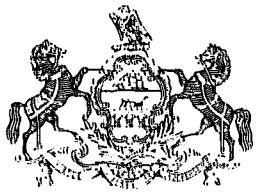
Environmental Hearing Board

Adjudications and Opinions



1993

Volume II

COMMONWEALTH OF PENNSYLVANIA
Maxine Woelfling, *Chairman*

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

1993

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1993.[1]

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

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1 This volume also contains one adjudication issued in 1992. That adjudication, South Fayette Township v. DER, 1993 EHB 1, was unintentionally omitted from the 1992 volume.

ADJUDICATIONS

OPINIONS AND ORDERS

1993 DECISIONS

COMMONWEALTH OF PENNSYLVANIA
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SECRETARY TO THE B

LOBOLITO, INC.	:	
	:	
v.	:	EHB Docket No. 92-147-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and NORTH POCONO C.A.R.E., Intervenor	:	Issued: April 8, 1993

ADJUDICATION

By Richard S. Ehmann, Member

Synopsis

Where, DER returns the revision in response to a municipal request to return a proposed sewage treatment plan revision without DER action as a result of the municipality's rescission of the resolution adopting the revision, no appealable DER action or adjudication has occurred. Accordingly, an appeal from this revision's return must be dismissed.

When DER simultaneously returns a companion proposed plan revision for the adjacent municipality which is linked in terms of sewage treatment methodology to the withdrawn plan revision, it acts in an appealable fashion because this second proposed revision was not withdrawn. However, the appeal from DER's action on this revision is moot because absent construction of the sewage treatment plant proposed in the withdrawn revision, the denied revision is not implementable.

Background

In the present appeal the Board is again asked to unravel the mysteries in the sewage facilities planning process established in the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, as amended 35 P.S. §750.1 *et seq.* ("Sewage Facilities Act"), and 25 Pa. Code Chapter 71. The instant proceeding was commenced on April 7, 1992 by Lobolito, Inc.'s ("Lobolito") appeal from a letter dated March 9, 1992 from the Department of Environmental Resources ("DER") to the Board of Supervisors of Clifton Township which returned that township's planning module for new land development in the township. This module proposed amendment of the Township's Official Sewage Facilities Plan to allow construction of an interim sewage treatment plant to treat sewage from the Clifton Elementary School located in Clifton Township, Lackawanna County, and Lobolito's subdivision (Rainbow Run) located in Lehigh Township, Wayne County.

By separate letter bearing the same date, DER returned Lehigh Township's Planning Module covering Rainbow Run. Lobolito appealed from that action also and its appeal received docket number 92-161-E. By Order dated May 11, 1992, the appeals were consolidated at the above docket number.

After consolidation, by an Opinion and Order issued on July 15, 1992, we allowed a group calling itself North Pocono Citizens Alert Regarding the Environment (C.A.R.E.) (hereinafter "North Pocono CARE") to intervene over Lobolito's objection. North Pocono CARE intervened in support of DER's position in this appeal.

Thereafter, the parties conducted discovery and filed their respective Pre-Hearing Memoranda. Subsequently, the appeal was scheduled for a hearing on the merits in December of 1992. Shortly before the scheduled hearing on November 25, 1992, the parties jointly suggested that in lieu of a merits hearing this Board adjudicate this matter on a stipulated factual record, Cross Motions For Adjudication On Stipulated Facts and supporting Briefs. Our Order of December 9, 1992 reflects our agreement to adjudicate the issues raised in this appeal in this underutilized fashion. Thereafter, on the schedule established in that Order, Lobolito filed its Motion and Brief and DER filed its responding Cross Motion and Brief. North Pocono CARE elected adoption of DER's Brief, as indicated in its letter to us dated February 22, 1993. It filed no Brief or Motion of its own. On March 1, 1993 the Board received Lobolito's Reply Brief.

On March 2, 1993, because a review of the parties' Briefs and the issues raised therein revealed a possible issue of mootness as to DER's letter to Lehigh Township which none of the parties had briefed, we ordered the parties to brief this issue by March 16, 1993. In due course, briefs on that issue were received from Lobolito and DER.

We adjudicate this consolidated appeal on the twenty-three stipulated facts, the two stipulated legal conclusions and the eleven stipulated exhibits.[1] Based on a complete review of this record, we make the following

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1 As to the exhibits, the parties have stipulated to their admission but not to the truth or relevancy thereof. Each party retained the right to argue on these points in its Brief.

findings of fact.

FINDINGS OF FACT

1. Lobolito is the owner and developer of a tract of land containing approximately 231 acres, located in Lehigh Township, Wayne County, which Lobolito proposes to subdivide and develop into approximately 205 residential lots. Lobolito's subdivision is known as both Rainbow Run and Big Bass Lake. (S-1), Exh. 11)[2]

2. Lobolito is a Pennsylvania Corporation with offices at P.O. Box 225, Gouldsboro, PA 18424. (S-2)

3. DER is the agency with the duty and authority to administer and enforce the Sewage Facilities Act, Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17, and the regulations promulgated thereunder. (S-3)

4. North Pocono C.A.R.E. is a non-profit organization incorporated in Pennsylvania with an address of P.O. Box 596, Moscow, PA 18444. (S-4)

5. North Pocono C.A.R.E. is a group of citizens who live near or in Clifton Township and on the Lehigh River downstream from Clifton Township. (S-5).

6. North Pocono School District ("School District"), is a school district organized and existing under the laws of the Commonwealth of Pennsylvania, located within portions of Lackawanna County and is the owner of a tract of land containing approximately 21 acres in Clifton Township,

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[2] S-__ is a reference to one of the parties' stipulated facts, while Exh.-___ is a reference to a stipulated exhibit.

Lackawanna County, upon which it proposes to construct the Clifton Elementary School ("School Project"). (S-6)

7. Lobolito and the School District entered into an agreement providing for, *inter alia*, the planning, permitting, construction and operation of a sewage treatment plant ("Plant") to be located on the School District property, to be owned and operated by a public utility corporation to be formed by Lobolito, and to serve both Rainbow Run and the School Project. (S-7)

8. Lobolito and the School District submitted applications to both Lehigh Township and Clifton Township for the purpose of amending their respective Official Sewage Facilities Plans to reflect sewage disposal for the school project and the subdivision in accordance with their agreement. (S-8)

9. After approving Lobolito's proposal by resolution on November 7, 1991, the Board of Supervisors of Lehigh Township, Wayne County, filed with DER an official sewage facilities plan revision which provided for the treatment of wastewater from Lobolito's subdivision across the Lehigh River in Clifton Township, Lackawanna County, at the Plant to be constructed on the School District's property in Clifton Township. (S-9, Exh. 3)

10. Lehigh Township's proposed revision of its Official Sewage Facilities Plan approving this concept was filed with DER on November 18, 1991. (S-9)

11. After approving the School District's proposal by resolution on November 9, 1991, the Board of Supervisors of Clifton Township, Lackawanna County, filed with DER an official sewage facilities plan revision which

provided for use of the Plant to be constructed as part of the School Project in Clifton Township to treat wastewater from the School Project in Clifton Township, Lackawanna County, and Lobolito's proposed subdivision across the Lehigh River in Lehigh Township, Wayne County. (S-10, Exh. 5)

12. Clifton Township's proposed revision of its Official Sewage Facilities Plan approving this concept was also filed with DER on November 18, 1991. (S-10)

13. The official sewage facilities plan revisions of Lehigh Township, Wayne County, and Clifton Township, Lackawanna County, are interdependent. (S-11)

14. The School Project in Clifton Township would be entirely commercial (non-residential), and the proposed sewage flows of the School Project would be approximately 14,000 gallons per day. (S-12)

15. Lobolito's Rainbow Run subdivision would consist of commercial property generating sewage flows of approximately 10,000 gallons per day and residential property generating sewage flows of approximately 58,000 gallons per day. (S-13)

16. On December 30, 1991, DER received a letter from the Clifton Township Solicitor (Exh. 10) asking DER not to complete its review or approve the official sewage facilities plan revision until Clifton Township's engineers performed and submitted to DER engineering studies addressing the project. DER never received any such studies from the township or its engineers. (S-14, Exh. 10)

17. On January 11, 1992, the Clifton Township Board of Supervisors acted upon a conditional use application and approved the School Project but denied the Plant to the extent that it would include the treatment of wastewater from the Rainbow Run subdivision. (Exh. 11) Lobolito and the School District appealed this action of the Clifton Township Board of Supervisors to the Court of Common Pleas of Lackawanna County. The appeal is pending. (S-15, Exh. 11)

18. As indicated in the Decision on the Application of the North Pocono School District for a Conditional Use Permit adopted January 11, 1992, and in Resolution 2-1992, adopted February 8, 1992, between November 9, 1991, and February 8, 1992, the Clifton Township Board of Supervisors determined that it would not be in the best interests of Clifton Township for sewage to be conveyed across the Lehigh River for treatment at the proposed sewage treatment plant for the School District. (S-16)

19. On February 8, 1992, the Board of Supervisors of Clifton Township adopted a resolution (Exh. 7) rescinding its approval of the official sewage facilities plan revision it had previously submitted to DER for the Lobolito/School District proposal. (S-17, Exh. 7)

20. On March 6, 1992, DER received a letter (Exh. 8), dated March 5, 1992, from the Clifton Township Solicitor. Attached to the letter was a copy of the February 8, 1992 Resolution of Clifton Township's Board of Supervisors rescinding Clifton Township's prior approval of the planning modules at issue. The letter requested DER to return the planning modules to the Clifton Township Board of Supervisors. (S-18, Exh. 8)

21. Under cover of a letter dated March 9, 1992 (Exh. 2), DER returned the planning modules to Clifton Township. DER's March 9, 1992 letter to Clifton Township did not expressly approve or disapprove this planning module. (S-19, Exh. 2)

22. Under cover of a second letter dated March 9, 1992 (Exh. 1), DER also returned the planning module to Lehigh Township. The letter notes that "since a valid revision to Clifton Township's Official Sewage Facilities Plan no longer exists for serving [Lobolito's Rainbow Run] project located in Lehigh Township, the wastewater needs for this project are not adequately addressed." DER's March 9, 1992 letter to Lehigh Township did not explicitly approve or disapprove this planning module. (S-20, Exh. 1)

23. DER returned the planning modules to Clifton and Lehigh Townships within 120 days of the Townships' submission of the modules to the DER for approval. (S-21)

24. Subsequent to DER's return of the planning modules to Clifton and Lehigh Townships, Lobolito filed its appeals, and has not requested the DER to review the modules. (S-22)

25. Subsequent to the filing of the appeals in this case, Lobolito and the School District filed an alternative planning module with both Clifton and Lehigh Townships. The alternative module provides for the construction of the sewage treatment plant within Lehigh Township, rather than Clifton Township. (S-23)

26. There is no evidence Lobolito owns any property in Clifton Township.

DISCUSSION

While the parties' cross motions and briefs raise many interesting issues as to how to interpret DER's actions and the regulations, including a DER assertion that certain of these regulations are *ultra vires*, the first issue we must address is DER's assertion of our lack of jurisdiction to hear this appeal. It is only if we have jurisdiction over this appeal that we have authority to address these other issues.

DER argues that its return of the modules to both townships was not an "action" of the type which creates a right to appeal to this Board. DER correctly points out that pursuant to Section 4(a) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7514(a), this Board's jurisdiction is limited to holding hearings on orders, permits, licenses or decisions of DER and that 25 Pa. Code §21.2(a) defines an appealable DER action as:

> 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, denials, modifications, suspensions and revocations or permits, licenses, and registrations; orders [to cease or undertake various activities]; and appeals from and complaints for the assessment of civil penalties.

A DER action is also appealable if it constitutes an "adjudication" within the meaning of 2 Pa. C.S. §101. There, "adjudication" is defined as:

> Any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made.

See Lehigh Township, Wayne County v. DER, EHB Docket No. 91-090-W (Opinion issued May 22, 1992) and John and Sharon Klay, d/b/a Fayette Springs Farms v. DER, EHB Docket No. 92-280-E (Opinion issued February 4, 1993).

DER asserts that it did not act or adjudicate as to the two plan revisions but merely returned them to the respective municipalities after Clifton Township rescinded its resolution amending its Official Sewage Facilities Plan. DER says that since it merely returned these proposed plan revisions, neither approving nor disapproving of same, it did not make a decision on their merits, which is what is required for its actions to be appealable to this Board. It further asserts that Lobolito's argument as to a "deemed approval" by DER of the two proposed revisions because of DER's untimely return of the modules does not create jurisdiction in this Board.

As to this last assertion by DER, we concur. Any suggestion of a "deemed approval" under 25 Pa. Code §71.54(e) and counter-arguments that there was no such deemed approval in this proceeding can only be addressed by this Board if it has jurisdiction over the subject matter. No portion of any applicable statute or regulation exists which creates a special type or class of subject matter jurisdiction for this Board allowing it to decide deemed approval questions of this type where the Board otherwise lacks jurisdiction over the subject matter of the entire appeal. Thus, the first question is: Do we have that jurisdiction?

Lobolito first addresses this jurisdiction question in its Reply Brief where it asserts that this was a final appealable decision by DER. There it argues that the planning process is lengthy and delay of planning

approvals can lead to a project's defeat, that the return of these modules to the townships was a rejection thereof, that even if the return of the Clifton Township revision modules was proper the return of the Lehigh Township revision modules was not, and that DER did not fail to act here but acted in an appealable fashion.[3]

Based on our analysis of the law as applied to the record, the answer to this jurisdiction question is no as to the Clifton Township proposed plan revision, but yes as to Lehigh Township's proposed plan revision.

Both Clifton Township in Lackawanna County and Lehigh Township located in Wayne County are vested with the specific responsibility for the planning needed to address sewage disposal needs within their own individual jurisdictions by Section 5(a) of the Sewage Facilities Act, 35 P.S. §750.5(a). Neither municipality is vested with authority to address such issues in the other municipality. And, though DER has supervisory responsibility with regard to both municipalities to insure that this municipal responsibility is properly fulfilled, even its supervisory role is limited and it is not empowered to undertake this planning itself. See 35 P.S. §750.5(e) and Morton Kise v. DER, et al., Docket No. 90-457-MR (Adjudication issued December 8, 1992). Thus, we look at each municipality and its proposed plan revision separately for jurisdictional purposes.

Clifton submitted its proposed revision covering the school project and sewage treatment plant to DER for approval. Had DER approved it, the

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3 The remainder of this Brief addresses other issues and arguments raised by DER rather than jurisdiction.

approved revision would have modified Clifton's existing plan in the fashion set forth in the revision, but before DER reacted to it by approving or disapproving same, Clifton rescinded its resolution approving the revision and withdrew the revision from DER's consideration. It is a resolution adopting the proposal as the township's own and making it a part of the township's plan which is essential if DER is to review it. Robert D. and Elizabeth L. Crowley v. DER, 1989 EHB 44. Clifton's rescinding resolution caused Clifton's unrevised Sewage Facilities Plan to remain as it existed prior to the proposed revision's initial submission to DER. Thus, while DER acted to return Clifton Township's proposal in response to the resolution's rescission and Clifton's request, it did not act in an appealable fashion. DER's return of the revision to Clifton did not modify Lobolito's then-existing rights, duties, or obligations in any fashion. George Reinert v. DER, 1989 EHB 77; Kephart Trucking Company v. DER, Docket No. 90-514-MJ (Opinion issued February 21, 1992); Westtown Sewer Company, et al. v. DER, Docket No. 91-269-E (Opinion issued February 4, 1992). Lobolito continued to have whatever rights, duties or obligations it had under Clifton's unrevised plan. Had DER approved or rejected Clifton Township's proposed revision, that would have changed the status quo and Lobolito accordingly could appeal. Solomon Run Community Action Committee v. DER, EHB Docket No. 90-483-E (Opinion issued January 24, 1992), Bronia Sultanik v. DER, 1986 EHB 1238. As a result, we conclude that as to Lobolito's appeal at Docket No. 92-147-E we lack jurisdiction thereover and must dismiss it.

In reaching this conclusion we explicitly reject Lobolito's argument that Clifton Township had no legal authority to rescind its proposed plan revision prior to DER's action thereon. The only authority cited for this contention by Lobolito is 25 Pa. Code §71.53(b).

Insofar as Lobolito asserts this regulation bars a subsequent rescission of this resolution, Lobolito's assertion lacks any support. Simply put, this regulation deals with issues of getting a municipality to review and act on proposals made to it by a property owner within the municipality so that proposals do not end up in a limbo created by a municipality which fails to promptly review and act on a property owner's proposal by either rejecting it or agreeing to adopt it and submit it to DER as municipality-endorsed. Nothing in this regulation deals with a subsequent municipal change of mind verbalized by resolution, as occurred here. Moreover, nothing in the regulations in 25 Pa. Code Chapter 71 or the Sewage Facilities Act prohibits municipal rescission occurring before DER acts on a pending plan revision. Clearly, once a plan is approved by DER and in place, the municipality must either get DER approval of another revision thereof or implement the plan. Kidder Township v. Commonwealth, DER, 41 Pa. Cmwlth. 376, 399 A.2d 799 (1979). But that is not the circumstance here. Moreover, we can understand the legislature and the Environmental Quality Board not prohibiting such a withdrawal. Flexibility rather than rigidity is what makes planning activities meaningful and able to accommodate changing circumstances. To hold otherwise is to agree with Lobolito that DER is locked into endorsement or rejection of each proposed revision and the municipalities may only revise or

implement their plans. Finally, since a plan for sewage disposal existed for this township prior to the proposal, the rescission and revision withdrawal left the unrevised plan still in place. If Lobolito is dissatisfied with that outcome, its remedy lies under Section 750.5(b) of the Act, if it can convince the School District to petition DER to order Clifton to revise its plan.

As to Lehigh Township's revision, however, DER acted in an appealable fashion. DER's letter to Lehigh Township (Exh. 1) was not written as a result of any resolution rescinding Lehigh's proposed plan revision. Lehigh's plan revision remained approved by it and before DER. Moreover, DER's letter to Lehigh reflects at least implicitly that even DER recognized the distinction between the two proposed plan revisions that its arguments on appealability ignore. DER's letter to Lehigh reflects the DER decision/conclusion that in light of Clifton's withdrawal of its proposed revision "the wastewater needs for this [Lobolito] project are not adequately addressed." This decision on the pending revision was clearly final. DER was not calling for further time for it to complete review or the submission of more information to it. Clifton's revision was withdrawn absolutely and so only Lehigh's remained. DER's return of this revision's module to Lehigh was in fact a DER denial thereof. A DER disapproval of a municipally adopted proposed plan revision is appealable. Sultanik, *supra*. Accordingly, we must sever Lobolito's appeal as to Lehigh's revision from its appeal of the Clifton Township revision and judge DER's actions as to Lehigh's proposal on their merits.

In evaluating DER's actions as to the Lehigh Township plan revision, we must keep in mind, however, the admittedly interrelated nature of the two

townships' proposals. No method for sewage treatment is proposed for the sewage generated by Lobolito's subdivision other than in the school project's plant. The only treatment proposed was found in the rescinded Clifton Township proposal. Because of this lack of sewage treatment in the Lehigh proposal, this Board can not grant Lobolito any effective relief, and thus its appeal as to the Lehigh Township plan revision must be dismissed as moot. Willard M. Cline v. DER, 1989 EHB 1101, and Empire Sanitary Landfill, Inc. v. DER, 1991 EHB 66.

We draw this conclusion because if Lobolito's tract were now to be developed as proposed in the plan revision, sewers would be built to collect and convey sewage from the homes and commercial establishments to be built on the tract downhill to the Lehigh River (a high quality cold water fishery according to Exh. 9). From there, the sewage would be piped beneath the river to the school district's tract, located on the opposite river bank, for treatment at a sewage treatment plant which is not provided for in Clifton Township's plan and thus will not exist. The result would be a discharge of sewage to the river. Further, once a plan revision calling for the construction of sewers is approved by DER, thereby becoming a part of Lehigh's Official Sewage Plan, the next step for the subdivider and township is plan implementation. As set forth in Section 7(a) of the Sewage Facilities Act, 35 P.S. §750.7(a), permits for such sewers are issued by DER pursuant to the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 ("Clean Streams Law"). See Toro Development Company v. Commonwealth, DER, 56 Pa. Cmwlth. 471, 425 A.2d 1163 (1981).

Sections 201 and 202 of the Clean Streams Law (35 P.S. §§691.201 and 202) collectively prohibit the discharge of sewage to the waters of the Commonwealth except as authorized by this Act and require a permit for all such discharges. Section 202 has long been interpreted to prohibit a discharge of sewage to a water of the Commonwealth (of which the Lehigh River is one) without a permit authorizing same. Edwin Trask v. DER, 1974 EHB 396, 405. Moreover, all discharges must be authorized by permit according to the regulations, see 25 Pa. Code §§92.3 and 95.1, and DER is not at liberty to ignore the mandate of these regulations. Mil-Toon Development Group v. DER, 1991 EHB 209. Finally, all discharged wastes must receive a level of treatment to be set by DER to protect the receiving waters, 25 Pa. Code §91.31, 92.3, 92.21, 92.31. Thus, DER could not issue Lehigh Township or Lobolito permits for sewers to serve the subdivision because there is no treatment proposed for sewage to be discharged therefrom. If DER cannot issue permits for these sewers in this circumstance, this revision is not implementable. Thus, because of the linked nature of the withdrawn Clifton Plan Revision and the denied Lehigh Plan Revision, it would appear that this Board can grant no meaningful relief to Lobolito as to DER's denial of Lehigh's revision.[4]

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[4] In so concluding, we have specifically not ruled on Lobolito's "deemed approval" argument as to Lehigh Township's Plan Revision based on 25 Pa. Code §71.54(e). DER rejected this revision by letter dated March 9, 1992 and had received it on November 18, 1991. By our computation the time between these dates adds up to less than the 120 days needed for deemed approval under §71.54(e). Even though DER clearly failed to review this plan revision within (footnote continues)

In its Brief on this mootness issue, Lobolito asserts the appeal is not moot since DER may order Clifton to either implement the plan revision previously filed and withdrawn or take such other action as DER feels are necessary to provide proper sewage facilities planning for an approved land development project within Clifton. Lobolito then alleges that Lehigh, the School District and Lobolito all relied on Clifton's submission of this revision to DER. Next, it asserts that DER's allowance of Clifton's withdrawal of the proposed revision was improper since it could compel implementation of this proposed revision.

As stated above, we agree with Lobolito that DER has the power to order implementation by Clifton of necessary sewage facilities planning activities. However, it simply does not flow from the legislature's empowerment of DER in this manner that DER erred in allowing the revision's withdrawal, especially where a further modification of the inter-dependent plans is currently under consideration as the parties have stipulated. DER does not order sewage facilities planning activities arbitrarily, it does so after it determines the existing plan is inadequate. See 35 P.S. §750.5(b). This withdrawn revision was not a part of Clifton's approved plan until after DER approves it. Until then, it was merely a proposed revision which was withdrawn prior to approval by DER. Moreover, contrary to Lobolito's argument, the stipulated facts clearly show that more than a conditional use application's denial occurred here.

(continued footnote)
the sixty day period specified in 35 P.S. §705.5(e), the statute contains no deemed approval language covering such failures.

We also reject Lobolito's assertion that Clifton's plan is inadequate because the township approved the school's construction but provided no means to treat sewage from the school. The stipulated facts show the school's conditional use application was approved except insofar as the Plant would be large enough to treat sewage from Lobolito's Rainbow Run, too. Thus, the conditional use application was not simply rejected. Moreover, the parties stipulated that even that decision is under appeal in the proper forum. It is not before us, nor, since we are a Board with limited jurisdiction, is it something we are authorized to adjudicate. Kise, *supra*.[5] Clearly Lobolito is not letting the conditional use decision lie, but that is a separate decision from the sewage facilities issues before us even though it relates to the School Plan and the Plant. Kise, *supra*. Lobolito is thus in error when it suggests a municipality may avoid its sewage planning responsibility by merely denying zoning permits.

Contrary to the inferences in Lobolito's Briefs, this also does not mean Lobolito lacks any means to move its development plans forward. Since there is no evidence Lobolito owns property in Clifton, it cannot petition DER to order Clifton's plan to be amended to accommodate the need for a sewage treatment plant to treat sewage from its development in Lehigh pursuant to 25 Pa. Code §71.14 or Section 5(b) of the Act (35 P.S. §750.5(b)). However,

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5 Even if DER has the power to order Clifton to revise its plan to provide for sewage treatment *vis à vis* the new school and its plan is inadequate, until it does so, all that is required to remedy that inadequacy is that DER order a revision to handle the school's volume of sewage, not the school's sewage and the sewage from Lobolito's subdivision.

Lobolito can seek and, indeed, has already sought approval by Lehigh for a further revision of Lehigh's plan to provide sewage collection and treatment within Lehigh. Moreover, if Lehigh should fail to address Lobolito's needs for sewage disposal in connection with development of its tract then Lobolito has access to the remedies in Section 5(a) of the Act and Section 71.14 of the regulations as to Lehigh.

Accordingly, we conclude that as to Lehigh's plan revision, this appeal is moot and make the following Conclusions Of Law and we enter the following Order.

CONCLUSIONS OF LAW

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

2. Actions of DER are appealable only if they are "adjudications" within the meaning of the Administrative Agency Law, 2 Pa.C.S. §101, or "actions" as defined at 25 Pa. Code §21.2(a). Lehigh Township, Wayne County v. DER, EHB Docket No. 91-090-W (Opinion issued May 22, 1992): John and Sharon Klay, d/b/a Fayette Springs Farms v. DER, EHB Docket No. 92-280-E (Opinion issued February 4, 1993).

3. Unless the Board has jurisdiction over the subject matter of this appeal, it may not adjudicate a party's "deemed approval" contentions because there is no separate grant of jurisdiction to the Board, separate from the grant of its jurisdiction to hear appeals from DER's actions or adjudications, authorizing it to decide "deemed approval" questions.

4. Neither the Sewage Facilities Act nor DER's regulations prohibit Clifton Township from rescinding its proposed plan revision prior to DER taking action on it.

5. Where a municipality rescinds its resolution adopting a revision to its sewage facilities plan before DER acts to approve or reject the revision and requests DER return the proposal to the municipality, DER's action returning this proposal to the municipality is not appealable to this Board.

6. Where DER not only returns the withdrawn revision but also returns an unwithdrawn but inter-dependent proposed plan revision of an adjacent municipality, DER's return of the second municipality's revision because its sewage disposal needs are no longer adequately addressed constitutes an appealable action or adjudication by DER.

7. Where the second municipality's plan revision proposed no method of treatment for the sewage to the generated by a subdivision within its borders except in a sewage treatment plant to be built under the adjacent municipality's withdrawn revision, the plan revision could not be implemented, and, thus, an appeal of DER's denial of this revision is moot since we can grant the developer no meaningful relief. William M. Cline v. DER, 1989 EHB 1101; Empire Sanitary Landfill, Inc. v. DER, 1991 EHB 66.

ORDER

AND NOW, this 8th day of April, 1993, it is ordered that Lobolito's appeal of DER's letter returning Clifton's proposed plan revision is dismissed as not being from an appealable action. It is further ordered that Lobolito's appeal of DER's letter denying Lehigh's proposed plan revision is dismissed as moot.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
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Richard S. Ehmann

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Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 8, 1993

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOARD

DAVID C. PALMER	:	**EHB Docket No. 92-466-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** April 8, 1993
and YORK COUNTY SOLID WASTE AND REFUSE	:	
AUTHORITY, Permittee	:	

OPINION AND ORDER SUR
MOTION TO DISMISS

By Maxine Woelfling, Chairman

Synopsis

A motion to dismiss an appeal as untimely is granted in part where the appellant, who was not the recipient of the Department of Environmental Resources' (Department) actions at issue, did not file a notice of appeal until over four years after notification of the Department's action was published in the Pennsylvania Bulletin. The appeal remains viable with regard to a challenge to the renewal of one of the challenged permits.

OPINION

This matter was initiated by the October 14, 1992, filing of a notice of appeal by David C. Palmer, who is representing himself in this matter.[1] While it is clear from the notice of appeal that Mr. Palmer is opposed to the

[1] As it will become evident in the remainder of this opinion, Mr. Palmer's *pro se* status has presented problems for the Board, the opposing parties and, not the least of all, Mr. Palmer. The Board has noted on a number of occasions that individuals who represent their own interests without legal counsel assume the risk that their lack of knowledge may lead to an adverse ruling. Michael and Karen Welteroth v. DER and Clinton Township Board of Supervisors, 1989 EHB 1017, 1022-1023; Doreen v. Smith and Evelyn Fehlberg v. DER and Herbert Kilmer and Joseph Bendick, EHB Docket No. 86-523-W (Adjudication issued March 11, 1992).

construction, operation - and the existence - of the York County Solid Waste and Refuse Authority's (Authority) municipal waste incinerator in Manchester Township, York County,[2] it is less clear what actions of the Department he is challenging. One of the attachments to the notice of appeal is a public notice regarding the Authority's application to renew its municipal waste processing permit (Solid Waste Permit No. 400561), but other correspondence attached expresses Mr. Palmer's opposition to any and all permits issued by the Department to the Authority. And, finally, the notice of appeal appears to incorporate a civil action instituted by Palmer in the York County Court of Common Pleas which, as relief, sought revocation of permits issued to the Authority.[3]

On November 13, 1992, the Authority filed a motion to dismiss Palmer's appeal, arguing that under 25 Pa. Code §21.52 the Board is without jurisdiction to hear Palmer's appeal because it was filed more than 30 days after the Department had published notice of its 1987 issuance of solid waste and air quality permits to the Authority in the Pennsylvania Bulletin.

The Department did not respond to the Authority's motion.

Palmer, on November 24, 1992, objected to the Authority's motion, contending that his appeal was filed in a timely manner because he instituted a civil suit within five years of the date of purchase of land for the

---

[2] The facility is commonly referred to as the Blackbridge incinerator and is the subject of another challenge pending before the Board, Residents Opposed to the Blackbridge Incinerator (ROBBI) v. DER and the York County Solid Waste and Refuse Authority, EHB Docket No. 87-225-W.

[3] The suit was dismissed by the York County Court of Common Pleas in a September 23, 1992, opinion. David C. Palmer v. York County Solid Waste and Refuse Authority, No. 91-SU-05958-07. Among other things, the Court held that it was without equity jurisdiction because Palmer had failed to pursue his claims relating to the permits to the Board.

Blackbridge incinerator. He also responded that the permits issued to the Authority were invalid because the only study relating to the incinerator was unfair, biased, and fraudulent.

As the Authority correctly notes, jurisdiction of the Board does not attach to an appeal unless the appeal is in writing and is filed with the Board within 30 days after notice of a Department action. In the case of third party appeals like Palmer's, the 30-day appeal period does not begin to run until publication of notice of the Department's action in the Pennsylvania Bulletin. Lower Allen Citizens Action Group v. Department of Environmental Resources and Hempt Bros., Inc., 119 Pa. Cmwlth. 236, 538 A.2d 130 (1988).

It is clear that Palmer's challenge to the 1987 issuance of the air quality and solid waste permits is untimely and must be dismissed. These permits were issued by the Department on May 13, 1987, and notice of their issuance was published at 17 Pa.B. 2262-2263 (June 13, 1987). Consequently, in order for Palmer to have filed a timely appeal of those permits, his notice of appeal would have had to be filed on or before July 14, 1987. Since Palmer's appeal was not filed until October 14, 1992, it was clearly untimely as to the 1987 permits and must be dismissed. Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976).

The Authority has not sought dismissal of Palmer's appeal as it relates to the renewal of Solid Waste Permit No. 400561 and, therefore, Palmer's appeal with respect to that permit will proceed.

O R D E R

AND NOW, this 8th day of April, 1993, it is ordered that:

1) The Authority's motion to dismiss the appeal of David C. Palmer is granted with respect to Palmer's challenge to the Department's issuance of air quality and solid waste permits; and

2) The Department and the Authority shall file their pre-hearing memoranda on or before April 23, 1993.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

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Administrative Law Judge
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Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 8, 1993

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOARD

BOROUGH OF MOUNT POCONO	:	
	:	
v.	:	EHB Docket No. 92-460-MR
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 13, 1993

OPINION AND ORDER
SUR
MOTION TO DISMISS FOR LACK OF JURISDICTION

Robert D. Myers, Member

Synopsis

Where a municipality affected by a storm water management plan approved by DER files an appeal with the Board, pursuant to provisions of §12(c) of the Storm Water Management Act, after receipt of a notice of violation issued by DER pursuant to provisions of §12(a) of the Act, the only issues properly before the Board are those related to DER's determination that the municipality has failed to perform its duties. The contents of the storm water management plan itself cannot be raised in such an appeal since a separate appeal provision governing those issues is contained in §9(c) of the Act. Since the issues raised by Appellant all concern the contents of the plan, they are not properly before the Board and the appeal is dismissed.

OPINION

The Borough of Mount Pocono, Monroe County (Appellant), filed a Notice of Appeal on October 9, 1992 requesting review of a Notice of Violation

issued by the Department of Environmental Resources (DER) on April 9, 1992 and received by Appellant on April 14, 1992. The Notice of Violation, issued pursuant to the Storm Water Management Act (Storm Water Act), Act of October 4, 1978, P.L. 864, as amended, 32 P.S. §680.1 *et seq.*, notified Appellant of DER's intention to direct the State Treasurer to withhold all funds payable to Appellant from the Commonwealth's General Fund because of Appellant's failure to comply with its duties under §11 of the Storm Water Act, 32 P.S. §680.11.

An appeal from this notification by the affected municipality may be taken within 180 days after receipt of the notification: §12(c) of the Storm Water Act, 32 P.S. §680.12(c). This period is considerably longer than that set forth in our Rules of Practice and Procedure, 25 Pa. Code §21.52(a); but, since it is established by statute, is controlling. The appeal, therefore, is considered timely.

On January 12, 1993 DER filed a Motion to Dismiss for Lack of Jurisdiction to which Appellant filed an Answer on February 1, 1993. The Board issued an Order on February 3, 1993 staying all proceedings pending action on the Motion.

DER claims (and Appellant essentially admits) that Appellant is a municipality in Monroe County; that Monroe County prepared and adopted on June 11, 1991 a Storm Water Management Plan for the Brodhead Creek Watershed; that Monroe County forwarded the Plan to DER on July 3, 1991; that DER approved the Plan on August 20, 1991; that the Plan imposed on Appellant the duty to adopt and modify certain municipal ordinances within six months after the Plan had been approved; that Appellant failed to do so; that DER informed Appellant on August 29, 1991 and on March 11, 1992 of its duties; and that DER issued the Notice of Violation on April 9, 1992.

With these facts as background, DER contends that Appellant's appeal must be dismissed because it seeks Board review of the Brodhead Creek Storm Water Management Plan. Since Appellant took no timely appeal from DER's approval of that Plan, it cannot now litigate issues pertaining to it. Appellant disagrees, arguing that the duties imposed upon it by the Plan are properly before the Board for consideration in an appeal taken from the Notice of Violation.

Since the Storm Water Act has rarely come before us, we have had no prior opportunity to consider it extensively. Counties are required to prepare and adopt a storm water management plan for each watershed within its borders "in consultation with the municipalites located" within the watershed (§5(a), 32 P.S. §680.5(a)). A watershed plan advisory committee, with representation from each involved municipality, must be established to render advice to the County, evaluate policy and project alternatives, coordinate the watershed plan with other municipal plans and programs and review the watershed plan prior to adoption (§6(a) and (b), 32 P.S. §680.6(a) and (b)). Before adoption by the County, a proposed watershed plan must be "reviewed by the official planning agency and governing body of each municipality, the county planning commission and regional planning agencies for consistency with other plans and programs affecting the watershed." (§6(c), 32 P.S. §680.6(c)). A public hearing must be held, with at least two weeks public notice, prior to adoption (§8(a), 32 P.S. §680.8(a)). Adoption must be by at least a majority of the members of the County governing body (§8(b), 32 P.S. §680.8(b)).

Every watershed plan is submitted to DER for its review and approval or disapproval (§9(a), 32 P.S. §680.9(a)). Any person aggrieved by DER's decision may appeal to this Board (§9(c), 32 P.S. §680.9(c)). Within six

months after a watershed plan is approved by DER, each affected municipality is required to adopt or amend and to implement whatever ordinances or regulations are necessary to regulate development in a manner consistent with requirements of the plan (§11(b), 32 P.S. §680.11(b)).

Section 12, 32 P.S. §680.12, pertains to the failure of a municipality to fulfill its duties under §11(b), *supra*. The procedure to be followed by DER is, first, to give a written notice of violation to the municipality (§12(a), 32 P.S. §680.12(a)), imposing on the latter an obligation to report to DER within 60 days of action taken to comply (§12(b), 32 P.S. §680.12(b)). If the municipality fails to fulfill its duties under the watershed plan within 180 days after receipt of the notice of violation, DER notifies the State Treasurer to withhold funds payable to the municipality out of the General Fund. Section 12(c), 32 P.S. §680.12(c), then goes on to read as follows:

> Provided, that prior to any withholding of funds, [DER] shall give both notice to the municipality of its intention to notify the State Treasurer to withhold payment of funds and the right to appeal the decision of [DER] within the 180-day period following notification. The hearing shall be conducted before the Environmental Hearing Board....If an appeal is filed within the 180-day period, funds shall not be withheld from the municipality until the appeal is decided.

Section 12(d), 32 P.S. §680.12(d), provides that "any person, other than a municipality," aggrieved by the action of DER may appeal to this Board "within 30 days of receipt of notice of such action...."

The Storm Water Act has three separate appeal provisions - one in §9 relating to DER's approval or disapproval of a watershed plan and two in §12 relating to DER's efforts to enforce the duties imposed by the Act on a municipality within the watershed. One of the §12 provisions applies

specifically to the municipality and the other applies to persons other than the municipality. We are convinced that this bifurcation of the appeal provisions was intended by the Legislature to have significance. The provision in §9 obviously was intended to deal strictly with DER's action in approving or disapproving a watershed plan. The language of §9(c) makes that abundantly clear.

> Any person [1] aggrieved by a final decision of [DER] approving or disapproving a watershed plan or amendment thereto, may appeal the decision to the Environmental Hearing Board....

The provision in §12 was intended to deal strictly with DER's determination that the municipality has failed to fulfill its duties - that is the only "decision" of DER referred to in §12.

Appellant's Notice of Appeal states unequivocally that the action appealed from is the Notice of Violation dated April 9, 1992 and that the appeal is filed under the provisions of §12(c) of the Storm Water Act, 32 P.S.§680.12(c). A copy of the Notice of Violation is attached to the appeal. The issues that can be raised in this proceeding, therefore, are only those that deal with DER's determination that Appellant has failed to perform its duties. Issues that pertain to the contents of the Brodhead Creek Storm Water Management Plan and its approval by DER are not properly before us in this appeal. Those issues can be raised only in an appeal filed pursuant to §9(c), 32 P.S. §680.9(c).

After a careful reading of the eight objections which Appellant raised in its Notice of appeal, we are satisfied that they all relate to the

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[1] "Person" is defined in §4, 32 P.S. §680.4, to include a municipality. Consequently, Appellant's argument that §9(c) was not intended to cover appeals by affected municipalities is rejected.

contents of the Plan; none relate to DER's Notice of Violation. Accordingly, we cannot entertain the appeal.[2]

ORDER

AND NOW, this 13th day of April, 1993, it is ordered as follows:

1. DER's Motion to Dismiss for Lack of Jurisdiction is granted.
2. The appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

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[2] This decision, although based on our interpretation of the appeal provisions of the Storm Water Act, is in accord with the principles of administrative finality: *Delta Mining Company, Inc. v. DER*, 1988 EHB 301; *Del-Aware Unlimited, Inc. et al. v. DER et al.*, 1988 EHB 1097.

EHB Docket No. 92-460-MR

DATED: April 13, 1993

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M. DIANE SMITH
SECRETARY TO THE BOARD

NEW HANOVER CORPORATION	:	
	:	
v.	:	EHB Docket No. 90-225-W
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and NEW HANOVER TOWNSHIP, MONTGOMERY COUNTY, AND PARADISE WATCH DOGS, Intervenors	:	Issued: April 19, 1993

OPINION AND ORDER SUR
NEW HANOVER TOWNSHIP'S
MOTION FOR SUMMARY JUDGMENT

By Maxine Woelfling, Chairman

Synopsis

A motion for summary judgment in an appeal of the disapproval of a landfill permit application is denied because genuine issues of material fact remain with respect to the separation distances between the bottom of the subbase and the regional groundwater table, the presence of groundwater in the sedimentation basins, and the nature of the road around the perimeter of the facility. The moving party has also failed to prove it is entitled to judgment as a matter of law with respect to the description of regional groundwater and the minimum slope of the leachate detection and collection lines.

OPINION

This matter arises out of New Hanover Corporation's (Corporation) June 5, 1990, notice of appeal from the Department of Environmental Resources'

(Department) May 7, 1990, denial of the Corporation's application for repermitting its landfill in New Hanover Township, Montgomery County. Presently before the Board for disposition is New Hanover Township's (Township) October 28, 1991, motion for summary judgment. The procedural posture of this matter was outlined in previous opinions and will not be repeated here. *See*, New Hanover Corp. v. DER *et al.*, 1991 EHB 440.

The Corporation filed its answer and memorandum of law on December 30, 1991. The Township filed its reply to the Corporation's answer on March 2, 1991. The Department filed a memorandum in support of the Township's motion on March 2, 1992. Neither the County of Montgomery nor Paradise Watch Dogs, also intervenors herein, filed a response to the Township's motion.

The Board will grant summary judgment if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Pa. R.C.P. 1035(b); Summerhill Borough v. Commonwealth, Department of Environmental Resources, 34 Pa. Cmwlth. 574, 383 A.2d 1320 (1978). In deciding a motion for summary judgment, the Board will view the facts in a light most favorable to the non-moving party. Penoyer v. DER, 1987 EHB 131, 133. Additionally, the Board's role in disposing of a motion for summary judgment is not to resolve issues of material fact, but to decide whether any issues exist. Tom Morello Construction Co., Inc. v. Bridgeport Federal, 280 Pa. Super. 329, 421 A.2d 747 (1980).

The Township first contends it is entitled to summary judgment because the Corporation's application for permit modification was incomplete and, as a result, the Department's denial could not have been an abuse of discretion. In granting the Township's motion to intervene in the

Corporation's appeal, we expressly limited the Township's intervention to the 20 issues set forth in the Department's denial letter. New Hanover Corp. v. DER, 1991 EHB 445, 448. Because the Department denied the Corporation's application for 20 specific reasons, the Township may not claim that the application was generally incomplete. Such a claim is outside the scope of the Township's intervention.

Isolation Distances

The Township argues it is entitled to summary judgment on paragraph 3.7 of the Corporation's notice of appeal,[1] in which the Corporation challenges the reason for denial set forth in paragraph 6 of the Department's denial letter. In that paragraph, the Department asserts that the Corporation's application did not satisfy the requirements of 25 Pa. Code §273.252(b) regarding isolation distances between the bottom of the liner subbase and the regional groundwater table. The Township supports the Department's position, arguing that the separation distance is not met, in particular, on sheet LF 3/20 of the Corporation's application. The Corporation responds that 25 Pa. Code §273.252(b) establishes a construction-based scheme and the application drawings are not as important as the construction certification under 25 Pa. Code §273.203. The Corporation further responds that the required separation distances have been met and that the Department's and Township's position is based on an incorrect interpretation of the application.

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1 The Township has moved for summary judgment on five paragraphs of the Department's denial letter. However, our jurisdiction only allows us to review claims set forth in the Corporation's notice of appeal. To resolve this conflict, we have correlated the paragraphs of the denial letter with the paragraphs of the notice of appeal.

The Department's regulations at 25 Pa. Code §273.252(b) state:

> No person or municipality may construct a liner system for a facility unless at least 8 feet can be maintained between the bottom of the subbase of the liner system and the regional groundwater table. The regional groundwater table may not be artificially manipulated.

The Corporation contends this section only establishes how its landfill must be built and not what must be submitted with its application. See also, NHC Exh. P, pp. 1-2 (affidavit of Richard Bodner, P.E., supporting the Corporation's belief that 25 Pa. Code §273.252(b) merely establishes a performance standard).[2] Because 25 Pa. Code §273.252(b) only establishes a construction-based scheme, the Corporation argues its application could not have been inadequate merely because it did not demonstrate an eight foot separation between the subbase and the regional groundwater table.

The Corporation's interpretation of 25 Pa. Code §273.252(b) fails to take into account the provisions of 25 Pa. Code §273.131(b), which state:

> Applications, plans, cross-sections, modules and narratives shall demonstrate how the construction and operating requirements of Subchapter C [25 Pa. Code §§273.201-273.332] (relating to operating requirements) will be implemented, and shall include quality control measures necessary to insure proper implementation.

Reading these two sections *in pari materia*, it is clear that the Corporation's application must demonstrate how it will implement the construction standards of 25 Pa. Code §273.252(b) and satisfy the eight foot separation requirement.

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[2] Exhibits will be noted as follows. "NHC Exh. __" refers to exhibits from the Corporation's answer to the Township's motion. "Twsp. Exh. __" refers to exhibits from the Township's motion and "Twsp. Reply Exh. __" to exhibits from the Township's reply to the Corporation's answer. "Dept. Exh. __" refers to exhibits from the Department's response.

We must now determine whether the Township established the absence of material fact regarding the separation distance set forth in the Corporation's application. The Township argues sheet LF 3/20 of the application shows that the Corporation did not demonstrate an eight foot separation between the subbase and the regional groundwater. See, Twsp. Exh. O (affidavit of Daniel Erdman, P.E., which has as an appendix, sheet LF 3/20). In deposition, Richard Bodner, P.E., testified that an eight foot separation between the subbase and the regional groundwater table was not maintained at point north 10,700 by east 8,250 on sheet LF 3/20. Twsp. Exh. L, pp. 116-127. In affidavits, both Mr. Erdman and Barbara Helbig, P.E., stated that an eight foot separation was not maintained at point north 10,670 by east 8,230. Twsp. Exhs. O, p.2, and R, p.1. The Township further argues that an eight foot separation is not maintained in the area surrounding wells MW-1AU, P-2, P-3A, P-3B and P-5. Twsp. Exh. O, p.3. Erdman states that he derived separation figures for these five wells from data the Corporation submitted to the Department with its application. *Id.* at pp. 2-3.

The Township, however, has not demonstrated an absence of genuine issues of material fact. Neither Erdman nor Helbig recognized that the contours on sheet LF 3/20, upon which they based their calculations, may represent the elevation to which the ground will be excavated and not the elevation of the bottom of the subbase. In his deposition, Bodner referred to the contours as both subbase excavations and subbase elevations. Twsp. Exh. L, pp. 120-122. He further testified that the application indicates the subbase will be 18 to 24 inches higher than the excavation. *Id.* at p. 123. Furthermore, in her affidavit, Elly Triegel, P.E., states the 1989 data portrayed on sheets LF 13/20 to LF 16/20 demonstrates that an eight foot separation is maintained at point north 10,670 by east 8,230 on sheet LF 3/20.

NHC Exh. N, p. 5.

With respect to the separation distance at the other points, well MW-1AU is not located within the landfill, NHC Exh. N, pp. 9-10, and cannot be used to determine the separation distances. Wells P-2, P-3A, P-3B, and P-5, while showing separation distances of less than eight feet, do not support summary judgment. Erdman stated in his affidavit that the separation distances at these wells represent the difference in elevation between the "liner bottom" and the "water table," Twsp. Exh. O, attachment B, but did not define his understanding of "liner bottom." Because Erdman already ignored the distinction between the bottom of the subbase and the bottom of the excavation, and because we must view the facts in a light most favorable to the Corporation, see, New Hanover, *supra*, we cannot find an absence of material fact with regard to this issue. For that reason, the Township is not entitled to summary judgment on paragraph 3.7 of the Corporation's notice of appeal.

Description of Regional Groundwater

The Township next contends it is entitled to summary judgment on paragraph 3.8 of the Corporation's notice of appeal, in which the Corporation challenges the reason for denial set forth in paragraph 8 of the Department's denial letter. In that paragraph, the Department states that the description of the regional groundwater was inadequate because it used 1986 groundwater data instead of the higher 1989 levels. The Township reiterates the Department's contentions, arguing the Corporation failed to submit a groundwater contour map that demonstrates the distance between the liner

subbase and the regional groundwater table on May 1989.[3] The Corporation admits that its groundwater contour map is based on 1986 data, but contends it submitted cross-sections and tables containing 1989 groundwater levels and, therefore, complied with the requirements of 25 Pa. Code §273.115(a).

The Department's regulations regarding the description of groundwater state:

> An application shall contain a description of the geology and groundwater in the proposed permit area and adjacent areas down to and including the lowest aquifer that may be affected by the facility, including the following:
> [(1) The results of test borings.
> (2) A description of each stratum.
> (3) The hydrologic characteristics of each aquifer.
> (4) The geologic structure within the permit area.
> (5) The uses of each aquifer.
> (6) The characteristics of each aquifer.
> (7) The extent of mineral deposits and mines within the permit area.]

25 Pa. Code §273.115(a). The Department's Sarah Pantelidou testified in her deposition that the Corporation's application was denied, under 25 Pa. Code §273.115(a), because it did not contain a groundwater contour map based on 1989 groundwater levels, which were higher than the 1986 levels on sheet LF 3/20. Dept. Exh. A, p.103.

In response, Elly Triegel stated in her affidavit that the Corporation's application satisfied the requirements of §273.115(a) because the cross-sections on sheets LF 13/20-LF 16/20 clearly showed the subbase and the May 17, 1989, groundwater levels, which were the highest recorded. NHC Exh. N, p.5. Triegel further stated that the application contained an

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3 The Township also argues that the Corporation did not adequately demonstrate whether perched water underlies the landfill. As we stated above, the Township must limit its claims to those raised by the Department in its denial letter. The Department did not assert in paragraph 8 that the Corporation failed to adequately describe perched water on the site.

extensive amount of data on the groundwater and geology of the site. *Id.* at p.6. The Corporation last argues Ms. Pantelidou testified in her deposition that she requested cross sections to relieve her concerns about the groundwater table, *see*, NHC Exh. O, p.9, and sheets LF 13/20 to LF 16/20 were submitted in response.

Contrary to the Township's assertion, the Corporation's application contained descriptions of the 1989 groundwater levels and their relationship to the bottom of the subbase. Furthermore, it is not clear, given Ms. Pantelidou's conflicting deposition testimony about the requirements of 25 Pa. Code §273.115(a) and the vague language of 25 Pa. Code §273.115(a) itself, whether the Corporation had to submit a contour map containing 1989 groundwater levels. The Township has not shown an absence of genuine issues of material fact regarding the adequacy of these descriptions, nor has it demonstrated that it is entitled to judgment as a matter of law.

Sedimentation Basins

The Township also asserts it is entitled to summary judgment on paragraphs 3.13, 3.13.1, and 3.13.2 of the Corporation's notice of appeal, in which the Corporation challenges the reason for denial set forth in paragraph 12 of the Department's denial letter. In that paragraph, the Department states the application does not satisfy 25 Pa. Code §273.243(g) because sedimentation basins two and three would contain groundwater and would be unable to manage the stormwater runoff from a 25-year, 24-hour precipitation event. The Township argues that the Corporation acknowledges groundwater will be present in the basins, yet failed, in designing them, to account for the capacity that will be lost to groundwater. The Corporation responds that its basins will be located above the regional groundwater table and comply with the requirements of 25 Pa. Code §273.243(g).

The Department's regulations at 25 Pa. Code §273.243(g) state:

> At a minimum, a sedimentation pond shall be capable of managing the runoff resulting from a 25-year, 24-hour precipitation event.

In her affidavit, Barbara Helbig, P.E., states that groundwater will be present in basins two and three and, as a result, the basins will have less capacity to manage stormwater runoff. Twsp. Exh. R, p.3.

In response, the Corporation contends no groundwater will be present in basins two and three. In her affidavit, Elly Triegel explains that Helbig's calculations are incorrect because they utilize the potentiometric contours portrayed on sheet LF 2/20, which represent the level to which the groundwater rose in monitoring wells due to the artesian pressure of the confined aquifer. NHC Exh. N, pp. 8-9. Triegel further explained that the potentiometric contours cannot be used to determine whether groundwater will be present in the basins because the basins will only be excavated to between eight and eleven feet and will not pierce the aquifer. *Id.*; see also, NHC Exh. P, pp. 152-157 (deposition of Richard Bodner, P.E., in which he states the basins will be separated from the groundwater table by confining rock and soil).

Because there are genuine issues of material fact about the presence of groundwater in basins two and three, the Township is not entitled to summary judgment on paragraph 3.13, 3.13.1, and 3.13.2 of the Corporation's notice of appeal.

Perimeter Access Road

The Township next contends it is entitled to summary judgment on paragraphs 3.15 and 3.15.1 of the Corporation's notice of appeal, which challenge paragraph 14 of the Department's denial letter. In that paragraph, the Department states the Corporation's application failed to include on its

cross sections the single lane, gravel access road around the perimeter of the facility. The Township merely reiterates the Department's position. The Corporation responds that the roadway in question is not an access road under the regulations and need not be shown on cross sections of the site.

The Department's regulations define an access road as:

> A roadway or course providing access to a municipal waste processing or disposal facility, or areas within the facility, from a road that is under Federal, Commonwealth, or local control.

25 Pa. Code §271.1. Access roads must be shown on cross sections of the site under 25 Pa. Code §273.131(b). Barbara Helbig states in her affidavit that the Corporation did not provide cross sections that show the perimeter access road cited in paragraph 14. Twsp. Exh. R, p. 4. The Township also provided a copy of sheet LF 12/20 of the permit application, which purports to show the perimeter road. Twsp. Reply Exh. B.

The Corporation admits that its cross sections do not show the road, but argues that it is not an access road under the regulations and need not be shown. Richard Bodner stated in his affidavit that the road is only intended for maintenance of the landfill and access to monitoring wells. NHC Exh. P, p.2.

While the Township has provided a copy of a map illustrating the roadway in question, we will not consider it in rendering our decision because its truth and accuracy have not been authenticated or verified by affidavit. Without this map, the Township has not shown that the road "provid[es] access to [the landfill] from a road that is under Federal, Commonwealth, or local control." Furthermore, the regulations do not make it clear that all roadways, whatever their purpose, must be shown in the cross sections. The regulations at 25 Pa. Code §273.213, which are the basis of paragraph 14 of

the Department's denial letter, only establish the requirements for "access roads." No regulations establish the requirements for other roads.

Because there remain genuine issues of material fact with respect to whether the perimeter road is an "access road," and because it is not clear that all roads must be shown in the cross sections, the Township is not entitled to summary judgment on paragraphs 3.15 and 3.15.1 of the Corporation's notice of appeal.

Leachate Collection System

The Township last argues it is entitled to summary judgment on paragraph 3.19 of the notice of appeal, which challenges the reason for denial set forth in paragraph 18 of the Department's denial letter. In that paragraph, the Department states that the leachate detection and collection lines have a minimum slope of less then two percent, in violation of 25 Pa. Code §§273.255(b)(5)(vii) and 273.258(b)(7). The Township's motion merely reiterates the Department's position. The Corporation does not counter the Township's and Department's assertions that the pipes have a minimum slope of less than two percent, but argues that its leachate detection zone and leachate collection system satisfy the minimum slope requirements cited above.

After reviewing the Department's regulations, we find that they do not require the pipes within the detection and collection systems to maintain a minimum slope of at least two percent. Section 273.255(b) states, in relevant part:

> ... the leachate detection zone of a liner system shall meet the following design requirements:
> (1) Be at least 12 inches thick.
> (2) Contain no material exceeding .25 inches in particle size.
> (3) Create a flow zone between the secondary liner and the primary liner ...
> (4) Contain a perforated piping system capable of detecting and intercepting liquid within the leachate detection zone ...

> (5) The piping system shall also meet the following:
>
> (i) The slope, size and spacing of the piping system shall assure that liquids drain from the leachate detection zone.
>
> * * *
>
> (iii) The pipes shall be installed primarily perpendicular to the flow.
>
> * * *
>
> (vii) The leachate detection zone shall have a minimum bottom slope of 2%.

25 Pa. Code §273.255(b). From this language, the leachate detection zone, within which the piping system will be located, must have a minimum slope of at least two percent. The pipes that constitute the piping system must lie perpendicular to the flow of leachate (i.e. perpendicular to the slope of the leachate detection zone) and at a slope sufficient to ensure that liquids will drain through them. This regulation clearly does not require the pipes to have a minimum slope of at least two percent.

Section 273.258(b) states, in relevant part:

> ... the leachate collection system with the protective cover shall comply with the following design requirements:
>
> (1) The leachate collection system shall include a perforated piping system which is capable of intercepting free flowing liquids and leachate within the protective cover ...
>
> (2) The perforated piping system shall be sloped, sized and spaced to assure that free flowing liquids and leachate will drain continuously ....
>
> * * *
>
> (6) The pipes shall be installed primarily perpendicular to the flow.
>
> (7) The leachate collection system shall have a minimum bottom slope of 2%.

25 Pa. Code §273.258(b). Under this subsection, the leachate collection system, of which the perforated piping system is a part, must have a minimum slope of at least two percent. The pipes comprising the piping system must lie perpendicular to the flow (i.e. perpendicular to the slope of the leachate collection system) and have a slope that is sufficient to ensure liquids will

drain continuously. This regulation also clearly does not require the pipes to have a minimum slope of two percent.

The Township has not shown that it is entitled to judgment as a matter of law. Its request for summary judgment on paragraph eighteen of the Department's denial letter is denied.

ORDER

AND NOW, this 19th day of April, 1993, it is ordered that New Hanover Township's motion for summary judgment is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: April 19, 1993

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M. DIANE SMITH
SECRETARY TO THE BOAR

KEYSTONE CEMENT COMPANY	:	
	:	
v.	:	EHB Docket No. 92-060-MR
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 19, 1993

OPINION AND ORDER
SUR
MOTION TO DISMISS

Robert D. Myers, Member

Synopsis

The Board allows an appeal from DER's issuance of the latest in a series of Temporary Permits under the Air Pollution Control Act and 25 Pa. Code §127.23 for two cement kilns for which Plan Approvals are in existence. In reaching this result, the Board rules that when Temporary Permits are issued successively for a period of about two years, they will be treated the same as final operating permits, giving all aggrieved parties the right of appeal to the Board. The Board refused to allow an appeal from DER's failure to act on Module I applications, however, because they cannot be construed as "actions."

OPINION

This proceeding originated on February 14, 1992 when Keystone Cement Company (Appellant) filed a Notice of Appeal seeking review of the issuance by the Department of Environmental Resources (DER) on January 14, 1992 of

Temporary Operating Permits Nos. 48-309-040B and 48-309-041B. These Temporary Permits, issued pursuant to 25 Pa. Code §127.23 (regulations adopted under the Air Pollution Control Act (APCA), Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 *et seq.*), authorized Appellant to utilize supplemental residual fuels in two cement kilns at its plant in East Allen Township, Northampton County. Plan Approvals for the use of these supplemental residual fuels had been issued by DER in March 1989. Temporary Permits had been issued on October 1, 1990, February 1, 1991, August 20, 1991, November 4, 1991 and (most recently) January 14, 1992.[1]

On July 17, 1992 DER filed a Motion to Dismiss the appeal on the grounds that the objections raised by Appellant are not justiciable by this Board. Appellant filed a Response to the Motion, accompanied by a memorandum of law, on October 2, 1992.

In its Notice of Appeal, Appellant set forth in 52 numbered paragraphs its objections to DER's action. Most of these objections actually are factual statements detailing Appellant's operations and the history behind the issuance of the Plan Approvals and the Temporary Permits. DER's Motion, referencing paragraphs 1 through 36, 49, 50 and 52, contends that to the extent these paragraphs are intended by Appellant to litigate the Plan Approvals or to raise terms and conditions alleged to have been agreed upon outside of the Plan Approvals they are not within the jurisdiction of the Board. In its Response, Appellant states that it has no such intent.

Referencing paragraphs 36, 41, 49, 50, 51 and 52 that deal with DER's alleged failure to approve Module 1 applications seeking DER's approval for Appellant to utilize additional supplemental residual fuels, DER argues that

---

[1] In its pre-hearing memorandum, Appellant states that another Temporary Permit was received on June 26, 1992.

these paragraphs raise an issue beyond the scope of the Temporary Permits and, in addition, seek review of DER non-action. Appellant responds by arguing that the Module 1 applications and DER's handling of them are pertinent evidence of a course of conduct designed to prevent Appellant from using supplemental residual fuels in its cement kilns.

Finally, DER contends that the objections in paragraphs 37, 38, 39, 40, 42 through 48, and 52 challenge DER's alleged failure to issue operating permits, another non-action. Appellant counters by asserting that it is seeking review of the Temporary Permits, specifically their duration.

We will discuss the appealability of the Temporary Permits first. So far as our research can determine, this issue has not previously been decided by the Board.

Permitting of an air contamination source is a two-stage process. During the first stage the applicant submits an application for Plan Approval, detailing the proposed facility and demonstrating how it will comply with the APCA and the Federal Clean Air Act, Public Law 88-206, 77 Stat. 392, 42 U.S.C.A. §7401 *et seq.* (25 Pa. Code §§127.11 and 127.12). When DER is satisfied with the proposal, it issues a Plan Approval which is valid for a limited period of time (25 Pa. Code §127.13).

After the Plan Approval has been received, the applicant proceeds to construct or install the facility in accordance with the Plan Approval. When that is completed, the applicant requests an operating permit. After DER satisfies itself that the facility complies with the Plan Approval, it will issue an operating permit which is valid for a period of one year[2] (25 Pa. Code §§127.21 and 127.24).

---

[2] 1992 amendments to the APCA have lengthened the period to five years (§6.1 of Act No. 95 of 1992, 35 P.S. §4006.1).

Temporary Permits are governed by 25 Pa. Code §127.23 which reads as follows:

> (a) [DER] may issue temporary permits to owners or operators with valid plan approvals to facilitate the shakedown of sources and air cleaning devices, to permit operations pending the issuance of permits as specified in §127.21 (relating to operating permit requirements) or to permit the evaluation of the air contamination aspects of the source. Temporary operations may be authorized as a condition of the plan approval but shall meet the requirements of this section.
>
> (b) A temporary permit issued will be valid for a limited period of time, not to exceed 180 days, but may be extended for additional limited periods, each not to exceed 120 days.
>
> (c) No temporary permit will be issued or extended which may circumvent the requirements of this chapter.

Clearly these Temporary Permits authorize the operation of air contamination sources for short periods of time for specific purposes. They can be issued only when valid Plan Approvals exist and when operations will fulfill (and not circumvent) the requirements of Chapter 127. Issuing such Temporary Permits requires DER to exercise discretion.

We cannot agree with DER that this is non-action. To the contrary, we find it to be an affirmative step taken by DER in accordance with regulatory provisions and after the exercise of discretion given to it by the APCA. It is, therefore, an "action" as defined in our procedural rules at 25 Pa. Code §21.2(a), conferring on Appellant "property rights" and "privileges" and imposing "duties, liabilities or obligations."

To be appealable, however, it must also be a "final" action: *Phoenix Resources, Inc. v. DER*, 1991 EHB 1681. The fact that the title includes the word "temporary" certainly suggests that such a Permit is not a final action, that something else remains to be done. Yet, the provisions of §127.23

require a high degree of finality before even a Temporary Permit can be issued. A valid Plan Approval must exist, of course, but beyond that, DER must be satisfied that the requirements of Chapter 127 have been met. The facility must be in compliance with the Plan Approval and, to all appearances, capable of operating in accordance with the APCA and the Clean Air Act. The only possible uncertainty would involve whether the actual operation of the facility can achieve the requirements of the Plan Approval. Resolving that uncertainty appears to be the main reason to issue Temporary Permits. The only other reason allowed by §127.23 is to permit the facility to operate pending the issuance of an operating permit. Obviously, that reason does not come into play until all shakedown and testing activities have been concluded to DER's satisfaction.

Here, Temporary Permits have been issued successively since October 1, 1990 allowing this air contamination source to operate for about two years without final operating permits. DER has not informed us of the reasons behind this procedure and we are at a loss to understand how Temporary Permits (as described above) can be used in this manner. The "shakedown of sources and air cleaning devices" and the "evaluation of the air contamination aspects of the source" certainly can be accomplished in less time. So can the issuance of final operating permits.

Temporary Permits were not intended to function as final operating permits. Nor were they intended to serve as unappealable half-measures through which DER can avoid final decisions. The successive issuance of

Temporary Permits, as occurred here, will be treated the same as the issuance of final operating permits, giving all aggrieved parties the right of appeal to this Board.[3]

DER's failure to act on the Module I applications is not appealable, however. In contrast to the Temporary Permits, which clearly amounted to DER "action," the Module I applications are still pending without any DER action having been taken. The distinction is crucial where appealability is concerned. Accordingly, the Module I applications cannot be litigated in this appeal: *Westinghouse Electric Corporation v. DER*, 1990 EHB 575.

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[3] While the Appellant here is the proposed permittee, third parties could just as easily be aggrieved by the successive issuance of Temporary Permits.

ORDER

And NOW, this 19th day of April, 1993, it is ordered as follows:

1. DER's Motion to Dismiss is granted in part and denied in part in accordance with the foregoing Opinion.

2. DER shall file its pre-hearing memorandum on or before May 10, 1993.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

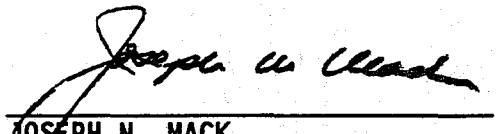
MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 19, 1993

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOA

CITY OF PHILADELPHIA	:	EHB Docket No. 92-034-W
	:	(Consolidated Docket)
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 21, 1993

OPINION AND ORDER SUR MOTION TO DISMISS

By Maxine Woelfling, Chairman

Synopsis

A motion to dismiss an appeal as untimely is denied where there are factual disputes relating to whether the Department of Environmental Resources' letters regarding appellant's 1989 operating grant subsidies were final actions.

OPINION

This matter was initiated with the City of Philadelphia's (City) January 24, 1992, filing of a notice of appeal challenging December 27, 1991, and January 14, 1992, letters from the Department of Environmental Resources (Department) relating to the 1989 operating grant subsidies for the City's sewage treatment plants. The City sought the grant subsidies pursuant to the Act of August 20, 1953, P.L. 1217, as amended, 35 P.S. §701-703, commonly referred to as Act 339.

On September 10, 1992, the Department filed a motion to dismiss the City's appeal as untimely, averring that because it had taken final action on

the 1989 operating grant subsidies on January 17 and 18, 1991, the City's appeal was untimely.

In its September 30, 1992, response to the motion, the City contends that a timely appeal was filed because the December, 1991, and January, 1992, letters, rather than the January, 1991, letters, were the Department's final actions. Furthermore, the City avers that in a February 13, 1991, meeting with the Department's personnel,[1] the Department orally agreed to reconsider certain issues, and that, as a result of that meeting, the January, 1991, letters were not final determinations and, therefore, not appealable actions. The City asserts that because this agreement resulted in the withdrawal of the January, 1991, determinations, no appeal could be filed until the Department rendered its final decisions. Moreover, the City requests the Board to impose sanctions against the Department for its bad faith and fraud in filing the motion to dismiss.

For the Board to have jurisdiction over an appeal, the appeal must be filed with the Board within 30 days of a Department action. 25 Pa. Code §21.52(a); Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). An "action" is defined as "any ... decision, determination, or ruling by the Department [of Environmental Resources] affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any person...." 25 Pa. Code §21.1(a). Here, the Department's motion must be denied because there is a dispute whether there was a final action by the Department.

Affidavits submitted demonstrate that the parties dispute certain facts relating to the February 13, 1991, meeting; namely, whether the

---

[1] Anthony Maisano, Bill Cummings, Esquire, Stuart-Gansell, Gertrude Bryson, and Parimal Parilk (the City's Exhibit A, Affidavit of David A. Katz, No. 7).

Department intended the January 17 and 18, 1991, letters to be its final decisions[2] and whether the Department rescinded these two letters as a result of the meeting.[3]

Since the Board must, in deciding this motion, resolve any doubts in favor of the City, Valley Peat & Humus Co. v. DER, EHB Docket No. 91-158-F (Opinion issued April 27, 1992), the Department's motion must be denied.[4]

---

[2] Department's Affidavit of Anthony Maisano dated September 2, 1992:

> I did not agree ... that the Department's decisions of January 17 and January 18, 1991 were not final decisions.

Affidavit of Joseph S. Clare III dated September 29, 1992, for the City:

> ... Mr. Maisano asked us to agree to not treat the January 17, 1991 and January 18, 1991 DER responses as the final determinations for the 1989 grant year....

[3] Affidavit of Anthony Maisano:

> I have not rescinded the Department's decisions contained in the January 17 and January 18, 1991 letters....

The City's Affidavit of David A. Katz dated September 29, 1992:

> ... Therefore the representatives of DER agreed their January 17 and 18, 1991 Act 339 grant eligibility letters were rescinded.... DER representatives then requested that I delay filing my appeal pending ... a final decision.... I then agreed to delay the filing of the City's appeal until they reached a final determination.

[4] Even if there were no factual dispute regarding the finality of the various Department letters, the same result may be compelled by the Commonwealth Court's recent opinion in Lehigh Township, Wayne County v. Department of Environmental Resources, Nos. 2142 C.D. 1991 and 1306 C.D. 1992 (Filed April 8, 1993). There, the Court held that the absence of a notification of appeal rights in Department correspondence coupled with equivocal language in the letters rendered the correspondence non-appealable. (footnote continued)

O R D E R

AND NOW, this 21st day of April, 1993, it is ordered that the Department's motion to dismiss is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: April 21, 1993

cc: **Bureau of Litigation**
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For Appellant:
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(Continued footnote)
While the January, 1991, letters at issue here did not contain the same type of equivocal language as the Lehigh Township letters, they, also, did not contain any notification of appeal rights. Moreover, the Department's subsequent actions here could be interpreted as equivocal.

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M. DIANE SMITH
SECRETARY TO THE BO

DUNKARD CREEK COAL, INC.	:	
	:	
v.	:	**EHB Docket No. 92-439-E**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: April 21, 1993**

OPINION AND ORDER SUR
DUNKARD CREEK'S
MOTION FOR SUMMARY JUDGMENT

By: Richard S. Ehmann, Member

Synopsis

The present litigation involves the Department of Environmental Resources' (DER) issuance of a series of orders to appellant, directing it to provide treatment for three discharges of acid mine drainage, based on DER's determination that appellant's mining caused these discharges. In prior litigation between DER and appellant, this Board sustained appellant's challenges to DER's previous order directing appellant to provide treatment for the same three discharges based on DER's determination that appellant, through the same mining activities, was responsible for these discharges. Our order in the previous litigation was a final determination on the merits and was not a judgment of non pros, as is alleged by DER. The Board thus concludes that the doctrine of *res judicata* precludes the instant litigation and accordingly grants summary judgment in favor of appellant.

OPINION

Appellant Dunkard Creek Coal, Inc. (Dunkard Creek) commenced an appeal on September 21, 1992, seeking our review of an order issued to it by DER on September 2, 1992 pursuant to the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.*, and the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* This DER order asserted that Dunkard had conducted mining on Surface Mine Permit (SMP) No. 3279115 (Althea No. 2), completing coal removal and backfilling by February 1983, and had also conducted mining on SMP No. 32810120 (Althea No. 3), completing its mining there in March of 1983.

DER's order determined that Dunkard's mining on the Althea No. 2 and Althea No. 3 mine sites had caused acid mine drainage at a private domestic water well (Burkley well), a spring (Spring-2) and an impoundment BS-10, located near Dunkard's mine sites. Paragraph 1 of DER's September 2, 1992 order required Dunkard to submit to DER a plan for interim treatment of Spring-2 and the discharge from impoundment BS-10 so as to meet applicable effluent limitations, while Paragraph 2 required Dunkard to implement this plan upon DER's approval. In Paragraph 3 of this order, DER directed Dunkard to submit to DER a plan for permanent treatment or abatement of Spring-2 and the discharge from impoundment BS-10, and at Paragraph 4, DER required Dunkard to implement this plan upon DER's approval. Paragraph 5 of DER's September 2, 1992 order required Dunkard to provide a suitable temporary replacement supply for the Burkley residence. At Paragraph 6 of this order, DER directed Dunkard to submit to a plan for permanent replacement or treatment of the Burkley well, and at Paragraph 7 DER required Dunkard to implement this plan upon DER's approval.

Dunkard's appeal of DER's September 2, 1992 order was assigned Docket No. 92-439-E. On September 23, 1992, DER issued a compliance order to Dunkard directing it to immediately comply with Paragraphs 1 and 5 of DER's September 2, 1992 order. Dunkard's appeal of this September 23, 1992 compliance order was assigned Docket No. 92-450-E. After DER amended its September 23, 1992 compliance order to reflect the proper location of Dunkard's mines, Dunkard appealed this amended compliance order at Docket No. 92-482-E. After DER issued another compliance order to Dunkard on November 17, 1992, directing it to immediately comply with Paragraphs 3 and 6 of DER's September 2, 1992 order, Dunkard appealed that compliance order at Docket No. 92-539-E. All of the above-described appeals have been consolidated at the instant docket number.

Presently before us is Dunkard's motion for summary judgment, filed on December 21, 1992, which DER opposes. In its motion, Dunkard contends our March 29, 1991 order which concluded previous litigation between Dunkard and DER at Dunkard Creek Coal, Inc. v. DER, EHB Docket No. 90-308-E (consolidated) has *res judicata* or collateral estoppel effect on the present litigation. Dunkard further argues that DER should not be able to avoid the consequences of our March 29, 1991 order by taking the actions against Dunkard which are challenged in the instant appeal. The affidavit of Dunkard's Henry E. Bartony, Sr., attached to Dunkard's motion, states that since 1983 and since this Board's March 29, 1991 Order, no mining activity or any earth disturbance has occurred on Dunkard's mine sites. DER does not dispute this assertion.

In ruling on Dunkard's motion, we keep in mind that we may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there

is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Robert L. Snyder, et al. v. Department of Environmental Resources, 138 Pa. Cmwlth. 534, 588 A.2d 1001 (1991).

Under the doctrine of *res judicata*,

> an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.

Mr. and Mrs. John Korgeski v. DER, et al., 1991 EHB 935, 946 (quoting Day v. Volkswagenwerk Aktiengesellschaft, 318 Pa.Super. 225, 465 A.2d 1313, 1316 (1983)). Four elements must be present for *res judicata* to apply: an identity of issues; an identity of causes of action; an identity of persons and parties to the action; and an identity of the quality or capacity of the parties suing or sued. Korgeski at 946. When these four elements are present, matters which were or could and should have been litigated in a prior proceeding may not be relitigated in a subsequent proceeding. Bethlehem Steel Corporation v. Commonwealth, DER, 37 Pa. Cmwlth. 479, 390 A.2d 1383 (1978).

Collateral estoppel is a broader concept than *res judicata* and requires only the same issue and same parties; the cause of action need not be the same. Fincher v. Township of Middlesex, 64 Pa. Cmwlth. 355, 439 A.2d 1353 (1982). Collateral estoppel applies if: the issue decided in the prior adjudication was identical with the one presented in the later action; there was a final judgment on the merits; the party against whom the plea is asserted was a party to the prior adjudication; and the party against whom it is asserted had a full and fair opportunity to litigate the issue in question

in a prior action. Askin v. Commonwealth, DPW, 56 Pa. Cmwlth. 80, 423 A.2d 1371 (1981). Collateral estoppel is designed to prevent relitigation of issues which have been decided and have remained substantially static, factually and legally. Keystone Water Co. v. Pennsylvania PUC, 811 Pa. Cmwlth. 312, 474 A.2d 368 (1984).

As Dunkard's motion is based on previous appeals before this Board, we may take judicial notice of the record in those matters. Hawkey v. Workmen's Compensation Appeal Board, 56 Pa. Cmwlth. 379, 425 A.2d 40 (1981); Diacon-Zadeh v. Devlet Denizyollari, 127 F.Supp. 446 (E.D. Pa. 1954). The record at Docket No. 90-308-E (consolidated) consists of six appeals by Dunkard from actions taken against it by DER; Docket Nos. 90-308-E; 90-393-E; 90-432-E; 90-465-E; 90-517-E; and 90-518-E.

The appeal at Docket No. 90-308-E was Dunkard's challenge to DER's June 20, 1990 suspension of Dunkard's SMP No. 3279115 pursuant to §4.3 of SMCRA, 52 P.S. §1396.4c. DER's suspension of this permit was specifically based on Dunkard's failure to abate the violations noted in two orders previously issued by DER; among these was DER's Order No. 90-3-055-S (attached to Dunkard's motion as Exhibit B). In DER's Order No. 90-3-055-S, issued March 23, 1990, DER determined Dunkard's mining activities at Althea No. 2 and Althea No. 3 caused a discharge of acid mine drainage from its mine site and affected the Burkley well, Spring-2, and impoundment BS-10. This order directed Dunkard to, *inter alia*, submit plans for temporary and permanent replacement of the Burkley well and for permanent treatment or abatement of the discharges at Spring-2 and impoundment BS-10.

In the appeal at Docket No. 90-393-E, Dunkard challenged DER's August 17, 1990 forfeiture of certain of its bonds pursuant to §4(h) of SMCRA, 52

P.S. §1396.4(h), because of alleged violations existing at SMP No. 3279115, including Dunkard's failure to submit plans for temporary and permanent replacement of the Burkley well and for the permanent treatment or abatement of the discharges at Spring-2 and impoundment BS-10.

At Docket No. 90-432, Dunkard sought our review of DER's September 19, 1990 forfeiture of certain of Dunkard's bonds pursuant to §4(h) of SMCRA because of alleged violations existing at SMP No. 32810120, including Dunkard's failure to submit a plan for temporary and permanent replacement of the Burkley well and failure to complete permanent treatment or abatement of the discharges at Spring-2 and impoundment BS-10.

Dunkard's appeal at Docket No. 90-465-E sought our review of DER's October 10, 1990 suspension of SMP No. 32810120 pursuant to §4.3 of SMCRA based on Dunkard's failure to abate the violations cited in Order Nos. 90-3-055-S and 90-3-075-S.

Docket No. 90-517-E was Dunkard's challenge of DER's October 23, 1990 assessment of civil penalties on Dunkard pursuant to §18.4 of SMCRA, 52 P.S. §1396.22, and §605(b) of the Clean Streams Law, 35 P.S. §691.605(b), for allegedly causing acid mine discharges at the Burkley well, Spring-2, and impoundment BS-10.

Docket No. 90-518-E was Dunkard's challenge of DER's October 23, 1990 civil penalty assessment on it pursuant to §18.4 of SMCRA and §605(b) of the Clean Streams Law, based on Dunkard's failure to comply with Order No. 90-3-055-S from April 25, 1990 to May 24, 1990. Dunkard also challenged the underlying order, No. 90-3-055-S, at this docket number.

Dunkard contended in its notices of appeal in each of the matters at Docket No. 90-308-E (consolidated) and in its pre-hearing memorandum at that

docket number that it was not responsible for affecting the discharges at the Burkley well, Spring-2, or impoundment BS-10.

DER had the burden of proof in each of the six appeals consolidated at Docket No. 90-308-E. Regarding the permit suspension and bond forfeitures, DER had to show by a preponderance of the evidence that the forfeitures and suspensions were a lawful and appropriate exercise of its discretion: 25 Pa. Code §21.101(a). Section 4.3 of SMCRA, 52 P.S. §1396.4c, gives DER the authority to issue orders as are necessary to aid in the enforcement of SMCRA, including orders suspending permits. Section 4(h) of SMCRA, 52 P.S. §1396.4(h), provides that DER shall forfeit bonds when a permittee fails or refuses to comply with the requirements of SMCRA. Those requirements include compliance with the terms of the permit and DER's orders and compliance with the applicable rules and regulations: 52 P.S. §1396.24. R. L. Maney Coal Company v. DER, EHB Docket No. 89-019-M (Adjudication issued April 21, 1992). Further, DER bore the burden of proving by a preponderance of the evidence that its assessments of civil penalties on Dunkard were lawful and appropriate exercises of its discretion. C&K Coal Company v. DER, EHB Docket No. 91-138-E (consolidated) (Adjudication issued September 30, 1992). In order for DER to have sustained its burden of proof as to the civil penalty assessments, it would have had to prove Dunkard's violations of SMCRA and the Clean Streams Law as alleged in its assessments. As Dunkard also challenged DER's Order No. 90-3-055-S, DER had the burden of proving there was a causal connection between Dunkard's mining operations and the discharges at the Burkley well, Spring-2, and impoundment BS-10. C&K, *supra*.

When DER failed to file its pre-hearing memorandum in the appeal at Docket No. 90-308-E (consolidated), we issued a rule to show cause, on

February 6, 1991 why sanctions should not be imposed on DER pursuant to 25 Pa. Code §21.124. After granting DER an extension of the return date for this rule, on March 29, 1991, having received neither a response to the rule to show cause from DER nor DER's pre-hearing memorandum, we issued an order sustaining Dunkard's appeals at Docket No. 90-308-E (consolidated). In our March 29, 1991 order, we explained that since DER bore the burden of proof, if we were to impose the seemingly lesser sanction of barring DER from presenting its case-in-chief, the result would be equivalent to sustaining Dunkard's appeals, and thus, we were sanctioning DER by sustaining Dunkard's appeals.

In examining whether the requirements for *res judicata* and collateral estoppel are present here, we first address DER's argument that our March 29, 1991 order was in the nature of a non pros judgment against DER and was not an adjudication on the merits which can support application of these doctrines. We reject DER's argument; our March 29, 1991 order was not a non pros judgment in favor of Dunkard.

Pursuant to Pa.R.C.P. 218, a court may enter a non pros on the court's own motion, if, when the case is called for trial, the plaintiff is not ready and is without a satisfactory excuse. Our courts have said that a judgment of non pros for the defendant is not on the merits and does not preclude the plaintiff from commencing another suit on the same cause of action provided it is brought within the applicable statute of limitations. Gordon-Stuart, Ltd. v. Allen Shops, Inc., 239 Pa.Super. 35, __, 361 A.2d 770, 772 (1976); Hatchigan v. Koch, 381 Pa.Super. 377, 553 A.2d 1018 (1989). For this reason, the courts have held that a non pros judgment cannot serve as a basis for application of the *res judicata* or collateral estoppel doctrines. Hatchigan, *supra* at __, 553 A.2d at 1020; Brower v. Berlo Vending Co., 254

Pa.Super. 402, 386 A.2d 11 (1978). The penalty suffered by the plaintiff is a delay in the trial of its cause. Thompson v. Cortese, 41 Pa. Cmwlth. 174, 398 A.2d 1079 (1979).

Contrary to DER's assertion, it is not in the position of a plaintiff in a civil proceeding who suffered a non pros for its failure to prosecute its cause and who may reinstitute its cause before that court. Our March 29, 1991 order bound the parties with the same force and effect as if a final adjudication had been rendered after a hearing on the merits at which DER would have been barred from presenting its case-in-chief. The parties could not have expected any further action by this Board in that matter. Once we issued our March 29, 1991 order, the litigation at Docket No. 90-308-E (consolidated) was terminated. Our March 29, 1991 order was final.[1] See Association of Rural and Small Schools v. Casey, __Pa. __, 613 A.2d 1198 (1992). As we have concluded that our order was final and not a judgment of non pros, we reject DER's argument that we lack the requisite final judgment on the merits for application of *res judicata* or collateral estoppel.

Turning to whether the elements for application of *res judicata* or collateral estoppel exist here, we point out that there is no dispute that the parties and their capacities in the present and prior litigation are identical. We thus turn to an examination of whether there is an identity of issues and causes of action. In evaluating identity of the causes of action, the question is whether the things sued upon or for (or the subject matters, the things in dispute, or the matters presented for consideration) here are

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[1] We note that the Superior Court pointed out in General Accident Fire & Assurance v. Flamini, 299 Pa.Super. 312, 445 A.2d 770 (1982), that Pennsylvania takes a broad view of what constitutes a final judgment for purposes of *res judicata*.

the same as those involved at Docket No. 90-308-E (consolidated) and whether the ultimate issues are the same. McCarthy v. Township of McCandless, 7 Pa. Cmwlth. 611, 300 A.2d 815 (1973); Commonwealth, DER v. Pennsylvania Power Co., 34 Pa. Cmwlth. 546, 384 A.2d 273 (1978).

We point out that practice before this Board is not the same as practice under the rules of civil procedure with regard to instituting an action before us. This Board has the power and duty to hold hearings and issue adjudications on orders, permits, licenses or decisions of DER. See Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7514(a). Pursuant to §7514(c) of the Environmental Hearing Board Act, 35 P.S. §7514(c), no action of DER adversely affecting a person is final as to that person until the person has had the opportunity to appeal the action to the Board. Thus, as both parties recognize in their briefs here, it is DER's actions against Dunkard which are brought before us to review by virtue of Dunkard's notices of appeal.

In each of the appeals at Docket No. 92-439-E (consolidated), DER has taken further action against Dunkard for its mining on the Althea No. 2 and Althea No. 3 mine sites allegedly causing acid mine drainage at the Burkley well, Spring No. 2, and impoundment BS-10. In the appeals at Docket No. 92-439-E (consolidated), DER has ordered Dunkard to provide temporary and permanent treatment for the Burkley well and to provide permanent treatment for or abate the discharges at Spring-2 and impoundment BS-10. This is the same matter which was in dispute at Docket No. 90-308-E (consolidated) and presents an identical ultimate issue. Thus, we agree with Dunkard that our March 29, 1991 order sustaining Dunkard's previous appeals at Docket No. 90-308-E (consolidated) precluded DER from taking the actions challenged at

the instant docket number under the doctrine of *res judicata*.[2] DER cannot relitigate what has previously been decided against it by this Board through issuing new orders based on the same alleged violations which were the subject of the decided appeals. We accordingly issue the following order granting summary judgment in Dunkard's favor.

O R D E R

AND NOW, this 21, day of April, 1993, it is ordered that summary judgment is granted in favor of Dunkard Creek Coal, Inc., and its appeal at Docket No. 92-439-E (consolidated) is sustained.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

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2 Because the doctrine of *res judicata* subsumes the more modern doctrine of collateral estoppel (issue preclusion), we have not discussed the application of the doctrine of collateral estoppel to the instant litigation in this opinion. City of Pittsburgh v. Zoning Board of Adjustment, 522 Pa. 44, 559 A.2d 896 (1989); Lebeau v. Lebeau, 258 Pa.Super. 519, 393 A.2d 480 (1978).

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 21, 1993

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LORAINE ANDREWS AND DONALD GLADFELTER	:	EHB Docket No. 87-482-W
v.	:	
	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES and EAST MANCHESTER TOWNSHIP	:	
	:	
and	:	
	:	Issued: April 23, 1993
NORMAN BERMAN and DAVID SCHAD, Intervenors	:	

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

By Maxine Woelfling, Chairman

Synopsis

An appeal of the approval of a revision to an official sewage facilities plan is dismissed. The Department of Environmental Resources' (Department) duties under the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 *et seq.* (Sewage Facilities Act), are limited to consideration of the effects of the method of sewage disposal proposed in the revision. Review of issues relating to land-use planning and other environmental impacts of the proposed subdivision which is the subject of the revision are either the responsibility of other agencies and units of government or the Department's responsibility in separate regulatory approvals.

INTRODUCTION

This matter was initiated on November 17, 1987, with the filing of a notice of appeal by Loraine Andrews and Donald Gladfelter (together referred

to as "Appellants") seeking review of the Department's July 23, 1987, approval of a revision to the Official Sewage Facilities Plan of East Manchester Township, York County (plan revision). The plan revision was for a residential housing development, known as the Riverview Subdivision (Riverview), to be located adjacent to Codorus Furnace and Riverview Roads.

By order dated January 6, 1988, the Board granted a petition to intervene filed by Norman Berman and David Schad (together referred to as "Intervenors"), the developers of Riverview. On May 10, 1989, the Board denied Intervenors' December 2, 1988, motion for summary judgment. Andrews and Gladfelter v. DER, 1989 EHB 612.

After the resolution of numerous discovery and procedural motions, a hearing was held on January 23 and 24, 1990, before Chairman Woelfling in Harrisburg. Parties present at the hearing were Appellants, Intervenors, and the Department.

Appellants filed their post-hearing brief on March 26, 1990. They argued the Department's approval of the plan revision was arbitrary and contrary to law because the Department failed to consider Riverview's effects on the historic and aesthetic values of Codorus Furnace, on flooding in Codorus Creek, on traffic in the area, on high quality farmlands, on the drinking water of neighboring properties, and on wetlands within the area to be encompassed by Riverview. They also alleged the Department did not assess whether the development would be consistent with a comprehensive program of water quality management for the watershed on which it would be located.

Intervenors filed their post-hearing brief on April 27, 1990. They contended that Appellants did not satisfy their burden of proving the

Department abused its discretion in approving the plan revision and that the Department is not required to review all aspects of a proposed subdivision when it reviews a plan revision.

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

Any arguments the parties did not raise in their post-hearing briefs are waived. Lucky Strike Coal Co. and Louis J. Beltrami v. Commonwealth, Department of Environmental Resources, 119 Pa. Cmwlth. 440, 547 A.2d 447, 449 (1988).

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

FINDINGS OF FACT

1. Appellants are Loraine Andrews and Donald Gladfelter, residents of Mount Wolf, Pennsylvania. (Notice of Appeal; N.T. 298, 310)[1]

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

3. Intervenors are Norman Berman and David Schad, the developers of Riverview. (Petition to Intervene)

4. On July 23, 1987, the Department approved a revision to the Official Sewage Facilities Plan of East Manchester Township to accommodate Riverview. (Notice of Appeal)

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[1] References to "N.T." are to the Notes of Testimony taken during the hearing. References to "Ex. A-___" and "Ex. I-___" are to the exhibits introduced into evidence by Appellants and Intervenors, respectively.

5. Riverview is in East Manchester Township and is bordered by Codorus Furnace Road to the west and southwest, Riverview Road to the north and south, Codorus Creek to the east, and the properties of Benjamin Smith and Glenn Olsen to the northwest. (Notice of Appeal; Ex. A-30)

6. Riverview is a proposed 96 acre housing development which is subdivided into 224 individual lots, 218 of which will be used for individual dwelling units. (Ex. A-30)

7. The dwelling units will receive drinking water from a public water supply system consisting of a series of wells, storage tanks, and six-inch distribution lines. (Ex. I-2)

8. The dwelling units will be serviced by a community sewage system consisting of a wastewater treatment plant with a surface water discharge and eight-inch collection lines. (Ex. I-2)

9. Stormwater runoff within Riverview will be dispersed into five detention basins located around its perimeter. (Ex. A-31)

10. Appellant Andrews lives on Codorus Furnace Road across from its intersection with Norman Drive, the western entrance to Riverview, while Appellant Gladfelter lives on Codorus Furnace road approximately 500 yards west of its intersection with Norman Drive. (N.T. 300, 310; Ex. A-30)

11. Kerry Leib, Department water quality specialist at the time of the submission of the proposed plan revision, had primary responsibility for reviewing it. (N.T. 8)

12. Mr. Leib recorded his findings and submitted them, along with the proposed plan revision, to the Department's Harrisburg regional office for further review. (N.T. 18; Ex. A-6)

13. After further review at the regional level, on April 13, 1987, Mr. Leib requested additional information from the East Manchester Township

Board of Supervisors regarding the source of Riverview's water supply and the location and use of the proposed wastewater treatment plant. (N.T. 20; Ex. A-16)

14. On June 10, 1987, the East Manchester Township Board of Supervisors submitted a new plan revision containing the requested information to the Department. (Ex. A-18)

15. On July 23, 1987, after review by Mr. Leib; Paul Yarnell, a planning engineer; and Roger Musselman, the Chief of Planning, the Department approved the plan revision. The Department's approval expressly stated that a Part II permit is required for construction of the sewer system, that both Part I and Part II permits are required for construction of the sewage treatment plant, and that the approval of the plan revision did not guarantee the issuance of the Part I and Part II permits. (N.T. 22-23; Ex. A-19)

16. Riverview lies approximately one-eighth to one-fourth of a mile across Codorus Creek to the northeast of Codorus Furnace. (N.T. 184; Ex. A-2)

17. Codorus Furnace was in use as an iron-making site from 1765 to 1859 and is eligible for inclusion on the National Register of Historic Places. (N.T. 178, 180, 183; Ex. A-22)

18. Looking to the northeast from Codorus Furnace, Riverview sits atop a bluff rising 75 to 80 feet above Codorus Creek. (N.T. 212-213)

19. Riverview contains lots along the bluff overlooking Codorus Creek, but only four or five are close to the edge. (N.T. 217; Ex. A-30)

20. Visitors travel to Codorus Furnace by automobile. The site has a parking lot directly off Codorus Furnace Road that can accommodate three or four cars. Visitors must walk along Codorus Furnace Road to get from one end of the site to the other. (N.T. 203, 211, 214)

21. The elevation of the 100-year floodplain of Codorus Creek adjacent to Riverview is 276 feet. There is no delineated floodway for this portion of Codorus Creek. (N.T. 114; Ex. A-26)

22. The proposed sewage treatment plant, its outfall, and the proposed outlet channels for detention basins "C" and "D" are located within the 100-year floodplain. (N.T. 113, 115; Ex. A-26 and A-26-1)

23. Automobiles will have access to Riverview from entrances on Riverview Road and Codorus Furnace Road. (Ex. A-30)

24. Codorus Furnace Road is a two-lane, state-owned, rural highway. (Ex. A-27 and I-1)

25. The Pennsylvania Department of Transportation approved a highway occupancy permit for Riverview's access to Codorus Furnace Road. (N.T. 159, 171, 349)

26. Codorus Furnace Road will be rebuilt to add a left turn lane at the Norman Road entrance to Riverview for automobiles traveling south on Codorus Furnace Road. (N.T. 172)

27. Riverview Road is a two-lane, township-owned, rural highway. (Ex. A-27 and I-1)

28. The Department does not review the quantity of groundwater available to a proposed subdivision when it reviews a plan revision. (N.T. 59, 62)

29. At the time of the Department's approval of the plan revision, Intervenors had not yet applied for permits for the public water supply system. (N.T. 352-353)

30. The land on which Riverview will be built is farmland. (N.T. 301, 311)

31. The Department performed no study to determine whether prime agricultural lands will be affected by Riverview's development. (N.T. 41)

DISCUSSION

When a third party, such as Appellants, challenges the Department's actions, it bears the burden of proving by a preponderance of the evidence that the Department committed an abuse of discretion. 25 Pa. Code §21.101(c)(3); Bobbi Fuller *et al.* v. DER, 1990 EHB 1726.

Appellants raise a host of arguments that place on the Department the burden of ensuring that Riverview will not adversely affect the Commonwealth's historic resources, cause flooding in Codorus Creek, adversely affect stormwater flows, increase traffic on neighboring roads, adversely affect the groundwater available to neighboring properties, decrease the amount of prime farmlands, or encroach upon wetlands. In the main, these arguments fail because they seek to impermissibly expand the scope of the Department's responsibilities under the Sewage Facilities Act and the regulations adopted thereunder at 25 Pa. Code Chapter 71.[2]

The Board has, on several occasions, held that the Department's role under the Sewage Facilities Act and Article I, Section 27 of the Pennsylvania Constitution is limited to a review of the proposed method of sewage treatment and disposal. See, Morton Kise *et al.* v. DER, EHB Docket No. 90-457-MR (Adjudication issued December 8, 1992); Dwight L. Moyer *et al.* v. DER, 1989 EHB 928. In Kise, we stated:

> It is clear to us that DER's Article I, Section 27, responsibilities must be exercised

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[2] All references to 25 Pa. Code Chapter 71 are to the regulations in effect at the time of the Department's approval. These regulations were adopted on August 2, 1971, and last amended on January 10, 1987 (17 Pa.B. 172). The regulations currently in effect were adopted June 10, 1989 (19 Pa.B. 2420).

> within the confines of the particular statute under which it is operating and its own jurisdiction under that statute. That means that under the SFA (as already discussed) DER must assess the environmental impact of the specific method of sewage disposal proposed in the plan revision. Depending on the circumstances, that may require consideration of noise, traffic, visual impact, etc.; but these environmental disturbances must be caused by the method of sewage disposal under review and not by other features of the proposed development. Those other features, pursuant to the legislative scheme, are the responsibility of local governments.

Morton Kise *et al.* v. DER, *supra*, at p.30.

These decisions are in accord with the Commonwealth Court's holding in Community College of Delaware County v. Fox, 20 Pa. Cmwlth. 335, 351, 342 A.2d 468, 478 (1975), *appeal dismissed as moot*, 475 Pa. 623, 381 A.2d 448 (1977), in which the court stated:

> It must be remembered, however, that the power of an administrative agency must be sculptured precisely so that its operational figure strictly resembles its legislative model... Thus, under the Sewage Facilities Act, the DER is entrusted with the responsibility to approve or disapprove official plans for sewage systems submitted by municipalities, but, while those plans must consider all aspects of planning, zoning and other factors of local, regional, and statewide concern, it is not a proper function of the DER to second-guess the propriety of decisions properly made by individual local agencies in the areas of planning, zoning, and such other concerns of local agencies, even though they obviously may be related to the plans approved.[3]

Looking at the provisions of the Sewage Facilities Act and its regulations, it is clear why the Department's duty in reviewing an official

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[3] Although *dicta*, this language was later cited with approval in Swartwood v. DER, 56 Pa. Cmwlth. 298, 424 A.2d 993 (1981), in which the Commonwealth Court held that local municipalities, not the Department, are to consider issues of land-use planning under the Sewage Facilities Act.

plan revision is limited to a consideration of the proposed method of sewage treatment and disposal. An "official plan" is a "comprehensive plan for the provision of adequate sewage systems adopted by a municipality or municipalities possessing authority or jurisdiction over the provision of such systems...." 35 P.S. §750.2. Under §10(2) of the Sewage Facilities Act, the Department has the power to approve or disapprove official plans and plan revisions. When reviewing an official plan revision, the Department must comply with the requirements of 25 Pa. Code §71.16. Most pertinent to this discussion are the requirements of subsection (e):

> * * * * *
>
> (e) In approving or disapproving an official plan or revision, the Department will consider the following:
>
> (1) whether the plan or revision meets the requirements of this section and of § 71.14 of this chapter,
>
> (2) the comments, if any, of the appropriate area wide planning agency and the county or joint county Department of Health,
>
> (3) whether the plan or revision is consistent with a comprehensive program of water quality management in the watershed as a whole, as set forth in § 91.31 of Chapter 91 of this title,
>
> (4) whether the plan or revision furthers the policies established pursuant of §3 of the Act and §§4 and 5 of the Clean Streams Law, and
>
> (5) whether the plan or revision is consistent with the requirements of Chapter 94 of this title (relating to municipal wasteload management).
>
> * * * * *

Although on its face §71.16(e) appears to impose broad authority on the Department to consider issues related to land-use planning, upon careful review it does not. It must be remembered that the official plan or revision referred to in subsection (e) relates to sewage services, and not general land-use planning. Under subsection (e), therefore, the Department must

consider whether the proposed method of sewage disposal, and not the subdivision as a whole: meets the requirements of 25 Pa. Code §§71.14 and 71.16, is consistent with a comprehensive program of water quality management, furthers the policies of the Sewage Facilities Act and the Clean Streams Law, and is consistent with the requirements of 25 Pa. Code Chapter 94.

When the Department approves a plan revision, it is not authorizing the construction or operation of the sewage treatment plant proposed therein, nor is it authorizing encroachment onto flood plains or floodways or into wetlands. It is merely approving a municipality's approach to providing sewage services to a subdivision. Before a sewage treatment plant may be built under a plan revision, permits to construct the treatment plant, to discharge from it into waters of the Commonwealth, and to encroach on wetlands and floodplains must be obtained from the Department. See, Bobbi Fuller *et al.* v. DER, 1990 EHB 1726 (even though the Department had already approved a plan revision authorizing a change in location of a treatment facility, the plant could not encroach upon a floodplain until the authority secured permits under the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 *et seq.* (Dam Safety Act), and the Flood Plain Management Act, the Act of October 4, 1978, P.L. 851, as amended, 32 P.S. §679.101 *et seq.* (Flood Plain Management Act)); Ex. A-19 (the Department's approval of the plan revision expressly stated that a Part II permit is required for construction of the sewer system and Part I and Part II permits are required for construction of the sewage treatment plant). The Department's approval of the plan revision, therefore, merely means that East Manchester Township's proposal for additional sewage services for Riverview

complies with the planning requirements of the Sewage Facilities Act and its regulations, not that it satisfied the construction and operation requirements of all the applicable statutes and regulations.

With the foregoing in mind, we turn first to Appellants' arguments regarding Riverview's effects on Codorus Furnace. Appellants argue the Department violated provisions of the Historic Preservation Act[4] and Article I, Section 27 of the Pennsylvania Constitution,[5] in approving the plan revision. These arguments are without merit because the Department's role under the Historic Preservation Act is limited only to the effects of Riverview's proposed sewage system, and because Article I, Section 27 does not impose a duty on the Department to ensure that land subdivisions will not affect the Commonwealth's historical resources.

Appellants argue the Department violated §8(4) of the Historic Preservation Act, 37 Pa.C.S. §508(4), which states, "Commonwealth agencies shall institute procedures and policies to assure that their plans, programs, codes, regulations and activities contribute to the preservation and enhancement of all historic resources in this Commonwealth." Appellants contend Codorus Furnace is an historic resource of this Commonwealth and the Department failed to assure that its approval of the plan revision contributed

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[4] 71 P.S. §1407.1(n). The Historic Preservation Act was repealed by the History Code, the Act of May 26, 1988, P.L. 414, as amended, 37 Pa.C.S. §101 *et seq.* The relevant language is now found in the Historic Preservation Act, 37 Pa.C.S. §501 *et seq.*, and we will cite to these sections for the convenience of the reader.

[5] "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."

to the preservation and enhancement of Codorus Furnace. Appellants further contend the Board's decision in Dwight Moyer *et al.* v. DER, 1989 EHB 928, supports their argument because in Moyer the Board applied the Historic Preservation Act to its review of the Department's approval of an official plan revision.

The factual situation presented to the Board in Moyer did not involve a plan revision relating to the subdivision of land. In Moyer, the plan revision merely permitted the municipality to relocate a sewage treatment plant and the issue was the effect of that relocated sewage treatment plant on Graeme Park, a nearby historic site, with appellants' concerns centering on the visual and odor impacts of the sewage treatment plant. The difference between Moyer and the case currently before the Board is obvious, since Appellants seek to have the Department review the effects of the entire subdivision on the Commonwealth's historical resources. Since the Department's duties under the Sewage Facilities Act are limited to consideration of the effects of the proposed sewage treatment system and Appellants have presented no evidence in this regard, they have not established that the Department abused its discretion.

Appellants also argue that the Department's approval violated its duties under Article I, Section 27, because Riverview will adversely affect Codorus Furnace. Appellants contend the language of Article I, Section 27, referring to the "historic and esthetic values of the environment" requires the Department to review Riverview's effects on Codorus Furnace. Appellants further contend this view of Article I, Section 27, is supported by the decision in Sameric Corp. v. City of Philadelphia, 125 Pa. Cmwlth. 520, 558

A.2d 155 (1989), *allocatur granted*, ___ Pa. ___, 575 A.2d 119 (1990), in which the Commonwealth Court held that the city had a duty under Article I, Section 27, to preserve an historic theater.

This argument is without merit because it places the burden under Article I, Section 27, on the Department, when it more properly lies on East Manchester Township. As we stated above, issues of land-use planning fall outside the scope of the Department's duties under the Sewage Facilities Act, which is limited to the effects of the proposed sewage treatment facility. In this case, because Appellants contend Riverview, as a whole, adversely affects Codorus Furnace, their challenge should be aimed at East Manchester Township, not the Department. See, Morton Kise v. DER, *supra*. (discussion at pp.30-31, holding that appellants' claims relating to aspects of the proposed development other than the method of sewage disposal are claims to be taken up with the municipality, not the Department).

Appellants next assert that the Department failed to determine whether the plan revision was consistent with a comprehensive program of water quality management in the watershed as a whole, as required by 25 Pa. Code §71.16(e)(3). More specifically, Appellants contend that the Department did not comply with the requirements of 25 Pa. Code §91.31(a), which is cross-referenced in §71.16(e)(3).

After examining the language of the two subsections of pertinent regulations, it is again apparent that Appellants are seeking to enlarge the nature of a plan revision. Subsection (e)(3) of §71.16 requires the Department to consider the consistency of a proposed plan revision "with a comprehensive program of water quality management in the watershed as a whole,

as set forth in §91.31 of Chapter 91 of this title." Section 91.31(b) contains the standards[6] by which that determination is made; the project must be included in and conform to either:

> (1) Appropriate Comprehensive Water Quality Management Plans approved by the Department; or
>
> (2) Official Plans for Sewage Systems which are required by Chapter 71 of this Title.

With respect to plan revisions, §91.31(b)(2) becomes nonsensical: a plan revision, by its very nature, cannot be included in and conform to an Official Plan for Sewage Systems. Thus, the only plans which would be applicable are those referenced in §91.31(b)(1) - the approved Comprehensive Water Quality Management Plans.[7]

---

[6] Section 91.31(b)(3) sets forth another standard which is not relevant here:

> (3) In cases where a comprehensive program of water quality management and pollution control is inadequate or nonexistent and a project is necessary to abate existing pollution or health hazards, the best mix of all the following:
>
> (i) Expeditious action to abate pollution and health hazards.
>
> (ii) Consistency with long-range development
>
> (iii) Economy should be considered in the evaluation of alternatives and in justifying proposals.

It is not relevant because "project" is defined in §91.31(a) as a project requiring approval under the Clean Streams Law or the provisions of Article II of Subpart C of Title 25 which, in turn, encompass Chapters 91 through 111. The plan revision requires approval under Chapter 71 and while the sewage treatment plant will eventually require approval under Subpart C, Article II, that has not yet occurred and, therefore, it is not before the Board. Moreover, the treatment plant is not required to abate pollution or a health hazard, as it is to serve new land development.

[7] These plans were popularly referred to as COWAMP plans. The effort to develop the plans was initiated pursuant to §5(b)(2) of the Clean Streams Law and later meshed with the requirements under §208 of the federal Clean Water Act, 33 USC §1288, to develop area wide waste treatment management plans. Such plans, also known as 208 plans, were required, *inter alia*, to include an identification of needed municipal waste treatment works for a 20 year period.

Appellants' contentions flow from their questioning of Kerry Leib:

> Q. Did you require any submittal or study that would tend to show the effects of this subdivision or any aspects of the subdivision on the watershed as a whole?
>
> A. In terms of what?
>
> Q. In terms of the statement in the regulations which I will just paraphrase to you, of a requirement to review the effects of proposed subdivisions on the watershed as a whole.
>
> The question I am asking is, other than what you have already discussed, did you do anything else that you considered assessing the effects on the watershed as a whole?
>
> A. No.

N.T. 31-32.

Appellants have not established that the Department abused its discretion by acting contrary to 25 Pa. Code §71.16(e)(3). Appellants produced no evidence regarding the identity or contents of any proposed Comprehensive Water Quality Management Plan applicable to the plan revision, much less evidence of inconsistency with such plans.

Appellants next contend the Department failed to consider Riverview's flooding, stormwater management, and traffic impacts.

Appellants argue that some of Riverview's lots, as well as the sewage treatment plant, will encroach into the floodway of Codorus Creek, possibly resulting in increased flooding. With respect to the treatment plant, the Board rejected a similar argument in Bobbi Fuller *et al.* v. DER, 1990 EHB 1726. In holding that a review of an official plan revision is the wrong time to raise the issue of construction in a floodplain and floodway, the Board stated:

> [t]his argument, though quite logical, is disingenuous, for it fails to account for the fact

> that the flooding impacts of the treatment plant are regulated by the Department pursuant to the Flood Plain Management Act and the rules and regulations adopted thereunder at 25 Pa. Code §106.1 *et seq.* and the Dam Safety and Encroachments Act and the rules and regulations adopted thereunder at 25 Pa. Code §105.1 *et seq.*

Fuller, 1990 EHB at 1757. Thus, the appropriate time to raise this issue is when construction permits are sought for the treatment plant. As for the lots in the subdivision, the municipality, and not the Department, has responsibility for regulating any flooding impacts of Riverview.

Regarding stormwater management, Appellants argue the Department failed to consider the effects of stormwater from Riverview on Codorus Creek and neighboring roads. Regulation of the stormwater impacts of the subdivision as a whole properly lies with East Manchester Township under the Municipalities Planning Code, the Act of July 31, 1968, P.L. 50, as amended, 53 P.S. §10101 *et seq.* (Municipalities Planning Code), the applicable municipal codes, and the Stormwater Management Act, the Act of October 4, 1978, P.L. 564, as amended, 32 P.S. §680.1 *et seq.* (Stormwater Management Act). Nothing in §14 of that statute, which enumerates the powers and duties of the Department, extends the Department's authority to considering the stormwater impacts of land development.

Lastly, with respect to traffic on neighboring roads, Appellants argue the Department violated its duties under Article I, Section 27, because it failed to review Riverview's effect on such traffic. Appellants believe the Commonwealth Court's opinion in Pennsylvania Environmental Management Services v. DER, 94 Pa. Cmwlth. 182, 503 A.2d 477 (1986) (P.E.M.S.), and the Board's opinion in Township of Middle Paxton v. DER, 1981 EHB 315, impose a duty on the Department under Article I, Section 27, to consider Riverview's effects on local automobile traffic.

In P.E.M.S., the Commonwealth Court held that for purposes of the Payne balancing test[8] "... the adequacy of public roads to the landfill must be considered at least to the extent necessary to 'conserve and maintain' the existing 'public and natural resources' as mandated by our Constitution." 94 Pa. Cmwlth. at 188, 503 A.2d at 480. The P.E.M.S. court was discussing the effects of the truck traffic that would be utilizing the proposed landfill. It imposed this duty on the Department because the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, makes the Department responsible for the transportation of solid wastes within the Commonwealth. Here, the issue is not the effects of the vehicles that would be used to service the proposed sewage treatment facility, but rather the effects of automobile traffic to and from the homes that would utilize the proposed sewage treatment plant. As we stated above, the Department's role under the Sewage Facilities Act and, therefore, its duties under Article I, Section 27, are limited to a review of the proposed method of sewage treatment and disposal. The Department, therefore, cannot be required to review the environmental effects of the increased automobile traffic that will result

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[8] It was held in Payne v. Kassab, 468 Pa. 226, 247, 361 A.2d 263, 273 (1976), that a three-part balancing should be used to determine whether the Commonwealth had complied with its duty under Article I, Section 27:

> (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
> (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
> (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

from Riverview's development.[9] See also, Bobbi Fuller, *et al.* v. DER, 1990 EHB 1726 (in requiring the Department to consider traffic effects under Article I, Section 27, the issue before the Board was the increase in traffic from trucks being used to construct and service the proposed facility).

It is clear that neither P.E.M.S. nor Township of Middle Paxton requires the Department, under the guise of Article I, Section 27, to review Riverview's effects on traffic on neighboring roads. This duty falls on East Manchester Township under the Municipalities Planning Code (municipal zoning ordinances shall be designed to prevent, among other things, congested travel and transportation, 53 P.S. §10604(2)), and the Department of Transportation under the State Highway Law, the Act of June 1, 1945, P.L. 1242, as amended, 36 P.S. §670.101 *et seq.* (requiring a highway occupancy permit before opening a driveway onto a state highway, 36 P.S. §670.420(b)(2)).

Appellants further contend the Department violated the requirements of 25 Pa. Code §71.14(b) and Article I, Section 27, because it failed to determine whether the proposed drinking water supply would be quantitatively adequate or would adversely affect the amount of groundwater available to neighboring properties. Appellants' contention is without merit.

The information that must be included in an official plan revision submission is enumerated in 25 Pa. Code §71.14. This list includes "[i]nformation relating to the type of water supply and type of individual or community sewage systems provided or to be provided including soil conditions and limitations for on-lot sewage disposal if applicable." 25 Pa. Code §71.14(b)(1). Contrary to Appellants' argument, this subsection does not

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[9] Since P.E.M.S. and Township of Middle Paxton arise from the same controversy, the Board's decision in Township of Middle Paxton is equally inapplicable.

require the Department to determine whether the proposed water supply will yield an adequate amount of water, nor does it require the Department to determine whether the proposed water supply will adversely affect neighboring water supplies. It merely requires that the revision include the type of water supply proposed in the subdivision in order to assess the impact of the proposed sewage disposal method on water supply (e.g. nitrate contamination of water supply wells).

In addition to not being an issue under the regulations, the Department is not bound by Article I, Section 27, to consider water supply quantity in reviewing plan revisions. In Keim v. DER, 1985 EHB 63, the Board was called upon to decide whether the Department, in approving a plan revision, had satisfied its duties under Article I, Section 27. Appellants in Keim argued, among other things, that the Department failed to consider whether the quantity of a proposed water supply to a new development was adequate. In rejecting their argument, the Board stated "... DER is not required to consider the volumetric adequacy of water supplies to proposed new developments in its reviews under the Sewage Facilities Act...." 1985 EHB at 80.[10]

The issue of water supply quantity is more properly considered by the Department in its review of any permit application for a public water supply pursuant to the Pennsylvania Safe Drinking Water Act, the Act of May 1, 1984, P.L. 206, as amended, 35 P.S. §721.1 *et seq.* (Safe Drinking Water Act). Section 5(b)(5)(ii) of the Safe Drinking Water Act requires the Department to implement a permit program which will assure that public water systems "will deliver water with sufficient volume and pressure to the users of such

---

[10] It should be noted that, in Keim, the developer nevertheless provided documentation of an adequate water supply. The fact that this information was provided does not alter the Department's duty under Article I, Section 27.

systems." Moreover, East Manchester Township also has responsibilities under the Municipalities Planning Code to deal with water facilities. See, 53 P.S. §10705(f) (municipalities granted the authority under Article V of the Municipalities Planning Code, 53 P.S. §§10501-10515, to establish standards for water facilities).

Appellants next contend the Department failed to study Riverview's adverse effects on prime farmlands, floodplains, and areas with limited water supply, as required by the Pennsylvania Environmental Master Plan, 25 Pa. Code §9.1 *et seq.* Appellants believe that the language of 25 Pa. Code §71.14(a)(5), referring to "any existing Commonwealth plan applicable to the official plan," requires the Department to consider these factors.[11] As we have already discussed, the Department has no responsibility to generally assess the impacts of the subdivision; its authority under the Sewage Facilities Act is confined to the method of sewage disposal. For the reasons that follow, we further hold that the Department bears no duty to review the official plan revision's effects on "prime farmlands."

Appellants' sole proof that this farmland is "prime" comes from the testimony of Appellant Gladfelter.

> **Q.** Could you describe in your experience the quality of the farmland in the area?
>
> **A.** I consider it very good.

(N.T. 311) "Prime farmlands" is not a defined term in the Master Plan. See, 25 Pa. Code §§9.111-9.116. Neither Appellants nor Intervenors offered any

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[11] 25 Pa. Code §71.14(a)(5) provides, in part, "[a]n official plan or a revision to an official plan submitted to the Department in accordance with this subchapter shall include ... any zoning; subdivision regulations; local, county, or regional comprehensive plans; or any existing Commonwealth plan applicable to the official plan."

definition of "prime farmlands" except that cited above. Nevertheless, even assuming that the land in the area is indeed "prime farmland," the Master Plan does not impose a duty on the Department to consider the effects of the official plan revision on such farmlands.

Section 1920-A(a) of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-20(a), requires the Environmental Quality Board to develop "a master environmental plan for the Commonwealth." Neither this Board nor any court has held that the Pennsylvania Environmental Master Plan imposes a substantive duty on the Department. The language of the Master Plan makes it clear why they have not.

> It shall be the environmental policy of the Commonwealth to protect and preserve the productive capability, resource potential, ecological significance, and aesthetic and open space values of the prime farmlands of the Commonwealth. 25 Pa. Code §9.111(b).
>
> It shall be the environmental policy of the Commonwealth to protect the prime farmlands of the Commonwealth by promoting and supporting a favorable social and economic climate which will strengthen the viability of agricultural communities throughout the Commonwealth. 25 Pa. Code §9.112(b).
>
> It shall be the environmental policy of the Commonwealth to develop an environmentally sensitive land policy planning program which protects the environmental values of the prime farmlands of the Commonwealth and coordinates activities at the State, regional, and local level related to the use of these lands. 25 Pa. Code §9.114(b).[12]

This language clearly cannot be read to impose any substantive duty on the Department because it is merely a statement of broad and subjective policy goals. Even if it could be so interpreted, it cannot expand the scope of the

---

[12] These three policies represent one-half of the six policies of the Master Plan towards "prime farmlands." The other three policies concern public investments, 25 Pa. Code §9.113(b), wastewater renovation, 25 Pa. Code §9.115(b), and farmlands of regional importance, 25 Pa. Code §9.116(b).

Department's authority under law. Accordingly, the Department did not violate the provisions of 25 Pa. Code §71.14(a)(5).

Appellants, citing the Commonwealth Court's decision in P.E.M.S., *supra*, further contend the Department also had a duty under Article I, Section 27, to consider Riverview's effects on farmlands.

In P.E.M.S., the the Commonwealth Court examined whether the effects of a landfill on nearby agricultural lands fell within the scope of Article I, Section 27. In holding it did, the court stated "[w]e hold that (1) the agricultural value of nearby lands to the mushroom farmers and fruit orchard owners is appropriately considered among the 'natural ... values of the environment' to which the 'people have a right' under PA. Const. art.I, §27...." 94 Pa. Cmwlth at 188, 503 A.2d at 480. Put another way, the Department had a duty under Article I, Section 27, to review a landfill's effects on neighboring farmland because the Department was responsible, under the Solid Waste Management Act, for approving the location of the landfill. Here, under the Sewage Facilities Act, responsibility for approving the location of a residential housing development falls on the municipality, not the Department. As we have repeatedly stated throughout this adjudication, the Department's duty is limited to approving the method of sewage disposal.

Finally, Appellants contend the Department violated the Dam Safety Act because development of Riverview will adversely affect delineated wetlands and Intervenors have not yet secured an encroachments permit. The Dam Safety Act does not regulate subdivision development in general - it governs the construction, operation, maintenance, modification, enlargement, or abandonment of obstructions and encroachments in wetlands. 32 P.S. §693.6(a).

Such construction, if and when it occurs, will require authorization by the Department under the Dam Safety Act, and this issue is properly raised at that time. See Bobbi Fuller, *supra*.

Because Appellants have failed to establish that the Department's approval of the plan revision was an abuse of discretion, the Department's approval of the plan revision must be sustained and this appeal must be dismissed.

CONCLUSIONS OF LAW

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

2. Appellants bear the burden of proving by a preponderance of the evidence that the Department abused its discretion in approving the revision to East Manchester Township's Official Plan.

3. In approving the plan revision, the Department did not violate the Historic Preservation Act.

4. The Department had no duty under the Pennsylvania Constitution, Article I, Section 27, to consider Riverview's effects on Codorus Furnace.

5. The Appellants failed to demonstrate that the plan revision was not consistent with a comprehensive program of water quality management.

6. In approving the plan revision, the Department had no duty under the Flood Plain Management Act or the Dam Safety Act to consider the adverse effects of Riverview's alleged intrusions into the floodplain and floodway of Codorus Creek.

7. In approving the plan revision, the Department had no duty under the Storm Water Management Act to consider Riverview's effects on stormwater flows into Codorus Creek and onto neighboring roads.

8. In approving the plan revision, the Department did not violate the standards of 25 Pa. Code §71.14(b)(1), relating to the type of water supply. Furthermore, the Department had no duty under the Pennsylvania Constitution, Article I, Section 27, to determine in its review of the plan revision whether Riverview's proposed drinking water supply would be quantitatively adequate or would adversely affect the amount of groundwater available to neighboring properties.

9. The Pennsylvania Environmental Master Plan, 25 Pa. Code §9.1 *et seq.*, imposes no substantive duty on the Department to consider Riverview's effects on prime farmlands, floodplains, or areas of limited water supplies. Furthermore, in approving the plan revision, the Department had no duty under the Pennsylvania Constitution, Article I, Section 27, to consider Riverview's effects on prime farmlands neighboring the site.

10. In approving the plan revision, the Department had no duty under the Dam Safety Act to consider Riverview's effects on alleged wetlands within the site.

O R D E R

AND NOW, this 23rd day of April , 1993, it is ordered that the Department's approval of the revision to East Manchester Township's Official Plan is sustained and the appeal of Loràine Andrews and Donald Gladfelter is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 23, 1993

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M. DIANE SMITH
SECRETARY TO THE BOA

COUNTY OF CLARION	:	
	:	
v.	:	**EHB Docket No. 92-274-W**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and CONCORD RESOURCES GROUP OF PENNSYLVANIA, INC., Permittee	:	**Issued: April 23, 1993**

OPINION AND ORDER SUR MOTION TO DISMISS

By Maxine Woelfling, Chairman

Synopsis

A letter from the Department of Environmental Resources (Department) advising an applicant for a hazardous waste disposal permit that its Phase I siting application was administratively complete does not constitute a final action which is appealable, and, therefore, the Board lacks jurisdiction over an appeal from the letter.

OPINION

Concord Resources Group of Pennsylvania, Inc. (Concord) submitted a Phase I siting application to the Department, under the Hazardous Sites Cleanup Act, the Act of October 18, 1988, P.L. 756, 35 P.S. §6020.101 *et seq.* (Hazardous Sites Cleanup Act), for a permit to construct and operate a hazardous waste treatment and disposal facility in Clarion County. On June 26, 1992, the Department advised Concord's Richard Gimello that the Phase I siting application was "administratively complete," and the Department would

begin its technical review.[1]

On July 27, 1992, the County of Clarion (County) appealed the Department's June 26, 1992, administrative completeness determination, arguing that the Department's determination was arbitrary, capricious and unreasonable, contrary to law, and contrary to Department regulations and policy because Concord's Phase I siting application did not contain all of the information required under the regulations.[2]

On October 2, 1992, Concord filed a motion to dismiss the County's appeal, asserting that the Department's letter was not an appealable action because it was not a final agency action affecting the personal or property rights, privileges, immunities, duties, liabilities or obligations of the County.[3] On October 26, 1992, the County filed its objections to Concord's motion to dismiss, contending that the determination letter was an appealable

---

1 Under §309(c) of the Hazardous Sites Cleanup Act, the Department had five months from its receipt of Concord's "administratively complete" Phase I siting application to review it for conformity with the Phase I exclusionary criteria at 25 Pa. Code Ch. 269, Subch. A. If the Department approved Concord's Phase I siting application, it would then have 90 days to determine whether the Phase II application was "administratively complete." 35 P.S. §6020.309(d). The Department would thereafter have ten months to review the Phase II application for conformity with the permit requirements of 25 Pa. Code Ch. 265, Subch. R. and the Phase II exclusionary requirements of 25 Pa. Code Ch. 269, Subch. A.

2 The Department's technical review of Concord's Phase I siting application, initiated after the June 26, 1992, completeness determination letter, lasted until August 3, 1992, when the Department denied Concord's Phase I siting application on its merits because Concord had failed to comply with the exclusionary criteria regarding wetlands under 25 Pa. Code §269.23. On September 2, 1992, Concord filed a notice of appeal from that denial at EHB Docket No. 92-416-W, and the County was permitted to intervene in that proceeding.

3 Concord also argued that the County failed to perfect its appeal, the County lacked standing to file its appeal, and the appeal was moot. Since the Board is deciding this motion on the basis of appealability, it is unnecessary to address Concord's other arguments.

action because it clearly affected the County's rights, duties and obligations to review the application as a host county.[4]

To be appealable to this Board, a Department decision must constitute an "action" or an "adjudication." "Action" is defined at 25 Pa. Code §21.2(a) as "any order, decree, decision, determination or ruling by the Department [of Environmental Resources] affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any person, including, but not limited to, denials, modifications, suspensions and revocations of permits ...." An "adjudication" is defined similarly at 2 Pa. C.S.A. §101. The Board has interpreted these provisions as conferring jurisdiction on it to review any decision of the Department which is final and affects personal or property rights, privileges, immunities, duties, liabilities, or obligations of a person. Environmental Neighbors United Front, *et al.* v. DER, EHB Docket No. 91-372-W (Opinion issued September 24, 1992). The Board has held that Department correspondence which neither changes the *status quo ante* nor imposes new obligations on the appellant is not an appealable action. Louis Costanzo t/d/b/a Elephant Septic Tank Service v. DER, 1991 EHB 1132. Furthermore, the Board has noted that each of the various parts of the Department's review of a permit application is not a single Department action reviewable by the Board. Environmental Neighbors United Front, *supra*.

Here, the completeness letter, which is the subject of the appeal, informed Concord that its Phase I siting application was administratively complete, that the Department would conduct an in-depth technical review and hold public meeting(s) and hearing(s) on the application, and that, if, at anytime, the proposed facility failed to comply with Phase I siting criteria,

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4 The parties also filed reply memoranda which re-iterated their previous arguments.

the Department would cease review and deny the application. Thus, the letter did nothing more than to notify Concord of the status of the Phase I siting application and outline the process and criteria under which the application would be reviewed.

The completeness letter has not affected the County's rights, privileges, or obligations, as no permit was issued and the County could still review and comment on the application. Nor has there been any change to the *status quo* - Concord is not authorized to construct its disposal facility. Consequently, the Department's June 26, 1992, letter is not an appealable action, and the Board has no jurisdiction to review it. Board of Commissioners of Union County v. DER and U.S.P.C.I. of Pennsylvania, EHB Docket No. 92-151-E (Opinion issued November 3, 1992).

ORDER

AND NOW, this 23rd day of April, 1993, it is ordered that Concord's Motion to Dismiss is granted.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 23, 1993

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M. DIANE SMITH
SECRETARY TO THE BOARD

NORTH POCONO TAXPAYER'S ASSOCIATION NORTH POCONO C.A.R.E.	:	
v.	:	EHB Docket No. 92-409-E
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and NORTH POCONO SCHOOL DISTRICT	:	Issued: April 23, 1993

OPINION AND ORDER
SUR APPELLANT'S MOTION TO
AMEND APPELLANT'S PRE-HEARING MEMORANDUM

By: Richard S. Ehmann, Member

Synopsis

A motion to amend an appellant's Pre-Hearing Memorandum to add new factual witnesses and new expert testimony by its previously identified expert is denied where cause for granting the motion is not shown. A party with the burden of proof may not rely on a witness' listing as a potential rebuttal witness in an opponent's Pre-Hearing Memorandum to excuse failure to list this witness as one to be called in its case-in-chief. Where information supporting and modifying permittee's application for permit was filed with DER by the applicant prior to the permit's issuance in July of 1992, but the third party appellant's expert failed to review same until a time close to the April 1993 date of the merits hearing, cause to modify the summary of expert testimony in appellant's Pre-Hearing Memorandum to reflect the expert's modified opinion and thus to allow introduction of modified expert testimony is not shown.

OPINION

The instant appeal is a joint appeal by two citizens groups called North Pocono Taxpayer's Association and North Pocono C.A.R.E. (collectively "TA/CARE") They are challenging the Department of Environmental Resources' ("DER") issuance of a Water Obstruction and Encroachment Permit on July 22, 1992 to the North Pocono School District ("School") in connection with construction of a new elementary school in Moscow Borough, Lackawanna County.

This appeal was filed on August 21, 1992. On August 28, 1992 this Board issued Pre-Hearing Order No. 1, which provided the parties until November 11, 1992 to complete discovery and directed that by that date, TA/CARE would file a Pre-Hearing Memorandum. This Pre-Hearing Memorandum was in part to provide a summary of expert testimony, a list of TA/CARE's witnesses and a list of the documents which TA/CARE would seek to introduce. The Order also mandated that DER and School would then file Pre-Hearing Memoranda responding to TA/CARE's Pre-Hearing Memorandum. Finally, it warned the parties that non-compliance with it could cause the imposition of sanctions. By Order dated December 10, 1992, this Board granted TA/CARE's Motion for an extension of time to file TA/CARE's Pre-Hearing Memorandum and ordered it to be filed by December 24, 1992.

Thereafter, TA/CARE and School filed their Pre-Hearing Memoranda.[1] On January 15, 1993, after a conference call with all parties' attorneys, the Board issued its Pre-Hearing Order No. 2. This Order scheduled the merits hearing on this appeal for April 26 and 27 of 1993 and directed certain other filings by the parties in reference to that hearing.

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[1]As is its routine procedure in third party appeals from permits, DER left permit defense to the permittee. It filed no Pre-Hearing Memorandum.

On April 9, 1993, the Board received TA/CARE's Motion To Amend Its Pre-Hearing Memorandum. According to the Motion, TA/CARE seeks leave to modify the scope of its expert's testimony and to add several fact witnesses who reviewed School's permit application on DER's behalf. However, TA/CARE's Memorandum Of Law In Support Of this Motion says TA/CARE also seeks to add federal officials as witnesses. Thereafter, by letter dated April 15, 1993, TA/CARE's counsel requested subpoenas for two additional witnesses who do not appear as listed witnesses in TA/CARE's proposed Amended Pre-Hearing Memorandum. By letter dated April 19, 1993, TA/CARE asked for an additional subpoena for a DER employee named Eugene Counsil, who is also not listed as a witness in TA/CARE's Pre-Hearing Memorandum. Finally, by a letter dated April 22, 1993, TA/CARE indicated it desires that the Board issue it a subpoena for DER employee Rick Shannon and stated that it is preparing a second Motion To Amend its Pre-Hearing Memorandum to add him as a witness.[2] On the afternoon of April 22, 1993, TA/CARE's second Motion To Amend was filed with this Board.[3] The Board issued all of these subpoenas when they were requested, but in so doing, acted ministerially and did not rule on the merit of TA/CARE's Motion.[4]

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[2]A companion letter of even date "withdraws" subpoenas by TA/CARE for Steven Mars, a federal employee, Ronald Mease, a DER employee, DER's custodian of records and the two persons who are not DER employees but for whom subpoenas were requested by letter of April 15, 1993.

[3]This opinion and accompanying order only address TA/CARE's initial Motion, not its second Motion which is pending and will be ruled on before the taking of evidence on April 26, 1993.

[4]A number of TA/CARE's filings with this Board mistakenly refer to TA/CARE as intervenors. TA/CARE are not intervenors here but appellants.

School has filed a timely response to TA/CARE's Motion opposing same. School points out TA/CARE's Motion was filed a mere seventeen days before the merits hearing. It asserts that TA/CARE seeks to modify the scope of its expert's testimony to cover further relevant materials which its expert has only recently become aware of, but that these materials were part of School's application for permit and predate the filing of the instant appeal. School then argues the lateness of the change is prejudicial to it and that TA/CARE has "failed to set forth any facts which would justify the amendment".

In a conference telephone call with all parties' counsel on April 21, 1993, we heard further argument on this Motion and learned that DER would file no response to it but joined in School's response.

In Midway Sewerage Authority v. DER, 1991 EHB 1445, James E. Wood v. DER, et al., EHB Docket No. 90-280-E (Opinion issued March 4, 1993), as well as elsewhere, we have discussed eleventh hour amendments of a party's Pre-Hearing Memorandum. In Midway Sewage, we affirmed the sitting Board Member's denial of a last minute attempt to add a new expert witness. In Wood, one of the issues was failure to specify the appellant's legal contentions. Both cases stand for portions of the proposition that trial by ambush is not to occur before this Board. Through our rules and decisions we have tried to create the situation where the parties disclose their respective factual and legal positions through Notices Of Appeal, discovery proceedings and the filing of Pre-Hearing Memoranda. We do this to facilitate the exchange of information by the parties. We also take pains to point out in Pre-Hearing Order No. 1, that a party's non-compliance therewith as to its Pre-Hearing Memorandum's content may result in the imposition of sanctions pursuant to 25 Pa. Code §21.124. This procedure allows each side the

opportunity to examine the strengths and weaknesses of its position and the strength and weaknesses of its opponent's position. Not only does such an opportunity allow a party to realistically assess its chances of prevailing on the merits of each issue, but it also allows parties to elect to abandon issues, reevaluate settlement options or to prepare rebuttal to an opponent's contentions. In short, to further overuse the level playing field analogy, we try to create a level surface on which hearings can be held with the most relevant evidence being presented on the outstanding issues in the most concise fashion.

When a party waits until seventeen days before a hearing to try to modify the subject matter on which it will offer expert testimony and tries to add fact witnesses, that party effectively attempts to tilt this level surface so that it inclines in its favor and against its opponents.

Such eleventh hour actions by a party may occasionally be necessary or appropriate. New, previously unavailable data may come into existence which changes the complexion of an appellant's position. See Spang and Company v. Department of Environmental Resources, 140 Pa. Cmwlth. 306, 592 A.2d 815 (1991). Another circumstance which is not unheard of is the occasional situation when a party needs to substitute experts because of the incapacity of its initially selected expert witness. Of course, these are merely two possible reasons to seek amendment out of many. However, cause to allow such amendments must be shown by the movant or we run the risk that eleventh hour amendment will become the exception which swallows the general concept that the Pre-Hearing Memorandum, as initially filed by a party, may be

relied upon by this Board and the other parties as setting forth the skeleton which the filing party will flesh out and clothe at the merits hearing through the identified evidence.

As to the additional fact witnesses, TA/CARE offered two explanations.[5] In the conference call, counsel for TA/CARE said failure to include DER's employees as witnesses was an oversight. Subsequently, in that same discussion, he indicated that in School's responding Pre-Hearing Memorandum it listed undisclosed DER personnel, so it was unnecessary for his client to list these people and withdrew his suggestion of oversight. A failure to list witnesses due to oversight is not cause to allow amendment this close to the trial date, even if it might be explained and excused if it occurred and was corrected sufficiently early in the pre-hearing path of an appeal to allow all other parties to adjust thereto. The same is true as to TA/CARE's alternative theory. Under 25 Pa. Code §21.101(c)(3), TA/CARE has the burden of proof in this appeal. In this circumstance neither School nor DER need call any witnesses on any subject if TA/CARE offers no evidence thereon. Accordingly, it is TA/CARE which must list its witnesses, as School and DER are only responding appellees. Moreover, it is TA/CARE, which had to file its Pre-Hearing Memorandum first and thus could not rely on what School or DER might file in response, who must initially list all witnesses it will call in support of its grounds for appeal.

As to expert's opinion, TA/CARE admits it conducted no discovery in this appeal, although after the discovery period closed, it says it asked

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[5]Even though TA/CARE's arguments are addressed only to calling DER's employees as witnesses, our conclusions in regard to these arguments apply to the other persons not listed in its initial Pre-Hearing Memorandum which it has also sought to subpoena.

School for production of documents which School refused. It says that after its expert reviewed some DER documents and rendered his initial opinion and it filed its Pre-Hearing Memorandum, it discovered he had only seen a portion of School's application for permit and had not seen the materials amending or modifying the initial application. TA/CARE says it only recently obtained this amending or modifying material and this caused the expert to modify his expert opinion in the fashion which TA/CARE now sets forth within the proposed Amended Pre-Hearing Memorandum. There is no allegation of fraud or misconduct by School or DER, nor any assertion that either of them hid these modifying and amending materials from TA/CARE. In the conference call, counsel for TA/CARE admitted on TA/CARE's behalf that all of these materials submitted by School to DER predated DER's decision to issue School this permit and TA/CARE's appeal. TA/CARE's Motion also fails to satisfactorily explain why, if this appeal was commenced in August of 1992, this omission was not discovered with attempts to correct it through this type of motion long before April 9, 1993. In this scenario, we are forced to conclude that the burden of TA/CARE's initial failure to gather all of the documents filed by School for its expert to review until just before the merits hearing must fall on TA/CARE, rather than School or DER, and that cause to ignore this failure is not found in a TA/CARE Motion filed this close to the date of the merits hearing.

Accordingly, we enter the following order.

ORDER

AND NOW, this 23rd day of April, 1993, it is ordered that TA/CARE's initial Motion To Amend Appellant's Pre-Hearing Memorandum is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: April 23, 1993

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M. DIANE SMITH
SECRETARY TO THE BOARD

CAROL RANNELS	:	
	:	
v.	:	EHB Docket No. 90-110-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 29, 1993

OPINION AND ORDER
SUR MOTION TO DISMISS

Maxine Woelfling, Chairman

Synopsis

Where the Department of Environmental Resources (Department) rescinds a compliance order which is the action forming the basis of an appeal to the Board, the appeal will be dismissed as moot, since the Board can no longer grant any effective relief.

OPINION

This matter was initiated by the March 12, 1990, filing of a notice of appeal by Carol Rannels, owner and operator of Crystal Springs Water Company, seeking review of the Department's February 27, 1990, issuance of a compliance order under the Pennsylvania Safe Drinking Water Act, the Act of May 1, 1984, P.L. 206, as amended, 35 P.S. §721.1 et seq. (Safe Drinking Water Act). The order directed Ms. Rannels to collect one microbiological sample from each of her three wells on a weekly basis, as mandated by 25 Pa. Code §109.303(a)(4). Ms. Rannels challenged the applicability of the monitoring requirements to Crystal Springs Water Company.

The Department filed a motion for summary judgment which the Board denied at 1990 EHB 1617, rejecting the Department's argument that Crystal Springs was a "bottled water system," and, therefore, subject to the monitoring requirements of the regulations adopted pursuant to the Safe Drinking Water Act. The Board, en banc, affirmed its decision at 1991 EHB 1523 and certified the matter for interlocutory appeal pursuant to Pa. R.A.P. 1311. The Commonwealth Court granted the Department permission to file an interlocutory appeal and affirmed the Board's decision in Department of Environmental Resources v. Carol Rannels, _____ Pa. Cmwlth. _____, 610 A.2d 513 (1992).

Subsequently, on December 4, 1992, the Department rescinded its February 27, 1990, compliance order and filed a motion to dismiss the appeal on the basis that it is now moot.

On December 18, 1992, Ms. Rannels filed her response in the form of a motion to postpone EHB's decision on the Department's motion, contending that it is inappropriate for the Board to dismiss the appeal without requiring the Department to state its reason for withdrawal of the order. On December 27, 1992, the Board denied Ms. Rannels' motion to postpone.

The term "moot" indicates that a case or controversy no longer exists, for whatever reason. Centre Lime and Stone Co., Inc. v. Comm., DER, No. 1825 C.D. 1992 (Opinion issued April 2, 1993). An appeal becomes moot when an event occurs which deprives the Board of the ability to provide effective relief, such as the Department's rescission of the action forming the basis of the appeal. Roy Magarigal, Jr. v. DER, EHB Docket 91-329-MR (Opinion issued April 16, 1992). When such an event occurs, the Board no longer has jurisdiction, as there is no relief that the Board can give the appellant.

Here the Department's December 4, 1992, letter rescinded the Department's compliance order which was the basis of Ms. Rannels' appeal. Consequently, there is no longer any relief the Board can grant Ms. Rannels, and her appeal must be dismissed as moot.

ORDER

AND NOW, this 29th day of April, 1993, it is ordered that the Department of Environmental Resources' Motion to Dismiss is granted.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

EHB Docket No. 90-110-W

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 29, 1993

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M. DIANE SMITH
SECRETARY TO THE BOA

ELEPHANT SEPTIC TANK SERVICE and LOUIS J. CONSTANZA	:	
v.	:	EHB Docket No. 92-560-E
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 30, 1993

OPINION AND ORDER SUR
MOTION TO DISMISS

By: Richard S. Ehmann, Member

Synopsis

An appeal from a letter of the Department of Environmental Resources (DER) is dismissed where the letter is not an appealable action of DER.

OPINION

This appeal was commenced on December 23, 1992 by Louis J. Costanza, individually, and Elephant Septic Tank Service (collectively Elephant), seeking our review of a DER letter dated November 25, 1992 to Eugene E. Dice, the attorney representing Elephant. DER's letter was a response to a letter dated October 16, 1992 from Attorney Dice to DER (Exhibit A to DER's Motion To Dismiss). DER's letter concerned the posting of bonds for sites covered by Elephant's permits for the application of sewage sludge for agricultural utilization purposes (agricultural utilization permits), which permits are issued by DER pursuant to the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*

Presently before us is DER's Motion to Dismiss Elephant's appeal based on the argument that DER's November 25, 1992 letter is not an appealable action. In reviewing DER's motion and Elephant's response thereto, we must view the motion in the light most favorable to Elephant, as it is the non-moving party. John and Sharon Klay, d/b/a Fayette Springs Farms v. DER, EHB Docket No. 92-280-E (Opinion issued February 4, 1993).

There is no dispute that Louis J. Costanza operates a septic hauling business known as Elephant Septic Tank Service and holds fourteen agricultural utilization permits from DER authorizing the application of sewage sludge on a total area of approximately 600 acres known as agricultural utilization sites. It is further undisputed that Mr. Costanza and Attorney Dice met with representatives of DER on October 9, 1992, at Attorney Dice's request, to discuss Elephant's permitted agricultural utilization sites. Elephant had not yet paid its annual report fee of $200 per site.[1] At this meeting, the matter of how Elephant could avoid paying annual report fees for the fourteen permitted sites was discussed. DER suggested that Elephant consolidate all of its sites under one permit, which would require Elephant to submit only one annual report but would entail Elephant's submission of a bond for the sites. The total bond amount was calculated at the meeting to be approximately $120,000 using DER's bond policy.

Attorney Dice's letter to DER states that Elephant and DER have been attempting to resolve outstanding issues that have been points of contention between them and that one of these outstanding issues is the level of bonding

---

[1] Section 275.222(a) of DER's regulations at 25 Pa. Code requires a person who applies sewage sludge to land under Chapter 275 of DER's regulations to submit to DER an annual operation report for each permitted facility. Section 275.222(d)(1) of 25 Pa. Code further requires, for the agricultural utilization of sewage sludge, that the annual report be accompanied by a nonrefundable annual permit administration fee of $200.

to be required of Elephant as part of the permit consolidation process. Attorney Dice's letter also indicates Elephant's willingness to post the required bond for the area where septage from septic tanks or storage tanks is deposited, but in it, Dice contends that DER is not justified in requiring bonds to be posted for areas where Elephant deposits processed sludge from municipal sewage treatment plants, pointing out that under SWMA, municipalities are not required to post such bonds. This letter also points out that only a portion of each site is used annually. Attorney Dice's letter states, "[w]e believe that the interests of fairness, as well as the interest of the environment would be better served by eliminating, or substantially reducing, the per acreage bond amount applicable to disposal of sludge from municipal sewage treatment plants." Attorney Dice's letter further indicates Elephant's willingness to pay a substantial part of the annual fees requested by DER "if the relief requested on the bonding can be granted by [DER], allowing [Mr. Costanza] to go forward with his permit applications." The letter concludes by saying, "[w]e would appreciate your prompt response to this request."

DER's November 25, 1992 letter advises that DER has reviewed the submitted information concerning the bonding for Elephant's fourteen sites. DER's letter states that "currently no options are available for a sliding scale or adjustable bond based on the actual acreage used for land application of septage." DER's letter further states:

> In general, we concur with the Southwest Regional Office's decision that without reducing the acreage, the bond will be approximately $120,000.
>
> If you have any questions concerning this subject, please contact Stephen Socash or Thomas Woy of my staff.

As DER points out in its brief, DER's actions are appealable only if they are "adjudications" within the meaning of the Administrative Agency Law, 2 Pa.C.S. §101, or "actions" as defined at 25 Pa. Code §21.2(a)(1). The definition of action is found at 25 Pa. Code §21.2(a). It is:

> An order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities of obligations of a person, including, but not limited to, denials, modifications, suspensions and revocations of permits, licenses, and registrations; orders to cease the operation of an establishment or facility; orders to correct conditions endangering waters of the Commonwealth; orders to construct sewers or treatment facilities; orders to abate air pollution; and appeals from and complaints for the assessment of civil penalties.

See Klay, *supra*; County of Clarion v. DER, et al. EHB Docket No. 92-274-W (Opinion issued April 23, 1993), and cases cited therein. "Adjudications" are defined as those actions which affect the personal or property rights, privileges, immunities, duties, liabilities or obligations of the party. Chester County Solid Waste Authority v. DER, 1987 EHB 523.
To fall within either of these categories, DER's November 25, 1992 letter must have some impact on Elephant's rights and duties. James Buffy and Harry K. Landis, Jr., v. DER, 1990 EHB 1665, at 1692.

After reviewing both Attorney Dice's letter and DER's letter, we conclude DER's letter is not an appealable action.

Elephant contends that it requested DER to determine the appropriate permit renewal and continuation fees, and that it is "in the process of applying for renewed or continued permits." From this contention, Elephant argues DER's letter is effectively a permit renewal decision which requires Elephant to submit a $120,000 bond in order to renew or continue its permits.

Contrary to Elephant's assertion, DER has not made a permit renewal decision here. According to DER's verified motion, Elephant currently has no permit applications, including any applications to consolidate any existing permits, pending before DER. Thus, the issue of how DER will act if and when Elephant submits an application for permit renewal or consolidation is not ripe. See Giorgio Foods, Inc. v. DER, 1989 EHB 331. To the extent that Elephant is arguing that DER has made a decision, in response to Attorney Dice's letter, on how DER will act when Elephant seeks permit renewal and is requesting our review thereof, Elephant is requesting declaratory relief from this Board. We are not empowered to render a declaratory judgment. Costanza v. DER, 146 Pa. Cmwlth. 588, 606 A.2d 645 (1992); Giorgio Foods, *supra*.

We further reject Elephant's argument that even if its appeal is not from a permit renewal decision by DER, it is still reviewable as an appeal of a DER "decision." Elephant argues that DER's letter, insofar as it states "we concur with the Southwest Regional Office's decision that without reducing the acreage, the bond will be approximately $120,000," indicates that DER has made a decision and that this decision alters Elephant's rights and duties as to the bonding requirement.

As we have previously explained, not all DER "decisions" are appealable, only those which affect the appellant's rights and duties. See Commonwealth, DER v. New Enterprise Stone & Lime Co., Inc., 25 Pa. Cmwlth. 389, 359 A.2d 845 (1976); Lobolito, Inc. v. DER, et al., EHB Docket No. 92-147-E (Adjudication issued April 8, 1993); Westtown Sewer Company, et al. v. DER, EHB Docket No. 91-269-E (Opinion issued February 4, 1992). Attorney Dice's letter says that Elephant and DER are trying to resolve outstanding points of contention between them and proposes a manner in which they might be

able to resolve the bonding and annual fee issues. DER's letter responds that DER is not able to deal with the bonding issue in the manner proposed by Elephant. DER's letter does not direct Elephant to submit a bond for its existing permits, nor does it direct Elephant to take any actions with regard to its existing sites. Thus, no change in the status quo ante occurred as a result of DER's letter.[2] See Keystone Castings Corporation v. DER, EHB Docket No. 92-517-E (Opinion issued February 25, 1993).

Finally, Elephant argues that in Andre Greenhouses, Inc. v. DER, 1979 EHB 311, this Board ruled that where an appellant has an arguable claim to an exemption from DER's regulations pursuant to a statutory exemption, the appellant is entitled to a determination of the statutory exemption question before going to the expense of complying with the regulations. Elephant contends that beneficial agricultural uses of municipal waste sludge to its permitted sites should be exempt from the bonding requirement under §505 of the SWMA, 35 P.S. §6018.505. Elephant alternatively contends that there is a statutory exemption from the bonding requirement specifically created under §505(f) of the SWMA, 35 P.S. §6018.505(f), for municipalities or municipal authorities, and it urges that it acts as an agent for various municipalities and thus has a "colorable claim" to this statutory exemption. Citing Andre

---

2 We note that in Wortman v. Commission on Human Relations, 139 Pa. Cmwlth. 616, 591 A.2d 331 (1991), cited by Elephant, the Commonwealth Court indicated that when an agency's decision or refusal to act leaves a complainant with no other forum in which to assert his or her rights, privileges, or immunities, the agency's act is an adjudication pursuant to 2 Pa.C.S. §101. However, in making this statement, the Court in Wortman had found the challenged agency letter in that matter had an impact on the appellant's rights, whereas here, we have found DER's letter has no impact on Elephant's rights and duties. Thus, we reject Elephant's contention that DER's letter in the instant matter is appealable based on the Wortman court's statement regarding lack of another forum.

Greenhouses, Elephant argues it is entitled to have the bonding issue considered by the Board before producing a $120,000 bond for its sites.

The Board's decision in Andre Greenhouses is not controlling of the instant appeal. In Andre Greenhouses, the challenged DER letter had specifically determined that the appellant was not entitled to an exemption from regulation which was explicitly provided by the governing statute in that matter and the Board ruled that DER's decision on the applicability of the exemption was an appealable action. In the present appeal, DER's letter has not determined whether Elephant is exempt from the bonding requirements under §505 of the SWMA, 35 P.S. §6018.505. This claim by Elephant is not even raised in Dice's letter to DER, so DER could not have addressed it in its responding letter. Further and contrary to Elephant's argument, it need not submit a $120,000 bond to DER for its sites in order to challenge the bond requirement; it may submit its application, refuse to submit the bond, and then appeal any DER denial of the permit based on such lack of bonding. At this point, however, DER has not taken an appealable action. Thus, we grant DER's motion to dismiss Elephant's appeal and enter the following order.

O R D E R

AND NOW, this 30th day of April, 1993, it is ordered that the Department of Environmental Resources' motion to dismiss is granted and the appeal of Louis J. Costanza and Elephant Septic Tank is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 30, 1993

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOA

AL HAMILTON CONTRACTING COMPANY	:	
	:	
v.	:	EHB Docket No. 93-073-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 4, 1993

OPINION AND ORDER
SUR PETITION FOR SUPERSEDEAS

By: Richard S. Ehmann, Member

Synopsis

In deciding whether to grant or deny supersedeas of a DER Cessation Order, the Board conducts a balancing of the three factors set forth in 25 Pa. Code §21.78. Where DER issues an order to a miner to conduct a study of groundwater in the area of a former mine site to determine if the mine site is producing the acid mine drainage found at a nearby, but not adjacent property and the miner does not comply therewith, the miner has a reasonable likelihood of showing that issuance of an order to cease dry coal processing because of non-compliance with the Study Order, is not mandatory under 25 Pa. Code §86.212(a). When all that has occurred at this mine site in the last seven years is the dry processing of coal from other mine sites, the miner has a reasonable likelihood of success in challenging the Cessation Order to the extent it is issued pursuant to DER's discretionary authority. Supersedeas of

DER's Cessation Order will issue where it appears there is no harm to the public if the Cessation Order is superseded and there is financial injury to the mining company from its compliance with DER's Cessation Order.

OPINION

On March 8, 1993, DER issued Al Hamilton Contracting Company ("AHC") an administrative order pursuant to Sections 5, 316, 402, 601 and 610 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§691.5, 691.316, 691.402, 691.601 and 691.610; Sections 4.2 and 4.3 of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §§1396.4b, 1396.4c; Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. 510-17; and the regulations found in 25 Pa. Code Chapters 86 and 87. This order ("Cease Order" or "Cessation Order") directed the cessation of all mining related activities, including coal processing and loading activities, on Surface Mining Permit No. 17723164. The Cease Order also directed AHC to immediately comply with DER's prior Administrative Order No. 924104 ("Study Order") to submit a plan for defining the geology and hydrogeology of AHC's Little Beth Operation "relative to pollutional conditions at the Cowder properties", including the installation and sampling of monitoring wells and piezometers as set forth in DER's letter to AHC dated December 3, 1992.

AHC appealed from this Cease Order on April 2, 1993, and its appeal was assigned Docket No. 93-073-E. Simultaneously, it filed its Petition For Supersedeas From Cessation Order. By Order of April 6, 1993, we directed DER to file its Response to AHC's Petition by April 13, 1993 and scheduled a

hearing with regard thereto for April 15, 1993. DER's Answer To Petition For Supersedeas opposing the relief sought by AHC was duly filed, and on April 15, 1993, we held the scheduled hearing.

According to the evidence, on September 25, 1992, DER issued AHC its Study Order (Joint Exhibit-1) for AHC's Little Beth Operation, located in Bradford Township, Clearfield County. The Study Order specified in part that the study of the area's geology and hydrogeology, which AHC was to undertake pursuant thereto, was to include the installation and sampling of monitoring wells and piezometers, a protocol for a detailed logging of all wells, the measurement of water levels and the monthly sampling and analysis of groundwater.

This Study Order was issued because DER suspected that AHC's mining of the Little Beth mine site was the most likely cause for a deterioration of groundwater quality at the nearby Cowder property. The Little Beth site, approximately 200 acres in size, lies north of Route 322 in Bradford Township. The mine site's boundary is irregular but is roughly rectangular in shape, with its northern border being Township Road No. 605 (T-605). To locate the site still further, according to the map which is Exhibit A-5, T-605 is all that lies between the mine site and Interstate 80 (I-80). The Cowder property lies on the opposite side of I-80 from AHC's site at a point due north from the northwestern quarter of the mine site. The surface in this area slopes from the mine site across I-80 toward the Cowder property.

According to the testimony, at least the northern half of AHC's mine site was mined in segments, with the western segment mined first and the

eastern segments mined and reclaimed last. The extraction of coal ceased and backfilling occurred in 1984 in this eastern portion of the mine. In the area of AHC's mine nearest the Cowder property, mining ceased in 1980.

In 1985, the water in Cowder's well began to go bad and acid mine drainage began seeping into the basement of Evelyn Cowder's home. DER says this continues to the present time. Cowder's property is roughly 700 feet from the mine site's boundary.

Upon receipt of DER's Study Order, AHC filed an appeal therefrom with this Board. The appeal was assigned Docket No. 92-471-E.[1] The hearing on the merits of that appeal is scheduled to run from June 1, 1993 through June 3, 1993.[2]

The only operations conducted by AHC on Little Beth at present or in the recent past consist of operation of AHC's coal preparation plant. AHC trucks coal to this site from other mines. The coal is stockpiled as raw coal, crushed and screened. Thereafter, it is stored temporarily, mixed to the desired blend and loaded onto trucks to be hauled to customers. This is AHC's only coal processing operation. Its equipment consists of rotary breakers, stackers, scavenger screens and sizing screens. This operation is

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[1]On the edge of T-605 where it abuts the Little Beth operation is a discharge which DER asserts to be the responsibility of AHC because of its mining of the Little Beth site. This discharge lies between the Cowder property and the Little Beth site. DER has issued AHC an Order as to the discharge. AHC has installed a treatment pond at this discharge point and filed an appeal from that order to this Board. That appeal bears docket number 92-468-E. Some of the issues therein may parallel the issues in the instant appeal but they are not identical and are not further addressed here.

[2]By Order dated April 16, 1993, the instant appeal and Study Order's appeal were consolidated with the parties' consent. At that time, the parties were also advised by the Board that this supersedeas proceeding only pertained to the Cessation Order's appeal.

conducted on the southeastern edge of the permit area. An application for a permit to operate this coal preparation plant is currently pending before DER. This coal preparation plant area is about 3,800 feet from the Cowder property.

After receipt of DER's Study Order, AHC gathered certain data and met with DER to discuss the Study Order, site conditions and compliance with the Study Order requirements. Some of this data was a DER report on Operation Scarlift and some, which related to I-80's construction, came from PennDOT. The Operation Scarlift data (Exh. A-3), and the I-80 construction data (Exh. A-1) was provided to DER, as was a history of mining at the Little Beth site (Exh. A-4) and a report by members of Hess & Fisher Engineers, Inc. as that firm's conclusions on AHC's behalf as to the hydrogeologic conditions in the area north of the Little Beth site. (Exh. A-2)

DER did not find from its review of AHC's submissions that AHC had shown that a subsurface study of the groundwater movement and quality in this area was unwarranted and told AHC's representatives this. AHC responded, after consideration, that it would not undertake the hydrogeologic study specified in the Study Order to the extent it required the drilling of monitoring wells, installation of piezometers, recording the wells' geology or collection and analysis of the monitoring wells' water. Based upon AHC's refusal to comply with that portion of its Study Order, on March 8, 1993 DER issued AHC its Cease Order (Joint Exh. No. 2).

It is with this evidence in mind that we turn to the Petition For Supersedeas. Petitions for Supersedeas before this Board are governed by 25 Pa. Code §21.78(a) of our rules, which mandate consideration of these factors. These are:

1. Irreparable harm to the petitioner.
2. The likelihood petitioner will prevail on the merits.

3. The likelihood of injury to the public if the petition is granted.

As we stated in McDonald Land & Mining Company, Inc. v. DER, 1991 EHB 129, 132:

> [A]dditionally, Section 21.78(b) requires us to deny supersedeas if pollution or injury to public health exists or is threatened during the supersedeas period. In ruling on such petitions, we also must keep in mind that [AHC] is the petitioner and bears the burden of proof. Globe Disposal Company et al. v. DER, 1986 EHB 891; Elmer R. Baumgardner, et al. v. DER, 1988 EHB 786.

While AHC has the burden of proof, there is a balancing test which must be conducted by this Board in regard to the three enumerated factors. Baumgardner, *supra*; Pennsylvania Fish Commission, et al. v. DER, 1989 EHB 619.

With regard to the "injury to the public if supersedeas is granted" factor we use to evaluate AHC's Petition, it is clear AHC prevails. There is no evidence of any injury to the public if the Cessation Order is superseded. There is also no evidence in the supersedeas record of pollution or injury to public health or threat of pollution or injury to public health occurring as a result of any of AHC's conduct covered by the Cessation Order. While a case for pollution or the threat of pollution might be asserted as to supersedeas of the Study Order, that is not the order as to which a supersedeas petition is before us at this time, and denial of supersedeas of the Cessation Order under 25 Pa. Code §21.78(b) cannot piggyback on the Study Order and arguments as to it and Section 21.78(b). Indeed, insofar as coal is not shipped to local electric utilities, AHC might have asserted, though it did not, that the public suffers a greater potential harm if the order is not superseded.

With regard to irreparable harm to AHC, a showing of a modest amount of economic harm has been made. AHC has complied with DER's Cessation Order since it was issued. According to its witnesses, most of AHC's working

capital is tied up in the coal sitting at the Little Beth operation waiting either to be processed or having been processed, waiting to be hauled to AHC's customers. This coal's value is roughly $600,000. AHC also provided evidence that its size is currently one third its size nine years ago. The testimony established that AHC only made a $2,000 profit last year and operated at a loss (the profit coming from the sale of equipment which is no longer needed since AHC's size is shrinking.) AHC's Alan Walker also testified that AHC processes about 50,000 tons of coal per month at its Little Beth operation and makes $1.00 per ton income from this coal processing, which it has lost as a result of the Cessation Order. Mr. Walker, as sole common stock shareholder and President of AHC, then testified that without relief, AHC could only operate until approximately May 8, 1993 and will go bankrupt about thirty days thereafter.

To counter this testimony, which by itself shows irreparable economic harm, DER offered evidence that a company called Fuel Fabricators ("Fuel") is located between a half mile and a mile south of AHC's processing operation. Both coal preparation plants are visible in the photograph which is Exhibit C-3(b). Mr. Walker is also the president and owner of Fuel, which has a large coal processing operation at this site. Fuel's plant can process 6,000 tons per day of coal when operating only one shift per day, as it does now, and thus could process all the coal processed at AHC's Little Beth operation in a month by operating as few as ten extra shifts per month. Moreover, DER has indicated that all of AHC's equipment and stockpiled coal may be removed from the Little Beth site without violating its Cessation Order. DER's witnesses have indicated that Fuel's permitted site is large enough to handle all of AHC's Little Beth equipment and coal if Mr. Walker wanted to move it there and

operate. DER's witnesses indicated such a move would not violate the Cessation Order, would not require new permits for the Fuel site or even modifications of Fuel's existing permits, and would not reflect adversely on AHC's pending application to obtain a wholly separate permit for coal processing on the portion of the Little Beth site used for that task until the Cessation Order's issuance.

While it is clear that AHC could move its processing operation and stockpile to the Fuel site with DER's blessing and this would stave off bankruptcy for AHC, we have previously held economic loss can constitute irreparable harm. AHC has been denied use of its coal processing plant and use of the working capital reflected by its stockpiled coal since March 8. It is true that it has not laid off employees and has not breached its contract to provide coal to Pennsylvania Electric's Shawville generating station. However, that came at the cost of using Fuel's facilities in the interim and of Fuel not shipping a 10,000 ton unit train of coal to Pennsylvania Power and Light (since Fuel could not produce the coal for both locations simultaneously). Moreover, unless Fuel's facility is reconfigured, Fuel's facilities cannot produce pea-sized coal. AHC's facilities can do so, and they represent about 10% of AHC's business.

DER's evidence punched large holes in AHC's irreparable harm argument but did not show no economic harm. Had DER told AHC it could move its coal and facilities to Fuel's site at that same time it issued AHC this order, a much stronger case for no harm might have been made. However, DER made this offer at the April 15, 1993 supersedeas hearing. As a result, AHC suffered economic loss in the period in excess of a month in which the processing operation was "ceased". We have previously held economic losses can

constitute irreparable harm. See McDonald, *supra*, and the cases cited therein. Here, the loss was not huge but was enough when coupled with AHC's likelihood of prevailing on the merits (discussed below) and lack of injury to the public for us to find in AHC's favor.[3]

Lastly, we turn to AHC's likelihood of prevailing on the merits, again keeping in mind it is AHC's likelihood of prevailing on the merits of the Cease Order's appeal, not the Study Order's appeal, which is at issue. DER's staff says it issued this order as required by DER's written policy and procedure and as required by 25 Pa. Code §86.212(a). DER's Policy and Procedure as to Compliance Orders (Exh. C-2) is binding on its staff in that they must follow it as to issuance of Compliance Orders. While statutes and regulations are as binding on AHC as DER, this DER policy and procedure does not bind AHC or this Board, and DER's compliance with these written guidelines on when to issue a Cessation Order does not make any Cessation Order issued by DER more or less valid when challenged by the order's recipient. Moreover, a reading of Section III A of DER's policy on Cessation Orders leads us to the belief that it does not apply here. Under this policy, Cease Orders are to be issued where mining activities cause or threaten imminent environmental harm, cause or threaten imminent harm to public safety or health, or when there is mining without a valid permit or license. Cease Orders may also be issued under this policy for failure to comply with a prior order which directed abatement of a specific activity or violation.

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[3]AHC also offered evidence of notice to AHC from DER of DER's future intent not to renew AHC's license and to revoke the Little Beth permit. The threat of such DER actions in the future, while clearly a concern to AHC, do not show present irreparable harm since expressions of future intent are not present actions and these intentions may never ripen into these actions by DER.

DER's Study Order does not appear to direct abatement of a violation or activity; it requires a specific type of study of the groundwater. Nor are any of the other grounds for issuance of a Cease Order in DER's procedural guidelines present based on the record made at the supersedeas hearing. Thus, a strong case can be made that AHC will prevail as to claims that DER's Policy and Procedure mandate DER's issuance of this Order to AHC.

The same is true as to DER's argument as to 25 Pa. Code §86.212(a). Under this subsection of the regulations, DER is mandated to issue Cease Orders under certain specific circumstances. DER has no discretion in issuing Cease Orders under this portion of this regulation because, as the regulation itself indicates, issuance of such orders is mandated of DER under Section 521 of the Federal Surface Mining Act, 30 U.S.C. §1271, and 30 C.F.R. 840.13 and 843.11, if DER is to administer the mining regulatory program in Pennsylvania under "primacy".

While DER lacks any discretion as to issuance of Orders under Section 86.212(a), our inquiry is focused on whether AHC's conduct falls within the purview of the prohibited conduct covered thereby. Under §86.212(a), DER must issue a Cease Order where conduct, a practice or violation creates an imminent danger to public health, causes or can reasonably be expected to cause significant imminent harm to land, air or water resources, or the condition, practice or violation will not be abated within the abatement period specified in DER's order. Clearly, only the latter category could arguably apply here.

DER argues non-compliance with the Study Order is a violation which will not be abated as specified therein, and thus DER is mandated to issue the Cease Order by this regulation. AHC responds that the Study Order requires no abatement but rather the commencement of study. It asserts it need not do the

study as directed by DER if it can prove there is no hydrologic connection between Cowder's property and the Little Beth site, which it says it has proved. We need not decide at this time whether it has proven this lack of connection or not, or even if its "proving" such a lack of connection constitutes a complete defense to DER's Order. However, we must decide whether AHC's claim that this section does not address the scenario arising in this appeal has a likelihood of success on the merits. We believe AHC's defense has a likelihood of success. The Study Order appears to direct no abatement action by AHC of any condition, practice or violation at the Little Beth site. According to DER's witnesses, DER issued the Study Order because it felt that AHC's mine site was the most likely source of the acid mine drainage found at the Cowder property. In passing, we observe that the concept of most likely source carries in it the concept of at least one other less likely source. We also note DER was not sure enough that AHC's site is responsible for the Cowders' problem to order AHC to treat the discharge, provide a replacement water supply and abate the conditions allowing contamination as DER frequently orders in mining situations. This is not to say the Study Order is any the less valid, but we do not decide that issue now and only address whether it is likely that AHC can prevail against DER's Section 86.212(a) argument. However, we view Section 86.212(a)(3)'s coverage of a miner's failure to abate within a time period set in a prior order to be aimed at circumstances such as where abatement of mining without a permit is ordered but the miner fails to comply rather than the circumstances here, so we find that AHC has likelihood of prevailing on that argument.

DER's authority to issue Cessation Orders is not found solely in Section 86.212(a), however. Section 86.212(b) explicitly recognizes DER's

discretionary authority to issue Cease Orders. DER's authority to issue such orders is found in Section 610 of the Clean Streams Law, 35 P.S. §691.610, and Section 3 of SMCRA, 52 P.S. §1396.4c. Both statutes provide that DER has the authority to issue such orders as in its discretion are needed to enforce these two statutes' various provisions.

When DER acts within its discretionary authority under 35 P.S. 691.610 and 52 P.S. §1396.4c to issue a Cease Order, it must do so only when, as the Commonwealth Court has said, the order is reasonable and appropriate under the circumstances. Commonwealth, DER. v. Mill Service, Inc., 21 Pa. Cmwlth. 642, 347 A.2d 503 (1975). Here, the evidence shows that mining of the Little Beth site ceased between seven and eight years ago (thirteen years ago in the portion of Little Beth nearest the Cowder properties). It also shows that the only operation carried on on the Little Beth site is the dry processing of coal. Further, the record shows partial compliance by AHC with DER's order in that some information was supplied as mandated in the Study Order and that a hearing before this Board on the merits of both the Study Order and the Cease Order is to occur less than three months after the Cessation Order's issuance. Additionally, the record demonstrates insufficient proof in the mind of DER's staff to satisfy them that AHC is the source of this acid mine drainage and only enough to convince them that AHC is the most probable source thereof. Finally, though the Board is aware that the Study Order is not superseded and has not been complied with in full, we are also aware of DER's ability to take judicial action to compel AHC's compliance therewith or to institute other options to bring about compliance therewith other than issuance of a Cessation Order. In these circumstances, it appears that AHC has a reasonable likelihood of showing that this Cessation Order was

not reasonable and appropriate in these circumstances as required by Mill Service, *supra*. In so ruling, we wish to make clear we are forming no opinion on the validity of DER's Study Order or the decision by DER to issue such an order, as opposed to undertaking such a study itself. However, we would be less than candid if we failed to point out that DER's willingness to allow AHC to move the entire processing operation and all coal from the Little Beth site to the Fuel site (a half mile away and resume operations), raises questions for us about why DER felt that it had to issue the Cessation Order.

Having stated the above, it appears in balancing all three factors that it is appropriate to enter the following order.

ORDER

AND NOW, this 4th day of May, 1993, it is ordered that this Board's Order of April 23, 1993, granting supersedeas of DER's Order of March 8, 1993 to AHC is affirmed.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: May 4, 1993

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
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Central Region
For Appellant:
William C. Kriner, Esq.
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KEITH SMALL	:	
	:	
v.	:	EHB Docket No. 92-534-MJ
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 7, 1993

OPINION AND ORDER SUR
APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
AND MOTION FOR CONTINUANCE
AND DER'S MOTION FOR SANCTIONS

By Joseph N. Mack, Member

Synopsis

DER's Motion for Sanctions is granted and Appellant's Motion for Enlargement of Time and Motion for Continuance are denied, where the Appellant has failed to identify his expert witness until one month prior to the scheduled hearing and has failed to take any steps to date in securing an expert report.

OPINION

The instant appeal was filed by Keith Small ("Appellant") on December 4, 1992 from the Department of Environmental Resource's ("DER's") denial of a Planning Module Component for a Small Subdivision. This Opinion addresses a Motion for Enlargement of Time and Motion for Continuance filed by the Appellant on April 23, 1993. DER filed a response opposing both motions, as well as its Motion for Sanctions, on May 3, 1993.

The Board's Pre-Hearing Order No. 1 requires the parties to file a pre-hearing memorandum identifying, *inter alia*, witnesses each party intends to call at the hearing and a summary of expert testimony. The Appellant filed his pre-hearing memorandum on March 3, 1993. Although the pre-hearing memorandum identified Sewage Enforcement Officer Charles Kovic as an expert witness, it further stated, "Appellant has not determined whether or not other expert testimony will be required at the hearing, and will timely supplement this Pre-Hearing Memorandum upon completion of discovery..." At the same time, the Appellant requested an extension of time in which to conduct discovery. Although DER opposed the request in a response filed on March 8, 1993, the Appellant was granted an extension to March 17, 1993 for the limited purpose of conducting depositions of two DER employees.

DER filed its pre-hearing memorandum on March 23, 1993. Thereafter, on April 1, 1993, DER filed a Motion to Compel Answers to Interrogatories, citing the Appellant's failure to supplement his responses to DER's First Set of Interrogatories and Request for Production of Documents or to provide full and complete responses thereto. The focus of DER's motion was the Appellant's failure to identify expert witnesses, other than Mr. Kovic, whose testimony he intended to offer at the hearing. By letter dated March 31, 1993, the Board advised the Appellant that he had until April 20, 1993 to respond to DER's motion.

In the interim, on April 14, 1993, a telephone conference call was held among counsel for the Appellant, counsel for DER, and the Board Member to whom this case was assigned. The purpose of the telephone conference was to schedule a hearing in this matter. The parties agreed to a scheduling of the hearing on May 18 and 19, 1993. During the telephone conference, counsel for the Appellant stated that his client had recently retained the services of Dr.

L. R. Auchmoody, a soil scientist, as an expert witness, but that Dr. Auchmoody had not yet conducted an inspection of the Appellant's site. Thereupon, the presiding Board Member ordered the Appellant's counsel to provide an expert report and/or answers to interrogatories by April 20, 1993, or the Appellant would be precluded from presenting any expert testimony on this matter at the hearing.

No expert report or answers to interrogatories were filed by the April 20, 1993 deadline. Instead, on April 23, 1993, the Appellant filed the present Motion for Enlargement of Time in Which to Answer Interrogatories and Motion for Continuance of the hearing (hereinafter the "Motion"). The Motion states that Dr. Auchmoody has incurred a back injury and that he would be unable to inspect the Appellant's site on or before May 3, 1993.[1] The Appellant alleges that he will be prejudiced if an enlargement of time is not granted and the hearing continued and that DER will suffer no prejudice as a result of an extension and continuance.

In a response filed on May 3, 1993, DER opposed the Appellant's Motion and filed its own Motion for Sanctions. DER argues that it was the Appellant's decision to delay in retaining Dr. Auchmoody as an expert and that it is not even clear at this point when Dr. Auchmoody will be able to inspect the property or whether his findings will support the Appellant's case since he has never examined the property. Finally, DER argues that it has arranged for its witnesses to be available on the scheduled dates and that a postponement would be prejudicial.

In a reply filed on or about May 4, 1993, the Appellant contends that, because of the nature of pleadings before the Board, he became aware of

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[1] To the Board's knowledge, no inspection had yet been scheduled by the date of this Opinion.

the full nature and extent of DER's reasons for denying his Planning Module only after the deposition of the DER witnesses. Secondly, he argues that four months from the filing of an appeal is not an unreasonable amount of time in which to locate and retain a soil scientist since, unlike DER, private parties do not employ experts who are readily available. Finally, he asserts that DER will not be prejudiced by having to readjust the schedule of its witnesses.

DER likens this matter to that in Midway Sewerage Authority v. DER, 1990 EHB 1554, in which the appellant was barred from presenting the testimony of a particular expert witness. In that case, the appellant had failed to identify the expert witness in its pre-hearing memorandum, in answers to interrogatories, in a pre-trial conference of counsel with the Board, or in its first supplement to its pre-hearing memorandum. The appellant did not identify the expert witness until one month before the hearing and provided a summary of expert testimony only two weeks prior to the hearing.

The Appellant argues that this case is unlike that of Midway because he has not waited until the last possible moment to disclose his expert, as did Midway. The Appellant further argues that the expert report will be provided to DER in sufficient time so that it will not be prejudiced.

We disagree with the Appellant's assertion that, unlike Midway, he has not waited until the last possible moment to identify his expert witness. The Appellant did not identify Dr. Auchmoody as an expert witness until the telephone conference call between counsel and the presiding Board Member to set a hearing date for this matter. Nor had the Appellant taken any further steps at that point than simply to retain Dr. Auchmoody; he had not even arranged for Dr. Auchmoody to inspect the property, much less provide DER with a written report of Dr. Auchmoody's findings.

Moreover, even after being ordered during the telephone conference call to provide an expert report and/or answers to interrogatories by April 20, 1993, it appears that the Appellant took no immediate action to comply with the order.

Although we agree that Dr. Auchmoody's disability is a circumstance beyond the Appellant's control, the Appellant's decision to wait until such time as the Board was scheduling the hearing in this matter before identifying the expert witness he intended to call at the hearing was well within his control. Even if the Appellant is correct in his assertion that four months is not an unreasonable amount of time for a private individual to retain a soil scientist, the Appellant has not demonstrated that he has been diligently pursuing this matter. Allowing his delay to postpone the start of the trial, at this point indefinitely, would be unfair and prejudicial.

Pursuant to 25 Pa. Code §21.124, the Board may impose sanctions upon a party for failure to abide by a Board order or rule of practice and procedure. Because the Appellant has failed to provide DER with an expert report and/or answers to interrogatories as discussed herein, he shall be precluded from calling Dr. Auchmoody as an expert witness at the hearing.

O R D E R

AND NOW, this 7th day of May, 1993, it is hereby ordered as follows:

1. The Appellant's Motion for Enlargement of Time and Motion for Continuance are denied for the reasons set forth herein.

2. DER's Motion for Sanctions is granted. The Appellant is precluded from calling Dr. Auchmoody as an expert witness at the hearing. The Appellant is further precluded from calling any expert witness other than that identified in his pre-hearing memorandum or in answers to interrogatories.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 7, 1993

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
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Southwest Region
For Appellant:
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M. DIANE SMITH
SECRETARY TO THE BOA

HAPCHUCK, INC.	:	
	:	
v.	:	EHB Docket No. 93-068-E
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 10, 1993

OPINION AND ORDER SUR MOTION REQUESTING MEDIATION

By: Richard S. Ehmann, Member

Synopsis

An Appellant's Motion seeking an Order submitting the matter under appeal to mediation (and staying this proceeding during the mediation), pursuant to Section 4(h) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, No. 94, 35 P.S. §7514(h), is denied where the Department of Environmental Resources ("DER") opposes mediation. By evidencing opposition to submission of this matter to mediation, DER has indicated unwillingness to voluntarily mediate and a willingness of all parties to mediate is a prerequisite to mediation pursuant to Section 4(h).

OPINION

On March 24, 1993, Hapchuck, Inc. ("Hapchuck") filed an appeal with this Board from DER's issuance to it of NPDES Permit No. PA0090867. The permit, issued February 24, 1993, authorizes a discharge from Hapchuck's Sanitary Wastewater Treatment Plant in North Bethlehem Township, Washington County, to an unnamed tributary of Pine Run.

On April 19, 1993, Hapchuck filed a one page Motion Requesting Mediation with this Board. The Motion requests that "this case be submitted to mediation pursuant to §4(h) of the Environmental Hearing Board Act and as set forth in Prehearing Order No. 1." It further sought a stay of the appeal proceeding before this Board during the mediation process.

On April 29, 1993, DER timely filed its Response In Opposition To Appellant's Motion Requesting Mediation. DER's response takes the position that Section 4(h) requires all parties to make the request for mediation and that DER believes this appeal is not one in which mediation is appropriate. It then concludes that this Board may not compel DER to mediate, and, thus, this Motion must be denied.

When the Environmental Hearing Board Act was drafted by the Legislature, Subsection 4(h) was inserted and provides:

> Subject to board approval, parties to any proceeding may request permission to utilize voluntary mediation services to resolve the dispute or narrow the areas of difference. If the board approves, the hearing shall be continued until the parties report the results of the mediation. If the parties accept the mediation report and the result is consistent with State and Federal environmental laws, then the board may enter the settlement as its decision. If mediation is unsuccessful, then the hearing shall be rescheduled and conducted in accordance with the provisions of law.

It is followed up by Paragraph 9 of our standardized Pre-Hearing No. 1, which was issued in this appeal on March 30, 1993. Paragraph 9 states:

> The parties may, with the approval of the Board pursuant to §4(h) of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7514(h), utilize voluntary mediation to resolve or narrow their disputes. In the event the parties so choose, the Board, upon motion of the parties, may stay the proceedings pending submission of the mediator's report.

Although this statute was enacted in 1988, this is the first Motion of this type to come before this Board. As this is the situation, it is perhaps unfortunate that it must be denied.

Clearly, a reading of Paragraph 9 makes it obvious that the Board interprets Section 4(h) as addressing voluntary mediation sought by all parties in an appeal rather than the situation where less than all parties seek it. Paragraph 9's references to parties is always phrased in the plural. Indeed, it references the parties choosing mediation and a "motion of the parties".

That the Board's interpretation of Section 4(h) is correct is also evidence from the section itself, which always refers to the parties in an appeal in a plural rather than a singular form. We cannot interpret Section 4(h) as evidencing a legislative desire to allow only one party to compel mediation in light of the plural usage in the section. That the legislature would not want one party to be able to compel the Board to direct mediation is also evident from a conceptual definition of "mediation". While the Environmental Hearing Board Act does not define mediation and it is not defined in other environmental statutes, it is defined in the Pennsylvania Municipalities Planning Code, the Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §10107, as:

> a voluntary negotiating process in which parties in a dispute mutually select a neutral mediator to assist them in jointly exploring and settling their differences, culminating in a written agreement which the parties themselves create and consider acceptable. (emphasis added)

Under this definition, it is clear this process is to be voluntary, not compulsory. Indeed, forcing a party to mediate against its will where it does not wish reconciliation logically predestines the mediation effort to failure.

Accordingly, borrowing this definition of mediation for the purposes of Section 4(h), we conclude that mediation as used in Section 4(h) refers to a process which all parties voluntarily seek to undertake and, where one party in an appeal opposes it, we must deny a motion seeking mediation.[1]

ORDER

AND NOW, this 10th day of May, 1993, it is ordered that Hapchuck's Motion Requesting Mediation is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: May 10, 1993

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
Zelda Curtiss, Esq.
Charney Regenstein, Esq.
Western Region
For Appellant:
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Athens, OH

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[1]By so concluding, we do not render any judgment on the validity of DER's argument that this Board may not compel DER to act in this fashion. See, however, 25 Pa. Code §21.82(a) and 25 Pa. Code §21.124.

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M. DIANE SMITH
SECRETARY TO THE BOA

RESCUE WYOMING AND JAYNES BEND TASK FORCE	:	
	:	**EHB Docket No. 92-339-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and WYOMING SAND AND STONE COMPANY, Permittee	:	**Issued:** May 12, 1993

OPINION AND ORDER SUR MOTION TO DISMISS

By Maxine Woelfling, Chairman

Synopsis:

Appeal is dismissed for lack of jurisdiction, as no effective relief can be granted by the Board in an appeal of the Department of Environmental Resources' (Department) alleged withholding of documents from a permit application file.

OPINION

This appeal has its origin in the Department of Environmental Resources' October 21, 1991, issuance of Noncoal Surface Mining Permit No. 66900303 to Wyoming Sand and Stone Company (Wyoming Sand and Stone). The permit, which was issued under the Noncoal Surface Mining Conservation and Reclamation Act, the Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. §3301 *et seq.*, authorized Wyoming Sand and Stone to conduct noncoal surface mining at a site in Mehoopany Township, Wyoming County.

On August 14, 1992, RESCUE Wyoming and the Jaynes Bend Task Force (RESCUE and JBTF) filed an appeal challenging the Department's alleged

withholding of documents relating to the reclamation phase of Wyoming Sand and Stone's surface mining operation[1] when they sought to review the permit application file.[2] RESCUE and JBTF asserted that the Department failed to provide them with a full and complete copy of Wyoming Sand and Stone's surface mining permit application and that the reclamation plan was inadequate and would result in destruction of historic and natural sites.

On November 17, 1992, Wyoming Sand and Stone and the Department filed a motion to dismiss the appeal, asserting that the Board lacks jurisdiction over an appeal challenging the Department's alleged "withholding of documents."

On December 7, 1992, RESCUE and JBTF filed their response to the motion, arguing that the Board has jurisdiction because the withholding of documents was a Department action and the "documents withheld" were part of a permit, the issuance of which is a valid basis for an appeal.[3]

We must grant the motion to dismiss. Without venturing into the thicket of what constitutes Department action for purposes of review by the Board, it is evident that we have no jurisdiction here because there is no relief that we can grant RESCUE and JBTF. Because we are not a tribunal of general jurisdiction, we do not have the power to issue a *writ of mandamus* to

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[1] RESCUE and JBTF also challenged the issuance of the permit at EHB Docket No. 91-503-W.

[2] RESCUE and JBTF's assertions regarding the adequacy of Wyoming Sand and Stone's reclamation plan were, by Board order dated September 16, 1992, stricken from their pre-hearing memorandum at Docket No. 91-503-W because of their failure to raise these issues in their notice of appeal.

[3] RESCUE and JBTF also made a number of other arguments which were not germane to the issues raised by the motion to dismiss. Both of these appellants are proceeding without benefit of counsel, and their response to this motion is illustrative of the difficulties faced by *pro se* appellants.

the Department to compel it to provide the excluded documents.[4] Albert J. Marinari v. Department of Environmental Resources, 129 Pa.Cmwlth. 569, 566 A.2d 385 (1989).

O R D E R

AND NOW, this 12th day of May, 1993, it is ordered that the motion to dismiss of Wyoming Sand and Stone Company and the Department of Environmental Resources is granted.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 12, 1993

[4] Moreover, the Department has already done so.

EHB Docket No. 92-339-W

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M. DIANE SMITH
SECRETARY TO THE BOARD

BRANDYWINE RECYCLERS, INC.	:	
	:	
v.	:	**EHB Docket No. 91-124-E**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: May 13, 1993**

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

By Richard S. Ehmann, Member

Synopsis

The Board reduces but sustains the Department of Environmental Resources' (DER) assessment of civil penalties under §605 of the Solid Waste Management Act (SWMA), 35 P.S. §6018.605, on appellant for its active participation in the transportation and disposal of used foundry sand at a residential development (which was not a disposal site permitted by DER) where it was being used as "fill".

Because the parties have stipulated that the appellant has complied with the order issued by DER to appellant and we have found appellant liable for the violations set forth in that order in our review of the appellant's challenge of the civil penalty assessment, we dismiss the appellant's appeal seeking review of DER's order, as that appeal is now moot.

BACKGROUND

An appeal at EHB Docket No. 91-124-F was initiated by the March 26, 1991 filing of a notice of appeal by Brandywine Recyclers, Inc. (Brandywine),

t/d/b/a Dixon Recyclers, seeking the Board's review of a February 27, 1991 order issued by DER. This order, which was issued pursuant to the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* (SWMA); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* (Clean Streams Law); and Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 (the Administrative Code), alleged that Brandywine had been involved with the dumping or depositing of a residual waste (foundry sand) onto the surface of the ground or the underground at the South Hill Run development in South Lebanon Township, Lebanon County, which was not a permitted solid waste disposal area. DER's February 27, 1991 order directed Brandywine, *inter alia*, to, within 15 days of its receipt of DER's order, remove all of the foundry sand which was disposed of at the South Hill Run residential development and convey it to a disposal facility permitted to accept it.

DER, on November 26, 1991, issued a civil penalty assessment against Brandywine in the amount of $45,053.11 pursuant to §605 of the SWMA, 35 P.S. §6018.605, based on the alleged connection between Brandywine and the depositing of 7181.42 tons of foundry sand at the South Hill Run residential development on December 27, 1990 through January 2, 1991. On December 23, 1991, Brandywine filed an appeal at EHB Docket No. 91-563-F seeking our review of DER's civil penalty assessment. The appeal of the civil penalty assessment was consolidated with Brandywine's appeal at Docket No. 91-124-F.

Following the resignation of Board Member Terrance J. Fitzpatrick, to whom these consolidated appeals were initially assigned for primary handling, these appeals were reassigned to Board Member Richard S. Ehmann and the docket number changed to No. 91-124-E (Consolidated) on September 15, 1992. A

hearing on the merits was held before Board Member Ehmann on October 15, 1992 We received DER's post-hearing brief on December 9, 1992 and Brandywine's post-hearing brief on December 24, 1992. DER filed its reply brief on Januar 4, 1993. According to Lucky Strike Coal Co., et al. v. Commonwealth, DER, 11 Pa. Cmwlth. 440, 547 A.2d 447 (1988), a party is deemed to abandon any contentions not raised in its post-hearing brief.

Upon a full and complete review of the record, consisting of a transcript of 198 pages and 15 exhibits, we make the following findings of fact.

FINDINGS OF FACT

1. Appellant is Brandywine, a Pennsylvania corporation with office: at 14th and Church Streets, Lebanon, Pennsylvania 17042. (Board Exhibit 1 (B Ex. 1); Notice of Appeal at EHB Docket Nos. 91-124-E and 91-563-E)[1]

2. Appellee is DER, the agency of the Commonwealth with the authority to administer and enforce the SWMA, the Clean Streams Law, Section 1917-A of the Administrative Code, and the rules and regulations adopted thereunder.

The Foundry Sand

3. Lebanon Foundry and Machine Company (Foundry) is a Pennsylvania corporation which manufactured steel casting products at its industrial facility located at 100 East Lehman Street, Lebanon, Pennsylvania. (N.T. 13; B Ex. 1)[2]

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[1]Board Exhibit 1 is the parties' joint stipulation of facts.

[2]"N.T." is a reference to the transcript of the hearing held on October
(footnote continued)

4. As part of its manufacturing process, the Foundry used approximately 12,000 tons of sand, which it stored on its site. (N.T. 65)

5. The Foundry would receive 100 pound-type bags of "virgin" sand and would store at least some of this sand in its building prior to using it. (N.T. 65)

6. The Foundry would take virgin sand and place it in a form so that molten metal could be poured into it to manufacture a steel casting. (N.T. 14, 36-37) Depending upon the type of metals being poured into the sand mold, the Foundry would add certain chemicals to act as "binders", which help the packed sand retain the mold shape being cast. (N.T. 37-38, 69) These chemicals included phenols. (N.T. 37-38)

7. DER's Inspector Anthony L. Rathfon, who was a DER solid waste specialist during 1990 and 1991, has conducted at least 10 inspections of the Foundry and is familiar with the Foundry's manufacturing process. (N.T. 12, 13, 14, 28)

8. As part of his routine inspections of the Foundry, Inspector Rathfon has observed that after being used in the Foundry's manufacturing process, the sand is dark and is fairly uniform in consistency, but is aggregated with pieces of residual poured metal. (N.T. 15, 34, 64) This sand material with attached residual metals is called "core" material. (N.T. 64)

9. During his routine inspections of the Foundry, Inspector Rathfon observed that once the sand had been used in manufacturing, the Foundry took it outside to the back of its facility, where it was stockpiled. (N.T. 40)

(continued footnote)
15, 1992. "C. Ex." is a reference to a DER exhibit, while "Jt. Ex." is a reference to a joint exhibit of the parties.

10. In 1980, DER had issued the Foundry a permit to dispose of its used sand at a solid waste disposal facility known as the Bachman Waste Management site. (N.T. 16) It had been the Foundry's procedure for at least 10 years to dispose of any temporarily stockpiled used sand at this permitted off-site disposal facility. (N.T. 16)

Brandywine's Involvement with the Foundry

11. Frank Dixon is the president of Brandywine and has been engaged in the business of recycling materials since 1975. (N.T. 71-72) As Brandywine's business involves recycling, not waste disposal, its business is not regulated under the SWMA. (N.T. 71-72, 169-170)

12. Prior to 1990, Brandywine had conducted business with the Foundry involving sales and purchases of scrap metal. (N.T. 98-99) Brandywine's dealings with the Foundry were sporadic, as the Foundry was not good about paying Brandywine. (N.T. 99)

13. Dixon knew that the Foundry was an industrial facility which used sand and disposed of its used materials at a landfill, but he did not know where the Foundry took the sand for disposal. (N.T. 72-73, 114) There is no evidence to show Dixon made any attempt to find out if the used sand hac previously been landfilled.

14. In the summer of 1990, Brandywine was involved in removing materials from the Foundry, and Dixon expressed his interest in removing scrap steel from the Foundry. (N.T. 99-101)

15. In November of 1990, the Foundry ceased operations and listed its property for sale. (B Ex. 1)

16. The Foundry's president, Hans Schmidt, first contacted Dixon in November of 1990 about removing sand from the Foundry. (N.T. 102)

Thereafter, Schmidt and Dixon had a series of conversations toward reaching an agreement for removal of the sand. (N.T. 106)

17. Dixon contacted a number of small truckers about removing sand from the Foundry and eventually located Harvey M. Fisher, who operates a sole proprietorship engaged in excavating, hauling and grading type work. (N.T. 109-110, 190)

18. Dixon observed the sand which was to be removed from the Foundry, and he believed it could be used as clean fill to raise the level of the ground's surface. (N.T. 105-106, 126)

19. During Dixon's discussions with Schmidt about removal of the used foundry sand, the Foundry supplied Brandywine with a copy of laboratory analyses of the used foundry sand and a cover letter from Light-Heigel & Associates, Inc. to the Foundry, dated September 25, 1990, in which the foundry sand was described as residual waste which was EPA non-toxic. (N.T. 74-77; C Ex. 2)

20. Dixon was unfamiliar with residual waste and had no prior experience in solid waste hauling, disposal or any types of activities regulated pursuant to the SWMA. (N.T. 97, 105, 123) There was no evidence offered showing any effort by Dixon to discover what non-toxic residual waste was prior to its haulage to South Hill Run.

21. Fisher looked at the sand at the Foundry and gave Dixon his fee for hauling the sand. (N.T. 113)

22. Fisher wanted to be paid for his hauling work on a daily basis so he could pay his truck drivers. (N.T. 88, 112)

23. Dixon conveyed Fisher's terms for doing the hauling job to Schmidt. (N.T. 113)

24. Dixon told Schmidt that he believed the sand removal could be done at a lower cost than Fisher's terms. (N.T. 113)

25. The Foundry was willing to pay $125 per 20 ton truckload to have the sand removed from its premises. (N.T. 108)

26. Inexplicably, Schmidt told Dixon that Fisher's fee for hauling was within the Foundry's allocation for sand removal and that the Foundry did not care what Dixon did with the difference between the amount the Foundry was willing to pay for the hauling job and the amount Fisher was willing to be paid for hauling the sand. (N.T. 113)

27. Schmidt asked Dixon to pay Fisher daily and said the Foundry would then pay Brandywine on the following day. (N.T. 88, 112) Dixon agreed to pay Fisher in this manner. (N.T. 85)

28. Dixon and Schmidt agreed that the Foundry would charge Brandywine $1.00 per truckload, or $.05 per ton, for the sand. (N.T. 83) Dixon believed the Foundry would, in this way, remove the sand as an asset on its books. (N.T. 90, 95)

29. Dixon and Schmidt agreed that transportation and all loading costs for the approximately 8,000 tons of sand were to be paid by the Foundry at a rate of $125 per 20 tons. Loading and removal was to start at 7:00 a.m. on December 26, 1990 and was to be completed in an expedited manner. (N.T. 89-90, 106; Jt. Ex. 2; B Ex. 1)

30. The Foundry also asked Dixon to count the number of trucks filled with sand leaving the Foundry and Dixon agreed to do this. (N.T. 113)

31. Dixon then agreed with Fisher on the amount Brandywine would pay Fisher for hauling the sand. (N.T. 85; B Ex. 1)

32. Although Dixon knew Fisher would have to take the sand somewhere, they reached no agreement as to where Harvey Fisher would be taking the used foundry sand and Dixon was not concerned about where it would be taken. (N.T. 85)

33. Once sand removal from the Foundry began, the sand was not removed in 20 ton truckloads but in smaller truckloads, and the cost was proportionately adjusted, e.g., the Foundry paid Brandywine $90 for smaller truckloads. (N.T. 115)

34. Dixon weighed some of the trucks used to remove the sand on his scale so that he could come up with average weights for the sand being hauled. (N.T. 115)

35. During sand removal Dixon spent three or four hours each day at the Foundry counting trucks and observing Fisher loading the trucks. (N.T. 86, 115)

36. The Foundry paid Brandywine a total of $44,405.11 but Brandywine paid Fisher a total of only $14,130 to remove and dispose of the sand. (B Ex. 1) Brandywine admittedly made a profit on its agreement with the Foundry. (N.T. 188)

37. Dixon admits that by his handling the payments to Fisher and counting the truckloads of sand which Fisher was removing, Brandywine became an active participant in the removal of the sand from the Foundry. (N.T. 113)

38. Although Schmidt became curious about where Fisher was taking the sand from the Foundry, Dixon was not. (N.T. 86)

39. Instead of asking Fisher about where he was taking the sand, Schmidt and Dixon followed one of the trucks hauling the sand on December 27,

1990 and discovered it was taking the sand to the South Hill Run residential development. (N.T. 86; B Ex. 1)

40. Brandywine, through Dixon, knew as of December 27, 1990 that the sand was being disposed of by Fisher at the South Hill Run residential development. There is no evidence that Brandywine made any effort toward ensuring that the sand was being properly disposed of between December 27, 1990, when it discovered the sand was being taken to the South Hill Run residential development, and January 2, 1991.

DER's Investigation

41. At 8:30 a.m. on January 2, 1991, DER's Inspector Rathfon received a telephone complaint from an anonymous person who informed DER that he had observed foundry sand being hauled by dump trucks from the Foundry to the South Hill Run residential development. (N.T. 16, 22, 28-29)

42. Inspector Rathfon immediately drove from his office at DER to the Foundry, where he observed sand being loaded from stockpiles at the rear of the facility by a front-end loader into dump trucks which were leaving the facility. (N.T. 16, 30; Jt. Ex. 10)

43. Inspector Rathfon then spoke with the Foundry's vice-president, Rafi Wiesler, who was present at the site. (N.T. 17, 31) Wiesler indicated he did not know where the sand was being taken and that Brandywine had purchased the sand from the Foundry and was responsible for its removal. (N.T. 32)

44. Inspector Rathfon followed one of the dump trucks to the South Hill Run residential development and observed the truck dump the sand as fill and a bulldozer subsequently grade it. (N.T. 20, 53; Jt. Ex. 10)

45. At the development Inspector Rathfon got out of his vehicle, walked around, and took several photographs of the activity he observed at the South Hill Run development on January 2, 1991. (N.T. 20, 43) He did not speak with anyone there. (N.T. 44)

46. Inspector Rathfon's photographs support his observations that dump trucks were dumping sand, which was black-colored and contained cores, and that bulldozers at the development were grading the sand off as fill. (N.T. 21-24; C Exs. 1-A, 1-B, 1-J, 1-K, 1-L)

47. Based upon his knowledge gained from prior inspections of the Foundry's waste sand and its practice of stockpiling its used sand, Rathfon believed the sand being disposed of at the development was a residual waste and he saw no need to have DER's chemists verify that. (N.T. 39-40, 42, 57)

48. Virgin sand does not contain core material. (N.T. 58) The cores which Inspector Rathfon observed and which are shown on C Exs. 1-K and 1-L show the sand at the development was a residual waste rather than clean fill. (N.T. 54-55, 58)

49. The South Hill Run development was not a DER-permitted solid waste disposal facility under the SWMA. (N.T. 49)

50. After making his observations at the development, Inspector Rathfon returned to the Foundry, where he spoke with Schmidt about the unpermitted disposal of foundry sand at the development and issued a compliance order to the Foundry directing it to cease and desist from disposing of the sand at the development. (N.T. 26, 174-175; Jt. Ex. 10)

51. The waste sand was removed from the Foundry and disposed of at the South Hill Run development during at least a three day period between

December 27, 1990 and January 2, 1991. (N.T. 139; B Ex. 1; Jt. Exs. 3, 4, 5, 6 and 8)

52. In January of 1991, the Foundry's attorney sent Brandywine a letter stating that it was the Foundry's position that Brandywine had taken title to the sand. (N.T. 93-94) Dixon did not respond to this letter. (N.T. 94)

53. Based upon information given him by Schmidt, Inspector Rathfon believed Brandywine had purchased, was given, was entrusted with, or was transferred the foundry sand and that the sand had been given to a third individual who had disposed of it at the development, and he indicated this in his January 2, 1991 inspection report. (N.T. 50-51; Jt. Ex. 10)

54. Following DER's investigation in January of 1991, the foundry sand was not removed from the development, so DER decided to issue an administrative order to Brandywine. (N.T. 174)

55. A copy of Inspector Rathfon's January 2, 1991 inspection report, his notes about his meeting with Schmidt, and a copy of the letter stating the agreement between Brandywine and the Foundry was forwarded to DER compliance specialist Robert France, who drafted DER's administrative order. (N.T. 62-63, 131)

56. DER's February 27, 1991 order cited Brandywine for violating sections 302(a), 303(a)(1), 610(1), (4), (8)(i) and (9) of the SWMA, 35 P.S. §§6018.302(a), 6018.303(a)(1), 6018.610(1), 6018.610(4), 6018.610(8)(i), and 6018.610(9), and directed Brandywine, *inter alia*, to, within 15 days of its receipt of the order, remove all foundry sand disposed of at the South Hill Run residential development and convey it to a disposal facility permitted to accept it. (Jt. Ex. 11; B Ex. 1)

57. After receiving DER's February 27, 1991 order, Schmidt and Dixon arranged with Fisher to remove the sand from the South Hill Run development and dispose of it at the Foundry's permitted disposal site. (B Ex. 1)

58. Brandywine and Fisher split the $12,000 cost for the removal of the sand from the South Hill Run residential subdivision to the Foundry's permitted disposal site. (N.T. 121; B Ex. 1)

59. Brandywine complied with DER's February 27, 1991 order within the time frames established therein, as modified pursuant to a March 7, 1991 meeting among Brandywine, the Foundry, and DER. (B Ex. 1)

DER's Civil Penalty Assessment

60. On November 26, 1991, DER issued a civil penalty assessment in the amount of $45,053.11 to Brandywine pursuant to §605 of the SWMA, 35 P.S. §6018.605 based on the violations contained in DER's February 27, 1991 order. (Jt. Ex. 15; B Ex. 1)

61. DER's Robert France calculated the amount of the civil penalty on DER's behalf using DER's guidelines, dated December 20, 1989, for calculating civil penalties under §605 of the SWMA, which are Jt. Ex. 1. (N.T. 131-132) These guidelines take into account, *inter alia*, the duration of the violations, the degree of severity of the violations; the willfulness of the violations; the savings to the violator by not taking the action it should have taken; the costs to the Commonwealth of investigating the incidents; and the history of past violations. (Jt. Ex. 1)

62. A copy of France's worksheet used for calculating the civil penalty in this matter is Jt. Ex. 14. (N.T. 133)

63. In deciding what violations Brandywine had committed, France relied on Inspector Rathfon's observations contained in his inspection report,

on conversations with Rathfon, on the laboratory analysis results from Light-Heigel that the Foundry had given Brandywine, on the agreement letter from the Foundry to Brandywine, and on the letter from the Foundry's counsel stating that it was the Foundry's position that Brandywine had taken title to the sand. (N.T. 93, 134-135, 150)

64. France determined the severity of the violation was in the low range, for which its guidelines allow DER to assess a penalty between $1,000 and $5,000. (N.T. 136-137; Jt. Ex. 14) He decided to assess the low end of this range, $1,000. (N.T. 137; Jt. Ex. 14)

65. Addressing the costs incurred by the Commonwealth regarding this violation, France could not assess any amount as no costs were documented. (N.T. 137; Jt. Ex. 14)

66. Since he had no information that Brandywine had intentionally or willfully committed the violations, France determined the degree of willfulness or culpability on Brandywine's part here was negligent, for which DER may assess between $500 and $5,000 under its guidelines. (N.T. 137-138; Jt. Ex. 14) Because Brandywine was engaged in the business of solid waste management (although not subject to SWMA regulation), France believed Brandywine should recognize that waste should be handled in a regulated manner, and he assessed a penalty of $3,000. (N.T. 137-139, 168-170; Jt. Ex. 14)

67. France initially added his $3,000 assessment for willfulness plus his $1,000 assessment for severity, for a total of $4,000, and multiplied this figure by the three (for the three days of violation), arriving at an assessment of $12,000. (N.T. 139)

68. France then determined the savings to the violator by looking at Brandywine's gross profit (the amount the Foundry paid Brandywine less the amount Brandywine paid Fisher to remove the sand from the Foundry) and determined this amount was $33,053.11. (N.T. 139-140) He added this figure to the $12,000 amount and arrived at a total civil penalty assessment of $45,053.11. (N.T. 139-141; Jt. Ex. 14; Jt. Ex. 15)

69. DER admits France erred in calculating Brandywine's gross profit, based on the invoices from the Foundry to Brandywine and Brandywine to Fisher, and that the amount of the gross profit to Brandywine should have been $30,275.11. (N.T. 140, 159, 181)

70. DER has offered no evidence to show that any portion of its penalty was based upon costs incurred by DER in investigating this matter, cost of restoration and abatement, deterrence, or "other relevant factors". (N.T. 137)

71. At the time DER made its civil penalty assessment, DER was aware that the sand had been removed from the unpermitted site and properly disposed of. (N.T. 174-175)

DISCUSSION

DER has the burden of proving by a preponderance of the evidence in these consolidated appeals that its action was not arbitrary, capricious, contrary to law, or otherwise an abuse of discretion. Fairview Water Company v. DER, EHB Docket No. 85-318-W (Adjudication issued September 22, 1992). DER bears this burden regardless of whether we are reviewing DER's February 27, 1991 administrative order to Brandywine or the civil penalty assessment. 25 Pa. Code §§21.101(b)(1) and (b)(3). In order to carry its burden as to the civil penalty assessment, DER must prove by a preponderance of the evidence

that violations of the SWMA were committed and that the amount of the assessment is reasonable and an appropriate exercise of its discretion. Joseph Blosenski, Jr., et al. v. DER, EHB Docket No. 85-222-M (Consolidated) (Adjudication issued December 23, 1992)

Violations of the SWMA

DER must prove by a preponderance of the evidence that Brandywine: (a) permitted the disposal of residual waste in a manner which is contrary to DER's rules and regulations (SWMA §302(a)); (b) permitted the transportation of residual waste to any processing or disposal facility within the Commonwealth without the facility holding a permit issued by DER to accept such waste (SWMA §303(a)(1)); (c) permitted the dumping or depositing of any solid waste[3] onto the surface of the ground without a DER permit (SWMA §610(1)); (d) assisted in the transportation or disposal of solid waste contrary to the rules and regulations adopted under the SWMA (SWMA §610(4)); or (e) caused or assisted in the violation of any provision of the SWMA (SWMA §610(9)). DER also bears the burden of proving by a preponderance of the evidence that Brandywine committed a violation of §610(8)(i) of the SWMA, which makes it unlawful for any person to:

> (8) Consign, assign, sell, entrust, give or in any way transfer residual or hazardous waste which is at any time subsequently, by any such person or any other person;
> (i) dumped or deposited or discharged in any manner into the surface of the earth or underground or into the waters of the Commonwealth unless a permit for the dumping or

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[3]The term "solid waste" is defined to include "residual waste". Section 103 of the SWMA, 35 P.S. §6018.103; J. P. Mascaro & Sons, Inc. v. DER, EHB Docket No. 89-580-F (Adjudication issued May 8, 1992).

> depositing or discharging of such residual or hazardous waste has first been obtained from the department...

DER's undisputed evidence shows that on January 2, 1991, DER's Inspector Anthony L. Rathfon, a DER solid waste specialist, investigating a complaint from an anonymous telephone caller regarding foundry sand being hauled from the Foundry to the South Hill Run residential development and dumped there, observed sand being moved from stockpiles at the rear of the Foundry by front end loader and loaded onto dump trucks. These dump trucks were then leaving the Foundry's premises. Inspector Rathfon inquired of the Foundry's vice-president, Rafi Wiesler, as to where this sand was being taken. Mr. Wiesler told Mr. Rathfon that Brandywine had purchased the sand from the foundry and was responsible for its removal. After following one of the dump trucks to the South Hill Run development, Inspector Rathfon observed the truck dump the sand there, where it was being used as fill, and a bulldozer subsequently grade it. The undisputed evidence further shows that the South Hill Run residential development did not hold a DER permit to act as a solid waste disposal facility under the SWMA.

Inspector Rathfon left his vehicle and walked around the development, taking photographs of what was occurring. These photographs, which were admitted into evidence, show a dump truck entering the residential development, a load of sand being dumped from a dump truck, and a bulldozer grading the sand. The photographs also show the sand was black in color, darker than the light brown surrounding soil, and contained broken cores, which shows that the sand had been used in the Foundry's manufacturing process. Inspector Rathfon testified at the merits hearing that based upon his knowledge of the Foundry's waste sand and its practice of stockpiling

waste sand at the rear of its facility, the sand he observed being hauled from the Foundry (which is unquestionably an industrial establishment) and dumped at the South Hill Run residential development was residual waste under the meaning of §103 of the SWMA.[4]

Brandywine contends, however, that DER had to establish that the sand in question had been used in the Foundry's manufacturing process, and it urges that DER failed to establish this because it did not conduct any scientific testing to determine whether the sand was used sand or virgin sand, nor did it present expert opinion testimony that the sand had been used by the Foundry but merely offered Inspector Rathfon's "speculation" that the sand had been used by the Foundry. Citing our decision in Swistock Associates v. DER, 1989 EHB 1346, and the Commonwealth Court's decision in Bortz Coal Company v. Air Pollution Commission, 2 Pa. Cmwlth. 441, 279 A.2d 388 (1971), Brandywine contends DER must present evidence of scientific testing in order to prove the alleged violations occurred.

We do not agree with Brandywine's argument that DER's evidence leaves us to speculate on a critical element in this matter, as was the situation in Swistock Associates, *supra*, and Bortz, *supra*. The sand material here was

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[4]Section 103 of the SWMA, 35 P.S. §6018.103, defines "residual waste" as follows (in pertinent part):

> Any garbage, refuse other discarded material or other waste including solid, liquid, semisolid, or contained gaseous materials resulting from industrial, mining and agricultural operations...provided that it is not hazardous.

Section 103 further defines "industrial establishment" as "any establishment engaged in manufacturing, including, but not limited to factories, foundries, mills, processing plants, refineries, mines and slaughterhouses."

discarded material resulting from industrial operations at the Foundry. That the sand was dark-colored and contained broken cores, as was shown in the photographs taken by Inspector Rathfon on January 2, 1991, C Exs. 1-K and 1-L, demonstrates the sand had been used in the Foundry's manufacturing process, as virgin sand would not contain core material. (N.T. 14-15, 40, 57-59) Even if some of the sand in question did not contain any cores, it was nevertheless discarded material from the Foundry's manufacturing operations. Thus, DER sustained its burden of proving the sand which was transported to the residential development from the Foundry was residual waste material.

Brandywine contends that its only involvement in this matter was to locate and pay the person who hauled the sand on behalf of the Foundry and that Brandywine did not own or purchase the sand or have authority to control the manner in which the sand was disposed of. The evidence belies this argument.

The evidence shows that Brandywine's president, Frank Dixon, was aware that the Foundry was an industrial facility which used sand. Dixon also knew that the Foundry disposed of its used materials at a landfill (although he was not sure whether these materials included the sand). In November of 1990, the Foundry's president, Hans Schmidt, contacted Dixon to see whether Brandywine was interested in removing the sand from the Foundry. Schmidt and Dixon subsequently had a series of conversations toward reaching an agreement for removal of the sand. During these discussions, the Foundry supplied Brandywine with a copy of laboratory analyses of the used foundry sand and a cover letter from Light-Heigel and Associates, Inc. to the Foundry, dated September 25, 1990, in which the foundry sand was described as a residual waste which was EPA non-toxic.

Pursuant to his discussions with Schmidt, Dixon contacted several truckers about hauling the sand from the Foundry. Eventually, Dixon located Harvey Fisher, who operates a sole proprietorship engaged in excavating, hauling and grading type work. Fisher looked at the sand at the Foundry and quoted Dixon his hauling fee. Fisher wanted to be paid for his hauling work on a daily basis so he could pay his truck drivers. Dixon conveyed Fisher's terms for doing the hauling job to Schmidt. The Foundry was willing to pay $125 per 20 ton truckload to have the sand removed from its premises. Dixon testified that he told Schmidt that he believed the hauling work could be done for a lower cost than Fisher's quoted fee, but says Schmidt advised Dixon that Brandywine could keep any difference in the amount the Foundry was willing to pay for the sand removal and the amount Fisher was willing to be paid for doing the hauling job. Schmidt also asked Dixon to pay Fisher on a daily basis, and they arranged for Dixon to make his payments to Fisher daily and for the Foundry to pay Brandywine on the following day. Dixon agreed to have the Foundry charge Brandywine $1.00 per truckload, or $.05 per ton, for the sand. Schmidt and Dixon agreed that transportation and all loading costs for the approximately 8,000 tons of sand were to be paid by the Foundry at a rate of $125 per 20 tons. Loading and removal was to begin at 7:00 a.m. on December 26, 1990 and was to be completed in an expedited manner. Dixon also agreed to count the number of trucks filled with sand leaving the Foundry.

Through his testimony, Dixon would have us believe that the Foundry, which was going out of business, entered into the agreement to charge Brandywine for the sand merely to remove the sand as an asset from the Foundry's books and would have us believe that the Foundry was willing to pay $45,000 to get rid of this asset. Dixon would like the Board to believe that

the Foundry did not care what amount of profit Brandywine would make on the deal and did not want any of that profit returned to it. In other words, Dixon would have us believe that the Foundry found as acceptable that, if Dixon could get Fisher to agree to remove the sand for even an amount less than $15,000 (as Dixon did here), Brandywine could make a profit for itself of double the amount Brandywine was paying Fisher and the Foundry would have no interest in this $30,000 profit because the Foundry was only interested in removing this "asset" from its books.

Dixon's testimony presents a credibility question on his part, and we cannot assign his testimony, that he knew nothing about the sand's disposal and simply located a hauler for the Foundry, credibility in view of the facts in this appeal. Dixon had previously conducted business with the Foundry on only a sporadic basis because he had found the Foundry to be undependable when it came to paying his business. Dixon admittedly was given documentation by the Foundry that the sand he was being "sold" was an EPA non-toxic residual waste. Dixon also knew the Foundry was willing to pay Brandywine $45,000 to be rid of its asset, yet Dixon says his suspicion was not aroused. Dixon, a businessman, at best shielded his eyes from the purpose of his transaction with the Foundry.

We cannot assign Dixon's testimony, that Brandywine acted merely as a conduit in the sand's removal, credibility under these circumstances. Clearly, Dixon's involvement went beyond locating Fisher for the Foundry. Dixon, on behalf of Brandywine, entered his own agreement with Fisher for the removal of the sand pursuant to Brandywine's agreement with the Foundry. Dixon did not care where Fisher would be taking the sand for disposal and did not discuss this matter with him. After Fisher began to remove the sand,

Dixon was involved in counting and weighing the trucks leaving the Foundry filled with sand. Dixon also followed one of Fisher's trucks to the South Hill Run development on December 27, 1990 and made no inquiry into the legality of disposing of the "residual waste" there. We need not determine whether Dixon's testimony was untruthful, however, just whether Brandywine violated the law as alleged by DER. The evidence shows Brandywine, through Dixon, (a) permitted the disposal of residual waste in a manner contrary to §75.21(a) of 25 Pa. Code,[5] a violation of SWMA §302(a); (b) permitted the transportation of residual waste to an unpermitted disposal site, a violation of SWMA §303(a)(1); (c) permitted the dumping or depositing of solid waste onto the surface of the ground without a DER permit, a violation of SWMA §610(1); (d) assisted in the transportation and disposal of solid waste contrary to 25 Pa. Code §75.29(g),[6] a violation of SWMA §610(4); and (e) caused or assisted in the violation of the SWMA, which is a violation of SWMA §610(9).

Brandywine also argues that DER's finding it liable for violating §610.8(i) of the SWMA imposes strict liability on it for the acts of third parties which are "remote in time and place" from Brandywine's actions and that this is a violation of Brandywine's due process rights. Citing our decision in Hanslovan v. DER, EHB Docket No. 89-363-F (Adjudication issued October 29, 1992), Brandywine contends that it should not be held liable for

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[5]Section 75.21(a) of 25 Pa. Code required a site which is to be used as a solid waste disposal area to be permitted. This section of DER's regulations has been reserved, effective July 4, 1992. See 22 Pa. B. 3389.

[6]Section 75.29(g) of 25 Pa. Code required that solid waste be transported to an approved processing or disposal site. This section of DER's regulations has been reserved, effective July 4, 1992. See 22 Pa. B. 3389.

acts about which it had no knowledge or control, and it asserts that it had no part in the decision to dispose of the sand at the unpermitted site. It further urges that the Commonwealth Court's decision in Waste Conversion, Inc. v. Commonwealth, 130 Pa. Cmwlth. 443, 568 A.2d 738 (1990), appeal denied, 525 Pa. 621, 577 A.2d 892, cert. denied, ___ U.S. ___, 111 S. Ct. 253 (1990), upon which DER's brief relies, is distinguishable from the instant matter in that the appellant in Waste Conversion undertook more control over the disposal of the waste materials than did Brandywine here.

We reject Brandywine's argument that it is not liable for violating §610(8)(i) of the SWMA. The evidence shows Brandywine, through Dixon, played an active part in the transfer of the waste sand to Fisher for disposal and was not merely a party without any knowledge of what was taking place. Dixon was aware that the sand was residual waste, and he agreed to involve Brandywine in the removal of the sand from the Foundry. It was Dixon who located Fisher to do the hauling of the sand. Dixon entered an agreement with Fisher for the removal of the sand pursuant to the terms of Brandywine's agreement with the Foundry. Although he knew that Fisher would have to dispose of the sand somewhere, Dixon did not care where Fisher took it for disposal and did not ask Fisher where he planned to take it. Once sand removal began, Dixon weighed and counted Fisher's trucks and paid Fisher for the hauling job on a daily basis, keeping for Brandywine as profit the difference between the amount the Foundry was willing to pay for transportation costs and the amount for which he was able to get Fisher to agree to do the hauling work. As of December 27, 1990, Dixon knew that the waste sand was being deposited by Fisher on the surface of the ground at the South Hill Run residential development, yet he took no action, at least before

January 2, 1991, to ensure that its disposal there was legal. Brandywine cannot so involve itself in the sand's transfer to Fisher for disposal and later contend that it is an innocent party which had no knowledge of or control over where Fisher would be depositing the sand. As Brandywine assumed a significant portion of the responsibility in the process of disposing of the waste sand, a residual waste, it had a duty to ensure that the disposal was completed as required by the SWMA. See Waste Conversion, *supra*.

We thus conclude that through Dixon, Brandywine's involvement in the transfer of the waste sand to Fisher for disposal was sufficient for DER to have found Brandywine violated §610.8(i) of the SWMA. That Dixon did not know or care where Fisher was disposing of the sand (until he followed one of Fisher's trucks) was at least negligence on his part, but Dixon's ignorance does not make Brandywine any less liable for committing a violation of §610(8)(i) of the SWMA. Cf. Hanslovan, *supra* (DER failed to show any action by Hanslovan which assisted in accomplishing the illegal activity).[7] We accordingly also reject Brandywine's due process argument, which is premised on the claim that Brandywine played no part in the violations of the SWMA here.

Amount of the Civil Penalty

While DER urges that the amount of the civil penalty assessment here is reasonable, Brandywine asserts that the civil penalty amount is excessive

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[7] In Hanslovan, *supra*, we pointed out that Waste Conversion, *supra*, involved a criminal penalties proceeding under §606 of the SWMA, 35 P.S. §6018.606, and that §606(1) imposes absolute liability for criminal violations, whereas in §605 of the SWMA, 35 P.S. §6018.605, the Legislature did not impose absolute liability, i.e., liability even when the violation is unintentional and non-negligent. Here, DER has imposed civil penalties on Brandywine pursuant to §605. Insofar as this is so, the instant appeal does not involve the imposition of absolute liability on Brandywine.

under the facts of this appeal and that this Board should exercise our discretion and assess a lower civil penalty amount.

Pursuant to §605 of the SWMA, 35 P.S. §6018.605, DER may assess a civil penalty of up to a maximum of $25,000 per day for any violation of the act or the regulations promulgated thereunder. In setting the amount of the penalty, DER is to consider the following factors: willfulness of the violation, damage to natural resources, cost of restoration and abatement, savings resulting to the violator, and any other relevant factors. As we explained in Zorger v. DER, EHB Docket No. 90-321-MJ (Adjudication issued February 20, 1992), our task is to determine whether DER abused its discretion in setting the amount of the assessment, and, where we find DER has abused its discretion, we may substitute our discretion and modify a civil penalty assessment. In conducting our review, we look to see whether there is a "reasonable fit" between the violations and the amount of the penalty. Frederick J. Milos, t/d/b/a Freddy's Refuse v. DER, EHB Docket No. 88-206-F (Adjudication issued October 28, 1992).

DER's compliance specialist Robert France determined the amount of the civil penalty assessment to Brandywine using DER's guidelines dated December 20, 1989. These guidelines and the rationale behind them have previously been approved by this Board. See Blosenski, *supra*.

We reject Brandywine's contention that DER should have treated the duration of the violation here to be only the one day on which Brandywine entered the agreement with the Foundry instead of the at least three days during which sand removal from the Foundry and disposal at the South Hill Run development took place. DER's evidence established that the transportation and disposal of the residual waste occurred at least during a three day

period, and Brandywine offered us no evidence to dispute this. We nevertheless find DER abused its discretion in setting an unreasonable penalty amount.

DER's calculations utilized $1,000, the low end of the range, for severity for each of the three days. Based upon the evidence, this amount is reasonable. DER further added an additional $3,000 for each of the three days based upon its determination that the degree of willfulness on Brandywine's part here was negligent (which carries an assessment range of between $500 to $5,000). Because Brandywine is engaged in the solid waste management business, DER believed its assessment of $3,000 was reasonable. We do not agree.

The evidence shows that Brandywine is engaged in the business of recycling materials such as scrap metals, which is not subject to regulation under the SWMA. While the recycling business is an activity related to the disposal of materials, the evidence does not demonstrate Dixon was familiar with the disposal of sand used by the Foundry. Nor is there any evidence showing any knowledge in Dixon or Brandywine as to the requirements of the SWMA. Thus, we find DER's assessment of an amount at the high end of the range to be an abuse of discretion, and we accordingly reduce the amount assessed for Brandywine's degree of willfulness (negligence) to $2,000, i.e., the middle of the range. This decrease in the amount of the assessment is applicable to all three days. Therefore, the civil penalty assessed on Brandywine is $1,000 (for severity) + $2,000 (for degree of willfulness - negligent) = $3,000 for each of the three days, or $9,000.

In arriving at its civil penalty assessment, DER assessed as savings to the violator $33,053.11, which it believed to be Brandywine's gross profit,

calculated by subtracting the amount Brandywine paid Fisher to remove the sand from the Foundry from the amount the Foundry had paid Brandywine. (N.T. 139-140; Jt. Ex. 14) DER acknowledges that it calculated this gross profit figure before it had all of the invoices involved here, and that the invoices reflect an actual gross profit to Brandywine of $30,275.11 rather than the $33,053.11 it initially assessed. Quoting Southwest Equipment Rental, Inc. v. DER, 1986 EHB 465, 481, DER argues, "[w]hat is important is assuring that the penalty assessed results in the elimination of any financial benefits accruing to the [violator] as a consequence of its unlawful activity." On the basis of Southwest Equipment Rental and Refiner's Transport and Terminal Corp. v. DER, 1986 EHB 400, DER contends either the $33,053.11 or the $30,275.11 gross profit figure is a reasonable approximation of Brandywine's gross profit which should be included in the civil penalty assessment. Moreover, DER argues Brandywine should not be able to offset against these gross profit amounts the $6,000 it paid to have the sand removed from the South Hill Run residential development and properly disposed of.

We must first deal with what figure is the correct one for us to deal with here. Obviously, it is $30,275.11. There is no basis in fact to assess $33,053.11.[8] DER's footnote saying a "reasonable fit" is all that is necessary and either figure is justified is rejectable for many reasons which we will not dwell on. Where DER assessed no penalty for deterrence, as was the case in the penalty assessed in South Equipment Rental and Refiner's

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[8]Counsel for DER recognized this error at the hearing when he stated: We, therefore, would agree on the record that the assessment is amended to reflect that amount; so the total assessment would then be $42,275.11. (N.T. 181) DER's argument that its original figure or this figure are both approvable by us is inconsistent therewith.

Transport, to assess more money ($33,053.11) than the evidence shows to be the gross profit is to assess an excessive penalty. It is not a reasonable fit, but is an abuse of discretion which we do not endorse.

On DER's behalf, France assessed a penalty equal to Brandywine's profit and inserted this figure in his calculation as a savings to the violator based on this conclusion. "Savings to the violator" does not necessarily equate to profit. In the typical situation, it is the difference between the violator's actual cost and what it would have cost to act legally. Such savings may produce a profit but can exist even when no profit is realized. We reject DER's simplistic approach of treating Brandywine's profit as its savings. While the record is not as detailed as we would like it, we do know that the cost of reloading the sand and properly disposing of it was $12,000. We presume that Fisher would have increased his bid to Brandywine by something close to this amount if he knew that the sand could not be used at South Hill Run but had to be disposed of at a properly permitted facility. We, therefore, conclude that Brandywine's savings were $12,000.

To the extent this figure overstates the amount, it stems from Brandywine's failure to present additional evidence. We include the full amount in the assessment, even though Fisher paid half of it, because we are measuring what would have been the case if the violation had not been committed.

DER has the burden of proof when it comes to showing us the basis for its penalty assessment for it. Southwestern Equipment Rental. For DER to assess for other than the degree of severity, savings to the violator and degree of willfulness, as is evident on Frances' penalty calculation sheet (Jt. Ex. 14), it must offer us evidence thereon. It cannot merely assert

Brandywine made profits in its dealings with the Foundry and ask us to agree to DER receiving this money, but must show us why the amount of the penalty is proper. No evidence of this type was offered to us, so we cannot justify a penalty in excess of the $21,000 outlined above.

Mootness of DER's February 27, 1991 Order

DER also argues in its post-hearing brief that Brandywine's appeal of DER's February 27, 1991 compliance order is moot since the parties have stipulated that Brandywine has complied with the order and we can no longer grant any effective relief with respect to it.

Brandywine responds by arguing that its appeal of DER's February 27, 1991 order is not moot to the extent that Brandywine disputes the violations alleged in DER's order and is concerned that if we dismiss its appeal of DER's order for mootness, the violations asserted in that order will remain part of Brandywine's history of past violations for purposes of future DER civil penalty assessments.

This Board has previously declined to dismiss appeals as moot where the orders under appeal could have an impact upon subsequent DER actions regarding the issuance and renewal of permits, and upon the assessment of civil penalties. See Decom Medical Waste Systems (N.Y.), Inc. v. DER, 1990 EHB 460 (and cases cited therein). Brandywine, therefore, would have a legitimate concern had we not found it liable for the violations set forth in the civil penalty assessment which are also contained in DER's February 27, 1991 order. Since the parties have stipulated that Brandywine has complied with DER's February 27, 1991 order and we have found Brandywine liable for violating the SWMA as set forth in that order, however, the Board can no longer grant any effective relief with respect to that order. See Al Hamilton

Contracting Company v. DER, EHB Docket No. 88-113-W (Consolidated) (Opinion issued July 9, 1992); Commonwealth v. One 1978 Lincoln Mark V, 52 Pa. Cmwlth. 353, 415 A.2d 1000 (1980). We thus dismiss Brandywine's appeal of DER's February 27, 1991 order.

CONCLUSIONS OF LAW

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

2. DER has the burden of proving by a preponderance of the evidence that violations of the SWMA were committed and that the amount of the civil penalty assessed is reasonable and an appropriate exercise of discretion. 25 Pa. Code §§21.101(b)(1); Joseph Blosenski, Jr., et al. v. DER, EHB Docket No. 85-222-M (Consolidated) (Adjudication issued December 23, 1992).

3. The sand which was removed from the Foundry and disposed of at the South Hill Run residential development was residual waste material.

4. Brandywine permitted the disposal of used foundry sand (a residual waste) at a disposal site which was not permitted to receive such waste, a violation of §302(a) of the SWMA.

5. Brandywine permitted the transportation of residual waste to an unpermitted disposal site, a violation of §303(a)(1) of the SWMA.

6. Brandywine permitted the dumping or depositing of a solid waste onto the surface of the ground without a DER permit, a violation of §610(1) of the SWMA.

7. Brandywine assisted in the transportation and disposal of solid waste contrary to the rules and regulations adopted under the SWMA, a violation of §610(4) of the SWMA.

8. Brandywine assisted in the violation of the SWMA, which is a violation of §610(9) of the SWMA.

9. Brandywine's active participation in transferring the waste sand to Fisher and Fisher's subsequent disposal of the sand at an unpermitted site make Brandywine liable for a violation of §610(8)(i) of the SWMA.

10. The $1,000 assessed by DER for severity for each of the three days on which the violations occurred was reasonable.

11. DER's assessment of $3,000 for the degree of willfulness (negligence) for each of the three days was not reasonable, and we substitute our discretion and instead assess a penalty of $2,000 for each of the three days.

12. The assessment of $33,053.11 as savings to Brandywine because of the violation was unreasonable as this figure does not represent the savings to the violator as a consequence of the violation. Brandywine's savings totaled $12,000 and a penalty in this amount is assessed.

13. Where DER offers evidence of a violator's profits from lawful and unlawful activities but does not assess a penalty on any theory other than willfulness of the violation, severity of the violation and savings to the violator or offer evidence thereon, no penalty based on any other factors in §605 is appropriate.

14. The total civil penalty assessment is $21,000.

15. As Brandywine committed the violations of the SWMA and the parties have stipulated that Brandywine has complied with DER's February 27, 1991 order, there is no longer any effective relief which this Board can grant with respect to that order and Brandywine's appeal of DER's order is moot.

O R D E R

AND NOW, this 13th day of May, 1993, it is ordered that:

1. Brandywine's appeal at EHB Docket No. 91-124-E is dismissed as moot and these appeals are unconsolidated; and

2. Brandywine's appeal at EHB Docket No. 91-563-E is sustained to the extent that the civil penalties are reduced to $21,000 and dismissed as to the remainder.

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Administrative Law Judge
Member

DATED: May 13, 1993

cc: DER, Bureau of Litigation
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M. DIANE SMITH
SECRETARY TO THE BOAF

NEW HANOVER CORPORATION	:	
	:	
v.	:	**EHB Docket No. 90-225-W**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, NEW HANOVER TOWNSHIP, COUNTY OF MONTGOMERY, and PARADISE WATCH DOGS	:	**Issued:** May 14, 1993

OPINION AND ORDER SUR MOTION OF MONTGOMERY COUNTY FOR PARTIAL SUMMARY JUDGMENT

By Maxine Woelfling, Chairman

Synopsis:

Summary judgment in favor of the County of Montgomery (County) and against New Hanover Corporation (Corporation) is granted in part and denied in part. The County is entitled to judgment as a matter of law on the issue of the Corporation's status as an "existing facility" because §502 of the Municipal Waste Planning, Recycling and Waste Reduction Act, the Act of July 26, 1988, P.L. 556, 53 P.S. §4000.502 (Act 101), does not apply to the County's grandfathered Act 97 plan.

Summary judgment is otherwise denied. The County failed to provide any basis for summary judgment on the Corporation's challenge to the County's Act 97 plan. The County further failed to demonstrate that the Department of Environmental Resources (Department) did not publish notice of its grandfather approval of the County's Act 97 plan in the Pennsylvania Bulletin, and, therefore, could not establish that the Corporation's appeal of the approval

was untimely. Last, the County failed to show that its implementation documents satisfied §513 of Act 101, which requires the County to submit documentation demonstrating 10 years of disposal capacity for the entire county.

OPINION

This case arose on June 5, 1990, with the filing of the Corporation's notice of appeal from the Department's May 7, 1990, denial of its application for repermitting its landfill in New Hanover Township, Montgomery County. Presently before the Board for disposition is the County's July 31, 1991, motion for partial summary judgment on five paragraphs of the Corporation's notice of appeal.[1] The procedural posture of this matter was outlined in previous opinions and will not be repeated here. See, New Hanover Corp. v. DER *et al*, 1991 EHB 440.

The Corporation filed its answer to the County's motion on September 16, 1991. The County filed a reply to the Corporation's answer on September 26, 1991. The Department, New Hanover Township, and Paradise Watch Dogs failed to respond to the County's motion.

The Board will grant summary judgment if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Pa.R.C.P. 1035(b); Summerhill Borough v. Commonwealth, Department of Environmental Resources, 34 Pa. Commonwealth 574, 383 A.2d 1320 (1978). In deciding a motion for summary judgment, the Board will view the facts in a light most favorable to the non-moving party. Penoyer v. DER, 1987 EHB 131,

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[1] The paragraphs, numbers 3.4.2, 3.4.4, 3.4.5, 3.4.6,and 3.4.8, are summarized below.

133. For the reasons set forth below, the County's motion is granted in part and denied in part.

The Grandfathered Act 97 Plan

The County first contends it is entitled to summary judgment on paragraphs 3.4.4 and 3.4.5 of the Corporation's notice of appeal, which state:

> 3.4.4 The Montgomery County Act 101 Plan is a nullity and without force and effect. Montgomery County attempted to "grandfather" its 1986 Act 97 Plan pursuant to the provisions of section 501 of Act 101 and the provisions for such grandfathering were not complied with. Montgomery County did not attempt to qualify a new 101 plan adopted pursuant to the provisions of Section 502 and 503 of Act 101.
>
> 3.4.5 The Montgomery County 101 Plan did not require all municipal waste generated within its boundaries to be processed or disposed at a designated processing or disposal facility contained in its 101 Plan as authorized by Section 304(d) of Act 101.

Notice of Appeal.[2] The County asserts that the Corporation did not timely challenge the Department's approval of the County's grandfathered Act 97 plan, that the County's 1990 plan revision rendered moot the Corporation's challenges to the County's grandfathered Act 97 plan, and that the Department's approval of the County's grandfathered Act 97 plan was timely.

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[2] The "1986 Act 97 Plan" refers to the County's original solid waste management plan, which the Department approved on May 6, 1986, pursuant to the provisions of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* (hereinafter referred to as the Act 97 plan). NHC Exh. 29, Appendix A.

The "Act 101 Plan" or "101 Plan" refers to the Department's May 15, 1989, approval of the County's Act 97 plan under §501(b) of Act 101. NHC Exh. 32, Appendix CT-3. (hereinafter referred to as the Grandfathered Act 97 Plan). Section 501(b) allows counties to gain interim approval of their Act 97 plans before preparing a solid waste management plan that complies with the more stringent requirements of Act 101. 53 P.S. §4000.501(b).

Exhibits will be noted as follows: "NHC Exh.__" refers to exhibits from the Corporation's June 11, 1991, motion for partial summary judgment, which the Corporation incorporated by reference, and "NHC Answer Exh.__" refers to exhibits from the Corporation's answer to the County's motion for partial summary judgment. "County Exh.__" refers to exhibits from the County's motion for partial summary judgment.

The County first argues it is entitled to partial summary judgment because the Corporation failed to challenge the Department's approval of the County's grandfathered Act 97 plan within the 30 day appeal period mandated by the Board's rules and regulations, 25 Pa.Code §21.52(a). The County asserts that because the Department did not publish notice of its approval of the County's grandfathered Act 97 plan in the Pennsylvania Bulletin, the 30 day appeal period began to run on November 16, 1989, when the Corporation received actual notice of that approval. See, NHC Exh. 10, ¶ 3; (Corporation's Petition to the Commonwealth Court for special relief, in which the Corporation stated "DER approved [the County's] waste management plan by letter dated May 15, 1989." The County contends that this statement proves the Corporation had actual notice of the Department's approval by the date of the petition, November 16, 1989.)

The Board's jurisdiction is limited to appeals filed within 30 days of the Department's action. 25 Pa.Code §21.52(a). In the case of a third party appeal, the 30 day appeal period begins to run upon publication of the Department's action in the Pennsylvania Bulletin, even if the third party appellant has actual notice of the Department's action before publication of the notice in the Bulletin. Lower Allen Citizens Action Group, Inc. v. DER, 119 Pa. Cmwlth. 236, 538 A.2d 130, *aff'd on reconsideration*, __ Pa. Cmwlth. __ 546 A.2d 1330 (1988). Only when the Department fails to publish notice of its action does the appeal period run from the date the third party receives actual or constructive notice of that action. Paradise Township Citizens Action Committee, Inc., *et al* v. DER and Paradise Township, EHB Docket No. 91-152-W (Opinion issued May 22, 1992).

Although the County's argument is based on its belief that the Department did not publish notice in the Pennsylvania Bulletin of its approval

of the County's grandfathered Act 97 plan, the County has not set forth any facts, by affidavit or otherwise, that demonstrate notice of this approval was not published. Without any proof, we cannot conclude that the Department failed to publish notice of its approval and, therefore, that the appeal period ran from the date of the Corporation's actual or constructive notice. The County has failed to demonstrate the absence of genuine issues of material fact regarding the timeliness of the Corporation's appeal of the County's grandfathered Act 97 plan.[3]

The County next argues it is entitled to summary judgment on paragraphs 3.4.4 and 3.4.5 because its 1990 plan revision renders moot the Corporation's challenges to the County's grandfathered Act 97 plan.[4] The County reasons that the Corporation's challenges to its grandfathered Act 97 plan are moot because it has been superseded by the County's Act 101 plan, and, as a result, the Board can no longer grant any relief regarding the grandfathered Act 97 plan.

The Board will dismiss an appeal as moot when it can no longer grant the relief the appellant requests. Empire Sanitary Landfill, Inc. v. DER, 1991 EHB 66. The Corporation's challenges to the grandfathered Act 97 plan are not moot because the issue presently before the Board is whether the Department's denial of the Corporation's application for permit modification was an abuse of discretion. Even if the grandfathered Act 97 plan was revised

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[3] Although the Board may take official notice of matters published in the Pennsylvania Bulletin, it is not the Board's responsibility to peruse weeks and weeks of the Bulletin in an attempt to buttress a party's motion for summary judgment.

[4] The County submitted its 1990 revision (hereinafter referred to as the Act 101 plan) pursuant to §501(e)(2) of Act 101. The Department approved the County's Act 101 plan on November 20, 1990. County Exh. V. The Corporation has appealed the Department's approval of the County's Act 101 plan at EHB Docket No. 90-558-W.

by the County's Act 101 plan, the Board can still hold that the Department's denial was an abuse of discretion at the time and that the Corporation should have received its permit modification under the grandfathered Act 97 plan.

The County last argues it is entitled to summary judgment on paragraphs 3.4.4 and 3.4.5 because the Department's grandfather approval of the County's Act 97 plan was timely and, therefore, valid. This argument is without merit since it fails to address many of the issues raised in these paragraphs. In paragraph 3.4.4, the Corporation broadly alleges that the Department did not comply with the requirements of §501(b), of which timeliness is but one issue. In paragraph 3.4.5, the Corporation does not even raise timeliness as an issue. The County's motion for summary judgment on paragraphs 3.4.4 and 3.4.5 of the Corporation's notice of appeal will, therefore, be denied.

Existing Facilities Under Act 101

The County next contends it is entitled to summary judgment on paragraph 3.4.6 of the Corporation's notice of appeal. In that paragraph, the Corporation alleges that §502(o) prohibits the County's grandfathered Act 97 plan from interfering with it because it is an "existing facility" under that subsection. The County argues that it is entitled to summary judgment on this paragraph because grandfathered Act 97 plans are exempt by the terms of §502(a) from satisfying the requirements of §502, including the prohibition against interfering with existing facilities.

This issue is resolved by §502(a), which states:

> Except as provided in section 501(b), every plan submitted after the effective date of this act shall comply with the provisions of this section.

This subsection clearly indicates that Act 97 plans gaining grandfather approval under §501(b) do not have to comply with the provisions of §502,

including the provisions of §502(o). Consequently, the Department, in denying the Corporation's application for permit modification, could not have abused its discretion for the reasons set forth in paragraph 3.4.6 of the Corporation's notice of appeal. Accordingly, the County is entitled to summary judgment on paragraph 3.4.6.

Implementation Documents

The County next contends it is entitled to summary judgment on paragraph 3.4.8 of the Corporation's notice of appeal. In that paragraph, the Corporation states:

> Montgomery County has not complied with Section 513 of Act 101 which is a condition precedent to the application of Section 507 of Act 101.

The County argues it is entitled to summary judgment here because it satisfied the requirements of §513(a) by submitting documents to the Department demonstrating the availability of disposal capacity for the County for the next 10 years, even if those documents do not demonstrate 10 years of disposal capacity for the entire county. The Corporation responds that the County is not entitled to summary judgment because the implementation documents do not address the entire county, §513 requires documentation demonstrating 10 years of disposal capacity for the entire county, and the Pottstown Landfill does not have 10 years of remaining capacity.

Section 507(a) of Act 101 states, in relevant part:

> 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... for a municipal waste landfill...under the Solid Waste Management Act, in the county unless the applicant demonstrates to the department's satisfaction that the proposed facility...."

It is clear from this language that before the Department may invoke §507 of Act 101 as a basis for denying the Corporation's application for permit

modification, the County must have satisfied the requirements of §513.

Section 513(a) states, in relevant part:

> Within one year following approval of a plan by the department, including plans approved pursuant to section 501(b), the county shall cause to be submitted to the department copies of all executed ordinances, contracts or other requirements to implement its approved plan and that will be used to ensure sufficient available capacity to properly dispose or process all municipal waste that is expected to be generated within the county for the next ten years.

The County contends its submissions satisfied §513 because that section only required the ordinances and contracts that were executed when the County submitted its Act 97 plan to the Department for grandfather approval, and because the County did not have to demonstrate 10 years of disposal capacity until after the Department approved its Act 101 plan.

Section 513(a) expressly states that it applies to grandfathered Act 97 plans. It is a fundamental rule of statutory construction that "[e]very statute shall be construed, if possible, to give effect to all of its provisions." 1 Pa.C.S. §1921(a). In order to give effect to all of §513, the concluding phrase, "and that will be used to ensure sufficient available capacity ... for the next ten years," must be read in conjunction with the provision regarding all executed ordinances, contracts, and other requirements. Section 513, therefore, clearly indicates that the County must submit documentation of ten years of disposal capacity within one year of the Department's approval of the County's grandfathered Act 97 plan.

Looking at the County's implementation documents, there remain genuine issues of material fact regarding the County's compliance with §513. The County first contends it has reserved 10 years of disposal capacity for the entire county at the Pottstown Landfill pursuant to §1111 of Act 101. County Exhs. H,I,J,P,Q,S. These documents, however, do not indicate that the

County has actually reserved capacity, but merely that it intends to do so. The County also contends its three disposal regions have entered into disposal agreements with the Pottstown Landfill,[5] but has only offered evidence of disposal agreements for the County's eastern and western regions. NHC Exh. 32, Appendix CT-4, and County Exh. Z. In addition, the County never demonstrated that 10 years of disposal capacity remain at the Pottstown landfill. The deposition testimony of Carol Thomas, which the County cites as proof of 10 years of capacity, merely states "that there were very good possibilities of many expansions at [the] facility." County Exh. N, pp 40-41. It is clear from the evidence before us that the County has only established that the Pottstown Landfill will have 10 years of capacity if the Department permits its expansion. Id.; NHC Answer Exh. 4, pp. 69-71.

The Act 97 Plan

The County last contends it is entitled to summary judgment on paragraph 3.4.2 of the Corporation's notice of appeal. In that paragraph, the Corporation claims that the Department's denial of its application for permit modification was an abuse of discretion because the County's Act 97 plan (see, note 2, *supra*) only covered the County's eastern region and did not designate a disposal facility for the County's western and northern regions. Because the County did not support its argument in either its motion or accompanying memorandum, its motion for summary judgment on paragraph 3.4.2 will be denied.

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[5] The County is divided into three disposal regions: eastern, western and northern.

O R D E R

AND NOW, this 14th day of May, 1993, it is ordered that the County's motion for partial summary judgment on paragraph 3.4.6 of the Corporation's notice of appeal is granted. The County's motion for partial summary judgment on paragraphs 3.4.2, 3.4.4, 3.4.5, and 3.4.8 of the Corporation's notice of appeal is denied.

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DATED: May 14, 1993

EHB Docket No. 90-225-W
Service List

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M. DIANE SMITH
SECRETARY TO THE BOARD

LANCASTER COUNTY SOLID WASTE MANAGEMENT AUTHORITY et al.	:	
v.	:	**EHB Docket No. 92-447-MR**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: May 17, 1993**

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Robert D. Myers, Member

Synopsis

DER sent a letter informing Appellants of new legislation imposing fees, advising of the due date for payment and the potential penalties for nonpayment, and enclosing a form. In response, Appellants claimed to be exempt. DER replied in another letter, stating that its interpretation of the provision did not exempt Appellants. Appellants appealed from this letter and, later, filed a Motion for Summary Judgment. The Board holds that DER's letter denying exemption to Appellants was appealable. After reviewing the statutory language, the Board also concludes that the facility is publicly owned by the municipal authority (one of the Appellants) and that the municipal authority is exempt from the payment of fees. Summary judgment is entered for Appellants.

OPINION

Appellants jointly filed a Notice of Appeal on September 30, 1992 seeking our review of an August 31, 1992 letter of the Department of Environmental Resources (DER) regarding §6.3 of the Air Pollution Control Act (APCA), Act of January 8, 1960, P.L. (1959) 2119, 35 P.S. §4006.3, added by Act No. 95 of 1992 and effective as of July 9, 1992. This section imposed annual fees upon air contamination sources emitting certain regulated pollutants.

On August 3, 1992 DER had sent a letter to Ogden Martin Systems of Lancaster, Inc. (Ogden) which has a plan approval extension authorizing the temporary operation of a municipal waste incinerator in Lancaster County. The letter (apparently a form letter sent to others besides Ogden) informed of the recent effectiveness of Act No. 95; of the interim fees imposed by §6.3, due and payable by September 1, 1992; and of the potential penalties for not paying. Enclosed with the letter were a reporting form and a copy of §6.3.

Lancaster County Solid Waste Management Authority (Authority) responded to DER's letter on August 12, 1992, asserting that it was the owner and operator of the Lancaster County Resource Recovery Facility and that Ogden was merely a subcontractor for operations. Quoting §6.3(f) of Act No. 95, the Authority claimed exemption from payment of interim fees on the ground that it was a "State entity, instrumentality or political subdivision." The Authority concluded the letter by requesting DER to formally recognize the exemption.

DER's response on August 31, 1992 (the letter from which the Authority and Ogden filed their joint appeal) stated that municipal authorities were not covered by the exemption in §6.3(f). The letter concluded with a reminder that interim fees had to be paid by September 1, 1992 to avoid penalties and interest.

On December 23, 1992 Appellants filed a Motion for Summary Judgment, supporting affidavit and legal memorandum. DER filed its Response, accompanied by an affidavit and legal memorandum on January 12, 1993. Appellants filed a supplemental memorandum of law on February 16, 1993. In their Motion, Appellants claim that no material facts are in dispute and that they are entitled to summary judgment as a matter of law on the interpretation of the exemption in §6.3(f). DER argues (1) that its August 31, 1992 letter is not an appealable action; and (2) that summary judgment cannot be entered in favor of Appellants, in any event, because of factual disputes concerning ownership and operation of the facility and because the exemption in §6.3(f) does not include municipal authorities.

Summary judgment can be entered if the pleadings, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law: Pa. R.C.P. 1035(b). The Board must view a Motion for Summary Judgment in the light most favorable to the non-moving party: *Robert C. Penoyer v. DER*, 1987 EHB 131. Our power to enter summary judgment presupposes that we have jurisdiction to entertain the appeal in the first place. DER's Response to the Motion questions our jurisdiction. Even if it had not, we have the power to raise it ourselves: *Louis Constanza t/d/b/a Elephant Septic Tank Service v. DER*, 1991 EHB 1132.

As set forth in §4(a) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7514(a), our jurisdiction is limited to "orders, permits, licenses or decisions" of DER. Our rules of Practice and Procedure refer to these collectively as DER "action." This term is defined in 25 Pa. Code §21.2(a) to include an "order, decree, decision, determination or ruling by [DER] affecting personal or property rights, privileges,

immunities, duties, liabilities or obligations of any person, including, but not limited to, denials, modifications, suspensions and revocations of permits, licenses and registrations; orders to cease the operation of an establishment or facility; orders to correct conditions endangering waters of the Commonwealth; orders to construct sewers or treatment facilities; orders to abate air pollution; and appeals from and complaints for the assessment of civil penalties."

This definition is necessarily expansive because of the many types of actions DER can take under the numerous statutes it administers: *Phoenix Resources, Inc. v. DER*, 1991 EHB 1681. Yet it does not encompass DER letters merely providing information or advice or setting forth DER's interpretation of laws or regulations: *Borough of Bellefonte v. DER*, 1990 EHB 521; *Chambers Development Co. v. DER*, 1988 EHB 198 ; *Sandy Creek Forest v. Commonwealth, Dept. of Environmental Resources*, 95 Pa. Cmwlth. 457, 505 A.2d 1091 (1986). The first letter (August 3, 1992) sent by DER to Appellants falls within this category. It simply provides information on the interim fees imposed by §6.3 of the new legislation, advises when the first report and payment are due, mentions the penalties and interest for nonpayment and encloses a reporting form.

The second DER letter (August 31, 1992) stands on different ground. It reacts to the Authority's August 12, 1992 letter, claiming exemption under §6.3(f) and specifically asking DER to recognize the exemption. The letter states that §6.3(f) "does not exclude municipal authorities such as incinerators or publicly-owned treatment works from the requirement to pay interim emission fees." Clearly, DER acted on the Authority's request by denying it. *Andre Greenhouses, Inc. v. DER*, 1979 EHB 311, is directly on point. Two letters were involved there also, dealing with an exemption under

§4.1 of the APCA. The Board held one of the letters to be advisory and not appealable. With respect to the other letter, the Board stated as follows on page 313:

> ...where an appellant has a colorable claim to an exemption provided by the governing statute, it would appear to be appropriate to ask the agency administering that act for determination as to whether or not appellant's activity might be exempt from regulation. [DER's] determination that the exemption provided by statute is or is not applicable does constitute appealable action in our view.

We agree with this analysis and adopt it here. Consequently, we hold that the DER letter of August 31, 1992 is appealable.

The exemption provided by §6.3(f) reads as follows:

> No emissions fee established under subsection (b), (c) or (j) of this section shall be payable by any State entity, instrumentality or political subdivision in relation to any publicly owned or operated facility.

The emission fees referred to are an annual interim air emission fee (subsection (b)), a permanent annual air emission fee (subsection (c)), and application and administrative fees (subsection (j)). It is the annual interim air emission fee that is involved here. That fee is not payable if the Lancaster County Resource Recovery Facility is owned or operated by the Authority and if the Authority qualifies as a "State entity, instrumentality or political subdivision."

DER argues that a factual dispute exists regarding the first condition. It concedes that the Authority owns the facility but contends that Ogden operates it. This argument presupposes that, to be exempt, a facility must be both publicly owned and publicly operated. We do not interpret

§6.3(f) that way. We give "or" its common function as a word indicating alternative choices. Accordingly, the condition is satisfied if the facility is either publicly owned or publicly operated.

DER also maintains that the Authority does not qualify as a "State entity, instrumentality or political subdivision." The argument flies in the face of Commonwealth Court's holding in *London Grove Township v. Southeastern Chester County Refuse Authority*, 102 Pa. Cmwlth. 9, 517 A.2d 1002 (1986), allocatur granted, 515 Pa. 589, 527 A.2d 548 (1987), appeal dismissed as improvidently granted, 517 Pa. 314, 535 A.2d 1052 (1988). Faced with the issue of whether the authority was an "instrumentality of the Commonwealth," the Court entered upon a detailed analysis of the appellate decisions considering the nature of authorities and concluded as follows (517 A.2d 1002 at 1004):

> Thus, under a long line of precedent, municipal authorities fall within the meaning of the term "instrumentality of the Commonwealth" because they are agents of the state.

While the statutory provision involved in *London Grove* was §702 of the Second Class Township Code, Act of May 1, 1933, P.L. 103, as amended, 53 P.S. §65762 (later deleted by amendment), rather than §6.3(f) of the APCA, we find no basis for reaching a different interpretation. The expansive language used by the Legislature in §6.3(f) convinces us that the intent was to provide exemption for all state and local facilities. That being the case, there is no rational basis for granting exemption to a political subdivision and denying it to a municipal authority.

There are no disputes as to any of the material facts and the moving parties are entitled to summary judgment as a matter of law. Accordingly, summary judgment will be entered for Appellants.

ORDER

AND NOW, this 17th day of May, 1993, it is ordered as follows:

1. Appellants' Motion for Summary Judgment is granted.

2. Summary judgment sustaining their appeal is entered for Appellants.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

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Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

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Member

JOSEPH N. MACK
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DATED: May 17, 1993

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RESIDENTS OPPOSED TO BLACK BRIDGE INCINERATOR (ROBBI)	:	EHB Docket No. 87-225-W
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
YORK COUNTY SOLID WASTE AND REFUSE AUTHORITY, Permittee	:	Issued: May 18, 1993

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

By Maxine Woelfling, Chairman

Synopsis

The Board dismisses an appeal of the Department of Environmental Resources' (Department) issuance of an air quality plan approval to a resource recovery facility, holding that the appellant failed to satisfy its burden to prove by a preponderance of the evidence that the Department had abused its discretion.

An application for plan approval need not actually weigh the prospective benefit against the environmental harm. So long as the application contains sufficient information for the Department to ascertain what the prospective benefits and environmental harms are, the Department can weigh the two itself. To establish that the Department abused its discretion

when it balances the two, an appellant must do more than simply demonstrate that the Department underestimated the environmental harm; he must show that the environmental harm clearly outweighs the benefit.

The Department did not abuse its discretion by using the health risk as set forth in the health risk assessment when the Department conducted the balancing test. Although the appellant argued that the assessment underestimated the health risk because it did not use the appellant's figures for the deposition velocity and the carcinogenic risk attributable to the consumption of contaminated food, the appellant failed to establish that its figures for those parameters were more reasonable than those in the assessment. The carcinogenic risk in the assessment need not have been expressed in terms of the "population risk," as opposed to the "maximally exposed individual," since the latter is the generally accepted methodology in the field. While the appellant also asserted that the assessment underestimated the health risk in other regards, the health risk as set forth in the assessment is the one used for purposes of balancing the harms against the benefits where the appellant fails to adduce evidence as to the extent of the underestimation, because the burden is on the appellant to demonstrate that the environmental harm clearly outweighs the benefits. Using the health risk as set forth in the assessment, the environmental harms do not clearly outweigh the benefits here.

The Department did not abuse its discretion by failing to seriously review the health risk assessment. The evidence admitted at the hearing on the merits shows that the Department did, in fact, seriously review the assessment.

The Department did not abuse its discretion simply because the facility receiving a plan approval will increase the health risk to the public

or simply because the health risk assessment submitted as part of the plan approval process underestimates the health risk. An underestimation in a health risk assessment, moreover, does not prevent the Department from conducting a thorough evaluation of the air pollution aspects of the source, where the appellant failed to establish that the underestimation was a material one.

The appellant failed to demonstrate that the context of an EPA guidance document indicated that a grandfather clause, exempting facilities from "top-down" analysis, did not exempt the recipient of the plan approval. The language of the grandfather clause itself was admitted into evidence and, taken alone, it embraces the plan approval here. The context of the document was never admitted into evidence, and the only evidence supporting the appellant's position is a general assertion from one of its witnesses that the context showed that the clause did not apply.

The fact that a plan approval does not contain a nitrogen oxide (NO_x) emissions limit does not render the issuance of the plan approval an abuse of discretion where insufficient data existed on NO_x emissions for the Department to set a specific limit at the time it issued the plan approval.

Thermal de-NO_x controls were not the best available technology (BAT) at the time the Department issued the plan approval because their effectiveness at removing NO_x from emissions was uncertain and the de-NO_x technology itself presents environmental risks.

The Department did not abuse its discretion by determining that a rotary combustor was BAT. Contrary to the appellant's assertion, the Department did actually review the choice of combustor to see if it was BAT. Furthermore, a technology need not be the best available technology with regard to every pollutant emitted from a facility to be the best available

technology for the source; all the characteristics of emissions must be considered when determining what technology is BAT.

Finally, regardless of appellant's assertions to the contrary, the Department did, in fact, determine that emissions from the facility would be the minimum attainable.

INTRODUCTION

This matter was initiated with the June 12, 1987, filing of a notice of appeal by the Residents Opposed to Black Bridge Incinerator (ROBBI) seeking review of a May 13, 1987, air quality plan approval issued by the Department to York County Solid Waste Authority (Authority) and Westinghouse Electric Corporation (Westinghouse). The air quality plan approval, issued pursuant to the Air Pollution Control Act, the Act of January 8, 1960, P.L. 2119, as amended, 35 P.S. §4001 *et seq.* (Air Pollution Control Act), and §1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 (Administrative Code), authorized the construction of a municipal waste incinerator resource recovery facility in Manchester Township, York County. The Authority is the owner of the facility; Westinghouse will construct and operate it. The Authority defended the issuance of the appeal on behalf of the permittees.

ROBBI's notice of appeal asserted that the air quality plan approval failed to adequately address a number of issues, including certain environmental ramifications of operating the incinerator, the necessity of obtaining pre-operation data about the surrounding community and environment as a baseline for future monitoring, and compliance with Article I, Section 27, of the Pennsylvania Constitution and §§ 2 and 6.1 of the Air Pollution Control Act, 35 P.S. §§4002 and 4006.1.

On September 11-15 and 20-21, 1989, the Board conducted a hearing on the merits. ROBBI filed its post-hearing brief on January 4, 1990. The Authority filed a reply brief on January 31, 1990. The Department, meanwhile, filed its post-hearing brief on February 14, 1990. Any issues not raised in the post-hearing briefs are deemed waived. Lucky Strike Coal Co. and Louis J. Beltrami v. Department of Environmental Resources, 119 Pa. Cmwlth. 440, 546 A.2d 447 (1988).

ROBBI raises a number of issues in its post-hearing brief. According to ROBBI, the Department violated 25 Pa. Code §127.1(1) when it issued the plan approval because none of the documents submitted as part of the plan approval process balanced the proposed benefits against the environmental harm. It also challenges the Department's failure to seriously review the health risk assessment, as well as the assumptions and conclusions of the assessment. ROBBI further challenges the Department's failure to require a top-down analysis of NO_x emission controls and the absence of an emissions limit for NO_x in the plan approval. Finally, ROBBI asserts that the Department abused its discretion in not requiring BAT with regard to NO_x controls, furnace technology, and minimum attainable emissions limits. The post-hearing briefs of the Authority and Department counter each of ROBBI's arguments, concluding that the Department did not abuse its discretion by issuing the plan approval to the Authority.

The record consists of a transcript of 1,617 pages and 51 exhibits. After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. Appellant is ROBBI, an association of persons opposed to the issuance of the air quality plan approval to the Authority. (Notice of Appeal)

2. Appellee is the Department, the administrative agency of the Commonwealth of Pennsylvania vested with the duty and authority to administer the Air Pollution Control Act; §1917-A of the Administrative Code; and the rules and regulations adopted thereunder.

3. Permittees are the Authority, a municipal authority that owns the resource recovery facility, and Westinghouse, a corporation which shall construct and operate it. (Ex. Y-1)[1]

4. On May 13, 1987, the Department issued an air quality plan approval to the Authority authorizing the construction of a 1,344 ton per day municipal waste incineration resource recovery facility in Manchester Township, York County. (Ex. Y-1)

5. The resource recovery facility is a mass-burn facility for processing municipal waste and the generation of electricity. (Ex. Y-3, Y-7)

6. The facility will utilize three Westinghouse/O'Connor rotary combustors. (Ex. Y-1)

7. Hartwin Weiss, Chief of Engineering Services for the Air Quality Control Program at the Department's Harrisburg Regional Office, coordinated the review of the air quality plan approval application, assigning various portions of the application to appropriate members of his staff for review. (N.T. 620, 628-633)

8. Weiss has a Bachelor of Science in electrical engineering and, at the time the plan approval was issued, had over 16 years experience with the Department's Air Quality Control Program. (N.T. 622-623; Ex. Y-12)

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[1] Exhibits from ROBBI are noted as "Ex. Y-___" and those from the Authority as "Ex. R-___." The notes of testimony, meanwhile, are referred to as "N.T. ___."

9. After finishing a completeness review of the plan approval application, Mr. Weiss assigned the technical review of the plan approval application to Ronald Davis, Air Pollution Control Engineer III at the Harrisburg Regional Office; Mr. Weiss chose Mr. Davis because of the latter's qualifications and experience with combustion units and large boilers. (N.T. 628, 633, 866, 871-872; Ex. Y-8)

10. Mr. Weiss kept himself informed of the progress of Davis' review. (N.T. 869)

11. Mr. Davis made a preliminary determination, with which Mr. Weiss concurred, that the Authority had demonstrated to the satisfaction of the Department that the facility would be able to consistently meet the requirements set forth in the applicable regulations and guidelines. (Ex. Y-7, at 18-19)

12. On January 12, 1987, the Department held a public hearing on the permit application. (N.T. 820-821; Ex. Y-8)

13. The Department received numerous comments on the application. (N.T. 821; Ex. R-7)

14. As a result of the comments received at the public hearing and to fulfill the Department's obligations under Article I, Section 27, of the Pennsylvania Constitution, Mr. Weiss informed the Authority that the Department was requesting a multiple pathway health risk assessment to evaluate the effects of exposure from other pathways in addition to inhalation. (N.T. 824, 827, 916-917; Ex. Y-8, at p.1, Y-20, at ¶ 1, 2)

15. Based upon a review of the plan approval application and the supplemental information the Department requested, including the multiple pathway health risk assessment, Mr. Weiss, on April 16, 1987, recommended to the Harrisburg Regional Air Pollution Control Engineer that the Department

issue the plan approval for construction of the facility. (N.T. 831-833; Ex. Y-8, at p.2)

16. The Harrisburg Regional Air Pollution Control Engineer, Leif Ericson, issued the plan approval to the Authority on May 13, 1987. (Ex. Y-1)

THE HEALTH RISK ASSESSMENT

17. A multiple pathway health risk assessment is a study which analyzes the health risk posed by exposure to stack emissions from a number of different pathways, such as skin contact, ingestion, and inhalation. (N.T. 1137; Ex. Y-5, at p.1-1)

18. As part of its second addendum to the plan approval application, the Authority submitted a health risk assessment which only evaluated the risk posed by inhalation. (N.T. 641; Ex. Y-4)

19. The Authority submitted a draft of the multiple pathway health risk assessment, which was reviewed by the Department in early April, 1987. (N.T. 620, 628-633, 931-932)

20. The Department received the final version of the multiple pathway health risk assessment on April 13, 1987. (N.T. 832, 931; Ex. Y-8, at p.2)

21. The Authority contracted with Malcolm Pirnie, Inc. (Malcolm Pirnie), a consulting firm, to perform the multiple pathway health risk assessment. (Ex. Y-5)

22. The multiple pathway health risk assessment was prepared by Malcolm Pirnie under the supervision of its principal toxicologist, Dr. Richard Califano. (N.T. 1133)

23. Dr. Califano has a Bachelor of Science in biology, a Master of Science in biology, and a Ph.D. in biology and environmental health science. (N.T. 1114-1116; Ex. Y-11)

24. Dr. Califano has received training or instruction in toxicology and health risk assessment. (N.T. 1114-1116; Ex. Y-11)

25. Dr. Califano has conducted or supervised a number of health risk assessments for resource recovery projects. (N.T. 1124-1128)

26. The Authority contracted with Clement Associates, Inc. (Clement Associates) to peer review the multiple pathway health risk assessment. (Ex. Y-5)

27. From an inventory of potential emissions, Malcolm Pirnie and the Department compiled a list of all those chemicals which could exert an influence on public health. (Ex. Y-5, at p.3-1)

28. Two types of chemicals appeared in the inventory:

(1) systemic toxins - substances which are not carcinogens but which are poisonous; and

(2) possible carcinogens - substances which the United States Environmental Protection Agency (EPA) has determined may cause cancer. (Ex. Y-5, at p.3-1)

29. Emission rates, adjusted for the anticipated waste feed, were estimated based on data from a number of similarly designed, operating plants, and the facility was assumed to be operating at 100% capacity for the entire 70 year modeling period. (Ex. Y-5, at pp.2-5, 4-3)

30. The facility is actually expected to operate at only 82% of its capacity. (N.T. 1164-1165)

31. To predict how emissions from the stack would migrate in the surrounding environment, Malcolm Pirnie employed two computer simulation models:

(1) deposition modeling was used to determine the amount of emissions that would settle to the surface of the ground.

(2) dispersion modeling was used to calculate the ambient concentrations of emissions in the air at ground level. (N.T. 1147-1148. 1328-1329; Ex. Y-5)

32. Both the deposition and dispersion modeling were conducted using the EPA's UNAMAP-6 version of the Industrial Source Complex Standard Terrain Model (the "ISC" model). (N.T. 1205; Ex. Y-5, at p.1-2)

33. The projections concerning the deposition of emissions were calculated for the area within a 5 kilometer (km) radius of the proposed source. (N.T. 1255; Y-5, at p.4-3)

34. Some contaminants will travel more than 5 km from the facility, but Malcolm Pirnie had determined earlier, in the inhalation health risk assessment, that the maximum point of impact lay only 1.5 km southeast of the facility. (N.T. 1216-1217, 1255)

35. There is no standard accepted procedure for setting the radius to be used in the modeling. (N.T. 1267)

36. The model did not consider "wet deposition," the influence precipitation might exert on deposition rates. (N.T. 1183)

37. To determine what effect the emissions would have on human health, the assessment calculated the amount of exposure a person would suffer were he to remain at the point of maximum impact for a 70 year period. (Ex. Y-5, at p.5-1)

38. The hypothetical person assumed to remain at the point of maximum impact for 70 years was designated the "maximally exposed individual." (Ex. Y-5, at p.5-1)

39. Contamination from emissions was calculated for three pathways: skin contact, inhalation, and ingestion. (Ex. Y-5, at pp.5-1, 5-2)

40. To project the levels of contamination in food tainted by emissions, all foodstuffs produced within the 5-km study area were considered to have the same contamination as foodstuffs produced at the farm in the 5-km study area, nearest to the maximum point of impact. (N.T. 1218-1220)

41. Foodstuffs produced more than 5 kms from the proposed site were assumed to have been uncontaminated. (N.T. 1216-1220)

42. To calculate the amount of contamination received by the maximally exposed individual from eating tainted food, food produced within the 5-km study area was divided into four broad categories: (1) dairy products, (2) beef products, (3) fish, and (4) staple crops and produce. (Ex. Y-5, at p.5-10)

43. Each category of food was weighted according to the level of contamination it contained, the prevalence of that category in the typical adult diet, and the proportion of the diet of that category which comes from outside the 5-km study area. (Ex. Y-5, at p.5-10)

44. The total exposure to each chemical was calculated by summing the exposure to that chemical resulting from the inhalation, ingestion, and transdermal pathways. (Ex. Y-5, at pp.5-13, 5-14)

A. **The Deposition Velocity**

45. The assessment used .2 centimeter per second (cm/s) as the deposition velocity; the figure was derived using the ISC model. (N.T. 1328; Ex. Y-5, at pp.4-1 to 4-6)

46. Dr. Paul Connet has a bachelor's degree in natural sciences, a doctoral degree in chemistry, and has conducted a year-and-a-half of research into the biochemistry of metal toxicity and carcinogenicity. (N.T. 6-9)

47. Dr. Connet has received no instruction or training in toxicology, in evaluating air pollution, or pertaining to health risk assessments. (N.T. 45-47)

48. Dr. Connet's knowledge about resource recovery facilities and their emissions is almost exclusively the result of his study of the literature in the field. (N.T. 54-55)

49. Dr. Connet has never reached a favorable conclusion regarding any resource recovery facility. (N.T. 338)

50. Dr. Connet testified that measurements taken in the field suggest that the ISC model does not accurately predict the behavior of small particles in the field. (N.T. 119-121)

51. Dr. Connet testified that the Sehmel and Hodgson model would have been a better choice, but he argued that the Sehmel and Hodgson model also failed to predict the behavior of small particles in the field. (N.T. 119-121)

52. Dr. Connet also testified that, until more precise data exists, the deposition velocity should be "a conservative default value" rather than a figure derived using either the ISC or the Sehmel and Hodgson model. (N.T. 120)

53. Dr. Connet testified that the deposition velocity used in the assessment should have been 1 cm/s because that figure was a "conservative" default value and because at least three other authorities--Moghissi, Chamberlain, and Olie--had derived the same figure. (N.T. 120; Ex. R-4, at p.2081, Ex. R-5)

54. The ISC model was the only deposition model approved by the EPA and was state-of-the-art in early 1987, when the Department issued the plan approval. (N.T. 1204, 1329-30, 1518)

55. The multiple pathway health risk assessment prepared by Malcolm Pirnie was peer reviewed by ICF Clement Associates. (N.T. 1317; Ex. Y-5, at "Acknowledgments")

56. Dr. Paul Chrostowski, Director of Research and Development for ICF Clements Associates, was principally responsible for the peer review of the assessment. (N.T. 1274, 1317; Ex. Y-9)

57. Dr. Chrostowski has received a Bachelor of Science in chemistry, a Master of Science in environmental science, a Ph.D. in environmental engineering and science, and has received training in toxicology and health risk assessment. (N.T. 1275; Ex. Y-9)

58. Dr. Chrostowski has served as a consultant for organizations opposed to a resource recovery facility and, in other situations, for organizations in favor of such a facility. (N.T. 1283-1289)

59. Of the 19 health risk assessments Dr Chrostowski reviewed through 1988, 15 used the ISC model to calculate deposition and air dispersion. (N.T. 1330-1331)

60. During the course of developing an implementation plan to comply with the Federal Clean Air Act, Puerto Rico conducted a study to determine how accurately the ISC model predicted the behavior of particles of various sizes. (N.T. 1338-1339)

61. The behavior of the particles in Puerto Rico's field test was very close to that predicted by the ISC model over the full spectrum of particle size. (N.T. 1339-1340)

62. Puerto Rico adopted the ISC model as a predictive tool in late 1988 after the field test. (N.T. 1339-1340)

63. The Sehmel and Hodgson model was not available at the time the assessment was prepared or approved. (N.T. 1333)

64. The Sehmel and Hodgson model was not actually run here but the typical deposition velocity obtained when the Sehmel and Hodgson model is run falls between .01 cm/s to .5 cm/s. (N.T. 1332, 1350)

65. The scientific papers written about deposition velocity are multitudinous and varied. (N.T. 1440)

66. The Moghissi, Chamberlain, and Olie studies that Connet relied upon when selecting 1 cm/s as the default value for deposition velocity are problematic:

(1) Moghissi selected the value for particulates in general, not specifically for emissions from resource recovery plants. (N.T. 1444-45);

(2) The 5-micron particles used in Chamberlain's study are considerably larger than those emitted from state-of-the-art resource recovery facilities and, therefore, Chamberlain's particles would have higher deposition velocities than those from facilities like the one the Authority proposes here. (N.T. 1444-1445; Ex. R-4 at 2081, Y-24);

(3) Olie selected the 1 cm/s figure as a default value, without measurements of the particle size distribution or mathematical modeling of that distribution. (N.T. 1445)

67. Dr. Maurice Trichon *et al.* authored a paper, entitled "The Impact of the Utilization of Best Available Technology at Resource Recovery Facilities on Human Exposure to 2, 3, 7, 8 - TCDD via Inhalation and Ingestion of Cow's Milk," which evaluated the 1 cm/s default value proposed by Connet and Webster. (Ex. Y-24)

68. The work of Dr. Trichon and the other authors of the paper is generally recognized as authoritative and reliable. (N.T. 1345)

69. Dr. Trichon *et al.* criticized Dr. Connet and Mr. Webster's proposed default value as having been based on studies of emissions from older facilities, which emit larger particles than more modern ones. (N.T. 1346-1350; Ex. Y-24, at 338-341)

B. **Contamination Received through the Food Chain**

70. Four dairies lay within the 5-km study area surrounding the proposed site of the facility. (N.T. 1233)

71. Using the deposition model, the assessment selected the dairy farm with the highest predicted deposition outfall and assumed that all milk from the study area would have the same level of contamination as milk from the cows on this dairy. (N.T. 1238)

72. The contaminant concentration in the cows' fodder was determined by calculating the amount of deposition each of the fodder's constituent crops would intercept. (Ex. Y-5, at p.4-22)

73. The concentration of contaminants in the cows' milk, meanwhile, was calculated from the concentration of contaminants in the fodder. (Ex. Y-5, at pp.4-22 to 4-24)

74. All the dairy farms in the study area sent their milk to one processing center, where their milk collectively accounted for 8 percent of the milk processed. (N.T. 1233-1234)

75. The assessment assumed 15 percent of the milk products leaving the processing center came from milk from the four dairies in the study area. (N.T. 1233-1234)

76. The assessment projected that maximally exposed individuals would consume dairy products from the processing center handling the tainted milk only 50 percent of the time; no field basis existed for selecting this figure. (N.T. 1235)

77. The assessment assumed that all of the contaminated milk passed through the processing center and that none was consumed directly. (N.T. 1232)

78. Using the information it derived about the contaminant concentration of the milk after it left the processing center, and about how frequently maximally exposed individuals consumed milk from the processing center handling tainted milk, together with EPA data on average daily milk consumption, the assessment calculated the amount of contamination the maximally exposed individual would receive from the tainted milk. (Ex. Y-5, at p.5-12)

79. Dr. Connet testified that the assessment should have used a model proposed by Stevens and Gerbec to calculate the carcinogenic risk posed by the consumption of tainted milk, and that, if the assessment had used the Stevens and Gerbec model, the figure for the carcinogenic risk attributable to milk would have been 16 times higher. (N.T. 356-359)

80. Explaining how he arrived at the conclusion that the assessment's calculation of the health risk from milk was 16 times lower than it should have been, Dr. Connet testified:

> I want you to compare the kind of dose that this person is going to get. They are going to get a smaller inhalation dose, probably one-seventh of the inhalation dose, which isn't going to be very big any way, but they are going to get a hundred over 15 times a hundred over 50 times one kilogram, which is the assumption used in the Stevens and Gerbec for the farmer consuming their own dairy products, over .035.
>
> Now if we do those calculations out, 100 divided by 35, times two, divided by .35, we get 16.
>
> So this person here is going to get 16 times the ingestion of milk dose here.
>
> (N.T. 358)

81. Dr. Connet assumed that none of the contaminated milk was mixed with uncontaminated milk before consumption. (N.T. 183, 356-359)

82. The U.S. Department of Agriculture estimates that home-grown dairy products account for only 40% of the dairy products consumed by the average person on a farm. (N.T. 1262-1263)

83. The risk that a carcinogen will induce cancer is directly proportional to the amount of exposure to that carcinogen. (Ex. Y-5, at p.3-14)

84. When Dr. Connet calculated the extent to which an underestimation in the risk attributable to milk would affect the risk attributable to all foods, he testified, "I will assume that half of that ingestion done [the dose from all foodstuffs] is from milk." He gave no basis for that assumption. (N.T. 359)

C. **"Maximally Exposed Individual" v. "Population Risk"**

85. The carcinogenic risk reported in the assessment was expressed in terms of the "maximally exposed individual" rather than in terms of what Dr. Connet refers to as the "population risk." (Ex. Y-5)

86. Risk assessments that consider the carcinogenic exposure from contaminated food typically measure the risk in terms of the maximally exposed individual. (N.T. 151; Ex. R-6)

87. At the time of the plan approval, the literature in the field did not calculate the population risk from food contamination. (N.T. 151)

D. Other Aspects of the Health Risk

88. Mr. Thomas Webster received a Bachelor of Science degree in interdisciplinary science; his specialty was in bio-physics. (N.T. 692-693; Ex. R-1)

89. Mr. Webster had no formal training or instruction in toxicology or air pollution emissions. (N.T. 399-402)

90. Mr. Webster testified that the health risk assessment underestimated the health risk because it failed to consider the effects of contaminated breastmilk and assumed that individuals were not eating fish from ponds, but he could not say how much of an underestimation either resulted in. (N.T. 411, 413, 415)

91. Mr. Webster did not know whether a fish pond existed in the area affected by emissions. (N.T. 411)

92. The exposure to each contaminant that will result from facility emissions amounts to no more than three percent of the typical exposure to that contaminant received by a rural non-smoker. (N.T. 1182-1183; Ex. Y-28)

93. The total excess incremental cancer incidence for lifetime exposure to organics ranges from roughly three in one million to five in one hundred million. (Ex. Y-5, at pp. 6-2, 6-4, and 8-3)

94. The risk level associated with maximum ambient organic concentrations from the emissions would constitute up to 0.001 percent of the overall risk of cancer incidence in the U.S. population. (Ex. Y-5, at pp. 6-2 and 6-4)

95. The facility would create revenue by selling electricity generated during combustion to the local utility, Metropolitan Edison. (Ex. Y-3, §4.4, at p.4)

96. Revenue from the sale of electricity, as well as possible revenue from the export of steam, will be used to offset the costs of operating the facility, reducing the cost of solid waste disposal in York County. (Ex. Y-3, §4.4, at p.4)

97. At the time of the hearing, the Authority and Manchester Township were negotiating an agreement to provide compensation to the Township for serving as the host community for the facility. (Ex. Y-3, §4.4, at p.4)

98. Up to 50 permanent jobs will be created and $1.5 million in economic benefits will accrue to York County annually. (Ex. Y-3, §4.4, at pp.4-5)

99. The facility would stabilize local waste disposal costs and, since incineration reduces waste volume by 90 percent, diminish the need for landfill space. (Ex. Y-3, §4.4, at p.5)

100. An access road, and possibly a sewer line, to the facility will facilitate the development of industrially-zoned property adjacent to the proposed site. (Ex. Y-3, §4.4, at p.5)

101. Energy produced during waste combustion will reduce the demand for energy from other sources. (Ex. Y-3, §4.4, at p.5)

THE DEPARTMENT'S REVIEW OF THE HEALTH RISK ASSESSMENT

102. Mr. Weiss had received a draft copy of the multiple pathway health risk assessment by early April, 1987, and the draft was essentially the same as the final copy submitted on April 13. (N.T. 932)

103. Mr. Weiss received the final copy of the multiple pathway health risk assessment on April 13, 1987, and approved it on April 16, 1987, after taking only a few hours to review the document. (N.T. 931-932)

104. On March 2, 1987, the Department received an overview of the topics the multiple pathway health risk assessment would address, outlining

the chemicals and exposure pathways to be considered and the risk analysis to be performed. (N.T. 830-837; Ex. Y-22)

105. When Mr. Weiss received the final copy, he simply checked to see whether significant differences existed between it and the draft copy. (N.T. 931-932)

TOP-DOWN ANALYSIS

106. The Department did not require top-down analysis before issuing the plan approval at issue in this appeal. (N.T. 908)

107. The "top-down" analysis requirement is imposed by an EPA guidance document issued on June 26, 1987, more than a month after the Department issued the Authority's plan approval. (N.T. 543-546; Ex. Y-1)

108. Where applicants for prevention of significant deterioration (PSD) permits are required to conduct top-down analysis, they must--in any instance where the facility failed to use the most stringent control technology--justify why the facility cannot use that technology. (N.T. 502-504)

109. The June 26, 1987, EPA guidance document provides:

> In consideration of the needs for program stability and equity, [sic] the sources which have in good faith relied on pre-existing permitting regulations, this guidance does not apply to PSD and MSR permit proceedings for which as of June 26, 1987, final permits have already been issued.
>
> (N.T. 544-545)

ABSENCE OF A NO_x EMISSIONS LIMIT

110. The Department's August 19, 1986, BAT Guidance for municipal waste incineration resource recovery facilities, Ex. Y-2, represents the baseline for determining BACT under federal regulations. (N.T. 808, 809, 811)

111. At the time the plan approval was issued, the Department had insufficient data about NO_x emissions to derive a specific NO_x emissions limit for the Authority's facility. (N.T. 817, 906)

112. The Authority's plan approval does contain a continuous monitoring requirement for NO_x emissions, however. (Ex. Y-1, at condition 4(c))

113. The BAT Guidance does not contain an emissions limitation or monitoring requirement for NO_x. (Ex. Y-2)

114. The plan approval issued to the Authority does not contain a NO_x emissions limit. (N.T. 909; Ex. Y-1)

115. Test data submitted to the Department as part of the permit review process showed that emissions from similar facilities in Gallatin, Tennessee, and Kure City, Japan, averaged approximately 140 to 150 ppm NO_x (corrected to 7% O_2) and 100 to 160 ppm (corrected to 7% O_2), respectively. (N.T. 1002)

116. In materials submitted to the Department as part of the plan approval process, Westinghouse projected that, based on data collected from existing similar Westinghouse/O'Connor rotary combustors, the Authority's facility will be 135 ppm NO_x on average, with occasional peaks of up to 220 ppm. (N.T. 1042-1043, 1093; Ex. Y-7, at 5)

117. Recent data from operating O'Connor combustors produce NO_x emissions comparable to those Westinghouse projected for the Authority's facility: a Bay County, Florida, facility emits 150-180 ppm of NO_x, and a Dutchess County, New York, facility emits 100-120 ppm. (N.T. 1004-1005, 1102-1103)

118. The Department's current BAT Guidance establishes a 300 ppm limit on NO_x emissions. (N.T. 902, 954, 1102)

THE DE-NO_x CONTROLS, THE COMBUSTOR, AND THE EMISSIONS LIMITS

119. Mr. David Beachler is the manager of environmental and quality engineering at the Resource Energy System Division of Westinghouse. (N.T. 973)

120. Mr. Beachler holds a Bachelor of Science degree in chemical engineering and a Master of Engineering Science degree. (Ex. Y-10)

121. Mr. Beachler has considerable experience in the design and operation of resource recovery facilities which employ the Westinghouse/O'Connor rotary combustor. (N.T. 1001-1005)

122. Mr. Thomas Germine is a professional, licensed engineer and an attorney; he received a bachelor's degree in physics and a master's degree in fluid mechanics. (N.T. 480-483)

123. The Westinghouse/O'Connor rotary combustors have a furnace configuration which differs from the reciprocating grate models used in the plants Mr. Germine has been associated with. (N.T. 486)

124. Thermal de-NO_x controls remove nitrogen oxide from emissions by injecting ammonia into flue gas from the combustor; the ammonia combines with the nitrogen oxide in the heated gas, producing nitrogen and water. (N.T. 505, 537, 995)

125. At the time the Department issued the plan approval to the Authority, several proposed waste incineration facilities in the United States incorporated thermal de-NO_x controls into their designs, but only one, a resource recovery facility in Commerce, California, was actually operating. (N.T. 555, 997; Ex. Y-3, at p.3-27)

126. The Commerce facility started operating in February of 1987, but testing of the de-NO_x system did not begin until May 25, 1987, 12 days after the Department issued the Authority's plan approval. (N.T. 555, 998, 1102)

127. At the time of the plan approval decision, no data existed on the efficacy of thermal de-NO_x controls on emissions from resource recovery facilities. (N.T. 846-847, 950-951)

128. Any ammonia that does not react with NO_x in the flue gas may react to form ammonium chloride which could color the emissions plume and result in an opacity violation. (N.T. 997)

129. An ammonia storage tank, necessary to store the ammonia used in the de-NO_x system, would increase the potential health and safety risk of those working in, or living near, the facility. (N.T. 998)

130. If, in a thermal de-NO_x system, the ammonia is not injected at the proper temperature or location, ammonia--a pollutant itself--may escape from the stack in the emissions. (N.T. 997)

131. Based upon their own experience, Weiss and the other Department reviewers felt that the Authority could achieve even lower emissions for certain substances than those provided in the guidance document. (N.T. 896)

132. The Department reviewers directed the Authority to conduct additional research and provide additional data to show why the Authority should not be subject to a more stringent standard. (N.T. 896)

133. On the basis of this additional data, the Department reviewers concluded that the facility could consistently achieve lower levels of emissions. (N.T. 896-897)

134. The Department reviewers informed the Authority that they had concluded the facility could consistently achieve lower emissions levels and informed the Authority to submit new figures for the facility's emissions limits. (N.T. 896-898)

135. The Department reviewers did not, themselves, propose specific numbers; instead, they waited for the Authority to submit its revised

emissions figures and then checked those figures against the emissions data. (N.T. 897-898)

136. The Department's reviewers concluded that the revised emissions figures the Authority proposed comported with the emissions data, so the Department fixed those figures as the emissions limits. (N.T. 897)

DISCUSSION

Under 25 Pa. Code §21.101(c)(3), a third party appealing the Department's issuance of a permit has the burden of proof. Snyder Township Residents for Adequate Water Supplies v. DER and Doan Mining Company, 1988 EHB 1202. The scope of the Board's review is to determine whether the Department's action was an abuse of discretion or an arbitrary exercise of its duties. Warren Sand and Gravel v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975). Our review is *de novo*, and where the Department has taken discretionary action, such as the issuance of a plan approval under the Air Pollution Control Act, we may substitute our discretion if we determine that the Department abused its discretion. Rochez Bros., Inc. v. DER, 18 Pa. Cmwlth. 137, 334 A.2d 790 (1975). Accordingly, ROBBI bears the burden of establishing that the Department's issuance of the plan approval to the Authority constituted an abuse of discretion or an arbitrary exercise of the Department's authority. As with our Findings of Fact, our discussion will be divided into sub-sections, each addressing issues ROBBI raised in its post-hearing brief.

DID THE DEPARTMENT VIOLATE 25 PA. CODE §127.1(1) WHEN IT ISSUED THE PLAN APPROVAL?

ROBBI maintains that the Department violated 25 Pa. Code §127.1(1) when it issued the plan approval because none of the documents submitted as part of the plan approval process balanced the proposed benefits against the environmental harm, and because the health risk reported in the assessment was

substantially underestimated. Our task in reviewing the Department's grant of the plan approval is to determine whether, at the time of the issuance of the plan approval, all applicable requirements were satisfied. Wolfe Dye and Bleach Works v. DER, 1978 EHB 215.

At the time the Department issued the plan approval, §127.1 provided:

> [N]ew sources shall not be established unless it is affirmatively demonstrated that:
>
> (1) the establishment of such sources is justifiable as a result of necessary economic or social development....[2]

According to ROBBI, §127.1 codified the balancing test set forth in Payne v. Kassab, 11 Pa. Cmwlth. 14, 312 A.2d 86 (1973), aff'd, 468 Pa. 226, 361 A.2d 263 (1976). The balancing test was the third prong of the three-pronged standard enunciated in Payne to resolve conflicts between environmental concerns and other factors under Article I, §27, of the Pennsylvania Constitution. Under that three-fold standard:

> 1) There must be compliance with all statutes and regulations applicable to the protection of the Commonwealth's natural resources;
>
> 2) There must be a reasonable effort to reduce environmental incursion to a minimum; and
>
> 3) The environmental harm which will result from the challenged decision must not so clearly outweigh the benefit to be derived that to proceed further would be an abuse of discretion.

ROBBI cites no legal authority to support its assertion that 25 Pa.

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[2] The regulations have since been amended and this provision rescinded. See 19 Pa.Bull. 1169, 1171 (March 18, 1989).

Code §127.1 codifies the third prong of the Payne standard. However, even assuming §127.1 did incorporate that balancing test, the Department did not violate that test here.

ROBBI maintains that the Department abused its discretion because none of the documents submitted by the Authority as part of the plan approval process balanced the environmental harm against the proposed benefits, and because the health risk assessment underestimated the actual health risk. Even assuming ROBBI adduced adequate evidence to support both assertions, however, ROBBI would not have established that the Department abused its discretion when balancing the harms and benefits. ROBBI's first assertion, that the documents submitted as part of the plan approval application failed to balance the harms and benefits, is insufficient because the Department, not the applicant, is the one obligated to weigh the harms against the benefits. A plan approval application need not balance the harms against the benefits. So long as the application contains sufficient information for the Department to ascertain the prospective benefits and environmental harms, the Department can weigh the two itself.

ROBBI's second assertion, that the Department abused its discretion under the balancing test because the health risk was substantially underestimated, suffers from a related problem. ROBBI had to do more than just establish that the Department underestimated the environmental harm. Under Payne, ROBBI had to prove that the environmental harm "clearly outweighed" the project's benefits. Even if we were to conclude that the health risk had been underestimated, it does not necessarily follow that the environmental harm clearly outweighs the benefits.

Furthermore, even if we did substitute our discretion for that of the Department, and conduct the balancing test, the environmental harm here does not clearly outweigh the benefits.

To balance the environmental harm against the benefits, we must first ascertain what the harms and benefits are. The only harm or benefit which remains a point of contention between the parties is the extent of the health risk the facility will pose. ROBBI asserts that the Authority's multiple pathway health risk assessment substantially underestimated the health risk; the Authority and Department argue it did not. Before delving into this issue in more detail, some background about the Authority's health risk assessment may prove helpful.

The health risk assessment at issue here is a multiple pathway health risk assessment, a study which analyzes the health risk posed by exposure to stack emissions from a number of different pathways, such as skin contact, ingestion, and inhalation (N.T. 1137; Ex. Y-5, at p.1-1). As part of its second addendum to the plan approval application, the Authority had submitted an assessment which dealt solely with the risk posed by inhalation (N.T. 641; Ex. Y-4). In light of comments received about the assessment and the need to balance the benefits of the facility against the environmental harms, the Department requested a multiple pathway health risk assessment from the Authority (N.T. 824, 827, 916-917; Ex. Y-20). The Authority submitted a draft of the multiple pathway health risk assessment, which was reviewed by the Department in early April, 1987 (N.T. 620, 628-633, 931-932). The Department received the final version of the multiple pathway health risk assessment on April 13, 1987 (N.T. 832, 931; Ex. Y-8, at p.2).

The multiple pathway health risk assessment was prepared by Malcolm Pirnie under the supervision of its principal toxicologist, Dr. Richard

Califano (N.T. 1133). From an inventory of potential emissions, Malcolm Pirnie and the Department compiled a list of all those chemicals which could exert an influence on public health (Ex. Y-5, at p.3-1). Two types of chemicals appeared on the list: (1) "systemic toxins," substances which are not carcinogens but are poisonous, and (2) "possible carcinogens," substances which EPA has determined may cause cancer (Ex. Y-5, at p.3-1). Emission rates, adjusted for the anticipated waste feed, were estimated based on data from a number of similarly designed, operating plants, and the facility was assumed to be operating at 100 percent capacity for the entire 70 year modeling period (Ex. Y-5, at pp.2-5, 4-3). The facility is actually expected to operate at only 82 percent of its capacity (N.T. 1164-1165).

To predict how emissions from the stack would migrate in the surrounding environment, Malcolm Pirnie employed two computer simulation models (Ex. Y-5, at p.4-1). Deposition modeling was used to determine the amount of emissions that would settle to the surface of the ground (N.T. 1147-1148, 1328-1329; Ex. Y-5, at p.4-1). Dispersion modeling, meanwhile, was used to calculate the ambient concentrations of emissions in the air at ground level (N.T. 447-1148, 1328-1329; Ex. Y-5, at p.4-2). Both the deposition and the dispersion modeling were conducted using the EPA's UNAMAP-6 version of the ISC model (N.T. 1205; Ex. Y-5, at p.1-2).

The projections concerning the deposition of emissions were calculated for the area within a 5-km radius of the proposed source (N.T. 1255; Ex. Y-5, at p.4-3). Some contaminants will travel more than 5 km from the facility, but Malcolm Pirnie had determined earlier, in the inhalation health risk assessment, that the maximum point of impact lay only 1.5 km

southeast of the proposed facility, well within the 5-km study area (N.T. 1216-1217, 1255). Furthermore, there is no standard accepted procedure for setting the radius to be used in the modeling (N.T. 1267).

The model did not consider "wet deposition," the influence precipitation might have on deposition rates (N.T. 1183).

For purposes of evaluating what effect the emissions would have on human health, the assessment calculated the amount of exposure a person would suffer were he to remain at the point of maximum impact for a 70 year period (Ex. Y-5, at p.5-1). This hypothetical person was designated the "maximally exposed individual" (N.T. 1475-1477). Contamination from emissions was calculated for three pathways: skin contact, inhalation, and ingestion (Ex. Y-5, at pp.5-1, 5-2).

Exposure through ingestion occurs from the incidental ingestion of emissions particles in soil and dust and from the consumption of contaminated food (Ex. Y-5, at p.5-6). To project the levels of contamination in food tainted by emissions, all foodstuffs produced within the 5-km study radius were considered to have the same contamination as foodstuffs produced at the farm in the 5-km study area, nearest to the maximum point of impact (N.T. 1218-1220). Foodstuffs produced more than 5 kms from the proposed site, meanwhile were assumed to have been uncontaminated (N.T. 1216-1220). To calculate the amount of contamination received by the maximally exposed individual from eating tainted food, food produced within the 5-km study area was divided into four broad categories: dairy products, beef products, fish, and, last, staple crops and produce (Ex. Y-5, at p.5-10). Each was weighted according to the level of contamination it contained, the prevalence of that category in the typical adult diet, and the proportion of the diet of that category which comes from outside the 5-km study area (Ex. Y-5, at p.5-10).

The total exposure to each chemical was calculated by summing the exposure to that chemical resulting from the inhalation, ingestion, and transdermal pathways (Ex. Y-5, at pp. 5-13, 5-14).

During the course of its case-in-chief, ROBBI adduced testimony from two expert witnesses--Dr. Paul Connet and Mr. Thomas Webster--who testified that shortcomings in the assessment's calculation of the carcinogenic risk resulted in a substantial underestimation of the overall health risk. According to Connet, the assessment underestimated the carcinogenic health risk because it:

A) utilized a deposition velocity of .2 cm/s derived using the ISC model, rather than a default value of 1.0 cm/s (N.T. 119-121, 186-188);

B) underestimated the amount of exposure which occurs through the food chain by a factor of 16 (N.T. 361);

C) expressed the health risk in terms of a "maximally exposed individual" rather than the "exported risk" (N.T. 151-156, 184-186);

D) used the ISC model, which is inappropriate for particles the size of incinerator fly ash (N.T. 119, 427-429; Ex. R-5);

E) assumed that dioxin is distributed on particles in proportion to particle weight rather than according to the amount of surface area (N.T. 166-169, 171-172); and

F) failed to account for enhanced deposition of fallout during precipitation (N.T. 164, 376).

Webster agreed with Connet's testimony (N.T. 410). He did, however, add two other reasons why he felt the assessment underestimated the risk:

A) the assessment did not consider the effects of contaminated breastmilk (N.T. 411, 414-416, 447); and

B) the assessment used fish from a creek, rather than fish from a pond, when calculating carcinogenic intake (N.T. 411-414).

We shall examine these assertions separately below.

A. **The Deposition Velocity**

The first objection to the health risk assessment pertains to the figure selected as the deposition velocity. The assessment used the value of .2 cm/s, which was derived using the ISC model (N.T. 1328; Ex. Y-5, at pp.4-1 to 4-6). The risk assessment employed the ISC model for two purposes: dispersion modeling (calculating the ambient concentration of a given contaminant at a particular point) and deposition modeling (calculating the amount of a contaminant deposited from the airplume onto the ground) (N.T. 1328-1329). For the moment, we are concerned only with the use of the model to calculate deposition.

According to Connet, field measurements suggest that the ISC model does not accurately predict the behavior of small particles in the field (N.T. 119-121). While Connet testified that another model, the Sehmel and Hodgson model, was sound in theory and a better choice than the ISC model, he added that the Sehmel and Hodgson model also failed to predict the behavior of small particles in the field (N.T. 119-121). He maintains that, until more precise data exists, the deposition velocity should be "a conservative default value" rather than a figure derived using either model (N.T. 120). Together with Webster, Connet recommends using a default value of 1 cm/s because that value is "conservative" and because at least three other authorities selected the same figure (N.T. 120; Ex. R-5).

The Authority, meanwhile, adduced testimony from two of its own experts which tended to support the .2 cm/s deposition velocity that the Authority's consultants used in the assessment and had derived using the ISC

model. The ISC model, for instance, was the only deposition model approved by the EPA and was state-of-the-art in early 1987, when the Department issued the plan approval (N.T. 1204, 1329-1330, 1518). Of the 19 health risk assessments one of the experts--Dr. Chrostowski--reviewed through 1988, 15 used the ISC model to calculate deposition and air dispersion (N.T. 1330-1331).

Furthermore, field data from a study in Puerto Rico validate the use of the ISC model. During the course of developing its implementation plan to comply with the Federal Clean Air Act, Puerto Rico conducted a study to determine how closely the ISC model predicted the behavior of particles of various sizes in the field (N.T. 1338-1339). The actual results of the field test fell very close to those predicted by the ISC model over the full spectrum of particle sizes, and Puerto Rico adopted the ISC model as a predictive tool in late 1988 (N.T. 1339-1340).

While ROBBI contends that the assessment should have utilized the Sehmel and Hodgson model--not the ISC model--if the assessment did not use a default value, the Sehmel and Hodgson model was not available at the time the assessment was prepared or approved (N.T. 1333). Furthermore, while the Sehmel and Hodgson model was not actually run here, the .2 cm/s value derived using the ISC model falls within the range typically obtained when the Sehmel and Hodgson model is used, from .01 to .5 cm/s (N.T. 1332, 1350). The 1 cm/s default value proposed by Webster and Connet, by contrast, does not fall within these values.

There are some other problems with the 1 cm/s default value. Connet and Webster selected 1 cm/s as their default value because they felt it was "conservative" and because at least three other authorities--Moghissi, Chamberlain, and Olie--had derived the same figure (N.T. 120; Ex. R-4, at p.2081, Ex. R-5). "Conservative" assumptions should be made in the absence of

adequate data, but the data base on deposition velocity is far from inadequate: the scientific papers written about deposition velocity are multitudinous and varied (N.T. 1440). Furthermore, it appears that conditions in the Moghissi, Chamberlain, and Olie studies differed in material respects from the conditions here. Moghissi selected the value of 1 cm/s for particulates in general, not specifically for emissions from resource recovery plants (N.T. 1444-1445). The 5 micron particles used to derive Chamberlain's value are considerably larger than those emitted from state-of-the-art resource recovery facilities, and, therefore, Chamberlain's particles would have higher deposition velocities than those from facilities like the one the Authority proposes here (N.T. 1444-1445; Ex. R-4 at 1081, Ex. Y-24). Olie, meanwhile, selected the 1 cm/s figure as a default value, without measurements of the particle size distribution or mathematical modeling of that distribution (N.T. 1445). At least one authority in the field has criticized Connet and Webster's proposed default value as having been based on studies of emissions from older facilities, which emit larger particles than more modern ones (N.T. 1346-1350; Ex. Y-24, at 338-341).

In light of the foregoing, ROBBI has not established that the default value it proposes was more reasonable than the value the Authority derived using the ISC model.

B. <u>Contamination Received through the Food Chain</u>

Connet testified that the amount of contamination that maximally exposed individuals receive from food is 16 times higher than the amount

reported in the assessment because the assessment underestimated the contamination resulting from consuming dairy products by a factor of 16 (N.T. 356-361).[3]

Before delving into Connet's criticism in more detail, it is necessary to outline the procedure used in the assessment to calculate the exposure to carcinogens which results from consuming milk products. The carcinogenic exposure from milk was calculated in four steps. The first was to ascertain the concentration of contaminants in the milk produced by cows in the outfall area. Four dairies lay within the 5-km study area surrounding the proposed site of the facility (N.T. 1233). Using the deposition model, the dairy farm with the highest predicted deposition outfall was selected, and it was assumed that all milk from the study area would have the same level of contamination as milk from the cows on this dairy (N.T. 1238). The contaminant concentration in the cows' fodder was determined by calculating the amount of deposition each of the fodder's constituent crops would intercept as the crops grew (Ex. Y-5, at p.4-22). The concentration of contaminants in the cows' milk, meanwhile, was calculated from the concentration of contaminants in the fodder (Ex. Y-5, at pp.4-22 to 4-24).

The second step was to calculate the contaminant concentration of the milk after it left the processing centers. All the dairy farms in the study area sent their milk to one processing center, where their milk collectively accounted for eight percent of the milk processed (N.T. 1233-1234). For the

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[3] Connet never explains why it necessarily follows that a sixteen-fold underestimation in the carcinogenic risk from milk products leads to a sixteen-fold underestimation in the carcinogenic risk from all foodstuffs. If--as Connet alludes elsewhere in his testimony--individuals are exposed to carcinogens in foods other than milk, then a sixteen-fold underestimation in the amount of exposure from milk products would result in less than a sixteen-fold underestimation in the amount of exposure from all foodstuffs (N.T. 359-360).

purposes of the assessment, however, 15 percent--not eight percent--of the milk products leaving the processing center were assumed to have come from milk from the dairies in the study area (N.T. 1233-1234).

The third step was to project how frequently the maximally exposed individuals consumed milk from processing centers handling contaminated milk as opposed to milk from other sources. The assessment projected that the maximally exposed individuals would consume dairy products from the processing center handling contaminated milk only 50 percent of the time (N.T. 1235). No field basis existed for selecting this figure (N.T. 1235).[4] Furthermore, the assessment assumed that all of the contaminated milk passed through the processing center and none was consumed directly (N.T. 1232).

In the fourth step, information generated from the second and third steps was used, together with EPA figures for average daily milk consumption, to calculate the amount of contamination the maximally exposed individual would receive from milk tainted by the facility's emissions (Ex. Y-5, at p.5-12). In other words, having ascertained the contaminant concentration in the milk consumed, the assessment multiplied that figure by the average amount of milk consumed to derive the amount of exposure to contaminants attributable to eating milk products (Ex. Y-5, at p.5-12).

Connet disagreed with the assessment's methodology. He argued that a different model, one proposed by Stevens and Gerbec, should have been used

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[4] While this arbitrary 50 percent reduction is disconcerting in any context, the effects of the reduction here are minimal. In the preceding step, the Authority assumed that 15 percent of the milk entering the processing center was contaminated when the actual figure was eight percent. That aspect of the assessment would have approximately doubled the contamination calculated but for the 50 percent reduction in this step. Taken together, the two assumptions roughly cancel each other out.

instead, and that, if it had, the figure for the carcinogenic risk posed by milk products would have been 16 times higher (N.T. 356-359).

Connet's testimony about the calculation of contamination attributable to milk products and its effect on the overall carcinogenic risk posed by foodstuffs, however, is discombobulated. It is difficult to discern what equations he is using or what numbers he plugs into them. Consider, for instance, the following portion of Connet's testimony:

> I want you to compare the kind of dose that this person is going to get. They are going to get a small inhalation dose, probably one-seventh of the inhalation dose, which isn't going to be very big anyway, but they are going to get a hundred over 15 times a hundred over 50 times one kilogram, which is the assumption used in the Stevens & Gerbec for the farmer consuming their own dairy products, over .035.
>
> Now, if we do those calculations out, 100 divided by 35, times, two divided by .035, we get 16.
>
> So this person here is going to get 16 times the ingestion of milk dose here.
>
> (N.T. 358)

There are at least five different ways of expressing the calculations set forth in the first paragraph, all of which yield different results.[5] In the second paragraph, where Connet purports to actually perform the calculation,

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[5] i.e.
$$= (100 \div 15) \times (100 \div 50) \times (1 \div .035)$$
$$= \{[100 \div (15 \times 100)] \div (50 \times 1)\} \div (.035)$$
$$= \{100 \div [(15 \times 100) \div (50 \times 1)]\} \div (.035)$$
$$= 100 \div \{[(15 \times 100) \div (50 \times 1)] \div (.035)\}$$
$$= 100 \div \{(15 \times 100) \div [(50 \times 1) \div (.035)]\}$$

(Connet never explained how he selected the figure ".035" and did not use this number when he actually performed the calculation in the following paragraph. There he used the figure ".35.")

he uses an equation different from the one he just described, introducing new numbers into the equation without ever explaining how he derived them.[6]

Furthermore, even assuming Connet performed the calculation correctly, ROBBI failed to establish that his calculation of the average concentration of contaminants in the milk products consumed is a better predictive tool than the approach the assessment utilized. Connet assumed that none of the tainted milk was mixed with uncontaminated milk before consumption (N.T. 183, 356-359). The assessment, meanwhile, assumed that all of the contaminated milk would travel to the processing center where it would be mixed with other milk, bringing the contaminant concentration down to a fraction of its original level (N.T. 1233-1235).

The assessment's assumption is closer to the mark. The U.S. Department of Agriculture estimates that home-grown dairy products account for only 40 percent of the dairy products consumed by the average person on a farm (N.T. 1262-1263). Even if the consumption of home-grown dairy products is considered, therefore, the concentration of contaminants would be closer to the level used in the assessment than the one used by Connet.

Finally, Connet's testimony suffers from a fatal flaw where he asserts that an underestimation of the health risk from milk would affect the calculation of the health risk from all foodstuffs. The risk that a carcinogen will induce cancer is directly proportional to the amount of exposure to that carcinogen (Ex. Y-5, at p.3-14). Therefore, the carcinogenic risk attributable to the ingestion of milk products divided by the carcinogenic risk attributable to all foodstuffs should equal the amount of

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[6] The number "100" appeared in the preceding paragraph of Connet's testimony, where Connet laid out the equation, but the numbers "35," "2," and ".35" did not.

carcinogen ingested in milk divided by the amount of carcinogen ingested in all foodstuffs or, expressed mathematically:

$$\frac{\text{carcinogenic risk from milk}}{\text{carcinogenic risk from all foodstuffs}} = \frac{\text{carcinogenic exposure from milk}}{\text{carcinogenic exposure from all foodstuffs}}$$

The relationship is important because it shows that to determine how much an underestimation in the carcinogenic risk from milk would affect the calculation of the carcinogenic risk from other foods, one must know what proportion of the exposure comes from milk and what proportion is attributable to other foods.

The problem with Connet's testimony is that he did not know what proportion of the ingestion dose came from milk. When he calculated the extent to which an underestimation in the risk attributable to milk would affect the risk attributable to all foods, Connet testified, "I will assume that half of that ingestion dose [the dose from all foodstuffs] is from milk." (N.T. 359). He gave no basis for that assumption (N.T. 359).

In light of the foregoing, ROBBI failed to establish that the figure it proposes for the carcinogenic risk attributable to contamination in the food chain is more reasonable than the figure utilized in the assessment.

C. **"Maximally Exposed Individual" v. "Population Risk"**

The fact that the carcinogenic risk was expressed in terms of the "maximally exposed individual" rather than in terms of the "population risk" does not render the risk assessment suspect. Connet and Webster have proposed a method for calculating the population risk resulting from the ingestion of contaminated food, but risk assessments which consider the carcinogenic exposure from contaminated food typically measure the risk in terms of the maximally exposed individual (N.T. 151; Ex. R-6). While Connet argues that

there are a number of reasons why the concept of "population risk" is better science than the "maximally exposed individual," we are unwilling to embrace a novel approach--especially when advanced by the party with the burden of proof--where that approach runs counter to the generally accepted methodology in the field (N.T. 150-154, 184-186).

In Pennsylvania, the admissibility of scientific evidence is determined using the standard enunciated in Frye v. United States, 54 App.D.C. 46, 293 F. 1011 (1923). Under the Frye test, expert testimony deduced from scientific principles is admissible only where the principles are generally accepted in that scientific field. The Authority never objected to the admissibility of Connet's testimony regarding the concept of "population risk," so the admissibility is not in question here. In deciding what weight to accord the testimony, however, the extent of its acceptance in the field remains a material consideration.

D. **Other Aspects of the Health Risk**

Connet and Webster maintained that the health risk assessment underestimated other aspects of the health risk as well. As noted earlier, they argued that the assessment should have assumed that dioxin is distributed on particles in proportion to the particle's surface area, not according to its weight; that the assessment used the ISC model, which is inappropriate for particles the size of incinerator ash; that carcinogenic intake should have been calculated assuming individuals ate fish from a creek, not fish from a pond; and, that the assessment should have considered the effects of ingesting contaminated breastmilk and the effects of enhanced deposition of fallout during precipitation.

The evidence ROBBI adduced with regard to these objections to the assessment differs from that pertaining to the objections we have previously

addressed in one essential respect: ROBBI never introduced evidence to show how much of a change in the overall health risk would result from any of the asserted underestimations. For example, Webster testified that the assessment underestimated the health risk because it failed to consider the effects of contaminated breastmilk and assumed that individuals were not eating fish from ponds, but he could not quantify either harm (N.T. 411, 413, 415).[7] Similarly, while Connet maintained that the assessment underestimated the health risk because it failed to account for wet deposition, used the ISC model, and assumed dioxin was distributed on particles in proportion to the particles' mass, ROBBI failed to adduce evidence as to what the overall health risk--or even the carcinogenic risk--would have been had the assessment considered any of these factors.[8]

Even assuming we concluded that the assessment underestimated the health risk, we would have to use the assessment's measure of the health risk when weighing the harms against the benefits. ROBBI maintains that the health risk is greater than that listed in the assessment, but ROBBI failed to establish how much greater. Therefore, the only way we could hold that ROBBI has demonstrated that the health risk "clearly outweighs" the accompanying benefits is if the health risk as set forth in the assessment clearly outweighs the benefits.

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[7] In fact, Webster was unaware of whether a fish pond even existed in the affected area (N.T. 411).

[8] Connet did testify that the maximum contamination reported in the assessment was five times smaller than it should have been since the assessment derived the deposition velocity using the ISC model rather than using the default value he proposed. We have addressed that argument earlier in this opinion. Otherwise, ROBBI presented no evidence showing what quantifiable effect use of the ISC model had on the overall health risk the assessment derived.

The health risk as set forth in the assessment does not clearly outweigh the benefits associated with the proposed facility, however. The exposure to each contaminant that would result from the facility's emissions is minimal compared to the exposure from other sources: in no case would exposure to a contaminant amount to more than three percent of the typical exposure to that contaminant received by a rural non-smoker (N.T. 1182-1183; Ex. Y-28). The increase in the incidence of cancer resulting from exposure to organic contaminants in the emissions would be small, between three in one million and five in a hundred million (Ex. Y-5, at pp.6-2, 6-4, and 8-3). The chances of getting cancer from organics in the emissions, moreover, are only .001 percent of acquiring the disease from some other source (Ex. Y-5, at pp.6-2 and 6-4).

The facility would also confer some considerable benefits to the community. It would create revenue by selling electricity generated during combustion to the local utility, Metropolitan Edison (Ex. Y-3, §4.4, at p.4). This revenue, together with possible revenue from the export of steam, would be used to offset the costs of operating the facility, thereby reducing the cost of solid waste disposal in York County (Ex. Y-3, §4.4, at p.4).

There are other advantages as well. At the time of the hearing, the Authority and Manchester Township were negotiating an agreement to provide compensation to the Township for serving as the host community for the facility (Ex. Y-3, §4.4, at p.4). Up to 50 permanent jobs will be created and $1.5 million in economic benefits will accrue to York County annually (Ex. Y-3, §4.4, at pp.4-5). The facility would stabilize local waste disposal costs and, since incineration reduces waste volume by 90 percent, diminish the need for landfill space (Ex. Y-3, §4.4, at p.5). An access road, and possibly a sewer line, to the facility will facilitate the development of

industrially-zoned property adjacent to the proposed site, while energy produced during combustion will reduce the need for energy from other sources (Ex. Y-3, §4.4, at p.5).

DID THE DEPARTMENT FAIL TO SERIOUSLY REVIEW THE HEALTH RISK ASSESSMENT?

ROBBI maintains that the Department never seriously reviewed the Authority's multiple pathway health risk assessment. A serious review was impossible, according to ROBBI, given the short interval between the time Weiss received the final copy of the multiple pathway health risk assessment and when Weiss approved it.

We disagree. Weiss received the final copy of the multiple pathway health risk assessment on April 13, 1987, and approved it on April 16, 1987, after taking only a few hours to review the document (N.T. 931-932). Nevertheless, a close examination of the evidence reveals that the Department's review was not nearly as cursory as the processing time of the final copy might alone suggest. On March 2, 1987, the Department received an overview of the topics the multiple pathway health risk assessment would address, outlining the chemicals and exposure pathways to be considered and the risk analysis to be performed (N.T. 830-837; Ex. Y-22). Weiss received a draft copy of the multiple pathway health risk assessment by early April, 1987, and the draft was essentially the same as the final copy submitted on April 13 (N.T. 932). When Weiss received the final copy, he simply checked to see whether significant differences existed between it and the draft (N.T. 931-932).

In light of the foregoing, the brief interval separating the receipt of the final multiple pathway health risk assessment and the document's approval does not indicate that the Department failed to seriously review it.

DID THE DEPARTMENT FAIL TO PROTECT AGAINST AN UNACCEPTABLE RISK TO PUBLIC HEALTH?

ROBBI maintains that the Department abused its discretion because, by issuing the plan approval, it failed to protect against an unacceptable risk to the public. In support of this assertion, ROBBI argues that the facility will increase the health risk to the public, that the health risk assessment underestimated the extent of that risk, and that the Authority failed to fulfill the requirements of 25 Pa. Code §127.12(a)(2) because it underestimated the extent of the health risk.

ROBBI has failed to establish that the Department abused its discretion in this regard. ROBBI cites no legal authority--nor are we aware of any ourselves--that would render the Department's decision on the plan approval an abuse of discretion simply because the Authority's facility would increase the health risk to the public or because the health risk assessment underestimated the extent of that risk, even assuming both assertions were accurate.

Nor does ROBBI fare any better with regard to its assertion that the Authority failed to fulfill the requirements of 25 Pa. Code §127.12(a)(2). That provision of the Department's regulations dictates that applications for plan approvals shall "contain such information as is requested by the Department and as is necessary to perform a thorough evaluation of the air contamination aspects of the source." Even assuming the assessment did underestimate the health risk, we cannot conclude that assessment was insufficient to conduct a "thorough evaluation of the air pollution aspects of the source" without knowing how much of an underestimation there was. As the party bearing the burden of proof, ROBBI had to show, at a minimum, that there was a <u>material</u> underestimation in the health risk as set forth in the

assessment. As noted earlier in this opinion, however, ROBBI never established how much the assessment underestimated the health risk, if at all.

WAS THE DEPARTMENT REQUIRED TO CONDUCT A "TOP-DOWN" ANALYSIS OF THE NO_x EMISSIONS CONTROLS?

ROBBI argues that an EPA guidance document required the Department to conduct a "top-down" analysis when determining whether the Authority's facility needed NO_x emissions controls to be BAT. Under the top-down approach, applicants for prevention of significant deterioration (PSD) permits must utilize the most stringent control technology available or justify why they cannot (N.T. 502-504). The Department did not require a top-down analysis here (N.T. 908).

An examination of the language in the guidance document reveals that the top-down analysis requirement does not apply to the Authority's facility. While the EPA issued the guidance document on June 26, 1987, the Department had issued the plan approval more than a month earlier, on May 13, 1987 (N.T. 543-546; Ex. Y-1). The guidance document provides:

> In consideration of the needs for program stability and equity, [sic] the sources which have in good faith relied on pre-existing permitting regulations, this guidance does not apply to PSD and MSR permit proceedings for which as of June 26, 1987, final permits have already been issued.
>
> (N.T. 544-545)

At first blush, it appears that the language is a grandfather clause exempting the authority from the guidance document requirements--indeed, ROBBI's post-hearing brief concedes as much (ROBBI's post-hearing brief, p.31). But ROBBI argues that the context of the guidance document makes it clear that the

language pertains only to the determination of whether certain controls are best available control technology (BACT) for sulfur dioxide, permanganate, and carbon monoxide.

As the party asserting the affirmative, ROBBI bore the burden of proceeding and the burden of proof. 25 Pa Code §21.101(a). Yet the guidance document was never admitted into evidence, and the only testimony on the issue was a general assertion by one of ROBBI's witnesses that the context of the language quoted above reveals that that language was not meant to apply to the document as a whole (N.T. 546-547). To conclude that ROBBI's position was more persuasive than the Authority's we needed to have the document in front of us or at least have more specific evidence about what the context was. We have neither.

DID THE DEPARTMENT ABUSE ITS DISCRETION BY NOT IMPOSING A LIMIT ON NO_x EMISSIONS?

ROBBI next argues that the issuance of the plan approval constituted an abuse of the Department's discretion because the plan approval does not contain a limit on NO_x emissions. Specifically, ROBBI maintains that the Department abused its discretion because the NO_x emissions from the proposed facility would exceed the amount projected in the plan approval application and the Department did not limit the NO_x emissions from the facility to the amount projected in the plan approval.

The Department did not include a NO_x emissions limit in the plan approval for a number of reasons. First, the BAT guidance document in effect at the time of the plan approval did not require a NO_x emissions limit (N.T. 808, 809, 811; Ex. Y-2). Second, at the time the plan approval was issued, the Department had insufficient data about NO_x emissions to derive a specific NO_x emissions limit for the Authority's facility (N.T. 817, 906).

Based on data collected from existing similar Westinghouse/O'Connor rotary combustors, Westinghouse projects that the NO_x emissions from the Authority's facility would be 135 ppm on average, with occasional peaks of up to 220 ppm (N.T. 1042-1043, 1093; Ex. Y-7, at 11, Ex. Y-17, at 5). Four other similar facilities emit comparable amounts of NO_x (N.T. 1002-1005, 1102-1103).

Although the Department did not impose a specific NO_x emissions limitation, the plan approval did require continuous monitoring of NO_x emissions (Ex. Y-1, at condition 4(c)).

The fact that the plan approval did not contain a NO_x emissions limitation does not render the issuance of the plan approval an abuse of discretion. We encountered an issue similar to the one raised here in T.R.A.S.H. and Plymouth Township v. DER *et al.*, 1989 EHB 487. In T.R.A.S.H. we confronted the question of whether the Department abused its discretion by granting an air quality plan approval to a resource recovery facility when the plan approval contained no limit on heavy metal emissions. To resolve that issue, we turned first to the structure of approval process under §6.1 of the Air Pollution Control Act:

> To initiate and operate an air contamination source in Pennsylvania, it is necessary to procure two permits from the [Department]; a plan approval permit prior to construction of the source and an operating permit after construction has been completed but prior to its operation....
>
> T.R.A.S.H.; 1989 EHB 487, 567 (quoting Doris J. Baughman, *et al.* v. DER and Bradford Coal Company, 1979 EHB 1, 10)

On the basis of the two-tiered structure of the approval process and a finding that inadequate data existed to formulate a limit on heavy metal emissions from resource recovery facilities, we concluded that the absence of a heavy metal emissions limit was not tantamount to an abuse of discretion:

> [W]e are aware of no requirement that the Department include emission limitations in plan approvals. The Department is given wide latitude to formulate plan approval conditions. Furthermore, we cannot lose sight of the two-tiered approval system under the Air Pollution Control Act and the fact that there is a difference between an authorization to construct a facility as opposed to an authorization to operate it. We recognize that a facility must be designed and constructed to meet a certain performance level, but there are circumstances, such as here with heavy metals, where, because of the scarcity of reliable performance data, it is not inappropriate to defer the setting of emission limits until some actual performance data is available.
>
> (1989 EHB 487, 576-577)

There is no reason to treat the absence of a NO_x emissions limit any differently. There was no requirement that the plan approval include emissions limitations, and insufficient data existed on NO_x emissions for the Department to set a specific limit on those emissions at the time it issued the plan approval.

DID THE DEPARTMENT VIOLATE 25 PA. CODE §127.12(a)(5)?

ROBBI argues that the Department violated 25 Pa. Code §127.12(a)(5) because the Department did not require the Authority to utilize thermal de-NO_x controls; because the Department allowed the Authority to select a rotary combustor, instead of a reciprocating grate model; and, because the Department simply acted as a rubber stamp when it reviewed the emissions limits in the plan approval application. We shall address each of these issues independently below.

A) **Thermal de-NO_x Controls**

ROBBI argues that thermal de-NO_x controls were available at the time of the plan approval application and that the Department should have required them because they would have reduced NO_x emissions to the minimum attainable

amount. Thermal de-NO_x controls remove nitrogen oxide from emissions by injecting ammonia into flue gas from the combustor; the ammonia combines with the nitrogen oxide in the heated gas, producing nitrogen and water (N.T. 505, 537, 995).

The provision of the Department's regulations at issue here, 25 Pa. Code §127.12, provides:

> (a) Applications for approval shall:
>
> * * * * *
>
> (5) Show that emissions from a new source will be the minimum attainable through the use of the best available technology.

The phrase "best available technology" (BAT), meanwhile, is defined at 25 Pa. Code §121.1:

> Equipment, devices, methods or techniques which will prevent, reduce or control emissions of air contaminants to the maximum degree possible and which are available or may be made available.

The determination of whether a particular pollution control device is BAT is not exclusively a question of whether it will reduce air pollution, however. In our T.R.A.S.H. adjudication, we referred to the regulations imposing the BAT requirement and noted:

> We do not read these regulations as mandating a plan approval applicant to select a piece of control technology simply because it, without consideration of any other factors, controls emission of a particular contaminant to the maximum degree possible. We are aware that the design and operation of an air contaminant source and control technology associated with it is a complex engineering decision. Indeed, we have recognized this complex and source-specific process in [Doris J. Baughman, *et al.* v. DER and Bradford Coal Company, 1979 EHB 1] where we found that under particular operating conditions a scrubber may be as effective as a baghouse for

> controlling particulates. We also recognized in Baughman that "The best available technology requirement does not require the addition of control devices in series, *ad infinitum*...."
>
> T.R.A.S.H., 1989 EHB 487, at 570 (citations omitted)

Here, it is clear that thermal de-NO_x controls were not BAT at the time the Department issued the plan approval. At that time, several proposed waste incineration facilities in the United States incorporated thermal de-NO_x controls into their designs, but only one, a resource recovery facility in Commerce, California, was actually operating (N.T. 555, 997; Ex. Y-3, at p.3-27). The Commerce facility started operating in February of 1987, but even there, testing of the de-NO_x system did not begin until May 25, 1987, 12 days after the Department issued the Authority's plan approval (N.T. 555, 998, 1102). At the time of the plan approval decision, no data existed on the efficacy of thermal de-NO_x controls on emissions from resource recovery facilities (N.T. 846-847, 950-951).

While the benefits of a thermal de-NO_x system were uncertain moreover, it was apparent that such a system would involve a certain risk. Ammonia might be emitted from the stack if it is not injected at the proper place or temperature (N.T. 997). Any ammonia which does not react with NO_x in the flue gas might form ammonium chloride, coloring the emissions plume and possibly resulting in an opacity violation (N.T. 997). Last, an ammonia storage tank, necessary to store ammonia used in the de-NO_x system, would increase the potential health and safety risk of those working in, or living near, the facility (N.T. 998).

De-NO_x controls were not BAT for the Authority's proposed facility at the time of the plan approval because their effectiveness at removing NO_x from

resource recovery emissions was uncertain and because they themselves present environmental risks.

The Ninth Circuit Court of Appeals opinion in Citizens for Clean Air v. EPA, 959 F.2d 839, 34 ERC 1681 (1992), is instructive. In Citizens for Clean Air, citizens groups contested the issuance of a permit under the Clean Air Act, as amended, 42 U.S.C. §§7401-7671q, for a municipal waste incinerator. They argued that the EPA should have added recycling requirements to the other pollution controls mandated in the permit because recycling combined with the other controls was the "best available control technology" (BACT), required under 42 U.S.C. §7475(a)(4). BACT is the federal analog of Pennsylvania's BAT requirement. The Court of Appeals held recycling was not necessary under the BACT requirement because the citizens groups had failed to show that recycling would be "quantifiably effective" in reducing emissions. 959 F.2d at 848, 34 ERC at 1687. According to the Court of Appeals, "[A] technology's effectiveness must be considered at some point to determine whether it is the 'best' technology....[w]ithout the requisite knowledge about the technology's effects on emissions, the technology also cannot be regarded as the 'best' technology." 959 F.2d at 848, 34 ERC at 1687 (citations omitted).

The rationale for concluding that de-NO_x controls were not BAT at the time the Department issued the plan approval is even more compelling. On top of the fact that no data existed about the effectiveness of the control system on resource recovery emissions, it appeared the de-NO_x control system itself may present a threat to the environment.

B) Furnace design

ROBBI also maintains that the Department violated 25 Pa. Code §127.12(a)(5) by allowing the Authority to select a rotary combustor as the

facility's furnace. According to ROBBI, the Department never evaluated whether the rotary combustor was BAT, and the rotary combustor is not as effective in controlling NO_x and carbon monoxide (CO) emissions as the traditional reciprocating grate design.

ROBBI, however, failed to establish that the Department did not evaluate whether the combustor was BAT. In fact, ROBBI failed to even adduce evidence supporting its proposition. The only evidence pertaining at all to this issue is the testimony of Hartwin Weiss, chief of the Department's Engineering Services Section, who testified that the Department determined that the rotary combustor design was BAT (N.T. 819-820). We find that testimony persuasive.

As for ROBBI's other assertion, that the rotary combustor is not as effective at controlling NO_x and CO emissions as the traditional reciprocating grate design, even if ROBBI is correct, it has not necessarily established that the rotary design is less than BAT. A technology need not be the best available technology with regard to every pollutant emitted from a facility to be the best available technology for the facility. BAT is a systemic analysis. In performing that analysis, one cannot look at particular emissions parameters in a vacuum; instead, all the characteristics of the emissions must be considered. One type of technology may reduce the amount of NO_x emitted but allow more dioxins to escape than another type of technology. Determining which of these two was BAT would require comparing the amount and consequences of the respective NO_x emissions, the amount and consequences of the respective dioxin emissions, and the relative effectiveness of each technology in reducing the various other substances emitted from the facility. If all other things are equal, a technology which produces lower NO_x or CO emissions than other technologies will be BAT. The problem here is that ROBBI

never adduced evidence to show that all the other aspects of the emissions of each furnace-type were equal. Nor did ROBBI establish that the reciprocating grate design was, with respect to the other substances emitted from the facility, as effective at controlling the facility's emissions and the sum of their consequences. Having failed to do either one, ROBBI cannot prevail on its claim that the rotary combustor is not BAT, even if that combustor was less effective in controlling NO_x or CO emissions, or both.

C) Minimum attainable emissions limits

Finally, ROBBI contends that the Department violated 25 Pa. Code §127.12(a)(5) because the Department simply acted as a rubber stamp when it reviewed the emissions limits in the plan approval application.

The evidence adduced at the hearing belies that assertion, however. The Department did not authorize the Authority's facility to emit at the baseline levels set forth in the guidance document (N.T. 896-898; Ex. Y-1). Instead, the Department concluded that the Authority could probably meet more stringent standards consistently, and directed the Authority to provide data showing why the Authority should not be subject to more stringent standards (N.T. 896). After reviewing the additional data the Authority submitted, the Department determined that the facility could, in fact, achieve lower levels of emissions and instructed the Authority to submit revised emissions figures (N.T. 896-898). The Department did select those figures as the emissions limits, but only after determining that the Authority's figures comported with the emissions data (N.T. 897).

In light of the foregoing, the Department did not abdicate its responsibility under §127.12(a)(5) to ascertain that emissions from the facility will be the minimum attainable through the use of BAT.

CONCLUSIONS OF LAW

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

2. ROBBI has the burden of proving that the Department's issuance of the plan approval to the Authority was an abuse of discretion. 25 Pa. Code §21.101(c)(3); Snyder Township Residents for Adequate Water Supplies v. DER and Doan Mining, 1988 EHB 1202.

3. Any issue not expressly addressed by the parties in their post-hearing briefs is waived. Lucky Strike Coal Company and Louis J. Beltrami v. DER, 119 Pa. Cmwlth. 440, 546 A.2d 447 (1988).

4. The Board's task in reviewing the Department's grant of a plan approval is to determine whether, at the time of the issuance of the plan approval, all applicable requirements were satisfied. Wolfe Dye and Bleach Works v. DER, 1978 EHB 215.

5. Under the Payne v. Kassab balancing test, a plan approval application need not balance the prospective benefits and environmental harms; so long as the application contains sufficient information for the Department to ascertain the prospective benefits and environmental harms, the Department can weigh the two itself.

6. Where an appellant asserts that the Department abused its discretion under the Payne v. Kassab balancing test, he must do more than simply demonstrate that the Department underestimated the environmental harm; he must show that the environmental harm clearly outweighs the benefits.

7. ROBBI failed to establish that the environmental harm resulting from the Department's issuance of the plan approval clearly outweighs the benefit to be derived.

8. ROBBI failed to establish that the default value it proposed was more reasonable than the value the Authority derived using the ISC model.

9. ROBBI failed to establish that the figure it proposes for the carcinogenic risk attributable to contamination in the food chain was more reasonable than the figure the Authority used in the assessment.

10. ROBBI failed to establish that the carcinogenic risk in the risk assessment should have been expressed in terms of the "population risk" instead of the "maximally exposed individual" because risk assessments typically measure the risk in terms of the maximally exposed individual, and the Board is unwilling to embrace a novel approach--especially when advanced by the party with the burden of proof--where that approach runs counter to the generally accepted methodology in the field.

11. Where ROBBI asserts that the health risk assessment underestimated the environmental harm, but fails to establish by how much, ROBBI must show that the environmental harm as set forth in the assessment clearly outweighs the benefits if ROBBI is to prevail under the Payne v. Kassab balancing test.

12. The environmental harm, as set forth in the health risk assessment, does not clearly outweigh the benefits to be derived from issuing the Authority the plan approval.

13. The Department did seriously review the health risk assessment.

14. The Department did not abuse its discretion simply because the facility receiving a plan approval will increase the health risk to the public or simply because a health risk assessment submitted as part of the plan approval process underestimates the health risk.

15. Applications for plan approvals must contain information which is requested by the Department and necessary to perform a thorough evaluation of the air contamination aspects of the source. 25 Pa. Code §127.12(a)(2).

16. An underestimation in the health risk in a health risk assessment does not prevent the Department from conducting a thorough evaluation of the air pollution aspects of the source where ROBBI failed to establish that the underestimation was, in fact, a material one.

17. Where the language in a grandfather clause in an EPA guidance document appears on its face to exempt facilities from top-down analysis if their final PSD permits were issued before June 26, 1987, ROBBI, as the party bearing the burden of proceeding and burden of proof, failed to establish that the context of the document shows that the grandfather clause does not apply here simply by adducing a general assertion to that effect from one of its witnesses.

18. The fact that the plan approval did not contain a NO_x emissions limit does not render the issuance of the plan approval an abuse of discretion, since insufficient data existed on NO_x emissions for the Department to set a specific limit at the time it issued the plan approval.

19. Applications for plan approvals must show that emissions from a new source will be the minimum attainable through the use of the best available technology. 25 Pa. Code §127.12(a)(5).

20. The BAT requirement for new sources does not mandate the imposition of the lowest achievable emission rate.

21. Thermal de-NO_x controls were not BAT at the time the Department issued the plan approval because their effectiveness at removing NO_x from emissions was uncertain and the de-NO_x technology itself presents environmental risks.

22. ROBBI failed to establish that the Department did not evaluate whether the combustor was BAT where the only evidence adduced at all relating to this issue was testimony that the Department did determine that the rotary combustor design was BAT.

23. A technology need not be the best available technology with regard to every pollutant emitted from a facility to be the best available technology for a source; all the characteristics of emissions must be considered when determining what technology is BAT.

24. ROBBI failed to establish that the furnace in the Authority's facility was not BAT.

25. The Department determined that emissions from the facility would be the minimum attainable.

26. The Department's issuance of the plan approval to the Authority was not an abuse of discretion.

O R D E R

AND NOW, this 18th day of May , 1993, it is ordered that the Department of Environmental Resources' issuance of Air Quality Plan Approval No. 67-340-001 to the Authority is sustained and ROBBI's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
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Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
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Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 18, 1993

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M. DIANE SMITH
SECRETARY TO THE BO

KENNETH SMITH AND BETTY SMITH, et al.	:	
	:	
v.	:	EHB Docket No. 92-479-MJ
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and STEWARTSTOWN BOROUGH AUTHORITY,	:	
Permittee	:	Issued: May 19, 1993

OPINION AND ORDER SUR PETITION FOR RECONSIDERATION OR REARGUMENT BEFORE THE BOARD EN BANC

By Joseph N. Mack, Member

Synopsis

The Appellants have not demonstrated exceptional circumstances requiring reconsideration of an Order denying the Appellants' petition for supersedeas. A petition for supersedeas must demonstrate not only that the alleged harm is irreparable but also immediate.

OPINION

This matter involves an appeal from the issuance of a permit to the Stewartstown Borough Authority ("the Authority") by the Department of Environmental Resources ("DER") for the agricultural utilization of sewage sludge at a site in Hopewell Township, York County. The appeal was filed by a number of residents near the site ("the Appellants").

On December 8, 1992, the Appellants filed a Petition for Supersedeas to prevent any application of the sludge by the Authority during the pendency of the appeal. In their petition, the Appellants alleged that even a single

application of sludge would pose a health threat to themselves and to the general public. A hearing on the supersedeas petition was held on February 8, 1993. Following the hearing, the parties were given an opportunity to file post-hearing and reply briefs. On March 22, 1993, the Board Member to whom this matter was assigned issued an Opinion and Order denying the Appellants' petition on the basis that they had failed to demonstrate the factors necessary for the granting of a supersedeas as set forth at 25 Pa. Code §21.78(a). The subject of the present Opinion and Order is a Petition for Reconsideration or Reargument Before the Board *En Banc* ("Petition for Reconsideration") filed by the Appellants on April 12, 1993. The Authority filed a Response opposing the request for reconsideration on April 20, 1993. By letter dated April 26, 1993, DER stated that it did not intend to file a response.

The Board's rules provide that reconsideration or reargument may be granted only for "compelling and persuasive reasons", generally limited to the following instances:

> (1) The decision rests on a legal ground not considered by any party to the proceeding and that the parties in good faith should have had an opportunity to brief such question.
>
> (2) The crucial facts set forth in the application are not as stated in the decision and are such as would justify a reversal of the decision. In such a case reconsideration would only be granted if the evidence sought to be offered by the party requesting the reconsideration could not with due diligence have offered the evidence at the time of the hearing.

25 Pa. Code §21.122(a). With regard to interlocutory orders, such as the one in question, reconsideration will be granted only where "exceptional circumstances" are present. City of Harrisburg v. DER, EHB Docket No. 91-250-MJ

(Opinion and Order Sur Motion for Reconsideration issued February 17, 1993); Cambria Coal C. v. DER, 1991 EHB 361, 363; Baumgardner v. DER, 1989 EHB 400.

The Appellants allege the following grounds as a basis for reconsideration: (1) the hearing judge improperly required the Appellants to demonstrate "immediate irreparable harm" as opposed to "irreparable harm"; (2) the hearing judge improperly required the Appellants to demonstrate an "immediate threat of harm to the public" as opposed to "likelihood of injury to the public"; (3) the facts indicate that even a single application of sludge poses a health threat; and (4) where the Appellants have established a health threat to themselves and to the human population, a supersedeas should be granted.

The Appellants contend that the hearing judge erred by requiring them to demonstrate that they would suffer "immediate irreparable harm" and "immediate harm to the public" (emphasis added) if the permit were not superseded. The Appellants appear to be arguing that they were held to a higher standard of proof than is required by the Board's rules at 25 Pa. Code §21.78(a) by having to demonstrate not only that they would suffer "irreparable harm" and "likelihood of injury to the public" if the supersedeas were not granted, but also that any such harm and injury was of an immediate nature.[1]

In the Opinion and Order denying the Appellants' request for supersedeas, the presiding Board Member found that "the Appellants did not demonstrate by a preponderance of the evidence that they will suffer immediate irreparable harm or that there is an immediate threat of harm to the public."

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[1] We note that the Appellants provided little in the way of an argument supporting their request for reconsideration. They did not expand on the grounds for reconsideration alleged in their Petition for Reconsideration nor did they file a brief in support of the Petition.

Slip op. at 5. This finding was based on the testimony provided by the Appellants' expert witness who stated that he could not put a timeframe on the immediacy of the alleged health effects of the application of the sewage sludge, and that it was his conclusion that it posed a "future health threat." The Opinion concluded that "[a]lthough Dr. Tackett's testimony indicates that there may be a need for further research into the allowable levels of lead being introduced to the environment, the evidence presented at the hearing does not clearly establish such an immediate threat of harm to the Appellants or the public as to warrant a supersedeas." Slip op. at 5-6.

The purpose of a supersedeas is to prevent harm which is likely to ensue during the pendency of a case before a final Order can be issued. See Local No. 1 (ACA), Broadcast Employees of International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America v. International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, 419 F. Supp. 263, 286 (E.D. Pa. 1976) (Irreparable injury is that which would ensue during the pendency of litigation if preliminary relief were denied but a permanent injunction were later held to be appropriate.) It is not enough that a petitioner show that he may suffer irreparable harm at some distant point in the future, but that such harm is imminent, in order to justify superseding the complained of action prior to a final ruling on the merits. See ECRI v. McGraw-Hill, Inc., 809 F.2d 223, 226 (3d Cir. 1987); Jostan Aluminum Products Co., Inc. v. Mount Carmel Dist. Industrial Fund, 256 Pa. Super. 353, 389 A.2d 1160 (1978); Keen v. City of Philadelphia, 124 Pa. Cmwlth. 213, 555 A.2d 962, 964 (1989), appeal denied, 524 Pa. 600, 568 A.2d 1250 (1989); Valley Center, Inc. for Mental Health v. Parkhouse, 62 Pa. Cmwlth. 453, 437 A.2d 74 (1981).

At the supersedeas hearing, the Appellants did not even meet the burden of demonstrating that they will suffer irreparable harm at any point in the future, much less that they will suffer immediate injury during the pendency of their case. Nor did they establish a likelihood of injury to the public. Contrary to the Appellants' contention that the "undisputed facts" show that even a single application of sludge will pose a health threat, the Appellants failed to demonstrate by a preponderance of the evidence that application of the sludge will result in harm to them or the likelihood of injury to the public. Moreover, the testimony provided by DER's Stephen Socash supports the presumption that the regulations under which the permit was issued are part of a valid regulatory scheme designed to ensure the protection of the public health, safety, and welfare. The Appellants called Mr. Socash as their witness and, thus, are bound by his testimony.

Because the Appellants have not presented exceptional circumstances which would warrant a reconsideration of their petition for supersedeas or reargument before the Board *en banc*, we enter the following Order:

ORDER

AND NOW, this 19th day of May, 1993, it is hereby ordered that the Appellants' Petition for Reconsideration or Reargument Before the Board En Banc is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 19, 1993

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M. DIANE SMITH
SECRETARY TO THE BOA

ERNEST BARKMAN, GRACE BARKMAN, ERN-BARK INC., and ERNEST BARKMAN JR.	:	
v.	:	**EHB Docket No. 90-412-W**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: May 21, 1993**

OPINION AND ORDER SUR
MOTION FOR PARTIAL SUMMARY JUDGMENT

By Maxine Woelfling

Synopsis

A motion for partial summary judgment is granted in part and denied in part.

The secretary/bookkeeper of a junkyard and recycling facility cannot be liable for violations of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* (Solid Waste Management Act), alleged to have occurred at the facility, even where she is a joint owner of the land on which the facility is located and the spouse of the facility's owner, since she was not involved with the management of the facility's operations or with the handling of any of the waste materials.

A corporation included in the order and civil penalty assessment cannot be liable for the Solid Waste Management Act violations at the facility where the corporation has no ownership interest in the facility (or the land it is located on) and the corporation did not participate in refuse collection

or any activity at all relating to the handling of waste materials. A Dun and Bradstreet report indicating the corporation was in the refuse business does not preclude summary judgment with regard to the corporation, since the Department conceded the report consisted of hearsay evidence but failed to support its assertion that the report fell within the business records exception to the hearsay rule. A motion for summary judgment cannot be defeated by statements that contain inadmissible hearsay.

Summary judgment is inappropriate with regard to an employee at the facility where genuine issues of fact remain as to whether that employee was involved in the management of operations or the handling of waste materials at the facility.

Appellants are not entitled to summary judgment with regard to whether they stored or processed municipal waste in violation of §201(a) of the Solid Waste Management Act where it is not apparent whether the storage or processing of municipal waste is at issue in the appeal.

Where appellants maintain they are entitled to summary judgment with respect to alleged violations of §§301 and 302 of the Solid Waste Management Act because the Department identified no residual waste at the facility, summary judgment is inappropriate where a genuine issue of fact remains as to whether the Department did, in fact, identify residual waste at the facility.

Similarly, where appellants maintain they are entitled to summary judgment with respect to alleged violations of §§501(b) and 501(c) of the Solid Waste Management Act because the Department identified no hazardous waste at the facility, summary judgment is inappropriate where a genuine issue of fact remains as to whether the Department did, in fact, identify hazardous waste there.

OPINION

This matter was initiated with the September 28, 1990, filing of a notice of appeal by Ernest Barkman (Ernest), Grace Barkman (Grace), Ern-Bark, Inc. (Ern-Bark), and Ernest Barkman Jr. (Ernest Jr.), (collectively, the Barkmans) seeking review of the Department of Environmental Resources' (Department) August 29, 1990, issuance of an order and civil penalty assessment relating to Ernest's junkyard and alleged recycling facility (the Facility) in Honeybrook Township, Chester County.

The order cited the Barkmans for numerous violations of the Department's regulations. According to the order, representatives of the Department were denied access to the facility on July 12, 1989, and January 30, 1990. (Ex. B-B, the Department's order, at ¶ 20.)[1] The Department eventually obtained access to the facility on February 28, 1990, and conducted six other site inspections between that date and August 20, 1990. (Ex. B-B, Paragraphs 20-28.) During the course of those inspections, the Department maintains in its order, it discovered that the facility violated §§201(a), 301, 302, 501, 608, and 610(1)-(4), (9) of the Solid Waste Management Act, §§8 and 13 of the Air Pollution Control Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §§4008 and 4013 (Air Pollution Control Act); §611 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.611 (Clean Streams Law); and the Department's regulations at 25 Pa. Code §§129.14(a) and 271.101. As a result, the Department ordered the Barkmans to cease storing and disposing of waste at the facility without a permit, since that activity constitutes a violation of the Solid Waste Management Act, and to allow representatives of the Department to

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1. "Ex. B- " denotes Barkmans' exhibits in support of the motion for summary.

inspect the Facility. It also assessed a civil penalty in the amount of $125,000 for the Barkmans' alleged violations.

The Barkmans' notice of appeal asserted that neither the Department nor its representatives had ever been denied access to the facility; that the civil penalties assessed constitute an abuse of the Department's discretion; and, that neither Ern-Bark nor any of the Barkmans had engaged in unlawful conduct under the Clean Streams Law or the Solid Waste Management Act. With regard to the last of these assertions, the Barkmans argued that, while Ernest utilized scrap metal, glass bottles, paper and other materials in his scrap and recycling business, he did not "store, collect, transport, process or dispose of" hazardous, municipal, residual or solid waste. The Barkmans also maintained that Grace, Ernest Jr., and Ern-Bark were not proper subjects for the Department's order and civil penalty assessment because they were neither involved with, nor had control over, the scrap and recycling business Ernest conducted at the facility.

On November 1, 1991, the Barkmans filed a motion for partial summary judgment and a memorandum in support. The Barkmans contended that Grace, Ernest Jr., and Ern-Bark are entitled to judgment as a matter of law because none of them were sufficiently involved with Ernest's scrap and recycling business to be liable even if, as the Department maintains, waste was unlawfully stored, collected, transported, or processed as part of that business. In addition, the Barkmans' motion requested partial summary judgment with regard to three of the seven alleged violations of §201(a) of the Solid Waste Management Act, and all of the alleged violations of §§301 and 302 and §§501(b) and 501(c) of the Solid Waste Management Act. According to the motion: (1) the Barkmans did not violate §201 of the Solid Waste Management Act, in that, contrary to the allegations in the Department's

order, the facility did not process or store municipal waste on February 28, 1990, May 24, 1990, or July 11, 1990; (2) they did not violate §§301 or 302 of the Solid Waste Management Act because those provisions pertain to residual waste and the Department has not specified what residual waste existed at the facility; and, (3) they did not violate subsections (b) or (c) of §501 of the Solid Waste Management Act because those provisions pertain to hazardous waste and the Department has not specified what hazardous waste existed at the facility.

The Department filed an answer and supporting memorandum on November 27, 1991. With regard to the request for summary judgment, the Department maintained that Grace, Ernest Jr., and Ern-Bark were all sufficiently involved with the activities at the facility to be liable for the alleged violations and, in the case of Grace, that she is liable, in any event, as a joint-owner of the site. With regard to the Barkmans' request for partial summary judgment, the Department argued only that processing of municipal waste had occurred at the facility and that it had identified residual and hazardous waste at the facility; it did not address the "storage" component of the Barkmans' argument.

On December 9, 1991, the Barkmans filed a reply to the Department's answer.

Before we turn to the specific arguments advanced in favor of, and in opposition to, summary judgment in the documents submitted by the Barkmans and the Department, we must first address some preliminary issues pertaining to those documents.

The factual and legal issues involved in this motion are not complicated, but the way they are presented in the motion, answer, memoranda, and supporting exhibits is. Unwittingly, the parties have constructed a

veritable Gordian Knot. The Barkmans' memoranda contain a number of unsupported assertions of fact; the Department's memorandum is replete with them. The Department denies, in its answer, that "processing" of municipal waste occurred at the facility on February 28, 1990, May 24, 1990, and July 11, 1990, then devotes fully half of its three-page argument against partial summary judgment in its memorandum to maintaining that "processing" did take place on those dates. (The Department's answer at ¶ 40, and its memorandum in opposition at pp. 5-7.)

The Barkmans' documents are even more dissonant. The Barkmans' memorandum in support and their reply to the Department's answer requested summary judgment on the alleged violations of §§610(1), 610(2), and 610(4) of the Solid Waste Management Act; the Barkmans, however, never requested summary judgment with regard to those violations in the motion itself. (The Barkmans' memorandum in support, at p. 41; and the Barkmans' reply to the Department's answer, at p.9.) The Barkmans' assert in their motion that the Department could not make out violations of §§301 or 302 of the Solid Waste Management Act on February 28, 1990, May 24, 1990, July 11, 1990, July 27, 1990, and August 20, 1990, because it identified no residual waste at the facility. (The Barkmans' motion, at ¶ 52.) The Department's order, however, never asserted that there were violations of §§301 or 302 of the Solid Waste Management Act on four of those dates. It asserted only that the Barkmans violated §§301 and 302 on February 28, 1990. (Ex. B-B at ¶ 21.)

The situation becomes even more complicated with respect to the alleged violations of §§201(a) and 501 of the Solid Waste Management Act.

The Department's order alleged that the Barkmans violated §501 on seven occasions. It is impossible to determine from the motion and answer, and the documents supporting them, just which of the provisions of §501 the

Department believes were violated, but the Barkmans' motion only requested summary judgment with respect to subsections (b) and (c). (The Barkmans' motion, at p.11.) While the motion requested summary judgment with regard to all the alleged violations of §§501(b) and 501(c), the averments in the motion pertain only to some of the alleged §501 violations. (The Barkmans' motion at ¶ 56 and p.11.) They do not address the §501 violations alleged to have occurred on May 6 or June 11, 1990. (Ex. B-B, at paragraphs 22 and 25.) The memorandum in support of the motion and the reply to the Department's answer, meanwhile, alternate between maintaining that the Barkmans are entitled to summary judgment with regard to §§501(b) and 501(c) and maintaining that they are entitled to summary judgment with regard to 501(a). (The Barkmans' memorandum in support, at pp. 40-41; the Barkmans' reply, at pp. 6 and 9.) The Barkmans never referred to any violations of §501(a) in the motion itself.

There are similar problems with respect to the alleged violations of §201(a) of the Solid Waste Management Act. The Department's order alleged that the Barkmans violated §201(a) on seven separate dates. (Ex. B-B.) Among other things, §201(a) provides that no person shall "store, collect, transport, process, or dispose of municipal waste" unless authorized to do so by the Department's rules and regulations. The Barkmans' memorandum requested summary judgment with respect to all of the alleged violations of §201(a), but the motion itself was not nearly so broad. (The Barkmans' memorandum in support, at p.41; the Barkmans' reply, at p.9.) It asserted only that the Barkmans had not engaged in the "processing" or "storage" of municipal waste on three of the dates they were alleged to have violated §201(a). (The Barkmans' motion at p.11.) It did not address the collection, transportation, or disposal of municipal waste on those dates, nor did it address the alleged violations of §201(a) on the other four dates at all.

For its part, the Department appears to have been oblivious to all the discrepancies in the Barkmans' filings; no mention was made of any of them in the Department's memorandum or answer.

For the purposes of ruling upon the Barkmans' motion, we deem the motion to control when it conflicts with the memorandum supporting the motion, and the answer to control when it conflicts with the memorandum opposing summary judgment. The purpose of the supporting memorandum is simply to explain the motion, not to augment it. The Board has held previously that motions for summary judgment must set forth, with adequate particularity, the reasons for summary judgment and that representations in the legal memoranda alone are insufficient. See County of Schuylkill *et al.* v. DER and City of Lebanon Authority, 1990 EHB 1370. To the extent, therefore, that the memorandum supporting a motion for summary judgment is inconsistent with the motion itself, the motion controls. The same rationale applies to the answer and the memorandum in opposition.

We adopted a similar approach to determine what significance to attach to certain averments contained in affidavits submitted by the Barkmans to support the motion. A number of aspects of the Barkmans' motion might have been more compelling had the Board looked directly to the supporting affidavits rather than simply determining whether the affidavits support the assertions they were cited for in the motion. Because, as noted above, the motion for summary judgment must set forth, with adequate particularity the reasons for summary judgment, the reasons must be apparent from the face of the motion. It is the movant's responsibility, not the Board's, to sift through the affidavits and other documents he uses in support, and to frame the motion so as to present his best case. Accordingly, even where it was apparent from the uncontested facts in the affidavits that a more compelling

case for summary judgment might have been made, we limited our analysis to the averments actually set forth in the motion.

We turn our attention next to the specific issues addressed in the motion, answer, and memoranda. The Board is empowered to grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Robert L. Snyder *et al.* v. Department of Environmental Resources, 138 Pa. Cmwlth. 534, 588 A.2d 1001 (1991). Once a motion for summary judgment has been properly supported, the burden is upon the non-movant to disclose evidence that is the basis for his argument resisting summary judgment. Felton Enterprises, Inc. v. DER, 1990 EHB 42, 45-46.

As noted earlier, the Barkmans' motion for summary judgment has two components. The first requested summary judgment with regard to Grace, Ernest Jr., and Ern-Bark. The second component of the motion requested partial summary judgment with regard to three of the seven alleged violations of §201(a), and all of the alleged violations of §§301, 302, 501(b), and 501(c). We shall examine each of these parts of the motion separately.

I. The Barkmans' request for partial summary judgment with regard to Grace, Ernest Jr., and Ern-Bark

According to the Barkmans, Grace, Ernest Jr., and Ern-Bark were not sufficiently involved with Ernest's scrap and recycling business to be liable, even if the business committed the violations alleged in the Department's order. We shall examine the request with respect to each of the three.

A. Grace

Together with her husband, Ernest, Grace jointly owns the property on

which the facility is located. (The Barkmans' motion and Department's answer, both at paragraph 1.) She did not start working at the facility until August of 1990, so she was not employed there at the time the Department alleges the Barkmans denied it access to the facility or when the Department conducted all but its last site inspection.[2] (The Barkmans' motion and Department's answer, both at ¶ 8.) Her duties at the facility include billing, bookkeeping, and other office work, and she was not involved in the management of operations or the handling of any of the materials at the facility. (The Barkmans' motion and Department's answer, both at ¶¶ 8 and 9.)[3] The Department, finally, included Grace in the order and civil penalty assessment simply because she was a joint owner of the land on which the business is run.

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2 The Barkmans maintain in their memorandum in support that Grace was not working at the facility when any of the alleged violations occurred. (The Barkmans' memorandum in support, p.19.) The Barkmans never made that assertion in the motion for summary judgment itself, however. As noted earlier in this opinion, the last site inspection referred to in the order occurred on August 20, 1990. Grace's affidavit, which the Barkmans cited for support, says only that she started working on the premises in August of 1990. (The Barkmans' motion and Department's answer, both at paragraph 8, Ex. B-C, at paragraph 2.)

3 In its response to paragraph 9 of the motion, the Department argues that Grace, in her affidavit, never said that she was not involved with the management of the operations of the facility. Her affidavit did contain the following averments, however, which, taken together, encompass that proposition:

> 6. My responsibilities do not include the handling of any of the recycled or other materials brought to the premises.
> 7. My responsibilities do not entail directing other employees in the handling of the materials on the premises.
> 8. I did not participate in the handling of any of the recycled or other materials brought to the premises.
> 9. I am not involved with the management of the various entities which operate on the premises.
> 10. The companies operating on the premises are managed and operated by Ernest Barkman, Sr.
>
> (Ex. B-C, Paragraphs 6-10)

(The Barkmans' motion and Department's answer at ¶¶ 14 and 15; Ex. B-M at p.61.)

The Barkmans argue that Grace is entitled to summary judgment because her conduct, position with the business, and status as joint owner of the property are not sufficient to make her liable for any violations which may have occurred at the facility. The Department, meanwhile, maintains that Grace's status as joint owner of the land is sufficient to make her liable and, in addition, that she was liable because she "permits the activity and ... benefits directly from Ernest's business as an employee of her husband." (Department's brief in opposition, at p.3.)

Because Grace asserted in her affidavit that she was not involved in the management of operations or the handling of any of the materials at the facility, the burden shifted to the Department to present contrary "facts" by counter-affidavits, depositions, or answers to interrogatories. The Department failed to offer any evidence to contradict Grace's affidavit. The only issue we need concern ourselves with here, therefore, is whether Grace, as an employee at the facility and joint owner of the land, can be liable for the alleged violations in the absence of any involvement with the management of operations or the handling of any of the materials. We hold she cannot.

The situation presented here is directly analogous to one we confronted in Joseph Blosenski Jr., *et al.* v. DER, EHB Docket No. 85-222-M (consolidated). (Adjudication issued December 23, 1992.) Like Ernest and Grace Barkman, Joseph Blosenski Jr., and his wife, Ada, were joint owners of a tract of land on which, the Department asserted, violations of the Solid Waste Management Act had occurred. Like Grace Barkman, furthermore, Ada Blosenski was a secretary/bookkeeper for a concern her spouse operated on the land.

The Board held in Blosenski that Ada Blosenski could not be held liable for violations of the Solid Waste Management Act occurring on the

Blosenski tract simply because she was a co-owner of the land and the secretary/bookkeeper for her husband's disposal service:

> Liability for violation of the [Solid Waste Management Act] does not attach simply by reason of ownership of the land on which the violations took place: Commonwealth, Department of Environmental Resources v. O'Hara Sanitation Company, 128 Pa. Cmwlth. 47, 562 A.2d 973 (1989). Some affirmative participation in the violations must be shown: Lawrence Blumenthal v. DER, 1990 EHB 187. This is true where corporate officers are concerned: Kaites v. Commonwealth, Dept. of Environmental Resources, 108 Pa. Cmwlth. 267, 529 A.2d 1148 (1987); Newlin Corporation *et al.* v. DER, 1989 EHB 1106, and is beyond serious argument where the targeted person is simply an employee.
>
> (Blosenski, at p.14)

We know of no reason to treat the situation here any differently. Since we do not find Grace liable under the Solid Waste Management Act, it follows that summary judgment must be granted in her favor as to the civil penalty assessment, as that penalty was assessed pursuant to §1917-A of the Administrative Code,[4] the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 and §605 of the Solid Waste Management Act.

B. Ernest Jr.

Ernest Jr.'s involvement with the facility is more extensive than Grace's. While he has no ownership interest in the facility, he is employed there as a mechanic and bus driver. (The Barkmans' motion and Department's answer, both at ¶ 25.) His responsibilities include driving a truck three days a week, truck maintenance, passing orders from Ernest to the other employees and, occasionally, escorting individuals around the premises. (The Barkmans' motion and Department's answer, both at ¶ 26; Ex. B-S.) He was also

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4 §1917-A does not empower the Department to assess civil penalties. It does authorize the Department to recover the costs of abating a nuisance.

authorized to grant access to the facility when his father was not present. (The Barkmans' motion and Department's answer, both at paragraph 26.) The Department included Ernest Jr. in the order and civil penalty assessment for three reasons: workers at the facility identified Ernest Jr. as "a responsible person at the site;" he was listed in a Dun and Bradstreet report; and he escorted a Department inspector around the facility during one of the site inspections. (The Barkmans' motion and Department's answer, both at ¶¶ 21-32.)

The Barkmans maintain that Ernest Jr. is entitled to summary judgment because he was not sufficiently involved with Ernest's business to be liable, even if Ernest's business involved unlawful activity regarding waste. We, however, disagree.

The Barkmans' motion never asserts that Ernest Jr.'s responsibilities at the site were limited to driving and maintaining the truck(s), passing along Ernest's directions, escorting individuals around the facility, and granting access to inspectors in his father's absence. It simply asserted that his responsibilities included these things. Nothing on the face of the motion indicates that Ernest Jr. was not involved in the management of operations or the handling of the materials at the facility. If Ernest Jr. participated in either one, he may well have rendered himself liable, depending upon the extent of his involvement.

Furthermore, even if Ernest Jr.'s duties at the facility were limited to those listed in the motion, he may still be liable. The motion asserts that Ernest Jr.'s responsibilities included granting access to inspectors in his father's absence. Two of the violations referred to in the order and civil penalty assessment pertain to incidents where the facility denied access to Department inspectors, and there is no averment in the motion that

Ernest Jr.'s father was present in either instance.

C. Ern-Bark

Ern-Bark is a Pennsylvania corporation with Ernest as its president. It was incorporated to develop real property and to own, lease, and sell real estate, motor vehicles and heavy equipment. (The Barkmans' motion and the Department's answer, both at ¶ 17; Ex. B-P.) It has no property interest in the land on which the facility sits nor has it participated in refuse collection or any related activity. (The Barkmans' motion and Department's answer, both at ¶ 19; Ex. B-Q and B-R.) Nevertheless, the Department included Ern-Bark in the order and civil penalty assessment because a Dun and Bradstreet report identified Ern-Bark as a refuse collection company. (The Barkmans' motion and Department's answer, both at ¶ 24; Ex. B-N and B-O, both at ¶¶ 20 and 21.)

According to the Barkmans' motion, Ern-Bark is entitled to summary judgment because it was not involved in refuse collection or the handling of waste materials at the facility and because it had no ownership interest in the facilities operating on the premises. They also maintain that the only basis the Department specified to support Ern-Bark's liability - a Dun and Bradstreet report indicating Ern-Bark was in the refuse business - was hearsay and, consequently, that it could not be used to counter their motion for summary judgment. The Barkmans also argue that it is too late in the proceedings for the Department to identify some other basis of liability.

The Department's response to these arguments was cursory. It asserted only that, together with Ernest, Ern-Bark owned the heavy equipment used to handle wastes at the facility, and that the Dun and Bradstreet document is a business record and, therefore, an exception to the hearsay rule. The Department identified no affidavits, depositions or other exhibits

to support its positions with regard to the heavy equipment or the Dun and Bradstreet report.

Ern-Bark is entitled to summary judgment. Barkmans' motion for summary judgment averred that Ern-Bark did not participate in refuse collection "or any activity related thereto." (The Barkmans' motion, at ¶ 19.) Among the exhibits submitted in support of the motion was an affidavit by Ernest, the president of Ern-Bark, which makes it clear that the phrase "or any related activity" encompasses any involvement in the handling of any materials brought to the site, or the ownership or leasing of heavy equipment, or any ownership interest in the facilities operating on the site. (Ex. B-R, at ¶¶ 13, 15, and 16.)

The Department's unsupported assertions are insufficient to withstand Ern-Bark's summary judgment motion when that motion is supported by an affidavit asserting that Ern-Bark was not involved at all in the handling of the waste materials at the facility. As noted earlier in this opinion, once a motion for summary judgment is made and properly supported, the non-moving party must set forth specific facts, by affidavits or otherwise, as provided under Pa.R.C.P. 1035, showing that there is a genuine issue for trial. Pa.R.C.P. 1035(d) and Felton Enterprises, *supra*. The Department did not properly support its assertion that Ern-Bark owned the heavy equipment.

Nor did the Department fare any better with regard to the Dun and Bradstreet report. The Department never denied that the report consisted of hearsay evidence; it simply stated in its response to the motion that the report was a business record, an exception to the general hearsay rule. A motion for summary judgment cannot be defeated by statements that include inadmissible hearsay evidence. See Isaacson v. Mobil Propane Corporation, 315 Pa. Super 42, 461 A.2d 624 (1983). Even assuming the contents of the Dun and

Bradstreet report would be sufficient to raise a genuine issue of fact, therefore, the Department had to establish in its answer and supporting exhibits that the report fell within the business records exception to the hearsay rule. The Department, however, failed to submit the report itself or any other supporting exhibits to show that it fell within this exception, and it did not present any argument in its memorandum of law to substantiate the assertion in its response to the motion.

II. The Barkmans' request for partial summary judgment with respect to the alleged violations of §§201(a), 301, 302, and 501 of the Solid Waste Management Act

The second component of the Barkmans' motion requested partial summary judgment with regard to three of the seven alleged violations of §201(a), and all of the alleged violations of §§301 and 302 and §501 of the Solid Waste Management Act.

A. The alleged violations of §201(a)

The Department's order alleged that the Barkmans violated §201(a) on seven occasions. Three of the seven occurred on February 28, 1990, May 24, 1990, and July 11, 1990. The order never specified precisely what the conduct was which violated §201(a); instead, it simply described the conduct alleged to be unlawful on each date, then listed the cites for the statutory provisions it deemed the conduct to violate. On February 28, the order alleges, Department inspectors discovered evidence of recent waste disposal and open burning and observed pesticide containers amidst charred debris. (Ex. B-B, at paragraph 21.) The order also alleged that on May 24 the Department's inspectors observed open burning and discovered evidence of recent waste disposal and processing, and that on July 11 the inspectors again observed open burning.

The Barkmans' motion never expressly referred to §201(a). Instead, it asserted that the Barkmans were entitled to partial summary judgment for "the violations relating to processing and storage of municipal waste" on the three dates listed above. (The Barkmans' motion, at paragraph 11.) Of the statutory provisions cited in the order for the February 28, May 24, and July 11 violations, only §201(a) pertains to municipal waste. The scope of §201(a), however, is not limited simply to the processing and storage of municipal waste. Section 201(a), provides: No person ... shall store, collect, transport, process, or dispose of municipal waste" except as authorized by the Department's rules and regulations. 35 P.S. §6018.201(a). (Emphasis added.)

The Barkmans never asserted in their motion that the Department cited the Barkmans for the unlawful processing or storage of municipal waste on the three days in question, as opposed to the unlawful collection, transportation, or disposal of that waste, and it is well recognized that summary judgment is appropriate only in those cases where the right is clear and free from doubt. See e.g. Marks v. Tasman, 527 Pa. 132, 589 A.2d 205 (1991). Therefore, because it is not evident that the storage or processing of municipal waste under §201 is necessarily even at issue in this appeal, the Barkmans are not entitled to summary judgment on that issue.

B. The alleged violations of §§301 and 302

The Department's order alleged that the Barkmans violated §§301 and 302 of the Solid Waste Management Act on February 28, 1990. (Ex. B-B, at paragraph 21.) Both provisions define unlawful conduct with regard to residual waste.

In their motion, the Barkmans maintain that they are entitled to summary judgment with respect to the alleged violations of §§301 and 302

because the Department is unable to identify any residual waste at the facility. The Barkmans' motion cites no support for the assertion that the Department has identified no residual waste at the facility, however, and the Department, in its answer, denied that assertion. (The Barkmans' motion and Department's answer, both at paragraph 51.) Therefore, even assuming that the Barkmans would be entitled to judgment as a matter of law had they established that the Department failed to identify any residual waste at the facility, a genuine issue of fact remains precluding summary judgment.

C. The alleged violations of §§501(b) and 501(c)

According to the Department's order, the Barkmans violated §501 on seven different dates. Section 501 has three subsections: §501(a), which defines unlawful conduct with regard to solid waste; and §§501(b) and (c), which define unlawful conduct with regard to hazardous waste. It is not apparent from the order precisely which subsections of §501 the Department believes were violated.

The Barkmans did not, in their motion, request summary judgment with respect to all of §501; instead, they maintained that they were entitled to judgment as a matter of law with regard to §§501(b) and 501(c) because the Department failed to identify any hazardous waste on the property. The Barkmans provided no support for the assertion in their motion that the Department identified no hazardous waste at the facility.

In its answer, the Department asserted that it had identified hazardous materials in the groundwater at the facility and that the contamination was the result of the Barkmans disposing of waste at the facility. Like the Barkmans, the Department provided no support for its assertions.

Even were we to assume that the alleged §501 violations pertained

only to subsections (b) and (c) and that the Barkmans would be entitled to judgment as a matter of law if the Department identified no hazardous waste at the facility, the Barkmans are not entitled to summary judgment here. A genuine issue of fact remains with regard to whether the Department identified any hazardous waste at the facility.

ORDER

AND NOW, this 21st day of May, 1993, it is ordered that:

1) The Barkmans' motion for partial summary judgment is granted with respect to Grace and Ern-Bark; and

2) The Barkmans' motion for partial summary judgment is denied with respect to all other issues.

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DATED: May 21, 1993

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MICHAEL STRONGOSKY	:	
	:	
v.	:	EHB Docket No. 92-263-MJ
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and RESOURCE CONSERVATION CORP., Permittee:		Issued: May 21, 1993

OPINION AND ORDER SUR MOTION FOR RECONSIDERATION

By Joseph N. Mack, Member

Synopsis

In an appeal from DER's approval of a minor modification of a previously issued landfill permit, the Appellant's motion for reconsideration of an Order granting summary judgment to the Permittee is denied where it fails to meet the tests for reconsideration set forth in 25 Pa. Code §21.122(a).

The report which the Appellant contends the Board failed to consider in granting summary judgment fails to support the Appellant's position on the minor modification's approval and deals with issues related to the permit's initial issuance, a subject outside the scope of his appeal. Second, the Appellant fails to state compelling and persuasive reasons for reconsideration based on his questioning of an affidavit submitted by RCC in support of its motion for summary judgment. Appellant's objections to DER's approval of this minor modification which were addressed in the Board's Opinion on the motion for summary judgment will not be re-examined in an Opinion on reconsideration

where grounds for reconsideration are not stated. Finally, Appellant's "Additional Discoveries for the Motion for Reconsideration", which were filed beyond the twenty day timeframe set forth in 25 Pa. Code §21.122(a), are untimely and, as such, may not be considered in ruling on the merits of his motion.

OPINION

This matter involves an appeal filed by Michael Strongosky challenging the Department of Environmental Resources' ("Department's") approval of a minor modification ("permit modification") to a solid waste permit held by Resource Conservation Corporation ("RCC"). In an Opinion and Order issued on March 31, 1993 ("March 31 Opinion"), the Board entered summary judgment in favor of RCC and dismissed the appeal. The matter now before the Board is a Motion for Reconsideration filed by Mr. Strongosky on April 12, 1993. The Motion is accompanied by a number of documents previously filed by Mr. Strongosky at various stages throughout his appeal.

The Board notified the Department and RCC that any objections to Mr. Strongosky's motion were due on or before April 23, 1993. The Department submitted no response. RCC requested an extension to May 7, 1993, which was not opposed by Mr. Strongosky, and on May 7, 1993, RCC filed a Motion in Opposition to the Motion for Reconsideration and a supporting brief.

The Board may grant reconsideration only for compelling and persuasive reasons generally limited to the following:

> (1) The decision rests on a legal ground not considered by any party to the proceeding and that the parties in good faith should have had an opportunity to brief such question.
>
> (2) The crucial facts set forth in the application are not as stated in the decision and are such as would justify a reversal of the decision. In such a case reconsideration would only be granted if the evidence sought to be

> offered by the party requesting the reconsideration could not with due diligence have offered the evidence at the time of the hearing.
>
> 25 Pa. Code §21.122(a)

Mr. Strongosky begins his Motion for Reconsideration by stating that he is submitting "new discovery that has a bearing on the fact that the minor modification...does indeed have [sic] caused problems at the landfill." However, as set forth hereinbelow, Mr. Strongosky's Motion for Reconsideration fails to provide any new grounds justifying reconsideration.

Mr. Strongosky first contends that, in reaching its decision, the Board failed to consider a report by Barron Hills Consultants, which Mr. Strongosky submitted to the Board on January 29, 1993. The report in question is a letter from Barron Hill Consultants to Fred Baldassare in the Department's Bureau of Solid Waste Management. The letter was written on June 4, 1991 on behalf of the Shade Township Supervisors and expresses concerns about "the proposed Resource Conservation Corporation (RCC) Landfill." The letter was appended to Mr. Strongosky's pre-hearing memorandum, along with numerous other items.

Contrary to Mr. Strongosky's assertion, the Board's decision does not ignore the contents of the Barron Hill letter. The Board reviewed this letter in writing its March 31 Opinion. However, the letter reinforces the Board's finding in its March 31 Opinion that Mr. Strongosky's appeal of this permit modification was, in fact, an attempt to challenge DER's initial decision in favor of issuance of the permit in 1991. As discussed in the March 31 Opinion, because Mr. Strongosky did not appeal the initial issuance of the permit, he is barred from challenging it at this time. Commonwealth, DER v. Wheeling-Pittsburgh Steel Corp., 473 Pa. 432, 375 A.2d 320 (1977), cert. denied, 434 U.S. 969.

The Barron Hill letter discusses the following concerns: high regional water table, recharge area of three public water supplies, complex groundwater flow regime, topographic position of the landfill as it relates to diversion of surface water, potential blasting damage from a nearby quarry, treatment of polluted groundwater, and adequacy of bonding for remediation after closure. These issues bear no relation to the permit modification which Mr. Strongosky appealed. As noted in our earlier Opinion, the permit modification dealt only with soil compaction standards. Therefore, the Barron Hill letter provides no basis for reconsideration.[1]

Secondly, Mr. Strongosky challenges the affidavit of Brian Gracey, Vice President and General Manager of RCC, which confirmed that the revisions contained in the permit modification dealt only with soil compaction standards. Mr. Strongosky challenges Mr. Gracey's affidavit on the basis that it does not state that Mr. Gracey is an engineer qualified to attest to engineering problems and the matters affected by the permit modification.

The affidavit in question states that Mr. Gracey is familiar with the terms and provisions of the solid waste permit and the permit modification. We have no reason to believe that Mr. Gracey, as Vice President and General Manager of RCC, would not be familiar with the terms of a solid waste permit secured by his company and any revisions to the permit. Nor do we believe that only an engineer would be qualified to identify the subject of the

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[1] Although Mr. Strongosky does briefly mention the issue of soil compaction standards in his Motion for Reconsideration, this issue was not raised in his notice of appeal. See March 31 Opinion, p. 4. Failure to timely include an issue in the notice of appeal means that its subsequent addition can only occur where an appeal *nunc pro tunc* might be allowed. Commonwealth, Pennsylvania Game Commission v. Commonwealth, Department of Environmental Resources, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), aff'd on other grounds, 521 Pa. 121, 555 A.2d 812 (1989). Mr. Strongosky cannot seek to have the dismissal of his appeal reconsidered on the basis that he is now addressing this issue. The Carbon/Graphite Group, Inc. v. DER, 1991 EHB 690.

revisions made by the permit modification.[2] We find the affidavit of Mr. Gracey to be credible, and Mr. Strongosky has presented no compelling or persuasive basis for disputing it.

The remainder of Mr. Strongosky's Motion, including the attachments, rather than providing a basis for reconsideration, merely reiterates his objections to the landfill. As we have explained in our March 31 Opinion, if Mr. Strongosky had concerns about the safety of the landfill, he was required to preserve those issues by filing an appeal of the issuance of the permit. Because the issue of a timely appeal from that permit's issuance was addressed in our earlier Opinion, we will not examine it here a second time. Concord Resources Group of Pennsylvania, Inc. v. DER, EHB Docket No. 92-416-W (Opinion and Order Sur Motion for Reconsideration issued February 1, 1993).

Finally, on May 5, 1993, Mr. Strongosky filed a document entitled "Additional Discoveries for the Motion for Reconsideration", which apparently represents additional grounds being put forth by Mr. Strongosky in support of reconsideration. Because these "Additional Discoveries" were filed beyond the twenty-day timeframe allowed for requests for reconsideration by 25 Pa. Code §21.122(a), they are untimely. Since they are untimely we cannot address

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[2] In its supporting brief, RCC states that Mr. Gracey is a registered engineer in the Commonwealth of Pennsylvania with over fifteen years of experience and that he is the site and construction manager of the project site. However, this information is not contained in Mr. Gracey's affidavit; nor does any affidavit verifying this information accompany RCC's brief. Therefore, we have no basis for relying on this statement in RCC's brief. However, we have determined Mr. Gracey to be qualified on other grounds.

their merits. However, a review of this document shows it to be a further litany of objections to the landfill, which, as explained above, does not form a basis for reconsideration under §21.122(a).[3]

Because Mr. Strongosky's motion fails to present compelling and persuasive reasons for reconsideration, as set forth in 25 Pa. Code §21.122(a), his motion must be denied.

O R D E R

AND NOW, this 21st day of May, 1993, it is hereby ordered that the Motion for Reconsideration filed by Michael Strongosky at EHB Docket No. 92-263-MJ is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

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Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

See next page for service list

[3] Several of the attachments are the same as those submitted with the Motion for Reconsideration.

DATED: May 21, 1993

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M. DIANE SMITH
SECRETARY TO THE BOA

KEYSTONE CARBON AND OIL, INC.	:	
	:	
v.	:	EHB Docket No. 92-052-E
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 4, 1993

OPINION AND ORDER SUR
MOTION TO DISMISS FOR FAILURE BY
APPELLANT TO BE REPRESENTED BY COUNSEL

By Richard S. Ehmann, Member

Synopsis

In an appeal before this Board a corporation may not appear *pro se* or be represented by officers who are not attorneys, but must be represented by a lawyer admitted to practice within Pennsylvania. This Board's Rule at 25 Pa. Code §21.21(a), allowing a corporation to appear before us through its officers, is invalid and contrary to law. Where a corporation has attempted to appear before us through its non-lawyer president, a motion to dismiss the appeal based on this representation will be granted where we have previously ordered the corporation to retain counsel but it has failed to comply therewith.

OPINION

This matter was initiated by the January 31, 1992, filing of a notice of appeal by Keystone Carbon and Oil, Inc. (Keystone) through its president, Michael Sircovics, (Sircovics) challenging the Department of Environmental

Resources' (DER) January 6, 1992, denial of a permit application[1] under The Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, 35 P.S. §6018.101 *et seq.* (Solid Waste Management Act), for a permit to operate a tire reclamation facility in Parker Township, Carbon County.

On April 1, 1993, DER refiled a motion to dismiss[2] Keystone's appeal for failure to be represented by counsel, or in the alternative, a motion for order requiring Keystone to be represented by counsel.[3] DER asserts that Keystone, as a corporation, must be represented by counsel in adversial proceedings and may not appear *pro se*, that 25 Pa. Code §21.21(a) is contrary to law insofar as it allows a corporation to appear through its officers, and that Mr. Sircovics is not an attorney licensed to practice in Pennsylvania and the Board cannot authorize him to practice law on Keystone's behalf.

On April 19, 1993, Mr. Sircovics wrote a letter to the Board enclosing what his letter describes as a brief in response to DER's Motion To

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1 On February 1, 1989, Keystone filed a notice of appeal, Docket No. 89-051-E, challenging DER's denial of a permit application for the same facility. On January 5, 1990, Keystone notified the Board of its desire to withdraw the notice of appeal. By order dated January 9, 1990, the Board ordered the appeal withdrawn and the matter closed and discontinued.

2 DER also filed a motion to strike Keystone's pre-hearing memorandum for lack of compliance with pre-hearing order No. 1 or in the alternative, a motion for order requiring compliance with pre-hearing order No. 1 and a motion to limit issues and evidence at the hearing. This opinion only considers the motion to dismiss.

3 DER originally filed a motion to dismiss on November 13, 1992. By a December 3, 1992, order DER's motion to dismiss was denied without prejudice; however, the alternative motion for an order pursuant to 25 Pa. Code §21.22(a) was granted and Keystone was ordered to retain counsel to represent it in this appeal on or before February 15, 1993. On February 22, 1993, the Board received a letter from Keystone, through Mr. Sircovics, stating that it had been unable to retain counsel and requesting a five month continuance to allow it to retain counsel. On March 2, 1993, the Board ordered Keystone to retain counsel to represent it in this appeal on or before March 30, 1993, and if Keystone failed to comply, DER was to advise the Board by April 2, 1993, whether it was refiling its motion to dismiss.

Dismiss. The thirteen page enclosure recites at length Mr. Sircovics' understanding of his dealings with DER up to the point of his filing the instant appeal. It also includes his complaint to the American Civil Liberties Union about his dealings with DER and how this Board insists Keystone retain a lawyer and states that Keystone is out of funds to hire counsel. Unfortunately, other then those statements and an attachment of a copy of 25 Pa. Code §§21.21 and 21.22, Keystone's response never addresses the issues raised by DER's Motion.

In support of its assertions, DER cites Walacavage v. Excell 2000, Inc., 480 A.2d 281,[4] in which the Superior Court addresses a question of first impression in Pennsylvania in whether a corporation could appear in court through a corporate officer and shareholder who is not a lawyer. In conformance with the holdings of the federal courts and the courts of other states, the Superior Court found the law is clear that a corporation cannot act except through its agent, and in a court, that agent must be an attorney admitted to practice before the court (unless a Rule of Civil Procedure or statute provides an exception). Furthermore, DER argues that the Pennsylvania Supreme Court applied the rule to the Workers Compensation Board and similar tribunals. In Shortz v. Farrell, 327 Pa. 81, 193 A.20 (1937), the Court found a corporation's claims adjustor, who represented it in a hearing before a referee in workers compensation cases, including the filing of pleadings and the conducting of direct and cross-examination of witnesses, was practicing law and sustained the lower court's decree. While recognizing such a Board is an administrative tribunal and less formal than a court, the Court recognized the judicial nature of proceedings before such Boards as opposed to

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4 Proper citation is 331 Pa. Super. 137, 480 A.2d 281 (1984).

proceedings before other governmental agencies which are executive or legislative in character. The Court pointed out that these functions require one, who represents another in a controverted proceeding before that Board, to function as a lawyer.

The Court stated that it did not matter that the proceedings before the referees were appealable to that Board because the factual record was made before the referees. As to corporations, the Court went on to observe, "there can be no legal representation at all except by counsel, because a corporation cannot appear in *propria persona*. [citations omitted] Were it otherwise, a corporation could employ any person, not learned in the law, to represent it in any or all judicial proceedings." Shortz at 90, 193 A. at ___. In accord generally see McCain v. Curione *et al.*, 106 Pa. Cmwlth. 552, 527 A.2d 591 (1987).

Following the precedent laid down by these cases, the Board finds no Rule of Civil Procedure or statute which authorizes Keystone to appear through its president. Keystone sought the permit under the Solid Waste Management Act, the regulations promulgated thereunder, but that statute and those regulations fail to address this issue. When DER denied Keystone's application, it advised Keystone it could appeal DER's decision to the extent authorized under "the Administrative Agency Law 2 Pa. C.S.A. Chapter 5A"[5] and Section 4 of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, No. 94, 35 P.S. §7514. Nothing in either act addresses the instant issue.

The Board is an independent quasi-judicial agency with adjudicatory powers, under the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. 7511 *et seq.* (Environmental Hearing Board Act). It has its

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5 Properly cited as 2 Pa. C.S. Chapter 5A.

own rules of practice and procedure, as set forth in 25 Pa. Code §21.1 *et seq.* Under Section 21.21(a) of these rules a corporation may appear before the Board through its officers. In addition, Section 21.21 (a) supersedes the General Rules of Administrative Practice and Procedure, 1 Pa. Code §§31.21, 31.22 and 31.23, which require a corporation to have counsel represent it in adversary proceedings, like this appeal.

There is no "legislative history" to illuminate the Environmental Quality Board's[6] reason for adopting 25 Pa. Code §21.21(a). We can only speculate that Section 21.21(a) was adopted to provide a broad range of prospective appellants with access to the Board. Furthermore, at the time the rule was adopted in the early 1970's, the Board was still evolving as an institution. Although such open access is desirable, the Board, as a quasi-judicial tribunal, conducts proceedings which are procedurally similar to courts of common pleas' trials. The fields of environmental regulation and environmental law have become more complex and sophisticated, as has practice before the Board. Important rights may be affected by a party's unfamiliarity with either the substantive law or procedure before a tribunal. The policy reasons for compelling corporations to be represented by counsel are sound. But even more importantly, the Board is bound by the relevant precedents of Pennsylvania's appellate courts and bound to apply the applicable law. We see nothing to distinguish the situation presented to the Supreme Court in Shortz from that presented in this appeal.

Therefore, the Board will invalidate 25 Pa. Code §21.21(a) to the extent it authorizes corporations to be represented by their non-lawyer

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6 Until the passage of the Environmental Hearing Board Act in 1988, the Environmental Quality Board was authorized to adopt rules of practice and procedure for proceedings before the Board.

officers in proceedings before the Board. Because the General Rules of Administrative Practice and Procedure apply to proceedings before the Board in the absence of valid, but inconsistent agency rules, Spang and Company v. Department of Environmental Resources, 140 Pa. Cmwlth. 306, 592 A.2d 815, 819 (1991), the requirement of the General Rules of Administrative Practice and Procedure, 1 Pa. Code §§31.21 and 31.22 that corporations be represented by counsel in adversial proceedings will be applied to proceedings before the Board.

In early December of last year we ordered Keystone to retain counsel, however, as is evident from its response to DER's refiled Motion To Dismiss, Keystone has failed to do so. Because this is a case of first impression before us, we are willing to give Keystone one last opportunity to understand the impact on its appeal of its failure to retain counsel. Accordingly, we grant DER's Motion in the fashion set forth below.

ORDER

AND NOW, this 4th day of June, 1993, it is ordered that DER's Motion to Dismiss For Failure of Appellant To Be Represented By Counsel is granted. Dismissal shall occur automatically (30 days from date of Order) on **July 6, 1993** without DER refiling a motion to dismiss unless before that date Keystone shall retain counsel to represent it in this appeal and shall have said counsel enter his or her new appearance with this Board on Keystone's behalf.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 4, 1993

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M. DIANE SMITH
SECRETARY TO THE BOA

RESCUE WYOMING, *et al.*	:	
	:	**EHB Docket No. 91-503-W**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, WYOMING SAND AND STONE COMPANY, Permittee and PENNSYLVANIA HISTORICAL AND MUSEUM COMMISSION, Intervenor	:	**Issued:** June 4, 1993 ***Amended:** June 8, 1993

OPINION AND ORDER
SUR MOTION FOR SANCTIONS

By Maxine Woelfling, Chairman

Synopsis:

Where appellants fail to comply with a Board order to supplement their interrogatories for new witnesses which were listed in their pre-hearing memorandum, the Board will grant a motion for sanctions and preclude testimony from these witnesses. Permittee's request for costs incurred in preparing and serving the motion will be denied.

OPINION

Presently before the Board for disposition is Wyoming Sand and Stone Company's (Wyoming Sand and Stone) October 19, 1992, motion for sanctions against RESCUE Wyoming, et al. (Appellants) for failure to comply with a Board order[1] compelling Appellants to supplement their answers to

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[1] On June 2, 1992, Appellants filed their pre-hearing memorandum. On July 29, 1992, Wyoming Sand and Stone filed a motion to strike for more specific footnote continued

Interrogatories 78-83[2] for the new witnesses[3] listed in their pre-hearing memorandum. Wyoming Sand and Stone avers that as a result of Appellants' failure to comply with the order, Wyoming Sand and Stone has been prejudiced in preparing its case in that it cannot evaluate the witnesses' credentials and qualifications as experts.

On October 30, 1992, Appellants filed their response, contending, *inter alia*, that the information sought was not relevant, and that they had previously provided the information and, therefore, complied with the Board's orders.

On November 12, 1992, Wyoming Sand and Stone replied and on October 26, 1992, and October 30, 1992, the Department of Environmental Resources and the Pennsylvania Historical and Museum Commission, respectively, advised the Board that they had no objection to Wyoming Sand and Stone's motion for sanctions.

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continued footnote
pre-hearing memorandum and motion to compel to clean up the defects regarding the witnesses. On September 16, 1992, the Board granted in part Wyoming Sand and Stone's motion by ordering Appellants to amend their pre-hearing memorandum to identify their fact and expert witnesses, but denied all other respects of the motion, and granted Wyoming Sand and Stone's motion to compel by requiring Appellants to supplement their answers to the interrogatories relating to witnesses to be called at a hearing.

[2] Interrogatories 78-83 requested the following information: name of witness; employment position; business and home addresses; his/her qualifications (schools attended, degrees received, experience in particular fields and list of all publications he/she authored); the subject matter on which he/she is expected to testify; the substance of the facts and opinions to which he/she is expected to testify and a summary of the grounds for each opinion; if a report or study will be used to identify it, all the information used or relied on in preparing it, and whether there will be testimony not appearing in it and the source of that testimony; and summarize the grounds for each expert opinion of each person identified.

[3] Those witnesses were: Ted Weir, Robert Monsey, Vivian McCartny, Ronald Williams, John Ireland, Hetty Biaz, George Turner, Bernard Sweeney, Don Greese, Marian Hrubovcak, John Chernesky, and Paul Connett, Ph.D.

Under 25 Pa. Code §21.124, the Board may impose sanctions on a party for failure to abide by a Board order. Such sanctions may include barring the use of witnesses not disclosed in compliance with any order. 25 Pa. Code §21.124; Nowakowski v. DER, 1990 EHB 244.

Here, the Board's September 16, 1992, order granted Wyoming Sand and Stone's motion to compel and ordered Appellants to supplement their answers to Interrogatories 78-83 for each of the pre-hearing memorandum witnesses to be called at a hearing. Appellants have not complied with the order, instead insisting that the requested information is irrelevant. On the contrary, the requested information is relevant as it ensures fairness to the other party during trial preparation and prevents surprise at trial.

An appropriate sanction in this instance is to preclude Appellants from presenting testimony from those witnesses for whom Appellants did not supplement Interrogatories 78-83.

Wyoming Sand and Stone's request for payment of reasonable expenses, including attorney's fees, incurred in preparing and serving this motion will be denied, since Appellants, who are acting *pro se*, believed in good faith that they had provided the requisite information.

O R D E R

AND NOW, this 4th day of June, 1993, it is ordered that:

1) Wyoming Sand and Stone's motion for sanctions against Appellants is granted and the testimony of the witnesses for whom Appellants did not supplement their responses to interrogatories is precluded; and

2) Wyoming Sand and Stone's request for attorneys fees and costs is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: June 4, 1993
***AMENDED:** June 8, 1993
See next page for service list.

* The only change to the opinion is in the first sentence of the Synopsis, where the word "three" has been deleted. That sentence now reads, "Where appellants fail to comply with a Board order to supplement their interrogatories for new witnesses which were listed in their pre-hearing memorandum, the Board will grant a motion for sanctions and preclude testimony from these witnesses."

EHB Docket No. 91-503-W
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M. DIANE SMITH
SECRETARY TO THE BOA

CARLSON MINING COMPANY	:	
	:	
v.	:	EHB Docket No. 91-547-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 10, 1993

OPINION AND ORDER SUR
PROPOSED PARTIAL CONSENT
ADJUDICATION AND ORDER

By: Richard S. Ehmann, Member

Synopsis

Where parties submit a proposed Partial Consent Adjudication to settle an issue remanded to DER after adjudication by this Board of the merits of the challenges to DER's initial action, and the proposed Partial Consent Adjudication fails to address the issues remanded to DER and does not indicate the consent of third parties who will be affected if the Board approves the proposed Partial Consent Adjudication, then the proposed Partial Consent Adjudication will be rejected by this Board pursuant to 25 Pa. Code §21.120(a).

OPINION

This appeal arose initially when Carlson Mining Company ("Carlson") appealed from a Department of Environmental Resources ("DER") administrative order to it to provide for operation and maintenance of a replacement water

supply for a homeowner (adjacent to its mine site) on a permanent basis.[1] In part, DER sought to have Carlson establish a $7,200 escrow to cover the cost of operation and maintenance of this replacement supply.

After the parties submitted this matter on stipulated facts and filed their briefs on the legal issues, we issued our Adjudication dated October 29, 1992. That Adjudication sustained DER in large part but not in full. In part, our Order of October 29, 1992 remanded this appeal to DER

> to devise, within 120 days of this order, a funding mechanism by which Carlson will provide funding for the Mackey replacement supply in accordance with the foregoing Adjudication. The Board retains jurisdiction over this appeal.

The area on which DER was not sustained concerned the mechanism selected by DER to assure Carlson's payment of the operational and maintenance ("O&M") costs of the replacement water supply for Lois Mackey ("Mackey").[2] DER's position was that Carlson had to set up an escrow account and give Mackey control over it. DER wanted no responsibility for these funds.

However, we found that Carlson raised legitimate concerns over DER's methodology. Carlson was concerned over DER's ability to return to seek further funds from it for O&M costs, if, in the future, circumstances with regard to this replacement water supply took a turn for the worse. On the other hand, if they took a turn for the better to the point that Mackey's pre-mining water supply was returned to its original quality and quantity, Carlson properly asserted its right to a return of any remaining escrowed

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1 The particular facts and issues raised in this appeal are discussed at length in our Adjudication and will not be repeated here.

2 As noted in footnote 11 of the Adjudication, we were also unable to conclude that DER's $7,200 figure was reasonable because of a lack of evidence as to the method by which it was computed and the factors included within the computation.

funds. Carlson also expressed concern that if it was to post these funds, it had some right to be sure they were used for O&M costs rather than any other uses which Mackey might want (assuming the money was given to her as initially required by DER). Because this was the second water supply replacement appeal coming before us recently, the other being Buffy and Landis v. DER, et al., 1990 EHB 1665, we implicitly recognized DER must be faced with other matters of this type where it and the miner reach agreement, and thus recognized in the Adjudication's footnote 12 that DER would undoubtedly want to adopt a uniform procedure to address these issues by regulation.[3]

At the end of the 120 day period referenced in our Order and, on March 11, 1993, DER and Carlson submitted a proposed Partial Consent Adjudication to us for this Board's approval as the method to resolve the issues which were remanded to DER. It says that Carlson will post the $7,200 in a Letter of Credit, with this amount payable to Mackey, her heirs, or assigns, upon the occurrence of:

> 1. issuance of a final unappealable court order affirming Carlson's duty to provide for these costs, or
>
> 2. issuance of a final court order affirming Carlson's duty to pay these funds which Carlson does not timely appeal.

The proposed Partial Consent Adjudication also provides the Letter of Credit terminates if a final unappealable court order is issued reversing this duty imposed on Carlson or by DER's failure to timely appeal from such a final

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[3] DER's failure to use regulations in the past to address mining issues on which it acted in a standard or uniform fashion has previously produced some caselaw with which DER now wrestles. Commonwealth, DER v. Rushton Mining Co., et al. 139 Pa. Cmwlth. 648, 591 A.2d 1168 (1991), allocatur denied, ___Pa. ___, 600 A.2d 541 (1991).

court order. Additionally, it provides that if Carlson fails to pay Mrs. Mackey's increased operating and maintenance costs the Letter of Credit is payable and further obligates Carlson to pay these O&M costs within 10 days of receipt of a bill from Mrs. Mackey for such costs. Next, it provides that Carlson withdraws its appeal as it pertains to the issues remanded to DER but states that the Partial Consent Adjudication is not intended to affect the remainder of the Adjudication.

When the attorneys for the parties were questioned concerning this proposal in a telephonic conference, they indicated this situation was like a party abandoning an issue in its appeal and Carlson no longer opposed these aspects of DER's order. DER's counsel further indicated that DER agreed to settle with Carlson in this fashion because DER did not want to go to the time and effort of preparing regulations on these issues until there was a Commonwealth Court opinion sustaining the adjudication's reasoning.

We reject the parties' suggestion that this situation is identical to the situation where, after filing an appeal reciting multiple issues, an appellant reconsiders and elects to abandon one of its issues while proceeding with the remainder. Here, the time for such an abandonment has passed. When the appeal was filed and this appeal heard, the parties submitted themselves and this issue to our jurisdiction. As a Board, we have conducted the *de novo* review of DER's decision to issue its administrative order to Carlson as we are required to do by Section 4 of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7514; Warren Sand and Gravel Co., Inc., et al. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975). We have drawn our conclusions based upon the evidence the parties have presented and the legal arguments advanced by their lawyers. We have issued our decision on the

merits of the arguments in support of DER's order and sustained Carlson in regard to certain aspects thereof. The Board's decision on the inadequacy of DER's methodology has been made. Thus, it is too late for this issue to be "abandoned" as the parties suggest. Indeed, to hold otherwise would be to make a mockery of the appeals process before this Board because it would allow the parties to pick and choose the portions of our decision they are satisfied with and with which they will comply. Accordingly, we reject this abandonment theory.

The proposed Consent Adjudication does not develop a mechanism for funding the O&M costs of Mackey's replacement water supply as mandated by the Order of this Board dated October 29, 1992 . We still do not know if this $7,200 figure is adequate and was set using the proper factors or how Carlson may get any remaining funds back if Mackey's pre-mining water supply returns to its pre-mining condition. Further, nothing in the Consent Adjudication addresses DER's ability to return to seek further monies from Carlson if the replacement water supply's condition declines in the future. Moreover, it is clear that the $7,200 Letter of Credit proposed now is not a $7,200 escrow account turned over to Lois Mackey as DER initially pushed to have done, so this proposed Partial Consent Adjudication is clearly neither an abandonment of this issue by Carlson nor compliance by DER with our Order.

Finally, and by no means insignificantly, these parties have provided us no indication of whether Mackey, whose rights were defined in part in our Adjudication, has even been consulted about the proposal in the proposed Partial Consent Adjudication. The Mackey water supply was the subject of the appealed-from order. Clearly, the proposed Partial Consent Adjudication narrows her rights. For example, if the $7,200 figure is inadequate to cover

Mackey's future O&M costs and we approve it, we may have foreclosed DER's ability to further enforce Section 4.2(f) of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.4(b)(f), as to Carlson and this replacement water supply. And, while Mrs. Mackey, like anyone dissatisfied with a settlement, may appeal it to the Board, this is unlike the situation usually presented by third party appeals of settlements. The statutory provision pursuant to which DER took action empowers DER to issue orders to mine operators to vindicate the rights of private parties. Thus, Mrs. Mackey stands in different shoes than other interested parties potentially dissatisfied with a settlement. Clearly, Mackey's informed consent to this proposal would greatly impact on our conclusions with regard to the Partial Consent Adjudication's appropriateness but the parties have not offered us any evidence thereof.

Accordingly, pursuant to our implicit power to reject the terms of this settlement pursuant to 25 Pa. Code §21.120(a), we issue the following Order.

O R D E R

AND NOW, this 10th day of June, 1993, pursuant to 25 Pa. Code §21.120(a) it is ordered that the parties' request that this Board approve their proposed Partial Consent Adjudication is denied. It is further ordered that by June 15, 1993, DER shall file with this Board its schedule for compliance with the portion of our Order of October 29, 1992 remanding the funding mechanism issue to it. The Board retains jurisdiction over this appeal.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

*Board Member Joseph N. Mack did not participate in this decision.

DATED: June 10, 1993

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M. DIANE SMITH
SECRETARY TO THE BOARD

PENNSYLVANIA-AMERICAN WATER COMPANY	:	
	:	
v.	:	EHB Docket No. 90-122-MJ
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 14, 1993

OPINION AND ORDER SUR
RELEASE RATE FOR DAM
ON REMAND FROM COMMONWEALTH COURT

By Joseph N. Mack, Member

Synopsis

The Board finds that the historically established, status quo release for a dam operated by the Pennsylvania-American Water Company adequately protects the water quality and fish and aquatic life of the stream on which the dam is located. Consequently, the Board affirms the status quo release.

OPINION

This matter arose from an appeal filed by the Pennsylvania-American Water Company ("PAWC") challenging a low-flow release requirement imposed by the Department of Environmental Resources ("DER") in a dam modification permit issued to PAWC on March 5, 1990. PAWC had obtained the permit for the purpose of performing repair work on the Philipsburg No. 3 Dam ("Dam No. 3") on Cold Stream in Rush Township, Centre County.

In an Adjudication issued on February 20, 1992, the Environmental Hearing Board ("Board") determined that DER had acted arbitrarily in imposing

a low-flow release requirement in the permit and had acted in violation of 25 Pa. Code §105.113(c) in calculating the rate. The Board sustained PAWC's appeal and struck the condition from the permit. See Pennsylvania-American Water Company v. DER, EHB Docket No. 90-122-MJ (Adjudication issued February 20, 1992).

Thereafter, on or about March 20, 1992, DER filed a Petition for Review with the Commonwealth Court seeking review of the Board's February 20, 1992 Adjudication. In its unreported Opinion issued on December 1, 1992, the Commonwealth Court affirmed the Board's order striking the low-flow release condition from the permit, but remanded the case to the Board to determine, based on the evidence in the record, whether the status quo release rate for Dam No. 3 was adequate. The Court directed that if the Board determined that the status quo release was not adequate, the matter should be remanded to DER for the establishment of a low-flow release rate in accordance with the regulations. This Opinion addresses that question.

In letters to the Board dated December 15, 1992 and December 20, 1992, respectively, DER and PAWC responded to the Court's order. DER contends that there is insufficient evidence of record to determine the adequacy of the release rate with respect to upstream and downstream needs, and urges that we remand this matter to it to address these issues. PAWC opposes DER's request for a remand, noting that the Commonwealth Court, on page 12 of its Opinion, was "convinced the Board has sufficient evidence of record to determine if the historically established or status quo release is adequate". It is PAWC's position that the status quo release is adequate.

We find that sufficient evidence does exist of record supporting PAWC's contention that the status quo release is adequate. This determination is based on the following findings of fact:

FINDINGS OF FACT

1. Dam No. 3 has been in operation since 1903. (T. 14-15)[1] It is used solely as a public water supply for portions of ten municipalities in western Centre County and eastern Clearfield County known as the Moshannon Valley District ("Moshannon Valley"). (T. 15)

2. Dam No. 3 contains an underdrain through which water is automatically released into Cold Stream at a rate of 80,000 to 100,000 gallons per day. (T. 20-21) The amount of flow being released through the drain has not varied considerably over the last 25 years. (T. 21)

3. The net storage capacity of Dam No. 3 is 8.9 million gallons, which is the equivalent of a five to six day supply of water for the Moshannon Valley. (T. 37)

4. Dam No. 3 is the primary source of water for the Moshannon Valley.

5. On July 6, 1989, PAWC applied to DER for a dam modification permit to perform repair work on Dam No. 3. (J.S. 6)

6. The proposed modifications in no way changed the stream flow conditions or caused the dam to withdraw more water from Cold Stream. (J.S. 8)

7. Notification of PAWC's application was sent by DER to various agencies and bureaus for comment. (T. 96)

8. The Bureau of Water Quality Management, which is the expert section within DER on water quality matters, had no objection to issuance of

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[1] "T. __" refers to a page in the transcript of the hearing on the merits. "J.S. __" refers to a stipulated fact under section (e) of the parties' Joint Stipulation filed on December 21, 1990. "Ex. J-__" refers to a joint exhibit admitted at the hearing.

the dam modification permit, nor did it recommend that a low-flow release requirement be imposed. (T. 110; Ex. J-2)

9. The Environmental Review Section of DER's Bureau of Water Resources Management, the Pennsylvania Game Commission, and the U.S. Department of the Interior's Fish and Wildlife Service did not raise any objection to issuance of the dam modification permit or recommend that a low-flow release condition be imposed in the permit. (Ex. J-4, J-5, J-7) In particular, the Department of the Interior found that "[n]o significant adverse effects on fish and wildlife [were] expected to result from the proposed activities", and the Game Commission determined that "no significant adverse effects on wildlife or wildlife habitats [were] expected." (Ex. J-5, J-7)

10. Only the Pennsylvania Fish Commission and DER's State Water Plan Division recommended that a low-flow release requirement be incorporated into the permit, primarily because of a trout fishery use designated for Cold Stream downstream of the dam.[2] (T. 96; Ex. J-13 and J-14)

11. Based on the aforesaid recommendation of the Pennsylvania Fish Commission and the State Water Plan Division, a special condition was inserted into PAWC's permit reading in relevant part as follows:

> A continuous flow of not less than 0.563 cubic feet per second, equivalent to 363,000 gallons per day, shall be maintained in the stream immediately below the dam unless the flow into the reservoir is less than that amount, in which case the lesser flow shall be maintained.

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[2] Cold Stream is designated as a cold water fishery in 25 Pa. Code §93.91 Drainage List L.

12. PAWC's John Settelin, who had been responsible for the operation of Dam No. 3 during the 15 years preceding the hearing, had never observed Cold Stream run dry downstream of the dam. (T. 18, 21)

13. A fish kill which occurred in Cold Stream downstream of Dam No. 3 in the early 1980's was investigated by PAWC, Trout Unlimited, and the Pennsylvania Fish Commission, and was traced to children throwing carbide bombs into Cold Stream. (T. 23)

14. Another fish kill occurred in Cold Stream downstream of the dam in 1989. This was investigated by the Pennsylvania Fish Commission, which was unable to determine the cause. During this time, however, water was passing over the spillway of Dam No. 3 into Cold Stream. (T. 24)

15. Other sources of water which feed into Cold Stream include Hawk Run and Tomtit Run. (T. 22)

16. Tomtit Run flows into Cold Stream downstream of Dam No. 3. (T. 25)

17. In August 1988, a kill occurred in a trout hatchery located adjacent to Tomtit Run upstream of the juncture between Tomtit Run and Cold Stream. This was caused by lack of flow and lack of oxygen due to a severe drought. (T. 25)

18. Water from Dam No. 3 does not flow to the trout hatchery on Tomtit Run. (T. 25)

DISCUSSION

In our Adjudication of this matter issued on February 20, 1992, we held that DER clearly has the authority, under §9(b) of the Dam Safety and Encroachments Act ("DSEA"), Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 *et seq.*, at §693.9(b), and 25 Pa. Code §105.113(a), to establish release rates in a permit issued under the DSEA where it deems it

necessary for the protection of public health, aquatic life, water quality, or instream or downstream uses. However, we determined that DER had arbitrarily imposed the release rate in question in PAWC's permit without giving consideration to the factors set forth in 25 Pa. Code §105.113(c).

The question now before us on remand from the Commonwealth Court is whether the status quo release of 80,000 to 100,000 gallons of water per day (F.F. 2) is adequate for the protection of water quality and fish and aquatic life in Cold Stream or whether a low-flow release requirement is necessary.

DER's stated purpose for imposing a low-flow release requirement for Dam No. 3 was the protection of a trout fishery located downstream of the dam. However, there is no evidence that the quality of life in the stream had been adversely impacted by the operation of Dam No. 3. On the contrary, the evidence indicates that Cold Stream supported a healthy, thriving environment downstream of the dam. Moreover, both the Department of the Interior's Fish and Wildlife Service and the Pennsylvania Game Commission, which reviewed PAWC's permit application, found that there would be no significant adverse impact on fish and wildlife without the imposition of a low-flow release requirement. (F.F. 9)

Although the trout fishery downstream of the dam did experience losses on two separate occasions, one in the early 1980's and another in 1989, neither of these could be traced to operation of the dam. The first incident was investigated by the Pennsylvania Fish Commission, Trout Unlimited, and PAWC and was traced to children throwing carbide bombs into the stream. (F.F. 13) The second incident, in 1989, was also investigated by the Pennsylvania Fish Commission, which was not able to determine the cause. (F.F. 14) However, the incident could not have been the result of too little flow in Cold Stream because at the time of the occurrence, water continued to pass

over the spillway of Dam No. 3, indicating that the reservoir was full and that there was no shortage of flow. (F.F. 14)

In August 1988, a kill which occurred in a trout hatchery on Tomtit Run, upstream of Tomtit Run's juncture with Cold Stream, was traced to low flow and lack of oxygen caused by a severe drought. (F.F. 17) However, water from Dam No. 3 does not flow to the trout hatchery and, therefore, the amount of water being released from Dam No. 3 would have no effect on the amount of flow reaching the hatchery. (F.F. 18)

Based on the evidence in the record, we find that the status quo release from Dam No. 3 adequately protects the stream life and water quality of Cold Stream, and that there is no basis for imposing a low-flow release requirement on Dam No. 3.

Therefore, we do not remand this matter to DER, but enter the following order:

O R D E R

AND NOW, this 14th day of June, 1993, in response to the Commonwealth Court's directive on remand, and based on our finding that the status quo release for Dam No. 3 provides adequate protection, it is hereby ordered that the status quo release for Dam No. 3 shall remain in effect.

ENVIRONMENTAL HEARING BOARD

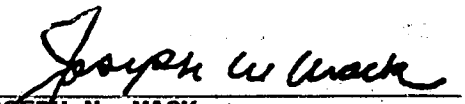
Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 14, 1993

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M. DIANE SMITH
SECRETARY TO THE BOAR

DELAWARE ENVIRONMENTAL ACTION COALITION et al.	:	
v.	:	**EHB Docket No. 91-430-MR (consolidated)**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and M & S SANITARY SEWAGE DISPOSAL, INC. PERMITTEE	:	**Issued: June 15, 1993**

OPINION AND ORDER
SUR
MOTION TO LIMIT ISSUES

Robert D. Myers, Member

Synopsis

Issues raised in an appeal from issuance of a water quality management permit that relate to issuance of a NPDES permit will be stricken. Issues raised in a pre-hearing memorandum not raised, directly or by necessary implication, in the notice of appeal also will be stricken. Appellants will be required to identify the specific regulations claimed to be violated in connection with the issues that have not been stricken.

OPINION

These consolidated appeals, filed by Delaware Environmental Action Coalition (DEAC) and Dr. James E. Wood (Wood), challenge the issuance by the Department of Environmental Resources (DER) on September 18, 1991, of Water Quality Management Permit No. 5290406 to M & S Sanitary Sewage Disposal, Inc.

(Permittee), for construction of a septage treatment plant and outfall in Westfall Township, Pike County.

On February 18, 1993 Permittee filed a Motion and Memorandum of Law to Limit the Issues for Hearing, to which Wood responded on March 4, 1993 and DEAC responded on March 25, 1993. DER advised us on March 1, 1993 that it had no objection to the Motion.

Permittee's Motion challenges certain issues identified in Appellants' pre-hearing memoranda which, according to Permittee, are not properly before the Board either because they relate to a National Pollution Discharge Elimination System (NPDES) Permit issued previously and appealed at Board Docket No. 90-280-E or because they were not raised in the Notices of Appeal filed in this proceeding.

Issues pertaining to a NPDES permit cannot be litigated in an appeal from issuance of a water quality management permit: *Fuller v. Department of Environmental Resources*, 143 Pa. Cmwlth. 392, 599 A.2d 248 (1991). Accordingly, the issues in paragraphs 3C and 3D of DEAC's Notice of Appeal and the issues in paragraphs 11 through 19 and 21 through 23 of the attachment to Wood's Notice of Appeal are stricken.

The Board's jurisdiction to consider an issue properly related to a water quality management permit depends upon how and when it is raised: *Pennsylvania Game Commission v. Commonwealth, Dept. of Environmental Resources*, 27 Pa. Cmwlth. 78, 509 A.2d 877 (1986), affirmed 521 Pa. 121, 552 A.2d 812 (1989); *NGK Metals Corp. v. DER*, 1990 EHB 376. If not raised in the Notice of Appeal, directly or by necessary implication, we cannot consider it. The only exception to this rule relates to the situation where discovery is necessary to frame the issue and a right to amend is reserved in the Notice of Appeal. DEAC reserved such a right in its Notice of Appeal; Wood did not.

We have considered, as broadly as reasonably possible, the issues raised by Wood in his Notice of Appeal. Yet, we can find no basis for the issues contained in paragraphs 4, 5, 7, 10 through 12 and 13 of his pre-hearing memorandum and they will be stricken. Since DEAC has stated in its response to the Motion that it is not seeking to amend its Notice of Appeal to add new objections, we have reviewed the issues set forth in DEAC's pre-hearing memorandum within the ambit of those set forth in its Notice of Appeal. We find no basis for the issues contained in paragraphs 7, 11, 16 through 20, 24 through 29 and 31 through 33 of the pre-hearing memorandum and they will be stricken.

Both Appellants have been less than specific in their citations of regulations they claim to have been violated by DER's issuance of this Permit. They will be required to remedy this.

ORDER

AND NOW, this 15th day of June, 1993, it is ordered as follows:

1. Permittee's Motion to Limit Issues is granted in part and denied in part pursuant to the foregoing Opinion.

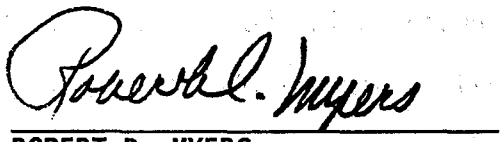
2. Paragraphs 3C and 3D of DEAC's Notice of Appeal and paragraphs 7, 11, 16 through 20, 24 through 29 and 31 through 33 of DEAC's pre-hearing memorandum are stricken.

3. Paragraphs 11 through 19 and 21 through 23 of the attachment to Wood's Notice of Appeal and paragraphs 7, 10 through 12 and 13 of Wood's pre-hearing memorandum are stricken.

4. On or before July 6, 1993 each Appellant shall file a supplemental pre-hearing memorandum specifically identifying each section of the regulations claimed to be violated in connection with the issues that have not been stricken.

EHB Docket No. 91-430-MR

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: June 15, 1993

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M. DIANE SMITH
SECRETARY TO THE BOARD

JAMES A. LAZARCHIK (COUNTRY VILLAGE)	:	EHB Docket No. 93-023-MJ
JAMES A. LAZARCHIK (SUNDIAL VILLAGE)	:	EHB Docket No. 93-024-MJ
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 15, 1993

OPINION AND ORDER SUR
MOTION TO DISMISS

By Joseph N. Mack, Member

Synopsis

An appeal which is not perfected until after the deadline of a Second Notice and Rule to Show Cause issued by the Board will be dismissed as untimely and for failure to comply with an order of the Board.

OPINION

These appeals spring from the Department of Environmental Resources' ("DER's") denial of two public water supply applications submitted by the appellant for two mobile home parks in Westmoreland County. The appellant was notified of DER's decision by letters dated January 12, 1993.

On February 9, 1993, the appellant, through his counsel, filed with the Board a Notice of Appeal in each case. The Notices of Appeal, as filed, did not indicate that a copy of the appeals had been served on DER's Office of Chief Counsel or the officer of DER who took the action, as required on page 3 of the appeal form.

On February 10, 1993, the Board issued an order in each case requiring the appellant to notify the aforesaid parties of the appeals and granted the appellant until February 25, 1993 to do so or to suffer dismissal as provided in 25 Pa. Code §21.52(c). The appellant did not respond to this order, and the Board issued a second order captioned as a Rule to Show Cause in each case which gave the appellant until March 18, 1993 to show cause why the two appeals should not be dismissed for failure to perfect or to prosecute.

The appellant did not respond to the Rule to Show Cause by the March 18, 1993 deadline. However, on March 22, 1993, the appellant filed with the Board a second copy of each appeal. These were accompanied by a photocopy of certificates of mailing showing that the appellant's counsel sent copies of the appeals to DER on March 17, 1993.

On April 28, 1993, DER filed Motions to Dismiss the appeals for untimeliness. The Board notified the appellant in each of the cases by letter dated May 6, 1993 of the receipt of the Motions to Dismiss and advised the appellant that any objections to the motions and a brief in support thereof were to be received by the Board no later than May 26, 1993. As of the date of this opinion, no response has been received from the appellant.

It should be pointed out initially that DER's Motions to Dismiss proceed on the assumption that the appeals were filed in March 1993. However, as indicated earlier, the appeals were filed with the Board on February 9, 1993, within the thirty-day appeal period. Therefore, although DER's brief competently examines the question of the Board's jurisdiction with respect to late-filed appeals, it is not applicable to the appeals in question.

We will, however, dismiss these appeals on grounds other than those stated by DER. Our examination centers on the fact that the appellant has

completely failed to follow a Board order on two separate occasions dealing with the relatively simple matter of perfecting an appeal in accordance with the instructions on the appeal form. On February 10, 1993, the appellant was ordered to supply the requested information on or before February 25, 1993. The appellant was advised that failure to do so could result in the dismissal of his appeals. This order went unheeded by the appellant, and on March 3, 1993, the Board issued a rule upon the appellant, in each case, to show cause why his appeals should not be dismissed for failure to perfect. The rule specifically stated that it was returnable to the Offices of the Board on or before March 18, 1993 and would be discharged if the appellant provided the requested information to the Board on or before that date. This deadline also went unheeded by the appellant; his response was not received by the Board until March 22, 1993.

This Board has ruled that the failure of an appellant to comply with a Board order is grounds for dismissal of an appeal; this is particularly true where the deadline stated in a Rule to Show Cause has been ignored by the appellant. Paul S. McGrath v. Commonwealth of Pennsylvania, DER, EHB Docket No. 92-527-MJ (Dismissal Order issued March 23, 1993), Bill Turner Enterprises v. Commonwealth of Pennsylvania, DER, EHB Docket No. 92-546-MJ (Dismissal Order issued May 25, 1993). We are mindful of our ruling in Bison Coal Company v. DER, 1988 EHB 1072, where the appellant delayed in perfecting its appeal after two requests from the Board. However, the appellant in Bison responded to DER's Motion to Dismiss with a plausible explanation of its failure to perfect. In the present case, we have no such explanation of the appellant's failure to comply with the deadline stated in the Board's Rule to

Show Cause since the appellant has not seen fit to respond to DER's motion. We are left with no alternative but to dismiss these appeals for failure to comply with either of the orders of this Board.

O R D E R

AND NOW, this 15th day of June, 1993, for the reasons discussed above, these two appeals, 93-023-MJ and 93-024-MJ are dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers
ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann
RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack
JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 15, 1993

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOA

CHARLES W. SHAY AND JUDITH C. SHAY and DON HERZOG d/b/a TRI-STATE LAND DEVELOPMENT CORPORATION	:	
v.	:	**EHB Docket No. 89-500-MR**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: June 16, 1993**

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

By Robert D. Myers, Member

Syllabus:

Under the impression that they did not need a DER permit, the Shays permitted dumping of various waste materials on their land in 1988. When DER learned of it and ordered the Shays to remove the waste, the Shays claimed to be financially unable to comply. In 1989 Herzog proposed a plan whereby screened construction/demolition waste from New York transfer stations would be brought to the site where additional operations would remove large items and all but a *de minimis* amount of wood. The 1988 waste would be removed and hauled away. DER approved the plan on the condition that the end product would qualify as clean fill.

When DER learned that the screening and other operations were not producing clean fill they ordered the Shays and Herzog to cease operations and

remove the unacceptable materials. Later excavation revealed construction/demolition waste that could not have been screened or picked over to any real extent.

The Board rules that the Shays and Herzog violated numerous provisions of the Solid Waste Management Act, the Clean Streams Law and the regulations. Judith C. Shay's responsibility arises primarily out of her failure to file timely appeals of DER orders naming her as a joint owner of the site and as a person jointly responsible for activities on the site. Herzog's responsibility is based upon his personal participation in the activities, despite the fact that he claimed to be acting solely in a representative capacity.

Procedural History

Charles W. Shay, Judith C. Shay and Don Herzog, t/d/b/a Tri-State Land Development Corporation, filed a joint Notice of Appeal on October 24, 1989, seeking review of an Order issued on September 26, 1989 by the Department of Environmental Resources (DER) regarding a site in Westfall Township, Pike County. The Order cited Appellants for the unpermitted disposal of solid waste on the site and demanded remedial action.

Initially, all Appellants were represented by Randolph T. Borden, Esquire, Hawley, Pennsylvania, who filed the Notice of Appeal. On or about September 10, 1990, John J. Zagari, Esquire, of Pittsburgh, Pennsylvania, took over the representation of Don Herzog and Tri-State Land Development Corporation. On March 28, 1991, Borden withdrew as counsel for the Shays and Charles W. Shay elected to appear on behalf of himself and Judith C. Shay. Zagari withdrew as counsel for Don Herzog and Tri-State Land Development Corporation on February 6, 1992.

Prior to withdrawal both Borden and Zagari had engaged in discovery on behalf of their clients. Zagari also had filed a pre-hearing memorandum which the Shays adopted as their own.

The appeal was scheduled for hearing on May 5, 6 and 7, 1992. Judith C. Shay's request for a continuance was denied on April 22, 1992. On May 4, 1992 the Board received a letter from James Kousouros, Esquire, of Kew Gardens, New York, stating that he represented Charles W. Shay, that Shay was hospitalized and that he (Kousouros) was tied up in trial in Bronx County, New York, that would last through May 7, 1992. He, therefore, requested a continuance. The letter was not accompanied by an entry of appearance or a motion to appear *pro hac vice*. Kousouros' request was denied on May 5, 1992.

When the hearing convened on that date in Harrisburg before Administrative Law Judge Robert D. Myers, a Member of the Board, DER was present with its counsel and witnesses. Don Herzog and Judith C. Shay also were present but were not represented by counsel. Charles W. Shay was not present either in person or by counsel. During a colloquy that took place among these parties and Judge Myers, Don Herzog stated that he also had retained Kousouros (about 4 weeks previous), wanted Kousouros to represent him at the hearing and did not wish to proceed without counsel. Both Don Herzog and Judith C. Shay complained about lack of adequate notice of the hearing (because of address changes) and about the absence of Charles W. Shay who was reported to be hospitalized.

Over the objections of DER, Judge Myers granted Appellants a continuance. He admonished them, however, that no further continuances would be granted and that Kousouros should enter his appearance immediately. On May 15, 1992 the Board issued a Notice of Hearing for July 21, 22 and 23, 1992, sending a courtesy copy to Kousouros.

The rescheduled hearing convened in Harrisburg on July 21, 1992 before Judge Myers. DER was present with its counsel and witnesses. Kousouros (who had not entered an appearance) presented a motion to appear *pro hac vice* on behalf of Don Herzog only. Charles W. Shay, who was present, stated that he would appear *pro se* and so would his wife, Judith C. Shay (who was ill but would be there the next day).

Kousouros' motion to appear *pro hac vice* was granted from the bench but his subsequent motion for a continuance was denied. Considering himself inadequately prepared to represent Don Herzog (because he had been retained only two weeks previous[1] and had only a few days to spend on the case) he withdrew and Herzog elected to proceed *pro se*.

The hearing occupied two days - July 21 and 22, 1992. A briefing order was issued on August 26, 1992. DER's post-hearing brief was filed on November 20, 1992. Meanwhile, on November 9, 1992, Richard B. Ashenfelter, Jr., Esquire, of King of Prussia, Pennsylvania, entered his appearance on behalf of the Shays. On November 25, 1992, Albert J. Slap, Esquire, *et al.* of Philadelphia, Pennsylvania, entered an appearance on behalf of Don Herzog and Tri-State land Development Corporation. Post-hearing briefs, prepared by these counsel, were filed on behalf of all Appellants on January 29, 1993.

The record consists of the pleadings, a 24-page transcript of the aborted hearing on May 5, 1992, a 433-page transcript of the hearings on July 21 and 22, 1992, and 24 exhibits.

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[1] Don Herzog had stated on May 5 that Kousouros had been retained four weeks previous (about April 7) whereas Kousouros stated on July 21 that he had been retained two weeks previous (about July 7). This three months discrepancy was not explained and we have made no attempt to resolve it. All parties were admonished in the strongest language on May 5 that no further continuances would be granted.

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

FINDINGS OF FACT

1. Appellants Charles W. Shay and Judith C. Shay, during the times pertinent to this Adjudication, were husband and wife and had a mailing address at 400 Shay Lane, Matamoras, Pike County, Pennsylvania 18336 (Notice of Appeal).

2. Don Herzog is a resident of New York and, during the times pertinent to this Adjudication, engaged in business under the name Tri-State Land Development Corporation (Tri-State) from an office address at P.O. Box 106, Ardley, New York 10502 (Exhibits H-1, H-2, H-3 and H-10).

3. The exact legal status of Tri-State has not been shown; Herzog referred to it as a corporation and to himself as president (N.T. 105, 249-251).

4. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*; the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*; section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and rules and regulations adopted pursuant to these statutes.

5. The Shays are joint owners of a tract of land in Westfall Township, Pike County, which they acquired in 1984. This tract of land is wedged between the Delaware River and Interstate 84 at the point where the eastbound lanes of this highway swing toward the southeast to cross the Delaware River bridge. A road paralleling Interstate 84 and known as Shay Lane provides access to the tract. Rose Lane, which abuts the tract on the

southwest, has residences along one side. The Borough of Matamoras lies to the north on the opposite side of Interstate 84 (N.T. 339; Exhibit C-6).

6. The Shays have devoted the northeastern-most portion of the tract to use as a campground and docking area. The remainder of the tract is the portion involved here (Site) (Exhibits C-6 and C-7).

7. During the construction of Interstate 84 in the mid-1960s, the Pennsylvania Department of Transportation (Penn DOT) used the Site as a borrow area. Soil was excavated and used as fill for the highway. Then tree stumps and similar debris were dumped into the hole and covered with topsoil. These operations left a bowl-shaped area subject to frequent flooding by the Delaware River (N.T. 339-343; Exhibit C-6).

8. In 1988 the Shays began construction of a 750-seat restaurant adjacent to the Site and wanted to fill in the Site to create a 200-car parking area. Steven S. Burd, District Manager of the Pike County Conservation District, advised Charles W. Shay on October 7, 1988 that he did not think "that the work which you are proposing requires any permits from [DER]" (N.T. 280-282, 343; Exhibit S-1).

9. The Shays arranged with Kelly Wall to bring clean fill to the Site. Instead, Wall hauled in shredded demolition waste, roofing material, construction debris, miscellaneous wood, paper and metal products, foam rubber, automobile tires, recording tape, office waste, newspaper and baled waste (N.T. 343-345; Exhibit C-10).

10. Responding to complaints of unlawful dumping, DER officials inspected the Site on October 19 and December 5, 1988, found the material described in Finding of Fact No. 9 and issued a Notice of Violation to the Shays on December 6, 1988 (N.T. 232, 344; Exhibit C-10).

11. After an inspection on February 27, 1989 revealed that the material was still in place on the Site, DER issued an Order and Assessment of Civil Penalties on March 6, 1989. The Order cited the Shays for the unlawful disposal of solid waste, directed them to remove the material and assessed them a civil penalty of $20,000 (N.T. 345; Exhibit C-10).

12. The Shays took no appeals from the December 6, 1988 Notice of Violation or the March 6, 1989 Order and Assessment of Civil Penalties (N.T. 233-234).

13. The Shays, by their counsel, Randolph T. Borden, requested a meeting with DER to discuss the March 6, 1989 Order and Assessment of Civil Penalties. The meeting, held on March 23, 1989, was attended by representatives and counsel for DER, Charles W. Shay, attorney Borden, Don Herzog of Tri-State, Ray Ryder of Ryder & Sons and Jerry Dotey of Pike County Engineering, Inc. (N.T. 244-245, 250-253; Exhibits C-12 and H-10).

14. The persons at the meeting discussed ways of removing the material dumped on the Site by Kelly Wall in light of the Shays' financial condition. Don Herzog proposed a plan whereby processed construction and demolition waste from transfer stations holding permits from the New York Department of Environmental Conservation would be brought to the Site, converted into unregulated clean fill principally by the removal of all but a *de minimis* amount of wood and other large items, and used in place of the material dumped by Kelly Wall. This latter material would be dug up and hauled away to an appropriate disposal facility (N.T. 130-131, 245-246, 254-256).

15. As part of the plan proposed at the March 23, 1989 meeting, Don Herzog presented DER with a list of acceptable accounts, a list of acceptable

trucking companies, and a list of safeguards. The list of safeguards contained the following items:

(1) 2 Tri-State employees in N.Y. monitoring transfer stations.

(2) 2 Security Guards on duty from 6:00 p.m.-6:00 a.m. 7 days a week.

(3) 1 Load Checker on viewing stand to superficially inspect each load.

(4) 5 Pickers to pick the wood out of each load and any paper.

(5) 1 Floor Foreman to manage pickers and check loads spread by machines.

(6) 2 Tri-State employees on site at all times.

(7) 2 Tractors with York Rakes to pull out any small pieces of wood.

(8) 1 Chipper to chip wood and load into dump truck.

(9) Wood removed from site on a daily basis.

(Exhibits H-1, H-2 and H-3).

16. On April 18, 1989 DER strongly advised the Shays to cease bringing in any new fill from New York transfer stations (a) until DER could investigate the potential for harm to the primary well serving the Borough of Matamoras, (b) until DER officials could visit the New York transfer stations, and (c) until reports were received concerning contaminants in the new fill (N.T. 300-301; Exhibit C-13).

17. Sometime after April 18, 1989, representatives of DER, accompanied by Herzog, Charles W. Shay and representatives of the New York Department of Environmental Conservation, visited several New York transfer stations and observed the processed construction and demolition waste. DER agreed that, with additional removal of wood, (down to no more than 10%), the

processed material would be suitable as fill for the Site (N.T. 136-138, 269-273, 305).

18. When DER officials visited the Site while dumping operations were being conducted, they observed

(a) a stand high enough to permit an inspector to examine the contents of incoming trucks;

(b) men and equipment picking unacceptable materials out of the new fill;

(c) containers for the deposit of unacceptable materials;

(d) a wood chipper;

(e) the rejection of some truckloads containing large quantities of wood;

(f) the typical quantity of wood to be 10% or less (N.T. 102, 119-123, 140-141).

19. Construction and demolition waste can contain lumber, metal, asphalt, brick, block, wallboard, corrugated container board, electrical fixtures, carpeting, furniture, appliances, nails, paint chips, etc. Screening was expected to remove all but the smallest of these items. Work at the Site was expected to remove additional amounts (N.T. 121, 125-127, 137-139, 267-269).

20. DER officials visited the Site on May 30, 1989, dug a hole in the new fill 18 to 20 inches deep, and discovered large pieces of wood, metals and cloth fragments. A meeting was held the following day between DER officials, Don Herzog and Charles W. Shay, at which the unacceptable materials at the Site were discussed. A letter, setting forth the results of this meeting, was sent to the parties by DER on June 7, 1989. Basically, it mandated the complete removal of the old fill by June 21, 1989, the gridding and sampling

of the new fill already in place, the sampling of new fill brought to the Site in the future, and the submission by Charles W. Shay of an application for Beneficial Use of Processed Demolition Waste by June 21, 1989 (N.T. 101-102, 142-145, 149, 242-243, 275, 291-292; Exhibit H-7).

21. An application for Beneficial Use of Processed Demolition Waste was filed by Charles W. Shay on or about June 21, 1989 (N.T. 275).

22. As a result of malodor complaints received from residents of Rose Lane, a DER official inspected the Site on July 8, 1989. Adjacent to several residences, the official detected an odor that he described as "ammonia-like or wet drywall-like." On July 10, 1989 DER issued Compliance Order 2890030 to the Shays, citing them for producing the malodors and directing them to cease operations for a period of ten days. The Shays took no appeal from this Compliance Order (N.T. 98-100, 128, 234-235; Exhibit C-5).

23. Soil samples of the new fill taken by Northeastern Environmental Associates, Inc. and DER in July 1989 reflected high levels of lead (Notice of Appeal; N.T. 100-101, 235; Exhibit C-14).

24. Because of the lead contamination, DER informed Appellants on September 15, 1989 that the only activity that would be allowed on the Site would be the removal of the lead-contaminated fill to an approved disposal facility. No more new fill was to be brought to the Site (N.T. 236-237; Exhibit C-8)

25. DER again warned Appellants on September 20, 1989 that no more new fill was to be brought to the Site and that the only allowable activity was removal of the lead-contaminated fill to an approved disposal facility. This warning was sent because of reports that Appellants were about to resume operations (N.T. 237-238; Exhibit C-9).

26. Attempting to investigate a rumor that Appellants had resumed operations, DER personnel were denied entry to the Site on September 25, 1989 (N.T. 97-98).

27. On September 26, 1989 DER issued the order forming the basis of this appeal (N.T. 92, 113; Exhibit H-4).

28. Despite receipt of the Order, Appellants continued to operate. DER personnel went to the Site on September 28, 1989 and videotaped the activities. New fill was being dumped on the Site and levelled off. The fill consisted of soil mixed with wood, plastics, wire, fabric and paper. While two men were picking some of the wood out of the fill and running it through a chipper, most of the items were being buried (N.T. 93-97; Exhibit C-3).

29. Late in September 1989 DER received a complaint from the Board of Supervisors of Westfall Township concerning contamination in domestic water wells along Rose lane. DER personnel visited the residents, took water samples and sent them to the DER laboratory for analysis. In one residence the water was black, foamy and very odorous, "the worst water I have ever seen", according to the sanitarian supervisor (N.T. 204-205).

30. The water samples reflected high levels of iron and manganese in many wells, high turbidity in most wells and arsenic (above the maximum contaminant level) in one well. DER informed 4 of the residents that their water was not safe to drink. Wells of the other 6 residents were considered potable (N.T. 206-211; Exhibits C-6 and C-11).

31. At DER's request the Matamoras Municipal Authority agreed to extend its water main to serve the residents of Rose Lane and agreed to provide an emergency connection at a nearby fire hydrant. The residents whose wells were highly contaminated have hooked onto the water system; the others have not (N.T. 212-213, 226).

32. The wells along Rose Lane generally are shallow wells, were impacted by flooding along the Delaware River around 1980 and could be impacted again by septic tanks or excessive rainfall. However, flooding and septic tank impacts would be bacteriological and would not explain the chemical contamination found in DER's sampling (N.T. 216-228).

33. DER sought and obtained injunctive relief against Appellants in the Court of Common Pleas of Pike County in order to force them to cease operations at the Site. Two separate contempt citations have been issued subsequently because of Appellants' failures to comply with DER's September 26, 1989 Order (N.T. 240).

34. Because of issuance of the September 26, 1989 Order, the lead contamination found on the Site and the chemical contamination in the Rose lane wells, DER never acted on Shays' application for Beneficial Use of Processed Demolition Waste (N.T. 103, 275, 292).

35. From March to October 1989 an estimated 429,000 cubic yards of new fill was placed on the Site covering approximately 8 acres. Throughout the operation, Charles W. Shay and Don Herzog worked closely together and were on the Site nearly every day overseeing operations. A net profit of about $1 million dollars was realized, of which Charles W. Shay received $164,000 and Don Herzog received $195,000 (N.T. 150-151, 167, 387-389, 398, 421; Exhibit C-6).

36. At DER's request, Appellants retained Groundwater Technology, Inc. (GTI) of Mountain Top, Pennsylvania, to conduct a hydrogeological investigation of the Site (N.T. 179-180).

37. In the course of its investigation from December 1989 to March 1990, GTI

(a) observed that the Site lies about 430 feet above mean sea level and slopes gently toward the southwest;

(b) observed that surface runoff from the Site discharges directly into the Delaware River which is the dominant hydrologic feature in the area;

(c) determined that the Site lies within the Delaware River Valley at a point where the sediments consist of unconsolidated sediments of Quaternary age, specifically alluvium, Terrace deposits and alluvial fan deposits aggregating 70 to 90 feet in thickness;

(d) determined that the shallow groundwater in the fluvial sediments is contained within the interstitial pores of the unconsolidated sediments and occurs under water table or unconfined conditions, receiving recharge through downward percolation of rainwater and finding discharge in the Delaware River;

(e) determined from available public and private water supply well log records that the fluvial sediments have a saturated zone approximately 65 feet thick and produce high yields at shallow depths;

(f) determined from the same records that groundwater within the Quaternary sediments is slightly acidic to neutral (pH generally between 6.0 and 7.5) and is characterized by low dissolved solids content;

(g) installed 5 monitoring wells (4 on the Site and a fifth northeast of the Site across Interstate 84) for the dual purpose of determining groundwater flow direction and groundwater quality;

(h) drilled all 5 of the monitoring wells to a depth of 28 feet (approximately 10 feet into the saturated zone);

(i) chose locations so that Monitoring Wells (MWs) 1 and 2 were in downgradient positions, MWs 4 and 5 were in upgradient positions and MW 3 was in a central portion of the Site; and

(j) measured groundwater elevations on four occasions during January to March 1990, took water samples on January 19 and March 9, 1990, and performed a slug test on January 1, 1990.

(N.T. 180-183, 191; Exhibit C-6).

38. GTI concluded

(a) that the shallow groundwater flows toward the southwest;

(b) that there is significant relative ability of the sediments to transmit shallow groundwater across the Site;

(c) that the shallow groundwater migrates at a rate estimated to range from 226 to 1157 feet per year;

(d) that barium, chromium, iron, lead and magnesium concentrations exceed maximum contaminant levels in various wells;

(e) that total dissolved solids exceed maximum contaminant levels in two of the wells; and

(f) that elevated organic vapor readings (indicative of decayed natural materials) in the well bores have the potential to ignite under certain conditions

(N.T. 184-194; Exhibit C-6).

39. Although GTI did not mention it in its report (Exhibit C-6), the water quality analyses for barium, chromium, iron, lead and magnesium show that the concentrations in the upgradient wells (MW4 and MW5) are considerably lower than the central and downgradient wells and, with the exception of iron, are all below the maximum contaminant levels (Exhibit C-6).

40. In July 1990 Appellants retained the Center for Hazardous Materials Research (CHMR) to develop a Waste Characterization Sampling and Analysis Plan (SAP) for the Site. After DER approved the SAP in August 1990, CHMR was retained to implement it (N.T. 59; Exhibit C-7).

41. On or about August 27, 1990 representatives of CHMR and DER arrived at the Site to begin implementation of the SAP, which provided for the following:

(a) groundwater sampling in the existing monitoring wells;

(b) surface water sampling in the Delaware River;

(c) backhoe trenching for visual characterization of the fill; and

(d) soil auger boring for sampling purposes and measuring gas levels at various depths

(N.T. 58-59; Exhibits C-1 and C-7).

42. The SAP called for dividing the Site into 31 grids, obtaining soil borings in each of them and digging 16 backhoe trenches (Exhibit C-7).

43. During August 29 and 30, 1990 CHMR dug 5 trenches and completed 7 soil borings on the northwest portion of the Site while DER videotaped the activity. This investigation revealed

(a) fill material averaging 8 to 10 feet in depth with no clearly defined fill/soil interface;

(b) fill material consisting of soil, stone, block and brick but mixed with great quantities of wood (including many large pieces) and lesser quantities of sheet metal, plastics, drywall, wire, cable, pipe, rebars and similar items;

(c) methane levels at or above the ignition level; and

(d) hydrogen sulfide (H_2S) levels dangerous to human life

(N.T. 62-75, 78-85; Exhibits C-1, C-2 and C-7).

44. CHMR and DER anticipated high methane readings because of GTI's investigation and report (see Finding of Fact No. 38) but both entities were surprised at the H_2S levels which hovered near or somewhat above the threshold level of 20 parts per million (ppm) in most of the trenches and bore holes but which exceeded the 300 ppm level (immediately dangerous to life and health) in trench #5 and bore holes #5 and #6, going off the meter scale at times. Digging and drilling were interrupted frequently and the work crews withdrawn while the gases escaped (N.T. 63-75; Exhibits C-1 and C-7).

45. The high levels of methane and H_2S are indicative of the decomposition of organic material under anaerobic conditions. This material could include, in addition to the fill, the tree stumps and other debris placed on the Site during construction of Interstate 84 (N.T. 67, 115-118, 324-326).

46. Because of the dangerous levels of H_2S encountered, CHMR recommended (and DER agreed) that excavation and drilling should be suspended on August 30, 1990 until a safe method of proceeding with the SAP could be devised (N.T. 75-76; Exhibits C-1 and C-7).

47. On September 12, 1990 CHMR (with DER observing) performed two test borings and a test trench to verify the presence of high levels of H_2S and methane. In October 1990 CHMR presented to DER a Health and Safety Air Monitoring Surveillance Plan as an amendment to the SAP. As approved by DER, this amendment dispensed with further trenching but provided for continuation of the soil boring and field sampling under heightened safety conditions. These activities were completed on October 22, 1990 and confirmed the revelations in Finding of Fact No. 43 (N.T. 76; Exhibit C-7).

48. The fill material excavated during August and October 1990 deviated from the quality of the material DER had earlier approved in its high wood content, the presence of large pieces of waste and debris that were supposed to be removed, and the presence of toxic contaminants (N.T. 167-170, 237, 241).

49. As of the date of the hearing, no fill had been removed from the Site and no other remedial steps had been taken (N.T. 240).

DISCUSSION

DER has the burden of proof. To carry its burden, DER must show by a preponderance of the evidence that the September 26, 1989 Order was lawful and an appropriate exercise of its discretion: 25 Pa. Code §21.101. Our review of DER's action is limited, however, to those issues raised by Appellants in their post-hearing briefs. All issues not so raised are deemed waived: *Lucky Strike Coal Co. and Louis J. Beltrami v. Commonwealth, Dept. of Environmental Resources*, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988).

In the September 26, 1989 Order DER accused the Shays of violating the SWMA and the CSL in connection with the activities of Kelly Wall in 1988 and of violating the SWMA, the CSL and 25 Pa. Code §271.101 in connection with the activities engaged in with Don Herzog in 1989. The Order accused Herzog of violating the SWMA, the CSL and 25 Pa. Code §271.101 in connection with the activities engaged in with the Shays in 1989. Specifically, the order cited these violations:

Shays -(1) dumping, depositing or permitting the dumping or depositing of solid waste including municipal waste, construction/demolition waste and residual waste onto the surface of the ground without a permit (1988) - 25 Pa. Code §271.101(a); §§201(a), 301, 302, 303, 501(a) 601 and 610(1), (2), (4), (6), (7) and (9) of the SWMA; §§503, 601 and 611 of the CSL;

(2) constructing and/or operating or permitting the constructing and/or operating of a solid waste disposal facility, to wit, a landfill, without a permit (1988) - 25 Pa. Code §271.101(a); §§201(a), 301, 302, 303, 501(a), 601, 610(1) (2), (4), (6), (7) and (9) of the SWMA; §§503, 601 and 611 of the CSL;

(3) operating a construction/demolition waste landfill without a permit (1989) - 25 Pa. Code §271.101(a); §§601, 610(1), (2), (4), (6), (7) and (9) of the SWMA; §§503, 601 and 611 of the CSL;

(4) producing offensive malodors (1989) - §§601, 610(1), (2), (4), (6), (7) and (9) of the SWMA; §§503, 601 and 611 of the CSL;

(5) refusing entry onto the Site by DER personnel (1989) - §§601, 610(1), (2), (4), (6), (7) and (9) of the SWMA; §§503, 601 and 611 of the CSL; and §1707 of the Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, P.L. 556, 53 P.S. §4000.101 *et seq.*[2];

(6) continuing to bring new fill onto the Site despite notification from DER that operations were to cease (1989) - §§601, 610(1), (2), (4), (6), (7) and (9) of the SWMA; §§503, 601 and 611 of the CSL; and

(7) creating a public nuisance (1989) - §601 of the SWMA; §§503 and 601 of the CSL.

Herzog - (1) assisting in the transportation or disposal of solid waste contrary to rules and regulations adopted pursuant to the SWMA (1989) - 25 Pa. Code §271.101(a); §§601, 610(1), (2), (4), (6), (7) and (9) of the SWMA; §§503, 601 and 611 of the CSL; and

(2) items (3), (4), (6) and (7) listed under the Shays.

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[2] Since DER did not issue the September 26, 1989 Order pursuant to this statute, the citation will be disregarded.

We will consider first the violations charged against the Shays - beginning with the SWMA and going from there to the CSL. We then will consider the violations charged against Herzog, following the same order.

Violations of Charles W. Shay and Judith B. Shay Under the SWMA

The Shays raise no defense to the 1988 violations. These violations were recited originally in the March 6, 1989 Order and Assessment of Civil Penalties (Exhibit C-10) issued by DER against both Charles W. Shay and Judith C. Shay. This Order and Assessment of Civil Penalties names the Shays as joint owners of the Site and as jointly responsible for the violations. Since no appeal was taken from this action of DER, the findings have become binding on the Shays and cannot be collaterally attacked in this proceeding: *Wheeling Pittsburgh Steel v. Commonwealth, Dept. of Environmental Resources*, 22 Pa. Cmwlth. 280, 348 A.2d 765 (1975), affirmed 473 Pa. 432, 375 A.2d 320 (1977). The Shays also do not raise a defense to item (4) - offensive malodors - and item (5) - refusing entry. That leaves items (3), (6) and (7), which the Shays lump together in a general defense to the Order. They argue, finally, that DER has not shown a basis for liability on the part of Judith C. Shay. We will deal first with this final argument.

Status of Judith C. Shay

To hold a person liable under the SWMA, DER must show, by a preponderance of the evidence, that the person participated in the violations: *Lawrence Blumenthal v. DER*, 1990 EHB 187. Mere ownership of the land on which the violations occurred is not enough: *Commonwealth, Dept. of Environmental Resources v. O'Hara Sanitation Company*, 128 Pa. Cmwlth. 47, 562 A.2d 973 (1989); *Joseph Blosenski, Jr., et al v. DER*, Board Docket No. 85-222-M (consolidated), Adjudication issued December 23, 1992.

Judith C. Shay is deemed to be jointly responsible with Charles W. Shay for the 1988 violations because she did not file an appeal to contest them. That "deemed" responsibility does not carry over to 1989, however. Something more is required to hold her jointly responsible for the violations of that year. No evidence has been presented showing that Judith C. Shay actually participated in those violations. There is, however, Compliance Order #2890030 (Exhibit C-5), issued by DER on July 10, 1989 and directed to both Charles W. Shay and Judith C. Shay.

The Compliance Order cites the Shays for violating §610(4) of the SWMA, 35 P.S. §6018.610(4), by reason of the malodors generated by the disposal of construction/demolition waste on the Site. Section 610(4) makes it unlawful to dispose of solid waste in a manner that creates a public nuisance. As noted above, the Shays have not attempted to defend against this charge in this appeal. Such an attempt would have been unavailing, in any event, because the Shays did not contest the Compliance Order itself by a timely appeal.

As with the March 6, 1989 Order and Assessment of Civil Penalties, so it is with Compliance Order #2890030 that the findings are binding on the Shays and cannot now be collaterally attacked. As a result, Judith C. Shay is deemed to be jointly responsible with Charles W. Shay for disposing of construction/demolition waste on the Site in a manner causing a public nuisance. Such responsibility, although "deemed" in law rather than shown in fact, implicates Judith C. Shay in the 1989 filling activities to the point where knowledge and participation in the entire enterprise can reasonably be presumed. Accordingly, we hold that Judith C. Shay is jointly responsible for all the alleged violations of the SWMA during 1989.

Discussion of violations

DER predicates the Shays' violations in items (3), (6) and (7) on 25 Pa. Code §271.101(a); §§601 and 610(1), (2), (4), (6), (7) and (9) of the SWMA; and sections of the CSL that will be discussed later. The regulatory provision - §271.101(a) makes it unlawful to own or operate a "municipal waste disposal or processing facility" without a permit from DER. The Shays violated this provision, according to DER, by using the Site as a construction/demolition waste landfill without a permit from DER. Any uncertainty over whether or not construction/demolition waste qualifies as municipal waste is dispelled by 25 Pa. Code §271.3(b) which states that construction/demolition waste is subject to Article VIII of the regulations (municipal waste) rather than Article IX (residual waste), regardless of whether it is, in fact, municipal waste or residual waste.

Construction/demolition waste is defined in 25 Pa. Code §271.1 as follows:

> Solid waste resulting from the construction or demolition of buildings and other structures, including, but not limited to, wood, plaster, metals, asphaltic substances, bricks, block and unsegregated concrete. The term also includes dredging waste. The term does not include the following if they are separate from other waste and are used as clean fill:
>
> (i) Uncontaminated soil, rock, stone, gravel, unused brick and block and concrete.
>
> (ii) Waste from land clearing, grubbing and excavation, including trees, brush, stumps and vegetative material.

The debris excavated at the Site during 1990 more clearly answers the description in the first sentence of the definition than that in the subsequent sentence excluding clean fill. To dispose of such waste on the Site, DER claims, the Shays needed a permit from DER under Chapter 277 of the

regulations. Since they had no permit, their activities violated 25 Pa. Code §271.101(a).

They also, according to DER, violated §610 of the SWMA which lists nine separate categories of unlawful conduct. DER cited six of these - (1), (2), (4), (6), (7) and (9). Paraphrasing the extensive language used, they refer to (1) depositing or permitting the depositing of solid waste without a permit, (2) operating or utilizing a solid waste disposal facility without a permit, (4) disposing or assisting in the disposing of solid waste contrary to the regulations or orders of DER or in a manner to create a public nuisance, (6) transporting or permitting the transporting of solid waste to an unpermitted disposal facility or contrary to the regulations or orders of DER, (7) refusing entry and inspection by a DER representative, and (9) causing or assisting in the violation of the SWMA, the regulations or orders of DER. These violations also constitute a public nuisance under §601 of the SWMA, argues DER.

Certainly, if the Shays needed a DER permit to place the fill on the Site, the evidence clearly establishes violations of §610(1), (2), (6) and (9). The malodors are a violation of §610(4) and the refusal of entry is a violation of §610(7). All of the violations constitute public nuisances under §601.

The Shays' principal defense is that they needed no permit. They argue that DER exempted them from the permit requirement of 25 Pa. Code §271.101(a) under the provisions of 25 Pa. Code §271.101(b) and, specifically, item (6) of that subsection. The cited provision states that a permit is not necessary for "use as clean fill of the following materials if they are separate from other waste...." What follows is the identical language used in §271.1 to exclude certain types of materials from the definition of

construction/demolition waste, quoted above. Those materials fall into two categories - (1) uncontaminated soil, rock, stone, gravel, unused brick and block and concrete, and (2) waste from land clearing, grubbing and excavation, including trees, brush, stumps and vegetative material.

According to the Shays, DER granted exemption to the fill with full knowledge of its content, having sent representatives to New York to examine it. Only later, after hundreds of thousands of cubic yards of the fill had been placed on the Site, did DER change its mind and decide that a permit was necessary.

The problem with this argument is its lack of factual support. We have found that Herzog proposed a plan whereby "processed construction and demolition waste" would be brought to the Site, "converted into unregulated clean fill" by the removal of large items and all but "a *de minimis* amount of wood" and used in place of the material deposited by Kelly Wall (Finding of Fact No. 14). The list of safeguards (Exhibit H-3) that Herzog gave to DER at their first meeting (Finding of Fact No. 15) is conclusive evidence that, from the beginning, DER was led to believe that the fill material would not be typical construction/demolition waste. Why else would Herzog promise to monitor the New York transfer stations, have an elevated stand at the Site for inspecting incoming loads, have pickers to remove wood and paper from the material, have tractors with rake attachments to pull out small pieces of wood, and have a chipper to reduce the wood to mulch? None of these safeguards was relevant if the approved material was construction/demolition waste.

We have found, in addition, that DER warned the Shays to pre-test the fill material for possible contaminants (Finding of Fact No. 16) and approved the "processed" construction/demolition waste observed in New York with the

understanding that additional wood would be removed on Site so that the content would be no more than 10% (Finding of Fact No. 17).

When an inspection in late May 1989 disclosed large pieces of wood, metals and cloth fragments, DER convened a meeting of the parties followed up by a letter (Exhibit H-7) again detailing what was acceptable (Finding of Fact No. 20). That letter firmly establishes that the agreement was "clean fill with a *de minimis* wood content" and that the materials discovered in late May did not satisfy that description. The letter sets forth the actions to be taken to prevent a recurrence of the problem and then states: "The purpose of the above agreement is to bring Mr. Shay in line with the original agreement regarding rigorous monitoring and separating procedures for a *de minimis* wood content."

DER witnesses acknowledged that, because the fill material started out as construction/demolition waste, they anticipated that it would contain a certain amount of metal, nails, asphalt, wallboard, wire, carpeting, etc. They expected the screening and on-Site activities to remove all but the smallest of these items. By allowing such items to remain, DER undoubtedly was stretching the definition of clean fill. Judging from the testimony of all the parties, we attribute this to a DER desire to find an economically viable solution to the problem facing the Shays - the removal of the Kelly Wall material when financial resources allegedly were inadequate.

Stretching by DER of the definition of clean fill afforded no legal basis for the Shays to deposit the material uncovered in 1990, however. If the contents of the material were closer to the definition of clean fill, we might be more sympathetic to the Shays' position. But the videotape (Exhibit C-2) destroys their credibility, visually demonstrating material almost identical to that discovered by DER in May 1989 - material that could hardly

have been processed or worked to any extent. Since the Shays knew in May 1989 that such material was unacceptable to DER, they cannot argue now that it satisfied the agreement. The evidence lends no support to the Shays' argument and we reject it.

Violations of Charles W. Shay and Judith C. Shay under the CSL

As noted earlier, DER also cited §§503, 601 and 611 of the CSL in support of items (3), (6) and (7). Section 503 declares it a nuisance for anyone to violate a regulation adopted pursuant to §501 of the CSL relating to the protection of present or future sources of public water. Section 601 deals with abating nuisances. Section 611 makes it unlawful to violate regulations adopted pursuant to the CSL. The permit requirement of 25 Pa. Code §271.101(a), discussed above, is contained in regulations adopted pursuant to authority of the CSL as well as the SWMA. Consequently, it must be considered a regulation falling within the scope of §§501 and 611 of the CSL, the violation of which is a public nuisance (§503 of the CSL) subject to abatement (§601 of the CSL).

We have concluded that the Shays needed a permit to place on the Site the type of material found there in 1990. Since they had no permit, they violated §§503, 601 and 611 of the CSL as well as those cited under the SWMA. The principles discussed above in connection with Judith C. Shay's status apply here as well, rendering her jointly responsible with Charles W. Shay.

While DER does not cite §316 of the CSL, 35 P.S. §691.316, in the findings clauses of the September 26, 1989 Order, it does include this section in the preamble to the ordering clauses where statutory and regulatory authority for its action is stated. Section 316 of the CSL provides, in part,

that whenever DER finds that pollution or a danger of pollution results from a condition existing on certain land in the Commonwealth, it may order the landowner or occupant to correct the condition.

We have held repeatedly that the landowners' responsibility under this section is not dependent upon a showing of knowledge or participation in creating the condition but exists regardless of fault: *Western Pennsylvania Water Company v. DER*, 1988 EHB 715, affirmed 127 Pa. Cmwlth. 26, 560 A.2d 905 (1989); *Paul F. and Madeline R. Kerrigan v. DER*, Board Docket No. 90-188-MR, Adjudication issued April 8, 1993, relying on *National Wood Preservers, Inc. v. Commonwealth, Dept. of Environmental Resources*, 489 Pa. 221, 414 A.2d 37 (1980), appeal dismissed 449 U.S. 803 (1980). As landowners both Charles W. Shay and Judith C. Shay came within the scope of this provision, if it was properly invoked by DER.

Pollution is broadly defined in §1 of the CSL, 35 P.S. §691.1, to include any type of contamination to waters of the Commonwealth that renders them detrimental to public health, to legitimate beneficial uses and to animals. Waters of the Commonwealth, according to the same section of the CSL, include both surface water and groundwater. As noted in Finding of Fact No. 23, samples of the fill taken in July 1989 reflected high levels of lead. The presence of this hazardous material on a Site close to, and upgradient of, the Delaware River certainly posed a sufficient "danger of pollution" to justify DER in activating the provisions of §316 in the September 26, 1989 Order. DER's judgment was vindicated just a few days later (when chemical pollution entered the water wells on Rose Lane immediately down-gradient from the Site) and again a few months later (when GTI's sampling of the monitoring wells reflected high levels of certain priority pollutants).

Violations of Don Herzog under the SWMA

Status of Don Herzog

Herzog claims that DER cannot charge him personally with any violations connected with the Site because he was acting solely in a representative capacity on behalf of Tri-State. As noted in Finding of Fact No. 3, the precise legal status of Tri-State was not shown. The September 26, 1989 Order refers to Herzog as "doing business as" Tri-State, thereby raising the inference that Tri-State is not a separate legal entity of its own.

The status of Tri-State is irrelevant, however, because the evidence overwhelmingly implicates Herzog as an active participant. As we have held in previous cases, an individual claiming to be involved only in a representative capacity (on behalf of a business entity, for example) can still be held responsible for his actions if they amount to violations of environmental laws: *Kaites et al. v. Commonwealth, Dept. of Environmental Resources*, 108 Pa. Cmwlth. 267, 529 A.2d 1148 (1987); *Lucky Strike Coal Company and Louis J. Beltrami v. Commonwealth, Dept. of Environmental Resources*, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988), affirming 1987 EHB 234.

The evidence shows that from March 23, 1989 on Herzog was a central figure in the filling project conducted on the Site. By their own admissions (Finding of Fact No. 35) Herzog and Charles W. Shay worked closely together and were on the Site nearly everyday overseeing the project. Herzog took part in the meetings with DER and the trip to New York. In fact, he was the individual whose representations about the material and whose list of safeguards was most effective in persuading DER to approve the project.

Herzog knew what DER had approved and took part in the meeting with DER on May 31, 1989 where the material discovered on the Site was rejected (Finding of Fact No. 20). Despite this knowledge and his close involvement

during subsequent months, more unacceptable material was brought to the Site and buried, even after DER ordered a cessation of all filling activities. Herzog is as personally responsible for this condition as Charles W. Shay.

Discussion of violations

The four violations charged to Herzog in item (2) are also charged against the Shays - items (3), (4), (6) and (7). The Shays did not contest item (4), regarding malodors, but did contest the others. What we have said above with respect to items (3), (6) and (7) applies to Herzog as well as the Shays and will not be repeated here. Herzog does raise the defense of estoppel, however, claiming that DER is now estopped from contending that a permit was necessary because of its prior approval of the material found on the Site in 1990. Without discussing the legal applicability of this defense, it is enough to say that the facts do not support the underlying premise. We find no misleading action on DER's part.

With respect to item (4) - producing offensive malodors - Herzog claims innocence and points to the absence of his name from Compliance Order #2890030, issued with respect to this condition. While it is true that the Compliance Order is addressed only to the Shays and is binding only on them, that is not enough to excuse Herzog. The evidence (Finding of Fact No. 22) shows that the "ammonia-like or wet drywall-like" malodors stemmed from the filling activities taking place on the Site. As already decided, Herzog was deeply involved in those activities. As a result, he is also responsible for the malodors which constitute a violation of §§610(4) and 601 of the SWMA.

In item (1) DER charges Herzog with assisting in the transportation or disposal of solid waste contrary to regulations adopted under the SWMA. This type of activity is declared to be unlawful conduct in §610(6) of the SWMA, 35 P.S. §6018.610(6), especially where the disposal site does not have a

permit. The evidence is clear that Herzog was the one most responsible for transportation. Accordingly, he is legally responsible for this violation, which also entails §§610(1), (2), (4), (7) and (9) and 601 of the SWMA.

Violations of Don Herzog under the CSL

What we have discussed earlier with respect to the Shays' violations under §§503, 601 and 611 of the CSL, 35 P.S. §§691.503, 691.601 and 691.611, applies equally to Herzog and we find that he also violated these statutory provisions.

We decline to hold Herzog accountable under §316 of the CSL, 35 P.S. §691.316, however, because of the absence of sufficient evidence to show that he was a "landowner" or "occupant" within the meaning of that provision. While his presence on the Site on an almost daily basis "could" make him an "occupant," there is no evidence to show exactly the capacity in which he was present and what his status was vis-a-vis the Shays who also were on the Site daily.

Site remediation

The September 26, 1989 Order required Appellants to remove from the Site all material except that meeting the definition of clean fill under 25 Pa. Code §271.101(b)(6)(i). The only challenge to the reasonableness of this requirement is raised in Appellants' pre-hearing memoranda, but it is based solely upon Appellants' position that DER approved the placement of the material uncovered in 1990. This argument has been rejected.

In their post-hearing briefs Appellants argue that the removal requirement is unreasonable because other remediation alternatives will accomplish the same result. This argument is based solely on the testimony of David J. Glaser, a technical representative of CHMR, who had prepared a remediation alternatives report in January 1992. Herzog attempted to enter

this report during the hearing. DER objected because a copy of the report had only been given to it on the first day of hearings and there was not sufficient time to give the highly technical aspects of the report proper consideration. The objection was sustained and the report was not allowed to be entered.

Over DER's objections that no prior notice had been given of Appellants' intention to call him as a witness, Glaser was permitted to testify on some of the conclusions reached by CHMR in its SAP report (Exhibit C-6). Glaser was familiar with the SAP report but had not participated in any of the work. During this testimony, Glaser was asked and testified as to his opinion or which remediation alternative was the "best." This was clearly improper and circumvented the prior ruling disallowing the remediation alternatives report. The testimony should have been stricken immediately and will be stricken now - from line 18 on page 329 of the transcript to line 19 on page 331. As a result, the reasonableness of DER's removal requirement will not be considered; it was not properly raised in Appellants' pre-hearing filings.

Hazardous waste

In its post-hearing brief DER argues that the waste on the Site is a "characteristic reactive waste pursuant to 25 Pa. Code §261.23(a)(5) - (7). It is a sulfide bearing waste and the pH conditions are between 2.0 and 12.5. Moreover, the methane gas levels exceed lower explosive limits and are capable of explosive reaction if subjected to a spark. Additionally, the hydrogen sulfide exceeds IDLH standards and thus poses a threat to human health and can cause morbidity or mortality." DER points out that this is hazardous waste (as defined in §103 of the SWMA, 35 P.S. §6018.103) and must be considered in our Adjudication.

DER first raised this point in its pre-hearing memorandum. The information supporting it was all gained after DER issued the September 26, 1989 Order. As a result, it is not mentioned in that Order. Certainly, the evidence is sufficient to warrant DER's conclusion. Our problem, however, stems from the fact that we are called upon to review the September 26, 1989 Order. While post-issuance evidence can be introduced by DER to sustain that Order, the evidence cannot be used to establish a violation not mentioned in the Order. If DER wanted us to consider the Site as a hazardous waste disposal facility, it needed to amend the September 26, 1989 Order or to issue a new order. Since it did neither, the issue is not before us.

CONCLUSIONS OF LAW

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

2. DER has the burden of proving, by a preponderance of the evidence, that the September 26, 1989 Order was lawful and an appropriate exercise of its discretion.

3. The Shays violated the SWMA, the CSL and the regulations in connection with the dumping by Kelly Wall in 1988 because they did not file a timely appeal from the March 6, 1989 Order and Assessment of Civil Penalties.

4. The Shays violated the SWMA, the CSL and the regulations in connection with the malodors generated by the filling activities in 1989 because they did not file a timely appeal from Compliance order #2890030 and because they did not pursue the issue in this appeal.

5. The Shays violated the SWMA, the CSL and the regulations in connection with the refusal of entry of DER personnel in September 1989 because they did not pursue the issue in this appeal.

6. Because Judith C. Shay did not file timely appeals from the March 6, 1989 Order and Assessment of Civil Penalties and from Compliance Order #2890030, she is deemed to be a joint owner of the Site and jointly responsible for the 1988 dumping by Kelly Wall and for the 1989 filling activities which generated the malodors. This deemed involvement in the Site is sufficient to hold her jointly responsible for all the 1989 filling activities.

7. The Shays violated the SWMA, the CSL and the regulations by using the Site as a construction/demolition waste landfill without a permit from DER.

8. The Shays are responsible, as landowners of the Site, to correct the conditions which pose a danger of pollution to the waters of the Commonwealth: §316 of the CSL, 35 P.S. §691.316.

9. Don Herzog, having participated personally in the 1989 filling activities with full knowledge of the conditions set by DER on its approval, he is personally responsible for any violations, despite the fact that he claimed to be acting in a representative capacity.

10. Herzog violated the SWMA, the CSL and the regulations by using the Site as a construction/demolition waste landfill without a permit from DER.

11. Herzog is not responsible under §316 of the CSL, 35 P.S. §691.316.

12. The reasonableness of DER's removal requirement was not properly raised in Appellants' pre-hearing filings and, as a result, cannot be considered.

13. Since the September 26, 1989 Order does not raise the issue of hazardous waste and since the Order was not amended to add that issue, it cannot be considered.

ORDER

AND NOW, this 16th day of June, 1993, it is ordered that the appeal is dismissed except with respect to Don Herzog's liability under §316 of the CSL. The appeal is sustained to that extent.

ENVIRONMENTAL HEARING BOARD

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ROBERT D. MYERS
Administrative Law Judge
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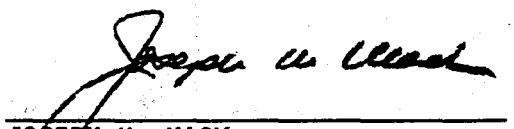
RICHARD S. EHMANN
Administrative Law Judge
Member

EHB Docket No. 89-500-MR



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 16, 1993

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M. DIANE SMITH
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WILLIAM MAY	:	
	:	
v.	:	EHB Docket No. 92-444-MR
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 16, 1993

OPINION AND ORDER
SUR
MOTION TO DISMISS

Robert D. Myers, Member

Synopsis

Where DER denies a Plan revision on the basis that the land is within a moratorium area and where, after the developer appeals from that action, DER confirms that the land is outside the area, the issue on which the appeal was based is moot and the appeal should be terminated. Since DER had done some review of the merits of the Plan revision, but the evidence did not show completion of that review, the revision will be remanded to DER for review and action in accordance with the regulations.

OPINION

William May, Appellant, filed a Notice of Appeal on September 24, 1992 seeking review of a letter issued by the Department of Environmental Resources (DER) on August 26, 1992, denying approval of planning modules

submitted as a revision to the Official Sewage Facilities Plan of Montour Township, Columbia County. The planning modules pertained to the William May subdivision, a two-lot proposal creating two commercial tracts.

The Plan revision was denied by DER because the land was within an area covered by a moratorium decreed by DER in 1989. Appellant's Notice of Appeal challenges DER's action by claiming that the land is outside the moratorium area. After the appeal was filed, DER became convinced that Appellant was correct.

DER issued a letter on October 26, 1992, confirming that the land is outside the moratorium area and authorizing Appellant to "resubmit the information for his subdivision." The letter goes on to state that "a new submission" must address the other four issues mentioned in the August 26, 1992 denial letter and legitimize a soil test conducted within a Pennsylvania Power and Light Company (PP&L) right-of-way.

On March 17, 1993 DER filed a Motion to Dismiss and supporting legal memorandum claiming that the appeal is moot. Appellant filed his Objection and supporting legal memorandum on March 29, 1993. DER filed a Supplemental Memorandum of Law on April 2, 1993. Appellant argues that his appeal should not be "dismissed," as DER requests, but should be "sustained," since DER acknowledges the correctness of Appellant's contention. Despite the argument over semantics, both parties agree that the proceedings before this Board should now be ended. Disagreement arises over what should happen next.

Appellant argues that the Board should do one of two things - either (1) order DER to approve the Plan revision as submitted, or (2) order DER to approve the Plan revision upon satisfaction by Appellant of the four issues

raised in the denial letter. This latter option would prohibit DER from imposing any requirements with respect to the soil test on PP&L's right-of-way because DER did not raise the issue in the denial letter.

DER argues that, since the only issue raised in the Notice of Appeal has been rendered moot, we should simply dismiss the appeal and do nothing more. We are not comfortable with that suggestion; nor are we willing to grant Appellant his first option - approval of the Plan revision as submitted.

The denial letter, as noted above, used the moratorium as its basis. It then went on to state that "Upon resolution of [the Township's] plan inadequacies and subsequent removal of limitations, this proposal can be resubmitted. At that time the following issues need to be addressed" (followed by a listing of the four issues, the substance of which is not relevant to our disposition of DER's Motion). Clearly, DER had engaged in some review of the merits of the Plan revision - despite its denial on the basis of the moratorium - and had found certain deficiencies. That being the case, we cannot order approval of the Plan revision as submitted.

Whether it would be appropriate to grant Appellant's second option (approval upon satisfaction of the four issues) depends, at the least, upon whether DER completed its review of the merits at the time of the denial letter. There is no evidence to prove this. The only evidence there is (the fact that DER came up with the soil test issue after the issuance of the denial letter) suggests that the review continued after that date. Under these circumstances, we are unwilling to confine DER's review to the four issues mentioned in the August 26, 1992 letter.

We will remand the Plan revision to DER for its normal review and action in accordance with the regulations.

ORDER

AND NOW, this 16th day of June, 1993, it is ordered as follows:

1. DER's Motion to Dismiss is denied.

2. The appeal is sustained.

3. The Plan revision is remanded to DER for review and action in accordance with the regulations.

ENVIRONMENTAL HEARING BOARD

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Joseph N. Mack

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DATED: June 16, 1993

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M. DIANE SMITH
SECRETARY TO THE BOAI

RESCUE WYOMING, ET AL.	:	
	:	
v.	:	EHB Docket No. 91-503-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 17, 1993
AND WYOMING SAND AND STONE COMPANY,	:	
PERMITTEE AND PENNSYLVANIA HISTORICAL	:	
AND MUSEUM COMMISSION, INTERVENOR	:	

OPINION AND ORDER
SUR MOTION TO DISMISS
AND FOR PARTIAL SUMMARY JUDGMENT

By Maxine Woelfling, Chairman

Synopsis

Where an unincorporated archaeological association, one of several appellants, indicates that it has a potential substantial, direct and immediate interest in the archaeological issues regarding a noncoal surface mining permit, the permittee's motion to dismiss for lack of standing will be denied. The motion will be granted with respect to the remaining appellants where they failed to demonstrate that they had standing on archaeological issues. The permittee's motion for partial summary judgment is granted where it is clear that appellants did not file a lands unsuitable for mining petition and did not demonstrate that the Land and Water Conservation and Reclamation Act, the Act of January 19, 1968, P.L. (1967) 996, as amended, 32 P.S. §5101 et seq. (Land and Water Conservation and Reclamation Act) was relevant to the appeal.

OPINION

This matter was initiated with RESCUE Wyoming, et al.'s[1] (RESCUE Wyoming, et al.) November 19, 1991, filing of a notice of appeal challenging the Department of Environmental Resources' (Department) issuance of Noncoal Surface Mining Permit No. 66900303. The permit, which was issued pursuant to the Noncoal Surface Mining Conservation and Reclamation Act, the Act of December 19, 1984, P.L. 1093, 52 P.S. §§3301 *et seq.* (the Noncoal Surface Mining Conservation and Reclamation Act), authorized Wyoming Sand and Stone Company (Wyoming Sand) to establish a sand and gravel mining facility along the Susquehanna River in Mehoopany Township, Wyoming County.[2] RESCUE

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[1] The appellants include the following organizations and individuals: RESCUE Wyoming (Return the Environment of Susquehanna Country Under Ecology, Wyoming County), Jayne's Bend Task Force (an unincorporated association of citizens), Society for Pennsylvania Archaeology, Frances Dorrance Chapter 11 (an unincorporated association of archaeologists), Sara R. Willoughby (Chairperson of RESCUE Wyoming), Laura Hasenzahl and Marilyn Robinson as Co-Chairpersons of Jaynes Bend Task Force and individuals, Dawn Griffiths-Connelly (President of the Society of Pennsylvania Archaeology), Joyce Libal (President of RESCUE) James E. Gillard, Barbara Shivelhood, Hilda C. Vaughn Estate (David E. Vaughn, Co-Executor), Al Pesotine (Secretary of the Society of Pennsylvania Archaeology) Norman Fitzgerald, Phyllis Fitzgerald, Charles Stonier, Marilyn Robinson, Lewis C. Robinson, James Charters, Janice Charters, Lewis B. Robinson, Ronald Kolakaski. The original notice of appeal included RESCUE and John D. Costello, RESCUE withdrew as a party on January 6, 1992, and John D. Costello withdrew on January 10, 1992. The Hilda Vaughn Estate withdrew on September 10, 1992.

[2] On December 10, 1990, Wyoming Sand filed a notice of appeal, EHB Docket 90-534-W, regarding its June 29, 1990, noncoal surface mining permit application. The Department held the application in abeyance until a public hearing and a Phase I archaeological survey to verify the extent of the known sites had been completed as required by the Department's rules and regulations in light of the Pennsylvania Historical and Museum Commission's (PHMC) determination that known archaeological sites were within the permit area's boundaries. Wyoming Sand contended that the Department's requirement of an archaeological survey and discontinuance of the permit application's review were arbitrary, capricious, an abuse of discretion, inconsistent with the law and ultra vires. On July 1, 1991, the parties entered into a settlement providing that a Phase I Survey be conducted on the permit area, except those portions with slopes over 15 percent. If a Phase II Survey is warranted based footnote continued

Wyoming, et al. challenged various aspects of the permit, including its failure to protect historical, archaeological and anthropological matters, to consider the lands as unsuitable for mining, and to consider possible groundwater contamination, as well as pollution to the Susquehanna River, as abuses of discretion by the Commonwealth, the Department and the PHMC. On March 20, 1992, the PHMC filed a petition to intervene in support of the permit. The Board granted the petition on April 22, 1992.

On March 24, 1992, Wyoming Sand filed a motion to dismiss and a motion for partial summary judgment. In its motion to dismiss, which was directed to the Society of Pennsylvania Archaeology (SPA), Wyoming Sand argued that SPA lacked standing to contest the permit because it had no substantial or direct interest. The motion for partial summary judgment was directed to RESCUE Wyoming, et al., and asserted that on all archaeological issues these parties lacked standing because they have not expressed any interest in archaeology or artifacts at the permit site.[3] In addition, Wyoming Sand contended that it was entitled to summary judgment against all appellants on assertions in the notice of appeal regarding a lands unsuitable for mining petition and the Land and Water Conservation and Reclamation Act.

On April 13, 1992, RESCUE Wyoming, et al. filed their objections to Wyoming Sand's motions, contending that RESCUE Wyoming, et al. had interests which were direct, immediate and substantial, that they filed a lands unsuitable for mining petition in a March 22, 1992, letter to Department

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(continued footnote)
on the Phase I findings, the Phase II Survey will be limited to three non-contiguous parcels which will not cumulatively exceed 7.5 acres. Thereafter the Department issued the permit at issue herein.

[3] The Board will treat Wyoming Sand's motion for partial summary judgment relating to the remaining appellants' standing as a motion to dismiss for lack of standing.

Secretary Arthur A. Davis, and that the Land and Water Conservation and Reclamation Act is relevant because RESCUE Wyoming, et al. are concerned with possible groundwater contamination and pollution of the Susquehanna River from strip mines.

The Department did not respond to the motions.

We will first address the standing issues. To challenge a Department action one must have "standing," i.e., must have a substantial interest which is directly and immediately impacted by the agency action being challenged. William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 163, 346 A.2d 269, 280-284 (1975); Roger and Kathy Beitel and Tom and Janet Burkhart v. DER, EHB Docket No. 92-278-E (Opinion issued February 19, 1993). A "substantial interest" is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law. South Whitehall Township Police Service v. South Whitehall Township, 521 Pa. 82, 86; 555 A.2d 793, 795 (1989). "Direct" means the matter complained of caused harm to the party's interest. Id. at 86-87, 555 A.2d at 795. "Immediacy" of an interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it. Id at 87, 555 A.2d at 795. In other words, the injury cannot be a remote consequence of the action. William Penn, 346 A.2d at 283, and McColgan v. Goode, 133 Pa. Cmwlth. 391, 576 A.2d 104 (1991). An organization has representational standing to challenge a Department action if one of its members can satisfy the standing criteria. Pohoqualine Fish Association v. DER, EHB Docket No. 91-084-F, (Opinion issued April 22, 1992).

Here, SPA expressed its archaeological interest in its response to Interrogatory 9:

> 9. (a) Identify each economic, recreational, aesthetic, and environmental interest of

SPA members affected by the Authorization to Mine Permit No. 300763-66900303-01-0.[4]

(b) Identify each person with knowledge concerning your answer to subpart (a) of this Interrogatory;

(c) Identify each document concerning your answers to subparts (a) and (b) of this Interrogatory.

Answer: None. No vested interest. Interest is only in preservation and conservation of archaeological sites.

Furthermore, Article II of SPA's bylaws indicates that the association's objectives include studying the archaeology of Pennsylvania and neighboring states and encouraging the careful preservation and cataloguing of all archaeological sites and artifacts. (Constitution and By-Laws of the Society for Pennsylvania Archaeology, Article II, 1(a) and (b), submitted with SPA's answers to the interrogatories.) Thus, SPA has an interest, other than the abstract interest of all citizens, in at least the archaeological issues. SPA appears also to have representational standing on behalf of at least one member regarding recreational, aesthetic and environmental interests concerning the permit area. Al Pesotine, Secretary of SPA and member, and Helen Kalkbrenner, member of SPA, filed an amendment[5] to SPA's response

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[4] The transmittal letter accompanying the permit refers to

Surface Mining Permit #66900303
Authorization to Mine Permit #300763-66900303-01-0
Jayne's Bend Operating
Mehoopany Township, Wyoming County

but the page one of the permit indicates the permit as "No. 66900303." Paragraph 2 of that same page refers to an authorization to mine in Part C of the permit. Part C of the permit was not attached to the notice of appeal.

[5] Dawn Griffiths-Connelly filed a letter on April 9, 1992 stating that she had miscontrued Interrogatory 9 to mean only monetary interest.

to Interrogatory 9 stating, "...As members of the SPA Chapter 11 we personally have a recreational, asthetic, [sic] and environmental interest affected by Authorization to mine permit #300763-66900303-01-1. Besides our general interest in the preservation and conservation of archaeological sites, we take our recreation in the exploration and investigation of these sites." At this point in the litigation, viewing the information in the light most favorable to SPA, it appears SPA has at least met the threshold criteria for standing, especially regarding the archaeological issues, and Wyoming Sand's motion to dismiss SPA's appeal for lack of standing must be denied.

As for Wyoming Sand's assertion that RESCUE Wyoming and the other remaining appellants lack standing to raise archaeological issues, the Board concludes that these appellants do not have standing to pursue these issues. In the notice of appeal, the objections and answers to Wyoming Sand's motion to dismiss and for partial summary judgment, the answers to Interrogatory 9, and the response to permittee's reply on standing and for partial summary judgment, the appellants failed to demonstrate that they had the substantial, direct and immediate interest requisite to establish standing on the archaeological issues. The only archaeological interest was expressed by Jaynes Bend Task Force, (JBTF), a subcommittee of RESCUE Wyoming, in a general statement in its answer to Interrogatory 9:

> 9. (a) Identify each economic, recreational, aesthetic, and environmental interest of JBTF members affected by the Authorization to Mine permit No. 300763-66900303-01-0.
>
> ...
>
> Answer: ... Valuable archaeology will be destroyed and that history gone forever....

This statement does not demonstrate a substantial interest, but rather an interest which does not surpass the common interest of all citizens in

procuring obedience to the law, Larry D. Heasley, et al. v. DER and County Landfill, Inc., 1991 EHB 772.

Summary judgment may be granted where the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035(b); Michael Strongosky v. DER and Resource Conservation Corp., EHB Docket No. 92-263-MJ (Opinion issued March 31, 1993). For the reasons which are set forth below, Wyoming Sand is entitled to judgment in its favor.

In the notice of appeal, RESCUE Wyoming, et al. assert that they petitioned the Department to designate the permit area as unsuitable for mining[6] under §315 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.315, that the Department failed to adequately consider the petition, and that the area is unsuitable for mining under the various statutes which contain provisions relating to lands unsuitable for mining. The March 24, 1992, affidavit of Milton McCommons of the Department, which is part of Wyoming Sand's motion, indicates that RESCUE Wyoming, et al. never filed a lands unsuitable for mining petition. On the other hand, RESCUE Wyoming, et al. claims that a March 21, 1991, letter to Secretary Davis was such a petition. We find that this letter fails to rise to the level of a petition because it lacks specific allegations supported by adequate factual basis for those allegations, as required by, inter alia, §315(m) of the Clean Streams Law. Therefore, Wyoming Sand and Stone is entitled to summary judgment regarding the assertions in the notice of appeal concerning the

---

[6] A person, who has an interest which may or will be adversely affected by surface mining, has the right to file a petition to have an area designated as unsuitable for surface mining. Plumstead Township Civic Association v. DER, ____ Pa. Cmwlth. _____, 597 A.2d 734 (1991).

petition to have the Department declare the lands involved as unsuitable for mining.

Finally, Wyoming Sand has moved for summary judgment regarding the allegation of RESCUE Wyoming, et al. that the Department acted contrary to the Land and Water Conservation and Reclamation Act, arguing that the statute is irrelevant. RESCUE Wyoming, et al. averred the act was relevant because it addresses preventing and eliminating stream pollution from strip mines.

The purpose of the Land and Water Conservation and Reclamation Act was to authorize the expenditure of $500 million to eradicate the scars of past mining practices, to eliminate stream pollution through the construction of sewage treatment plants, to plan for and develop public outdoor recreation facilities, and to develop county and municipal park and recreation facilities. See 32 P.S. §5116. The Land and Water Conservation and Reclamation Act has no bearing on the issuance of noncoal surface mining permits, and, therefore, Wyoming Sand is entitled to partial summary judgment on this issue.

ORDER

AND NOW, this 17th day of June, 1993, it is ordered that:

1) Wyoming Sand's motion to dismiss the Society of Pennsylvania Archaeology as a party for lack of standing is denied;

2) Wyoming Sand's motion to dismiss the remaining appellants' contentions relating to archaeological issues for lack of standing is granted; and

3) Wyoming Sand's motion for partial summary judgment regarding Paragraphs 20-22 and 34 of the notice of appeal is granted.

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DATED: June 17, 1993

cc: See next page for service list

EHB Docket No. 91-503-W
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M. DIANE SMITH
SECRETARY TO THE BO

EDWARD P. McDANNIELS	:	
	:	
v.	:	EHB Docket No. 88-040-MJ
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 23, 1993

OPINION AND ORDER SUR
APPLICATION FOR AWARD OF
ADJUDICATIVE FEES AND EXPENSES

By Joseph N. Mack, Member

Synopsis

Having determined that the appellant is a prevailing party and that the position of the Department of Environmental Resources ("Department") was not substantially justified, the Board awards the appellant $10,000 in attorneys fees under the Costs Act, 71 P.S. §2031 *et seq.* In so holding, the Board rejects the Department's contention that the total value of assets held by the appellant and his wife as tenants by the entireties should be included in calculating the appellant's individual net worth for the purpose of determining eligibility as a "party" under §2 of the Costs Act, 71 P.S. §2032. However, the Board finds that one-half of the value of the assets held in the entireties should be included in the calculation of the appellant's net worth.

OPINION

This matter stems from an appeal filed by Edward P. McDanniels from an Order and Permit Denial issued by the Department in connection with the

placement of fill material on McDanniels' property. The "Permit Denial" attempted to deny McDanniels' water obstruction and encroachment permit application which had been "reactivated" by the Department, after the Department had initially returned the application and advised McDanniels that no such permit was required for his proposed activity. The "Order" directed McDanniels to remove the fill from his property, which he had placed after being notified by the Department that no permit was required.

In an Adjudication issued on December 16, 1992, the Board held that it had been an abuse of discretion for the Department to reactivate McDanniels' permit application, *sua sponte*, and to order McDanniels to remove the fill material after notifying him that no permit was required for the fill activity.

On January 15, 1993, McDanniels submitted an Application for Award of Adjudicative Fees and Expenses pursuant to the Costs Act, Act of December 13, 1982, P.L. 1127, 71 P.S. §2031 *et seq.* The Application was accompanied by a statement of McDanniels' net worth (Exhibit A), a listing of real estate owned jointly with his wife (Attachment 1), and copies of itemized billings from counsel to McDanniels (Exhibit B).

The Department, on February 4, 1993 and March 5, 1993, filed Motions for Enlargement of Time to Conduct Discovery and File Objections. The Department was granted extensions to April 5, 1993 to conduct discovery on McDanniels' net worth and costs related to this matter, and on April 7, 1993, it filed an Answer and supporting brief opposing McDanniels' Application.

On April 19, 1993, McDanniels filed a brief in support of his application, to which the Department filed a reply brief on April 26, 1993. In a letter dated May 5, 1993, McDanniels filed a response to the Department's reply brief.

Eligibility as a "Party"

The Department first denies that McDanniels meets the eligibility criteria of a "party" under the Costs Act. Excluded from the Cost Act's coverage are "[a]ny individual[s] whose net worth exceeded $500,000 at the time the adversary adjudication was initiated..." 71 P.S. §2032 (Definition of "Party").

The Department does not dispute that McDanniels' individually-held assets and liabilities amount to a net total which is under $500,000. The "Statement of Applicants' [sic] Individual Net Worth" shows assets amounting to $8,250 with liabilities of $19,000, for a total personal net worth of -$10,750. (Exhibit A to Application)

However, the Department contends that the total value of all assets held by McDanniels and his wife as tenants by the entireties should also be included in the calculation of McDanniels' net worth. The inclusion of these jointly-held assets, asserts the Department, places him over the $500,000 eligibility limit. McDanniels disputes that the value of assets held as tenants by the entireties should be included in computing his net worth since he lacks the power to convey them. Moreover, contends McDanniels, even if jointly-held assets were included in the calculation, his share would be only one-half of the value of the assets, not the total value. McDanniels contends that even if one-half of the value of the joint assets and liabilities were added to his individual assets and liabilities, the net amount would still be less than $500,000.

The Costs Act provides no guidance as to the treatment of assets and liabilities held jointly by a husband and wife in calculating an individual's worth for purposes of eligibility under the Act. Nor does it appear that this particular issue has been definitively addressed by the Board or the courts.

In James E. Martin v. DER, 1990 EHB 724, the applicant for an award of attorneys fees and costs under the Costs Act, had submitted a statement reciting the assets and liabilities held by himself as an individual and the assets and liabilities held jointly with his wife. In that case, however, no issue arose as to which assets and liabilities should be considered in calculating Mr. Martin's net worth because even when the net worth of his individual assets and liabilities was aggregated with his net worth jointly with his wife, the total was substantially less than $500,000.

The Department urges us to examine this matter under Pennsylvania law on tenancy by the entireties and cites us to a number of cases on this subject. The primary case on which the Department relies as support for its position is that of In re John F. Panas, 68 B.R. 421 (Bankr. E.D. Pa. 1986). However, we are puzzled by the Department's reliance on this case, which dealt with the rights of a secured creditor with respect to property held in tenancy by the entireties. In Panas, a secured creditor had a claim against a husband and wife which was secured by property held by them as tenants by the entireties. The husband filed for bankruptcy. In examining the rights of the secured creditor with respect to the subject property, the Court held that the creditor was entitled to foreclose against the entire property.

The Department is quite correct in pointing out that the bankruptcy of one spouse does not affect a secured creditor's claim against both spouses which is secured by property held as tenants by the entireties. Likewise, "a judgment creditor may execute on entireties property to enforce his judgment if both spouses are joint debtors...However, if only one spouse is a debtor, entireties property is immune from process, petition, levy, execution, or sale." Klebach v. Mellon Bank, N.A., 388 Pa. Super. 203, 565 A.2d 448, 450 (1989) (Citations omitted) (Emphasis in original), allocatur granted ___ Pa.

___, 593 A.2d 420 (1990). See also, Garden State Standardbred Sales Co., Inc. v. Seese, ___ Pa. Super. ___, 611 A.2d 1239, 1243 (1992) ("[E]ntireties property is unavailable to satisfy the claims of the creditor of only one of the tenants.")

However, despite the Department's urging that the Panas case is "directly analogous to the facts of McDanniels", no analogy can be drawn from Panas to the issue presented here with respect to the calculation of "individual net worth" under the Costs Act. In the present case, the Department's Order and Permit Denial were directed solely to Mr. McDanniels. Mr. McDanniels was the sole appellant in this action. It is his net worth which must be examined for purposes of eligibility for recovery under the Costs Act. See also, Gerald E. Booher and Janice B. Booher v. DER, EHB Docket No. 92-026-MJ (Opinion and Order Sur Motion for Summary Judgment issued on December 15, 1992) (Privity does not automatically exist merely by virtue of a spousal relationship or joint ownership of property but, rather, depends on the facts of the case.) If the situation were reversed and the Department was seeking to execute on a judgment against McDanniels, property held by McDanniels and his wife as tenants by the entireties would not be subject to attack. Constitution Bank v. Olson, ___ Pa. Super. ___, 620 A.2d 1146 (1993).

Nor are we swayed by the Department's assertion that, by submitting the permit application in his name only, McDanniels was "holding himself out as the sole owner of the property [in question]" or that he "had the implied permission of his wife to secure a permit, thereby retaining the permit's benefits for both McDanniels and his wife, and their property." (Emphasis in original) We do not find, as the Department appears to be implying, that McDanniels intentionally misled the Department into thinking the property in question was owned by him alone. Moreover, as the Board noted in the

Adjudication of this matter, there was no permit application pending at the time the Department took its action against McDanniels (Adjudication, p. 15); thus, the Department cannot claim that it was misled by the filing of the application.

We, therefore, reject any argument that, because the Department was misled by the application, the total joint net worth of Mr. and Mrs. McDanniels should be the figure used in determining Mr. McDanniels' eligibility for recovery under the Costs Act.

This does raise the question, however, of whether Mr. McDanniels' individual net worth should include one-half of the value of the assets held jointly with his wife (as opposed to the entire value as asserted by the Department.) McDanniels argues that this amount should not be included in his net worth because he does not have the power to convey jointly-held assets.[1]

As noted above, the Costs Act provides no guidance as to the treatment of jointly-held assets in the calculation of an individual's net worth. However, it is clear by the legislature's definition of "party" that the Costs Act was designed to assist only persons of a certain economic level in defending against unwarranted agency actions. Although certain restrictions apply to the conveyance of entireties property, McDanniels is, nonetheless, enjoying the use of this property, and it contributes to his economic level. Therefore, the entireties property should not be entirely excluded from the calculation of his individual net worth. The most equitable approach is to include one-half of the value of the entireties assets in the

---

[1] We agree with the Department in footnote 2 of its brief that, while there are obvious restrictions on the conveyance of real estate and certain other items which may be owned jointly by Mr. and Mrs. McDanniels, such restrictions would not necessarily apply to all jointly-held items, such as the McDanniels' joint checking account.

calculation of McDanniels' net worth. This approach is consistent with the treatment of entireties property under the Divorce Code, 23 Pa. C.S.A. §3101 *et seq.*, whereby property held as tenancy by the entireties during the marriage converts to tenancy in common after divorce, and each former spouse holds an equal one-half share. *Id.* at §3507(a).

However, even after adding one-half of the value of the assets held jointly by the McDanniels to Mr. McDanniels' statement of personal net worth, we still arrive at a figure of less than $500,000. The total value of the jointly-owned real estate listed on Attachment 1 of McDanniels' application was approximately $799,500 in 1988.[2] McDanniels and his wife also own a share in a mutual fund which was valued at $30,000 in 1988. (Response to Interrogatory No. 11.A) Finally, McDanniels and his wife hold a joint checking account, the balance of which fluctuates but never exceeds $50,000. (Response to Interrogatory No. 11.A) The combined total of the real estate, mutual fund, and checking account is $879,500. One-half of this amount is $439,750. Combining this amount with the net worth of the assets and

---

[2] Although the figures on Attachment 1 total $772,000, these figures must be adjusted in light of McDanniels' answers to the interrogatories sent to him by the Department regarding McDanniels' net worth in 1988, the year in which the Order and Permit Denial was issued. See 71 P.S. §2032 (Definition of "Party") McDanniels' answer to interrogatory number 11.B states that in 1988 Mr. and Mrs. McDanniels jointly owned a mortgage executed on property located at 859 Rumsey Avenue with a balance of $22,000. This is not reflected on Attachment 1. In that same response, McDanniels states that the value of the mortgage held by him and his wife on property located at 621 Noble Avenue was $30,000 in 1988. Finally, in his response to interrogatory number 11.E, McDanniels states that the value of the interest held by him and his wife in the property designated as Iroquois Industrial Park was less than $180,000 in 1988. However, no other value is given for 1988, and, therefore, we shall include this amount as $180,000. Because no values of personal property (jewelry, furniture, objets d'art, automobiles, boats, etc.) were provided, we have not factored a value for such property into this calculation.

liabilities owned individually by McDanniels, or -$10,570, results in a total of $429,750, which is within the limit prescribed by §2 of the Costs Act, 71 P.S. §2032.

Thus, we find that there is no question that McDanniels falls within the eligibility requirements of a "party" under the Costs Act.

Prevailing Party

Secondly, the Department denies that McDanniels constitutes a "prevailing party" within the meaning of the Costs Act. A "prevailing party" is defined in §2 of the Act as

> **"Prevailing Party."** A party in whose favor an adjudication is rendered on the merits of the case or who prevails due to withdrawal or termination of charges by the Commonwealth Agency or who obtains a favorable settlement approved by the Commonwealth Agency initiating the case.
>
> 71 P.S. §2032.

It is the Department's contention that the Board's adjudication of this matter was not "rendered on the merits of the case". Rather, asserts the Department, McDanniels' appeal was sustained not because of merit but merely due to the Department's "administrative oversight". The Department contends that this is not the type of case which the Costs Act was designed to address.

The Department's characterization of its action as simple "administrative oversight" ignores the basis of our adjudication. The Board's decision was not rendered on the basis of a mere technicality , but due to our finding that the Department had committed a clear abuse of discretion by its actions, a decision which was made on the merits of the case.

Moreover, contrary to the Department's position, it is difficult to imagine a case which more clearly falls within the designed purpose of the Costs Act than the present case, where an individual was forced to bring an

appeal at great expense to challenge the consequences of the Department's "administrative oversight".

Therefore, contrary to the Department's assertion, our adjudication of this matter in McDanniels' favor was rendered on the merits of the case, and, thus, McDanniels meets the criteria of a "prevailing party" under §2 of the Act. 71 P.S. §2031.

"Substantial Justification"

The Department asserts that the Board may not award costs in this matter because the Department's action was "substantially justified". Section 3(a) of the Costs Act provides as follows:

> (a) Except as otherwise provided or prohibited by law, a Commonwealth agency that initiates an adversary adjudication shall award to a prevailing party, other than the Commonwealth, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer finds that the position of the agency, as a party to the proceeding, was substantially justified or that special circumstances made an award unjust.

71 P.S. §2033(a). An agency's position is "substantially justified" if it has a reasonable basis in law or fact. *Id.* at §2032.

The Department contends that its action in this matter was substantially justified because it was based on a determination that McDanniels' fill activity would detrimentally impact a wetland and, secondly, because McDanniels had supplied misleading information to the Department in his application.

The Department compares its action in this matter to that in D.E.S. v. Commonwealth, Department of Public Welfare, 130 Pa. Cmwlth. 37, 566 A.2d 1261 (1989), which involved a refusal by the Department of Public Welfare ("DPW") to expunge from its records a report of indicated child abuse. On

appeal from a decision of the hearing officer upholding DPW's refusal, the Commonwealth Court determined that the parent, who was the subject of the report, had struck the child but that the child did not suffer serious physical injuries causing severe pain, and it ordered DPW to expunge the report. The parent then filed a petition for award of attorneys fees under the Costs Act. The Commonwealth Court upheld the hearing officer's denial of the petition on the basis that the adversary adjudication had not been initiated by DPW but by a county agency. However, the Court went on to say that even if the adversary adjudication had been initiated by a Commonwealth agency, the petitioner still would not have been entitled to attorneys fees because the actions of DPW and the county agency had been substantially justified on the basis that there had been sufficient facts to justify a report of child abuse. The Court concluded that to hold otherwise would defeat the intent of the legislature in enacting the Child Protective Services Law, 11 P.S. §2201 *et seq.*, the purpose of which was to encourage more complete reporting of suspected child abuse and to establish a system for the swift investigation of such reports. 566 A.2d at 1264.

The action taken by the Department in the present case is a far cry from the DPW's action with respect to a report of child abuse in D.E.S., and unlike the situation in that case, an award of attorneys fees and expenses in the present case would not have a chilling effect on the Department's ability to take action under the statutes it is empowered to enforce. The Department contends that it was substantially justified in seeking to rectify the environmental harm which it determined had occurred as a result of McDanniels' fill activity. While we agree that the Department is charged with the duty of environmental protection, including the preservation of wetlands, we cannot find that the Department's action in this case was substantially justified

where it sought to take such action after notifying McDanniels that he was free to undertake the fill activity without a permit. Nor are we unmindful of the fact that McDanniels' application stated in error that no body of water was involved. As we explained in our Adjudication of this matter, the Department clearly had knowledge at the time the permit application was submitted that the McDanniels' site contained a wetland and was in a better position than McDanniels to know whether a permit was required for the activity in question. Edward P. McDanniels v. DER, EHB Docket No. 88-040-MJ (Adjudication issued December 16, 1992), p. 16, 17.

Special Circumstances

Finally, the Department asserts that special circumstances exist in this case which would make an award under the Costs Act unjust. The Department argues that, while it is true that McDanniels successfully defended his fill activity based on the Department's administrative error, he should not be rewarded under the Costs Act for an "illegal wetland fill" and destruction of a valuable environmental resource. The Department contends that the particular facts of this case do not fall within the Costs Act's goals of deterring unwarranted agency actions and assisting individuals with limited financial means in seeking review of or defending against unreasonable administrative actions. See Archie Joyner v. Commonwealth, DER, ___ Pa. Cmwlth. ___, 614 A.2d 406 (1992).

The Department is correct in its assertion that a prevailing party may not be entitled to an award of attorneys fees and expenses where special circumstances exist which would make such an award unjust. 71 P.S. §2033(a); Joyner, *supra*. However, we find that the circumstances of this case are not such as would prohibit an award under the Costs Act.

The Department argues that McDanniels should not be rewarded for his "illegal wetland fill". However, despite the Department's characterization of the fill activity as "illegal", McDanniels was simply acting in response to the Department's notification that no permit was needed for his activity. The Department cannot argue that McDanniels' filling of the wetland without a permit was illegal after advising McDanniels that no permit was required.

The Department further argues that McDanniels should not be rewarded for destroying a valuable environmental resource. We agree that environmental incursion may be a "special circumstance" contemplated under §3(a) of the Costs Act, 71 P.S. §2033(a). However, while the record supports the Department's characterization of the destruction of the wetland as "willful" (Department's Reply Brief, p. 3), willfulness does not imply maliciousness, but refers only to an intentional act. It is not disputed that McDanniels intentionally (as opposed to unintentionally) filled in the wetland. However, as noted above, McDanniels sought to obtain a permit for his activity and was told that none was needed. His activity certainly cannot be characterized as "malicious" destruction.

The Department contends that, regardless of fault, a valuable environmental resource has been lost, and McDanniels should not be allowed to benefit from that. While we sympathize with the Department's position, an award under the Costs Act is not to "benefit" or "reward" McDanniels for the loss of a wetland. It is for the purpose of reimbursing McDanniels for a portion of the expense incurred in having to defend against a clear abuse of discretion by the Department.

In conclusion, we find that McDanniels meets the criteria for an award of attorneys fees and expenses under the Costs Act.

Amount of Award

The only matter which remains is to determine the amount of award to which McDanniels is entitled. Pursuant to §2 of the Costs Act, no award may be made in excess of $10,000. 71 P.S. §2032 (Definition of "Fees and expenses") In addition, attorneys fees may not be awarded at a rate exceeding $75 per hour, except in limited circumstances which have not been claimed here. *Id.*

Exhibit B to McDanniels' petition contains an itemized billing for legal services. Page 7 shows that a total of 173.80 hours were expended in this matter by counsel for McDanniels. The Department has not challenged this figure, nor do we find it to be unreasonable given the complexity and extent of the issues involved. Page 7 further shows that several attorneys in the firm worked on McDanniels' case and that he was billed at an hourly rate ranging from $25 per hour to $185.00 per hour as follows:

Hours Worked	Billed Per Hour
.20	$ 40.00
.20	25.00
47.00	160.00
2.20	185.00
103.40	75.00
8.50	75.00
12.30	135.00

Because no hourly rate may exceed $75, our calculation is as follows: (.20 x 40) + (.20 x 25) + (47 x 75) + (2.20 x 75) + (103.40 x 75) + (8.50 x 75) + (12.30 x 75) = $13,018.00. As noted above, however, no award may be made in

excess of $10,000, and, therefore, McDanniels' petition will be granted in that amount.[3]

Findings and Conclusions

Finally, §3(c) of the Costs Act requires the Board to "include written findings and conclusions and the reasons or basis therefor." 71 P.S. §2033(c). The reasons and basis for our decision granting McDanniels' petition have been set forth in this opinion as well as in our adjudication of this matter. The following findings are taken from this opinion and our adjudication:

FINDINGS

1. Edward McDanniels is the prevailing party in this matter.

2. At the time the Department issued the Order and Permit Denial which was the subject of the appeal, McDanniels' net worth did not exceed $500,000.

3. The Department's position in this matter, as it related to both the Order and the Permit Denial, was not substantially justified.

4. Counsel for McDanniels spent a total of 173.80 hours on this matter and billed McDanniels at an hourly rate ranging from $25 to $185. Adjusting the hourly rate so that no portion of McDanniels' bill for legal services exceeds a rate of $75 per hour, we calculate total attorneys fees in the amount of $13,018, which exceeds the statutory limit set by §2 of the Costs Act, 71 P.S. §2032.

5. McDanniels is entitled to attorneys fees in the amount of the statutory limit of $10,000.

---

[3] Because that portion of McDanniels' petition seeking attorneys fees reaches the statutory limit allowed by the Costs Act, we do not reach the question of whether McDanniels would be entitled to an award for related costs.

O R D E R

AND NOW, this 23rd day of June, 1993, it is ordered that McDanniels' application for Award of Attorneys Fees is granted, and the Department of Environmental Resources shall, within 30 days, pay $10,000 to McDanniels.

ENVIRONMENTAL HEARING BOARD

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ROBERT D. MYERS
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Member

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JOSEPH N. MACK
Administrative Law Judge
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DATED: June 23, 1993

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SECRETARY TO THE BOA

CARLOS R. LEFFLER, INC.	:	EHB Docket No. 91-210-W
	:	(Consolidated Docket)
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
AIRLINE PETROLEUM CO.	:	EHB Docket No. 91-308-W
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 23, 1993

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

By Maxine Woelfling, Chairman

Synopsis

The Department of Environmental Resources (Department) abused its discretion under §1307 of the Storage Tank and Spill Prevention Act, the Act of July 6, 1989, P.L. 169, 35 P.S. §6021.101 *et seq.* (Storage Tank Act), in assessing distributors who violated §503(b) of the Act by making deliveries to underground storage tanks that were not registered under §503(a) of the Act civil penalties of $1,000 per violation. The Department failed to prove that the distributors' conduct was willful, that the penalties were necessary or sufficient to negate any profits earned, and that the conduct it sought to encourage through the penalties was authorized by the statute. The Depart-

ment further failed to adequately explain the gross disparity between the $1,000 penalty assessed a distributor for violating §503(b) and the $50 penalty assessed a tank owner for violating §503(a).

INTRODUCTION

In these unrelated appeals, Carlos R. Leffler, Inc. (Leffler) and Airline Petroleum Co. (Airline) challenge the Department's assessments of civil penalties in the amounts of $3,000 and $1,000, respectively. Because the appellants raise nearly identical claims, we are writing a joint adjudication that will set forth separate findings of fact, but a common discussion and conclusions of law.

BACKGROUND

A. Leffler's Appeal

On May 31, 1991, Leffler filed a notice of appeal (EHB Docket No. 91-210-MR) from the Department's May 6, 1991, assessment of a $2,000 civil penalty for Leffler's alleged violations of §503(b) of the Storage Tank Act in delivering gasoline on two occasions to an unregistered underground storage tank at Edgewood-in-the-Pines (Edgewood), Butler Township, Luzerne County.

On June 17, 1991, Leffler filed a notice of appeal (EHB Docket No. 91-240-MR) from the Department's May 17, 1991, assessment of civil penalties in the amount of $1,000 for Leffler's alleged violation of §503(b) of the Storage Tank Act as a result of its delivery of 5,990 gallons of diesel fuel to an unregistered underground storage tank at Country Miss, Inc., Easton, Northampton County. By order dated September 18, 1991, this appeal was consolidated with Leffler's May 31 appeal at EHB Docket No. 91-210-MR.

A hearing on the merits was held before Chairman Maxine Woelfling[1] at the Board's Harrisburg office on February 25, 1992. The Department was represented by counsel, while Leffler appeared *pro se* through its Safety Director, Dennis J. Olson.[2] The Department filed its post-hearing brief on April 17, 1992, and Leffler filed its post-hearing brief on May 7, 1992. The record in this appeal consists of 146 pages of testimony (Leffler N.T.), six Department exhibits (Ex. C-__), and eleven Leffler exhibits (Ex. L-__).

B. Airline's Appeal

Airline filed its notice of appeal (EHB Docket No. 91-308-B)[3] on July 25, 1991, challenging the Department's June 26, 1991, $1,000 civil penalty for Airline's alleged violation of §503(b) of the Storage Tank Act in delivering 600 gallons of heating oil to an unregistered underground storage tank at a building owned by Berens Two Realty in South Abington Township, Lackawanna County.

A hearing on the merits was held on January 23, 1992, before Chairman Woelfling at the Board's Harrisburg office. The Department was represented by counsel, while Airline appeared *pro se* through its former owner, Robert N. Lettieri. The Department filed its post-hearing brief on March 2, 1992, and Airline responded with its post-hearing brief on April 2, 1992. The Department filed a reply brief on April 20, 1992. The record in this matter

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[1] The hearing was held before Chairman Woelfling and not Board Member Robert Myers, to whom it was originally assigned. This matter was subsequently reassigned to Chairman Woelfling on February 27, 1992.

[2] The Board has recently held in Keystone Carbon and Oil, Inc. v. DER, EHB Docket No. 92-052-E (Opinion issued June 4, 1993), that a corporation must be represented by counsel in proceedings before the Board. Since these appeals were heard before the Keystone Carbon opinion and the Department did not raise lack of counsel as an issue, we will not address it here.

[3] The matter was also subsequently reassigned to Chairman Woelfling.

consists of 56 pages of testimony (Airline N.T.), four Department exhibits (Ex. D-__), and one Airline exhibit (Ex. A-__).

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

FINDINGS OF FACT - LEFFLER

1. The Department is the agency with the duty and authority to administer and enforce the Storage Tank Act and §1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 (Administrative Code).

2. Carlos R. Leffler, Inc. is a corporation with a business address of Main and Linden Streets, Richland, Pennsylvania 17087. (Notice of Appeal)

3. Edgewood-in-the-Pines, Inc. is a corporation with a facility located in Butler Township, Luzerne County. In September 1990, Edgewood owned a 1,000 gallon gasoline underground storage tank at this facility. (Ex. C-1)

4. Country Miss, Inc. is a corporation with a facility located in Easton, Northampton County. In October 1990, Country Miss owned a 4,000 gallon gasoline underground storage tank, and 5,000 and 10,000 gallon diesel underground storage tanks at this facility. (Ex. C-2)

5. On September 10 and September 26, 1990, Leffler delivered 800 gallons of gasoline to Edgewood's underground storage tank. Edgewood paid Leffler a total of $1,798 for those deliveries ($748 and $1,050, respectively). (N.T. 86 and 137; Ex. C-5)

6. On October 19, 1990, Leffler delivered 5,990 gallons of diesel fuel to Country Miss's 10,000 gallon underground storage tank. Country Miss paid Leffler $7,505.47 for this delivery. (N.T. 80 and 137; Ex. C-6)

7. Edgewood registered its underground storage tank under §503(a) of the Storage Tank Act on November 29, 1990. (N.T. 52 and 87; Ex. C-1)

8. Country Miss submitted its underground storage tank registration form and the registration fee for 1989-1990 to the Department on October 9, 1990. (N.T. 54; Ex. C-2). Country Miss submitted its registration fee for 1990-1991 on November 14 or 15, 1990, and the Department registered its tanks under §503(a) of the Storage Tank Act on November 21, 1990. (N.T. 75; Ex. C-2)

9. When a tank owner registers an underground storage tank under §503(a) of the Storage Tank Act, it receives a registration sticker and a registration certificate. The sticker is to be placed on the fill pipe, adjacent to the fill pipe, or on the inside of the catchment basin. The certificate is to be used as a secondary means of identifying registered underground storage tanks in case the sticker fails. (N.T. 16-17 and 20)

10. Registration stickers can fade and become unreadable. (Ex. L-3 and L-5)

11. When Country Miss received its registration certificate, it placed the certificate in a file in the office. (N.T. 78). Edgewood also filed its certificate upon receipt. (N.T. 87)

12. In May 1991, the Department had verbal guidelines for the assessment of civil penalties under §1307 of the Storage Tank Act. Under these guidelines, the Department assessed underground storage tank owners violating §503(a) of the Storage Tank Act a minimum civil penalty of $50 and assessed distributors violating §503(b) of the Storage Tank Act a minimum civil penalty of $1,000. (N.T. 36-38)

13. In developing a minimum civil penalty assessment of $1,000 for distributors, the Department examined the willfulness of the action, the savings to the violator, and the deterrence of future violations. The

Department also looked at damage to natural resources and the cost of restoration, but assigned no dollar value to these factors. (N.T. 38-40)

14. The Department considered delivery to an unregistered tank to be a willful action because distributors should be aware of the requirements of the Storage Tank Act and the means of identifying registered tanks, and because delivery of product is an affirmative act. (N.T. 30 and 38)

15. The Department believed that the savings to a distributor which violated the Storage Tank Act were the profits that the distributor earned from its delivery to the unregistered tank. (N.T. 39). The Department provided no evidence of the profits earned by Leffler from its deliveries.

16. The Department considered the deterrence of future violations to be the most important factor in assessing distributors a high minimum civil penalty. (N.T. 11-15, 40)

17. Russell Sager, the environmental compliance specialist who issued the civil penalty assessments to Leffler, used the Department's verbal guidelines to determine the amount of the penalties. (N.T. 98-100)

18. On May 6, 1991, the Department issued a civil penalty assessment in the amount of $2,000 to Leffler for Leffler's September 10 and 26, 1990, deliveries of gasoline to an unregistered underground storage tank at Edgewood. (N.T. 101-102; Notice of Appeal)

19. On May 17, 1991, the Department issued a civil penalty assessment in the amount of $1,000 to Leffler for Leffler's October 19, 1990, delivery of diesel fuel to an unregistered underground storage tank at Country Miss. (N.T. 101; Notice of Appeal)

20. The Department believed it was important to assess tank owners a small civil penalty in order to encourage voluntary registration of unregistered tanks. (N.T. 37)

21. A tank owner that failed to register its underground storage tank was assessed a civil penalty equal to the fee for registering the tank for one year. (N.T. 37)

22. The Department assessed Edgewood a civil penalty in the amount of $50. (N.T. 97)

23. The Department assessed Country Miss a civil penalty in the amount of $50 per violation, for a total of $150. (N.T. 83)

FINDINGS OF FACT - AIRLINE

1. The Department is the agency with the duty and authority to administer and enforce the Storage Tank Act and §1917-A of the Administrative Code.

2. Airline Petroleum Company is a corporation with a business address of P. O. Box 187, Clarks Summit, Pennsylvania 18411. Airline owns and operates a fuel distributorship that is located in Clarks Summit, Lackawanna County. (Stipulation of Facts)

3. Berens Two Realty is a company with a facility in South Abington Township, Lackawanna County. In December 1990, Berens Two owned a 10,000 gallon underground storage tank used to store heating oil at the facility. (Stipulation of Facts)

4. On December 14, 1990, Airline delivered 600 gallons of heating oil to Beren Two's underground storage tank in South Abington Township. (Stipulation of Facts)

5. Berens Two registered its underground storage tank under §503(a) of the Storage Tank Act on December 28, 1990. (Stipulation of Facts)

6. On June 26, 1991, the Department assessed Airline a civil penalty of $1,000 for Airline's December 14, 1990, delivery of heating oil to Berens Two. (Notice of Appeal)

7. In June 1991, the Department had written guidelines for the assessment of civil penalties under §1307 of the Storage Tank Act. Under these guidelines, underground storage tank owners that violate §503(a) of the Storage Tank Act were assessed a minimum civil penalty of $50 and distributors that violate §503(b) of the Storage Tank Act were assessed a minimum penalty of $1,000. (N.T. 14)

8. In developing its $1,000 minimum civil penalty, the Department considered deliveries to unregistered underground storage tanks to be a willful violation of §503(b) of the Storage Tank Act. The Department also believed it was necessary to negate any profits a distributor earned from such a delivery. The Department placed the most emphasis, however, on the need to deter future violations. (N.T. 29, 38, and 39). The Department did not consider environmental damage and the cost of restoration in setting the minimum penalty. (N.T. 16)

9. The Department considered a delivery to an unregistered tank to be a willful action because the distributor should have known the requirements of the Storage Tank Act and how to identify registered tanks. (N.T. 29)

10. The Department provided no evidence of the amount of profit earned by Airline from its delivery of 600 gallons of heating oil to Berens Two Realty.

11. With respect to deterrence, the Department believed the Storage Tank Act established a private regulatory scheme in which distributors would become the primary means of enforcing §503(a). (N.T. 6-7, 38). The Department contended it was necessary to assess distributors high minimum civil penalties to encourage them to undertake their enforcement role. (N.T. 15, 38)

12. Russell Sager, Environmental Compliance Specialist, used the Department's guidelines for civil penalty assessments in issuing a $1,000 civil penalty to Airline. (N.T. 29, 30)

13. Sager assessed the $1,000 minimum penalty because Airline's December 14, 1990, delivery was Airline's first offense under the Storage Tank Act, because Airline's delivery was a willful act, and because Beren Two's tank could have leaked its contents into the environment. (N.T. 28-30)

14. Sager considered Airline's actions to be willful under the Storage Tank Act because Airline should have known the requirements of the Act. (N.T. 29)

15. Airline owned many petroleum storage tanks and was probably familiar with the requirements of the Storage Tank Act. (Ex. C-4)

16. Airline did not know the size of the underground storage tank at Berens Two on December 14, 1990. (Stipulation of Facts)

17. Berens Two did not inform Airline that its underground storage tank had a capacity of 10,000 gallons. (Stipulation of Facts)

18. Berens Two's underground storage tank in South Abington Township did not leak or otherwise damage the environment. (N.T. 29-30)

19. Berens Two was assessed a civil penalty of $50 for not timely registering its underground storage tank. (N.T. 35)

DISCUSSION

In both of these cases, the issue before the Board is whether the Department's assessing Leffler and Airline civil penalties of $1,000 per violation was reasonable in light of the Department's assessing underground storage tank owners $50 per violation. The burden here is on the Department to show that the imposition of the penalty was not an abuse of discretion and that the amount of the penalty was proper. 25 Pa. Code §21.101(b)(1); Ronald

E. Johnson t/a Indiana Fuel Co. v. DER, EHB Docket No. 90-537-MJ (Adjudication issued July 21, 1992). While our role in appeals of civil penalty assessments is not to determine the amount of penalty we would have imposed, "[w]here the Board determines that DER has abused its discretion in assessing a civil penalty, we may substitute our discretion for that of DER and modify a civil penalty assessment." Johnson, at p.9.

It is clear from the facts of these cases that the Department did not abuse its discretion in imposing a penalty against Leffler and Airline. Section 503(a) requires every owner of an underground storage tank to register its tank with the Department by November 5, 1989. Section 503(b) states:

> After [August 5, 1990], it shall be unlawful to sell, distribute, deposit or fill an underground storage tank with any regulated substance unless the underground storage tank is registered as required by this section.

Gasoline, diesel fuel, and heating oil are defined in §103 of the Storage Tank Act as "regulated substances."

In Leffler's case, Edgewood and Country Miss did not register their underground storage tanks until November 29, 1990, and November 21, 1990, respectively. Leffler delivered gasoline to Edgewood's unregistered tank on September 10 and September 26, 1990, and diesel fuel to Country Miss on October 19, 1990. Leffler cannot dispute that it violated §503(b).

In Airline's case, Berens Two did not register its underground storage tank until December 28, 1990. Airline, however, delivered heating oil to Berens Two on December 14, 1990. Airline also cannot dispute that it violated §503(b).

Under §1307, the Department has the authority to assess a civil penalty for any violation of the Storage Tank Act. The Department, therefore, did not abuse its discretion in assessing Leffler and Airline civil penalties

for their violations of §503(b). While it was not an abuse of discretion for the Department to assess civil penalties, both Leffler and Airline argue that an assessment of $1,000 per violation was unreasonable.

The three tank owners involved in this case, Edgewood, Country Miss, and Berens Two, each received a civil penalty from the Department in the amount of $50 per tank. (Leffler N.T. 83, 97; Airline N.T. 35). Foster Dale Diodato, the Chief of the Storage Tank Technology Section in the Department's Bureau of Water Quality Management, testified that the Department had guidelines for the assessment of civil penalties under the Storage Tank Act and that under these guidelines, underground storage tank owners are assessed a penalty of $50 for each tank that is not registered under §503(a). (Airline N.T. 14). See also, testimony of Russell Joseph Sager, environmental compliance specialist in the Department's Northeast Region, who stated that he has issued approximately 270 $50 civil penalty assessments to owners of unregistered underground storage tanks. (Leffler N.T. 104; Airline N.T. 33).

The Department argues that it imposes $50 civil penalties on tank owners to encourage registration under §503(a). If the civil penalties were higher, the Department contends tank owners would rather take the chance they will not be caught with unregistered tanks than register their tanks and pay the late registration penalty.

Although the Department only imposes a $50 civil penalty on tank owners for violations of §503(a), its guidelines mandate a civil penalty of at least $1,000 for distributors that violate §503(b). (Leffler N.T. 100 and Airline N.T. 30). The Department argues that assessing distributors high civil penalties is necessary to prevent them from delivering product to unregistered tanks. If the penalties were low, the Department asserts they would not be a disincentive to violating §503(b).

Using the Department's guidelines, Sager issued civil penalty assessments in the amount of $1,000 per violation against Leffler and Airline, for total penalties of $3,000 and $1,000 respectively (Leffler N.T. 100; Airline N.T. 30). Because the Department assessed these penalties under its guidelines, the Department's burden is to show that these guideline-based penalties are consistent with the factors in the statute under the specific facts of these cases. Western Hickory Coal Co. v. DER, 1983 EHB 89, 105. To determine if the Department satisfied its burden, we will examine the factors to be used in assessing a civil penalty under §1307, how the Department developed its guidelines, and whether the guideline-based penalties are reasonable in light of the specific facts of Leffler's and Airline's appeals.

Under §1307, the Department is to consider the following factors in assessing a civil penalty: "the willfulness of the violation; damage to air, water, land or other natural resources of this Commonwealth or their uses; cost of restoration and abatement; savings resulting to the person in consequence of the violation; deterrence of future violations; and other relevant factors."

The Department explained that it derived a $1,000 minimum penalty for distributors, as opposed to $50 for tank owners, as follows. A delivery to an unregistered tank is a "willful" action because a distributor should know the requirements of §503(b) and be able to identify an unregistered tank. (Leffler N.T. 38; Airline N.T. 29). The Department also reasoned that because a distributor earns a profit from delivering product, the penalty imposed must be high enough to negate these profits. (Leffler N.T. 39; Airline N.T. 39). Lastly, the Department believes it is essential to deter distributors from delivering to unregistered tanks because a distributor's refusal to deliver product will force a tank owner to register its tanks or be deprived of their

use. (Leffler N.T. 40; Airline N.T. 38). With respect to environmental damage and the cost of restoration, the Department did not consider these factors in deriving its $1,000 minimum civil penalty because they do not necessarily always result from merely filling an unregistered tank. (Leffler N.T. 39; Airline N.T. 16).

After reviewing this evidence, we find that the Department abused its discretion in issuing civil penalty assessments of $1,000 per violation to Leffler and Airline. The Department characterizes all distributors' deliveries to unregistered tanks as "willful" under the Storage Tank Act because distributors should know they are prohibited from delivering to unregistered tanks under §503(b) and because distributors should know how to identify registered tanks. Such a general characterization is in error.

We have previously held that in order for conduct to be "willful," the actor must have known that its conduct was unlawful under applicable statutes and regulations. "Basically, in determining the degree of willfulness of a violator's conduct, we must focus upon the violator's recognition (or lack thereof) of the fact that its conduct may cause a violation of law." Refiner's Transport and Terminal Corp. v. DER, 1986 EHB 400, 441. While the statute at issue in Refiner's Transport was the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, this general understanding of "willful" conduct is applicable here as well. See also, Western Hickory Coal Co. v. DER, *supra.* (discussing the meaning of willful conduct under §22 of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.*). In Ronald E. Johnson, we held that the

Department did not show the appellant's conduct was "willful" under §1307 of the Storage Tank Act merely by proving the appellant had knowledge of the requirements of the act.

Based on this understanding of the term "willfulness," the Department abused its discretion in determining that all distributors willfully violate §503(b) of the Storage Tank Act when they make a delivery to an unregistered tank. Looking specifically at Leffler's conduct, the Department did not prove that Leffler knew Edgewood's and Country Miss's underground storage tanks were not yet registered under §503(a). While Leffler should have taken additional steps to determine whether these tanks were registered, we cannot hold that it acted in willful or knowing violation of the Storage Tank Act. At worst, Leffler's conduct was merely careless.

With respect to Airline, Robert N. Lettieri testified that Airline honestly believed the tank at Berens Two was not an "underground storage tank" under §103 because it was less than 3,000 gallons in size and only stored heating oil for use on the premises. (Airline N.T. 42-44).[4] He further testified that Airline had no reason to believe it was delivering to a tank with capacity in excess of 3,000 gallons because the few deliveries of greater than 3,000 gallons that Airline made were split between two tanks. This conduct cannot be considered willful. At worst, Airline's conduct was also careless, since Airline could have taken additional steps to determine the size of Beren Two's tank.

Although the Department claimed the $1,000 minimum civil penalty was necessary to negate any profit a distributor earns from its delivery to an

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[4] Section 103 states that the term "underground storage tank" does not include "[t]anks of 3,000 gallons or less used for storing heating oil for consumptive use on the premises where stored."

unregistered underground storage tank, it provided no evidence of the profits earned by Leffler and Airline. Because the amount of profit varies with each delivery, the Department could not have determined that a $1,000 civil penalty was sufficient or necessary to negate all profit earned. The Department, therefore, did not satisfy its burden of proving that a $1,000 penalty was necessary to ensure that a distributor will earn no profit from a delivery to an unregistered tank.

The Department placed the most emphasis on the need to deter distributors from delivering product to unregistered tanks. Believing that the Storage Tank Act transformed distributors into a small army of deputies whose role was to enforce §503(a) of the act, both Ronald Brezinski and Foster Diodato testified that the act would be effective only if distributors refused to deliver to unregistered tanks, thereby depriving tank owners of their use. (Leffler N.T. 40; Airline N.T. 6, 15). Both also testified that in order to ensure the distributors fulfilled their role under the act, it was necessary to punish them with severe civil penalties if they delivered product to unregistered tanks. (Leffler N.T. 40; Airline N.T. 15).

The deterrent value of a civil penalty varies from person to person. The Board held in DER v. Koppers Company, Inc., 1977 EHB 55, 67, that in assessing the deterrent value of a civil penalty, it is necessary to "look to the facts of the case to determine what conduct would likely be deterred by the imposition of a substantial civil penalty." If the conduct sought to be deterred here were merely the filling of unregistered tanks by these product distributors, perhaps a substantial civil penalty would be warranted if the Board were presented with the evidence to substantiate it. But, the purpose

of the assessment, by the Department's own admission, is to encourage implementation of what the Department has characterized as a private regulatory concept.

This private regulatory scheme is an integral part of the Department's enforcement strategy. While we ordinarily must defer to the Department's interpretation of a statute it administers, we are not obliged to do so where the Department's interpretation is clearly erroneous. County of Schuylkill *et al.* v. DER and City of Lebanon Water Authority, 1989 EHB 1241, 1267. We find no support in the statute for the Department's interpretation. Nor can we resort to the Department's characterization of the legislative history, since the language of the Storage Tank Act is clear on its face that the Department, and not its unwilling or reluctant army of deputies, is responsible for enforcing the statute. §1921 of the Statutory Construction Act, 1 Pa.C.S.A. §1921, and Borough of Glendon v. Department of Environmental Resources, 145 Pa. Cmwlth. 238, 603 A.2d 226 (1992), allocatur denied, ___ Pa. ___, 608 A.2d 32 (1992).

Even beyond this fundamental flaw, the Department's policy toward deterrence is somewhat confusing. On the one hand, the Department does not believe it is necessary to impose high civil penalties in order to deter tank owners from violating §503(a), while on the other hand, the Department does impose severe penalties on distributors to deter them from violating §503(b). This disparity has no basis in either §503(b) or §1307. Section 503(b) does not state or even imply that a distributor's delivery to an unregistered tank is a more serious violation than a tank owner's failure to register its underground storage tank. Similarly, §1307 does not establish separate

penalty schemes for violations of §503(a) and §503(b). In addition, §1307 states that "deterrence of future violations" is but one factor to consider in determining the amount of civil penalty.

Looking at the six factors in §1307 together, we hold that Leffler and Airline will be assessed a civil penalty in the amount of $50 per violation, for a total penalty of $150 in Leffler's case and $50 in Airline's case. We have already stated that we do not consider their conduct to be willful merely because they had knowledge of the requirements of the Storage Tank Act. There was no damage to the air, land, or water of the Commonwealth, nor were there any costs of restoration or abatement. (Leffler N.T. 39; Airline N.T. 29-30). There is no evidence before us regarding the amount of profit Leffler and Airline earned from these sales. Finally, while there is obviously a need to deter future violations, there is no evidence in the record regarding deterrent value of the assessments, other than that relating to the flawed private enforcement scheme.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the subject matter of these appeals and the parties hereto.

2. The burden of proof in these appeals rests with the Department to demonstrate that the penalty and the amount were not an abuse of discretion and were properly assessed. 25 Pa. Code §21.101(b)(1); Ronald E. Johnson t/a Indiana Fuel Co. v. DER, EHB Docket No. 90-537-MJ (Adjudication issued July 21, 1992).

3. Section 503(b) of the Storage Tank Act makes it unlawful to sell, distribute, or deliver a regulated substance to an underground storage tank after August 5, 1990, unless the tank is registered in accordance with §503(a) of the Act.

4. Leffler violated §503(b) of the Storage Tank Act on three separate occasions by delivering gasoline to unregistered tanks at Edgewood-in-the-Pines on September 10 and 26, 1990, and diesel fuel to an unregistered tank at Country Miss, Inc. on October 19, 1990.

5. Airline violated §503(b) of the Storage Tank Act by delivering heating oil to an unregistered tank at Berens Two Realty on December 14, 1990.

6. In assessing a civil penalty under the Storage Tank Act, the Department is required to consider the following factors: willfulness of the violation; damage to air, water, land, or other natural resources; cost of restoration and abatement; savings resulting to the person in consequence of the violation; deterrence of future violations; and any other relevant factors.

7. There is no basis in the Storage Tank Act for assessing distributors higher civil penalties for filling unregistered storage tanks than those assessed the owners of the tanks for failing to register them.

8. The Board may substitute its discretion for that of the Department and modify a civil penalty assessment when it finds that the Department has abused its discretion in either assessing the penalty or in setting the amount of the penalty. Ronald E. Johnson, *supra*.

9. The Department abused its discretion in assessing Leffler and Airline civil penalties of $1,000 per violation.

10. The Board will substitute its discretion for that of the Department and modify the civil penalties assessed Leffler and Airline.

ORDER - LEFFLER

AND NOW, this 23rd day of June, 1993, it is ordered that:

1) Carlos R. Leffler, Inc.'s appeals are sustained in part and dismissed in part; and

2) The amount of the civil penalties assessed by the Department is modified to $50 per delivery to an unregistered tank, for a total of $150.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 23, 1993

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
Barbara L. Smith, Esq.
Northeast Region
For Appellant:
Dennis J. Olson
CARLOS R. LEFFLER, INC.
Richland, PA

ORDER - AIRLINE

AND NOW, this 23rd day of June , 1993, it is ordered that

1) Airline Petroleum Company's appeal is sustained in part and dismissed in part; and

2) The amount of the civil penalty assessed by the Department is modified to $50.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
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Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 23, 1993

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M. DIANE SMITH
SECRETARY TO THE BOA

PAGNOTTI ENTERPRISES, INC., d/b/a TRI-COUNTY SANITATION COMPANY	:	
v.	:	EHB Docket No. 92-039-E
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and FOSTER TOWNSHIP SUPERVISORS, and SAVE OUR LOCAL ENVIRONMENT II, LAWRENCE P. AND LINDA KORPALSKI, KENNETH POWLEY AND THOMAS MEYERS, SR., Intervenors	:	Issued: July 7, 1993

ADJUDICATION

By Richard S. Ehmann, Member

Synopsis

The Board dismisses an appeal from the Department of Environmental Resources' (DER) denial of a Municipal Waste Phase II permit for a proposed landfill pursuant to 25 Pa. Code §271.201. The appellant failed to sustain its burden of proving that its proposed design will address DER's concerns about potential for failure of the landfill once constructed. Moreover, appellant failed to provide DER with compliance history information regarding violations and bond forfeitures in connection with its related parties which occurred after its Phase I permit application was submitted to DER and while its Phase II permit application was pending. This compliance history information was put before the Board in our *de novo* review, however, and it

shows the appellant's related parties to have an extensive history of violations and non-compliance. We thus find no abuse of DER's discretion in denying the permit.

BACKGROUND

On December 26, 1991, the Waste Management Program of DER's Bureau of Waste Management sent a letter to Tri-County Sanitation Company (TCS) denying TCS' Municipal Waste Phase II permit application. TCS is a joint venture of Pagnotti Enterprises, Inc. (Pagnotti) and Louis J. Beltrami (Beltrami). TCS' application proposed a municipal waste landfill to be located in Foster Township, Luzerne County. The proposed landfill site consists of 600 acres, most of which contains abandoned mines.

DER denied TCS' application pursuant to 25 Pa. Code §271.201 on the basis that TCS had failed to adequately address the issues raised in DER's October 3, 1990 comment letter and to provide the necessary information to demonstrate the landfill would comply with the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*; the Municipal Waste Planning, Recycling and Waste Reduction Act (Act 101), Act of July 28, 1988, P.L. 556, 53 P.S. §4000.101 *et seq.*; and the rules and regulations promulgated thereunder. DER's reasons for denial are set forth in eight numbered paragraphs in its denial letter.

Pagnotti, d/b/a TCS, commenced this appeal of DER's denial letter on January 28, 1992. By order issued March 19, 1992, we granted the Foster Township Supervisors' (Foster) petition to intervene. By order issued April 9, 1992, we granted a petition to intervene filed on behalf of Save Our Local Environment II, Lawrence P. and Linda Korpalski, Kenneth Powley, and Thomas Meyers, Sr. We subsequently denied TCS' motion for reconsideration of our

order allowing Foster's intervention. Beltrami t/a TCS also filed a separate appeal at Docket No. 92-036-E challenging DER's denial of TCS' permit application. Beltrami's appeal was consolidated with the instant appeal until Beltrami withdrew his appeal in July of 1992.

A hearing on the merits was held on October 27-30, November 4-5, and November 12-13, 1992 before Board Member Richard S. Ehmann.[1] One witness, Harold Ash, was unable to testify but the parties agreed his testimony would be taken by deposition, with TCS afforded an opportunity for rebuttal. After receiving the transcript of Ash's deposition on January 15, 1993 (no rebuttal being offered by TCS), we directed the parties to file their respective post-hearing briefs, which they have done. The parties are deemed to have abandoned all arguments not raised in their post-hearing briefs. Lucky Strike Coal Company v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988).

We also received from TCS on February 8, 1993, a motion to strike the testimony of Donald Karpowich from the record. We will rule on this motion in this Adjudication.

Upon our examination of two of DER's reasons for denial, we have determined its denial was proper. Thus, we will limit this Adjudication to those reasons, and we need not address TCS' challenges to DER's remaining reasons for denial. Willowbrook Mining Company v. DER, 1992 EHB 303.

The record consists of a transcript of 1789 pages, numerous exhibits, and Harold Ash's deposition (which pertains to factual issues which we do not

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[1]We note that the transcript of the merits hearing fails to reflect that the hearing occurred on November 12, 1992, and incorrectly indicates two days of hearing as both occurring on November 5, 1992.

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

FINDINGS OF FACT

1. Appellant is TCS, which has a principal place of business at P. O. Box 450, Pittston, Pennsylvania, and a place of business at Rural Route 2, Box 153-R, Weatherly, Pennsylvania. (Notice of Appeal; Board Exhibit 1 (B-1)).[2] TCS is a joint venture of Pagnotti and Beltrami. (B-1)

2. Appellee is DER, the agency of the Commonwealth with the authority to administer and enforce the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*; the SWMA; Act 101; the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, as amended, 35 P.S. §4001 *et seq.*; Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and the rules and regulations adopted thereunder.

3. Intervenor is Save Our Local Environment II (which is a citizens group comprised of residents of the communities surrounding the proposed landfill), Lawrence P. and Linda Korpalski, Kenneth Powley, and Thomas Meyers, Sr. (collectively SOLE II). (N.T. 1591, 1617)[3]

4. Foster is also an intervenor.

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[2] "N.T." represents a citation to the transcript of the merits hearing.

[3] References to the parties' joint stipulation will be "B-1". References to Pagnotti's exhibits will be "P-__"; references to DER's exhibits will be "C-__".

Beltrami's Permit Application

5. On April 3, 1987, Beltrami submitted to DER an application for a proposed municipal waste landfill to be located in Foster Township, Luzerne County. (N.T. 29, 86, 88, 729-730; B-1)

6. Beltrami is president of Beltrami Enterprises, Inc. (BEI) and its subsidiary, Lucky Strike Coal Company (Lucky Strike). (N.T. 30; B Ex. 2; C Ex. 54, Admissions 27 and 28)

7. Upon DER's review of Beltrami's application in April of 1987, DER identified a problem with Beltrami's compliance history and advised Beltrami that his permit application would be denied and that DER would not further process this application. (N.T. 31, 730, 940-941)

8. After Beltrami's discussion with DER, Beltrami approached Pagnotti proposing that Pagnotti begin a business relationship with him regarding the proposed landfill. (N.T. 87)

9. Pagnotti and Beltrami orally agreed to enter into a partnership in the proposed landfill, with Pagnotti as a 50% partner of Beltrami. (N.T. 88-90)

10. Beltrami withdrew his permit application October 30, 1987. (N.T. 31, 940; B-3)

TCS' Permit Application

11. TCS submitted its Phase I municipal waste landfill permit application to DER on November 25, 1987. (N.T. 29, 87; B-3)

12. The proposed landfill is to be located on the south dip of a mountainside which rolls down into a valley. (N.T. 174) The landfill would be constructed approximately 150 feet above the valley floor and 100 feet below the top of the mountain. (N.T. 174)

13. The 600 acre site on which the landfill is to be located has been both deep mined and surface mined for coal. (N.T. 173, 921; P-1H) Most of the 600 acre site contains abandoned mines and ninety percent of this area is presently being mined. (N.T. 173, 921)

14. The footprint (disposal area) of the landfill would be on 57 acres. (N.T. 237, 268, 921; P-1H)

15. Mine waste (rockfill) has been cast into excavated areas on the footprint during surface mining operations. (N.T. 431, 626)

16. Form C of TCS' Phase I permit application lists BEI as the owner of the property on which the proposed landfill will be built. (P-1A) Form C also sets forth the compliance history of TCS and its related parties, which include Pagnotti, BEI, and Lucky Strike. (N.T. 30; P-1A) TCS' Phase I application states that Pagnotti will have responsibility for operation and control of the landfill and Beltrami will have no duties regarding operation or management. (N.T. 941) Form C shows that all of these entities have a lengthy violation history. (P-1A)

17. DER sent TCS a Letter of Deficiency, dated March 24, 1988, in which it advised that DER was concerned about Beltrami's compliance history and requested TCS to clarify the involvement he would have with the proposed landfill. (N.T. 731; C-12)

18. DER issued a pre-denial letter to TCS on February 23, 1989, in which it directed TCS to revise Form C of its application so DER could review up-to-date and accurate compliance history information. (N.T. 739; C-11)

19. TCS submitted its Phase II permit application on November 21, 1989. (N.T. 801; B-3)

20. DER advised TCS that its Phase I application was administratively complete in a letter dated March 9, 1990. (B-3)

21. On April 9, 1990, DER determined that both Phase I and Phase II of TCS' permit application were administratively complete. (B-3)

22. On October 3, 1990, DER sent TCS a 25-page Technical Review Comments Letter in which it advised TCS *inter alia* that its analysis of potential settlement at the site was extremely deficient. (N.T. 267, 802; B-1; C-9) DER's letter further stated that TCS' submission did not contain a detailed slope stability analysis and requested TCS to provide DER with such an analysis. (C-9)

23. Subsequently, DER's Carl Zbegner, who is a sanitary engineer employed by DER's Bureau of Waste Management, and Alvin Roman, who is a professional engineer (P.E.) employed by Number One Contracting, discussed how TCS would abate the potential for settlement of the mine spoil at the proposed landfill site. (N.T. 231, 1410, 1423) Number One Contracting is a subsidiary of Pagnotti and was to perform the excavation work at the proposed landfill. (N.T. 34, 114, 231, 653)

24. A meeting was held on October 23, 1990 between representatives of DER and TCS to discuss DER's October 3, 1990 letter and TCS' plan for consolidating the mine spoil. (N.T. 1023, 1418; B-1) Carl Zbegner attended on behalf of DER, and Al Roman and James Tedesco (who is Chairman of the Board of Pagnotti) attended on behalf of TCS. (N.T. 28-29, 1416-1417)

25. TCS proposed to densify the mine spoil either through a process known as deep dynamic compaction (DDC) or by excavating the area down to the bedrock surface. (N.T. 1423-1424) DDC is a process by which a heavy weight is dropped from a crane to the ground, resulting in a crater being formed on

the surface of the ground and compaction of the materials in the area beneath it. (N.T. 413-414) This process is repeated for a number of specified times over the area to be compacted. (N.T. 414) With each successive dropping of the weight in a particular spot, there is less penetration of the ground at that spot. (N.T. 415)

26. In a letter to TCS dated December 11, 1990, DER advised TCS that DER wanted detailed, final designs for how TCS would compact the mine spoil. (N.T. 1042-1044; C-29) DER's letter also gave TCS an additional 60 days to respond to DER's October 3, 1990 letter. (C-29)

27. In March of 1991, TCS submitted to DER its revised Phase II permit application, including the results of testing of the performance of DDC at the proposed landfill site. (N.T. 803, 1078)

28. On March 13, 1991, DER entered into a Consent Order and Agreement (COA) with Pagnotti Coal Company (PCC), which is listed as a subsidiary of Pagnotti in Form C of TCS' application. (N.T. 70, 783, 786; C-33; P-1A) Under this COA, PCC agreed to pay $172,632 in civil penalty assessments for violations for which DER had previously cited BEI or to reclaim the Eckley Miner's Village site in lieu of the civil penalty. (C-33) PCC also agreed that the following evidence concerning its relationship with BEI exists: the presence of Pagnotti equipment at the BEI surface mining sites; Pagnotti's supervision of BEI operations; the submission to DER by Pagnotti's engineers of information concerning regulatory requirements regarding operation of BEI's sites; and representatives of Pagnotti negotiated and settled civil penalties proposed to be assessed on BEI. (C-33, C-54; B-2)

29. On December 6, 1991, DER declared forfeit, pursuant to §4(h) of SMCRA, 52 P.S. §1396.4(h), a number of mining bonds posted by BEI and Lucky

Strike in connection with various surface mining permits based on violations at their mine sites. (N.T. 44, 793; P-24; B-2; C-54)

30. DER's reasons for forfeiting BEI's mining bonds included BEI's: failure to maintain backfilling equipment needed to complete reclamation of affected areas; failure to complete reclamation of the mine sites as required by the reclamation plan; improper disposal of non-coal wastes on the site; failure to seal exploration drill holes; failure to submit monitoring reports; failure to comply with DER orders; failure to show a willingness or intention to comply with applicable laws and regulations; failure to pay outstanding civil penalties; and accumulated other violations identified in numerous DER Inspection Reports, letters, and Notices of Violation (NOV). (B-2; C-54)

31. DER's reasons for forfeiting Lucky Strike's mining bonds included Lucky Strike's: removal of backfilling equipment needed to complete reclamation of affected areas; failure to comply with DER orders; failure to backfill and reclaim in accordance with its approved reclamation plans; failure to show a willingness or intention to comply with applicable laws and regulations; failure to pay outstanding civil penalties; and accumulated other violations as identified in DER Inspection Reports, letters, and NOVs. (B-2; C-54)

32. BEI and Lucky Strike appealed each of DER's December 6, 1991 bond forfeitures to this Board. (B-2; C-54 at Admission 34)

33. DER's Bureau of Waste Management was made aware of DER's December 6, 1991 bond forfeiture actions relating to BEI and Lucky Strike through an interoffice memorandum from DER's Bureau of Mining and Reclamation dated December 20, 1991. (N.T. 947, 1020; P-24)

34. On December 26, 1991, DER denied TCS' permit application. (N.T. 908; P-25) At Paragraph 1 of its denial letter, DER stated in pertinent part:

> (a) The plan does not demonstrate, [sic] that this section of the landfill can be compacted enough to address the potential for failure to the facility.
>
> . . .
>
> (d) The application did not adequately address the impact of differential settlement or subsidence on slope stability.

At Paragraph 5, DER said:

> 5. ... the application does not contain accurate information regarding the violation history of the applicant or related parties. The Department determined that numerous violations and bond forfeitures related to either Pagnotti's or Beltrami's coal operations are not identified in the Form C - Compliance History.

35. At the time of DER's denial of TCS' permit application, DER's Waste Management Program knew about the March 13, 1991 COA and the December 6, 1991 bond forfeitures. (N.T. 1559-1560)

36. DER did not deny TCS' permit application solely on the basis of the compliance history of TCS and its related parties because DER wanted to describe for TCS what was deficient about its proposed project. (N.T. 1523-1524, 1551, 1581)

Compliance History

37. DER issued a Field Compliance Order to BEI on March 20, 1992, citing BEI for unpermitted disposal of fuel-contaminated soil on property located within the mine site covered by Surface Mining Permit (SMP) No. 40763006. (N.T. 1527; C-31)

TCS' Proposed Landfill

38. TCS proposes to construct the landfill in layers. First, a subbase of crushed stone or other base material would be placed on the surface of two feet of clay, then leachate collection pipes would be added. Thereafter, TCS would install a lower liner, a layer of sand, and finally install an upper liner. (N.T. 263-265) The area before any subbase material (crushed stone and clay) is applied is referred to as the subgrade. (N.T. 263-265)

39. The bedrock surface contour at the proposed site contains within it depressions resulting from previous strip mining. (N.T. 485, 487)

40. TCS proposes to move unconsolidated mine spoil from areas which have more than 40 feet of mine spoil overlying the bedrock surface, regrading lower areas to bring them up to the subgrade level. (N.T. 277)

41. TCS proposes to densify the mine spoil within the proposed landfill footprint for a depth of 40 feet down to the bedrock surface. (N.T. 277, 416, 614, 685)

42. It is unclear from TCS' Phase II permit application as to where the bedrock is located. (N.T. 574)

43. TCS's proposal is that the contractor's work plan will be submitted to DER after the permit is issued and that the contractor will have to comply with the specifications in TCS' application that there will be 40 feet of material on top of the bedrock. (N.T. 563, 575, 587, 618-619)

44. Under TCS' proposal, the contractor would use tests, such as sounding tests, to verify the 40 feet of mine spoil to bedrock. (N.T. 506-508)

45. TCS would use DDC up to the point where the surface of the bedrock comes within 10 feet of the ground's surface. (N.T. 417, 614) At that point the mine spoil not densified by DDC would be placed in three foot lifts, with each lift compacted by rolling with heavy vibrators. (N.T. 417, 614-617) A four foot lift of select fill would then be placed directly below the liner. (N.T. 417)

46. The area on which TCS proposes to use DDC is a very large area which is approximately 1500 feet by 600 feet. (N.T. 484-486, 1141)

47. In the area where DDC will not be used and the material will be roller compacted, TCS would have to use a bench excavation where the bedrock juts out from the side of a cliff in the currently existing valley. (N.T. 571-572)

48. TCS also proposes as an alternative to DDC excavating the mine spoil to within 50 feet of the bedrock surface and compacting it in controlled layers. (N.T. 458; P-1H at §3.5)

Potential For Failure Of the Constructed Landfill

49. Woodward-Clyde Consultants (WC) was engaged by TCS to assess underground mining conditions at the site and the potential for mine subsidence because of the mine spoil being used as fill. (N.T. 408) Volume V of TCS' application (P-1H) contains the information developed from WC's work submitted by TCS to DER in March of 1991. (N.T. 430)

50. WC conducted settlement analyses in order to predict possible deformations of the subgrade under the full load of waste to be landfilled. (N.T. 443) WC's initial settlement analysis used estimated data from a literature search while its later settlement analysis used site-specific data derived from testing at the site. (N.T. 412)

51. WC conducted a surface wave geophysical survey of the mine spoil to derive the compressibility of the spoil before and after DDC. (N.T. 418-422) A surface wave geophysical survey yields a shear wave velocity which can be correlated to compressibility factors used in a finite element analysis to predict settlement. (N.T. 418, 423)

52. The results of WC's DDC testing conducted on a test footprint at the proposed site are contained in Appendix C of Volume V. (N.T. 445)

53. WC's DDC test results indicate the upper 25 feet of material overlying the bedrock was compacted by DDC, but the process made little impact on any material below that level. (N.T. 426, 445)

54. WC also conducted roller compaction tests, the results of which are contained in Appendix D of Volume V. (N.T. 453)

55. WC's analyses of its roller compaction tests on the material at the proposed site indicate the material was relatively incompressible as a result of this process. (N.T. 453-454)

56. WC's settlement analyses indicate there would be three inches primary settlement, and, after 100 years, a total settlement (primary and secondary) of six inches.[4] (N.T. 454; P-1H at §3.4)

57. TCS proposes a double liner system using two 60 mil high density polyethylene (HDPE) liners for the landfill. (N.T. 311-312)

58. Pursuant to the liner manufacturer's criteria, the subgrade surface below the liner is to be firm and compact in order to avoid a tear in the liner. (N.T. 323, 334)

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[4] Primary settlement occurs where a load is placed on material, rapidly compressing it; secondary settlement occurs slowly, over time. (N.T. 424)

59. If the liner would tear, leachate would travel from the landfill into a pool of water in the deep mine beneath the site and eventually into Buck Mountain Creek. (N.T. 338-340, 820)

60. Based on WC's settlement analysis, WC predicts the maximum tensile stresses for the liner would be less than one percent, which would be within the liner's five percent tolerance. (N.T. 444, 455; P-1H at §3.4)

61. Mine spoil on a slope has potential for failure (to slide or bulge). (N.T. 433) A slope stability analysis is performed by postulating failure surfaces to determine the slope's factor of safety against failure. (N.T. 433, 1245)

62. A factor of safety of "1" indicates a slide will occur, while "2" indicates good slope stability. A factor of safety of "1.5" is considered to be satisfactory. (N.T. 433-434)

63. WC's slope stability analysis results indicate a factor of safety of 1.5 or greater. (N.T. 442)

64. William Gardner, who is a P.E., was employed by WC and its predecessor from 1956 until 1991, when he started his own geotechnical engineering firm. (N.T. 391-394)

65. While at WC, Gardner became involved with TCS' permit application in 1989. (N.T. 408) Gardner was involved in generating the data and performing both the settlement and slope stability analyses on behalf of WC. (N.T. 1787)

66. Gardner was the sole expert in geotechnical engineering who testified at the merits hearing on behalf of TCS. (N.T. 396, 407)

67. Gardner has previously been involved with three projects using DDC to stabilize the ground where buildings were to be constructed, but he has

no experience with DDC being used to stabilize the ground where a landfill is to be constructed nor with DDC use in an area as large as TCS' proposed site. (N.T. 401, 403)

68. Richard Mabry, who is a P.E., was employed by WC from 1967 until 1983. (N.T. 1102, 1106-1107; C-39)

69. Mabry is a self-employed geotechnical engineer who was initially engaged by SOLE II to review and comment on TCS' permit application. (N.T. 1102, 1117)

70. Mabry reviewed TCS' revised Phase II application for field testing and analyses of DDC and roller compaction and compared the findings against TCS' original Phase II application. (N.T. 1127)

71. Mabry's two reports, dated September 17, 1990 and July 31, 1991, contain his conclusions regarding TCS' application. (N.T. 1118-1119; C-39, C-40)

72. DER relied in part on Mabry's conclusions in deciding to deny TCS' application. (N.T. 1065)

73. Mabry was the only expert in geotechnical engineering called by DER at the merits hearing to testify on behalf of DER. (N.T. 1104, 1117)

74. While employed by WC, Mabry was involved with a proposal to use DDC in connection with constructing a hotel over a municipal waste landfill. Mabry has never been involved with a proposal to use DDC in connection with constructing a landfill over mine spoil. (N.T. 1106-1114)

Beltrami's Continued Involvement

75. Nolan Perin was listed as the contract operator in Form C of TCS' Phase I permit application. (N.T. 1188-1189; P-1A)

76. Perin is one of the owners of and is chairman of Grand Central Sanitation, which is located in Pen Argyl, Pennsylvania. (N.T. 1187-1188) Grand Central Sanitation operates a landfill. (N.T. 1188)

77. Prior to filing his permit application with DER, Beltrami contacted Perin and engaged him to serve as advisor for the proposed landfill from the conceptual stage through the permitting stage. (N.T. 1195, 1199) Perin was to be paid for his services by a portion of the revenues from the landfill once it was permitted. (N.T. 1196)

78. After Pagnotti became involved in the proposed landfill, Perin remained as advisor to the project but represented Beltrami and not Pagnotti. (N.T. 1194-1195, 1199)

79. No clear delineation was made between Pagnotti and Beltrami as to responsibility for the permit application and ownership of the proposed landfill while Perin worked on the project. (N.T. 1194)

80. Between 1987 and 1990, Perin served as advisor to the proposed landfill regarding feasibility of certain operations; he brought in consultants and coordinated the permit application process. (N.T. 1200)

81. As Pagnotti became more involved with the proposed landfill project, Perin became less involved. (N.T. 1214)

82. In a letter dated September 20, 1990, Perin notified Beltrami that he would not continue his involvement with the proposed TCS landfill nor would he serve as contract operator. (N.T. 1189-1190)

83. Beltrami was actively involved with the permit application for the proposed landfill both prior to and following Perin's September 20, 1990 letter. (N.T. 1204-1205)

84. Beltrami has continued to be involved in the permit application process for the proposed landfill at least up until the seven or eight months preceding the merits hearing (early 1992). (N.T. 1206)

Due Process

85. DER routinely gives two technical reviews to an application for a municipal waste landfill permit. (N.T. 1542)

86. TCS' permit application received four technical reviews. (N.T. 1542) No other applicant for a solid waste landfill permit has been given four DER technical reviews. (N.T. 1553)

DISCUSSION

This appeal involves our review of whether DER properly denied TCS' Phase II permit application for a municipal waste landfill proposed to be constructed on a site which has been both deep mined and surface mined for coal. The permit applicant is a joint venture between Pagnotti and Beltrami, both of whom have been involved in the business of mining coal in the Commonwealth along with their related entities.

In its post-hearing brief, TCS contends due process considerations require us to set aside DER's denial of TCS' permit application. Additionally, TCS argues that DER's reasons for denial in its denial letter were insufficient and that TCS has adequately addressed the deficiencies raised by DER's denial letter. Further, TCS argues that compliance history

cannot serve as a basis for denial of its permit application. TCS accordingly asks us to direct DER to issue the permit, or issue it subject to conditions which TCS says will satisfy DER's concerns.

We begin our discussion by examining the assignment of the burden of proof. As TCS is challenging DER's denial of its Phase II permit application for a municipal waste landfill, it is TCS which bears the burden of proof in this matter. 25 Pa. Code §21.101(c)(1). In order to sustain its burden of proof, TCS must show by a preponderance of the evidence that DER's denial of its permit application was arbitrary, capricious, contrary to law, or a manifest abuse of discretion. Warren Sand and Gravel Co., Inc. v. Commonwealth, DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975); Franklin Township Board of Supervisors v. DER, et al., 1992 EHB 266. For a party to sustain its burden of proof by a preponderance of the evidence, more is necessary than that the evidence in favor of the proposition be equal to that opposed to it. "The evidence of facts and circumstances on which [the party] relies and the inferences logically deducible therefrom must so preponderate in favor of the basis proposition he is seeking to establish as to exclude any equally well-supported belief in any inconsistent proposition." C&K Coal Company v. DER, 1992 EHB 1261 (citing Henderson v. National Drug Co., 343 Pa. 601, ___, 23 A.2d 743, 748 (1942)).

The second question we must address is what evidence we may consider. As we explained in our decision in Al Hamilton Contracting Co. v. DER, 1992 EHB 1458, the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7511 *et seq.*, empowers the Board to conduct a *de novo* review of DER's actions. The nature of our *de novo* review was interpreted by the Commonwealth Court in Warren Sand and Gravel, *supra*, as imposing a duty on the

Board to determine whether DER's action can be sustained or supported by the evidence taken by the Board. Consistent with Warren Sand and Gravel, we have held that we were not restricted to a review of DER's determination on an application for a surface mining permit and allowed expert testimony not developed prior to DER's action. Township of Salford, et al. v. DER and Mignatti Construction Co., 1978 EHB 62, 77. Accordingly, TCS must prove it is clearly entitled to the permit before the Board will order DER to issue it based upon the evidence put before us. Al Hamilton Contracting Co., *supra*; Sanner Brothers Coal Co. v. DER, 1987 EHB 202.

We review DER's denial of TCS' permit application against the requirements found at 25 Pa. Code §271.201.[5] This section of DER's regulations provides:

> A permit application will not be approved unless the applicant affirmatively demonstrates that the following conditions are met:
>
> . . .
>
> (2) The permit application is complete and accurate.
> (3) Municipal waste management operations can be feasibly accomplished under the application as required by the act, the environmental protection acts and this title.
> (4) The requirements of the [SWMA], the environmental protection acts, [title 25] and Pa. Const. Art. I, §27 have been complied with.
> (5) Municipal waste management operations under the permit will not cause surface water pollution or groundwater pollution. ...
> (6) When the potential for mine subsidence exists, subsidence will not endanger or lessen the ability of the proposed facility to operate in a manner that is consistent with the act, the environmental protection acts and this title, and

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[5] We note that §271.201 has been amended subsequent to DER's denial in this matter. See 22 Pa. Bulletin 5105.

> will not cause the proposed operation to endanger the environment or public health, safety or welfare.
>
> (7) The compliance status of the applicant or a related party under section 503(c) and (d) of the act (35 P.S. §6018.503(c) and (d)) does not require or allow permit denial.

Due Process

TCS asserts DER did not provide it with adequate notice of what DER was requiring TCS' application to contain or an adequate opportunity to comply with DER's requirements before denying TCS' application. On this basis, TCS contends DER denied TCS due process in its handling of TCS' permit application.[6] Citing Warren Sand and Gravel, *supra*, TCS argues that due process of law required DER to notify TCS of what the "rules of the game" were in this matter and DER's failure to do so warrants our setting aside DER's denial here.

As the Commonwealth Court explained in Warren Sand and Gravel, *supra*, due process of law requires fairness. See also Mercy Convalescent Home, Inc. v. Commonwealth, DPW, 96 Pa. Cmwlth. 217, 506 A.2d 1010 (1986). Our review of the facts and circumstances in this appeal reveals no denial of due process to TCS by DER's handling of its permit application. The evidence shows DER conducted four technical reviews of TCS' permit application, whereas DER routinely accords such permit applications two technical reviews. DER's representatives discussed deficiencies in TCS' permit application with TCS'

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[6] Although it is unclear from TCS' post-hearing brief as to whether it is asserting a violation of the due process guarantee of the United States Constitution or the Pennsylvania Constitution, we note that due process guarantees under the State Constitution are no greater than those afforded by the Federal Constitution. Empire Sanitary Landfill, Inc. v. DER, 1991 EHB 102; Coades v. Commonwealth, Bd. of Probation and Parole, 84 Pa. Cmwlth. 484, 480 A.2d 1298 (1984).

representatives on a number of occasions and DER also indicated to TCS what it expected from TCS' application in writing over the course of DER's review of the permit application. TCS would have DER continue to review its application submissions and allow TCS to submit additional information until DER finds the permit application to be approvable. As we explained in Willowbrook, *supra*, it is the permit applicant which must satisfy DER that its application satisfies each of DER's concerns. TCS was given an adequate opportunity to submit a complete application to DER for review under the circumstances in this matter. Moreover, TCS has had the opportunity to present evidence to this Board explaining its permit application. Cf. Empire Coal Mining & Development v. DER, ___ Pa. Cmwlth. ___, 615 A.2d 829 (1992).

Paragraph 1(a) and (d) of DER's Denial Letter

TCS asserts its compaction proposal is sufficient to address the potential for mine subsidence, differential settlement, and slope instability at the proposed landfill site.

According to the evidence before the Board, TCS is proposing to densify the mine spoil within the landfill's footprint for a depth of 40 feet down to the bedrock surface. The bedrock surface contour at the proposed site contains depressions resulting from previous strip mining and it is unclear from TCS' permit application as to where the bedrock is located. Under TCS' proposal, the contractor for TCS will have to comply with TCS' specification that there be 40 feet of spoil on top of the bedrock, and the contractor will have to use some sort of testing to determine the 40 feet to bedrock. TCS proposes to use DDC up to the point where the surface of the bedrock comes within 10 feet of the ground's surface. At that point, any mine spoil not densified by DDC would be placed in three foot lifts, with each lift compacted

by rolling with heavy vibrators. A four foot lift of select fill would then be placed directly below the liner.

WC was engaged by TCS to assess the underground mining conditions at the proposed landfill site and the potential for mine subsidence because of the mine spoil. WC also performed settlement analyses and slope stability analyses to assess the effectiveness of DDC and roller compaction on the mine spoil at the site. William Gardner, who is a geotechnical engineer, was involved in generating the data used in WC's analyses and performing the analyses on behalf of WC. WC's settlement analyses indicate as a worst case, the total settlement would be three inches under primary settlement and a total of six inches after 100 years. Based on WC's settlement analyses, WC predicts the maximum tensile stresses on the landfill's liner would be less than one percent, which would be within the liner's five percent tolerance. WC's slope stability analyses indicate a factor of safety of 1.5 or greater, which would be satisfactory.

At the merits hearing, Gardner's expert opinion was that at the point where no further densification can be obtained by DDC, the compacted mine spoil would provide a stable base for TCS' proposed landfill, adequate to address the potential for failure of the landfill. (N.T. 665) It was Gardner's expert opinion that based on WC's settlement analyses, TCS would sufficiently compact the disposal area to address the potential for failure of the landfill. (N.T. 455-456) Moreover, in Gardner's expert opinion, based on WC's slope stability analyses, TCS' design would provide a good factor of safety against any type of failure problems. (N.T. 456) It was also Gardner's

expert opinion that no significant potential for pothole-type mine subsidence exists. (N.T. 1741, 1745) Gardner also opined that there would not be a one inch gap between each pipe segment along a pipeline. (N.T. 1714)

Even though he was initially hired by SOLE II in regard to reviewing TCS' application, at the merits hearing Richard Mabry testified as an expert in geotechnical engineering on behalf of DER. Mabry reviewed WC's analyses and produced two expert reports containing his conclusions, one dated September 17, 1990 and the other dated July 31, 1991. In performing a settlement analysis Mabry would select a value for parameter(n) different from that selected by WC. (N.T. 1222-1223) Using 0.34 as parameter(n) instead of 0.5, as used by WC, Mabry would predict greater settlement than WC's prediction. (N.T. 1224) Mabry also challenges the figures used for K(e) and K(b) in WC's settlement analyses as inconsistent with WC's field data. (N.T. 1225) Additionally, based on his review of TCS' application, Mabry has concluded that there exists the potential for differential settlement[7] and damage to the landfill's liner from a cliff or highwall buried beneath the proposed landfill site. (N.T. 1148-1149) Mabry is also concerned that the liner system potentially will be damaged by one inch joint separations in the leachate drain pipe system. (N.T. 1149) After reviewing WC's slope stability analyses, Mabry identified a "glitch" in WC's computerized slope stability analysis, which he says is indicated by the factors of safety WC arrived at in analyzing stability with a Claymax liner system and an HDPE liner system. (N.T. 1238) He did not explore this glitch because he did not have a print-out for WC's analyses. (N.T. 1241-1243) Mabry also questions the 4:1

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[7]"Differential settlement" is the difference in settlement between two points at the landfill. (N.T. 338, 443)

slope WC used in its analyses, and he instead anticipates a 3:1 slope. (N.T. 1249) An analysis of a 3:1 slope would show a factor of safety of less than 1.5 or less than satisfactory. (N.T. 1249) Further, Mabry predicts the potential for pothole-type mine subsidence resulting from downward percolating water from the ground surface near the Number 3 mine tunnel (a deep mine tunnel beneath the landfill footprint) which extends up to the coal vein. He believes this pothole-type subsidence could cause sudden differential settlements and allow leachate to escape from the liner system. (N.T. 1323-1324, 1356; C-39) In Mabry's expert opinion, TCS has not provided sufficient information to show the proposed landfill site can be adequately compacted. It is Mabry's expert opinion that TCS has not addressed the differential settlement or subsidence effects which could impact the liner system and slope stability. (N.T. 1289)

In its post-hearing brief, TCS urges us to accept Gardner's expert testimony and discount Mabry's testimony, arguing Mabry's testimony lacked an adequate basis in fact and did not meet the "rule of certainty" for expert testimony applied in Pirches v. General Accident Insurance Co., 354 Pa. Super. 303, 511 A.2d 1349 (1986). TCS points to places in Mabry's testimony which were couched in "possibilities" as to the potential failures he described. TCS further points to Mabry's testimony that he was relying on his engineering judgment as to the potential failures at the proposed landfill site and that he did not have any hard numerical data to demonstrate that those failures would actually occur. (N.T. 1402-1403)

We have previously addressed the "rule of certainty" in Al Hamilton Contracting Co. v. DER, 1991 EHB 1799, which TCS' brief fails to cite. In Al Hamilton, we explained that in devising the "certainty test", the courts have

merely taken the standard of proof required to prove causation (or future events) and made it into a rule of evidence: expert testimony is not admissible unless it is sufficient to prove the issue in question. See Packel and Poulin, Pennsylvania Evidence, §706 (1987). We concluded in Al Hamilton that the rationale for this rule breaks down where expert testimony need not be certain to prove the issue in question. In Al Hamilton, we pointed out that under Sections 3 and 315 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.3 and §691.315, and 25 Pa. Code §86.37(a), applicants for surface mining permits carry the burden of proving their operations are not likely to cause pollution and DER need only show the potential for pollution exists. We further pointed out in Al Hamilton that even in conventional causation cases, courts will not require an expert to render an opinion as to causation with certainty where the proponent of the evidence does not bear the burden of proof (citing Neal by Neal v. Lu, 365 Pa. Super. 464, 530 A.2d 103 (1987)). We thus concluded in Al Hamilton that the certainty requirement was inapplicable in that matter.

Here, DER's regulations at 25 Pa. Code §271.201(4) provide that a permit application for a municipal waste landfill will not be approved unless the applicant demonstrates, *inter alia*, that the requirements of the SWMA, the Clean Streams Law, and 25 Pa. Code have been complied with. Section 3 of the Clean Streams Law, 35 P.S. §691.3, prohibits the discharge of any substance into the waters of the Commonwealth which causes or contributes to pollution or creates a danger of pollution. "Waters of the Commonwealth" includes groundwater. 35 P.S. §691.1. Consistent with this provision, DER's regulations at 25 Pa. Code §271.201(5) provide that a permit application for a municipal waste landfill will not be approved unless the permit applicant has

shown that municipal waste management operations will not cause surface water or groundwater pollution.

Following our reasoning in Al Hamilton, we conclude that DER's expert testimony in this matter need only establish the potential for leachate to escape the proposed landfill facility and enter the waters of the Commonwealth. Accordingly, we reject TCS' assertions regarding the rule of certainty and conclude the rule has no effect on our consideration of Mabry's expert testimony on behalf of DER.

While Gardner did not agree with the concerns raised by Mabry, he was unwilling to testify that Mabry's expert opinions were incorrect. Upon questioning by the presiding Board Member, Gardner was asked whether he and Mabry were two reputable experts looking at the data and coming to conflicting but reasonable opinions, or whether one of the experts was correct and the other incorrect. (N.T. 1786) Gardner responded that the two experts simply had different perspectives on the data. Examining both Gardner's expert testimony and that of Mabry, we conclude TCS has not proven by a preponderance of the evidence that the landfill's base would be compacted enough to address the potential for failure to the proposed landfill or that TCS has sufficiently addressed DER's concerns regarding the potential for failure to the proposed landfill from differential settlement, subsidence, and slope instability. C&K Coal Company, *supra*. Thus, we find no abuse of DER's discretion with regard to its denial of TCS' permit application on the basis of its concerns about the potential failure of the constructed landfill.

Paragraph 5 of DER's Denial Letter

TCS argues that DER cannot rely on TCS' failure to update its Form C compliance history while its application was pending before DER as a reason

for denying TCS' permit application. TCS contends DER knew about the compliance history information which was not identified in TCS' Form C since DER issued the violations and bond forfeitures to TCS' related parties. Alternatively, TCS argues DER learned of these matters at the hearing, so DER's reasons in paragraph 5 of its denial are moot. TCS also contends it offends due process for DER to require TCS to update its compliance history where neither DER's regulations nor any directive from DER required TCS to do so.

TCS is essentially arguing that it need not have reported the violations committed by its related parties and compliance actions taken in response to those violations after submission of its Form C. TCS instead would place the burden on DER to investigate whether there has been any change in the compliance status of the applicant or its related parties after submission of Form C. Such an argument runs counter to DER's regulations, which place the burden of informing DER of compliance matters on the applicant, regardless of DER's knowledge of compliance matters.

Pursuant to 25 Pa. Code §271.125,[8] an application for a permit to operate a municipal waste landfill must contain certain information for the 10-year period prior to the date on which the application is filed, including a description of notices of violation sent by DER to the applicant, or a related party; a description of administrative orders, civil penalty assessments and bond forfeiture actions by DER against the applicant or a related party; and a description of a consent order, consent adjudication, consent decree or settlement agreement entered by the applicant or a related

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[8] We note that 25 Pa. Code §271.125 has been amended subsequent to DER's denial of TCS' permit application here. See 22 Pa. Bulletin 5105.

party in which DER was a party. DER may not approve TCS' permit application unless TCS has demonstrated its compliance status or the compliance status of its related parties, under §503(c) and (d) of the SWMA, 35 P.S. §6018.503(c) and (d), does not require or allow permit denial. 25 Pa. Code §271.201(7). Section 503(c) of the SWMA (35 P.S. §6018.503(c)) authorizes DER to deny or revoke a permit if it finds that the applicant "has failed or continues to fail" or "has shown a lack of ability or intention" to comply with environmental laws, regulations and orders. Section 503(d) of the SWMA provides:

> (d) Any person or municipality which has engaged in unlawful conduct as defined in this act, or whose partner, associate, officer, parent corporation, subsidiary corporation, contractor, subcontractor or agent has engaged in such unlawful conduct, shall be denied any permit or license required by this act unless the permit or license application demonstrates to the satisfaction of the department that the unlawful conduct has been corrected.

35 P.S. §6018.503(d). "Unlawful conduct" is defined in Section 610 of the SWMA (35 P.S. §6018.610) to include operating in violation of the SWMA or in violation of rules, regulations and orders of DER, and operating so as to create a public nuisance or threat to the public health, safety and welfare.

It is clear from Sections 503(c) and (d) of the SWMA that DER's consideration of compliance history does not end with TCS' submission of Form C to DER. Even once a permit is issued, DER has the authority to revoke the permit because of compliance status. 35 P. S. §6018.503(c). As is evident here, permit applications are submitted in phases, and DER's review thereof occurs over a protracted period of time. Over such a period of time, an applicant's compliance status can change radically as it did here. Thus, it

is important that the applicant provide DER with current compliance information in order to sustain its burden of affirmatively demonstrating its compliance status or that of its related parties does not require or allow permit denial.[9] We accordingly perceive no "unfairness" to TCS, by DER's requiring TCS to submit complete and accurate compliance history information to DER for its review, as would amount to a violation of TCS' due process right under Warren Sand and Gravel, *supra*.

Further, the issue of the completeness and accuracy of the compliance history relating to TCS' permit application is not moot, as that issue had been put before the Board in our *de novo* review. As TCS is requesting us to direct DER to issue TCS the permit it seeks, we must necessarily consider whether, based on the evidence before us, TCS has affirmatively shown that TCS' compliance status or that of its related parties does not require or allow permit denial. 25 Pa. Code §271.201(7).[10]

On the basis of FR&S, Inc. v. DER, 132 Pa. Cmwlth. 422, 573 A.2d 241 (1990), TCS contends we should not consider Beltrami's compliance status,

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[9]We note that TCS' brief argues that if DER wishes to implement a policy requiring an applicant to update its compliance history, DER must first cause the Environmental Quality Board to adopt a regulation consistent with the Commonwealth Documents Law (citing Hardiman v. DPW, Woodville State Hospital, 121 Pa. Cmwlth. 120, 550 A.2d 590 (1988)). TCS has produced no evidence in this matter to support its allegation of a DER policy on this matter, so we need not further discuss this argument.

[10]On this basis, we reject TCS' argument based on Harman Coal Co. v. Commonwealth, DER, 1977 EHB 1, aff'd 34 Pa. Cmwlth. 610, 384 A.2d 289 (1978), that it is a denial of due process for TCS to be forced to address the issue of compliance history. Moreover, Harman Coal is distinguishable from the instant matter. In Harman Coal, DER's letter denying the applicant's application for a mining permit did not indicate the issue of the impact the applicant's uncorrected violations under the surface mining regulations would have on its permit application. In the present matter, however, DER's denial letter clearly indicates TCS' failure to address compliance concerns.

arguing he has withdrawn from management responsibility at the proposed landfill. TCS argues that the present case is analogous to the situation in FR&S and, consequently, Beltrami's violations, which (TCS describes as the former management here) "should not be used in determining the status of the new management's application." We disagree with TCS' assertion that the instant matter presents an analogous situation to that in FR&S.

FR&S was an appeal to Commonwealth Court by FR&S, Inc. (FR&S) challenging our Adjudication at FR&S, Inc. v. DER, 1989 EHB 769, in which we sustained DER's denial of FR&S's application for a Solid Waste Permit based on the applicant's long history of unlawful conduct. Upon its review, the Commonwealth Court concluded that based on the unlawful conduct of FR&S' previous operator, the FR&S landfill would have been disqualified from receiving a permit. However, the Court noted that FR&S' previous operator had resigned as authorized agent of FR&S and had withdrawn from operation of the landfill and a new management team had then assumed control at FR&S. The Commonwealth Court ruled DER should have issued FR&S' permit because the Court determined that the record lacked substantial evidence upon which to find that the new management team was actively involved in the problems at the FR&S landfill which occurred just after the new management team took charge. The Commonwealth Court directed DER to issue FR&S' permit, but specifically ordered that the permit be conditioned on the exclusion of FR&S' former operator from any operating control and that control would continue in the hands of replacement management.

In contrast to the scenario in FR&S, there is no clear distinction in the instant appeal between a former operator and new management, as TCS contends. The evidence before us shows that it was Beltrami who was first

interested in seeking a permit from DER for the TCS landfill in 1987, and, when DER indicated to him that his compliance history would not allow him to receive approval of his permit application, it was Beltrami who approached Pagnotti suggesting a joint venture. The evidence further shows that Beltrami and Pagnotti orally entered into a 50-50 partnership in the TCS landfill. Pagnotti's James Tedesco testified that under this agreement, Pagnotti was to have full responsibility for operation and management of the landfill and Beltrami was to have no duties regarding day-to-day operation or management of the landfill. (N.T. 33, 88-90, 114) Nolan Perin initially was hired by Beltrami in 1987 to advise Beltrami on permitting matters for the proposed landfill and he continued to serve as advisor to the project once Beltrami entered the joint venture with Pagnotti. Perin testified that while he worked on the landfill project, there was no clear delineation between Beltrami and Pagnotti as to ownership of the facility and responsibility for the application. (N.T. 1194) Perin did not represent both Pagnotti and Beltrami, but represented Beltrami's interests. Between 1987 and 1990, Perin served as an advisor to the proposed landfill as to feasibility of operations, coordinated TCS' application process and put TCS in contact with consultants. As Pagnotti became more involved with the proposed landfill project, Perin became less involved, and, on September 20, 1990, he notified Beltrami that he would no longer be involved with the proposed landfill. According to Perin's testimony, Beltrami was actively involved in the permit process for the proposed TCS landfill both prior to and following Perin's September 20, 1990 letter, and he continued to be involved in the permit application process, at least up until the seven or eight months preceding the merits hearing (early 1992). While TCS' reply brief argues that Perin was uncertain as to dates,

there is nothing to suggest that Perin was confused about the date when he withdrew his involvement from the proposed project or as to Beltrami's involvement in the project with reference to the time of Perin's September 20, 1990 letter and the merits hearing.[11] In light of Perin's testimony that Beltrami continued his involvement in the landfill permit process, even after DER advised him that it would deny a permit application made by Beltrami because of his compliance history, we assign little weight to Tedesco's testimony that Beltrami would not be involved in operation or management of the proposed landfill.

Further, the evidence shows that Pagnotti's subsidiary entered into a March 13, 1991 COA with DER under which it agreed to pay $172,632 in civil penalty assessments for violations for which DER had previously cited BEI or to reclaim the Eckley Miner's Village site. Under this COA, PCC (Pagnotti's

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[11]In its reply brief, TCS argues that the failure of DER and/or the intervenors to call Beltrami as a witness at the merits hearing, without an explanation for deciding not to subpoena Beltrami's attendance, supports the inference that Beltrami's testimony would have been unfavorable to DER and the intervenors. In support of this argument, TCS cites National Recovery Systems v. Nemchik, 24 D&C 3d 22 (1982), and Beers v. Muth, 395 Pa. 624, 151 A.2d 465 (1959). As stated by the Supreme Court in Beers, the rule in Pennsylvania is "where evidence which would properly be part of a case is within the control of the party whose interest would naturally be to produce it, and, without satisfactory explanation he fails to do so, the [factfinder] may draw an inference that it would be unfavorable to him." Id. at ___, 151 A.2d at 466. Here, Beltrami had previously filed his own appeal of DER's permit denial. He is a joint venturer in TCS with Pagnotti, placing him in an adversarial posture to DER and the intervenors. Thus, there is no need for us to resort to the inference that his testimony would have been adverse or unfavorable to DER and the intervenors. However, we note TCS' reliance on the rule in Beers might just the same work against TCS. Beltrami's testimony that he is to have no involvement in the proposed landfill would properly be part of TCS' case, and, as Beltrami is a joint venturer in TCS with Pagnotti, his testimony was within TCS' control. Yet, since TCS offers no explanation for failing to produce such testimony from Beltrami to support its assertion that he will have no involvement, we draw the inference that his testimony would have been unfavorable to TCS' position.

subsidiary) also agreed that PCC equipment is present at BEI's surface mining sites, PCC supervises BEI's operations, PCC's engineers submitted information to DER regarding the regulatory requirements concerning operation of BEI's sites, and PCC's representatives have negotiated and settled civil penalties proposed to be assessed on BEI. This type of commingling of operations is consistent with Perin's testimony that no clear delineation between Pagnotti's ownership and management responsibilities and those of Beltrami exists as to the proposed TCS landfill. Additionally, Beltrami holds a 50% interest in the proposed landfill itself, and BEI, of which he is president, is the owner of the property where the landfill is to be constructed according to Form C. Further, the evidence shows Beltrami has continued to exercise some degree of control over the proposed landfill while knowing that DER is concerned about any involvement on his part and suggests he will continue this level of involvement. We thus conclude Beltrami's compliance status is relevant to our review of DER's denial of TCS' permit application.

TCS also contends DER expressly approved the joint venture between Beltrami and Pagnotti, fully aware that Beltrami's violation history alone would warrant permit denial, because Beltrami would have no control over management of the proposed landfill. On this basis, TCS argues DER should not be able to deny TCS' permit application because of Beltrami's compliance history. The evidence does not support an estoppel against DER, however. In order to make out a claim of equitable estoppel, TCS would have to show DER: 1) intentionally or negligently made a misrepresentation to TCS, 2) knowing or having reason to know that TCS would justifiably rely on those misrepresentations, and 3) induced TCS to act to its detriment. Foster v. Westmoreland Casualty, Co., 145 Pa. Cmwlth. 638, 604 A.2d 1131 (1992); Police

Pension Fund Ass'n Bd. v. Hess, 127 Pa. Cmwlth. 498, 562 A.2d 391 (1989). The evidence does not show that DER made any misrepresentation to TCS that Beltrami's compliance history would not affect DER's consideration of TCS' permit application. There is no evidence of a misrepresentation to TCS in this record. Rather, the portion of the testimony cited by TCS' brief establishes only that in 1987, when DER received TCS' Phase I application setting forth the BEI and Lucky Strike surface mining violations, DER merely indicated to TCS that it would proceed with its review of TCS' application. (N.T. 940-942) TCS points to nothing which amounts to an inducement on the part of DER upon which TCS could have justifiably relied.

Before proceeding to consider whether compliance status in this matter requires or allows permit denial, we consider TCS' motion to strike the testimony of Donald Karpowich, Foster's Zoning/Code Enforcement officer, from N.T. 1679 through N.T. 1693. While this motion was filed with TCS' post-hearing brief, TCS' objection to the relevancy of Karpowich's testimony was raised at the time when he was being questioned at the merits hearing. (N.T. 1679)[12] Counsel for Foster, who was calling Karpowich as a witness, argued that Karpowich's testimony should be allowed because it related to evidence acquired by DER after DER's denial of TCS' permit application which was relevant to TCS' intent to comply with the law. (N.T. 1682) Foster was offering Karpowich's testimony concerning an incident which allegedly occurred on November 12, 1992, the day before he was called to testify at the merits hearing. (N.T. 1682) Following an off-the-record discussion, the sitting

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[12]As we noted in Al Hamilton Contracting Co. v. DER, 1992 EHB 1122, in order to be timely, an objection must be raised at the time when a question is asked if the grounds for objection are then apparent. See Bell v. City of Philadelphia, 341 Pa. Super. 534, 491 A.2d 1386, 1390 (1985).

Board Member ruled that Karpowich's testimony regarding the November 12, 1992 incident would be heard by the Board, subject to TCS' right to file a motion to strike along with its post-hearing brief. (N.T. 1687) In this motion to strike, TCS argues that Karpowich's testimony is irrelevant as to TCS' application. In response, DER asserts *inter alia*, that the violation history of an applicant and its related party is always relevant to both DER and the Board and that we should consider evidence of an event bearing on TCS' compliance history which was discovered after DER issued its denial letter.

Foster also filed a Brief in Opposition to Appellant's Motion to Strike Testimony. Foster urges Karpowich's testimony, that on November 12, 1992, Karpowich and DER Waste Management Specialist Charles Rogers investigated a complaint concerning BEI's property near Eckley, down the street from TCS' proposed landfill, and found approximately 110 barrels marked with hazardous symbols and "oil" which had their contents leaking into the ground, is relevant after-acquired evidence bearing on the issue of the compliance history of Louis J. Beltrami, BEI, and Pagnotti, and their intent to comply with the law. Foster has attached as Exhibit A to its Brief a document it asserts is a copy of BEI's notice of appeal filed with this Board on December 23, 1992 objecting to a compliance order which was issued by DER's Charles Rogers on December 3, 1992 regarding the condition on BEI's property near Eckley on November 12, 1992, and a copy of DER's December 3, 1992 compliance order.

Upon considering TCS' motion to strike, we find we must grant the motion, as Karpowich's testimony from N.T. 1679 to N.T. 1693 is irrelevant to the issue of TCS' and its related parties' compliance history and intent to comply with the law. Our Supreme Court has explained: "Evidence is relevant

if it tends to make a fact at issue more or less probable." Hatfield v. Continental Imports, Inc., ____ Pa. ____, 610 A.2d 446 (1992). At the time that Foster offered Karpowich's testimony, counsel for Foster represented that Karpowich would be testifying regarding evidence acquired by DER after its denial of TCS' permit application and that this testimony bore on TCS' intent to comply with the law. While Karpowich testified on direct examination by Foster that he had inspected BEI's property near Eckley on November 12, 1992 along with DER's Charles Rogers and had discovered what he believed to be barrels leaking oil into the ground there (N.T. 1682-1688), he did not know whether DER had issued any NOV or citation to BEI for the condition existing on its property on November 12, 1992. (N.T. 1693) Accordingly, there is no evidence before us that these events observed by Karpowich are a violation of any statute administered by DER and relevant to TCS' compliance history. Although Foster attempts to bring before the Board evidence of DER's issuance of a compliance order to BEI on December 3, 1992, as a result of DER's November 12, 1992 inspection of the BEI property near Eckley through its attachment to its Brief in Opposition to TCS' motion strike, we must disregard this attachment. Foster did not file a Petition to Reopen this record to add this information pursuant to 1 Pa. Code §35.231(a). That is the only procedure through which we could consider this proffered evidence.[13] See Spang & Co. v. DER, 140 Pa. Cmwlth. 306, 592 A.2d 815 (1991); Spang & Co. v.

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[13]We may take judicial notice of our own records, (See, Hawkey v. Workmen's Compensation Appeal Bd., 56 Pa. Cmwlth. 379, 425 A.2d 40 (1981)), and thus even if we would take judicial notice of the notice of appeal which is Exhibit A to Foster's Brief in Opposition to TCS' Motion to Strike, we would still lack any evidence of record to establish that the notice of appeal and attached December 3, 1992 DER compliance order pertain to the same alleged violations described by Karpowich's testimony.

DER, 1992 EHB 701. Without such evidence, Karpowich's testimony at N.T. 1679 to N.T. 1693 is irrelevant to this appeal. It is, thus, stricken as it was inadmissible.[14]

The compliance information in this matter shows an extensive history of violations and non-compliance on the part of TCS' related parties. The Compliance Background set forth at Form C of TCS' Phase I application is replete with violations for which Pagnotti's subsidiaries and BEI and Lucky Strike were cited relating to their coal mining activities. The evidence at the merits hearing showed BEI and Lucky Strike have continued their history of non-compliance with the laws of the Commonwealth following submission of TCS' Form C, as evidenced by the numerous violations set forth in the COA, the December 6, 1991 bond forfeitures, and DER's March 20, 1992 field compliance order citing BEI for unpermitted disposal of fuel-contaminated soil on property located within the mine site covered by SMP 40763006.

In view of this extensive violation history, we do not believe TCS can operate its landfill in a manner which complies with the law and believe TCS would operate its landfill with the same conduct its related parties employ in their mining operations. With such a terrible violation history, we cannot say DER abused its discretion in denying TCS' permit application.

We accordingly make the following conclusions of law and enter the appropriate order dismissing TCS' appeal.

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[14]We note that evidence which is not relevant is not admissible. See Commonwealth v. Jackson, 336 Pa. Super. 609, 619 A.2d 431, 437, (1984). In arriving at our decision in this adjudication, we have not considered Karpowich's testimony which we have found to be irrelevant; thus, there has been no prejudice to TCS as a result of the sitting Board Member's ruling on TCS' objection. See Murphy v. Commonwealth, DPW, 85 Pa. Cmwlth. 23, 480 A.2d 382 (1984).

CONCLUSIONS OF LAW

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

2. TCS bears the burden of proof in an appeal of DER's denial of its Municipal Waste Phase II Permit application. 25 Pa. Code §21.101(c)(1).

3. TCS must show by a preponderance of the evidence that DER's denial of its permit application was arbitrary, capricious, contrary to law, or a manifest abuse of discretion. Warren Sand and Gravel Co., Inc. v. Commonwealth, DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975); Franklin Township Board of Supervisors v. DER, et al., 1992 EHB 266.

4. In order for the Board to order DER to issue the permit, TCS must prove it is clearly entitled to it. Al Hamilton Contracting Co. v. DER, 1992 EHB 1458; Sanner Brothers Coal Co. v. DER, 1987 EHB 202.

5. The Board, in its *de novo* review, may consider evidence produced at the merits hearing and is not limited to the information available to DER at the time DER acted. Al Hamilton Contracting Co. v. DER, 1992 EHB 1458.

6. The "rule of certainty" does not preclude us from considering the expert testimony of DER's geotechnical engineering expert. See Al Hamilton Contracting Co. v. DER, 1991 EHB 1799.

7. TCS did not sustain its burden of proving by a preponderance of the evidence that its landfill's base will be compacted enough to address the potential for failure to the facility or that TCS has adequately addressed the impact of differential settlement, subsidence or slope instability.

8. DER properly considered the compliance history of TCS' related parties, BEI and Lucky Strike, as to incidents occurring after TCS submitted its Phase I permit application.

9. No denial of TCS' due process rights by DER occurred here.

10. TCS has not made out an equitable estoppel against DER.

11. DER did not abuse its discretion in denying TCS' permit application where TCS' related parties have an extensive history of violations.

12. The Board grants TCS' motion to strike the testimony of a witness regarding violations occurring the day before he testified at the merits hearing where that testimony is irrelevant to the Board's decision.

13. Where the Board determines DER's denial of TCS' permit application was proper on the basis of any of DER's reasons for denial in its denial letter, it need not address DER's remaining reasons for denial. Willowbrook Mining Company v. DER, 1992 EHB 303.

O R D E R

AND NOW, this 7th day of July, 1993, it is ordered that TCS' motion to strike the testimony of Donald Karpowich is granted and TCS' appeal at EHB Docket No. 92-039-E is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: July 7, 1993

cc: **DER, Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BO

POHOQUALINE FISH ASSOCIATION	:	
	:	
v.	:	**EHB Docket No. 91-084-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and CHESTNUTHILL TOWNSHIP, Permittee	:	**Issued: July 13, 1993**

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

By Richard S. Ehmann, Member

Synopsis

This Board has jurisdiction over a third party's challenge to DER's approval of a planning module for a minor subdivision. Such an appeal is not a challenge to a DER decision not to order the municipality to revise its entire 537 Plan.

25 Pa. Code §§21.101(a) and (c)(3) apply and set the burden-of-proof upon Pohoqualine Fish Association ("PFA").

Where a party seeks to introduce expert testimony from a previously undisclosed expert, identified for the first time within a month of the merits hearing, the Board will sustain a motion barring this evidence's introduction. 25 Pa. Code §21.107(b) does not authorize the last minute disclosure of additional expert testimony on behalf of any party.

A 537 Plan which conforms to the current requirements for plans of this type is a prerequisite to DER's ability, under 25 Pa. Code §71.55, to

approve a planning module for a minor subdivision as an exception to the plan revision requirements with regard to new land development found in 25 Pa. Code §71.52. Since neither Chestnuthill Township's ("Chestnuthill") current 537 Plan nor the module for this minor subdivision contains the information required under Section 71.55(a)(4), DER erred in approving this planning module as an exception pursuant to Section 71.55.

Finally, when the subdivision's module calls for four residential building lots and four additional mini-lots on which the four residences will locate their separate sewage absorption fields, the module's proposal is not for individual on-lot sewage systems. Accordingly, DER cannot review it and treat it as if it does propose individual on-lot systems.

BACKGROUND

On March 4, 1991, PFA filed an appeal with this Board from the Department of Environmental Resources' ("DER") approval on February 4, 1991 of a planning module for a minor subdivision submitted by Chestnuthill. Chestnuthill had submitted this module for a subdivision to be called Penny Creek Estates which would be located between McMichael Creek and State Highway No. 715 in Chestnuthill Township, Monroe County.

Thereafter, DER filed a Motion To Dismiss the appeal, asserting that PFA lacked standing to appeal DER's approval. After PFA had filed its Response In Opposition To Motion To Dismiss and a Memorandum Of Law in support thereof, then Board Member Terrance J. Fitzpatrick issued an Opinion and Order on April 22, 1992 regarding this Motion in which he held that PFA had the requisite standing to appeal.

Thereafter, the PFA filed its Pre-Hearing Memorandum, and, when DER notified the Board that it declined to defend approval of this planning module but had advised Chestnuthill and the property developer to defend it, the Board amended the appeal's caption adding Chestnuthill to it. [1] Chestnuthill's Pre-Hearing Memorandum was filed with us on August 7, 1992. The property developer has not participated in this proceeding, although our file reflects that she had counsel contact the Board about participating and we advised her counsel in writing that she could Petition To Intervene.

On September 17, 1992, the appeal was transferred to Board Member Richard S. Ehmann on Board Member Fitzpatrick's resignation. Thereafter, we conducted a hearing on its merits on January 6, 1993. Immediately prior to the hearing's commencement, we granted PFA's Motion In Limine which sought to bar the testimony of William E. Palkovics, Ph.D., as an expert on behalf of Chestnuthill. This issue is addressed further below. Thereafter, we received the hearings' transcript and the parties filed their Post-Hearing Briefs with Chestnuthill's Brief arriving last on March 25, 1993.

The record in this appeal consists of 13 Exhibits and a transcript of 175 pages. After a full and complete review of the record and all of the parties' filings, we make the following Findings of Fact.

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[1] DER elected not to file a Pre-Hearing Memorandum but at the Board's direction had counsel at the merits hearing and filed a Post-Hearing Brief.

FINDINGS OF FACT

1. Appellant is PFA, with an address of Pohoqualine Fish Association c/o James Hartzler, R.D. #2, Box 343, Saylorsburg, PA 18353. (Notice Of Appeal)

2. An Appellee is Chestnuthill, a township in Monroe County, Pennsylvania with a mailing address of Box 277, Gilbert, PA 18331. (Notice Of Appeal and Exh. A-4)[2]

3. The other appellee is DER, which is the agency in the executive branch of the government of the Commonwealth of Pennsylvania charged with responsibility to administer and enforce the provisions of the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965), as amended, 35 P.S. §750.1 *et seq* ("Act 537"); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*; and the rules and regulations promulgated thereunder as found at 25 Pa. Code Chapters 71, 72 and 73.

4. Kathryn A. Beck is the owner of a 6.5 acre tract located on the east side of Route 715, one tenth of a mile south of Route 715's intersection with Sugar Hollow Road in Chestnuthill Township, Monroe County. (Exh. A-2, A-5; B-3)

5. Beck proposes development of this vacant land into a single family residential subdivision she calls Penny Creek Estates. (Exh. A-8(a) (b) (c); B-3)

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[2] Appellant's Exhibits are designated herein as A-___. Board Exhibits are designated as B-___. Transcript citations appear as T-___. There were no Exhibits offered on behalf of either appellee. Facts Stipulated to by the parties appear as JS and are found in Board Exhibit No. 1.

6. Penny Creek Estates' eastern boundary is McMichaels Creek. (Exh. A-5) At the time DER took action on the planning module for Penny Creek Estates this stream was designated as a High Quality-Cold Water Fishery under 25 Pa. Code §93.9(c).[3] (T-88)

7. The lands along McMichaels Creek and lying both north and south of Penny Creek Estates is owned by PFA, which also owns nine miles of the stream banks adjoining McMichaels Creek in this area of the township. (Exh. A-5; T-101)

8. PFA is a one hundred year old private recreational fishing club whose clubhouse, a former hotel, is located on the tract of land just to the north of Penny Creek Estates. (Exh. A-5; T-79, 87)

9. In 1988 Chestnuthill and DER approved a plan for sewage disposal in Penny Creek Estates which became Chestnuthill's Official Sewage Plan under Act 537 for the Penny Creek Estates portion of the township (the "5 Lot Plan"). (Exh. A-1, A-3; T-23, 38)

10. Exhibit A-1 is the map of the 5 Lot Plan showing five lots located around a cul-de-sac, with each lot served by its own on-lot sewage system. (T-32; JS)

11. The 5 Lot Plan was not implemented by Beck or Chestnuthill. (T-72)

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3 The Pennsylvania Bulletin of May 15, 1993, reflects that the Environmental Quality Board acted favorably on a petition by PFA to raise the designation of the portion of this stream above Lake Hiawatha to Exceptional Value. See 23 Pa. Bull. 2325 to 2329.

12. Exhibit B-2 is the map for a different method of sewage disposal for Penny Creek Estates now before the Board in this appeal; it was initially prepared as part of a new sewage disposal plan for this tract in late 1989 ("the New Plan"). (T-32-33; B-2)

13. When Exhibits A-1 and B-2 are compared, they show that the on-lot sewage disposal systems located on Lots 2, 3, 4 and 5 of the 5 Lot Plan are located within the 100 year flood plain of McMichaels Creek. (Exh. A-1; B-2)

14. On Exhibit B-2 (the New Plan map) Lots 2 and 3 are located entirely within McMichaels Creek's 100 year flood plain, (on the 5 Lot Plan they are Lot Nos. 3 and 4). All but roughly 2% of Lot 1 is in this flood plain as is about 40% of Lot 4 (the 5 Lot Plan's Lot Nos. 2 and 5, respectively). Only about 1% of the lot designated Lot 1 in the 5 Lot Plan is in this flood plain. (B-2)

15. Prior to issuance of permits for sewage systems pursuant to the 5 Lot Plan, the Township's Sewage Enforcement Officer informed the owner, or the owner's consultant, that because a large portion of the property was located in the 100 year flood plain, no permits could be issued for the approved sites. (JS; T-110)

16. Under the New Plan, the remaining fifth lot not in the flood plain is divided into four small lots of roughly equal size to be utilized for locating the sewage disposal field to be built for each of the other four lots. Under this scheme a house built on Lot 1 will have its sewage absorption field located on separate Lot 1A, a house built on Lot 2 would have its absorption field on separate lot 2A, and so on. (T-33)

17. In this New Plan the sewage from these four houses will run in separate sewer lines from the homes in a common right-of-way around the edge of the cul-de-sac and across the front of the house lots to the corresponding sewage absorption field lot. (T-42, 66-67)

18. The New Plan does not show where the tank portion of the on-lot system will be located (T-111), but each house lot can only locate its absorption field on its corresponding sewage absorption field lot and no structures may be built on the sewage absorption field lots. (T-70)

19. Penny Creek Estates is either named for/after the nickname of a former owner (T-147, 152) or the intermittent stream that rises on PFA property north of Penny Creek Estates and flows south along the western edge of Penny Creek Estates before joining McMichaels Creek at a point south of Penny Creek Estates. (T-80, 87; JS) The intermittent stream's (Penny Creek) flow is substantially augmented by surface water runoff from Route 715 and lands west of Route 715. (Exhs. 6(a), 6(b), 7(c), 8(c); T-95, 98, 145-146)

20. Chestnuthill adopted an ordinance governing sewage disposal systems in 1988. (Exh. B-5; T-60, 148) Section 6.2 of the ordinance prohibits the installation of on-lot system's absorption field within 100 feet of a lake, stream, "or other surface water." (Exh. B-5; T-62) The area of lot 4A to be used for the absorption area as shown on the map which is Exh. B-2, is within 100 feet of both the wetland shown on Exh. B-2 and Penny Creek, and the absorption field areas shown for Lots 1A, 2A and 3A on Exhibit B-2 are all within 100 feet of Penny Creek. (Exh. B-2; JS; T-121)

21. A Report captioned "Feasibility Report Sewage Facilities" revised August 9, 1974 is Chestnuthill's current Official Sewage Plan under Act 537 ("Township 537 Plan"). (Exh. B-4; T-59)

22. The requirements of 25 Pa. Code Chapter 71 with regard to municipal 537 plans mandates in part, at Sections 71.21(a)(4) and 71.71, that municipalities are required to assure proper operation and maintenance of sewage facilities within their borders by establishing sewage management programs as part of their official plan or revisions thereto. (T-60)

23. Chestnuthill's Township 537 Plan contains no sewage management program and makes only casual mention of on-lot sewage disposal as being less preferred than the potential municipal sewage collection systems and treatment plants which it discusses in detail. (Exh. B-4; T-59, 119)

24. Neither the 5 Lot Plan nor the New Plan contains a sewage management program for Penny Creek Estates. (Exh. A-2, B-3; T-127, 128)

25. The 5 Lot Plan for Penny Creek Estates submitted by Chestnuthill to DER for its approval, as ultimately approved by DER (Exh. A-4), was not a plan revision as envisioned in 25 Pa. Code Chapter 71. (T-112) Because it contained less than 10 lots, the New Plan for Penny Creek Estates was submitted to DER as an exception to the plan revision requirements with regard to new land development proposals. (T-112, 129)

26. By letter dated February 4, 1991, DER approved the New Plan for Penny Creek Estates as submitted by Chestnuthill Township. (Exh. A-4) It is this letter from which PFA appealed. (PFA's Notice Of Appeal)

27. There is no evidence in the record to suggest DER gave any consideration to whether the proposal for sewage disposal in the New Plan comprises a community system as defined in the applicable regulations.

DISCUSSION

Lack Of Jurisdiction

Chestnuthill asserts that the sitting Board Member erred in admitting testimony as to the current status of the municipality's Township 537 Plan. At the merits hearing (T-114) and on pages 10 and 11 of its Post-Hearing Brief, Chestnuthill argues that we should not consider evidence as to Chestnuthill's existing Township 537 Plan and its conformance to the currently applicable regulations. Citing Ralph D. Edney v. DER, 1989 EHB 1356, Chestnuthill argues that DER has failed to take action against Chestnuthill on the issue of whether its Township 537 Plan complies with the requirements of the current regulations governing such plans and its election not to do so is not reviewable by this Board, so we lack jurisdiction to consider any issues relating to it. (Chestnuthill's Pre-Hearing Memorandum at page 6) At the hearing, the sitting Board Member distinguished Edney from this proceeding because this is an appeal from the planning module's approval. In its Post-Hearing Brief, Chestnuthill argues that no legal distinction exists between Edney and the instant appeal because PFA seeks reversal of the planning module approval based in part on deficiencies in Chestnuthill's Township 537 Plan. Thus, Chestnuthill says PFA seeks to force an upgrade of the plan where DER has failed to do so.

We decline Chestnuthill's invitation to find we lack jurisdiction over appeals from planning module approvals. While Chestnuthill cites Edney for the correct proposition, it is not a proposition applicable in the instant appeal. In Edney, DER's refusal to take a specific action against a sewage enforcement officer and permits issued on behalf of his township employer was held to be a non-appealable exercise of DER's prosecutorial discretion. See also Edward Simon v. DER, 1991 EHB 765; Frank Columbo, et al. v. DER, et al., 1991 EHB 370. However, it is equally clear that where a planning module's approval by DER is challenged by a third party, DER has exercised its discretion to approve the module and we have long held that we have jurisdiction to hear appeals from such decisions. Solomon Run Community Action Committee v. DER, et al., 1992 EHB 39; Baney Road Association v. DER, et al., 1992 EHB 441. Thus, Edney is inapplicable here because DER exercised its discretion and acted to approve this planning module. Such actions by DER are appealable according to Section 4 of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7514. ("EHB Act") We do not see PFA as challenging the Township 537 Plan as Chestnuthill asserts. Clearly, a challenge to an entire Plan adopted in the 1970's is barred as untimely. Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). Rather, the Notice Of Appeal clearly challenges only the New Plan for Penny Creek Estates. Of course a decision on the merits of a DER approval of a planning module could tangentially call into question an entire 537 plan. For example, an entire 537 Plan's adequacy might be challenged, if the plan failed to address a portion of the municipality, via an appeal from a plan revision purporting

to revise the plan for this same area. This is not the case here, however; only the correctness of DER's approval of the New Plan is questioned here. While the grounds used tangentially and indirectly challenge the Township 537 Plan, such an indirect challenge is insufficient to act as a bar to a challenge to this planning module. For us to conclude otherwise would be to conclude such a module could almost never be challenged because all such appeals reference existing 537 plans in some fashion.

Burden of Proof

The next issue we must address here is the issue of burden-of-proof.[4] Only DER's brief addresses it, arguing that under 25 Pa. Code §21.101(a) and (c)(3), the burden is on PFA.[5] DER is correct that the burden is on PFA. See Loraine Andrews and Donald Gladfelter v. DER, et al., EHB Docket No. 87-482-W (Adjudication issued April 23, 1993).

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[4] PFA's brief argues it has standing to take this appeal. We do not revisit this issue in this adjudication because PFA's standing is not disputed in the post-hearing briefs of either DER or Chestnuthill. Any argument not raised in a party's post-hearing brief is deemed waived. Lucky Strike Coal Co., et al. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d, 447 (1988).

[5] In light of the existence of 25 Pa. Code §71.12(f) and the absence of proof of the validity of Chestnuthill's existing Township 537 Plan by either Chestnuthill or DER, an interesting question arises as to exactly what PFA must prove. We have elected not to address this question or whether the Environmental Quality Board continues to have authority to promulgate such a rule since passage of the Environmental Hearing Board Act, 35 P.S. §7514 *et seq.*, because none of the parties briefed or raised it but pointed out, if applied, it might create an anomalous result.

Admissibility of Palkovics' Testimony

Chestnuthill's brief next challenges the ruling at the hearing, in response to PFA's Motion in Limine, that Dr. William Palkovics could not testify as an expert on Chestnuthill's behalf. Chestnuthill claims this was an incorrect ruling.

This appeal was filed in March of 1991. Thereafter, on May 21 of 1991, the Board issued an Order formally correcting the case's caption to include Chestnuthill as a party.[6] This Board's May 21, 1991, Order also directed Chestnuthill to file its Pre-Hearing Memorandum by July 8, 1992. Pre-Hearing Order No. 1 directed that Chestnuthill's Pre-Hearing Memorandum contain a list of its witnesses and a summary of any expert testimony it would offer at the hearing. Thereafter, we granted Chestnuthill an extension of that deadline until August, and, as recited above, we received Chestnuthill's Pre-Hearing Memorandum at that time. Dr. Palkovics was not listed as a witness, nor was a summary of his expert testimony offered in Chestnuthill's Pre-Hearing Memorandum. Moreover, no amendment of Chestnuthill's Pre-Hearing Memorandum was ever offered.

Thereafter, in September we set this matter down for a merits hearing on January 6, 1993. According to Chestnuthill's own counsel, it did not disclose Dr. Palkovics as a proposed expert until early December (T-11) although PFA claims it was mid-December. After Palkovic's disclosure PFA

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6 Chestnuthill had been a party to this proceeding since it had been commenced by operation of 25 Pa. Code §21.51(g), since it was the recipient of DER approval of the 1989 Plan it submitted, but it had been left out of the appeal's caption.

filed its Motion in Limine. This circumstance is governed by our decisions in the line of cases including Midway Sewage Authority v. DER, 1991 EHB 1445, and James E. Wood v. DER, EHB Docket No. 90-280-E (Opinion issued March 4, 1993). There, as here, just before the hearing new expert evidence was proposed by one party and objected to by opposing counsel. Here counsel for Chestnuthill indicates that the decision to hire Dr. Palkovics was not made until November of 1992. (T-10) Moreover, according to its Post-Hearing Brief, Chestnuthill proposed to have Dr. Palkovics testify on soils suitability based upon data gathered less than a month prior to the hearings. The problem with his testimony here is the same as that in Midway and in Wood. The nature of proceedings before this Board, more often than not, turns on conflicting expert testimony offered by opposing parties. To allow a party to produce such an expert at the eleventh hour, with the merits hearing approaching, when it could have hired the expert and produced his report sooner unnecessarily precludes or severely limits an opposing party regarding discovery as to the expert testimony. Chestnuthill says it mailed Palkovics' report to opposing counsel only seventeen days prior to the hearing. Chestnuthill's Brief says it forwarded a copy of Palkovics' report on December 21, 1992, but our docket shows that the report has not been received by this Board. Thus, it never filed it or otherwise summarized his testimony as required by Pre-Hearing Order No. 1. This last minute expert disclosure and failure to provide a summary of his testimony also prevents, or at least substantially curtails, an opponent's ability to prepare rebuttal to the proposed expert's testimony. Finally, the seventeen day period in which PFA

could have had this report included both the Christmas and New Year's holidays and two weekends, making this seventeen day period much shorter than initially apparent. In sum, we must conclude that PFA's objections and assertions of prejudice to it are meritorious and under Midway and Wood affirm the decision granting PFA's Motion In Limine.

In so doing we reject Chestnuthill's assertion, that 25 Pa. Code §21.107(b) is a Board rule allowing any witness to testify regardless of whether his or her identity is undisclosed. This rule deals in part with testimony of a witness submitted in written form. Not only was no written testimony offered by Chestnuthill to the Board, but there also was no showing it had been provided to PFA's counsel at least three days prior to the hearing as required by this rule. Thus this rule does not apply here. Moreover, the procedure outlined in Section 21.107(b) is a possible alternative procedure for use before this Board; it is, in fact, rarely if ever used. Finally and most importantly, even if use of the procedure in Section 21.107(b) was contemplated here by Chestnuthill, contemplation of use of that procedure offers no excuse for Chestnuthill's non-compliance with Pre-Hearing Order No. 1.[7]

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[7] At the hearing, Chestnuthill offered Dr. Palkovics solely in the field of soils suitability, an issue its Post-Hearing brief says is no longer at issue. Chestnuthill then says Palkovics might have offered expert testimony in other fields if he had been allowed to testify. In response to that suggestion, we wish to again try to make clear this Board's position that while we find expert testimony helpful in many appeals, the "level playing field" of our hearings requires that experts be limited to expert testimony in areas in which they were timely offered as expert witnesses by their sponsoring party. (footnote continues)

Exception To Plan Revision Requirement

With these important but preliminary questions behind us, we next turn to the issues raised on the merits by PFA and the opposing parties' responses thereto. Under the regulations found in 25 Pa. Code Chapter 71, each municipality must have a duly promulgated (and DER approved) 537 Plan. This is the base plan for existing and future sewage disposal needs in an entire township. Here, no one disputes that the 1974 Feasibility Report (Exh. B-4) is what Chestnuthill is using as its Township 537 Plan. There is also no dispute that in 1988 that Township 537 Plan was modified to provide sewage disposal for a 5 lot subdivision called Penny Creek Estates by the 5 Lot Plan, that DER approved that modification, and that no appeal was taken from DER's approval. Accordingly, Chestnuthill has the Township 537 Plan as modified through 1988 by the 5 Lot Plan which addresses Penny Creek Estates. Together they are Chestnuthill's base 537 plan.

Apparently because of the location of the McMichaels Creek flood plain within Penny Creek Estates, the developer saw problems with the likelihood of getting Chestnuthill to issue permits for the installation of on-lot sewage systems on all 5 lots. To continue development of this tract she then elected to proceed to further modification of Chestnuthill's base 537 Plan. The developer's New Plan called for moving the on-lot systems from

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(continued footnote)
To hold otherwise is to turn orderly hearing procedures into a chaos of last minute alleged "expert testimony".

the 4 lots in the flood plain to the single lot of the 5 without this "flood plain" problem and division of that lot into four separate mini absorption field lots (one for each of the lots on which a residence would be built).

Whether this means there are four lots in this subdivision or eight lots in this subdivision, there is no question that this subdivision is less than ten lots. This size limitation is critical because of 25 Pa. Code §71.55. 25 Pa. Code §71.52 mandates a formal revision to the Township 537 Plan whenever new land development occurs. This revision process requires the gathering and submission of extensive amounts of information, ranging from the type of facility to be constructed and the quality of sewage to be generated, to alternative methods of sewage treatment and the relationship of the proposed development to existing sewage needs, sewage management programs and proposed sewage facilities. 25 Pa. Code §71.55 provides an exception to Section 71.52's extensive revision process if certain conditions are met, including that the subdivision be for on-lot systems serving single family residences in a ten lot or less subdivision.

PFA first challenges DER's approval of the New Plan as an exception under 25 Pa. Code Section 71.55. There is no dispute between the parties as to the fact the module package submitted to DER for the New Plan does not comply with 25 Pa. Code §71.52 and is not a plan revision. Thus, the only way DER could have approved this New Plan was under Section 71.55 as an exception to Section 71.52. PFA asserts that DER could not approve this New Plan under Section 71.55 because Chestnuthill's Township 537 Plan fails to meet the current requirements for 537 Plans found in Chapter 71 even when the 5 Lot

Plan is added to it, i.e., PFA argues an up to date 537 Plan which meets current Chapter 71 standards regarding the information which 537 Plans are to contain is an essential prerequisite to consideration of any proposal as an exception under Section 71.55. PFA then argues Chestnuthill's existing Township 537 Plan clearly fails to meet these standards so DER abused its discretion in acting under Section 71.55 to approve the New Plan. Specifically, PFA alleges Chestnuthill's Township 537 Plan fails to comply with 25 Pa. Code Section 71.21 (a)(5)(iii) and compliance therewith is mandated by Section 71.55(a)(4).

We read Section 71.55(a)(4) to require that the New Plan be consistent with 71.21 (a)(5)(i-iii) relating to content of official plans. In turn, Section 71.21(a)(5)(iii) states the Plan must evaluate each alternative identified in Section 71.21(a)(4) for the provision of new or improved sewage facilities in areas of need to determine applicable water quality standards, effluent limitations, or other technical requirements contained in SubChapter D of Chapter 71.[8]

Within Subchapter D, Section 71.62(b) deals with on-lot systems of the type proposed here and lists requirements that a 537 Plan and/or the revision (here, the exception's module) must contain. These include the anticipated raw waste characteristics, documentation of suitable soils and

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8 The extremely convoluted nature of these regulations makes the provision of an expert interpreter or guide essential for the uninitiated. See Estate Of Charles Peters, et al. v. DER, 1992 EHB 358. However, the story of the 5 blind men describing the elephant by examining different portions of its anatomy also appears to have some application to developers who try to understand and work within these regulations.

geology at the site including United States Soil Conservation Service soils mapping or its equivalent, and contour lines, soil profiles and percolation tests. PFA is correct where it contends that compliance with Section 71.21(a)(5)(iii) cannot be determined based on Chestnuthill's Township 537 Plan (Exh. B-4) even as modified the 5 Lot Plan and Map (Exhs. B-2, B-3). The Township 537 Plan for Penny Creek Estates does not address geology, soils suitability, soils mapping or raw wastes characteristics and neither does the portion known as the 5 Lot Plan. Accordingly, we cannot see how DER could determine the information required by Section 71.55 was provided or how it could lawfully have approved the New Plan as an exception in its absence. None of the parties offered testimony from DER's employees so there is no evidence of record explaining DER's action.

While DER's Post-Hearing Brief addresses Section 71.55 (a)(4) and consistency with Subchapter D, it asserts that PFA is arguing the location of the four on-lot sandmounds in a less than one acre area creates the potential for inadequate treatment. PFA's Brief does make this argument but makes it two or three pages prior to the argument identified above. As to this argument by PFA on the other hand, DER's Post-Hearing Brief fails to address it in any fashion. Chestnuthill's Brief is also silent on it except for its argument as to Edney.

In drawing our conclusion that PFA is correct and, therefore, DER could not approve this subdivision under Section 71.55 as an exception, we add that this result does not leave the developer without any remedy. She may either implement the Township 537 Plan as modified by 5 Lot Plan if

Chestnuthill's sewage enforcement officer believes he may lawfully issue the on-lot permits provided for therein, or she may prepare a new land development revision to Chestnuthill's 537 Plan pursuant to 25 Pa. Code §71.52 and submit it to Chestnuthill and thence to DER for approval. In reaching this conclusion, we also declare that by this holding we do not direct Chestnuthill to prepare a revision of its Township 537 Plan where DER has elected not to mandate that Chestnuthill do so. For this Board to require such a township-wide revision might run us afoul of Edney as Chestnuthill argues. It may be that Chestnuthill's nearly twenty year old township 537 plan is in need of substantial revision to bring it into compliance with the current requirements of Chapter 71 but DER, in the exercise of its prosecutorial discretion, has elected not to require that revision. We make no determination of these questions, however, in drawing the conclusion above.

Having concluded DER lacked adequate data from which to have approved the New Plan, it follows that DER abused its discretion by reaching its decision to approve this proposal as an exception under 25 Pa. Code §71.55 in this partial information vacuum. Under Mil-Toon Development Group v. DER, 1991 EHB 209, we held that DER must comply with its own regulations. It has failed to do so here when approving this module. Accordingly, we must sustain PFA on this issue.[9]

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[9] We do not rule on the question of whether a nineteen year old Feasibility Study, which only addresses when it may be feasible to install municipal sewerage systems in portions of this township, could ever have been considered an adequate 537 Plan under current Chapter 71 requirements, but we have our doubts that it could be based on this analysis.

Definition Of An Individual On-Lot Sewage System

Having reached the conclusion outlined immediately above, we could stop and not consider PFA's other arguments. See Willowbrook Mining Company v. DER, 1992 EHB 303. As to all other argument save one, we adopt this position.

One other point deserves comment, however. It concerns the question of whether the New Plan's proposal for a separate lot for each residence's absorption field falls outside the definition of "individual on-lot sewage system" and "lot" for purposes of application of Section 71.55.

Section 71.55 talks in terms of individual on-lot sewage systems serving single family dwelling units in a subdivision of less than ten lots.

Section 71.1 defines a "lot" as a part of a subdivision used as a building site or intended to be used for building purposes which will not be further subdivided. It defines "Individual Sewage Systems" as "a sewage facility ... located on a single lot and serving one equivalent dwelling unit ... ." One type of such individual sewage systems is an "Individual On-Lot Sewage System" which in turn is defined as "an individual sewage system which uses a system of piping tanks or other facilities for collecting, treating and disposing of sewage into a subsurface absorption area or a retaining tank". Finally, Section 71.1 defines "Community Sewage System" as "a sewage facility ... for the collection of sewage from two or more lots, or two or more equivalent dwelling units and treatment or disposal, or both, of the sewage on one or more of the lots, or at another site." To these definitions PFA adds the definition of individual on-lot sewage system found in 25 Pa. Code Chapter

72, which is the chapter of DER's regulations dealing with issuance of permits for on-lot systems. In 25 Pa. Code Section 72.1, Individual On-lot Sewage System is defined as " a system of piping, tanks, or other facilities serving a single lot and collecting, treating, and disposing of domestic sewage into a subsurface absorption ... on that lot. ..."

Based on these definitions, PFA then asserts that what is proposed in the New Plan are absorption areas located off the four residential building lots on four separate absorption field lots, so the proposal fails to fall within the definition of what can be an exception and, therefore, this must be a community sewage system to which Section 71.55 does not apply.

The parties have stipulated in their joint stipulation to the fact that the New Plan contains four building lots and "four separate lots to be utilized for individual sewage systems." (Joint Stipulation Page 5), and the evidence establishes the sewage from each of the four single family residences will flow from the residential lot via pipes connecting only that house and the house's on-lot system to that system's absorption field located on one of these absorption field mini-lots. The piping for all four systems is to be in separate pipes but will travel via a common easement across the other residential lots.

In response to this argument, Chestnuthill says the absorption field for each house is located on only one lot and a lot can mean more than the parcel on which the house sits. DER concedes the proposed sewage facility is not located on a single lot with the dwelling being served and that the conveyance lines run from one residence across other lots but contends that

does not mean this is a community on-lot sewage system because the four proposed on-lot systems remain separate and distinct from each other. It therefore concludes this New Plan's proposal was neither clearly an individual nor a community system, so it was reasonable for DER to treat this proposal as for individual systems.

Minimal information was submitted to DER with this planning module because DER elected to treat the module containing the New Plan as an exception. In this circumstance DER's election was not an error on the side of caution. There is no evidence in the record to suggest DER gave any consideration to the issue of whether these systems comprise a community sewage system as defined, whether they are four individual on-lot sewage systems or if they are neither fish nor foul. No evidence was introduced to show how this Board can ignore the definition in Section 72.1 in deciding this issue (or how Chestnuthill could do so in issuing permits for these systems). Section 72.1's definition mandates the individual on-lot system be on the lot with the single family residence. The clear implication of a similar conclusion exists when the Chapter 71 definitions stand alone. Further, if we interpret the regulations as DER suggests, we must virtually ignore the "on a single lot" language in the definition of individual sewage system and we do not believe that the EQB intended us to ignore these words. See 1 Pa. C.S. §1922(2). Clearly, we should read all these definitions together. See 1 Pa. C.S. §1932. We also reject Chestnuthill's assertion that the "Lot" in these regulations can mean more than a single tract of ground. Under 71.1 "Lot" means one single parcel of ground, not lot and separate sewage absorption

field mini-lot. What is proposed in the New Plan could be asserted to be a community sewage system, since four lots' sewage is collected, although in separate lines, and conveyed to another series of four contiguous sites for disposal. We conclude that what is proposed here is not an individual on-lot system located on the same lot as the proposed residences and thus Section 71.55 does not apply to this proposal. Having reached this conclusion, we do not need to decide whether or not this is a proposal for a community sewage system and do not do so.

Based on this discussion we make the following Conclusions Of Law and enter the following Order.

CONCLUSIONS OF LAW

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

2. PFA bears the burden of proving that DER abused its discretion on approving the Penny Creek Estates' New Plan as an exception under 25 Pa. Code §71.55.

3. Based upon the precedent of Midway Sewage Authority v. DER, 1991 EHB 1445, the Board affirms the sitting Board Member's decision barring the use of Dr. Palkovics as an expert witness for Chestnuthill, and granting the Motion filed by PFA in regard thereto, because of Chestnuthill's failure to timely disclose his identity or provide his expert report until seventeen days prior to the hearing.

4. 25 Pa. Code §21.107(b) does not allow a party to call any witness to testify on its behalf regardless of that party's failure to timely disclose

the witness' identity or provide a summary of his expert testimony in accordance with a prior order of this Board.

5. While the Board lacks jurisdiction to review DER's failure to exercise its prosecutorial discretion, that lack of jurisdiction does not bar it from a review of a DER exercise of its discretion in approving a planning module modifying the sewage disposal methodology to be used at the Penny Creek Subdivision.

6. Where the evidence shows the planning module submitted by Chestnuthill failed to demonstrate compliance with all of the requirements of 25 Pa. Code §71.55 and its Township 537 Plan fails to address some of the same requirements for a 537 Plan, DER abused its discretion in approving this planning module under Section 71.55.

7. For a planning module to be approved under Section 71.55, sewage disposal must occur through use of individual on-lot sewage systems located on the same lot as the single family residence. Locations of all of the subdivision's individual on-lot sewage systems on a single redivided residential lot with the sewage from the remaining lots being collected and conveyed across residential lots to the proposed locations of the separate disposal fields, even if there are separate collection and conveyance lines, makes the proposal something other than one using individual on-lot sewage systems to which Section 71.55 applies.

8. Under Willowbrook, where the Board sustains a challenge to DER's approval of a planning module on one or more grounds it need not rule on the merits of the other grounds raised in the appeal.

ORDER

AND NOW, this 13th day of July, 1993, it is ordered that the appeal by PFA from DER's approval of the New Plan for Penny Creek Estates is sustained.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: July 13, 1993

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