department subjected PA Waste to a mini-environmental assessment in the guise of a suitability analysis, which is exactly what the regulatory change was designed to prevent.

The Department protests that Section 507(a) of Act 101 itself still requires an evaluation of relative suitability. That is undoubtedly true, but Act 101 does not require a *separate* evaluation of suitability. The regulatory change makes it clear that relative site suitability is a component of the environmental assessment, not a separate and unnecessary duplicative step.

The regulations clearly provide that an application for a municipal waste landfill permit is to be a two-phase process. 25 Pa. Code § 273.101. Phase I is the environmental assessment and Phase II is the technical review. Here, the Department subjected PA Waste to a three-phase review, the first phase being the separate suitability analysis that is no longer required by Section 273.139.[6] The Department's Deputy Secretary explained that the issues that PA Waste was required to analyze would "normally" be part of the harms/benefits analysis in Phase I, but the Department created a new phase here because PA Waste was not in the county plan. (T. 401-02. *See also* 423-24.) However, there is nothing anywhere in Act 101 or in any implementing regulation to support imposing a new, separate, preliminary permit-review phase on facilities that

[6] Curiously and in a seeming departure from its normal practice (T. 41, 134), the Department required PA Waste to submit both Phase I and Phase II of its application simultaneously, and yet, the Department never reviewed Phase I before rejecting the application. (T. 310-11, 553.)

are not provided for in county plans. There might be an expanded environmental assessment for such landfills, but there is no statutory or regulatory authority for putting such landfills through a separate environmental siting assessment precedent to the comprehensive environmental assessment provided for in the regulations.

The EQB's decision to eliminate a separate siting analysis not only eliminated a redundancy, it otherwise makes perfect sense. If the relative harms and benefits of a project are to be evaluated rationally, all of the harms and benefits should be evaluated together. The Department's evaluation in this case focused too much attention on alleged harms associated with trucking waste. (T. 553.) PA Waste was given no opportunity to show how these alleged harms might be mitigated, and how any unmitigated harms balance against the benefits of the project. The Department's approach results in a distorted and truncated environmental assessment. Furthermore, requiring the applicant and the permit reviewers to go through two environmental assessments is a waste of time and energy.

That a suitability test should not be separated from the harms/benefits test is further illustrated by the Department's difficulties in implementing it in this case. PA Waste complains that the Department seemed to be making the test up as it went along, and that complaint is not entirely without merit. (FOF 22.) Rather than try to devise an entirely new test on an *ad hoc* basis in the context of an individual permit application, it would seem to be more prudent to develop an approach to applying Act 101's suitability criterion as part of the harms/benefits test with due consideration for its possibly wider application.

Thus, we conclude that the Department erred by requiring PA Waste to meet a separate suitability test. PA Waste also argues that the Department erred by applying the substantive criteria of Section 273.139(c) (repealed) as if they still existed. The Department responds that it

may force an applicant to analyze the criteria described in its technical deficiency letters by virtue of Act 101 itself and the Board's holding in *Leatherwood, supra*, which discussed such factors. The Department argues that *Leatherwood* interpreted Section 507(a) and the implementing regulations, and even though the regulation has changed, *Leatherwood* allows the Department to apply the repealed regulatory standards because the statute itself has not changed.

The Department's reliance on *Leatherwood* is entirely misplaced. We were very clear that our analysis in that case was based on Act 101 *and* the regulation as it was written *before* Subsection (c) was repealed. We were very clear that our holding was not an interpretation of Act 101 standing alone, and, in fact, we stated that our analysis was somewhat academic because many of the regulations being discussed – including Section 273.139(c) – had been replaced or significantly amended. 2002 EHB at 198. On appeal the Commonwealth Court repeated that the Board's discussion of Act 101 was dicta and "largely academic" and it declined to discuss any Act 101 issues. *Leatherwood*, 819 A.2d at 615. *Leatherwood* clearly does not speak to the extent to which the substantive criteria employed by the Department in applying a suitability analysis under the old regulation survive incorporation into the more comprehensive environmental assessment conducted as part of the Phase I review.[7]

The question going forward, then, is whether it is appropriate for the Department to use criteria that seem to be based upon the Board's interpretation of a repealed regulation in the Department's review of the suitability component of the environmental assessment to be performed under Phase I of the permit review.[8] It may be that the repeal of Section 273.139(c)

[7] Even if *Leatherwood's* discussion of suitability survived the regulatory change, that decision does not independently support the Department's imposition of a *separate* test.

[8] The Department argues in its brief that the regulatory change to Section 273.139 actually broadened the scope of appropriate inquiry under Section 507 of Act 101. Although there is no legal or factual support for this statement, and it is not clear that the statement accurately reflects Departmental policy, if the

signaled that a review pursuant to Section 271.127 adequately covers the suitability question. After all, Section 271.127 directs the Department to consider some of the same things that it considered in its suitability analysis (e.g. traffic, air quality, municipal waste plans).[9] Indeed, the Department's Deputy Secretary acknowledged that the factors that go into a suitability analysis would have been subsumed in the harms/benefits test had PA Waste's facility been in the county's plan. (T. 401-02). If Section 507(a)(2)(iii) adds anything new to the analysis, it is not obvious at this juncture what that new material is or should be. It is also not clear how any change to the Department's harms/benefits test as a result of adding a suitability component would need to be effectuated. *See Dauphin Meadows v. DEP*, 2000 EHB 521 (harms/benefits test must be set forth in regulation). Resolving these questions at this stage would be premature. We will leave it to the Department on remand to formulate an appropriate analysis in the first instance.

Because the Department improperly performed the suitability analysis in this case apart from the more comprehensive environmental assessment, and because that was the only basis for its denial of PA Waste's permit application, we sustain PA Waste's appeal and remand the matter to the Department for further review of PA Waste's application consistent with this Adjudication.

CONCLUSIONS OF LAW

1. PA Waste bears the burden of proof. 25 Pa. Code § 1021.122(c)(1).

2. PA Waste bears the burden of proving by a preponderance of the evidence following a *de novo* review of the Department's action that the Department's action is unlawful,

---

statement were true, it would further support our conclusion that suitability, whatever that turns out to be, should be evaluated in the context of the environmental assessment.

[9] This regulatory overlap further demonstrates the merit of repealing § 273.139(c).

unreasonable, or not supported by the evidence. *Pequea Township v. Herr*, 716 A.2d 678, 686 (Pa. Cmwlth. 1998).

3. It is a fundamental rule of statutory and regulatory construction that a change in language indicates a change in intent. *CSC Enterprises v. State Police*, 782 A.2d 57, 63 (Pa. Cmwlth. 2001).

4. The regulations provide that an application for a municipal waste landfill permit is to be a two-phase process. Phase I is the environmental assessment and Phase II is the technical review. 25 Pa. Code § 273.101.

5. Act 101 and the implementing regulations do not provide for a separate evaluation of suitability beyond any suitability assessment conducted as part of the Phase I environmental assessment. 53 P.S. § 4000.507(a); 25 Pa. Code § 273.139.

6. The Department erred by requiring PA Waste to meet a separate suitability test precedent to the Phase I environmental assessment when the regulation, as revised, eliminated the test.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PA WASTE, LLC	:	
	:	
v.	:	**EHB Docket No. 2008-249-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CLEARFIELD COUNTY, Intervenor	:	

ORDER

AND NOW, this 19th day of November, 2010, it is hereby ordered that PA Waste's appeal is **sustained**. The Department's permit denial is rescinded and PA Waste's application is remanded to the Department for further review in accordance with this Adjudication and Order.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

MICHAEL L. KRANCER
Judge

Judge Richard P. Mather, Sr., recused himself and did not participate in this matter.

DATED: November 19, 2010

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2009-067-L**
	:	**(Consolidated with 2010-033-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TILDEN TOWNSHIP, Permittee	:	**and 2010-104-L)**
	:	
	:	**Issued: December 9, 2010**
	:	

OPINION AND ORDER ON DEPARTMENT'S MOTION TO COMPEL

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a motion to compel the appellant to produce a stream survey report prepared by an expert who is not going to be called as a witness at the hearing on the merits.

OPINION

These consolidated appeals relate to the Department of Environmental Protection's (the "Department's") decision not to renew the NPDES permit authorizing Frank T. Perano ("Perano") to operate a waste water treatment plant serving the Pleasant Hills Mobile Home Park located in Tilden Township, Berks County. The Department has filed a motion asking us to order Perano to produce a stream survey conducted by representatives of Perano on April 22, 2008 of the unnamed tributary that acts as the receiving stream for Perano's discharge. The Department has requested a copy of the survey in interrogatories and document requests but

Perano has refused to turn it over. Perano has asserted that the survey is exempt from discovery pursuant to Pa.R.Civ.P. 4003.5(a)(3), which reads as follows:

> A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except a medical expert as provided in Rule 4010(b) or except on order of court as to any other expert upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means, subject to such restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate.

Perano correctly points out that Rule 4003.5(a)(3) applies in Board proceedings. 25 Pa. Code § 1021.102 (discovery in Board proceedings governed by Pa.R.Civ.P.); *Concerned Residents of the Yough v. DER*, 1990 EHB 703, 707; *New Hanover Township v. DER*, 1989 EHB 31, 33.

The Department does not question that the survey embodies facts known or opinions held by a nontestifying expert employed in anticipation of litigation. Rather, the Department asserts that Perano must turn over the report because (1) Perano has an independent obligation under his NPDES permit to provide information requested by the Department, and (2) the "exceptional circumstances" contemplated by Rule 4003.5(a)(3) are present in this case because it is impracticable for the Department to obtain facts and opinions regarding the condition of the stream on or about April 22, 2008 by any other means. The Department is incorrect on both counts.

Perano as an NPDES permiteee undoubtedly has an independent duty to provide information reasonably requested by the Department. Part B.I.C.1 of his permit specifically provides:

> The permittee shall furnish to DEP, within a reasonable time, any information which DEP may request to determine whether cause

> exists for modifying, revoking and reissuing, or terminating this permit, or to determine compliance with this permit.

The pendency of an appeal before this Board does not automatically stay this condition, or any other permit condition for that matter. Whatever right the Department has to request information, as well as whatever duty Perano has to supply that information pursuant to a separate information request made in accordance with the permit condition, continues in force during the pendency of an appeal. If the Department, for example, orders Perano to supply the information, that order would constitute a separate appealable action and we would consider Perano's obligation to produce the report pursuant to the permit in that context.

By the same token, however, the permit condition does not govern discovery conducted in a Board appeal. The permit condition does not trump the Board's rules. If the Department (or any other party) seeks discovery of information in a Board proceedings, it must follow the Board's rules. The duty to provide information in the context of a Board proceeding is not founded upon or related in any respect to the NPDES permit. Therefore, Perano's permit condition does not provide a basis for granting the Department's motion to compel.

We are also not persuaded that the Department's desire to know the condition of the stream on or about April 22, 2008 in order to defend its position in this appeal is the sort of "exceptional circumstance" contemplated by Rule 4003.5(a)(3). There is nothing special about that date. The Department's case is based upon an alleged history of problems at the plant over a period of years. The Department has performed its own stream surveys. Although we do not doubt that the information from the survey would be helpful, it takes more than that to give rise to an "exceptional circumstances."

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2009-067-L**
	:	**(Consolidated with 2010-033-L)**
COMMONWEALTH OF PENNSYLVANIA,	:	**and 2010-104-L)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and TILDEN TOWNSHIP,	:	
Permittee	:	

ORDER

AND NOW, this 9th day of December, 2010, it is hereby ordered that the Department's motion to compel is **denied.**

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: December 9, 2010

c: **DEP Bureau of Litigation:**
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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2010-001-L**
	:	**(Consolidated with 2010-016-CP-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 10, 2010**

OPINION AND ORDER ON MOTION TO COMPEL

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a party's motion to compel the Department to produce hard copies of civil penalty complaints and consent assessments of civil penalties in other cases. To the limited extent that the requested documents are at all relevant, the Department's response of making some of the documents available to review and copy was an adequate response.

OPINION

The Department of Environmental Protection (the "Department") has filed a complaint for assessment of civil penalties at EHB Docket No. 2010-016-CP-L against Frank T. Perano ("Perano") for alleged violations that occurred in connection with a waste water treatment facility owned and operated by Perano at his Cedar Manor Mobile Home Park in Dauphin County. Perano served its fourth set of document requests on the Department on July 20, 2010. Perano requested that the Department produce two things: (1) "all complaints for the assessment of civil penalties issued in the southcentral region involving alleged violations of the Clean

Streams Law, the Department's regulations under the Clean Streams Law, and/or the terms of NPDES permits," and (2) "all consent assessment of civil penalties issued in the southcentral region involving alleged violations of the Clean Streams Law, the Department's regulations under the Clean Streams Law, and/or the terms of NPDES permits." The Department objected to the requests but also supplied Perano with a listing of enforcement actions taken by the Southcentral Regional Office for the years 2007 through 2010, which included all civil penalty complaints and consent assessments of civil penalties. It also told Perano he could review all of the documents in the Department's file room.

Perano, not satisfied with the Department's response, has filed a motion to compel asking us to order the Department to "produce the consent assessments and civil penalty complaints as requested by Mr. Perano." It argues among other things that Robert Kachonik, a Water Program Specialist at the Bureau of Water Supply Facility Regulation, testified in his deposition that he received a copy of every enforcement action taken by the Department. Perano suggests that Kachonik can simply produce hard copies of all of those enforcement actions. He says that the Department should at the very least make its "database" available.[1] He argues that the documents are "clearly relevant."

The Department disagrees. Among other things, it notes that neither Perano's notice of appeal in EHB Docket No. 2010-001-L nor his answer to the Department's complaint in EHB Docket No. 2010-016-CP-L alleges that the Department violated his right to equal protection. It adds that information regarding what the Department has done in other enforcement actions is neither relevant nor calculated to lead to the discovery of relevant evidence. It adds that its production of a list of its enforcement actions, an offer to make documents in Kachonik's

[1] We are not sure what "database" Perano is referring to. The Department apparently does because it says the databases are "publicly available." (Response ¶ 14.)

possession available in electronic form, and its invitation to Perano to view and copy all documents in other cases maintained in the Department's file room together constitute an adequate response given the nature of Perano's request.

The fact that this case arises from a civil penalty complaint seems to have gotten lost in Perano's motion and the Department's response thereto. The Board's role in a civil penalty complaint case under the Clean Streams Law, 35 P.S. § 691.1, *et seq.*, is to make an independent determination of the appropriate penalty amount. *DEP v. Simmons*, EHB Docket No. 2009-029-CP-K, slip op. at 15 (Adjudication, April 6, 2010); *DEP v. Pecora*, 2008 EHB 146, 158; *DEP v. Kennedy*, 2007 EHB 15; *DEP v. Leeward Construction, Inc.*, 2001 EHB 870, *aff'd* 821 A.2d 145 (Pa. Cmwlth.), *app. denied*, 827 A.2d 431 (Pa. 2003). The Department suggests an amount in the complaint, but that suggestion is purely advisory. *DEP v. Strubinger*, 2006 EHB 740; *Westinghouse v. DEP*, 705 A.2d 1349 (Pa. Cmwlth. 1998). The Department's guidance documents that it uses in suggesting a penalty amount are one step further removed from the Board's deliberations. As we explained in *DEP v. Kennedy*, 2007 EHB 15,

> We do not view it as our responsibility to evaluate whether the Department had followed its own guidance document in calculating a *suggested* penalty in a complaint action. Rather, our responsibility is to assess a penalty based upon applicable statutory maxima and criteria, regulatory criteria (if any), and Board precedent.

2007 EHB at 26 (emphasis in original).

Perano's motion to compel seeks disclosure of "consent assessments and complaints for civil penalties" in other situations and cases. Even where an appeal is taken from a civil penalty *assessment*, if information regarding penalties assessed by the Department in other cases has any probative value at all, that scant evidentiary value is often outweighed "by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Pa. R. Evid. 403.

See American Auto Wash v. DEP, 729 A.2d 175, 179 (Pa. Cmwlth. 1999)(evidence the Board excluded regarding allegedly significantly reduced penalties against other operators was irrelevant to the reasonableness of the penalty imposed.) Here, we fail to see how the Department's settlements with other parties and how much the Department has asked for in other cases should guide *the Board's* assessment in this case. We do not intend to examine settlements and prayers for relief in other cases when we decide what if any penalty will be imposed in this case. Although *Board precedent* may be relevant if materially similar circumstances are shown to be present, *Westinghouse v. DEP*, 745 A.2d 1277, 1281-82 (Pa. Cmwlth. 2000), the information sought by Perano is not. Nor is it reasonably calculated to lead to the discovery of relevant evidence.

Furthermore, given Perano's questionable (at best) right to demand the information it seeks through discovery, we view the Department's response as adequate. In *Ambler v. DEP*, 2006 EHB 761, we said:

> The Board has certainly permitted a review of records in lieu of specific answers to interrogatories. However, the fact that the answering party must search large files to derive responsive material is not enough, by itself, to justify a general direction to files as an answer to an interrogatory. This is especially true where a requestor seeks materials that are directly related to the basis or reason for the Department's decision. In those instances, the Board has required a responder to at least direct the requestor to a portion of a document or file that is responsive to the discovery request. By contrast, where an interrogatory is broadly worded, seeks decades worth of Department records on a broad category of actions, or is unlikely to lead to admissible evidence for use at hearing, the Board has found that making files available is appropriate.

2006 EHB at 763-64 (footnotes omitted). To the list of situations where making files available is appropriate we would add Perano's effort in this case.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2010-001-L**
	:	**(Consolidated with 2010-016-CP-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 10th day of December, 2010, Frank T. Perano's motion to compel is **denied.**

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: December 10, 2010

c: **DEP Bureau of Litigation:**
Connie Luckadoo, Library

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

HENRY A. AND BARBARA M. JORDAN	:	
	:	
	:	
v.	:	**EHB Docket No. 2009-046-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WEST PIKELAND TOWNSHIP, Permittee	:	**Issued: December 21, 2010**

OPINION AND ORDER
ON MOTION TO DISMISS

By Michelle A. Coleman, Judge

Synopsis:

The Board denies the motion to dismiss this appeal as moot. The NPDES permit which is the subject of this appeal was terminated at the completion of construction activities of the soccer field. However, this termination has been appealed to the Board in a separate appeal and therefore is not a final action. The Board may still provide relief with respect to the NPDES permit.

OPINION

Before the Board is the Permittee's Motion to Dismiss the appeal as moot. This motion was filed by the Permittee, West Pikeland Township ("Township") after the Chester County Conservation District ("Conservation District") terminated the NPDES permit on August 25, 2010.

Procedural and Factual Background

This appeal, objecting to the Department's issuance of the National Pollutant Discharge Elimination System ("NPDES") Individual Permit for Stormwater Discharges Associated with Construction Activities (No. PAI011508070) to the Township, was filed on April 8, 2009. The crux of the Appellants' objections to the NPDES permit is that the permit fails to require the Township to implement adequate post construction stormwater BMPs.

On April 10, 2009 the Appellants filed an application for Temporary Supersedeas and Petition for Supersedeas. The Board granted the temporary supersedeas and conducted a four day hearing on the Petition for Supersedeas. At the conclusion of the hearing the parties conducted settlement discussions throughout the summer and fall of 2009, however in January of 2010 the parties requested that the Board render an opinion on the Petition for Supersedeas. The Board found that the Appellants had not met their burden and denied the Petition for Supersedeas in an Opinion and Order issued on February 5, 2010.

A hearing on the merits was scheduled to begin on July 6, 2010, however the parties requested an extension to continue to work on a settlement of the matter and the hearing was continued to September 20, 2010. A joint request of the parties was filed on July 26, 2010 requesting an extension of the hearing to October 18, 2010. After the Board granted the parties' request to reschedule the hearing to October 18, 2010, the Township filed this Motion to Dismiss on September 13, 2010. In light of this Motion to Dismiss the Board stayed the proceedings.

The catalyst behind the Township's filing this Motion to Dismiss was the Conservation District's letter terminating the NPDES permit on August 25, 2010 after it determined that the construction activities have been completed and the site stabilized.[1] The Township's Motion

[1] Henry A. Jordan passed away during the litigation of this appeal and Barbara Jordan has continued to litigate this matter.

requests the Board to dismiss the appeal as moot since the subject matter of the appeal no longer exists. The Appellant filed an appeal with the Board of the Conservation District's letter terminating the permit on September 8, 2010 which is pending at EHB Docket No. 2010-138-C.

NPDES Permit

The NPDES permit which is the subject of this appeal authorized the discharge of stormwater from construction activity. The permit provided a clause for its termination when all stormwater discharges from construction activities were eliminated, it specifically provides: "[w]hen all stormwater discharges associated with construction activity that are authorized by this permit are eliminated the permitee or co-permittee of the facility must submit a Notice of Termination form . . . ." NPDES permit, p. 5. That clause coincides with 25 Pa. Code § 102.7 which states, "upon permanent stabilization of the earth disturbance activity under § 102.22(c) (relating to permanent stabilization), the person who obtains permit coverage . . . shall submit a notice of termination to the Department or county conservation district." 25 Pa. Code § 102.7(a). The August 25, 2010 letter states that:

> [t]he District inspected the Site on Thursday, August 19, 2010, and determined that the Township has completed construction activities such that the Site is permanently stabilized within the meaning of 25 Pa. Code Section 102.22(c). Consequently, the District hereby approved the Notice of Termination for purposes of 25 Pa. Code Section 102.7, and the Permit is now terminated and closed.

Township Motion to Dismiss, Exhibit A.

Mootness

The issue before the Board is whether this appeal should be dismissed as moot. It has been held that a matter becomes moot when the Board can no longer provide effective relief.

Horsehead Resource Development v. DEP, 780 A.2d 865 (Pa. Cmwlth. 2001), *petition for allowance of appeal denied,* 796 A.2d 987 (Pa. 2002); *see also Perano v. DEP*, EHB Docket No. 2010-033-L (Opinion & Order issued May 27, 2010); *Blue Marsh Labs.,* 2008 EHB at 307-08; *Morris Township v. DEP*, 2006 EHB 55; *Solebury Township v. DEP,* 2004 EHB 23, 28-29; Valley *Forge Chapter of Trout Unlimited v. DEP*, 1997 EHB 1160.

Here, the NPDES permit, the subject of this appeal, has been terminated and in a separate action that termination has been appealed at EHB Docket No. 2010-138-C ("2010 Appeal"). Until the Board makes a determination on the appeal of that termination that action is not final as to the Appellant. *See* 35 P.S. § 7514(c). If we find this appeal, EHB Docket 2009-046-C ("2009 Appeal"), to be moot then it would render a premature ruling on the 2010 Appeal. Thus, in light of the issues in the 2010 Appeal we are unable to dismiss the 2009 Appeal. *See Richmond Township v. DEP*, 2007 EHB 755 (issues in the two appeals were so intertwined that to grant a motion to dismiss would result in a premature ruling on the second appeal).

Accordingly, we enter the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HENRY A. AND BARBARA M. JORDAN	:	
	:	
	:	
v.	:	**EHB Docket No. 2009-046-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WEST PIKELAND TOWNSHIP, Permittee	:	

ORDER

AND NOW, this 21st day of December, 2010, it is hereby ordered that the Township's Motion to Dismiss the appeal as moot is **denied**.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Judge

DATED: December 21, 2010

c: **DEP Litigation:**
Attention: Connie Luckadoo

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

CHRISTINA MCMILLEN	:	
	:	
v.	:	**EHB Docket No. 2010-154-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 21, 2010**

OPINION AND ORDER
DISMISSING THE APPEAL

By Michelle A. Coleman, Judge

Synopsis:

The Board dismisses Appellant's appeal for failure to follow Board rules and orders.

OPINION

The Board dismisses this appeal because the Appellant has failed to comply with Board orders. The Appellant appealed the Department of Environmental Protection's August 3, 2010 Water Quality Management Permit and Annual Maintenance Report requiring monthly and annual maintenance reports for small flow treatment facilities. (Notice of Appeal). After receiving the appeal the Board issued a failure to perfect order directing the Appellant to provide proof of service as required by 25 Pa. Code § 1021.51 by October 18, 2010. The Appellant ignored the order.

The Board issued a second order requesting the Appellant to provide the required information by November 24, 2010. The Order also provided that "[f]ailure to file the required information on or before November 24, 2010 will likely result in dismissal of the appeal." Order

of November 10, 2010.

We have not received any correspondence from the Appellant, other than the notice of appeal filed on September 27, 2010. The notice of appeal is required to be served on the Department, here there is no proof that such service ever occurred. *See* 25 Pa. Code § 1021.51. The Department is entitled, as a matter of law, to know the Appellant's objections to its actions. *See Robert Bishop v. DEP*, 2009 EHB 259. More than two months after filing a notice of appeal, the Appellant still has not complied with the basic requirement of serving the Department with the notice of appeal. *See Robert Bishop v. DEP*, 2009 EHB 259; *Perrin v. DEP*, 2008 EHB 78.

It is well established that the Board has the power under its rules to impose sanctions for failure to comply with Board rules and orders, 25 Pa. Code § 1021.161. We have said in the past that a sanction that results in dismissal is justified where a party fails to comply with Board orders and rules. *See Miles v. DEP*, 2009 EHB 179, 181 (failure to follow Board orders and rules indicates a lack of intent to pursue an appeal); *see also KH Real Estate, LLC*, EHB Docket No. 2009-004-R (Opinion & Order March 4, 2010), slip. op. 2; *Bishop v. DEP*, 2009 EHB 259; *Pearson v. DEP*, 2009 EHB 628; *RJ Rhodes Transit, Inc. v. DEP*, 2007 EHB 260; *Swistock v. DEP*, 2006 EHB 398; *Sri Venkateswara Temple v. DEP*, 2005 EHB 54. Therefore, we dismiss this appeal for failing to comply with Board orders and rules. Accordingly, we enter the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CHRISTINA MCMILLEN	:	
	:	
v.	:	**EHB Docket No. 2010-154-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 21st day of December, 2010, it is hereby ordered that above captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

MICHAEL L. KRANCER
Judge

RICHARD P. MATHER, SR.
Judge

DATED: December 21, 2010

c: **DEP, Bureau of Litigation:**
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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

PATRICIA A. WILSON AND PAUL I. GUEST, JR.	:	
v.	:	**EHB Docket No. 2009-024-L (Consolidated with 2009-026-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEWTOWN TOWNSHIP, Permittee and BPG ENTITIES, THE ROUSE GROUP DEVELOPMENT COMPANY, LLC, and ASHFORD LAND COMPANY, L.P., Intervenors	:	**Issued: December 27, 2010**

OPINION AND ORDER ON PETITION FOR COSTS AND ATTORNEY'S FEES

By Bernard A. Labuskes, Judge

Synopsis

The Board denies a petition for costs and attorney's fees in two consolidated appeals that successfully challenged the Department's approval of a municipality's Act 537 Plan Update because the appeals did not constitute proceedings pursuant to the Clean Streams Law.

OPINION

Patricia A. Wilson and Paul I. Guest, Jr. (hereinafter collectively "Guest") filed appeals that we consolidated from the Department of Environmental Protection's (the "Department's") approval of an Update to Newtown Township's Act 537 Sewage Facilities Plan. Although both parties originally appeared *pro se*, Guest, who is an attorney, eventually entered his appearance on behalf of Wilson. After an extensive period of discovery, pre-hearing motions, two trials, and

post-hearing briefing, we issued an Adjudication sustaining the appeals. *Wilson v. DEP*, EHB Docket No. 2009-024-L (Adjudication, November 1, 2010). We found that the Department should not have approved the Update because Newtown Township had no intention of implementing the Update at the time of the Department's approval.

Although we neither mentioned the Clean Streams Law nor relied upon it in any way in our Adjudication, Guest has filed a petition for reimbursement of costs and attorney's fees pursuant to Section 307(b) of that statute, 35 P.S. § 691.307(b).[1] That section authorizes this Board in its discretion to order the payment of costs and attorney's fees we determine to have been reasonably incurred by a party "in proceedings pursuant to this act." *Id.* The Department in response to Guest's fee petition argues that these consolidated appeals are not "proceedings pursuant to" the Clean Streams Law. We agree.

Fortunately, we have the benefit of some very recent case law on what constitutes a proceeding pursuant to the Clean Streams Law. In *DEP v. Pine Creek Valley Watershed Association*, Docket Nos. 12 & 13 C.D. 2009 (Pa. Cmwlth., March 25, 2010), *pet. for allowance of appeal denied*, 5 A.3d 820 (Pa. 2010) (*"Pine Creek"*), the Court upheld this Board's award of partial fees to a citizens' group that challenged the Department's approval of sewage modules for two residential developments that proposed on-lot septic systems that would have discharged into groundwater within the Pine Creek watershed, Pine Creek being an Exceptional Value (EV) waterway. The citizens argued that the antidegradation regulations promulgated pursuant to the Clean Streams Law, 25 Pa. Code § 93.4(b) and (c), applied to the Department's review of the sewage modules. In response to the appeal, the Department acknowledged the applicability of

[1] The Sewage Facilities Act, 35 P.S. § 750.1 *et seq.*, does not contain a provision for the recovery of counsel fees.

the antidegradation regulations and its failure to comply with them, and it rescinded its approval of the sewage planning modules.

The citizens petitioned for an award of fees for that portion of their efforts that related to the antidegradation issue. We granted the petition. *Pine Creek Watershed Ass'n v. DEP*, 2008 EHB 237 and 705. We noted that the Department did not dispute that its decision to withdraw its approval of the sewage modules was responsive to the citizens' contention that the Department failed in its duty to consider the impact of its approval on Exceptional Value waters. That duty arose under the antidegradation regulations promulgated under the Clean Streams Law. The citizens' notice of appeal specifically charged the Department with failing to consider the impacts to EV waters as required by the antidegradation regulations. The citizens' prehearing memorandum, evidence presented at the trial, and post-hearing brief all focused on the antidegradation issue. We pointed out that the antidegradation regulations were promulgated under the authority of the Clean Streams Law, and that the Commonwealth was required to adopt the antidegradation regulations by EPA under the Federal Water Pollution Control Act in order to obtain primacy. 2008 EHB at 242-43 (citing 40 C.F.R. § 131.12.) We concluded that "the provenance of these antidegradation requirements as a Clean Streams Law matter is beyond question." 2008 EHB at 243.

We were affirmed on appeal. *Pine Creek, supra.* The Commonwealth Court first said that the statutory requirement that fees be incurred in "proceedings pursuant to this act" can also be stated as "proceedings" or "litigation" "arising under" or "arising out of the Clean Streams Law or accompanying regulations." *Id.*, slip op. at 7-9. In putting meaning to those words, the Court examined the reason the citizens filed their appeal, i.e., the purpose of the litigation. Specifically, it asked whether the litigation was brought for the purpose of correcting or undoing

something that the Department did that was contrary to the Clean Streams Law or its regulations. The Court looked at whether the regulations at the center of the controversy were promulgated pursuant to the Clean Streams Law, and whether those regulations related to discharges to waters of the Commonwealth. *Id.* It asked whether the citizens' notice of appeal raised Clean Streams Law objections. It asked whether resolving the appeal clearly implicated the Clean Streams Law.[2]

The Court found that the answers to all of these questions left no doubt that the pertinent part of the citizens' appeal constituted a proceeding pursuant to the Clean Streams Law. The citizens' case was founded upon the Department's failure to comply with regulations designed to protect streams from degradation. The purpose of the appeals was to prevent that degradation. Resolving the case required the Board to interpret and apply the regulations designed to prevent water quality degradation.

Thus, in order to determine whether an appeal to this Board qualifies as a proceeding "pursuant to the Clean Streams Law" for purposes of resolving a fee petition, *Pine Creek* teaches that we should consider the following:

- The reason the appeal was filed, i.e., the purpose of the litigation
- Whether the notice of appeal raised objections related to the Clean Streams Law
- Whether the party pursued the Clean Streams Law objections through the trial and in post-hearing briefing
- Whether the regulations at the center of the controversy were promulgated pursuant to the Clean Streams Law

[2] In response to a dissent, the Court noted that the statutory authority for taking the particular action in question (e.g. approving sewage modules) is "not the test." Slip op. at 8. The majority was also not bothered by the fact that the case involved sewage as opposed to industrial waste. Although the statutory authority for the Department taking the particular action under appeal is not "the test," we also do not see it as entirely irrelevant.

- Whether the case implicates discharges to waters of the Commonwealth

In light of these factors, we conclude that Guest's appeals did not constitute proceedings pursuant to the Clean Streams Law; they were without a doubt proceedings pursuant to the Sewage Facilities Act and nothing else. As to the reason for the appeals, the Appellants' purpose was perfectly articulated by Wilson at the hearing:

> I brought this appeal because I had hoped that the township would go through the proper planning process to determine what the right answer was for sewers in my community as well as the larger community that they were looking at. And what I have been met with in my opinion has been not a desire to do the proper planning that will result in the right answer for the residents as well as the developers. ... I would like you to dismiss the current plan because I believe that this township has no intention, never had any intention, to implement this plan.

(Wilson T. 210-211.) The purpose of the Guest appeals was to overturn the Township's Plan Update. Guest sought to overturn the Update because the Update did not comply with the Sewage Facilities Act and the regulations promulgated thereunder. This case was all about sewage facilities planning. The Clean Streams Law did not play a supporting role in this case, let alone the lead.

Guest was able to dig up two objections in the Wilson notice of appeal as support for his claim that this is a Clean Streams Law case:

> 4. Township did not complete sewage needs survey for all areas contemplated. No environmental studies took place even though planned easements include disruption of Lewis Creek, a designated high priority waterway. (Exhibit 2 included)
>
> 8. Plan presented may effect wetlands and streams. No environmental studies or testing were completed for this plan.

However, Guest did not pursue these objections in prehearing memoranda, at trial, or in post-hearing briefs. There was absolutely no evidence or argument presented regarding harm to

waters of the Commonwealth. No discharges to waters were discussed or mentioned. The lack of proper attention being paid to failing septic systems in the Township was cited, not as an environmental threat, but as another example of the Township's poor planning.

The regulations at the center of this case were 25 Pa. Code §§ 71.31(f) and 71.32(d)(4), which provide that a municipality must be able and committed to implementing a plan update before submitting it to the Department for approval. (Adjudication, slip op. at 6.) The regulations derive from Section 5(d)(9) of the Sewage Facilities Act, 35 P.S. § 750.5(d)(9), which provides that "[e]very official plan shall: (9)[d]esignate municipal responsibility for implementation of the plan." These regulations do not relate in any material way to water quality. It is true that they were promulgated in part pursuant to the Environmental Quality Board's authority to promulgate regulations under the Clean Streams Law, but the truth of the matter is that there are hundreds of regulations that are not closely associated with water pollution but nevertheless rely at least in part on the authority to promulgate regulations granted by the Clean Streams Law. *See, e.g.*, 25 Pa. Code Chapters 77 (noncoal mining), 78 (oil and gas wells), 86 (coal mining), 270a (hazardous waste), 271 (solid waste), and 977 (storage tank indemnification fund). The *substance* of the regulations is what is important, and Sections 71.31(f) and 71.32(d)(4) relate directly to sewage planning, not water quality protection.

Finally, the Board's resolution of this case related to the Sewage Facilities Act, not the Clean Streams Law. Nothing about our Adjudication inures to the benefit of clean streams, except in the remote and indirect sense that informed sewage planning tends generally to result in better water quality, but so does effective air pollution control, safe mining, and proper hazardous waste management. To award Guest fees in this case would give credence to the fear expressed in the dissent in *Pine Creek* that reading Section 307 of the Clean Streams Law too

broadly could theoretically implicate "almost every DEP approval." *Id.*, slip op. at 17 (Jubelirer, dissenting). We are convinced that the Legislature did not intend such a broad reach for taxpayer subsidized litigation.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PATRICIA A. WILSON AND PAUL I. GUEST, JR.	:	
v.	:	**EHB Docket No. 2009-024-L (Consolidated with 2009-026-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEWTOWN TOWNSHIP, Permittee and BPG ENTITIES, THE ROUSE GROUP DEVELOPMENT COMPANY, LLC, and ASHFORD LAND COMPANY, L.P., Intervenors	:	

ORDER

AND NOW, this 27th day of December, 2010, Guest and Wilson's petition for costs and attorney's fees is **denied**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

MICHAEL L. KRANCER
Judge

RICHARD P. MATHER, SR.
Judge

DATED: December 27, 2010

c: **DEP, Bureau of Litigation:**
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