COMMONWEALTH
OF
PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

ADJUDICATIONS

1981

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

DURING THE PERIOD OF THE ADJUDICATIONS

1981

Chairman.........DENNIS J. HARNISH

Member...........ANTHONY J. MAZULLO, JR.

Member...........EDWARD GERJUOY

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 1981 EHB 1

FORWARD

In this volume are contained all of the final adjudications of the Environmental Hearing Board issued during the calendar year 1981.

This Environmental Hearing Board was created by the Act of December 3, 1970, P.L. 834, which amended the Administrative Code of 1929, Act of April 7, 1929, P.L. 177, *as amended*. The Act of December 3, 1970, commonly known as "Act 275", was the Act that created the Department of Environmental Resources. Section 21 of that Act, §1920-A of the Administrative Code, provides as follows:

"§1921-A Environmental Hearing Board

(a) The Environmental Hearing Board shall have the power and its duties shall be to hold hearings and issue adjudications under the provisions of the act of June 4, 1945 (P.L. 1388), known as the "Administrative Agency Law," or any order, permit, license or decision of the Department of Environmental Resources.

(b) The Environmental Hearing Board shall continue to exercise any power to hold hearings and issue adjudications heretofore vested in the several persons, departments, boards and commissions set forth in section 1901-A of this act.

(c) Anything in any law to the contrary notwithstanding, any action of the Department of Environmental Resources may be taken initially without regard to the Administrative Agency Law, but no such action of the department adversely affecting any person shall be final as to such person until such person has had the opportunity to appeal such action to the Environmental Hearing Board; provided, however, that any such action shall be final as to any person who has not perfected his appeal in the manner hereinafter specified.

(d) An appeal taken to the Environmental Hearing Board from a decision of the Department of Environmental Resources shall not act as a supersedeas, but, upon cause shown and where the circumstances require it, the department and/or the board shall have the power to grant a supersedeas.

(e) Hearings of the Environmental Hearing Board shall be conducted in accordance with rules and regulations adopted by the Environmental Quality Board and such rules and regulations shall include time limits for taking of appeals, procedures for the taking of appeals, location at which hearings shall be held and such other rules and regulations as may be determined advisable by the Environmental Quality Board.

(f) The board may employ, with the concurrence of the Secretary of Environmental Resources, hearing examiners and such other personnel as are necessary in the exercise of its functions.

(g) The Board shall have the power to subpoena witnesses, records and papers and upon certification to it of failure to obey any such subpoena, the Commonwealth Court is empowered after hearing to enter, when proper, an adjudication of contempt and such order as the circumstances require."

In addition, the Board hears civil penalties cases pursuant to The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1, *et seq*. and the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, *as amended*, 35 P.S. §4001 *et seq*. and reviews the Department's assessments of civil penalties under Section 605 of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, 35 P.S. 6018.605 and under Section 13 of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, *as amended*, November 30, 1971, 52 P.S. 1396.22.

Although the Board is made, by §62 of the Administrative Code, 71 P.S. 62 an administrative board within the Department of Environmental Resources, it is functionally and legally separate and independent. Its Chairman and two members are appointed directly by the Governor, with the consent of the Senate[1] and their salaries are set by statute.[2] Its

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1. Administrative Code, §472.71 P.S. §180-2.

2. Act of September 2, 1961 (P.L. 1177, No. 525) *as amended* November 8, 1971 (P.L. 535, No. 138).

secretary[3] is appointed by the Board with the approval of the Governor.

The department is a party before the Board in most cases.[4] Other parties include recipients of DER orders, penalties assessments, permit denials and modifications and other DER actions. Third party appeals from permit issuances are also common in which cases the permittees are also parties.

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3. The current Secretary of the Board is M. Diane Smith, who was appointed on April 1, 1976.

4. The one exception has been appeals from decisions of municipalities and county health departments under the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, *as amended*, 35 P.S. §750.1, *et seq*. That exception was eliminated for the future by amendments to the Pennsylvania Sewage Facilities Act enacted July 22, 1974, (Act 208).

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EHB—43: 12/79

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES

Docket No. 78-157-S

Mining -
Mine Drainage Permit
Bond Forfeiture

ADJUDICATION

By: Dennis J. Harnish, Member, January 16, 1981

This matter comes before the board as an appeal from DER's forfeiture of five bonds issued by the appellant as a surety to the Commonwealth of Pennsylvania to guarantee the compliance of the appellant's principal, a mine operator, with the requirements of the Anthracite Strip Mining and Conservation Act during the principal's strip mining operations. A hearing was held on February 21 and 22, 1980 before Hearing Examiner Louis R. Salamon, Esquire, at which time testimony was transcribed and a large number of exhibits were admitted as evidence. Based upon the aforesaid notes of testimony and exhibits, as well as the briefs of the parties which were submitted throughout the summer of 1980, the above board member has prepared the instant adjudication.

FINDINGS OF FACT

1. Appellant is the American Casualty Company of Reading, PA (American), a Pennsylvania corporation with principal offices located in Reading, PA.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources (DER), which has the duty and responsibility of administering the Surface Mining Conservation and Reclamation Act. 52 P.S. §1396.1 *et seq.* (SMCRA) and the regulations duly promulgated thereunder by the Environmental Quality Board.

3. The DER is also the successor agency for the Department of Mines and Mineral Industries (DM&MI).

4. The Department of Mines and Mineral Industries had the duty and responsibility of administering the Anthracite Strip Mining and Conservation Act, 52 P.S. §681.1 *et seq.* (now repealed in so far as inconsistent with SMCRA) (Anthracite Act) and regulations duly promulgated thereunder.

5. On or about December 2, 1963, the Glen Alden Corporation (Glen Alden) applied to DM&MI for a surface mining permit for an operation in Newport Township, Luzerne County approximately 0.5 miles NE of Glen Lyon, PA, also referred to as Retreat Mountain West (30-6).

6. This permit was originally issued by DM&MI for eight (8) acres.

7. A surety bond was posted for this permit. The number of said bond was #471660 in the gross amount of $10,000, $5,000 of which applied to #30-6. American was the surety of Glen Alden's obligation on said bond.

8. The permit #30-6 changed hands in 1966 from Glen Alden to the Blue Coal Corporation, which acquired Glen Alden's assets.

9. A supplemental bond agreement was executed by the parties to Bond #471660, amending said bond by adding Blue Coal as a principal to said bond.

10. Surface mining at #30-6 was always conducted by Blue Coal through the use of "contract operators"; first, Kingston Excavating Company (Kingston) and later Lucky Strike Coal Company (Lucky Strike).

11. The DER applies the phrase "contract operator" to the situation where one party, the principal, has the mining license, site permit, mine drainage permit and legal responsibility for the mining and another party is doing the actual mining subject to the principal's supervision and control.

12. Permit area 30-6 was completely rough graded by Kingston on or about December 31, 1974.

13. Lucky Strike redisturbed the westerly portion of #30-6 beginning in February or March, 1975.

14. The portion of #30-6 redisturbed by Lucky Strike after February or March 1975 was not within the original eight (8) acres permitted for mining to Glen Alden by DM&MI in 1963.

15. All activities by Lucky Strike on #30-6 ceased on or about November, 1976.

16. No coal extraction took place on the original eight (8) acre section of #30-6, identified on DER Exhibit 1 by outlining in red, after 1971.

17. The area on Permit #30-6 within the red outlines on DER Exhibit 1 have been satisfactorily graded and only requires planting to satisfy the Department's requirements.

18. Blue Coal affected all portions of #30-6 by its mining activities at said site.

19. Blue Coal failed to reclaim Permit #30-6 in the manner specified by its various permits, and the Anthracite Act.

20. The reclamation required at #30-6 includes backfilling a long pit visible on the southern boundary of the permit and final grading and planting all the acres within the permit.

21. On or about March 26, 1964, Glen Alden applied to DM&MI for a surface mining permit for an operation in Newport Township, Luzerne County approximately 0.5 miles NE of Glen Lyon, PA, also referred to as Retreat Mountain-35 Slope (#30-21).

22. This permit was originally issued by DM&MI for four (4) acres.

23. A surety bond was posted for this permit. The number of said bond was #484858 in the amount of $5,000, the statutory minimum. American was the surety for Glen Alden on said bond.

24. The permit #30-21 changed hands in 1966 from Glen Alden to Blue Coal for reasons heretofore mentioned.

25. A supplemented bond agreement was executed by the parties to Bond #484858 on or about May 4, 1966, amending said bond by adding Blue Coal as a principal to said bond.

26. Information supplied by the annual permit applications, annual reports and a completion report for four (4) acres filed in 1965 indicates that from 1964 to approximately October 4, 1972, #30-21 was amended and renewed numerous times.

27. The total acreage of #30-21 at the time when SMCRA took effect was approximately 37 acres, most of which had been disturbed by Glen Alden's or Blue Coal's operations.

28. In order to properly bond the operation as the acreage increased over the original 1964 acreage, various additional surety bonds were filed by Blue Coal with the DER, including Surety Bond #336-1929 in the amount of $9,500 filed in 1967.

29. American was the surety to Blue Coal on said bond.

30. Except for a brief period in 1974, surface mining at #30-21 was always conducted by Blue Coal through the use of contract operators: first, Kingston and later, Lucky Strike.

31. DER inspection reports during the period from 1972 to 1974 indicate that operations at #30-21 were being conducted for Blue Coal by Kingston as a contract operator under Blue Coal's permit.

32. No extraction of coal by Kingston took place on those sections of 30-21 identified on DER Exhibit 2 by outlining in orange and red, being approximately 29 acres, after January 1971.

33. Kingston completed the rough grading on Permit #30-21 of all areas disturbed on the permit.

34. Blue Coal itself conducted a stripping operation on Permit #30-21 at its easterly edge from approximately February to April 1974.

35. The area affected by Blue Coal in 1974 was wholly outside the approximately 29 acres indicated on DER Exhibit 2 by orange and red outlining.

36. Lucky Strike redisturbed approximately 10 acres of #30-21 within the area on DER Exhibit 2 outlined in red between August 1974 and December 1975.

37. Lucky Strike was operating on Permit #30-21 as a contractor under Blue Coal's permits and license and subject to Blue Coal's supervision and control.

38. Grading on all areas of #30-21 has been performed to the DER's satisfaction. The last activity on Permit #30-21 took place in December 1976.

39. Although #30-21 has been completely graded by Blue Coal; the company failed to plant the entire area of the permit with appropriate grasses and trees.

40. Blue Coal has failed to reclaim Permit #30-21 in the manner specified by its permit and the Anthracite Act.

41. On or about June 26, 1967, Blue Coal applied to DM&MI for a surface mining permit for an operation in the "reservoir" area of Sugar Notch Borough, Luzerne County, also referred to as Sugar Notch - Ross (#30-48).

42. This permit was originally issued by DM&MI for 4.25 acres.

43. A surety bond was posted for this permit. The number of said bond was #5447769 in the amount of $5,000, the statutory minimum. American was the surety for Blue Coal on said bond.

44. No coal extraction has taken place on #30-48 after January 1970.

45. On or about November 25, 1970, DM&MI sent Blue Coal a notification of intent to forfeit all surety bonds posted for #30-48 in January 1971 for Blue Coal's failure to properly and timely restore the affected acreage.

46. A letter from Blue Coal to the DM&MI dated December 4, 1970, indicates that Blue Coal had recommenced restoration activities.

47. By letter dated October 13, 1971, Blue Coal requested it be allowed to complete its reclamation and restoration obligations at #30-48 by filling the stripping areas with breaker refuse from the Huber Breaker.

48. DER inspector, William Sanders, and Acting Chief of the Anthracite Mine Safety Section, George Sterling, concurred with Blue Coal's request for an extension of time.

49. The estimated time for completion of the backfilling using the breaker refuse was two or three years.

50. The DER granted Blue Coal's request for an extended backfilling schedule for #30-48.

51. Inspection reports from 1972 to February 1974 indicate that reclamation activities at #30-48 were taking place in a satisfactory manner using the refuse from Huber Breaker.

52. Backfilling was accomplished at #30-48 periodically from the date of approval through approximately June of 1976 utilizing refuse from Huber Breaker.

53. Blue Coal has failed to reclaim Permit #30-48 in the manner required by its permit and the Anthracite Act.

54. The entire area of #30-48 was affected by Blue Coal's operations there.

55. Seventy-five (75) percent of Permit #30-48 is covered with breaker refuse and must be covered with dirt and graded.

56. The entire area of Permit #30-48 must be appropriately planted.

57. On or about June 7, 1967, Blue Coal applied to DM&MI for a surface mining permit for an operation in Newport Township, Luzerne County, located approximately 0.25 miles southeast of Wanamie and one (1) mile south of Glen Lyon also referred to as Wanamie #19--South Crop (#30-47).

58. This permit was originally issued by DM&MI for twelve (12) acres.

59. A surety bond was posted for this permit. The number of said bond was #5447765 in the amount of $6,000. American was the surety for Blue Coal on this bond.

60. By such application, Blue Coal requested that the DER combine #30-47 with two adjacent, pre-existing permits, #30-80 and #30-84, as well as amending the combined acreage of those three to add 19.5 acres.

61. The basis for said request was that #30-47, #30-80 and #30-84 were physically "interconnected" and thus required an integrated restoration plan.

62. Blue Coal submitted American bond #5447765 to the DER in order to properly bond the new permit.

63. The DER issued a combined permit on May 24, 1972 covering these three operations (#30-88).

64. Coal extraction took place along the northerly boundary of former permit area #30-47 up until 1975.

65. No coal was extracted from the large pit designated on CX 9 as "A" after 1971.

66. Lucky Strike operated on Permit #30-88 (including former #30-47) as a contract operator following August 1974 under Blue Coal's permit, license and supervision.

67. Blue Coal itself operated the site prior to August 1974.

68. Blue Coal failed to reclaim Permit #30-88 in the manner provided by its permit, or the Anthracite Act.

69. The reclamation work required at Permit #30-88 includes numerous large excavations, which are alphabetically indicated on CX 54 and 10.

70. In addition to the large excavations indicated on CX 54 and 10, there are additional small pits and disturbances and the entire area of #30-87 needs to be graded and planted.

71. All the acreage of the four permits at issue herein was already substantially disturbed by Blue Coal's mining activities by 1973.

72. Beginning in late 1973, DER inspectors noticed that backfilling at several of the permit areas at issue herein was falling behind schedule and that necessary backfilling equipment was being moved off-site.

73. From 1973 to the date of bond forfeiture, the DER made numerous attempts to keep Blue Coal in compliance with its legal backfilling obligations.

74. Verbal orders concerning backfilling followed by written confirmation orders, were issued to Blue Coal by District Inspector Sanders on October 29, 1973 and December 7, 1973.

75. Said orders indicated that #30-6, #30-21, #30-83 and #30-88 were still active but backfilling was falling behind and that #30-48 was still inactive and restoration should continue at the then-present rate.

76. Said orders further required that no backfilling equipment was to be moved from any of Blue Coal's permits prior to completion of the reclamation work.

77. As a result of Inspector Sander's orders, backfilling rates were increased, particularly at #30-6 and #30-21 by Kingston.

78. This backfilling activity by Kingston ceased around March of 1974 about which time persons in the DER also started to hear reports that Blue Coal's mining equipment was for sale and that the company was being liquidated.

79. A meeting was held May 6, 1974 with Blue Coal officials in an attempt to amicably settle the controversy.

80. On May 13, 1974, a letter was sent from K. W. James Rochow, Assistant Attorney General assigned to DER to Franklin Gelder, Esquire, counsel for Blue Coal.

81. By such letter, Blue Coal was advised that legal action would be taken unless Blue Coal resumed backfilling immediately.

82. Because of continued failures by Blue Coal, a Complaint in Equity, Application for Special Relief, and Motion for a Preliminary Injunction were filed in the Luzerne County Court of Common Pleas, No. 51 of 1974, on May 24, 1974.

83. A temporary injunction was issued May 24, 1974, freezing the mining equipment of Blue Coal until further order of the court.

84. A stipulation between DER and Blue Coal counsel was entered as a final order of the court on June 12, 1974.

85. Said stipulation provided, *inter alia*, for backfilling and reclamation to be performed by Kingston at #30-6, #30-21 and by Blue Coal at #30-83, #30-48 and #30-88.

86. Said application further provided that all necessary backfilling or reclamation was to be brought current by December 31, 1974.

87. Blue Coal and Lucky Strike executed an agreement in August 1974, which gave permission to Lucky Strike to conduct mining activities on behalf of Blue Coal. Lucky Strike operated as a contract miner.

88. The August agreement further provided that Lucky Strike was to perform the reclamation obligations of Blue Coal at all sites relevant hereto.

89. Lucky Strike did satisfy a portion of Blue Coal's reclamation obligations, but failed to bring the reclamation current by December 31, 1974.

90. In response to continuing failures by Blue Coal to comply with the court order a Petition for Contempt was filed with the Luzerne County Court on April 14, 1975.

91. On or about June 27, 1975, ownership and control of Blue Coal again changed hands.

92. In March and April 1976, the new owners sought and received a "moratorium" on the obligations of Blue Coal to comply with the Luzerne Court order with respect to backfilling.

93. The purpose of the "moratorium" was to allow sufficient operating income to flow into the corporation from Lucky Strike under its lease agreements with Blue Coal, so that the corporation could become solvent.

94. A completion report, #1193, was filed for #30-21 on or about July 28, 1975.

95. On May 7, 1979, completion report #1193 filed with respect to #30-21 was approved as to the backfilling but not approved as to the planting necessary on the permit.

96. As a result of this approval, American's liability as surety on Bonds #484858 and #336-1929 was reduced to $1,000 and $1,900 respectively, according to the terms of said bonds.

97. One of the reasons the DER allowed Blue Coal to continue extracting coal at its many operations in Luzerne County in spite of its failure to promptly reclaim each of its mining sites was the understanding that operating revenues were necessary to generate sufficient income to allow Blue Coal to continue to perform the necessary reclamation.

98. This DER perception influenced enforcement strategy with respect to Blue Coal in that a formal DER determination of violation would have not only allowed the forfeiture of all Blue Coal's bonds, but also would have precluded reissuance of Blue Coal's license and revocation of its permits, thereby eliminating any potential for the generation of operation revenues.

99. Blue Coal, through contractors, did perform substantial reclamation as the result of DER enforcement actions.

100. American Casualty was the surety on many of the areas reclaimed by Blue Coal and its contractors during this enforcement period and benefitted substantially from the reduction in its outstanding maximum 1973 liability. Among the benefits were:

a. Permit #30-21, which was totally disturbed in 1973 but was subsequently restored by Kingston and Lucky Strike. American's original liability was reduced from $14,500 to $2,900.

b. Permit #30-23, for which American stood as surety, was completely reclaimed by Blue Coal through Lucky Strike after 1973 and American was subsequently released from its previous liability of $14,000.

c. Permit #30-35, for which American stood as surety, was completely reclaimed by Blue Coal through Lucky Strike after 1973 and American was subsequently released from its previous liability of $5,000.

d. Permit #30-90, for which American stood as surety, was completely reclaimed after 1973 and American was subsequently released from its previous liability.

101. The DER took the present action forfeiting American's bonds, in November of 1978, after being informed by the trustee for Blue Coal that Blue Coal was breaking off negotiations with Lucky Strike relative to a transfer of Blue Coal's permits, thereby indicating, conclusively, that Blue Coal was abdicating its responsibilities under its permits, the Anthracite Act and the SMCRA.

DISCUSSION

The pertinent facts in this matter are complex but, fortunately, not greatly contested. Beginning in December of 1963 the Glen Alden Corporation applied to DER's institutional predecessor, the Pennsylvania Department of Mines and Mineral Industries (DM&MI) for a series of strip mining permits under the Anthracite Strip Mining and Conservation Act of June 27, 1947, P.L. 1095, *as amended*, 52 P.S. §§681.1 *et seq*.

Pursuant to Section 6 of that Act, 52 P.S. §681.6, Glen Alden had to file a performance bond along with each of its applications. These bonds were on forms furnished by the DM&MI, were made payable to the Commonwealth and were conditioned on the operator's faithful performance of all requirements of the Anthracite Act. These bonds were in an amount of at least $500.00/acre of affected land and with a minimum face value of $5,000.00 per bond. The appellant was the surety on each of the five bonds here at issue filed by Glen Alden.

In 1966 Blue Coal Corporation acquired Glen Alden's assets and each of the said bonds were amended to add Blue Coal as a principal to the bond. Blue Coal, infrequently using its own labor and equipment, but more often using the labor and equipment supplied by other companies, continued mining on each of the four separate mining sites covered by the five bonds in question until all of the originally permitted area covered by each bond had been affected by mining. Blue Coal also expanded its mining activities to other areas which required the amendment of its permits and some additional bonding.

In 1971 the Anthracite Act was replaced by the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 *et seq*. (SMCRA). Blue Coal applied for and eventually received permits under SMCRA which permits replaced the yearly

renewable permits it had obtained under the Anthracite Act. At this time, the aforedescribed bonds were transferred to secure performance under the SMCRA permits. The appellant objects to this board's consideration of anything that happened under SMCRA; the appellant argues that its obligation as surety arose under and is controlled by the Anthracite Act.

Since there is no evidence in this record that the appellant had notice of or approved the shifting of its bonds to the SMCRA permits, its argument seems to have some force. Moreover, it does not appear that this board needs to consider SMCRA in order to fully resolve the instant appeal. Therefore, this adjudication is directed solely towards the Anthracite Act and the bonds presently at issue, all of which were issued thereunder.

As described above, it is uncontested that all of the bonded areas have been totally affected by Blue Coal's mining activities. Indeed, appellant points out, and DER admits, that the extraction of coal from all the permitted areas in issue had already ceased in 1971.

A. The Five-Year Limitation in the Act and Bonds

Appellant bases its first argument on this fact, i.e., that more than 5 years transpired between the termination of coal extraction and DER's forfeiture of the bonds in November of 1978. Appellant's legal argument grows out of language in Section 6 of the Anthracite Act and in the bonds themselves to the effect that liability under each bond shall be for the duration of strip mining (or open pit mining) at each operation and for a period of five years thereafter. Appellant argues that the definition of strip mining set forth in the Anthracite Act at 52 P.S. §681.3 is restricted to the removal of coal so that the five year period be-

gins as soon as coal is removed. DER counters that strip mining rightfully includes reclamation and planting.

The board agrees with DER. The definition of "strip mining" in the Anthracite Act does seem to be, as DER suggests, merely descriptive of the process of mining without specifying when the mining process starts or stops. Clearly, this definition is included, not to define the start or end of the mining process but rather to distinguish strip mining from deep mining which is controlled by different legislation. Moreover, the whole thrust of the Anthracite Act would seem to be to put an end to the narrow definition of mining as solely the removal of coal. For example, Section 11 of the Act requires backfilling after coal removal, 52 P.S. §681.11, while Section 14, 52 P.S. §681.14, requires the planting of spoil banks and back fills.

The appellant suggests that the 5-year provision was included to prod the Department to ensure that backfilling was completed within five years of coal extraction. However, on the basis of the above cited sections of the Anthracite Act, and those set forth below, the five-year period would seem to run at the earliest from the operator's filing of a completion report with the Department. Section 15 of the Anthracite Act, 52 P.S. §681.15, requires that "[w]ithin six (6) months after the backfilling and other acts required by this act have been completed, operator shall file with the department...a completion report on a form to be prescribed...identifying the operation and stating the area affected by open pit mining and such other information as may be required by the secretary before releasing the bond of the operator."

Clearly, Section 15 contemplates that mining is not completed with regard to releasing the operators bond, at least until the completion report is

filed by the operator.[1] Only then does the period for the Department's inspector to approve or disapprove the completion report begin, pursuant to Section 16 of the Anthracite Act, and only after this approval by its inspector is the Department authorized to release any of the bond. Viewed in this light, the 5-year duration of bonds in Section 6 of the Act represents a balance between the rights of principals and their sureties to have DER review a completion report and inspect a site promptly after it is reclaimed and DER's need is to see whether the planting on that site will cover and whether there will be any post-mining drainage. The five-year period also is a legislative recognition that coal extraction may be proceeding over a period of years on a bonded site concurrent with reclamation of portions of the site.

Under Section 1928 of the Statutory Construction Act, 1 Pa. C.S.A. §1928 statutes are to be liberally construed so as to achieve the legislature's objective in promulgating the Act. *Commonwealth v. Barnes and Tucker Coal Company*, 455 Pa. 392 319 A.2d 871 (1974). The Anthracite Act was promulgated to prevent the pollution of streams and rivers and to improve the use, enjoyment and tax value of the lands of this Commonwealth as well as to prevent soil erosion therefrom. 52 P.S. §681.1. The interpretation proferred by the appellant would frustrate the legislature's intent that bonds be used to restore unreclaimed mining areas where the permittees have failed to comply with the Act, (Section 17 of the Act, 52 P.S. §681.17) and would reward those operators who failed to file completion reports as required by Section 15 of the Act, 52 P.S. §681.15. Thus, this interpretation must be rejected.

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1. The only completion report filed in this matter was filed on July 28, 1975. The bonds were all forfeited in November of 1978 which, of course, is within 5 years from the filing of the completion report.

B. Bonds Issued Under the Anthracite Act are Penal Rather Than Indemnity Bonds

This board has held that DER has the burden of proof in bond forfeiture cases. In this matter, DER introduced testimony and exhibits which clearly established that all portions of each of the mining sites in question had been affected by Blue Coal's mining.[2] DER also proved that there are outstanding violations of the Anthracite Act at each site in that all sites require at least planting to comply with Section 14 of the Act and some sites also require extensive backfilling prior to replanting.

DER's evidence is weaker with regard to describing the specific restoration costs at each site. DER introduced some unit cost testimony to which appellant objected. DER, however, submitted that it did not need to introduce any testimony concerning specific costs of restoration because bonds issued under the Anthracite Act are penal in nature so that the face amount of each bond is forfeit upon default. The appellant argues that these bonds are indemnification bonds so that DER must rigorously prove its damages under each bond.

The parties agree that whether a given bond is an indemnity or a penal bond depends upon the terms of the bond itself and of the statute pursuant to which it was issued, *U.S. v. U.S. F. & G. Company*, 35 F. Supp. 959, 962 (E.D. Pa., 1940). Not surprisingly, however, the parties differ in their analyses of the instant bonds.

The appellant submits that the Pennsylvania Supreme Court opinion in *Pennsylvania Turnpike Commission v. U.S. F. & G. Company*, 412 Pa. 222, 194 A.2d 423 (1963) controls. In this case bonds issued by U.S. F. & G. to guarantee the

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2. This is necessary because the bonds and the Anthracite Act both condition the bonds on the land affected.

performance of the Turnpike Commissioner's Secretary-Treasurer were held to be indemnity bonds even though the word "penal" was used in the bonds. DER argues that whereas *Pa. Turnpike, supra,* may correctly represent the law with regard to official bonds; bonds issued under the Anthracite Act were issued to secure compliance with a statute and thus these bonds are controlled by the rule adopted by the Pennsylvania Supreme Court in *Commonwealth v. J. & A. Moeschlin, Inc.,* 314 Pa. 34, 170 A. 119 (1934) that such bonds are penal in nature.

Moeschlin, supra, involved a bond issued pursuant to the (Liquor Control) Act of February 19, 1926, P.L. 16, 47 P.S. §121. The obligation language of the bond in *Moeschlin, supra,* is strikingly similar to the obligation language in the instant bonds; both types of bonds are conditioned upon the principal's full and faithful performance of all requirements of the respective acts and each type of bond remains in full force and effect pending full and proper performance. The Pennsylvania Supreme Court held that this language caused the bonds in question to be penal bonds so that the full face value of these bonds would be forfeit upon the principal's default.

Citing United States Supreme Court opinions, the Pennsylvania Supreme Court defined penal bonds as follows:

> "These authorities and others that are cited announce the rule, which may be said to be firmly established, that on breach of a penal bond given to the State to secure performance of a contract for the public benefit, or to do or refrain from doing an act in the public interest or in furtherance of a public policy, recovery, may be had for the full amount named, no contrary purpose appearing; for damages to the obligee would in such circumstances be difficult or impossible of ascertainment and proof, and hence in such cases it is said that the parties will be held to have intended the full sum named should be forfeited." 314 Pa. 34, 44

It would seem clear that bonds issued under the Anthracite Act fall within the above definition. Moreover, the instant bonds contain confession of

judgment clauses and as, *Moeschlin, supra,* also indicates, such clauses indicate that the amount due is ascertainable from the face of the bond. The same result was reached by Pennsylvania Superior Court in *Commonwealth v. Eclipse Literary and Society Club,* 117 Pa. Superior Ct. 339 (1935) and *Commonwealth v. Mackill,* 120 Pa. Superior Ct. 408 (1936) wherein that court construed bonds issued under two other acts. A sheparidization of *Moeschlin, supra,* reveals no case overturning this decision or any failing to find a performance bond as described above to be a penal bond.

Appellant suggests that the *Pa. Turnpike* decision, being subsequent to *Moeschlin, supra,* was meant to overrule that decision. However, implicit reversals are not favored and the *Turnpike* case does not cite let alone overrule *Moeschlin, supra.*

The apparent difference between these cases seems to be, as suggested by DER, that *Moeschlin, supra,* embodies the general rule of law regarding the public bonds as discussed in the Annotation at 103 A.L.R. 403 while the *Turnpike* opinion sets forth the general rule of law regarding official bonds as discussed at the Annotation at 64 A.L.R. 934. It is instructive that no case citing the *Turnpike* opinion involves a bond issued to guarantee compliance with a statute.

Since we have agreed with DER that bonds issued pursuant to the Anthracite Act are penal bonds and since, as discussed above, DER has shouldered its burden of proving affected land and violations of the Anthracite Act, DER has properly forfeited the bonds in question unless one of the appellant's affirmative defenses pertains.

C. Estoppel

The Appellant's estoppel argument rests upon DER's alleged negligent failure to enforce the backfilling requirements of the Anthracite Act against the

principal Blue Coal, at a time when this company allegedly could have completely reclaimed all affected areas. By waiting until after Blue Coal went bankrupt to forfeit the bonds in question, the appellant continues, it has been denied a source of indemnification.

An initial problem with this argument is that the appellant has introduced no evidence to support its theory that DER was negligent.

The only evidence on this issue, which comes from DER officials, is to the effect that DER energetically enforced the Anthracite Act and, in fact, substantially reduced appellant's total liability as a surety by forcing Blue Coal to reclaim many adjacent areas which appellant had bonded. The appellant has the burden of proof on any affirmative defense and it clearly cannot be held to have met its burden on the basis of the evidence in this record. Moreover, underlying its arguments is the notion that the surety was entitled to some notice that its principal was in violation of the Anthracite Act. However, *Eclipse, supra*; *Commonwealth v. McMenamin*, 122 Pa. Superior Ct. 91 (1936); and *Penelope Club Liquor License Case*, 136 Pa. Superior Ct. 505 (1939) all stand for the proposition that a surety is not entitled to notice of its principal's violations prior to forfeiture.

Finally, it appears that in order for an estoppel to be made out in a suretyship situation, the creditor must lead the surety to believe that it has been released whereafter the surety occupies a worse position than it would have, had it not been misled. 35 Pennsylvania Law Encyclopedia 397 p. 447. Here, there is not even an allegation that DER led or misled the appellant into believing that it had been released, let alone any evidence on this issue. In fact, DER did notify the appellant, albeit on June 8, 1977, that it was not released and that the bonds in question were subject to forfeiture.

D. Surety Release

Appellant's final argument involves only three of the bonds at issue, (only those covering permits 30-6 and 30-21) since this argument is based upon the alleged "substitution" of Lucky Strike as the operator responsible for mining on these areas with a consequent release of the appellant. Again, this would-be affirmative defense is completely unsupported by any evidence favorable to the appellant.

The testimony (again, only of DER employees) would indicate that Lucky Strike worked for Blue Coal as its agent rather than as an independent entity answerable directly to DER. While it appears that at some point Lucky Strike was required to obtain its own bonding for areas 30-6 and 30-21, it also appears that this point in time did not take place until after the instant forfeitures when DER had long since given up on Blue Coal.

Moreover, appellant has not submitted any testimony to support its argument that Lucky Strike's mining activities worsened the conditions at either permit area 30-6 or 30-21. To the contrary, DER's employees testified that Lucky Strike's activities improved the situation at both areas.

In conclusion, this board has determined that DER has properly forfeited each of the bonds in question.

ORDER

AND NOW, this 16th day of January, 1981, appellant is ordered to make full and prompt payment to DER of each of the following amounts:

a. Bond No. 471660 (executed December 9, 1963) $5,000.00.

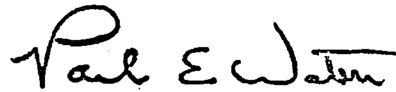
b. Bond No. 5447769 (executed June 16, 1967) $5,000.00.

c. Bond No. 544765 (executed June 15, 1967) $6,000.00.

d. Bond No. 484858 (executed March 26, 1964) $1,000.00.

e. Bond No. 3361929 (executed August 3, 1967) $1,900.00.

ENVIRONMENTAL HEARING BOARD



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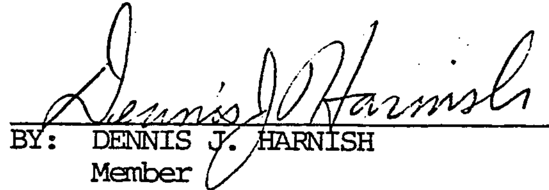


BY: DENNIS J. HARNISH
Member

DATED: January 16, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

BETHLEHEM TOWNSHIP MUNICIPAL AUTHORITY

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Docket No. 80-155-H

Federal Clean Water Act
Construction Grant Program

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

By: Dennis J. Harnish, Member, June 25, 1981

This matter arises from DER's refusal to approve and pass on to EPA, a grant amendment filed on behalf of Bethlehem Township Municipal Authority (of Bethlehem Township, Northampton County). The amendment would authorize grant monies for the construction of a sewage collection system in a development known as Oakland Hills I located in the township. This adjudication is being prepared on the basis of the briefs of the parties and a set of stipulated facts with attached exhibits filed by the parties with this board; the appellant has waived the opportunity for a hearing.

FINDINGS OF FACT

1. The Bethlehem Township Municipal Authority (authority), on December 3, 1971, retained the services of Gilbert/Commonwealth, previously

Gilbert Associates, Inc., (Gilbert) as consulting engineers for purposes of taking all necessary action to develop plans and obtain approval for the construction of a collection and interceptor sewer system to serve portions of Bethlehem Township.

2. On February 27, 1973, Gilbert submitted, on behalf of the authority, sewerage application No. 4873405, together with all necessary plans and specifications, to the Commonwealth of Pennsylvania, Department of Environmental Resources (DER) in Reading, Pennsylvania.

3. On February 28, 1973, Gilbert, acting on behalf of the authority, submitted to DER, for certification as state agent for the Environmental Protection Agency (EPA), a federal construction grant application and all necessary documents for financial assistance for the construction proposed in sewerage application No. 4873405, which was designated as project No. C-420939-02.

4. On March 13, 1974, DER issued to the authority Water Quality Management Permit No. 4873405, approving the construction of pump stations, sewers and appurtenances and six stream crossings.

5. The authority received, on November 25, 1975, local agency approval from the Joint Planning Commission Lehigh-Northampton Counties for the planning and construction of the collection and interceptor sewer system.

6. On March 17, 1977, DER forwarded to EPA the uncertified grant application of the authority for a Step III federal construction grant award for project No. C-420939-02, and all necessary plans and specifications which had been stamped with DER approval, dated March 16, 1977.

7. On April 18, 1977, DER forwarded to the Pennsylvania State Clearing House for review and evaluation the documents submitted by the authority, noting that DER recommended approval of the project, and assigning to the project PSCH No. 77-03-02-301.

8. On June 21, 1977, DER corresponded to EPA to advise that DER had approved construction project No. C-420939-02 and that the project had been certified by DER for a federal construction grant.

9. All of the aforestated action, including specifically the application for sewerage permit, the issuance of the sewerage permit, the application for federal construction grant, and approval and certification by DER of the project for a federal construction grant, related to a project for the construction of a collection and interceptor sewer system, which specifically included the Monocacy Creek interceptor and an associated collection system designed to serve a development in Bethlehem Township known as "Oakland Hills I".

10. Subsequent to the issuance of the sewerage permit No. 4873405, and the approval and certification by DER of project No. C-420939-02 for a federal construction grant, EPA raised questions about project No. C-420939-02 relating to that portion of the project known as the Monocacy Creek interceptor and associated collectors.

11. The questions raised by EPA related primarily to the fact that existing on-lot septic systems in the area to be serviced by the Monocacy Creek interceptor and associated collectors did not, at the time, appear to have a history of significant malfunctions. EPA also questioned the design capacity of the Monocacy Creek interceptor.

12. As a result of the questions raised by EPA, the authority, on September 1, 1977, eliminated the Monocacy Creek interceptor and collection system from the federal construction grant application.

13. On September 30, 1977, EPA approved a federal construction grant amendment for project No. C-420939-02 on the basis of the amended application which had deleted the Monocacy Creek interceptor and collection system.

14. On October 18, 1977, EPA informed the authority that the Monocacy Creek interceptor and collection system, all of which had been deleted from the project, were still considered eligible for a federal construction grant and could possibly be reinstated into the project upon a demonstration of sufficient need for sewers in the Monocacy Creek drainage basin.

15. Approximately seventy percent (70%) of the homes currently constructed in the area known as Oakland Hills I were built and were in existence prior to October 15, 1972.

16. Since that time, at least 44 malfunctions have been experienced in the on-lot systems in Oakland Hills I, 21 malfunctions have been reported to DER, and 12 permits have been issued by DER to repair on-lot systems.

17. At the present time, a significant number of the on-lot systems in Oakland Hills I are experiencing malfunctions, and repairs are difficult, and in some cases impossible, due to the soils and variable percolation rates existent in the area.

18. As the result of the on-lot sewerage system malfunctions experienced in Oakland Hills I, and in an effort to secure a sewerage disposal system to service that area, an interceptor and collection system has been installed to service areas surrounding Oakland Hills I, pursuant to private contract financed jointly between the authority and certain private concerns, which interceptor is connected to the authority's sewerage treatment plant. These facilities will be transferred over exclusively to the authority's sewerage system after a period of three years.

19. In an effort to complete the sewage disposal system to service Oakland Hills I, Gilbert, on behalf of the authority, submitted to DER, on or about April 15, 1980, an application for a federal construction grant amendment

to project No. C-420939-02, which sought financial assistance for the construction of collection sewers for the Oakland Hills I development. The proposed application for federal construction grant amendment referenced EPA's statement of October 18, 1977, that the entire Monocacy Creek interceptor and collection system could possibly be reinstated into project No. C-420939-02 (see paragraph 14 above), upon a demonstration of a sufficient need for sewerage facilities, and the application included the necessary documentation. The proposed amendment to project No. C-420939-02 does not request reinstatement for the Monocacy Creek interceptor and collection system, but does request reinstatement of that portion of the collection sewer system which would have served the Oakland Hills I development. The proposed Oakland Hills I development collection sewers will be connected to the interceptor system referenced in paragraph 18 above.

20. On August 22, 1980, DER notified the authority that the application for a federal construction grant amendment was denied. That letter of denial cited as the basis for the denial the DER regulation relating to changes in scope of a construction grant project, codified at 25 Pa. Code §103.14. The letter of denial did not indicate whether or not the request for grant increase was justified, or make any reference to the previous EPA statement of October 18, 1977 concerning possible reinstatement of that portion of the eligible project upon a proper showing of justification, or indicate whether or not DER considered any need for the amendment. Instead, the DER letter of denial classified the additional construction contemplated as a change in the scope of the original grant, and denied the grant amendment request solely on that basis.

21. 25 Pa. Code §103.14, which addresses changes in the scope of federally funded construction grant projects, was effective prior to the date of the authority's April 15, 1980, request for an amendment to the grant for project No. C-420939-02.

DISCUSSION

The board is required, in this matter, as it was in *Latrobe Municipal Authority, et al v. DER*, EHB Docket No. 75-211-C (October 22, 1975) and *Abington Township v. DER*, EHB Docket No. 78-012-S (October 17, 1980) to delve into the complex area of federal-state interaction concerning the construction grants program for sewerage facilities. As we stated in *Latrobe, supra*, our function in such cases is to review only those actions taken by DER under the Federal Water Pollution Control Act (Clean Water Act), *as amended*, 33 U.S.C. 1251 *et seq.*; we have no jurisdiction over the United States Environmental Protection Agency (EPA) which agency is given the final authority by the Clean Water Act to disburse construction grants. 33 U.S.C. §1281 *et seq.*

In the instant matter, the issue, as it was in *Abington, supra*, is the submission, by a municipality, of an application for an additional construction grant. DER's actions in this matter began with DER's attempt to fulfill its duties as set forth at Section 204(3) of the Clean Water Act, 33 U.S.C. §1284(3). This section empowers EPA to approve only those construction grants which have been certified by the appropriate state water pollution control agency. Pursuant to this section DER, on or about June 21, 1977, did certify to EPA, for construction grant funding, a sewerage project for Bethlehem Township, Northampton County designated as project No. C-420939-02. This project, on which the authority was the designated grantee, specifically included, but was not limited to, the so-called Monocacy Creek interceptor and an associated collection system designed to serve a development in Bethlehem Township known as "Oakland Hills I". DER also issued sewerage permit No. 4873405 to the authority (on or about March 13, 1974) which covered the above described project.

The problem which has resulted in the instant appeal arose on or about June 17, 1977 when EPA raised questions about the Monocacy interceptor--Oakland Hills portion of the said project. Correspondence from this period, copies of which were attached to the stipulation of facts, demonstrate that EPA was concerned that too few malfunctions had occurred in the Oakland Hills I area to justify a need for federally funded collection sewer in this area. Although the authority's engineers tried to assuage EPA's doubts in this regard, on or about August 24, 1977 EPA informed the authority that its grant application would be held up "until this matter could be resolved".

In response to EPA's ultimatum, the authority, (on or about September 1, 1977), deleted the Monocacy Creek interceptor sewer and all related adjoining sewers from the grant application. This apparently satisfied EPA for on October 14, 1977, EPA awarded the authority a step III construction grant for the aboved-described project minus the Monocacy interceptor and Oakland Hills I sewers.

It is interesting that even <u>after</u> the grant award, EPA did not consider the Monocacy Creek interceptor Oakland Hills I sewer part of the project to be a dead issue. On October 18, 1977, EPA informed the authority that "...the Monocacy Creek Interceptor and related adjoining sewers which were deleted from this project could possibly be reinstated into the eligible project", if the authority could demonstrate sufficient need for sewers in the Monocacy Creek drainage basin.

Since October of 1977 the remainder of the above-described sewerage project has been constructed and the need for public sewerage service in Oakland Hills I has become manifest. At least 44 malfunctions of the on-lot sewage disposal systems servicing residences in Oakland Hills I have occurred which represents the failure of a significant number of the on-lot systems in this

area. Moreover, according to Mr. Clause, a DER employee, the soils in the Oakland Hills I area are mapped as Washington silt loams, soils having extremely variable percolation rates and pinicale limestone bedrock which make on-lot repairs extremely difficult and in some cases, impossible.

An interceptor and sewage collection system financed by the authority and private parties has been constructed to service areas surrounding Oakland Hills I. While these facilities do not *per se* address the need of Oakland Hills I, the interceptor does obviate the need to construct the Monocacy Creek interceptor to service the said development. All that remains to address the now clear needs of Oakland Hills I is to construct collection sewers in that development and to connect them to the already constructed interceptor.

On April 15, 1980 the authority submitted to DER an application for a construction grant amendment to project No. C-420939-02 to finance the Oakland Hills I collection sewers.

It is DER's August 22, 1980 denial of the said construction grant amendment which has precipitated the instant appeal. DER's August 22, 1980 denial did not discuss whether or not the requested grant amendment was justified. Instead, DER characterized the requested grant amendment as a change in scope of the grant project and therefore covered by 25 Pa. Code §103.14. This section provides that:

> "§103.14. Changes in scope.
>
> (a) All changes in scope of a grant project must be submitted in writing to the Department for approval.
>
> (b) Grant funding for changes in the scope of a grant project will be approved by the Department:
>
> (1) if the change in scope is the result of new or revised requirements of 42 U.S.C. §§4342, 4343, 4346A, 4346B and 4347; the Federal Act and the Federal regulations promulgated thereunder; this subchapter; other changes directed by EPA or DER; or

(2) in the case of a Step 3 grant project:
(i) where the change in scope is necessary to protect the structural or process integrity of the facilities; or
(ii) where adverse conditions are identified during the construction of the facilities which could not have been foreseen by the design engineer prior to encountering the condition.

(c) The cost of any additional work under $100,000 resulting from a change in scope shall not be eligible for grant participation unless the grantee requests and the Department subsequently gives written approval of the change in scope. Where changes in scope costs will exceed $1000,000, written approval will be required prior to initiation of the additional work. Funding eligibility for any change in scope will be based on the criteria described in subsection (b) of this section."

DER held that since the requested grant amendment did not fall into either of the categories specified at Sections 103.14(b)(1) or 103.14(b)(2) DER could not certify the requested grant amendment to EPA.

The appellant authority argues that 25 Pa. Code §103.14, which became effective December 22, 1979, should not have been applied in this instance to the authority's request to amend a construction grant issued on September 30, 1977. DER points out that §103.14 was effective as of April 15, 1980 when the authority filed its grant amendment request and therefore argues that DER properly applied §103.14 to the said application. We believe that DER is correct that applying §103.14 to grant amendment applications filed after December 22, 1979 is not a retrospective application of §103.14. *Commonwealth of Pennsylvania, DER v. Barnes & Tucker Coal Company*, 455 Pa. 392, 319 A.2d 871 (1974). Moreover, we agree with DER that it must apply its regulations when and where they apply *Commonwealth v. Harmar Coal Company*, 452 Pa. 77, 306 A.2d 308 (1973). A necessary corollary to this proposition is that this board may not set aside an action of DER which is properly based upon its regulations. *Rochez Brothers, Inc. v. DER*, 18 Pa. Commonwealth Ct. 137, 334 A.2d 790 (1975).

Although we have agreed with the DER's arguments as set forth above, we do not agree that DER should have applied Section 103.14 against the authority <u>in the present matter</u>. Section 103.14, by its terms, applies only where there has been a change in the scope of a grant project. DER has directed us to no definition of the phrase "change in the scope" but, apparently, relies upon the grant issued by EPA on September 30, 1977 as defining the scope of the grant project. There are several problems with this analysis. In the first place, the authority's original application included the Monocacy interceptor and Oakland Hills I sewer within the project scope and there is no evidence in the record to indicate that this application was changed by the authority. Instead it appears that all that the authority did in response to EPA pressure was to reduce its request for the amount of money to finance the project. The EPA letter of October 18, 1977 indicates that even after its grant award to the authority, EPA still considered the Monocacy interceptor and Oakland Hills I sewer to be a part of the grant project (albeit an unfunded part). As the administering agency, EPA's analysis should be given due consideration.

Secondly, DER by its certification of June 21, 1977, included the Monocacy interceptor and Oakland Hills I sewers within the grant project. This record is devoid of any indication that DER ever withdrew or modified its certification of the full project. It follows, therefore, that the scope of the authority's project as acknowledged by EPA and certified by DER included the Oakland Hills I sewers within its ambit. Thus, the authority's grant amendment request of April 15, 1980 which was directed to the Oakland Hills I sewers did not change the scope of the project. Therefore, this requested amendment is not covered by Section 103.14 of DER's regulations.

Since we have determined that Section 103.14 of DER's regulations does not apply to the instant matter, we find that this board's adjudication in *Abington*,

supra, controls the instant matter. As in *Abington, supra*, we note that, pursuant to 40 C.F.R. §35-915-1(c), Pennsylvania has been required to set aside at least 5 percent of the total federal construction funds for each fiscal year for grant increases and that, according to federal law, the only precondition to EPA's review of said grant increases is "...written confirmation by the state for each application, that the grant increase is justified..." 40 C.F.R. §35.915(h).

Indeed, our approval of Section 103.14 herein, when properly applied, eliminates the only other argument raised in *Abington, supra*, i.e., DER's need to allocate scarce construction grant funds in reasonable manner. We would expect that in most cases applicants will not be able to demonstrate, as the authority did here, that DER certified and EPA acknowledged a project including the facilities for which these applicants now seek grant monies. Section 103.14 would, of course, apply to these applicants and would generally prohibit the award of grant amendments thereto.

CONCLUSIONS OF LAW

1. The board has jurisdiction over the subject matter and the parties.

2. DER is responsible for establishing and managing a system for prioritizing and certifying to EPA requests for federal construction funds and justifying grant amendments to EPA.

3. Application of 25 Pa. Code 103.14 to grant amendment applications received after the effective date of said regulations is not a retroactive application of said regulation.

4. Bethlehem's request for a modification of its federal construction grant does not, in the circumstances of this case, constitute a change in the

scope of the grant project, pursuant to 25 Pa. Code 103.14, wherefore said regulation does not apply to the instant matter.

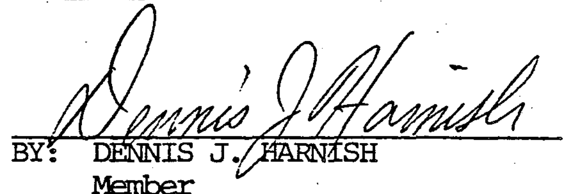
5. The instant matter is controlled by this board's adjudication in *Abington Township v. DER*, EHB Docket No. 78-012-S (issued October 17, 1980).

ORDER

AND NOW, this 25th day of June, 1981, the appeal of Bethlehem Township Municipal Authority is sustained. It is ordered that this entire matter be remanded to the Department of Environmental Resources. The Department of Environmental Resources is directed to approve collector sewers for the Oakland Hills I Development as described herein before, as an amendment to the existing grant made by the United States Environmental Protection Agency for project No. C-420939-02. It is further ordered that the Department of Environmental Resources shall proceed with such with such approval in an expeditious manner and shall promptly take any and all other actions necessary to properly place this matter before EPA.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman



BY: DENNIS J. HARNISH
Member

DATED: June 25, 1981

EG

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, Petitioner	:	IN THE COMMONWEALTH COURT OF PENNSYLVANIA
v.	:	
BETHLEHEM TOWNSHIP MUNICIPAL AUTHORITY, Respondent	:	No. 1813 C.D. 1981

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OCT - 6 1983
ENVIRONMENTAL HEARING BOARD

BEFORE: HONORABLE THEODORE O. ROGERS, Judge
HONORABLE JOHN A. MacPHAIL, Judge
HONORABLE JOSEPH T. DOYLE, Judge

(Panel)

ARGUED: November 18, 1982

OPINION BY JUDGE DOYLE FILED: October 5, 1983

Before this Court is an appeal by the Department of Environmental Resources (DER) from a decision and order of the Environmental Hearing Board (EHB) sustaining an appeal by the Bethlehem Township Municipal Authority (Authority) from a refusal by the DER to certify an amendment to the Authority's sewage construction grant to the federal Environmental Protection Agency. (EPA).

The facts in this case are undisputed. The Authority, seeking a federal construction grant to aid in the development of a sewer system pursuant to the federal Clean Water Act, 33 U.S.C. §§1251-1376 (1978), submitted a development plan to the DER for certification. Certification by the DER of said plans is a prerequisite to their submission to the EPA for funding. The DER certified the plan on June 21, 1977. The EPA, however, as the final approving authority, objected to a portion of the proposed sewer system including an aspect designed to serve a development in the Township known as Oakland Hills I. The basis for the objection was a lack of a demonstrable need for sewers at that time. As a result of the objection, the Authority eliminated, inter alia, the Oakland Hills I portion of the plan from its grant application and the EPA approved funding. In conjunction with

this approval, the EPA informed the Authority by letter dated October 18, 1977, that the deleted aspects of the project could be reinstated upon a demonstration of a sufficient need for sewers in the area in question.[1]

Due to an increasing number of malfunctions in the on-lot sewer systems in Oakland Hills I, some of which are irreparable, the Authority sought to amend its construction grant on April 15, 1980, so as to reinstate the Oakland Hills I aspect of the project. The DER, however, refused to certify the amendment to the EPA on the grounds that it constituted a "change in scope" in the project and therefore was subject to 25 Pa. Code §103.14(b)(2), the criteria of which the authority failed to meet.[2] The Authority appealed to the EHB which sustained the appeal on the grounds that the amendment application in the instant case did not constitute a "change in scope." Accordingly, the DER was ordered to certify the amendment to the EPA. The appeal to this Court followed in which the DER contends that application of 25 Pa. Code §103.14(b)(2) was proper in this case and should operate to require rejection of the amendment application.

This Court's scope of review in cases such as that before us is limited to a determination of whether there has been

a violation of constitutional rights, an error of law, or a lack of substantial evidence to support a necessary finding of fact. Department of Environmental Resources v. Bierman, 23 Pa. Commonwealth Ct. 646, 354 A.2d 48 (1976).

The EHB reasoned as follows in ordering the DER to certify the Oakland Hills I amendment to the EPA:

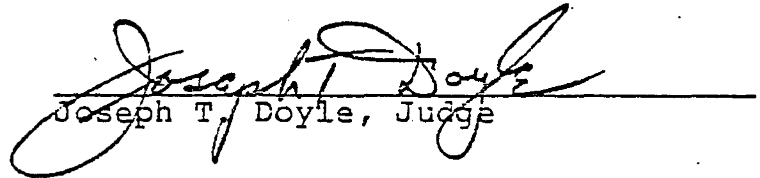
> [W]e do not agree that DER should have applied Section 103.14 against the authority in the present matter. Section 103.14, by its terms, applies only where there has been a change in the scope of a grant project. DER has directed us to no definition of the phrase 'change in the scope' but, apparently, relies upon the grant issued by EPA on September 30, 1977 as defining the scope of the grant project. There are several problems with this analysis. In the first place, the authority's original application included the Monocacy interceptor and Oakland Hills I sewer within the project scope and there is no evidence in the record to indicate that this application was changed by the authority. Instead it appears that all that the authority did in response to EPA pressure was to reduce its request for the amount of money to finance the project. The EPA letter of October 18, 1977 indicates that even after its grant award to the authority, EPA still considered the Monocacy interceptor and Oakland Hills I sewer to be a part of the grant project (albeit an unfunded part). As the administering agency, EPA's analysis should be given due consideration.
>
> Secondly, DER by its certification of June 21, 1977, included the Monocacy interceptor and Oakland Hills I sewers within the grant project. This record is devoid of any indication that DER ever withdrew or modified

> its certification of the full project. It follows, therefore, that the scope of the authority's project as acknowledged by EPA and certified by DER included the Oakland Hills I sewers within its ambit. Thus, the authority's grant amendment request of April 15, 1980 which was directed to the Oakland Hills I sewers did not change the scope of the project. Therefore, this requested amendment is not covered by Section 103.14 of DER's regulations. (Emphasis in original.)

We fully recognize that the DER is more than a mere intermediary or clearing house for grant applications to the EPA. There exists only a finite level of federal funds for water pollution control projects in any given year. The DER must establish priorities and allocate these funds in a manner which will best serve the interests of the Commonwealth as a whole. See Sections 204, 205 and 303 of the Clean Water Act, 33 U.S.C. §§1284, 1285 and 1313 (1978); 40 C.F.R. §35.915. In the case at bar, however, the EPA by virtue of its letter of October 18, 1977, has clearly obviated any authority the DER may otherwise have by law and/or regulation to review the proposal for the Oakland Hills I work by any standard other than those criteria enunciated in the letter. Whether Oakland Hills I can be technically classified as an amendment to the approved project, or a change in scope, or whatever, is irrelevant to our analysis. The proposal to construct those sewers at this time is the byproduct of the EPA's, authority of final approval over these matters.[3] The EPA was acting within its authority and the DER, having had its mandatory

bite at the apple prior to submission of the 1977 proposal to the EPA, must now be considered to be bound by the conditions for reinstatement of the project.

Accordingly, we affirm the decision of the EHB regarding the certification of the Oakland Hills I project to the EPA. The latter agency may review the request pursuant to the criteria it established for that project's reinstatement in 1977.



Joseph T. Doyle, Judge

Judge MacPhail concurs in the result only.

FOOTNOTES

[1] The letter read, in pertinent part:

> The purpose of this letter is to inform you that the Monocacy Creek Interceptor and related adjoining sewers which were deleted from this project could possibly be reinstated into the eligible project. However, two criteria must be met before consideration can be given:
>
> 1. Demonstrate sufficient need for sewers in the Monocacy Creek drainage basin.
>
> 2. Indicate progress in the implementation of the Lower Nazareth Township Facility Plan.

[2] 25 Pa. Code §103.14(b)(2) reads:

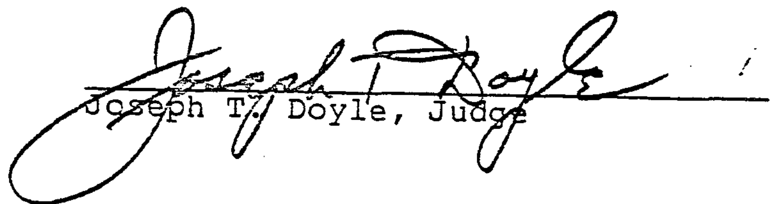
> (b) Grant funding for changes in the scope of a grant project will be approved by the Department:
>
> (2) in the case of a Step 3 grant project:
>
> (i) where the change in scope is necessary to protect the structural or process integrity of the facilities; or
> (ii) where adverse conditions are identified during the construction of the facilities which could not have been foreseen by the design engineer prior to encountering the condition.

[3] <u>See</u> 40 C.F.R §35.903(d).

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES,	:	IN THE COMMONWEALTH COURT
	:	OF PENNSYLVANIA
Petitioner	:	
v.	:	
BETHLEHEM TOWNSHIP MUNICIPAL AUTHORITY,	:	
Respondent	:	No. 1813 C.D. 1981

O R D E R

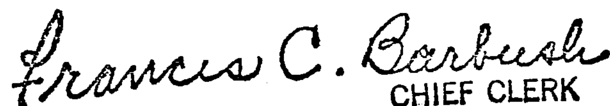
NOW, October 5, 1983, the decision and order of the Environmental Hearing Board in the above captioned matter, Docket No. 80-155-H, dated June 25, 1981, is hereby affirmed.



Joseph T. Doyle, Judge

CERTIFIED FROM THE RECORD

OCT 5 1983



CHIEF CLERK

EHB-43: 12/79

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

CHARLES J. BONZER : Docket No. 80-033-B

: Dams and Encroachments

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By the Board, February 24, 1981

This appeal is from an order issued by the Department of Environmental Resources (DER) requiring appellant, Charles J. Bonzer, to remove a culvert from a tributary of Streets Run, a stream located in Baldwin Borough, Allegheny County. The order was issued initially on January 31, 1980 to Charles Bonzer and four other persons as owners of the property containing the culvert. The order was subsequently amended on August 22, 1980 to delete the names of the persons other than Charles J. Bonzer. The amendment averred that Charles Bonzer became sole owner of the property in question as a result of a transfer of ownership dated June 19, 1980.

The order was issued under the Dam Safety and Encroachment Act, the Act of November 26, 1978, *as amended* by the Act of October 23, 1979, P.L. ______, No. 70, 32 P.S. §693.1 *et seq.* and Section 1917-A of the Administrative Code, the

Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §510-17 which grants the DER the power and authority to abate nuisances.

A hearing was held on the appeal in Pittsburgh on October 2, 1980 and both parties have filed post-hearing briefs containing suggested findings of fact and conclusions of law.

FINDINGS OF FACT

1. Appellant is Charles J. Bonzer an individual who resides at 3925 Frederick Street, Baldwin Borough, Allegheny County, Pennsylvania.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources which has the duty and obligation to enforce the Dam Safety and Encroachment Act, Act of November 26, 1978, *as amended*, by the Act of October 23, 1979, P.L. ________, No. 70, 32 P.S. 693.1 *et seq.* and to abate nuisances pursuant to Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §510-17.

3. Appellant is the owner of Bonzer Plumbing Supply Company located at 4850 Streets Run Road, Baldwin Borough, Pennsylvania.

4. Appellant is the owner of a parcel of property with the address of 4850 Streets Run Road. The property was transferred to appellant by deed dated June 19, 1980.

5. The Bonzer property is bordered on the east by Streets Run, a stream which flows generally in a north to south direction.

6. The Bonzer property is bordered on the northwest by Streets Run Road, a road owned and maintained by the Pennsylvania Department of Transportation (PennDOT).

7. Streets Run Road is adjacent and parallel to a railroad right-of-way owned by the Baltimore and Ohio Railroad.

8. A tributary of Streets Run known as "Tributary No. 1" flows from west to east across the B & O Railroad, Streets Run Road and the Bonzer property.

9. Tributary No. 1 is conveyed through the Bonzer property by a series of four pipes. Following Tributary No. 1 backwards from the confluence with Streets Run, the following culverts are found: a steel pipe 2.1 feet by 3.6 feet and 40 feet long; 40-60 feet of open channel; a steel pipe 4.5 feet by 5.5 feet and 60 feet long; a steel pipe 3.5 feet in diameter and 20 feet in length; a pipe of reinforced concrete 30 inches in diameter which extends past the Bonzer property line and under Streets Run Road.

10. Both the 2.1 by 3.6 foot pipe and the 4.5 by 5.5 foot pipe are crushed and misaligned from their original round shape.

11. None of the pipes located on the Bonzer property have sufficient capacity to carry Tributary No. 1 during a ten-year flood flow rainfall. The largest pipe is capable of carrying only 58% of a ten-year flood flow and 33% of a hundred-year flood flow.

12. Tributary No. 1 flows under Streets Run Road through a 30-inch in diameter reinforced concrete pipe.

13. The 30-inch in diameter reinforced concrete pipe does not have sufficient capacity to carry Tributary No. 1 during a ten-year flood flow.

14. Tributary No. 1 flows under the B & O Railroad tracks via two twin box culverts, each sized 6 feet by 3 feet. The culverts form a bridge under the railroad tracks known as Bridge No. 80.

15. The culverts under the B & O Railroad have insufficient capacity to convey Tributary No. 1 during flooding conditions.

16. Tributary No. 1 is a wet weather stream.

17. Tributary No. 1 floods recurrently.

18. The failure of the culverts under the Bonzer property, Streets Run Road and the B & O Railroad to convey Tributary No. 1 during periods of heavy flows has caused Tributary No. 1 to flood over Streets Run Road, the B & O Railroad and Bonzer's property.

19. The flooding of Streets Run Road, has at times caused the road to become impassable. It also has resulted in ice slicks forming during freezing weather and causing a hazard to motorists.

20. B & O Railroad Bridge has been shut down at least once because of a washout caused by the flooding of Tributary No. 1.

21. The DER has never issued a permit for the culverts in Tributary No. 1.

22. The Pennsylvania Department of Transportation is committed to replacing the culverts under Streets Run Road pending a commitment by Bonzer to replace the culverts under his property.

DISCUSSION

This case involves a recurrent flooding problem along a section of Streets Run Road in Baldwin Borough, Allegheny County. The culprit stream is a small intermittent tributary of Streets Run known as Tributary No. 1. Its course is not very long, perhaps one mile, and its drainage area is small, about 3/4 of a square mile, yet because it runs down a very steep hillside it becomes a deluge during periods of heavy rains.

At the bottom of the hill the stream flows under Baltimore and Ohio Railroad tracks, beneath Streets Run Road, and across about 250 feet of a parcel

of property owned by Charles Bonzer and thence into Streets Run. Culverts have been installed to channel the stream under the railroad, the highway and Bonzer's property. Unfortunately none has sufficient capacity to carry the stream during periods of heavy rainfall. 25 Pa. Code 105.141[1] requires that a culvert constructed in a location such as this must have sufficient capacity to accomodate a 100-year or a 50-year flood flow rainfall depending on whether the area is considered urban or suburban in character. None of these culverts has the required capacity. In fact, the largest culvert under either the Bonzer property or Streets Run Road lacks the capacity to carry even a ten (10) year storm. Further, over the years the culverts have become misshapen, distorted and obstructed with silt and such debris as tires and tree branches.

As a direct consequence of the size and condition of the culverts there is a backup of the stream and resulting flooding during heavy rains. The flooding causes the ponding of water on Streets Run Road, which has at times made it impassable. During freezing weather it has caused icy road conditions which are particularly hazardous to unsuspecting motorists. The railroad has had its service disrupted at least once because of a washout of its tracks and on numerous occasions it has needed to send out work crews to restore the track and track bed after flooding. The Bonzer property also is flooded during these incidents and water has entered the Bonzer plumbing supply store located there.

The DER bases its order on two statutes: the Dam Safety and Encroachment Act, *supra*, Section 14 of which grants to DER the authority to order an owner to repair or remove an encroachment which is unsafe or adversely affects property or the environment; and Section 1917-A of the Administrative Code, which empowers the DER to order the abatement of nuisances.

---

1. The regulations found at 25 Pa. Code 105 were rescinded and a new Chapter 105 promulgated on September 25, 1980. Pennsylvania Bulletin, Vol. 10, No. 39, pp. 3843-3866. The provisions of 25 Pa. Code 105.41 are now found in 25 Pa. Code 125.161 and are unchanged.

The evidence, which is not disputed, shows that the flooding condition occurring at Tributary No. 1 represents a hazard to the public safety and constitutes a public nuisance. For the condition to be corrected the culverts must be removed or replaced with an adequately sized channel.

In defense to the DER order appellant advances two arguments. Initially, appellant contends that the cause of the flooding are the culverts under the railroad and the road and thus the order was directed to the wrong party. Appellant's argument is not supported by the evidence. The uncontradicted testimony of a hydraulic engineer who testified for the DER was that all the culverts are undersized and all must be replaced. He opined that if only the B & O and Streets Run Road culverts are replaced the flooding condition will continue to exist. PennDOT is committed to enlarging its culvert once there is a committment from appellant. We therefore find that the DER did not abuse its discretion by directing the order solely to appellant.

Appellant also argues that he is not responsible for the culverts under his property because they were installed by Allegheny County and the County has an easement across his property to allow for the maintenance of the culverts.

The fact that Bonzer did not install the culverts across his property is not determinative. Causation is not an element of the law of nuisance. If they exist on his property and cause a public nuisance, he is responsible for correcting the condition. No one can gain a prescriptive right against the public to continue a nuisance on his property. See the Pa. Supreme Court decision in *Barnes and Tucker v. Commonwealth of Pennsylvania*, 455 Pa. 392, 319 A.2d 871 (1974) wherein the Court stated that:

> "the absence of facts supporting concepts of negligence, forseeability or unlawful conduct is not the least fatal to a finding of the existance of a common law nuisance" 319 A.2d at 883.

Also see *National Wood Preservers v. Commonwealth of Pennsylvania*, _____ Pa. _____, 414 A.2d 37 (1980).

However, we agree with the thrust of appellant's argument, i.e. a person who holds an easement across another's land for maintenance of a culvert is responsible for any damage caused by the presence of the culvert. Here, however, the evidence does not support appellant's contention that Allegheny County holds an easement across his property.

The burden is on appellant to prove the existance of the easement. When DER established that appellant owned the parcel of land in question, the burden shifted to appellant. Also, the burden of proving the existence of an easement is on the person who claims it exists. *Brady v. Yodanza*, _____ Pa. Super. _____, 409 A.2d 48 (1979). The deed transferring the property to appellant does not show that it is encumbered by an easement.[2] The only other documentary evidence which is pertinent is a plat of a subdivision which includes Bonzer's property. It indicates an easement in the area of Tributary No. 1 but it does not show to whose benefit the easement arises. Also, the document is self-serving in that it was prepared at the behest of appellant for submittal to the Baldwin Borough Planning Commission. We informed appellant at the hearing that he could

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2. Section 2 of the Act of April 1, 1909, P.L. 91, 21 P.S. §3, *as amended*, states:

> "All deeds or instruments in writing for conveying or releasing land hereafter executed, granting or conveying lands, unless an exception or reservation be made therein, shall be construed to include all the estate, right, title, interest, property, claim, and demand whatsoever, of the grantor or grantors, in law, equity, or otherwise howsoever, of, in, and to the same, and every part thereof, together with all and singular the improvements, ways, waters, watercources, rights, liberties, privileges, hereditaments, and appurtenances whatsoever thereto belonging, or in anywise appertaining, and the reversions and remainders, rents, issues, and profits thereof."

submit after the close of the hearing for our consideration any documents which show the existence of the easement in the name of Allegheny County. No documents were submitted. Thus we find that there is not sufficient evidence in the record on which we could base a finding that Allegheny County owns an easement across appellant's land for maintenance of the culvert.

In sum, we find that the culverts installed in the channel of Tributary No. 1 across the Bonzer property do not have sufficient capacity to convey the stream and this lack of capacity results in the flooding of Streets Run Road, the Baltimore and Ohio Railroad tracks and the Bonzer property and generally is detrimental to the public safety and constitutes a nuisance. We further find that Charles Bonzer is the party responsible for replacing the culverts because they exist on his property and, as the owner of property on which a nuisance exists, he is responsible for its abatement, and that the DER has authority to order the abatement of this nuisance under Section 14 of the Dam Safety and Encroachment Act, *supra*, and Section 1917-A of the Administrative Code.

CONCLUSIONS OF LAW

1. The board has jursidiction over the parties and the subject matter of this appeal.

2. Section 14 of the Dam Safety and Encroachments Act grants to the DER the authority to order an owner to repair or remove an encroachment which is unsafe or adversely affects property or environment.

3. The flooding condition which occurs at the area where Tributary No. 1 crosses under Streets Run Road constitutes a public nuisance.

4. The DER did not abuse its discretion by directing the order requiring the removal of the culvert to only Charles Bonzer.

5. Charles Bonzer is responsible for rectifying the problem caused by the culverts through his property even if the culverts were installed by another person.

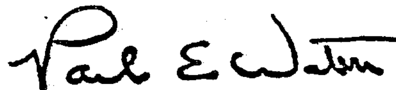
6. The evidence adduced at hearing does not support a finding that Allegheny County holds an easement across Charles Bonzer's property.

7. The burden of proving the existance of an easement is on the person who claims it exists.

ORDER

AND NOW, this 24th day of February, 1981, it is hereby ordered that the appeal of appellant is dismissed and the January 31, 1980 order of the DER to Charles J. Bonzer as amended by the August 22, 1980 letter is sustained.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman

DENNIS J. HARNISH
Member

DATED: February 24, 1981

EHB-43: 12/79

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

EVALYN R. BRILL :

:

: Docket No. 80-081-W

: Dams Safety and Encroachments Act
35 P.S. §693.1

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and HARTMAN & LAPP, Permittee
JOHN E. SCHUPPERT, Intervenor

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

By: Paul E. Waters, Chairman, February 2, 1981

This matter comes before the board as an appeal from the issuance of a Dams Safety and Encroachments permit under the Act of October 26, 1978 P.L. 1375 *as amended* (35 P.S. §693.1 *et seq.*), for maintenance of 600 feet of fill along the Conestoga River, by Hartman and Lapp, permittees.

Appellant, Evalyn R. Brill a resident of Lancaster County, where the fill is located and John E. Schuppert an adjoining property owner, seek to have the permit revoked based on their allegations that flooding is caused by the fill located in the 100-year floodplain, and because of violation of several regulations and DER's failure to require an erosion and sedimentation plan.

FINDINGS OF FACT

1. Hartman and Lapp is a partnership doing business at 1520 Lincoln Highway East, West Lampeter Township, Lancaster County, Pennsylvania 17602.

2. Ms. Evalyn R. Brill is an individual with a residence at 133 Conestoga Boulevard, Lancaster Township, Lancaster County, Pennsylvania 17602.

3. Mr. John E. Schuppert lives at 17 Conestoga Woods Road, Lancaster Township, Lancaster County, Pennsylvania, directly across from the Hartman and Lapp property on the Conestoga River, and is an Intervenor.

4. An Original Permit No. 3673715 was issued to Hartman and Lapp by DER on July 30, 1973.

5. Original Permit No. 3673715 authorized the placement of fill along the bank of the Conestoga River on land owned by Hartman and Lapp in Lancaster, Pennsylvania, for a length of approximately 286-feet; the fill was to be placed between 85 and 185 feet away from the top of the bank of the Conestoga River, with the maximum height of the fill not to exceed three feet.

6. Original Permit No. 3673715 was never appealed.

7. The fill actually placed by Hartman and Lapp was approximately six hundred feet in length, exceeding the 286-foot limitation contained in the original permit.

8. On August 14, 1979, Hartman and Lapp filed an application for an amended permit to maintain the fill actually placed by Hartman and Lapp.

9. Intervenor has seen the number and severity of floods increase on the Conestoga River over the last few years.

10. Amended Permit No. 3673715 authorizes the maintenance of the fill actually placed by Hartman and Lapp; the amended permit authorizes maintenance of fill for approximately 600 feet in length along the left bank of the Conestoga River (when facing downstream) from a point approximately 1/4 mile downstream of Old Route 30 Bridge, and having its toe parallel to and 85 feet landward of the left bank.

11. The fill authorized under Amended Permit No. 3673715 is located in the floodway of the Conestoga River.

12. The fill is located 85 feet from the stream bank and the Conestoga River must already experience flooding conditions and extend beyond its normal banks before any water from the river reaches the fill area.

13. As indicated in the cross-sections of the floodplain of the Conestoga River at the location of the fill the floodplain of the Conestoga River in the area of the fill contains approximately ten thousand (10,000) square feet.

14. The fill authorized by Amended Permit No. 3673715 causes a reduction in the cross-section for the 100-year floodplain of approximately three percent.

15. The fill as placed by Hartman and Lapp has a negligible affect on the elevation and velocity of floodwaters in the 100-year floodplain.

16. No earthmoving activity or other activity in the stream is authorized by Amended Permit No. 3673715; the amended permit authorizes only the maintenance of existing fill.

17. Mr. Paul Gardosik, Regional Engineer, DER Bureau of Dams and Waterway Management, inspected the site of the Hartman and Lapp fill in March, 1978.

18. Upon inspecting the fill placed by Hartman and Lapp, Mr. Gardosik determined that the fill had been placed satisfactorily, but that final stabilizing, including finished grading, dressing of slopes, and seeding was necessary.

19. Mr. Gilbert Kyle, Director, DER Bureau of Dams and Waterway Management, inspected the fill at the Hartman and Lapp property on August 3, 1979.

20. At his inspection of the fill on August 3, 1979, Mr. Kyle determined that the fill was stable.

21. DER issued an Amended Permit No. 3673715 to Hartman and Lapp on March 18, 1980.

22. No erosion and sedimentation plan was required by DER before issuance of the amended permit.

D I S C U S S I O N

On July 30, 1973 DER issued a permit under the Water Obstruction Act of June 25, 1913 P. L. 555, 35 P.S. §681,[1] authorizing Hartman and Lapp to place fill along the left bank of the Conestoga River in West Lampeter Township, Lancaster County, Pennsylvania. The area to be covered was 85 feet from the edge of the left bank and was to run parallel to the bank 286 feet and to a height not exceeding three feet. In fact, permittee placed fill for a length of 600 feet along the river, in violation of the permit conditions. Although no appeal was filed, certain concerned citizens, including appellant here, brought this and other matters to the attention of DER and on August 14, 1979, permittee filed a second application seeking to amend the permit, this time to authorize the additional fill that was already in place.

The Dams Safety and Encroachments Act specifically provided:

"(c) The owner of any existing dam, water obstruction or encroachment who does not hold a permit shall apply for and receive a permit pursuant to this act on or before January 1, 1981."

DER properly advised permittee to apply for an amended permit in order to bring it into compliance with the above provision. Appellant would have this Board find some impropriety in this fact and characterizes it as an effort to—"legitimize the violative fill." There is no doubt that this is exactly what our legislature had in mind in enacting the above cited language.[2] Any dispute that appellant or intervenor has regarding the procedure in this matter therefore be taken up with the legislature, and not DER, permittee or this board.

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1. This Act was repealed by the DamsSafety and Encroachments Act 35 P.S. 693.1 *et seq*, which was enacted in 1978 and became effective before the amended permit was issued.

2. The permit also required that the work be completed by December 31, 1975 and that DER be notified. Appellant offered no evidence that this was not done, and DER was unable to confirm or deny it.

Appellant further argues not only that the first permit should have been revoked[3] but that the amended permit only compounds the flooding problems in the area. We are convinced that Intervenor John Schuppert has observed periodic flooding in the area of the Conestoga river, where his home is located. This, however, does not resolve the controversy. When questioned on the point, he testified: N. T. page 55, page 56 lines 1-15, page 57 lines 16-25, page 58, lines 1-6

> "A Really, I attribute, of course, all of this, the amount that was put in there, because it was really a large amount, that it has raised the level of the water. I might add during flooding, not the normal water.
>
> THE EXAMINER: When you say "put in there," you are talking about put into the bank area as opposed to on the bank?
>
> THE WITNESS: No; it is on the bank, right. Conestoga Creek is a relatively -- right now, it is almost to the point of being dried up, but it accumulates a lot of runoff during rainstorms, thunderstorms or heavy periods of rain, and it fills up from this now.
>
> Of course, it has been prone, I think, through the years of flood. Later, in recent years, it has done this more frequently it seems since all of this building activity has been going on. In recent years, it has gotten --
>
> Subsequently, on cross-examination, Intervenor was asked:
>
> "Q You referred to a lot of upstream activity going on. What are you referring to there?
>
> A Well, fills, other fills. There has been other filling upstream.
>
> Q Where was that?
>
> A Well, one is a Church, which I am not sure -- they filled. I made that as a general reference to filling, and I don't think it is any secret that there has been filling upstream from where we are in the Conestoga Creek, because there has been controversy about that in Lancaster.
>
> Q And you think that affects the area in question; is that correct?
>
> A I think anything affects it really. Just like any shovelful of dirt you throw along that creek affects it. I mean it is a minute effect, but you pile them on top and they all add to it. They add to the problem."

---

3. It would seem that appropriate enforcement action would have been well grounded if it had been filed after a quantity of fill in excess of the permit limit had been placed, but before the amended permit was issued.

Our question, then, is not whether there is more flooding now, than there was prior to 1973, but, rather --- does the fill placed by permittee add appreciably to the frequency and severity of flooding? There is no doubt that the fill, which is placed more that 80 feet from the bank of the Conestoga, can play no significant part in the frequency of flooding.[4] This is true because the fill will not be encountered by water unless and until there is a flood of some significance already in existence. The evidence does not convince us that the blame for the infrequent flooding which this area has experienced can be laid at the doorstep of permittee. There can be no doubt that when severe flooding occurs, the 600 feet of fill will have some impact. The evidence, however, indicates there to be only a 3% floodplain reduction at this location.[5] The evidence presented does not support the appellant's allegations nor justify the intervenor's concern. Moreover, the evidence does not show that the permitted fill would cause any increase in flood heights or would create any erosive velocity in the stream or would cause any increase in downstream damage. Thus, no violation of DER's regulations has been made out.

The regulations provide at §105.251:

> "An application for any proposed levee, fill, or similar structure in or along a stream or body of water will not be approved by the Department where:
>
> (1) it will increase flood heights, either on the opposite bank or upstream, and flood easements or flood protection has not been provided;
>
> (2) it will create erosive velocities in the stream and appropriate protection has not been provided;

---

4. Intervenor further testified N.T. page 56, lines 19-25.

"THE WITNESS: It is on the bank, right. It starts a certain distance in from the edge of the bank and then goes back to where it slopes up towards Lampeter Road.

THE EXAMINER: Would it be true, Mr. Schuppert, that the water wouldn't even get to that point until it had already flooded?

THE WITNESS: That's true."

5. The floodplain was measured horizontially prior to the placing of any fill and was again measured with the fill in place considering a 100 year flood. There are 10,000 square feet in the floodplain and the fill took only 300 square feet or 3%. There is some question raised about the accuracy of these measurements but no evidence was offered to refute them.

(3) it will increase flood damages downstream through a loss of floodplain storage; or

(4) it is designed for a discharge less than the 100-year flood."

As previously indicated, we have found no violation of this regulation.

There is much concern expressed by appellant over the fact that DER at one time said that the additional fill authorization would be considered as a "proposed" action,[6] but the amendment procedure which was actually used, considers only maintenance of existing fill. The only basis for objection would seem to exist if the project could escape review by one procedure rather than another. In fact, appellant was specifically advised that an application for permit amendment filed by permittee Hartman and Lapp, was under consideration and that there would be a right of appeal when and if it was issued. We can find no harm to remedy.[7]

Finally, the question of the standing of appellant has been raised numerous times throughout this proceeding.[8] We have given appellant every opportunity to show standing but the testimony is not sufficient to carry her burden of proof on this issue. When asked the question directly: Page 9 lines 4-12.

> "THE EXAMINER: Well, that is the question that we are interested in. What affect has the flooding had on you? Has the flooding had an affect on you? Is that your position personally?

---

6. In a letter of March 12, 1980 to a group of which appellant was a member, DER indicated : "The Department will consider Hartman and Lapp's amended permit as if it is a Proposed action. If the issuance of the amended permit would conflict with the current law and regulations, the Department will enforce corrective action as necessary to maintain waterway capacity of the stream."

7. One other aspect of the problem is the fact that DER did not require a sedimentation and erosion plan be filed by permittee. The fill is now stabilized and none is deemed necessary. Appellant would have DER, nevertheless require such a plan, even though the period when it was needed — during placement of the fill, is many years past. While not excusing this shortcoming, we also will not now require performance of a useless act.

8. Inasmuch as appellant was without counsel we denied without prejudice a motion to dismiss the appeal, filed prior to hearing by permittee.

MS. BRILL: Personally, yes. We believe that the filling has created additional flooding for people.

THE EXAMINER: Of your property as well?

MS. BRILL: Perhaps. It is very hard to ascertain exactly what affects the amount of flooding that one receives."

There is some evidence that the appellant does not live in the immediate vicinity of the fill area, but was elevated to spokesperson for those who do. She is not an attorney at law, but was permitted to conduct her own case before the board. It goes without saying, that she can not legally represent the intervenor or others in any capacity. In an effort to prevent the possible dismissal of the case without giving it the consideration it deserves, the board allowed one John E. Schuppert, an adjoining landowner to intervene in the proceedings on the day of hearing. It is now clear that we must dismiss the appeal of Evalyn R. Brill for want of standing. The intervenor, of course, remains a proper party to the proceedings.

CONCLUSIONS OF LAW

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

2. Appellant, Evalyn R. Brill does not reside in close proximity to the fill permit area, the subject of these proceedings, has failed to show any affect upon her property from the alleged flooding, and therefore lacks standing for her appeal.

3. John E. Schuppert, filed a petition to intervene which was allowed by the board, at hearing, over objection of permittee. Granting a petition to intervene is largely within the discretion of the Hearing Officer, and was proper under the facts of this case, inasmuch as the permit would otherwise escape review simply because the parties did not have benefit of counsel.

4. Intervenor has failed to carry the burden of proving that there has been any increase in the frequency or severity of flooding due to the fill which Hartman and Lapp was permitted to maintain.

5. Intervenor has failed to prove a violation of the Dams Safety and Encroachments Act or any regulation of DER because of issuance of Amended Permit No. 3673715.

O R D E R

AND NOW, this 2nd day of February, 1981, the appeal of Evalyn R. Brill is hereby dismissed for lack of standing and the action of DER in issuing Amended Permit No. 3674715 to Hartman and Lapp is hereby sustained.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

DENNIS J. HARNISH
Member

DATED: February 2, 1981

EHB-43: 12/79

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

RAYMOND L. BUTERA : Docket No. 80-114-H

: Pa. Sewage Facilities Act
25 Pa. Code 71.16, 94.11

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

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

By: Dennis J. Harnish, Member, March 10, 1981

This matter comes before the board as an appeal from DER's disapproval of a proposed amendment to the official sewage facilities plan of Upper Providence Township, Montgomery County. The proffered amendment contemplated connection of appellant's proposed subdivision to the sewer system served by the Montgomery County Sewer Authority's (MCSA) "Oaks" sewage treatment plant. DER's rejection of the proffered plan amendment was based, in part, on its conclusion that the Oaks plant was hydraulically overloaded.

FINDINGS OF FACT

1. Appellant is Raymond L. Butera (Butera), an individual whose business address is 30 West Airy Street, Norristown, Pennsylvania.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources (DER), the agency entrusted with the administration of the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. 1535, No. 537, *as amended*, 35 P.S. §750.1 *et seq.* (Sewage Facilities Act), and of the Pennsylvania Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1 *et seq.* (Clean Streams Law).

3. This appeal relates to Butera's proposed development of a tract of ground of approximately nine acres, located in Upper Providence Township, Montgomery County, known as the "Char-Mar" subdivision, into forty-two lots for twin houses.

4. On October 12, 1979, DER's Norristown Regional Office received from Butera a "Planning Module for Land Development" which was submitted to request that, in order to accommodate the Char-Mar subdivision, Upper Providence Township be permitted to revise its official plan pursuant to the Sewage Facilities Act (537 plan) and pursuant to Title 25 Pa. Code, Chapter 71, the Rules and Regulations of DER promulgated under the Sewage Facilities Act and the Clean Streams Law.

5. On or around November 2, 1979, DER's Norristown office received from the Township a letter transmitting the Char-Mar planning module and indicating that the Township had approved Butera's proposed revision to the Township's 537 plan.

6. By letter dated December 6, 1979, DER informed the Township that it was deferring action upon the Char-Mar planning module, since the Montgomery County Sewer Authority (MCSA), which operates sewage plant facilities into which the Township and therefore the proposed Char-Mar development would discharge sewage, had not yet submitted the wasteload management plan required of it by Title 25 Pa. Code, Chapter 94.

7. On February 27, 1980, Butera's counsel wrote to DER citing DER's December 6, 1979 letter to the Township and requesting that DER clarify the status of its review of Butera's proposed revision to the Township's 537 plan.

8. By letter dated March 20, 1980, Charles Rehm, Chief of the Planning Section of the Bureau of Water Quality Management at DER's Norristown Regional Office, responded to Butera's February 20 letter. In this response, Rehm: (1) described DER's efforts to obtain from MCSA a wasteload management plan for dealing with the hydraulic overload problem at the Oaks sewage treatment plant; (2) reported on proposals then being considered for allocation of capacity which DER and MCSA hoped would be made available by infiltration/inflow (I/I) work on MCSA-owned lines; (3) explained that DER would need to extend the period for review of requests for revisions of 537 plans (such as Butera's) concerning systems served by the Oaks plant, and furthermore that, until such time as MCSA submitted an acceptable wasteload management plan, the only final action DER could take on a 537 plan revision request concerning a system served by the Oaks plant would be to deny it.

9. On or about May 27, 1980, Butera's counsel requested that DER take final action on Butera's request to revise Upper Providence Township's 537 plan to include the Char-Mar development.

10. By letter dated June 24, 1980, Mr. Rehm informed Butera's counsel that Butera's requested revision to Upper Providence Township's 537 plan was not approved, because "[t]he overloaded conditions at the Montgomery County Sewer Authority's plant remain outstanding." That denial of approval is the subject of this appeal.

11. According to flow reports submitted by MCSA pursuant to their obligations under Title 25 Pa. Code, Chapter 94 (94 reports), sewage flows through

the Oaks sewage treatment plant have exceeded its rated hydraulic capacity of 3.7 million gallon per day (mgd) during at least twenty months out of the forty-three month period covered by the reports.

12. One reason that the Oaks sewage treatment plant exceeds its rated hydraulic capacity is infiltration inflow; i.e., during rainy weather water seeps from the ground through cracks in the sewer lines leading to the plant.

13. During February 1979, the Oaks plant experienced average flows of 12.3 mgd for twelve days; for the rest of the month the plant was flooded out.

14. At least twice during the twelve-month period preceding June 1980, the Oaks plant exceeded its rated hydraulic capacity of 3.7 mgd for three consecutive months.

15. The Oaks plant is in a state of chronic hydraulic overload and the overload is getting worse.

16. Hydraulic overloading at a sewage treatment plant of the type used at Oaks results in the washing of partially untreated and raw sewage into the stream serving the plant, and also reduces the ability of the plant to treat subsequent flows. Discharge of partially untreated and raw sewage into a stream covers the stream bottom, smothering the food supply for aquatic life and exerting an unusually high oxygen demand, causing the formation of hydrogen sulfide and methane gases.

17. In a number of instances from 1977 to date the sewer system leading to the Oaks plant was incapable of handling the quantity of flow, and at these times, the pump station bypassed raw sewage directly into the Schuylkill River. Had the bypassed sewage gone through the system the flow rates would have been even higher than those listed.

18. MCSA has applied for federal grant money to expand the Oaks plant from its present hydraulic capacity of 3.7 mgd to 9 mgd; the earliest time that

construction could be completed assuming that the application is approved, how-ever, is three to four years in the future.

19. A number of times since 1977, DER has requested that MCSA and municipalities tributary to the Oaks plant limit sewer connections or engage in allocation of sewage capacity.

20. In 1979, when MCSA's Chapter 94 reports still indicated that the Oaks plant was hydraulically overloaded, DER requested that MCSA submit to DER a wasteload management plan for dealing with the overload, pursuant to its obligations under the newly amended Title 25 Pa. Code §94.21(a)(3). MCSA, however, did not submit such a plan until June 18, 1980.

21. The wasteload management plan for the Oaks plant submitted by MCSA on June 18, 1980 relies entirely on correction of I/I problems and projects a maximum flow reduction of .5 mgd.

22. MCSA's wasteload management plan for I/I reduction would take considerably longer than six to nine months to implement and would at best result in the elimination of twenty to thirty percent of the estimated .5 mgd of I/I, because I/I correction work involves elimination of cracks throughout the length of a long sewer system.

23. Even if implementation of MCSA's proposed I/I work resulted in reduction of the full projected .5 mgd of load, it is now apparent that .5 mgd more of capacity would serve only to accept the additional loads caused by those construction projects tributary to the Oaks system which have already been given 537 revision approval; i.e. there would be no additional capacity for new projects created by I/I work to the Oaks plant.

24. After DER became aware of the Oaks plant overload problem in 1977, and when it became apparent that MCSA and local officials were not taking ef-

fective action to limit connections to the Oaks system, DER considered but rejected imposition of a ban on connections to the system pursuant to 25 Pa. Code §94.31. DER instead expected and encouraged local officials to work out solutions to the problem at the local level in accordance with the newly amended 25 Pa. Code §94.21, the Clean Streams Law and the Sewage Facilities Act.

25. When DER became aware of the overload problem at the Oaks plant in 1977, it began informing applicants for 537 plan revisions that it would require an extension of time for action on all 537 plan revision applications which would result in connections to the sewer system tributary to the overloaded plant. The extensions were required so that DER could evaluate the plan revision applications in light of MCSA's anticipated wasteload management plan. DER felt that an immediate grant of revision approval would be inappropriate in light of the existing hydraulic overload, and an immediate refusal would be necessary unless MCSA found a way to manage the Oaks wasteload properly until the plant was expanded to a capacity of 9 mgd.

26. In the spring of 1979, assuming that MCSA's I/I work could yield some 50,000 gallons per day of flow capacity in the Oaks system, DER, as it has in other cases, offered to MCSA and all municipalities served by the Oaks plant, including Upper Providence Township, the opportunity to apply for the use of that anticipated 50,000 gallons per day of capacity via "special allocations".

27. When MCSA and its tributary municipalities failed to submit requests to utilize the 50,000 gallons-per-day special allocation, DER approved a 537 plan revision calling for the "Geyer-Kratz" subdivision to add 33,900 gallons per day additional flow to the Oaks system.

28. Other than its 1979 approval of approximately one-third of Geyer-Kratz's total requested flow, DER did not approve any 537 plan revision requests

to add additional flow to the Oaks system from the time it began requesting extensions of time for revision review in 1977 through September, 1980, when all deferred revision requests were denied.

29. DER several times recommended to MCSA and local officials that they explore methods to gain additional capacity in the Oaks system other than I/I, to wit, the use of temporary on-site septic systems or interconnection with sewage interceptor lines in Norristown or Valley Forge.

30. DER met with the Home Builders Association of Montgomery County and with other developers to discuss alternatives to disposal of sewage in the overloaded Oaks system.

31. DER employees met with Butera or his representatives and suggested methods of sewage disposal for the Char-Mar subdivision other than connection to the overloaded Oaks system.

32. During DER's meeting with Butera or his representatives, DER employees advised that on-site disposal systems be explored for the Char-Mar subdivision, because Montgomery County's Soil Survey indicated that the development site might be suitable for on-site systems.

33. Butera testified that neither he nor anyone acting on his behalf has investigated any method of sewage disposal for the proposed Char-Mar development other than connection to the overloaded Oaks system.

DISCUSSION

Raymond L. Butera, appellant herein, has subdivided a 9.08 acre tract of ground situated in Upper Providence Township (Township) into a 42-lot subdivision which is known as Char-Mar. In May of 1980, the appellant obtained final plan approval for Char-Mar from the Township as required by the Pennsylvania

Municipalities Planning Code, 53 P.S. §§10101 *et seq.* However, this approval was conditioned *inter alia* upon obtaining all DER approvals required under the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, *as amended*, 35 P.S. §750.1 *et seq.* (Sewage Facilties Act) as well as obtaining the sewer extension permit required by the Pennsylvania Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended* 35 P.S. §691.1 *et seq.* (Clean Streams Law).

Pursuant to DER's practice and the applicable law (25 Pa. Code §91.31 *et seq.*) it was necessary for appellant to obtain DER's approval of an amendment to the Township's Sewage Facilities Act plan before filing an application with DER for a sewer extension permit. Accordingly, on or about November 2, 1979, the Township submitted to DER a Planning Module for Land Development for Char-Mar.[1]

On December 6, 1979, DER notified the Township that it had completed its review of the profferred amendment but that it was deferring action thereupon pending receipt of an approved Chapter 94 Management Plan from Montgomery County Sewer Authority (MCSA). MCSA is the permittee of the "Oaks" sewage treatment plant where sewage generated at Char-Mar would be treated according to the proffered amendment. Since 1977 the Oaks plant has been hydraulically overloaded in a chronic manner so DER felt that it could not approve any more connections to the plant unless and until MCSA, through its Chapter 94 Management Plan, demonstrated that additional capacity would be made available to handle Char-Mar as well as other higher priority projects. It was not until June 24, 1980, following a specific request by appellant's counsel, that DER formally disapproved the proffered amendment.

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1. The Planning Module itself was received on or about October 12, 1979, but the transmittal letter of the Township adopting the module as an amendment to its official plan was not received until November 2, 1979 and only then was the proffered amendment complete. 25 Pa. Code §71.16(b)(2).

Appellant's first argument regarding DER's disapproval is that the proffered amendment had been approved by operation of law. To decide this question it is first necessary to decide whether the proffered amendment was a plan revision or a plan supplement since different regulatory review periods are triggered by these different types of amendments.

The proffered amendment was styled as a supplement and appellant urges us to consider it to be such. However, DER has considered it to be a revision. Pursuant to 25 Pa. Code §71.15(b)(2) all amendments to official plans must be considered as revisions unless the official plan adequately meets the sewage disposal needs of the proposed subdivision. Since the Oaks plant suffers from hydraulic overloading, it cannot be considered as an adequate method of sewage disposal for Char-Mar at this time. Moreover, DER's determination that an amendment to an official plan should be treated as either a revision or a supplement is entitled to great weight. *Maxwell Swartwood, et al v. Commonwealth of Pennsylvania, DER*, No. 2435 C.D. 1979 (decided January 23, 1981). We, therefore, conclude that the proffered amendment should be considered as a plan revision.

Pursuant to 25 Pa. Code §71.16(c) DER is required to either approve or disapprove a plan revision within 120 days and this regulation is as binding upon DER as a statute. *In Re: Bentleyville Plaza, Inc.*, 38 Pa. Commonwealth Ct. 235, 392 A.2d 899 (1977). Pursuant to 25 Pa. Code §71.16(d). However, DER's failure to disapprove a plan revision within 120 days shall not be deemed to constitute approval of that plan revision, if DER, within that time, informs the municipality that an extension of time is necessary to complete review.

Here, more than 120 days passed between the Township's submission of the Char-Mar plan revision and its formal disapproval by DER. However, on December 6, 1979 DER sent the Township a letter in which it stated that it had completed its review of the Char-Mar plan revision but was deferring

action thereupon pending receipt of a wasteload management plan from MCSA. The question presented to this board, therefore, is whether DER's letter of December 6, 1979 constitutes a request for an extension of time which tolls 25 Pa. Code §71.16(d).

In *Beaver Construction Company, Inc. v. Commonwealth of Pennsylvania, DER*, No. 1767 C.D. 1980 (decided October 2, 1980), Commonwealth Court was presented with this precise issue. DER's letter in *Beaver, supra*, as here, stated that its review of the proffered plan review had been completed but that DER was deferring action thereupon.[2] The plaintiff, in *Beaver, supra*, argued that §71.16(d) was not tolled because a) the letter stated that review had been completed and b) it did not contain a specific request for an extension of time. Commonwealth Court, however, held that "a full reading of the entire letter points strongly to the conclusion that the subsequent statement in the letter, referring to further action, overrides the initial statement that review has been completed." (See page 5 of slip opinion.)

In *Beaver, supra*, which was a mandamus action, Commonwealth Court did not have to decide the issue of whether the above language constituted a request for an extension since the plaintiff therein bore the burden of clearly proving its legal right. Because plaintiff, in *Beaver, supra*, had not clearly shown DER's letter to be other than a request for extension Commonwealth Court denied the requested relief.

In this case, too, the appellant, as the party appealing DER's refusal to approve a plan revision, bears the burden of proof. *Raymond E. Diehl v. Commonwealth of Pennsylvania, DER*, 1979 EHB 105; *Eagles View Lake v. DER, et al.*, 1978 EHB 44. Therefore, we hold that *Beaver, supra*, controlls the present case and we, too, reject the appellant's §71.16(d) argument.

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2. Since the *Beaver* plan review was also for a Montgomery County subdivision, it is likely that the same reason for deferral existed in *Beaver, supra*, as here, i.e., lack of capacity in the Oaks plant.

Most of appellant's remaining arguments allege that DER abused its discretion in disapproving the Char-Mar plan revision. Appellant doesn't contest DER's finding that the MCSA Oaks sewage treatment plant is hydraulically overloaded as that term is defined at 25 Pa. Code §94.1. Indeed appellant didn't contravert the testimony of DER officials to the effect that, by reason of this overload, raw sewage was periodically discharged into the waters of the Commonwealth (through a by-pass) and that the treatment efficiency of the plant was substantially reduced with regard to the remaining sewage.

Appellant's main line of attack was that DER should have used other methods (including sewer bans) to address this overload condition rather than the method which DER did adopt, i.e., deferring approvals of sewer extension permits and plan approvals for developments tributary to the Oaks plant. This argument is quite similar to an argument addressed by this board in *The Kravitz Company v. Commonwealth of Pennsylvania, DER*, 1978 EHB 224. There, the board stated that:

> "Appellant complains that the department has not imposed a sewer ban on connections to the lines in question, and argues that it should be permitted an extension as long as lateral connections are being allowed. Again, appellant fails to distinguish between an extension and a connection, which are treated differently in the law and seem clearly distinguishable in fact. Any person buying into an area where there are existing sewers would reasonably expect to be able to connect to those sewers; whereas a person buying unsewered land for development must reasonably expect to obtain some sort of permit to sewer the land or to provide for sewerage treatment by on-lot septic systems. Those differing expectations are supported by the reality that connections to existing lines up to a planned capacity have been contemplated in the design and permitting of the existing treatment plant and collection system. Where problems with the system develop it is logical, and to us entirely proper, to begin by refusing to permit extensions of the system and as a last resort to prohibit any connections to existing lines. The policy that is embodied in the law, and the old and new regulations adopted by the Environmental Quality Board, to ban lateral connections to

existing lines as a last resort where environmental conditions warrant such an imposition seems to us a reasonable one. We cannot accept appellant's argument that an extension should be allowed if lateral connections are being allowed." 1978 EHB 224, 232

The appellant has proffered no cogent reason which would cause us to depart from the decision cited above.

The appellant also alleges that DER's actions have deprived him of his right to equal protection under the laws. DER's officials Messers. Rehm and Stinson, who were witnesses for both parties, testified that since the summer of 1977 DER treated all those who, like the appellant, required sewer extension permits and/or plan approvals, signifying the Oaks plant for treatment in a similar manner.

DER deferred action on all these requests until MCSA could develop more capacity at the Oaks plant by reducing infiltration and inflow to the sewer system tributary to the Oaks plant and/or by planning, financing, and constructing such short-term alternatives as connections to the Valley Forge or Norristown sewage treatment plants or even the construction of temporary package type sewage treatment plants adjacent to the Schuylkill River. When DER finally determined from review of MCSA's Chapter 94 plan that the only alternative acceptable to MCSA, infiltration-inflow reduction, would not free up capacity useable by those in appellant's position, all similarly situated parties received denial letters.[3]

Appellant cites three types of allegedly inconsistent practice:

a) connections to the Oaks plant by those who required no plan approvals (because they were within the service area of the existing system);

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3. Even if all the projected 500,000 gpd capacity were freed up this would be used by developments which had pre-1977 plan approvals, no extra capacity would be available for those like appellant who had not obtained plan approvals.

b) connections to the Oaks plant by those parties who had pre-1977 plan approvals; and

c) the Geyer-Kratz subdivision which was approved pursuant to a "special allocation" of an additional 50,000 gallons capacity at the Oaks plant.

Clearly, those parties in categories "a" and "b" above can be sharply distinguished from the appellant. Those in category "a" are traditionally and by law (see Chapter 94) considered to be the responsibility of local government.[4] Similarly, those in category "b" can easily be distinguished from the appellant. The law consistently recognizes the difference between revoking a plan approval already given by DER and refusing to approve a proposed plan revision. *Toro Development Company v. Commonwealth of Pennsylvania, DER*, No. 2464 C.D. 1979 (issued February 4, 1981).

Finally, although it is less clear, the Geyer-Kratz situation can be distinguished from appellant's situation. At the time the Geyer-Kratz plan revision was partially approved (33,900 gpd out of 97,650 gpd), DER believed that more than 50,000 gpd of infiltration would be removed within 6 to 9 months. DER now knows a) that it will be at least another 9 months until infiltration is removed and b) that any additional capacity so created would be taken up by projects which already have plan approval. It is elemental constitutional law that neither the due process nor the equal protection clause is violated by reasonable classifications. The appellant has not borne his substantial burden of demonstrating his classification to be unreasonable.

In conclusion, this board sympathizes with the plight of the appellant and other would-be developers whose projects are stymied by lack of adequate

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4. DER has consistently attempted to encourage MCSA to control these connections although its efforts, in this regard, have yet to be blessed with success. See also the discussion on page 11, *supra*.

sewage services. The board has, in fact, made every effort to accomodate both environmental and economic interests. (See for example, *Dover Township Board of Supervisors, et al. v. Commonwealth of Pennsylvania, DER,* EHB Docket No. 78-090-W.) However, in this case, the board's sympathy is strained because the appellant has failed to even investigate the alternative of on-lot sewage disposal systems even though this alternative was suggested to him by DER officials and even though the Montgomery County soils map indicates the potential suitability of the underlying Char-Mar to accept and renovate sewage. Moreover, due to the efforts of DER and MCSA, the Oaks plant is due to be expanded within 3 to 4 years so that the appellant is not condemned to defer development of Char-Mar indefinitely.

With all of this in mind, as well as 25 Pa. Code §94.11 which prohibits sewer extensions tributary to overloaded plants and 25 Pa. Code §71.16 (e)(4) which requires DER to implement *inter alia* §94.11 when reviewing plan revisions, DER's presently appealed denial is clearly supported by both the facts and the law.

CONCLUSIONS OF LAW

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

2. Pursuant to 25 Pa. Code §71.16 and 94.11 DER may properly disapprove a plan revision based upon a connection to a hydraulically overloaded plant.

3. DER's letter of December 6, 1979 was a request for a extension of time which tolled 25 Pa. Code 71.16(d).

4. DER's denial of the requested plan approval did not deny appellant of due process or equal protection of the laws and was neither arbitrary nor capricious.

5. The appellant had the burden of proof in this matter.

ORDER

AND NOW, this 10th day of March, 1981, the appeal in the above matter is dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: DENNIS J. HARNISH
Member

DATED: March 10, 1981

EHB—43 12/79

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

EDWARD WAYNE BUTZ : Docket No. 80-144-H

: The Clean Streams Law
Sewer Extension

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and EAST LAMPETER TOWNSHIP SEWER AUTHORITY, Permittee

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

By: Dennis J. Harnish, Member, July 23, 1981

The present matter arises from the issuance by DER to the East Lampeter Township Sewer Authority of a sewer extension permit which would allow the authority to connect some 27 homes to the Manheim Township interceptor which is tributary to the Lancaster North Sewage Treatment Plant.

FINDINGS OF FACT

1. Northwest of and adjacent to the City of Lancaster is located a residential community of more than 27 residences having a suburban development density.

2. The said community consists of homes serviced by on-lot sewage disposal systems many of which are at least 20 years old.

3. Six of the said 27 systems malfunction on occassion (usually during wet weather) causing the backup of sewage through plumbing fixtures into the homes serviced by said systems as well as the appearance of wet spots in the yards of said residences; the occupants of these residences have petitioned for public sewers.

4. No malfunctions have been documented or reported at the remaining 21 residences and the occupants of many of these residences do not want public sewers.

5. None of the owners whose systems have malfunctioned has attempted to repair or replace his system; however, due to soil types, easements, and lot sizes it may be difficult or impossible to replace some of these systems.

6. The community in question is bound on the north by Pa. Route 23, and on the south by Pine Drive; it comprises homes arranged along Willow Road and Franklin Circle which circles off Willow Road.

7. Willow Road slopes from a point adjacent to Franklin Circle to Pa. Route 23.

8. The authority proposes to sewer Franklin Circle and the portion of Willow Road which slopes towards Pa. Route 23 and to extend the sewerline which presently runs along Pa. Route 23 and terminates at a pump station east of Willow Road down to Pa. Route 23, across the Conestoga River and into the Manheim Township interceptor.

9. The Manheim Township interceptor connects, through a pump station, to the Lancaster North Sewage Treatment Plant.

10. The said pump station periodically overloads, causing sewage to flow from two manholes through two backyards to, respectively, Landis Run and the Conestoga River.

11. The Lancaster North Sewage Treatment Plant is hydraulically overloaded.

12. Sewage collected in the proposed project would add to the overload at the said sewage treatment plant and pump station although the additional flow would not be of great significance compared to the existing overload.

13. The connection of six homes in the said community experiencing malfunctions is necessary for the elimination of public health hazards.

DISCUSSION

The present matter involves a residential community adjacent to and northeast of Lancaster, Pennsylvania. This community is located in East Lampeter Township, Lancaster County and is bounded on the north by Pa Route 23 and on the south by Pine Drive. The 21 homes pertinent to the instant matter are arranged along Willow Road (which road connects Pa. Route 23 to Pine Drive) and Franklin Circle which circles off Willow Road.[1]

The topography of the area is such that Willow Road slopes towards Pa. Route 23 from a point adjacent to Franklin Circle. All of the homes in this area, which is settled at suburban density, are serviced by some type of on-lot sewage disposal systems. Public water is available although some residents prefer to use their private wells as water supplies and they have, apparently, not been forced to connect to the public water system.

The requests of some six families in this area for public sewerage moved the supervisors of East Lampeter Township, through the East Lampeter Township Sewer Authority, to plan a public sewage collection system for this area.

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1. The permit in question discusses 27 homes but DER at the hearing stated that only 21 homes were actually contemplated to be sewered.

The proposed project would sewer Willow Road from, and including, Franklin Circle down to Pa. Route 23 and thence along Pa. Route 23 and across the Conestoga River to a connection point with the existing 36" Manheim Township interceptor. The said interceptor delivers sewage via a Manheim Township pump station to the Lancaster North Sewage Treatment Plant.

In order to effectuate this plan, East Lampeter Township Sewer Authority, applied to DER for a sewer extension permit. On or about November 2, 1979 DER denied the requested permit because of a conflict with Chapter 94 of DER's regulations. The conflict arose from 25 Pa. Code §94.11 of DER's regulations which, at that time, simply forbade sewer extensions where the additional flows contributed to the overload of the receiving plant, or pump station, on other portions of the sewer system.

The appellant asserted and the other parties stipulated that prior to November 2, 1979 and continuing through today to an uncertain point in the future, the Lancaster North plant has suffered, suffers and will continue to suffer from a continual hydraulic overload of a substantial magnitude. Moreover, the appellant asserted and at least DER admitted that the Manheim pump station is subject to periodic overloads which cause periodic discharges of raw sewage from two manholes adjacent to said pump station across two separate backyards into the Conestoga River and Landis Creek (a tributary thereof). The appellant also offered first-hand testimony and conclusive photographic evidence of these overflows.

Notwithstanding the above, DER reversed its Novmeber 2, 1979 decision and, pursuant to a settlement with the authority, issued a sewer extension permit to the authority to service the area in question.

DER does not deny the continuance of the aforesaid overload problems but maintains that there is a public health hazard in the area in question which permits DER to issue the permit in spite of the said overloads, pursuant to §94.11 *as amended*, October 3, 1980.

The present text of §94.11 provides that:

"§94.11. Sewer extensions.

> (a) A sewer extension shall not be constructed if the additional flows contributed to the sewerage facilities from the extension will cause the plant, pump stations, or other portions of the sewer system to become overloaded or if such flows will add to an existing overload unless such extension is in accordance with an approved plan and schedule submitted pursuant to §94.21 or §94.22 of this title (relating to existing or projected overload) or unless such extension is approved pursuant to §94.54 of this title (relating to sewer line extension)."

DER did not assert that §§94.21 or 94.22 applied, therefore in order for the sewer permit in question to be authorized pursuant to §94.11 it must fall within the §94.54 exception.

Section 94.54 of DER's regulations states:

"§94.54. Sewer line extension.

> Exceptions to a ban are limited to those exceptions which do not require the extension of existing sewer lines, except as needed for the elimination of public health hazards or pollution or for facilities of public need."

While there was some skirmishing between the parties as to whom should shoulder the burden of proof on the public health issue the facts on this issue were not greatly disputed. Some five or six of the 27 systems in the area (those servicing the homes around Franklin Circle) periodically malfunction during wet weather. These malfunctions cause occasional backups of sewage through plumbing fixtures in the affected homes and some occasional wet spots in the affected backyards. The other 15 to 16 homes in the project area have not been shown to have experienced any malfunctions and the appellant and residents of 13 of these homes do not want public sewerage service.

Whether the above facts constitute a public health hazard is somewhat problematical considering that less than 1/3 of the residences (only 6) are af-

fected and considering further that DER has no guideline or regulation which defines a public health hazard. Indeed, neither of the DER officials who testified saw any malfunctioning systems during their visit although they did see evidence that six systems had malfunctioned prior to their inspection trip. Even assuming that the six systems in question do constitute a public health hazard we feel that DER has exceeded its authority under §94.11 in issuing the permit under appeal.

Section 94.11, as most recently amended, permits DER to correct public health hazards by permitting the connection of homes having present malfunctions to overloaded sewer systems.[2] However, §94.11, even as amended, does not permit DER to authorize the connection of homes with properly functioning on-lot systems to an overloaded sewage system. The language of §94.11 is clear. Connections cannot be allowed "except as needed for the elimination of public health hazards..."

Even if §94.11 were not so clear Article I, §27 of the Pennsylvania Constitution would require the same result. Commonwealth Court has held that

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2. Even before the amendment of §94.11 this board had fashioned an exception to §94.11 in *Darby Creek, infra.* This case is easily distinguishable from the situation presented in *Darby Creek Joint Authority, et al v. DER & Newtown Township*, EHB Docket No. 80-076-W wherein this board upheld DER's sewer extension permit which allowed connections to an overloaded sewer system on the basis of a public health hazard.

In *Darby Creek, supra,* we found the overload to be intermittant and of minor concern for a decade. Here the interceptor line overflow apparently occurs rather frequently and has been a matter of deep concern by DER and Manheim Township. Moreover, the treatment plant overload which is here a constant, was absent in Darby Creek.

Finally, in *Darby Creek, supra,* the board found that in the affected area all of the existing 250 homes had on-lot septic systems which were malfunctioning and creating a present health hazard. Here, only six homes of the 27 in the area have been identified as having malfunctioning septic systems.

in order to comply with this provision the state or local agency in question must *inter alia* reduce the environmental incursion to a minimum *Payne v. Kassab*, 11 Pa. Commonwealth Ct. 14, 312 A.2d 86 (1973); *Concerned Citizens for Orderly Progress v. DER*, 36 Pa. Commonwealth Ct. 192, 387 A.2d 989 (1978).

The way to accomplish this constitutionally mandated purpose in the instant matter is revealed by the following colloquy between the appellant and Mr. Frederick A. Marrocco, DER's regional water quality manager, in which DER's policy regarding discharges to overloaded plants is discussed:

> "Q ...Is there ever a permit given to a specific Sewer Authority where an overloaded condition exists where they can proceed with their system with the intention that only the residents affected with the health hazard would have to hook up?
>
> * * *
>
> THE WITNESS: We have in situations where we have public health needs, a municipality or authority wants to address those needs, the only alternative is to convey it to a treatment plant, to condition that permit so that only those residents that have problems can connect to the system."

DER has filed a motion to open the record of the instant matter to permit the introduction of permit no. 3679419, the presently appealed permit. Neither party has objected to the admission of this permit of which, in any event, we could take official notice under our rules. The said permit is conditioned as follows:

> "This permit is issued subject to all Department of Environmental Recourdes Rules and Regulations now in force and the following Special Conditions:
>
> A. Connections to the herein approved sanitary sewers are limited to the twenty-seven (27) existing residential dwellings with on-lot sewage problems as identified in the sewerage modules, plans, and amendments that accompanied Application No. 3679419 dated June 7, 1979.
>
> It is required by law that this permit before being operative shall be recorded in the office of the Recorder of Deeds in Lancaster County."

The evidence in this matter has clearly established that only six (6) existing residential dwelling units have on-lot sewage problems rather than the twenty-seven (27) identified in said condition. Moreover, pursuant to the Article I, Section 27 of the Pennsylvania Consitution, 25 Pa. Code §94.11 as quoted above and the DER policy discussed immediately above, only those homes actually experiencing on-lot sewage problems may be connected to overloaded facilities.

We shall, therefore, uphold sewer extension permit 3679419 issued by DER to the authority but we shall modify the special condition added to that permit by DER to limit connections to the extended sewer line to the six (6) homes presently experiencing on-lot sewage disposal problems. These homes shall include the homes of the residents who testified on behalf of the authority in the instant matter.

It must be noted that we would be reluctant to modify the above condition if substantial evidence on the record demonstrated that the project could not go forward without the participation of the homes in the area which have no demonstrable problems with their on-lot systems. There is, however, no such evidence. Mr. Wilson B. Smith, the authority's consulting engineer, was the only witness to testify as to the economic feasibility of the project. On page 168 of the Notes of Testimony he was asked what would be the economic impact on the project if some persons in the project area were not required to connect to the system. He started to answer that it would be difficult in such circumstances to pay for the project but he quickly amended his answer to state that it could be difficult.

Mr. Smith's careful answer was, in fact, required since 1) he had conducted no feasibility study; 2) the authority had not calculated how much revenue (if any) it needed to generate from connection fees or the like to support the project; 3) counsel for the authority stipulated (N.T. 155,6)

that the authority would pay for at least a share of construction costs and 4) Mr. Chester Crist, (vice-chairman of the authority) testified that the authority has substantial funds in its bond redemption, improvement fund and sinking fund withdrawals to finance the project.

We hold that the authority had the burden of persuasion on this issue since it was the authority which sought to take advantage of the health hazard exception of §94.11 and the party relying upon an exception must establish its right thereto; McCormick, Law of Evidence Chapter 36 §318, p. 675; *Rothstein v. Aetna Ins. Co.*, 216 Pa. Super 418. Thus, the absence of evidence establishing the need to require connection of all homes in the area in order to address the health problems of those having malfunctioning systems is to be held against the authority.

CONCLUSIONS OF LAW

1. The board had jurisdiction over the parties and the subject matter.

2. Under 25 Pa. Code §94.11 sewer extensions to overloaded sewage plants, pump stations and/or lines are not allowed except as provided pursuant to 25 Pa. Code §§94.21, 94.22 and 94.54.

3. In the circumstances of this case only six connections have been demonstrated to be needed for the elimination of a public health hazard.

4. Six connections are the minimum necessary to correct the public health hazard and thus constitute compliance with the second test under Article I, §27 of the Pennsylvania Constitution.

5. DER's finding that twenty-seven connections were necessary to abate existing problems was arbitrary and capricious when only six homes in the area had malfunctioning systems and no evidence established the need to connect additional homes in order to connect the homes with malfunctioning systems.

O R D E R

AND NOW, this 23rd day of July, 1981, DER's issuance of sewerage permit no. 3679419 is upheld but the special condition of the permit is amended to be limited to the six (6) homes with on-lot sewage problems as identified and discussed above.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: DENNIS J. HARNISH
Member

DATED: July 23, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

DONALD T. COOPER : Docket No. 81-032-H

Dams and Encroachments Permit

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and HEIRS OF CLARENCE MERCATORIS

ADJUDICATION

By: Dennis J. Harnish, Member, August 24, 1981

This matter arises from DER's denial of an application filed, on May 5, 1979, by Donald T. Cooper and his wife, Kathleen Cooper. The application was for a permit to install a seasonal dock extending into Conneaut Lake in Sadsbury Township, Crawford County.

FINDINGS OF FACT

1. Donald T. Cooper and Kathleen Cooper (Coopers) are the appellants in the above-captioned matter.

2. Coopers own a home in which they live year-round on Oakmere Place in Sadsbury Township, Crawford County which home is located in the Oakland Beach Allotment (also known as Oakland Beach Golflands) (Allotment) at Conneaut Lake.

3. Coopers, like other residents in the Oakland Beach Allotment, lease the land they live on through long-term leases.

4. There are eighty-two (82) long-term property leaseholders in the Oakland Beach Allotment and some 188 lots.

5. By application dated May 5, 1979, Coopers applied to the Commonwealth of Pennsylvania, Department of Environmental Resources (DER), the appellee, for a permit to locate a boat dock in Conneaut Lake at the foot of Oakmere Place.

6. Mr. Cooper first put his seasonal dock in the lake in 1979. He has reinstalled it yearly since, despite the lack of a permit from DER to do so.

7. Said dock which extends sixty-eight feet into the lake from the shore is owned by Coopers and two other men who own homes in the Allotment.

8. Currently, there are four (4) boats using Coopers' dock.

9. Others have asked Mr. Cooper if they could use his dock, but Coopers have told them no, because there is not enough room.

10. There are only two docks at the end of Oakmere Place, one of which is Coopers' dock.

11. At most, one more dock could be put in at the end of Oakmere Place but then it would be too crowded for boats to use any of the three docks.

12. The Coopers' claim the right to locate their dock at the end of Oakmere Place by virtue of their lease of their residence property on Oakmere Place. Coopers neither own nor exclusively lease any lakefront property and they have no agreements with lakefront property owners to allow their dock to be located there.

13. Their lease provides that Coopers shall have a right to "The use of all streets, parks and docks granted to...Oakland Beach Land Company".

14. All of the leaseholders of lots in the Oakland Beach Allotment have a right through their common lessor to "free and uninterrupted use, liberty

and privilege of, and passage in and along those certain roads, parcels of land and dock or parts thereof...described as follows, to-wit:

"5. ...Oakmere Place...and

6. That certain dock or pier of the D. L. and T. P. McGuire, commonly known as the Oakland Beach Dock for the purposes of entering and leaving boats on Conneaut Lake."

15. The roads in Oakland Beach Allotment, including Oakmere Place, were accepted by the Sadsbury Township Board of Supervisors as public roads and title thereto apparently passed to the supervisors in a court action in Crawford County Common Pleas Court in 1936.

16. Oakmere Place as described in said lease runs all the way to the easterly edge of Conneaut Lake.

17. At the end of Oakmere Place the Conneaut Lake Joint Municipal Authority constructed a sanitary sewage pump station in 1969.

18. The pump station's construction caused the shoreline at the end of Oakmere Place to be extended about twenty (20) feet into the lake.

19. Coopers' dock connects to the land created by the pump station's construction.

20. Neither the Conneaut Lake Joint Municipal Authority nor the Sadsbury Township Board of Supervisors has given consent to Coopers' dock being located on this land; both the Authority and the Township deny ownership of this land.

21. At the time Coopers applied to DER for their permit, the Environmental Quality Board's Regulations, promulgated in 1978, provided:

"§105.312. Riparian property.

Where the applicant for a permit pursuant to this subchapter does not own all the riparian property behind the proposed structure, notarized and signed releases must be procured from such property owners by the applicant and furnished to the Department." (T-176 to 177 and 25 Pa. Code §105.312).

22. In 1980, subsequent to Coopers' submission of their application, but prior to their permit's denial, the Environmental Quality Board promulgated new regulations pursuant to the Dam Safety and Encroachment Act, *supra*. See 25 Pa. Code Chapter 105; 25 Pa. Code Section 105.332 provides:

> "When an applicant proposes location of a structure on or in front of riparian property not owned by the applicant, the applicant shall obtain and furnish to the Department notarized and signed releases from the owners of all affected riparian property."

23. Pursuant to this regulation and by letter dated June 4, 1980, DER sought proof from Coopers of their ownership of the shore behind their dock.

24. Coopers never responded to DER's letter by establishing either ownership of this land or a release for their dock from the owners of the affected riparian property.

25. DER denied Application No. 2079713 because of Coopers' failure to address this issue as required by the said regulations.

26. The Commonwealth owns the land to which the Coppers' dock is attached.

DISCUSSION

It is often stated that "hard cases make bad law". The temptation to make bad law in this case is strong (but has, hopefully, been avoided). Donald T. Cooper and his wife Kathleen Cooper are, in the opinion of the hearing examiner, fine, upstanding citizens of this Commonwealth; the kind of people whom one would wish to have as friends and neighbors. Moreover, the Coopers are before this board not because of any alleged present or future pollution or menace to the public health and safety but merely because they have erected a dock which extends into Conneaut Lake.

The dock in question is seasonal in nature having first been installed by the Coopers, at the foot of Oakmere Place, in 1979 and having been replaced each summer since then. Oakmere Place is the only street in the Oakland Beach Allotment, the resort development which includes Oakmere Place, which reports directly to Conneaut Lake. It is, therefore, not surprising that the foot of Oakmere Place has been the locus of a number of docks since at least the forties. At present the foot of Oakmere Place supports both the Coopers' dock and a dock constructed by a Mr. A. Dale Clarke under DER encroachment permit 2074712 as issued on or about January 25, 1975.[1]

Since 1975 when Mr. Clarke received his permit the law regarding encroachments has become significantly more rigorous. There is little doubt that Coopers' dock is both an "encroachment" and a "water obstruction" as those terms are defined in Section 3 of the Dam Safety and Encroachment Act of 1978, Act of November 26, 1978, P.L. 1375, 32 P.S. §693.1 *et seq.*; 32 P.S. §693.3 (Act). Thus, pursuant to Section 6 of said Act, 32 P.S. §693.6, the Coopers' are required to obtain a permit for their dock.[2]

Moreover, pursuant to Section 9 of the Act, 32 P.S. §693.9, DER may only grant a permit if it determines that the proposed project complies with the provisions of the Act and the regulations adopted thereunder.

Of course, the Coopers did attempt to obtain a permit by filing their application therefor on or about May 5, 1979. However, on or about February 24, 1981 DER denied the said application for its failure to comply with §§105.32 and 105.332 of DER's regulations.

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1. There is no room for any additional dock at the end of Oakmere Place or for additional mooring space on the Coopers' dock.

2. Section 7 of the Act, 32 P.S. §693.7, permits the Environmental Quality Board by regulation to exempt certain categories of encroachments and water obstructions from permit requirements. However, the regulation promulgated by the EQB pursuant to this authorization, 25 Pa.Code §105.12, does not exempt the category including the Coopers' dock.

The Coopers strenuously argue that the said regulations, which became effective September 28, 1980, should not be applied to their earlier filed application. The law on this point, however, supports DER's contention that DER was required on February 24, 1981 to apply the regulations then in effect. *Commonwealth v. Harmar Coal Company*, 452 Pa. 77, 306 A.2d 308 (1973); *Altland v. Spenkle*, _____ Pa. Cmwlth. _____, 427 A.2d 275 (1981).[3]

Several of the 1980 regulations seem important for our consideration in this matter. Section 105.14(b)(3) instructs DER in reviewing permit applications to consider *inter alia* "[t]he effect of the proposed project on the property or riparian rights of owners above, below, or adjacent to the project".

In order that DER may implement the policy of protecting riparian owners set forth in this regulation, Section 105.332 of the regulations requires that "...an applicant shall obtain and furnish to the Department notarized and signed releases from the owners of all affected riparian property".

The releases required by Section 105.332 clearly comprise information required by Chapter 105 of the regulations and thus an application which is not accompanied by such a release is incomplete under the terms of 25 Pa. Code §105.19(b). Moreover, pursuant to §105.21(a)(2) as well as Section 8(a) of the Act, 32 P.S. §693.8(a) the department may act favorably only upon <u>complete</u> applications.

In the instant matter it is clear that the Coopers' dock is located on property which the Coopers do not own and it is further clear that they have failed to submit to DER any releases from the owner of this property. It thus follows that unless the Coopers can avoid the affect of Section 105.332, they are not entitled to the encroachment permit which they seek here. In this regard

3. Even if the Coopers were correct that the regulation in existence at the time they filed their application applied, their cause would not be advanced. Note the essential similarity between §§105.312 and 105.332 as set forth, respectively, at Findings of Fact 21 and 22.

the Coopers first assert, that by virtue of their long-term lease of their Oakmere Place property they have an interest or easement in the property at the foot of Oakmere Place and thus no release is required.

A review of the 1929 lease to John Harned, through which lease the Coopers' rights arise, indicates that this lease guarantees to the Coopers as well as all other lessees of Allotment properties, the right to free and uninterrupted use etc. with regard to Oakmere Place as well as "[t]hat certain dock or pier of the D. L. and T. P. McGuire, commonly known as the Oakland Beach Dock...".

Although there was some testimony concerning the locus of the Oakland Beach Dock, its location was by no means clarified on the record. It is certain, however, that the dock installed by the Coopers in 1979 was not "that certain dock..." designated in the 1929 lease. Thus, the Coopers' rights must reside, if anywhere, in their right to use Oakmere Place. But, the Coopers' nonexclusive right to use Oakmere Place in common with other lessees would not seem to support the right of any of the lessees to construct a dock thereupon. This is particularly true since the same lease did provide a common lease interest in an existing dock. Further, the Coopers "use" of Oakmere Place reduces its utility to other lessees; e.g., no other lessees can now build a dock at this location or use Coopers' dock.[4]

Moreover, subsequent to the 1929 lease, in 1936, title to Oakmere Place was taken, through court action, by the Sadsbury Township Board of Supervisors.

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4. Oakmere Place is defined in said lease as extending to the eastern shoreline of Conneaut Lake.

Thus, whatever interest the Coopers might have had in Oakmere Place pursuant to said lease has been extinguished.

It must be pointed out that the Coopers attempted to comply with §105.332 by requesting a release from Sadsbury Township. At this point the Coopers' saga passes from the unusal to the bizarre. It appears that in 1969 the Conneaut Lake Joint Municipal Authority constructed a sewage pump station at the foot of Oakmere Place. This construction included deposition of fill in Conneaut Lake so as to create a fan-shaped addition to the shoreline at the foot of Oakmere Place extending some 20 feet into the lake. It is from this area that the Coopers' dock extends.

Because of the existence of this additional area, Sadsbury Township disclaimed ownership of the affected area and refused to issue the requested release.

Unfortunately for the Coopers, the Authority too disclaimed ownership of the property in question and also refused to issue a release upon the Coopers' request. Thus, as stated above, the Coopers have not been able to comply with §105.332 by supplying DER with a release from the property owner, and DER on the basis of the above-cited Act and regulations, has denied the Coopers' application.

It is clear to the board that if either the Township or the Authority (or both) claimed ownership of the property in question yet failed or refused to provide the requested release that DER's denial would have been well grounded in fact and law. Here, however, neither the Authority nor the Township claims ownership of property which, but for the fill, lies below the low water mark of Conneaut Lake. As DER pointed out in its excellent and thorough brief, the Commonwealth owns Conneaut Lake below the low water mark *Conneaut Lake Ice Company v. Quigley*, 225 Pa. 605, 74 A. 648 (1909). Thus, under the peculiar facts of this

case we find that the Commonwealth owns title to the property in question. We are mindful of DER's warning concerning this board's lack of jurisdiction and to adjudicate the quality of the Coopers' title. If the quality of their title was in dispute we probably would not adjudicate it. However, here there is no disagreement between DER and the Coopers that the property in question is owned neither by the Township or the Authority. The logical alternative therefore is that the property must be owned by the Commonwealth.[5]

Since we have found for the purposes of this litigation that the Commonwealth owns the fan-shaped piece of property at the foot of Oakmere Place as well as the land submerged beneath the Conneaut Lake, it will be necessary for the Coopers to comply with Section 15 of the Act (32 P.S. §693.15) as well as 25 Pa. Code §105.31 by acquiring a DER lease of this property from DER. From footnote 4[6] of DER's brief it appears that there should be no problem in the processing of this lease and this matter will therefore be remanded to DER.

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5. Of course, by the ancient real property doctrine of Escheat, the Commonwealth, as sovereign, holds title to all unclaimed property whether or not it is submerged beneath the waters of the Commonwealth.

6. "DER was bound to adhere to the Attorney General's Opinion. Section 512 of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, 71 P.S. §192. Because of the Attorney General's Opinion and Coopers' failure to produce a legislatively granted title, DER refused to process Coopers' application until after the Dam Safety and Encroachments Act, *supra*, became law. Section 15 of that statute empowers DER to lease these submerged state-owned lands; therefore, DER recommended processing of Coopers' application. Subsequently, the application was denied for the reasons set forth in this Brief." (emphasis added).

CONCLUSIONS OF LAW

1. The board has jurisdiction over the parties to and the subject matter of this appeal.

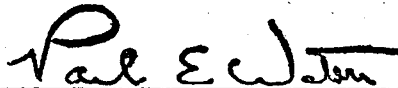
2. Coopers, as permit applicant, bears the burden of proving their entitlement to this permit.

3. In the circumstances of this case no release is required under 25 Pa. Code §105.332 because the Commonwealth owns the so called riparian property in question as well as lands submerged beneath Conneaut Lake; a lease of both areas by the Commonwealth is required.

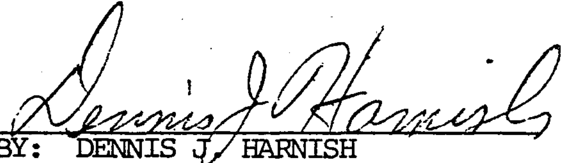
ORDER

AND NOW, this 24th day of August, 1981, this matter is remanded to DER for action in accordance with this adjudication.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman



BY: DENNIS J. HARNISH
Member

DATED: August 24, 1981

EHB-43: 2/79

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

R. CZAMBEL, SR. : Docket No. 80-152-G

Dam Safety and Encroachments Act
32 P.S. §693.1
25 Pa. Code §105.161

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and INDEPENDENT ENTERPRISES, Permittee

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

By the Board: The following adjudication was drafted by Edward Gerjuoy, Esquire and is issued by this board with minor modification. April 30, 1981

This matter comes before the board as an appeal from the issuance of a permit under the Dam Safety and Encroachments Act of November 26, 1978, as amended (32 P.S. §693.1 et seq.), to the permittee Independent Enterprises, for construction of a culvert in Thoms Run, a stream in South Fayette Township, Allegheny County.

Appellant Roy K. Czambel, Sr., an owner of property in the vicinity of the proposed culvert, seeks to have the permit revoked based on allegations that in issuing the permit DER violated various regulations, especially those regulations (25 Pa. Code §105.161) intended to assure that the flow capacity of the proposed culvert will be adequate to prevent flooding.

This matter was given a hearing on January 14 and 15, 1981, after the board had denied a motion by Independent Enterprises to quash the appeal (opinion and order dated December 11, 1980). Mr. Czambel, who is not an attorney, appeared pro se at this hearing, but was permitted to be assisted in his presentation by William F. Kruse, another adjacent property owner and also not an attorney; Mr. Kruse had signed the original notice of appeal as co-appellant. Mr. Czambel and Mr. Kruse each stated for the record that they had received the opportunity to have an attorney and that they understood their presentation of their case might be hampered by their failure to secure an attorney.

FINDINGS OF FACT

1. Appellant Roy K. Czambel, Sr., is an individual who resides and owns property in South Fayette Township, Allegheny County, at the address Box 915, Oakdale, Pennsylvania 15071.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, which has the duty and responsibility of administering the Dam Safety and Encroachments Act, 32 P.S. §693.1 et seq. and the regulations duly promulgated thereunder by the Environmental Quality Board.

3. Permittee is Independent Enterprises, Inc., a Pennsylvania corporation with principal offices located in Pennsylvania.

4. The officers of Independent Enterprises, Inc., are Salvadore Cargnoni, Doris J. Cargnoni, Jack S. Cargnoni and James G. Cargnoni (hereinafter the Cargnonis), whose mailing address is Box 221, Bridgeville, Pennsylvania 15017.

5. On August 12, 1980, DER granted permittee a permit (number ENC 02-58) to construct and maintain a 90 foot long multi-plate arch culvert, 14 feet wide

and 67 inches high, in Thoms Run, South Fayette Township, Allegheny County.

6. This arch culvert is to be constructed on property owned by the Cargnonis.

7. At some time prior to 1980, permittee had installed in Thoms Run, in the neighborhood of the proposed arch culvert which is the subject of this action, a culvert consisting of a pipe approximately 300 feet long and five or six feet in diameter.

8. This prior pipe culvert had been constructed without a permit from DER.

9. On January 25, 1980, subsequent to construction of this pipe culvert, permittee applied to DER for a permit seeking authorization for construction and maintenance of this prior pipe culvert.

10. This January 25, 1980 permit application was denied by DER on April 15, 1980.

11. About 250 feet upstream of the prior pipe culvert and the site of the proposed culvert there is a county bridge over Thoms Run.

12. During April and May, 1980, flooding occurred upstream of the aforesaid pipe culvert, as well as upstream of the county bridge, causing damage to a number of homes in the area.

13. Thereafter, on June 11, 1980, residents of the area met with DER representatives, including Lawrence Busack.

14. Mr. Busack, a registered professional engineer in the State of Pennsylvania, is employed by DER as a regional hydraulic engineer for Western Pennsylvania, which territory includes the site of the arch culvert.

15. On September 9, 1980, Independent Enterprises and the Cargnonis consented in writing to a DER Order requiring removal of the pipe culvert and

restoration of the portions of Thoms Run disturbed by previous activities associated with the pipe culvert, by a date no later than September 30, 1980.

16. This consent order refers to a "proposed bridge" which "is to be erected" over Thoms Run in the vicinity of the removed pipe culvert.

17. By December 31, 1980, the pipe culvert had been wholly removed from the stream, and the arch culvert construction was nearly complete.

18. The arch culvert was designed to also function as a bridge, and already is so functioning.

19. As of the date of the hearing, on January 14, 1981, Mr. Busack had last inspected the construction site on December 31, 1980.

20. On the basis of this December 31, 1980 inspection, Mr. Busack concluded that the arch culvert basically had been properly installed, in accordance with DER rules and regulations, except for minor deviations which would not affect the flow capacity of the culvert.

21. On the basis of this same December 31, 1980 inspection, Mr. Busack concluded that the site was in compliance with the terms of the aforementioned consent order, except for minor deviations.

22. As of December 31, 1980, the permit's requirements for stabilization of the stream channel in the vicinity of the construction site had not yet been fully met.

23. Failure to properly maintain the stream channel in the vicinity of the arch culvert can adversely affect the flow capacity of the culvert.

24. Under the terms of the permit, the work it authorizes need not be completed before December 31, 1983, but must be completed by that date.

25. Mohammad Farooq, a hydraulic engineer, is employed by DER's Bureau of Dams and Waterway Management, reviewing permit applications for water obstructions, such as culverts.

26. Mr. Farooq processed the permit application which is the subject of this appeal.

27. Mr. Farooq gave this permit application special scrutiny, because he had knowledge of the concerns regarding this project which had been expressed by residents in the area.

28. Before approving permittee's permit application to construct the arch culvert, Mr. Farooq determined that even in the event of a hundred year frequency storm (a storm so large that it is not expected to occur more than once in a hundred years) the flow capacity of the arch culvert would be adequate to prevent flooding of adjoining properties.

29. The aforesaid determination was based on several different methods of calculating water flow into the culvert during a 100 year frequency storm, and involved three days of calculations which were independently checked by one of Mr. Farooq's colleagues.

30. The determination, by DER's engineers, that the arch culvert would be adequate to handle the flow resulting from a hundred year frequency storm without flooding, did not involve estimates of the possibility of debris (such as trees swept down by the storm waters) obstructing the arch culvert and reducing its flow capacity.

31. In approving the permit application for the arch culvert, DER's engineers did not review the adequacy of the designed load-bearing capacity of the culvert when used as a bridge.

32. Preston Chiaro, appellant's expert who made calculations of the expected water flow into the culvert during a 100 year frequency storm, is a registered professional engineer specializing in pollution control whose employment duties have involved storm water overflow of sewers and other water flow channels, but whose education has not involved majoring in hydrology, hydraulics or fluid mechanics.

33. Mr. Farooq has taken courses in hydraulics and hydrology at Penn State University since receiving his bachelor's degree in engineering, and was employed as a design engineer of irrigation channels and bridges before taking his present job with DER.

34. The arch culvert as installed is capable of handling a flow of 889 cubic feet per second.

35. The culvert is being constructed in an area which is suburban or perhaps even rural, but assuredly is not urban.

DISCUSSION

Our review of this permit approval is to determine whether the DER has committed an abuse of discretion or an arbitrary exercise of its duties or functions. Warren Sand and Gravel Company, Inc. v. Commonwealth of Pa., DER, 341 A.2d 556, 20 Pa. Cmwlth Ct. 186 (1975); Diehl v. Commonwealth of Pa., DER, 1979 EHB 105, 108; Lackawanna Refuse Removal, Inc., v. Commonwealth of Pa., DER, EHB Docket No. 79-024-B (issued February 3, 1981). In the instant action, the burden of proving such abuse of discretion or arbitrary exercise of DER's functions is on the appellant. See Rule 21.101(c)(3) of the board's rules and regulations and Milan Melvin Sabock and Concerned Citizens of Garlow Heights v. Commonwealth of Pa., DER, 1979 EHB 229, 238. Appellant's varied, often poorly articulated claims must be examined with these precepts in mind.

Appellant's main claim is that DER incorrectly calculated the volume of water flow which the arch culvert would have to handle during a hundred year frequency storm, with the result that DER has approved a culvert which will cause flooding in the event of a hundred year frequency storm, in violation of 25 Pa. Code § 105.161. However, appellant has not sustained his burden in this

regard. Appellant's expert Preston Chiaro testified that his calculations indicated the arch culvert would have to pass about 1000 cubic feet per second (cfs) of water during a hundred year frequency storm (N.T. pp. 50-55). DER's expert Mohammad Farooq testified that he had calculated the 100 year frequency flow would lie between 700 to 768 cfs, these being the results of three different calculations by three different methods (N.T. p. 268). Moreover, these calculated flows by Mr. Farooq agree closely with the 733 cfs hundred year frequency flow computed by permittee's engineer Richard Kasmer (N.T. p. 341) and with the 100 year frequency flow value of 750 cfs computed by the U.S. Army Corps of Engineers, in a letter to Mr. Salvadore Cargnoni dated January 1980 (DER Exhibit A, entered into evidence without objection, N.T. p. 275). Although Mr. Chiaro offered reasons why his calculations were correct and Mr. Farooq's and the other calculations were erroneous, these reasons were disputed by Mr. Farooq (N.T., pp. 272-3 and pp. 280-284). There was no evidence that Mr. Chiaro is more competent to perform such calculations than Mr. Farooq, let alone the Army Corps of Engineers; if anything, the evidence suggests the contrary view. Mr. Chiaro agreed that the arch culvert, if constructed according to plan, would handle the 100 year frequency flow value of approximately 750 cfs computed by Mr. Farooq, Mr. Kasmer and the Corps of Engineers (N.T. p. 60). Moreover, Mr. Farooq checked the "backwater effect" of water backing up behind the culvert during a 100 year frequency storm, to be sure this backwater would remain within the stream channel upstream of the culvert and not spill over the stream channel to flood adjoining properties (N.T. p. 271). Therefore it is not possible to conclude that DER incorrectly calculated the volume of water flow the arch culvert would have to handle during a 100 year frequency storm. Correspondingly, this claim of appellant's assuredly offers no basis whatsoever for concluding that DER—whose Mr. Farooq scrutinized the instant permit application with special care (N.T. p. 267)—abused its discretion or arbitrarily exercised its functions

in approving a culvert expected to be capable of passing 889 cfs (as Richard Kasmer, the engineer who designed the arch culvert, asserted without contradiction or challenge, N.T. pp. 343 and 392-3).

Appellant interlaced the claim just discussed—namely that DER's calculated 100 year frequency storm flow of approximately 750 cfs grossly underestimates the actual 100 year frequency storm flow to the culvert—with a number of subsidiary arguments seemingly directed at showing the arch culvert will cause flooding even if the 750 cfs figure is correct. These subsidiary arguments appear to be: (1) during a severe storm, such as a 100 year frequency storm, trees and other debris are likely to be swept toward the arch culvert and to become lodged in it or against its entrance, thereby clogging the culvert and causing flooding; (2) in recent years the stream bed upstream of the arch culvert has experienced heavy siltation and other deterioration, which will make the risk of flooding much greater than DER supposes; (3) the culvert is being inadequately maintained, causing further deterioration of the stream channel and additional risk of flooding. However, these arguments cannot justify sustaining the appeal, for reasons explained below.

Relative to the clogging argument, Mr. Busack testified that the debris generated by the relevant watershed "most likely would pass through both the county bridge and the arch culvert" (N.T. p. 192). Mr. Farooq testified that if debris washed down the stream bed is stopped in the vicinity of the arch culvert, then such stopping is more likely to occur at the county bridge 250 feet upstream of the arch culvert than at the culvert itself. (N.T. pp. 297-8). It is true that the following colloquy between Mr. Busack and the hearing examiner did take place (N.T. pp. 186-7):

> "THE HEARING EXAMINER: But I would like you to answer the following question: Did you, in your answer previously when you stated that you thought that this culvert would be adequate for a hundred year flood, and that indeed that flooding would be caused more probably by the county bridge than by the culvert,

did you, in that answer, take into account the possibility of debris, obstruction and so on, which Mr. Kruse is presently alluding to?

THE WITNESS: To my knowledge, there is no analytical way to determine whether or not debris would create a greater problem for the pipe arch than it would create at the county bridge. I have no method by which I can tell how big a tree will get stuck in either culvert. I just assume that most debris that comes down will simply pass through both structures.

THE HEARING EXAMINER: Well, it is not clear to me what your answer is to my question. When you answered this question before, had you thought about the possibility of obstruction by trees and things like that?

THE WITNESS: No."

However, appellant presented no evidence that clogging of the culvert by debris was likely, nor does appellant point to any DER regulation which requires DER to take into account the possibility of debris obstruction before approving an application for construction of a culvert. The permittee will be required to maintain the arch culvert in accordance with DER regulations, including 25 Pa. Code §105.171 which reads in part:

> "(a) The owner or permittee of any culvert or bridge shall be responsible for maintaining the structure opening thereof in good repair and assuring that the flood carrying capacity of the structure is maintained at all times. The owner or permittee shall inspect the opening and approach of the culvert or bridge at regular intervals of not less than once each year and shall after obtaining the verbal or written approval of the Department, remove all silt and debris which might obstruct the flow of water through the structure. It shall be assumed that the flow of water is obstructed when there has been a reduction of the effective area of the structure opening of greater than 10%."

On the foregoing facts, it would be unjustified to conclude that DER's approval of the permit, without considering the possibility of clogging by debris, constituted an abuse of DER's discretion or arbitrary exercise of its functions.

Appellant's argument that because of deterioration of the stream bed in recent years the risk of flooding associated with the presence of the arch culvert

will be greater than DER supposes, is supported by no evidence on the record. At the end of the hearing, after the permittee and DER had closed their cases, and of course long after the appellant had closed his case, the appellant offered to present evidence that siltation had caused the level of the stream bed to rise significantly in recent years. Because appellant could give no cogent reason for not having presented such testimony during his case in chief, and because the appellant was unable to explain why such evidence would be relevant to the instant appeal, the hearing examiner refused to admit this proffered evidence. However, because appellant was appearing pro se without an attorney, and obviously was confused by the hearing procedures, the hearing examiner suggested that appellant submit his intended testimony in affidavit form, along with his post-hearing brief, as possibly the basis for a petition to reopen the record (N.T. pp. 404-5). Accordingly, appellant did submit three affidavits to the effect that since about 1976 silt and erosion have raised the stream bed level under the county bridge about two feet. Appellant did not file a petition to reopen the record, and his brief does not clarify the relevance of these affidavits to his appeal. Nor was any evidence or argument offered during the hearing which even remotely suggests that deterioration of the stream bed would increase the volume of water reaching the arch culvert during a 100 year frequency storm, beyond the approximately 750 cfs value calculated by Mr. Farooq, Mr. Kasmer and the Corps of Engineers. Similarly, there was no evidence that this alleged rise in the stream bed had made erroneous DER's estimates of the flooding risks ascribable to the presence of the arch culvert in Thoms Run. Mr. Chiaro did not calculate the back-water effect of the arch culvert on the stream channel, whether silted or unsilted N.T. p. 83); Mr. Farooq, though cross examined extensively by appellant, stated unequivocally (N.T. p. 271):

"That in the event of a hundred year frequency storm, the backwater effect will not exceed the channel depth, and it would not extend beyond the downstream end of the county bridge, and will not flood any adjacent properties."

Therefore, the alleged deterioration of the stream bed in recent years, even if proved, cannot possibly justify the conclusion that DER's approval of the permit was an abuse of discretion or an arbitrary exercise of DER's functions. Furthermore, it is apparent that this holding would be unaltered even if appellant's three affidavits had been accepted into evidence; appellant was not prejudiced by the hearing examiner's refusal to accept testimony about the stream bed level after appellant had closed his case.

Harry R. Barnett, executive director of the Allegheny County Conservation District, testified that on December 10, 1980, during a visit to the arch culvert construction site, he found the stream banks in the vicinity of the site were not being maintained in accordance with the terms of the permit (N.T. pp. 102 and 113). He further testified that if the sedimentation and erosion controls called for in the permit were not implemented, the carrying capacity of the culvert could be reduced (N.T. p. 123). This testimony of Mr. Barnett's is not contradicted by Mr. Busack's testimony that when he visited the site on December 31, 1980, the arch culvert basically had been properly installed, except for minor deviations which would not affect the flow capacity of the culvert (N.T. pp. 194-5). Mr. Busack's visit to the site took place three weeks after Mr. Barnett's; on December 31, 1980 Mr. Busack did observe that the stream channel had not yet been fully stabilized. Mr. Busack's assertion that the flow capacity of the culvert would not be affected by the condition of the stream channel when he saw it is not inconsistent with Mr. Barnett's opinion that failure to implement the controls called for in the permit could reduce the carrying capacity of the culvert. Mr. Busack was not asked whether he agreed with this opinion, which Mr. Barnett

is competent to voice. The Allegheny County Conservation District is a quasi-state agency to which, in Allegheny County, DER has delegated responsibility for administering erosion and sedimentation regulations to the Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P.S. §691.1 et seq. (N.T. p. 130). Mr. Barnett is an authorized state inspector for the Commonwealth of Pennsylvania Bureau of Water Quality Management (N.T. pp. 125-6). Moreover, Mr. Barnett's suggested mechanisms whereby improper maintenance of the culvert and its neighboring stream channel may produce adverse effects on the culvert's flow capacity—namely by the sides of the stream bank falling into the stream and blocking the flow to the culvert, or by causing excessive sedimentation in the culvert (N.T. pp. 102 and 123)—are quite reasonable.

The board therefore finds that as of December 31, 1980 the permit's requirements for stabilization of the stream channel in the vicinity of the construction site had not yet been fully met, and that failure to maintain the stream channel as the permit requires can adversely affect the flow capacity of the culvert. However, this finding scarcely justifies the conclusion that DER abused its discretion in granting the permit. As the permittee and DER argue, the subject of this appeal is whether or not the permit was issued in compliance with statutory requirements and DER's regulations. Whether or not the arch culvert is being installed and maintained in accordance with the permit's requirements, and whether or not failure to meet these requirements can adversely affect the culvert's flow capacity, must be considered irrelevant to the issue of whether the permit was properly granted.[1] It would be relevant to show that the permit's installation and maintenance requirements were insufficient to ensure the culvert's flow capacity would not deteriorate, but no such evidence was presented. In fact, the evidence is to the contrary. Before the permit was granted, Mr. Barnett himself agreed that its sedimentation and erosion control requirements were adequate. In a letter dated

1. We, of course, urge DER not to overlook this problem, and we see no reason why corrective measures should be delayed until 1983.

June 27, 1980, from the Allegheny County Conservation District to the Deci Corporation, the designers of the arch culvert, introduced into evidence as part of appellant's Exhibit 2, Mr. Barnett writes:

> "The District comments on this plan are as follows: The plan appears adequate to minimize accelerated soil erosion and sedimentation, if properly implemented and maintained during the construction phase."

At the hearing, Mr. Barnett seemingly did object to paragraph 10 of the permit, which states that the work authorized by the permit need not be completed until December 31, 1983 (N.T. pp. 115-6). Mr. Barnett apparently felt that delaying full implementation of sedimentation and erosion control plans for so long a period could cause serious deterioration of the culvert's flow capacity. He even suggested that this paragraph 10 of the permit—if interpretable as allowing the permittee to delay completion of the permit's sedimentation and control requirements to December 31, 1983—might be in conflict with provisions of the Clean Streams Law. However, this suggestion never was followed up by appellant; certainly there was no showing that DER should have insisted the channel stabilization be completed before December 31, 1980, or that failure to fully stabilize by December 31, 1980 already had adversely affected the culvert's flow capacity. Mr. Barnett's own June 27, 1980 letter, referred to above, does not suggest that an early time limit be placed for completion of erosion and sedimentation controls. Consequently the board once again holds that an argument made by appellant—in this instance the argument that the culvert is being inadequately maintained—cannot justify sustaining the appeal.

To recapitulate, the discussion to this point first has explained the reasons for rejecting appellant's main claim that DER incorrectly calculated the needed flow capacity of the arch culvert during a 100 year frequency storm, and then has gone on to explain why appellant's three subsidiary arguments (1) - (3)

stated earlier also have been rejected. This does not conclude the discussion, however; appellant put forth a number of other arguments which must be examined.

During the hearing, and in his post-hearing brief, appellant claimed that under the terms of 25 Pa. Code §105.26(a) DER should have revoked the arch culvert permit which is the subject of this appeal, because—appellant further claimed—the permittee had not complied with the terms of the September 9, 1980 consent order signed by DER, the Cargnonis and the permittee, made part of the record as appellant's Exhibit 4 (actually appellant never formally introduced this consent order into evidence, but the board has taken judicial notice of its contents, as permitted under its rules and regulations, 25 Pa. Code §21.109). Since DER has not revoked the permit, appellant now asks this board to order the revocation.

The regulation 25 Pa. Code §105.26(a) reads:

> "(a) Failure to comply with any provision of this chapter, any order of the Department, or any term or condition of a permit issued pursuant to this chapter will be cause for the Department to revoke or suspend any permit."

This regulation is part of Subchapter A. General Provisions, in Code Chapter 105. Dam Safety and Waterway Management, issued under the authority of the Dam Safety and Encroachments Act. Consequently this regulation could be pertinent to DER's handling of this permit. However, Mr. Busack was the only witness to be asked specifically whether there had been compliance with the September 9, 1980 consent order, which requires that various restorations of the stream channel in the vicinity of the previous pipe culvert be completed no later than September 30, 1980. He testified, relative to his December 31, 1980 visit to the site (N.T. p. 202):

> "I would interpret my site inspection to indicate that for the most part the site is in compliance with that order. There are some minor deviations, such as the stabilization of the right bank, which haven't been completed."

It is doubtful that this testimony, taken at face value, states a sufficient degree of noncompliance with the terms of the consent order to make DER's refusal to revoke the permit under 25 Pa. Code §105.26 an abuse of DER's discretion. Furthermore, the holding of George Eremic v. Commonwealth of Pa., DER, 1976 EHB 324, makes it highly questionable that DER's refusal to revoke the arch culvert permit under the terms of 25 Pa. Code §105.26(a) is an appealable action which this board can review, even recognizing that the Eremic holding may have been somewhat weakened by Newlin Township v. Commonwealth of Pa., DER, 1979 EHB 33, 56-57. Nevertheless, the board has decided that a ruling on the merits of this noncompliance claim of appellant's would be unwarranted at this time, and might have unjustified res judicata implications. Instead, the board has chosen to reject this claim on procedural grounds, which are ample. The claim that the permit should be revoked was first raised by appellant at the hearing. Appellant's original appeal and his pre-hearing memorandum mention neither revocation nor 25 Pa. Code §105.26. The board rules, therefore, that the issue of the revocation of the arch culvert permit granted to permittee is not part of the subject matter of appellant's present appeal.

In his post-hearing brief appellant argues that in approving the arch culvert permit DER had broken a promise it had made to appellant and other residents of the area that a bridge would be erected over Thoms Run, not a culvert within the stream. Apparently appellant feels that this allegation, if substantiated implies DER abused its discretion in granting the permit. The board rejects this implication. Furthermore, the allegation is unsubstantiated. Appellant's primary evidence in support of the allegation consists of a statement by Wanda L. Vettorel to the effect that she was present at a meeting June 11, 1980 between citizens in the area and DER representatives where, according to Ms. Vettorel (N.T. pp. 23-24)

> "Statements were made by Larry Busack in regard to trying to remove the obstruction from the stream and install a bridge, something that would be serviceable to Mr. Cargnoni and not obstruct the stream in the area where our constituents live."

In addition, paragraph 2b of the aforesaid consent order, in listing the restorations to be performed on the stream channel, contains the phrase "where the proposed bridge is to be erected". Even if Ms. Vettorel's testimony is taken to be an admission by a party-opponent, and therefore not hearsay, these items of evidence are very slender reeds in support of the allegation that DER made a binding promise to approve a bridge, not a culvert. Appellant offered no evidence that Mr. Busack was authorized to bind DER, or that DER legally could make a binding promise to the citizens in derogation of the permittee's legal rights. Appellant himself, in the course of argument during the hearing, stated that whatever agreement was reached at the meeting was not in writing (N.T. p. 10). Although appellant called Mr. Busack as his own witness, he never asked Mr. Busack whether Mr. Busack had made the statement attributed to him by Ms. Vettorel; indeed throughout Mr. Busack's prolonged questioning there was not the slightest mention of events at the June 11, 1980 meeting. All in all, this argument of appellant's, namely that DER broke a promise to the citizens, has neither the legal nor evidentiary basis needed to justify a holding that DER abused its discretion in granting the permit.

Appellant also argued vigorously that the permit should not have been granted because the culvert also was being used as a bridge; this use, for which the cover over the culvert was designed, was attested to by Mr. Busack and Mr. Kasmer (N.T. pp. 221 and 397). However, appellant—although repeatedly urged by the hearing examiner to address the issue in his post-hearing brief—never explained clearly why the culvert's use as a bridge should have been reason for DER to refuse the permit. Apparently appellant fears that this use as a bridge may damage the culvert and thereby adversely affect its flow capacity (N.T. p. 394), but appellant never

pointed to a regulation, relevant to the culvert's functioning as a bridge, which DER was required to consider and did not consider before granting the permit. The DER regulations governing culverts, issued under the authority of the Dam Safety and Encroachments Act, happen to lie in a subchapter to 25 Pa. Code Chapter 105 titled "C. Culverts and Bridges". Nonetheless, nowhere in this subchapter is there any indication that DER should have examined the load-bearing capacity of the culvert's cover before approving the permit. Mr. Busack, without contradiction or challenge by appellant, testified as follows (N.T. pp. 223-4):

> "THE HEARING EXAMINER: ... Do the regulations for designing a culvert, do they include regulations or specifications, or some kind of rules for the cover and the load-bearing capacity of the cover?
>
> THE WITNESS: There are no regulations that require submission of information as to the load-carrying capacity of the structure. If there are obvious structural deficiencies, they are pointed out to the permittee at the time of the review, but the structural capacity is totally up to the design engineer. Our review process deals mainly with the hydraulic capacity of the culvert, the capacity of the culvert to pass expected flood flows without substantial flood hazards.
>
> THE HEARING EXAMINER: Is there a requirement for a highway permit, or something like that, when something like this is designed and trucks are going to go over it?
>
> THE WITNESS: If such a permit is required, it is required by an agency other than DER."

Despite this testimony of Mr. Busack's, it is probable that 25 Pa. Code §105.161, which reads:

> "(a) Bridges and culverts shall be designed and constructed in accordance with the following criteria: ...
> (2) The structure shall not create or constitute a hazard to life or property, or both."

forbids DER to approve a permit application for a culvert whose design makes it obviously likely to collapse. However, appellant presented no evidence that this culvert's load-bearing functions were likely to collapse it, or to otherwise adversely affect the culvert's flow capacity. Therefore, Appellant has made no

showing whatsoever, that DER abused its discretion or acted arbitrarily in granting this permit although the culvert was to be used as a bridge.

In his brief, appellant offers a second basis for requesting revocation of the permit, this time his belief the culvert is in violation of 25 Pa. Code §105.166(b), which states:

> "Culverts shall be of sufficient width to minimize narrowing of the stream channel."

Appellant's only argument in support of revocation on the grounds of this regulation is: "This culvert has definitely narrowed the stream channel." The inadequacy of this allegation that there has been narrowing of the stream channel (even if there had been good evidence in support of the allegation, which there was not) to support a claim that the culvert has not minimized narrowing of the stream channel is obvious. Consequently, this claim of appellant's can be dismissed unhesitatingly, whether or not the board has the authority to review DER's failure to revoke the permit, as discussed earlier in connection with the Eremic and Newlin Township holdings. The claim would merit equally unhesitating rejection if appellant had argued that approval of the permit in the face of 25 Pa. Code §105.166(b) represents an abuse of DER's discretion.

Finally, appellant has argued, in his brief and during the hearing, that the proper standard for design of the arch culvert should be capacity to handle the 100-year frequency flood flow, rather than the 50-year frequency flood flow DER believes the regulations require (N.T. p. 212). The arch culvert is 90 feet long (N.T. pp. 211-12). Therefore, by 25 Pa. Code sections 105.141 and 105.142, the culvert is governed by Subchapter C of 25 Pa. Code §105.161(c), which reads:

> "(c) The general criteria for design flows are as follows:
> (1) Rural area--25-year frequency flood flow.
> (2) Suburban area--50-year frequency flood flow.
> (3) Urban area--100-year frequency flood flow."

What little testimony was developed at the hearing on the character of the community in the neighborhood of the arch culvert is wholly consistent with the determination that the area is far from urban, and appellant admits as much in his brief, wherein he writes:

> "A fifty year frequency would be inadequate for this area which has great potential for urban growth."

Nevertheless, appellant argues that the urban area design standard should have been used because §105.161(d) requires DER to take into account the area's potential for development during the anticipated life of the arch culvert. However, appellant produced no testimony showing that development into an urban area was likely in the vicinity of this particular culvert. In any event, DER's Mr. Busack and Mr. Farooq each testified the culvert would handle the 100 year frequency flood flow. Mr. Busack's explicit testimony was:

> "Q. Do you know what the design standard, as specified in the regulations, is for this culvert?
>
> A. For a culvert in this particular location, design standard of 50 year flood is adequate.
>
> Q. And then, could you tell me why it is that we have been discussing the hundred year flood flow?
>
> A. Basically, when I do a field analysis, I simply rely on the hundred year flood exclusively to determine if there is a flooding impact, figuring that if a structure is adequate for the hundred year flood, it will be adequate for the 50 year flood."

On these facts, there are absolutely no grounds for holding DER abused its discretion when it interpreted the regulations as requiring merely a 50 year frequency storm design standard for this particular culvert, rather than the 100 year frequency design standard appellant advocates.

In sum, the board sympathizes with appellant and the other residents of the area, who have suffered flooding in the past. But appellant definitely has not met his burden of showing that DER abused its discretion in granting the permit.

In particular, there has been no showing that DER's approval of this arch culvert permit will increase the risk of flooding by even a 100 year frequency storm.

CONCLUSIONS OF LAW

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

2. The purpose of the board's review is to determine whether DER has committed an abuse of discretion or an arbitrary exercise of its duties or functions.

3. The burden of proof when a third party appeals DER's grant of a permit is on the appellant.

4. DER's failure to take into account the possibility that the culvert will be clogged by debris before approving the permit for its construction was not an abuse of discretion nor an arbitrary exercise of DER's duties or functions.

5. Whether or not the culvert whose construction had been approved is being installed and maintained in accordance with the permit's requirements is irrelevant to the issue of whether the permit was properly granted.

6. Whether or not failure to meet the requirements imposed by the permit can adversely affect the culvert's flow capacity is irrelevant to the issue of whether the permit was properly granted.

7. The claim that DER should have revoked the permit because of permittee's alleged noncompliance with a prior DER order, first raised by appellant at the hearing on this appeal from DER's approval of the permit, is not part of the subject matter of this appeal.

8. The DER regulations governing this 90 foot long arch culvert are contained in Subchapter C of 25 Pa. Code Chapter 105.

9. In granting the permit under the regulations in Subchapter C to 25 Pa. Code Chapter 105, DER did not abuse its discretion merely because the culvert also was to be used as a bridge.

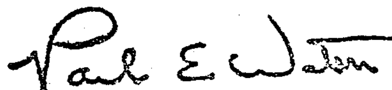
10. The proper standard for design of this 90 foot long culvert is the 50 year frequency flood flow standard of 25 Pa. Code §105.161(c)(2).

11. DER's issuance of this permit was not an abuse of discretion or an arbitrary exercise of DER's duties or functions.

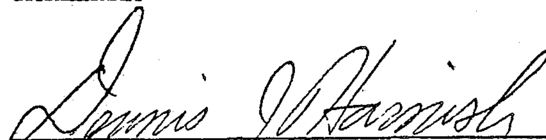
ORDER

AND NOW, this 30th day of April, 1981, the appeal in the above matter is dismissed.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman



DENNIS J. HARNISH
Member

DATED: April 30, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

DASET MINING CORPORATION	:	Docket No. 78-102-B 78-103-B 79-112-B 79-113-B
v.	:	Surface Mining
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES		

ADJUDICATION

By the Board, July 29, 1981

This matter involves two appeals by Daset Mining Corporation from the Department of Environmental Resources' (DER) refusal to issue a surface mining permit under the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.S. 1198, *as amended*, 52 P.S. §1936.1 *et seq.* (Surface Mining Act) for an operation adjacent to Crooked Creek State Park in Burrell Township, Armstrong County.

Two additional appeals by Daset at Docket Nos. 78-103 and 79-113 were consolidated here. They concern DER's refusal to issue a surface mining permit for an operation in Oliver Township, Jefferson County, for reason that appellant's application did not include a supplemental "C", consent to entry, form. During the hearings appellant decided not to pursue these appeals and therefore they are dismissed.

This controversy was first brought before this board through an appeal by Daset on August 25, 1978 from a refusal by the DER to act on Daset's pending permit application. DER responded to the appeal by a motion to quash alleging that this board lacked jurisdiction because the DER had not yet acted on the application for permit. DER contended that the appellant was not aggrieved because DER was merely "refraining from reviewing" the application until Daset rectified alleged violations of the Surface Mining Act at its existing surface mining operations. We denied DER's motion as spurious. We held that a refusal to act on a permit application is unquestionably a decision of the DER appealable to this board under Section 1921-A of the Administrative Code, Act of April 9, 1929, P.L. 177, *as amended*. (Opinion and Order Sur Petition to Quash Appeal dated June 7, 1979.) Thereafter, the DER by letter dated July 13, 1979 formally denied Daset's application. Daset appealed that denial at Docket No. 79-112. The appeal was consolidated with Daset's prior appeal and set for hearing. DER's reason for the denial, as set forth in the July 13, 1979 letter, is that the location of the operation immediately adjacent to the boundaries of Crooked Creek State Park is precluded by state and federal law against mining within 300 feet of a public park.

Thirteen days of hearings were held on the appeal and both parties submitted post-hearing briefs containing proposed findings of fact and conclusions of law. There was an extensive delay between the completion of the hearings and the submission of post-hearing briefs because of a change in counsel by both the appellant and DER and their need to become familiar with the voluminous record.

Based on the entire record, we hereby find as follows:

FINDINGS OF FACT

1. Appellant, Daset Mining Corporation (Daset) is a corporation, organized and existing under the laws of the Commonwealth of Pennsylvania, with its principal place of business in Delmont, Pennsylvania.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, the Commonwealth agency which has the responsibility to issue permits for surface mining operations under the Surface Mining and Conservation Act, *supra*, and The Clean Streams Law, the Act of June 22, 1927, *as amended*, P.L. 1987, 35 P.S. §691.1 *et seq*.

3. Daset is one of three Pennsylvania corporations owned by the Jacobs family. The other two are Jacobs Contracting Corporation and Armstrong Land Company.

4. Seaborn Jacobs is the president of the three Jacobs' family corporations. His two sons, Terrence and Darryl, are the secretary and treasurer respectively of all three corporations. These three men are also the directors of each corporation as well as the sole shareholders of each.

5. A parcel of property located in Burrell Township, Armstrong County known as the Dilick property was leased to Messrs. Batistig and Liperote for surface mining purposes.

6. Bastistig and Liperote formed the Darmac Corporation for the purpose of mining in Pennsylvania.

7. The Jacobs family negotiated an assignment of the Dilick property lease from Batistig and Liperote to Armstrong Land Company which solely engages in the business of owning real estate. Daset was to mine Dilick as a subcontractor under Armstrong.

8. Daset submitted applications for mine drainage and mining permits for the Dilick operation on May 23, 1977. The mine drainage permit application number was 35(a)76SM8. The mining permit application number was 1551-8.

9. A mine drainage permit for the Dilick operation was issued to Daset on June 20, 1977.

10. The Pittsburgh and West Virginia Coal Company loaned to Armstrong and Daset a total of $200,000 to help complete its lease and royalty transactions and to perform the mining.

11. Between August 1975 and December 1977 Daset was issued five mining permits and four mine drainage permits to mine within twenty-five feet of the boundary of Crooked Creek State Park.

12. On August 3, 1977 the Federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §1201 *et seq*. became law.

13. By letter dated January 12, 1978 appellant was informed that its application for a permit for the Dilick site could not be approved unless it was modified to delete the area in the application within 300 feet of the Crooked Creek State Park boundary because Section 522(e)(5) of the Federal Surface Mining Control and Reclamation Act prohibited mining there.

14. Crooked Creek Lake is a body of water located on lands condemned by the United States government for flood control purposes.

15. There are 2,667 acres of federal land surrounding Crooked Creek which are officially designated "Crooked Creek Lake".

16. Of the 2,667 acres of federal land, 2,440 acres are leased to the Commonwealth of Pennsylvania for recreational purposes. The acreage leased to the state in part borders on the Dilick site.

17. Crooked Creek Lake is administered by the U.S. Army Corps of Engineers for flood control purposes.

18. The Pennsylvania Fish Commission conducts fish conservation and fish stocking operations at Crooked Creek Lake.

19. The DER's Bureau of State Parks enforces the laws of the Commonwealth within the boundaries of Crooked Creek State Park and maintains recreational activities at the park.

20. The Dilick property is bounded by Crooked Creek State Park.

21. Appellant owned all rights to the coal on the Dilick property prior to March 1977.

22. Appellant sustained substantial financial obligations in exchange for the right to mine the coal on the Dilick property.

23. At today's coal prices it is economically infeasible to limit coal mining to that part of the Dilick property more than three hundred feet from Crooked Creek State Park.

24. The Dilick property within 300 feet of the Crooked Creek State Park boundary contains approximately 150,000 tons of coal.

25. The landslide that occurred in February 1976 below a haul road constructed by appellant as part of the Meyers-Davis operation resulted from appellant's construction of the haul road and the movement of trucks and heavy equipment on the road.

26. The DER and appellant on March 31, 1976 signed an agreement which required appellant to reclaim the landslide area, pay $2,500 to a surface mining reclamation fund and post a $1,500 bond.

27. After the March 31, 1976 agreement between DER and appellant, the DER re-instated appellant's Meyers-Davis permit.

28. The landslide did not preclude DER from issuing a surface mining permit to appellant during the period May 23, 1976 to August 3, 1976.

29. A discharge of sediment from a surface mining operation of appellant in Plum Borough, Allegheny County did not prevent the DER from issuing a suface mining permit to appellant.

30. The evidence adduced at hearing did not establish that appellant mined coal on federal lands during its Fleckinger operation.

DISCUSSION

Crooked Creek State Park was created in the early 1950's from lands surrounding a lake formed by a United States Army Corps of Engineers flood control dam. The park includes 2,400 acres of land condemned by the federal government for flood control and later leased to the state on condition that the lands be used for parks and recreation. The park has facilities for boating, fishing, hunting, picnicking, hiking, camping and cross-country skiing. Appellant requests a permit for a surface mining operation on a parcel of land near the park, known as the Dilick property, and DER has denied the application alleging that the application proposes mining within 300 feet of Crooked Creek State Park contrary to state and federal law.

Initially, appellant disputes DER's contention that the Dilick property borders Crooked Creek State Park. Appellant agrees the property borders lands condemned by the United States for the flood control project, but it argues that the lands were never dedicated as part of the park. In support of its position, appellant contends that the DER, the state agency responsible for maintaining the state parks, never considered the lands a park and that the Commonwealth never added any facilities or made any improvements to areas within four miles of the Dilick site.

It appears that the bureau of DER responsible for issuance of surface mining permits did not consider the land in question to be state park lands prior to review of this application as it had previously issued other permits for operations adjacent thereto including a mine drainage permit for this site on June 20, 1977.[1] Also appellant is correct when it states that the area has no features or characteristics which would suggest it is part of a state park complex. The nearest camp sites, picnic tables and bathing areas are over ten miles away and there are no signs denoting the area as a park within five miles. Two park officials were called by the DER to testify to the state park boundaries: Douglas Hoehn, the park superintendent and Harlem Grafton, the park facilities manager for the United States Army Corps of Engineers. Hoehn is responsible for the operation and maintenance of the park as well as its chief law enforcement officer. He testified that he is familiar with the boundaries and has at times walked the park boundaries. Grafton testified that he has been over the boundary area many times and knows its location as well as anyone. Both officials testified that the Dilick property borders Crooked Creek State Park lands. Based on their testimony we find that the Dilick property borders Crooked Creek State Park. Their uncontradicted testimony is of greater weight and more persuasive than the inferences the appellant wishes us to draw from the actions of the Bureau of Surface Mining and the undeveloped state of the area.

The Commonwealth statute on which DER relies to support its denial is Section 4.2(c) of the Pennsylvania Surface Mining Act. Section 4.2(c), as it

---

1. Two permits are required for every surface mine, the surface mining permit at issue here and a mine drainage permit which approves mine drainage plans and treatment facilities.

was in effect during the period relevant to this matter, provides in pertinent part:

> "[N]o operator shall open any pit for surface mining operations (other than borrow pits for highway construction purposes) within one hundred feet of the outside line of the right-of-way of any public highway or within three hundred feet of any occupied dwelling house unless released by the owner thereof, or any public building, school, park or community or institutional building or within one hundred feet of any cemetery or of the bank of any stream."
> (Emphasis supplied)

DER interprets Section 4.2(c) to prohibit mining within 300 feet of a state park whereas appellant interprets Section 4.2(c) to prohibit mining within 300 feet of a park building. This board previously addressed this question in *Kerry Coal Company v. DER*, EHB Docket No. 77-083 and 77-084-C (March 9, 1979). We agreed with the DER's position, holding that the subject of the statutory limitation is the park itself and not merely the buildings thereupon. We reasoned that the word park is one in a series of nouns not a co-ordinative adjective which modifies the noun, building. We suggested that the legislature, in attempting to limit the openings of a pit for surface mining, would not include the buildings in a valuable natural resource like a park and ignore the park land itself.

Our interpretation was subsequently found to be in error by Commonwealth Court. The Court held in *Kerry Coal Company v. DER*, ___ Pa. Commonwealth Ct. ___, 425 A.2d 46 (1981) that "park buildings" are the subject of the statutory protection as the work "park" must be read as an adjective modifying word "building". Thus, Section 4.2(c) of the Pennsylvania Surface Mining Act, as interpreted by the Commonwealth Court does not prohibit Daset from mining the Dilick property adjacent to Crooked Creek State Park.

This is not the end of the analysis, however. DER also relies upon Section 1272(e) of 30 U.S.C.A. which states in pertinent part that:

> "After enactment of this Act[2] and subject to valid existing rights no surface coal mining operations except those which exist on the date of enactment of this Act shall be permitted--...(5)...within three hundred feet of any...public park..."

It seems clear to us that the federal act prohibits mining within 300 feet of any public park rather than park building subject to "valid existing rights".

The issue here, therefore, is whether appellant's application is subject to "valid existing rights". A valid existing right has been defined by federal regulation, 30 C.F.R. 761.5 as follows:

> "Valid existing rights means:
>
> (a) Except for haul roads,
> (1) Those property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract or other document which authorizes the applicant to produce coal by a surface coal mining operation; and
> (2) The person proposing to conduct surface coal mining operations on such lands...
> (i) Had been validly issued, on or before August 3, 1977, all State and Federal permits necessary to conduct such operations on those lands...."

Appellant owned all rights to the coal on the Dilick property prior to March 1977 and it had sustained substantial financial obligations in exchange for the right to mine the coal. Armstrong Land Company, a real estate company owned by the Jacobs family, paid $100,000 for the Dilick lease in March 1977 and since that time has been paying $500.00 per month for advanced coal royalties. Appellant also purchased a new dragline for $509,500 to mine Dilick. Appellant estimates that investments and obligations incurred by Daset and Armstrong in order to mine Dilick represent in excess of 25% of the combined net worth of Daset Mining Corporation, Jacobs Contracting Corporation and Armstrong Land Company, the three Jacobs family corporations.

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2. The Act became law on August 3, 1977.

Appellant's total investment is at stake inasmuch as a proscription against mining the Dilick property within 300 feet of the Crooked Creek park boundary precludes mining any of the Dilick parcel. At today's coal prices, it is economically infeasible to mine only that area outside three hundred feet because the amount of cover above the coal increases as the distance from the border increases. The difference between mining and not mining is 150,000 tons of coal i.e. 650,000 tons as opposed to 500,000 tons. The cost of removing the increased cover while not being able to recover the 150,000 tons most easily reached makes mining Dilick infeasible.

Since Daset had purchased the right to mine the coal in the Dilick property prior to August 3, 1977, it has a valid existing right to mine the total parcel including the area within 300 feet of the Crooked Creek State Park boundary if it can meet the second part of 30 C.F.R. 761.5, that is, if it had acquired the permits needed to mine prior to August 3, 1977.

Appellant applied to DER for both the mine drainage permit and the surface mining permit on May 23, 1977. The mine drainage permit was issued on June 20, 1977. The surface mining permit was never issued and is the subject of this appeal. Appellant contended throughout the hearing and by post-hearing brief that the DER abused its discretion by refusing to act on its surface mining permit application prior to August 3, 1977. The DER responded to appellant's contention in its July 13, 1979 permit denial letter when it stated that appellant had not accrued an entitlement to the surface mining permit prior to August 3, 1977 because the issuance of a mining permit is not a ministerial duty but is discretionary with the DER, and, in the exercise of its discretion, the DER did not act on its permit application because of a violation of law involving a landslide beneath a haul road constructed by appellant.

The DER's characterization of its duty to issue permits as discretionary rather than ministerial is meaningless in the context of this case. The DER is clearly required to act on a permit application. Section 4(2)(b) of the Pennsylvania Surface Mining Act states "upon receipt of an application, the [DER] shall review same...should the secretary object to any part of the proposed, he shall promptly notify the operator by registered mail of his objections, setting forth his reasons therefore, and shall afford the operator a reasonable opportunity to...take such actions as may be required to remove the objections."

DER's allegation of noncompliance by appellant with the Surface Mining Act during the period between May 23, 1977, when the application was submitted, and August 3, 1977 resulted in a substantial amount of testimony over appellant's compliance status during that period, and, a fortiori, whether the DER abused its discretion by not issuing a permit before the August 3, 1977 cutoff date. The issue appeared to be mooted by a decision of the United States District Court for the District of Columbia that interpreted the federal surface mining regulation defining valid existing right. *In re Permanent Surface Mining Regulation*, _____ F. Supp. _____ (D.C. _____ 1980) _____ No. 79-1144, _____ Feb. 26, 1980, aff'd. _____ F.2d _____ (D.C. cir. _____ 1980), No. 80-13080, July 10, 1980, the Court held that:

> "a good faith attempt to obtain all permits before the August 3, 1977 cut-off date should suffice for meeting the all permits test."

Since appellant had submitted its applications for the permits prior to August 3, 1977, it would appear that appellant has satisfied all the conditions of 30 C.F.R. 761.5 and should be found to possess a valid existing right to mine the entire Dilick parcel.

Nonetheless, DER in its post-hearing brief, continues to argue that non-compliance by appellant with the Surface Mining Act during the period May 23, 1977 to August 3, 1977 precludes a finding that appellant made a good faith attempt

to obtain the surface mining permit because Section 4(2)(b) of the Surface Mining Act prohibits the DER from issuing a permit to an applicant who operates an existing surface mine in violation of the Surface Mining Act. Section 4(2)(b) of the Surface Mining Act provides in pertinent part:

> "No application shall be approved with respect to any operator who has failed and continues to fail to comply with the provisions of this act...or with the terms and conditions of any permit issued under 'The Clean Streams Law' of June 22, 1937 (P.L. 1987), as amended, or where any claim is outstanding against any operator...under this act..."

The violation the DER referenced in its July 13, 1979 denial letter involved a landslide which occurred as a result of appellant's construction of a haul road on a hillside leading to a surface mining operation known as the Meyers-Davis operation in the Crooked Creek State Park area. The landslide incident resulted in the suspension by DER of the Meyers-Davis permits. It is clear from the record that the landslide was caused by appellant's construction of the haul road. DER presented the testimony of Alfred E. Whitehouse, a geologist who inspected the landslide area for the U.S. Army Corps of Engineers. He testified, as an expert, that the landslide resulted from the cut into the hillside and the movement of trucks and heavy equipment on the haul road. Waterways patrolman James Smith testified to his observations of the landslide and its effect on Crooked Creek. He testified that ground from the hillside slid into Crooked Creek. Smith also testified that spoils and other earthen materials from the mine site were used by appellant to construct a berm along the haul road, and those materials slid down the hillside into the stream. Because of the incident Smith caused a summary violation to be issued against appellant on April 7, 1976. Appellant was adjudged guilty of polluting Crooked Creek and assessed a fine.

The issue here is not whether appellant caused the landslide in 1976 but whether appellant, as a result of the landslide, continued to be in a state of noncompliance with the Surface Mining Act during the review period of May 23, 1977 to August 3, 1977 and therefore DER was precluded, as a matter of law, from issuing the permit before the effective date of the federal legislation. We find that the landslide did not preclude DER from issuing the permit. In point of fact, DER's own actions during that period refute the allegations that appellant was in a state of noncompliance affecting its capability to receive a surface mining permit. The DER signed an agreement with appellant on March 31, 1976 requiring appellant to reclaim the landslide area, pay $2,500 to the Surface Mining Fund and post a $1,500.00 bond. Subsequent to signing the agreement, appellant's Meyers-Davis permit was re-instated and on March 24, 1976 DER wrote a letter to appellant stating that appellant was, at that time, in compliance with the law at the Meyers-Davis operation. Reports of subsequent inspections of the landslide area by William A. Shay, the state surface mine inspector for the Armstrong County area did not indicate any violations. His report on May 3, 1977 stated that the slide had been cleaned up "except for about 20%". His July 20, 1977 report stated that most of the slide was cleaned up and on September 15, 1977 he reported that the slide was completely cleaned up. Shay testified that he did not place appellant's operation in a noncompliance status during the period because appellant was, in his opinion, proceeding satisfactorily with the reclamation. Jim Smith, the waterways patrolman, testified that he considered the incident closed after the summary conviction in April 1976 and the execution of the agreement between appellant and DER. Also, the DER keeps a "violation docket" listing all violations by surface mining operators that are noted or cited by the inspectors. The docket is used as a reference for,

among other reasons, permit approval. The docket did not list appellant as being in noncompliance during the review period. Perhaps even more telling, DER did issue a permit to appellant during the period. On June 20, 1977 the mine drainage permit for the Dilick operation was issued to appellant. In fact, from March 1976 to March 1980 Jacobs Contracting and Daset Mining Corporation have received from DER in excess of 30 mining permits. During the review period, Jacobs Contracting and Daset were conducting surface mining operations at five different sites under five different permits from DER. Moreover, the DER never took any enforcement action against appellant for either the landslide or for a violation of the agreement to reclaim the landslide affected area. We therefore find that the record does not support an allegation of noncompliance during the review period which would have prohibited the DER from issuing to appellant the surface mining permit.

The DER presented evidence of two other occurrences which it contends constitute violations occurring during the review period. Initially, we note that appellant was not given any notice prior to the hearing that the denial of the permit was in any way related to these incidents or that they would be argued to this board as a basis for the permit's denial. In fact, the DER had never notified appellant that it considered them to be violations of law. We would therefore be hesitant to deny appellant a permit based on those occurrences because of the unfairness of raising incidents for the first time thirty months after their occurrence and the obvious difficulty of rebutting such allegations. However, we need not address the issue as DER did not show, in either instance, that a violation occurred.

The first alleged violation pertains to a discharge of sediment from an operation located in Plum Borough, Allegheny County. In support of its allegation DER presented testimony of a security officer from the Pennsylvania

Fish Commission. He testified that he observed siltation from the operation discharge across Route 48 and then into a tributary of Pucketa Creek. The officer never visited the actual operation, never notified the operator nor did he notify the DER. He did not spend more than twenty minutes at any one time investigating the incident. In contrast, the area surface mining inspector testified that he observed the siltation, noted that it occurred after a heavy rain and observed appellant cleaning it from Route 48. He did not find the problem to be severe enough to report as a violation. Neither the DER nor the Fish Commission ever notified appellant that they believed the siltation incident constituted a violation of law.

The second incident involves an allegation that appellant mined federal lands while operating a site in Burrell Township, Armstrong County known as the Fleckinger operation. This allegation was investigated by an investigator from the U.S. Department of Interior, Office of Surface Mining, as a result of a citizen complaint. He concluded that appellant neither mined coal on federal property nor mined off its permit area.

In sum, the DER did not show that there existed any violation of the Surface Mining Act which prohibited the issuance of a surface mining permit to appellant prior to the August 3, 1977 effective date of the federal surface mining legislation.

The gist of this case is that the DER denied appellant a permit to mine within 300 feet of a state park boundary because it interpreted a Pennsylvania statute and a federal regulation to prohibit the mining. However, subsequent interpretations of the Pennsylvania statute by the Pennsylvania Commonwealth Court and the federal surface mining regulation by the United States District Court showed the DER interpretation to be incorrect. Accordingly, we find the DER's denial of the permit to be in error and we remand the matter to DER to act on appellant's surface mining application No. 1551-8 in accord with this opinion.

CONCLUSIONS OF LAW

1. This board has jurisdiction over the subject matter of these proceedings and the parties thereto.

2. Section 4.2(c) of the Pennsylvania Surface Mining and Reclamation Act, in effect during the period relevant to this matter, does not prohibit mining within 300 feet of a state park boundary; rather, Section 4.2(c) prohibits mining within 300 feet of a park building.

3. Appellant had a valid existing right to surface mine coal within 300 feet of Crooked Creek State Park on the date of enactment of the Federal Surface Mining Law.

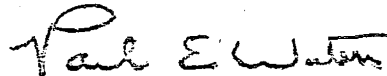
4. Appellant was not operating its surface mining operations in noncompliance with the law during the period May 23, 1977 to August 3, 1977 and thus its compliance status did not prevent DER from issuing a permit to surface mine the Dilick parcel of property.

ORDER

AND NOW, this 29th day of July, 1981, appellant's appeals at Docket Nos. 78-102 and 79-112 are sustained and DER's denial of Surface Mining Permit No. 1551-8 is reversed. The matter is remanded to the DER for the issuance of Permit No. 1551-8.

Appellant's appeals at Docket Nos. 78-103 and 79-113 are dismissed for failure of appellant to prosecute same.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
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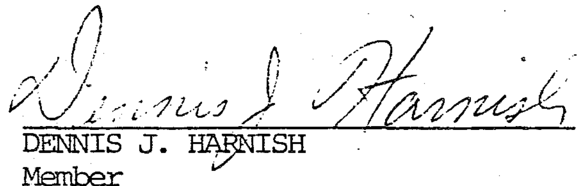

DENNIS J. HARNISH
Member

DATED: July 29, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

FOSSIL FUELS, INC.

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Docket No. 80-222-H

Surface Mining Transfer
Application §§99.11, 99.22

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

By: Dennis J. Harnish, Member, June 19, 1981

This matter involves the appeal of Fossil Fuels, Inc. from DER's denial of appellant's application to transfer a mine drainage permit.

FINDINGS OF FACT

1. Appellant is Fossil Fuels, Inc., a Pennsylvania corporation with its principal place of business at R. D. #9, Box 251, Greensburg, Pennsylvania 15601, and telephone number of (412) 834-6622.

2. This appeal is brought to review the November 21, 1980 denial of appellant's transfer application by Thomas R. Vayansky, district mining manager, DER. The transfer application which was filed on or about July 20, 1980 was to transfer mine drainage permit 3474SM64 from Morcoal Company to Fossil

Fuels, Inc. This permit covers a mining site located near the village of Chaintown in South Huntingdon Township, Westmoreland County.

3. In a letter dated August 29, 1980, Nancy DiMeolo, geologist for the Department of Environmental Resources, Environmental Protection Bureau of Mining and Recreation, Armburst Professional Center, Greensburg, Pennsylvania, indicated that "in order to transfer the above referenced mine drainage permit, Morcoal Company must place the corporate seal on a notarized Release Letter" and Fossil Fuels must submit corrected mine maps. (Emphasis added.)

4. Philip K. Evans and Fossil Fuels, Inc., relying on Nancy DiMeolo's letter of August 29, 1980, and subsequent telephone conversation indicating that approval would be granted to the transfer of the permit upon receipt of the requested corrected mine maps, had his consulting engineer, Penn-Laurel Association, Inc., revise the mine maps in conformity with her request.

5. By letter dated September 22, 1980 signed by Randall L. Musser, vice-president of Penn-Laurel Association, Inc., a strip mine consulting and engineering firm, Fossil Fuels, Inc. submitted to DER the corrected maps to deal with the issues outlined in the letter of August 29, 1980 from Nancy DiMeolo, DER geologist.

6. In the spring of 1980 Donald J. Zutlas a DER official had advised Mr. Evans not to submit applications and fees for license and bonds unless and until the transfer application had been approved. On or about October 1, 1980, Nancy DiMeolo, DER geologist, informed the appellant by a telephone call to Philip K. Evans, appellant's president, that everything for the transfer was completed and approved, that the appellant should submit its bonds and license to the DER.

7. Philip K. Evans traveled to Harrisburg on or about October 12, 1980, and submitted his bonds, certificate of deposit and license for the site. Philip Evans paid the $500.00 to DER for his 1980 license.

8. The requested bonds were approved by DER director, J. Anthony Ercole and Donald J. Zutlas on October 20, 1980. Growth Savings Certificate No. M33103, dated October 9, 1980, drawn on Mellon Bank, Pittsburgh, Pennsylvania, payable to Philip K. Evans d/b/a Fossil Fuels, Inc., in the amount of $17,200.00 was assigned to DER. The bond was approved by Assistant Attorney General Duke Pepper.

9. Verification of the assignment of the certificate of deposit was delivered by DER to Philip K. Evans on October 22, 1980.

10. In the latter part of October, 1980, Nancy DiMeolo, DER geologist, telephoned Philip K. Evans, president of Fossil Fuels, Inc. and told him that DER had received Fossil Fuels' bond and license and that everything was fine and that "you will receive your permit very shortly, they (the bond and license) have been approved, it's just a matter of writing this particular area up."

11. The license fee in the amount of $500.00 was not refunded.

12. The Commonwealth of Pennsylvania continues to retain the bond money.

13. Mr. Evans acting on behalf of Fossil Fuels, Inc., in reliance on the approval of the transfer by DER officials, borrowed the amount of ten thousand dollars ($10,000.00).

14. In further detrimental reliance the appellant moved the equipment to the site, purchased additional equipment and changed his position regarding other activities and work.

15. Mr. Randall L. Musser, is the vice-president of Penn-Laurel Associates, Inc., and is a licensed surveyor and a licensed registered engineer. Mr. Musser prepared the application for transfer of the mine drainage permit in this case to Fossil Fuels, Inc. and prepared the maps and revisions requested by Nancy DiMeolo, DER geologist. Mr. Musser has been involved in the preparation of dozens of transfer applications.

16. The appellant was not informed by Nancy DiMeolo in her August 29th letter or by any other DER official at any time that the site was inactive until the rejection letter of November 21, 1980.

17. The application for transfer of a mine drainage permit does not contain any reference or question as to whether a site is "active" or "inactive".

18. The standard procedure in preparing a mine drainage permit transfer is to submit a letter of transfer, or a letter transferring the permit to the transferee, a letter accepting the responsibility of the permit, a mine drainage permit face sheet, and an exhibit sheet for the permit, as well as exhibits 1, 2, and 3 which deal with questions about the owners of the company, their previous mining experience, their previous mining associates. The exhibits also require identification of adjacent and affected owners. The mine drainage permit transfer face sheet is a form supplied by the department.

19. Mine drainage permits have been transferred by DER for sites which have never had mining initiated on them, and other mine drainage permits have been transferred for sites upon which the coal has been removed, and the site has been backfilled, and has been lying idle for a year.

20. The mine drainage permit covers 159.3 acres, the bonded area is 10.7 acres.

21. The data, as submitted by Fossil Fuels in its application, is inadequate for the following reasons:

(a) The mine drainage map incorrectly locates Township Road 690.

(b) A variance to mine or affect within 100 feet of the road has not been obtained by the applicant. (A variance was presented to the Hearing Board at the time of hearing.)

(c) The slopes of the area exceed 21° and no plan for steep slope mining is included.

(d) The sediment and erosion control plans submitted with the application are not site specific.

(e) As a result of the steep slopes and required buffer zones for the coal outcrop, the proposed ponds will not fit in the area.

(f) The discharge from the ponds will empty on the township road right-of-way, and there are no existing lateral drains to handle the drainage.

(g) The treatment ponds will discharge onto the proposed township right-of-way.

(h) No typical ditch design has been provided.

(i) Ditches above the proposed highwall are not shown on the plan.

(j) The method of conveying water across the area without emptying into the pit or creating erosion and sediment problems has not been addressed.

22. The department has never approved Fossil Fuels' transfer application in writing.

23. The data contained in paragraph 21 is required to demonstrate that the site could be mined without pollution.

24. The Chaintown site mined by Morcoal was the subject of DER's bond forfeiture as upheld, following hearing, by this board at *Morcoal Company v. DER*, EHB Docket No. 79-189-B (issued April 30, 1981).

DISCUSSION

This matter involves a mining site located in South Huntingdon Township, Westmoreland County near the village of Chaintown (Chaintown site) which site has recently been before us in another matter. In *Morcoal Company v. DER*, EHB Docket Number 79-189-B, we upheld DER's forfeiture of reclamation bonds for this site finding *inter alia* that this site had been opened but not reclaimed

and that sedimentation and erosion control measures had not been implemented which resulted in a discharge of silt into the nearby Jacobs Creek.

Mining at the Chaintown site had been initiated under mine drainage permit 3474SM64 which had been issued by DER to Morcoal in 1974. The present matter involves DER's denial of appellant's application to transfer the said permit to appellant. Apparently, appellant's efforts regarding the proposed transfer began in the spring of 1980. Mr. Philip K. Evans, president of appellant, testified that he initially contacted Donald J. Zutlas, chief of the licensing and bonding division, in DER's Bureau of Surface Mining Reclamation concerning the transfer. Mr. Evans further testified that he offered to submit the applications and fees for a mining license and bonding for the proposed site. However, Mr. Zutlas suggested that Mr. Evans should withhold the $500 license fee and bonds until he had been alerted that the transfer had been approved. Following the conversation with Mr. Zutlas, Mr. Evans testified that he contacted Mr. Randall L. Musser, a professional engineer with Penn-Laurel Associates, Inc., to process the transfer application with DER. During this period Mr. Evans and Mr. Musser contacted various DER personnel including Nancy D. DiMeolo, a geologist in DER's Greensburg office, regarding the said application.

On August 29, 1980 Ms. DiMeolo sent Mr. Evans a letter (App. Ex. 1) setting forth three items needed to "complete processing" transfer of the said mine drainage permit. Mr. Musser testified that the latter two of these three items were promptly addressed by submitting a revised property map to DER. (See also App. Ex. 6, Mr. Musser's cover letter dated September 22, 1980 returning the revised map to DER.)

As to the first item—bonding—Mr. Evans testified that after Ms. DiMeolo informed him that this was the only remaining item necessary to effect

transfer—he filed with DER a growth savings certificate in the amount of $17,200.00 assigned to DER which amount covered the 10.7 acres which included haul roads and the area to be affected under the first mining permit.[1] Mr. Evans also testified that in reliance upon Ms. DiMeolo's statement, he obtained a 1980 mining license at a fee of $500.00; borrowed working capital in the amount of $20,000.00 (of which he has at this time received and spent $10,000.00); and purchased two bulldozers.

After he had obtained the license and bonding in October 1980 Mr. Evans testified that he again spoke with Ms. DiMeolo who told him, "[w]e have received your notification that the bonds and everything is fine, we hope that, you will receive your permit very shortly, they have been approved, it's just a matter of writing this particular area up".

Instead of receiving the permit, however, on November 6, 1980 Mr. Evans received another letter from Ms. DiMeolo which indicated a discrepancy between submitted plans and actual field conditions. Following this letter, Mr. Evans met with Ms. DiMeolo, as well as other DER officials including Mr. Thomas R. Vayansky, DER's district mining manager, to discuss the application but this meeting failed to produce the desired permit. Instead on November 21, 1980, Mr. Evans received the denial letter from Mr. Vayansky which is the subject of the instant appeal. This letter suggests that since the site in question, is "inactive", 25 Pa. Code §99.22 does not specifically prescribe the authority to transfer the permit. The letter also submits that DER's regulations require that mine drainage applications must demonstrate that mining would be conducted in a manner which would prevent pollution to the waters of the Commonwealth. In this regard, some eleven inadequacies in the application were identified.

1. Mine drainage permit 3474SM64 covered about 159.3 acres.

With this background in mind the questions presented in this matter include:

(a) Is DER estopped to deny the transfer of the said mine drainage?

(b) If DER is not estopped, is the action set forth in the presently appealed November 21, 1980 denial letter arbitrary and capricious, contrary to law or unconstitutional?

With regard to the first issue, DER argues that it cannot be estopped by the action of one of its employees and DER further challenges Mr. Evans' memory of Ms. DiMeolo's statements. DER's construction of the case law is too broad. Clearly, the Commonwealth can be subject to estoppel *in pais*. In *Commonwealth, DPW v. UEC, Inc.*, 483 Pa. 503, 397 A.2d 779 (1979), the Pennsylvania Supreme Court held that the Commonwealth was estopped from asserting a statute of limitations by reason of the statements of various Commonwealth officials and the detrimental reliance thereupon by employees of UEC, Inc. See also *Commonwealth, DER v. Barnes & Tucker Coal Company*, 455 Pa. 392, 319 A.2d 871 (1974) where the Pennsylvania Supreme Court found on the basis of the facts in that case that estoppel did not lie against DER. *Commonwealth v. Western Maryland R.R. Company*, 377 Pa. 312, 105 A.2d 336 (1954) and the other cases cited in footnote 6 p. 785 of *UEC, Inc., supra*, carve out a narrow exception to the application of estoppel against the Commonwealth. These cases state that estoppel by laches cannot be applied against the government to prevent it from exercising some governmental function. Thus, mistaken indulgence by, or errors of a commonwealth employee create no prescriptive rights in a regulatee.

In the present case some, but not all, of the elements of estoppel *in pais* are present. It is clear that Ms. DiMeolo made essentially the statements to which Mr. Evans testified. The Commonwealth's efforts to impeach Mr. Evans' memory and/or credibility cannot overcome the added strength given his testi-

mony by DER's failure to call Ms. DiMeolo (who was present at the hearing) to rebut his testimony. Mr. Evans' good faith reliance upon Ms. DiMeolo's statements is also uncontraverted.

The missing element to establish an estoppel is that there is no evidence that Ms. DiMeolo had the authority to issue the requested permit or to make DER's final determination in the matter. One always relies upon oral representations of public officials at his peril and when the public official is a staff person rather than, as in *UEC, Inc., supra,* the Secretary of a Department and his general counsel, the peril is grave indeed. Thus, we hold that an estoppel has not been made out on the facts of this case against DER.[2]

Having decided that there has been no estoppel, the question becomes whether the challenged action is arbitrary or capricious, contrary to law or unconstitutional. In this regard, the starting point will be 25 Pa. Code §99.22 which governs transfers of mine drainage permits. Section 99.22 provides that:

> "§99.22. Transfer of permits.
>
> (a) Permits may be reissued in a new name provided that no change of ownership is involved.
>
> (b) If a person desires to assume the operation of an active mine and does not wish to submit an entirely new application, the Department will accept an application which incorporates the original plan of drainage. In such a case the applicant shall expressly agree to abide by all permit conditions, assume the responsibility for any violations which may occur on the area previously affected and shall furnish the Department with complete information as to the identity of the applicant, a property map in triplicate showing the extent to which the mining has been completed under the existing permit and such additional information as will enable the Department to determine that the applicant is able to operate the mine in such a manner as to prevent pollution to waters of the Commonwealth."

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2. We have also determined that DER did not issue the requested permit and then attempt to revoke it and thus, we are not prepared to shift the burden of proof on the completion or incompleteness of the application to DER.

DER argues that the said mine drainage permit for the Chaintown site cannot be transferred because this site is inactive. It is clear, through the testimony of Mr. Evans, that no mining has been conducted on this site since 1977 and that the site has not been reclaimed. Moreover, we take official notice of the *Morcoal, supra*, adjudication in which Morcoal's bonds on this site were forfeited.

On the other hand, there is no evidence that DER has voided Morcoal's mine drainage permit and Mr. Musser testified that in at least two other situations DER permitted the transfer of unvoided mine drainage permits on sites where mining had not been conducted for up to one year prior to the transfer. This is strong evidence that DER considered the determination of whether a mine is active in the context of Section 99.22 to be within its discretion rather than a matter of law.

The absence of any definition of "active mine" in the statute or regulation fortifies this position.[3] Another reason for so construing that the determination of whether a mine is active within DER's discretion is the public policy argument that DER should be given great latitude in allowing the transfer of permits so that responsible operators could be encouraged, by the lure of the lower bonding rates available under old permits, to correct violations on mining sites abandoned by less competent operators. Indeed, in the instant matter, the appellant is seeking the opportunity to correct the problems created by Morcoal at the Chaintown site.

Thirdly, applying the cannons of statutory construction to Chapter 99 of DER's regulations also supports the view that DER has discretion to determine whether a site is active for purposes of §99.22. Looking at Chapter 99 as a

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3. "Active operation" is defined at 52 P.S. 1396.3 but this definition relates to noncoal operations only.

whole it appears that the term "active mine" in §99.22 relates back to §99.21 which states that permits become null and void within two years of issuance if mining is not commenced within this period. Clearly, a void permit cannot be transferred and the "active mine" phrase in §99.22 merely reflects that permits which become void by operation of §99.21 or which are voided by DER cannot be transferred. Similarly, comparing §99.22 to §99.23 it is seen that in the latter section the name of a permittee may be changed without a transfer application, map and/or additional information (all required under §99.22) so long as the mine is in operation. This clearly implies that the phrase "active mine" in §99.22 comprehends something less than the phrase "mine in operation" in §99.23, since the safeguards in §99.22 greatly exceed those set forth in §99.23.

Since the determination of whether a mine is active under §99.22 is within DER's discretion we may review DER's exercise of this discretion. *Rochez Brothers v. DER*, 18 Pa. Commonwealth Ct. 137, 334 A.2d 790 (1975). Given the fact that the Chaintown site was in litigation during the time the present transfer application was being processed and that members of DER's legal and technical staffs participated in this litigation we find it incredible that DER now asserts that Mr. Evans owed DER information concerning the activity of his site even though such information was not requested by DER. Clearly, DER as a corporate entity must be charged with knowledge of status of the Chaintown site and just as clearly, at least someone in DER must have concluded that this site was an "active mine" as that term is used in §99.22. While, as stated above, such a tacit determination was not final so as to constitute the transferral of the permit or so as to create an estoppel, it,nevertheless, must be weighed by this board in reviewing DER's exercise of discretion. Moreover, the present record indicates that DER, in other cases, has transferred permits on sites which have been literally inactive for over a year. Since DER came forth with no testimony

to distinguish the instant application from transfer applications approved in other, seemingly similar, situations, we must conclude that DER had no reason for treating the instant appellant differently from the other applicants. Unreasoned classification is the very definition of an arbitrary and capricious action. Thus, in the circumstances of this case we find that it was an abuse of DER's discretion to determine the Morcoal site to be inactive.

This does not conclude the matter, however. Section 99.22(b) as quoted above, allows DER to request "such additional information as will enable the department to determine that the applicant is able to operate the mine in such a manner as to prevent pollution to the waters of the Commonwealth". The questions 1 through 11 in DER's denial letter of November 21 represent an attempt to solicit this information and appellant's own expert witness, Mr. Musser, agreed that each of the 11 items was reasonable and that only the variance item for the Township Road T-690 has yet to be addressed by the appellant. It would, therefore, seem proper for DER to require the appellant to submit the information requested regarding the other items prior to the issuing of the requested transfer permit and the application is remanded to DER for this purpose. Such a remand, while protecting the environment, and allowing DER to comply with the Pennsylvania Constitution, Article I, §27, 25 Pa. Code §§ 99.11 and 99.22 and *Harmon Coal Company v. DER*, 384 A.2d 289, should not unduly inconvenience the appellant whose expert estimated that it would take as little as two weeks to supply the requested information. This remand should also cure any constitutional defects in DER's procedure in this matter and comply with the apparent requirement in Section 5(c) of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.4(C), *as amended*, October 10, 1980 for DER to afford appellant a reasonable opportunity to amend its application.

CONCLUSIONS OF LAW

1. The board has jurisdiction over the parties and the subject matter.

2. The Chaintown site as described above is an active mine as that term is used in 25 Pa. Code §99.22; in the circumstances of this case, DER was arbitrary and capricious in determining that it was inactive.

3. DER was not estopped from denying the appellant's transfer application because of the representations of a DER employee who was not demonstrated to have the authority to issue the permit.

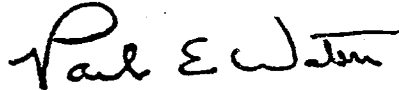
4. DER has authority under 25 Pa. Code §§99.11 and 99.22 and Article I, §27 of the Pennsylvania Constitution to require a showing from an applicant for a transfer permit that it can conduct mining so as to prevent pollution to the waters of the Commonwealth.

5. DER's request for additional information in the instant matter was neither arbitrary nor capricious nor contrary to law.

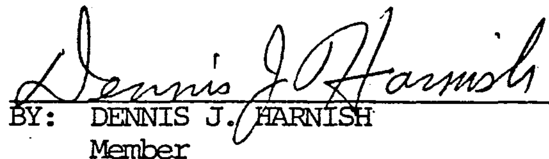
ORDER

AND NOW, this 19th day of June, 1981, the appellant's transfer application, as described above, is remanded to DER for a review of such information as appellant may submit concerning items 1 through 11 in the letter of November 21, 1980. DER's review of this material shall be completed within 30 calendar days following its receipt of complete information from the appellant or such additional period as may be granted by written approval of the appellant or this board. The board retains jurisdiction.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman



BY: DENNIS J. HARNISH
Member

DATED: June 19, 1981

EHB—43: 12/79

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
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Harrisburg, Pennsylvania 17101
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A. H. GROVE & SONS, INC. :

: Docket No. 79-205-W

: Clean Streams Law

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

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

By: Paul E. Waters, Chairman May 29, 1981

This matter comes before the board as an appeal from an order issued by DER, requiring appellant A. H. Grove & Sons, Inc., to conduct certain tests in order to determine necessary steps to prevent further pollution of wells by oil products. Appellant conducts a business operation in which he uses or used a number of large subsurface petroleum products storage tanks. DER,after investigation, has concluded that leaks from these tanks and/or spillage on the business premises is causing a water pollution problem in the area. The order was issued in an effort to obtain more information on the cause and cure for this ongoing problem, of which appellant acknowledges, but denies responsibility.

FINDINGS OF FACT

1. A. H. Grove & Sons, Inc. (Grove) is a Delaware Corporation licensed to do business in Pennsylvania.

2. Grove owns and operates an automobile service station and automobile dealership (dealership) located on Red Lion Avenue, in Felton, Pa.

3. Richard Grove is the president of Grove.

4. In the usual course of business at the Grove dealership, various products of petroleum derivation were used and sold, including gasoline, motor oils, transmission fluids, lubricants, fuel oil and kerosene.

5. At least five subsurface petroleum-product storage tanks are located at the dealership, and were used for the storage of gasoline, fuel oil and kerosene. Three of the tanks were utilized to store gasoline; one tank was used for fuel oil storage; and one tank was used for kerosene storage.

6. The 25 year old subsurface tanks at the dealership are owned by Grove and were purchased from Gulf Oil Company on or about September 24, 1974.

7. In 1973, an investigation of groundwater contamination affecting domestic water supply wells in Felton was performed by a DER geologist, as a result of a number of complaints from private citizens in Felton.

8. DER's investigation of groundwater contamination in Felton involved, (1) an inspection of the basic geological setting of the area to determine direction of groundwater movement, (2) the measurement of water table elevations in domestic water supply wells to determine the slope or gradient of the groundwater table, and (3) the sampling and investigation of obvious sources of groundwater contamination.

9. In the course of the investigation, DER determined that the domestic water supply wells of several residents in Felton were contaminated with pollutants of petroleum derivation.

10. On September 4, 1973, January 15, 1974, and March 11, 1974, a well belonging to the Eppley family was sampled by DER, and weathered gasoline and oil, or related solvent-type contaminants were detected in the well water.

11. On September 4, 1973, DER sampled a well belonging to the Schmuck family and gasoline and oil were detected in the well water and on January 15, 1974, DER sampled a well belonging to the Sentz family and weathered gas was detected in the well water. Weathered gasoline is gasoline which has been chemically altered by contact with air, soil and ground water. This alteration includes the addition or deletion of materials as a result of migration of gasoline through soil and groundwater.

12. DER, in the course of the investigation, also sampled the C. Grove well (no relation to Grove) and the Cook well. By simple taste and smell tests, the Cook and C. Grove wells were not contaminated with gasoline or oil; however, it was noted that the C. Grove well had been reported as contaminated in 1973.

13. The contaminated wells, which were the focus of the investigation, are located to the east of the Grove dealership, in a straight line, with the Sentz well in closest proximity to the dealership, followed by the Eppley well, the Cook well (not contaminated), the Schmuck well, and the C. Grove well (not contaminated at the time of DER's visit).

14. In the course of the investigation, DER conducted a limited, door-to-door survey of private residences in Felton to determine if other residents were experiencing water well contamination. No other gasoline or oil groundwater contamination problems were discovered, other than in the Sentz, Eppley and Schmuck wells.

15. Based on groundwater table elevation measurements, DER determined that groundwater flows from the dealership to the contaminated wells of Sentz, Eppley, and Schmuck, and that groundwater contaminants entering the groundwater at the dealership would move towards the Sentz, Eppley, and Schmuck wells.

16. DER observed an area at the dealership where Mr. Richard Grove admitted dumping or disposing waste oil, and oil-absorbent waste materials onto the surface of the ground. The amount of dumped material was appreciable.

17. At the time of the inspection, at least one subsurface gasoline storage tank at the dealership, which was believed by Richard Grove to be empty, contained a significant amount of gasoline.

18. The improper practices of waste oil handling and existence of subsurface tanks at the dealership was consistent with the pattern and type of pollution groundwater discovered.

19. As a result of the investigation, DER requested that Grove test all subsurface petroleum products storage tanks for leakage.

20. The Grove dealership is located approximately 100 feet west of the Sentz well, and a snowmobile dealership is located approximately 500 to 600 feet north of the Sentz well.

21. The water table in the affected area is relatively shallow. The order of contamination of the private water supply wells was Eppley first, Schmuck second, C. Grove third, and Sentz fourth, notwithstanding that the Sentz well is located closest to the dealership, followed by Eppley, Schmuck and C. Grove wells.

22. The type of well construction used in the Sentz, Eppley, Schmuck and C. Grove wells accounts for the sequence of well contamination, with shallow, or hand-dug wells being much more susceptible to contamination than deep, drilled and cased wells.

23. The Sentz well is drilled, cased and located south of the Sentz residence; the Eppley well is hand-dug and located south of the Eppley residence; the Cook well is drilled and located north of the Cook residence; the Schmuck well is hand-dug and located south of the Schmuck residence; and the C. Grove well is a drilled well within a former hand-dug well, and is located south of the C. Grove residence.

24. Petroleum products will float on the surface of the water table, but a certain portion of petroleum product is soluble and slowly disperses to deeper groundwater, thus making gasoline contamination possible below the water table.

25. The fact that the Sentz well is the closest well to the Grove dealership, yet was not the first well contaminated, may be due to the nature of the Sentz well as drilled, cased well. The Sentz well is less susceptible to contamination than the Eppley dug well.

26. The cost of properly closing an abandoned or unused subsurface petroleum product storage tanks is approximately $150 per 1,000 gallons of tank capacity.

27. Three gasoline subsurface tanks are located on the eastern side of the Grove dealership garage; one subsurface fuel oil tank is located to the south of the dealership garage; and one subsurface kerosene tank is located on the north side of the dealership garage.

28. DER sampled the Sentz and Eppley wells on April 27, 1979, and found the Sentz well to be contaminated with organic compounds and the Eppley well to be contaminated with gas and oils.

29. On August 13, 1979, DER sampled the Eppley and Sentz well and found both to be contaminated with weathered gas. In addition, the Eppley well was analyzed by gas chromatograph and mass spectroscopic methods, and organic compounds were discovered in the sample, including pentane, cyclopentane, methyl-propenol, pentane, cyclohexane, hexane, benzine, and toluene.

30. By measuring water table elevations and evaluating surface geology, DER again determined that the groundwater contamination problem was characterized by the presence of a shallow water table along a flood plain. In this setting, groundwater is susceptible to contamination by improper surface disposal of wastes, and by leaking subsurface gasoline tanks.

31. Utilizing a hand level, DER measured water table elevations in Muddy Creek (a stream adjacent to the dealership), in the Eppley well, and in the Hannigan well. As a result of these investigations, DER found that the water table sloped to the southeast, or from the Grove dealership in the direction of the contaminated wells.

32. Mr. Richard Grove, president of Grove, admitted that oil and other petroleum products were spilled at the dealership in the area witnessed by DER, and admitted that it was probable that some dumping of products including oils, oil absorbents, and degreasers occurred at the dealership.

33. Mr. Michael Difillippo, a DER laboratory chemist, testified that the water quality samples in which he found "uncharacterizable organics", closely resembled certain types of oil.

DISCUSSION

The question which we are called upon to answer in this proceeding is whether DER can require a private owner to conduct certain tests on his own land to determine the extent of, and possible necessary corrective action to prevent, further water pollution. At first blush the question would seem to suggest its own obvious answer in the context of the facts in this case.

Appellant operates a business in Felton, York County, PA at which he has underground storage tanks and makes other uses of petroleum products. His neighbors are experiencing water contamination from petroleum products. There is no other immediate logical explanation for the water well problems that have plagued the area for a number of years, than the one reached by DER. The facts clearly support the probability that appellant's activities have in some yet unknown way, contributed to the water problems.

Appellant contends[1] that DER is without authority under these circumstances to enter the order here on appeal.[2] It is true that the order does proceed from the basis that appellant *may* be responsible, and ends up with the conclusion that if tests show he is responsible, then further action's

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1. Appellant has declined to file a final brief in this matter so we must look to its pre-hearing memo for details on the basis of its appeal.

2. The appeal states:

> "Order is not based upon fact, was entered without due process and is further unreasonable and imposes a substantial undue burden on appellant and is in effect a condemnation of the appellant's business and property. Said order is further unconstitutional under the Pennsylvania and the United States Constitutions.

are called for.[3] Are the steps required of appellant in the order of December 12, 1979 reasonable, based on the available evidence of probable responsibility? We think that they are. In commenting on the admittedly inconclusive evidence, a

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3. Appellant is ordered:

"A. Immediately upon receipt of this order, take all steps necessary to abate the continued discharge of any gasoline, oils or other contaminants and polluants into the waters of the Commonwealth via discharge onto or under the surface of the ground.

B. Within 15 days of receipt of this order, arrange for and perform an approved, temperature adjusted, hydrostatic test, utilizing a pressure testing device with an accuracy of 0.05 gallons per hour, or better, on each petroleum storage tank located at the said business premises located on Red Lion Avenue, Felton Borough, York County, and submit a written report to Mr. Richard Shertzer of the Harrisburg Regional Office of the Department of Environmental Resources, 407 South Cameron Street, Harrisburg, PA 17101, Telephone (717) 787-9665. Grove shall provide 72 hours advance notice of the said test to DER and permit DER representatives to be present on the premises during said test.

C. Within 15 days of the receipt of this order, arrange for and excavate four backhoe pits or test borings at such places and in such manner on the business premises as representatives of DER shall direct. The backhoe pits or test borings must be excavated to the depth of the water table, so that soils at the existing water table may be examined, and so that the excavated soils from the pits or borings may be examined for the presence of petroleum, gas, or oil contaminants. Grove shall notify Mr. Richard Shertzer at the aforementioned address at least 72 hours in advance of the date set for the excavations. Grove shall permit representatives of DER to be present on the business premises during the excavations and shall permit the DER representatives to conduct sampling and testing activities on the ground water and soil in and around said pits or borings.

D. Within 15 days of the receipt of this order and continuing until January 18, 1980, Grove shall provide representatives of DER, upon request, with access to his business premises, during regular business hours, for the purpose of physical inspection and sampling of all water wells situated on the business premises.

E. In the event that the tests performed under paragraph B or C determine that one or more of the underground petroleum storage tanks is leaking, or has a leak:

i. Grove shall immediately take such actions as are necessary to abate the discharge of any gasoline or petroleum products to the waters of the Commonwealth, including, but not limited to, excavation and removal to a site satisfactory to the Department of gasoline or petroleum saturated soils in the vicinity of the leaking storage tank.

geologist testified: N.T. 9 lines 2-18

> "Q.Now, in an effort to speed things up, Mr. Peffer, in as brief a manner as possible, can you describe what it was about your investigations which led you to conclude that, as you testified, A. H. Grove & Sons was the cause of the groundwater contamination in question?
>
> A. There were three basic facts or basic pieces of evidence that led me to that conclusion. One was the spacial pattern of pollution. The polluted wells were all essentially in a line, in a direction from the A.H. Grove property stretching to the east or southeast.
>
> The second piece of evidence was the fact that hydrocarbon products were being stored and improperly disposed of on the A. H. Grove property in such a manner that they could cause ground-water pollution.
>
> The third piece of evidence was that there was a gradient or a slope to the water table in the direction from the A. H. Grove property towards the affected wells."

DER relies for authority in part upon The Clean Streams Law 35 P.S. §691.10,[4] which provides:

> "The department may, in its order, require compliance with such conditions as are necessary to prevent or abate pollution or effect the purposes of this act."

The Act specifically states that its purpose is not only to prevent further pollution of the waters of the Commonwealth "-but also to reclaim and restore to a clean, unpolluted condition every stream in Pennsylvania that

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3. Continued.

   ii. Grove shall remove any polluted ground water by any means acceptable to DER, including, but not limited to the removal of said polluted ground water by pumping.

   iii. Grove shall supply the owners of any private water supply well which was affected by the gasoline or other petroleum ground water pollution, with an alternative water supply, until such time as the ground water pollution is abated and removed."

4. DER has also cited as authority the Solid Waste Management Act, 35 P.S. §6018.104,while expressing reservations, we do not reach the issue.

is presently polluted."[5] Further, the prevention and elimination of water pollution is recognized as being directly related to the economic future of the Commonwealth. See *Commonwealth v. Barnes & Tucker Co.*, 319 A.2d, 353 A.2d 4711. There is additional authority in 35 P.S. §691.316 which provides:

> "Wherever the department finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth, the department may order the landowner or occupier to correct the condition in a manner satisfactory to the department—."

This would seem to be ample authority to support any reasonable order of the kind here at issue. It is interesting to note that both parties rely upon 35 P.S. §691.316 to support of their respective positions. DER relies upon the statement that where a danger of pollution exists, it—"may order the landowner or occupier to correct the condition in a manner satisfactory to the board—." Appellant, on the other hand points to the requirements regarding payment. It does not disagree with DER that further testing is clearly called for, the disagreement concerns when and how payment is made. The Act states:

> "For the purpose of collecting or receiving the expenses involved in correcting the condition, the board may assess the amount due in the same manner as civil penalties are assessed under the provisions of Section 605 of this Act."

Appellant construes this to mean that it can not be called upon to make tests at its own expense. We do not place such a limited construction on that language. It would appear to be simply an additional weapon in the arsenal, of DER not an exclusive remedy to a water pollution problem.

Directing now our attention to the specific provisions of the order, it is not at all clear that it places no more than a reasonable burden upon appellant under the facts of this case. The order requires that appellant conduct an approved temperature adjusted, hydrostatic test utilizing a pressure testing device with an accuracy of 0.05 gallons per hour. The purpose being

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5. 35 P.S. §691.4.

to determine whether the storage tanks are leaking. This was done once before, and although the results seem to have been negative, DER argues that they were inconclusive. In any event, DER has ordered four back-hoe pits or test borings in the area to the depth of the water table. Inasmuch as this second test is to be carried out regardless of the out-come of first tests, we see no reason for appellant to incur the cost of the first test. If oil products have leaked from the tank into the water table the second test is designed to detect it. If it has not, then the imme-diate problem would not seem to be one that can be demonstrated to have been caused or contributed to, by appellant, regardless of the present condition of the tanks.[6]

We do not overlook the evidence presented by appellant which does raise some question as to whether it is fully responsible for the water pol-lution problem presently being experienced in the area. Indeed, that is the reason we move cautiously in not allowing DER to order two seperate tests. At the same time, however, there is sufficient evidence implicating ap-pellant, to require that we sustain the order to the extent indicated.[7]

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6. Either the tanks will be shown to be leaking or not. If one is leaking, this must be detected in the water or soil to have any probative value. If not, then it will still be necessary to conduct the second test.

7. The order contains another provision for appellant to provide water systems to certain homeowners in the area. We do not now pass upon that provision. As it was conditional, it is not now before us.

CONCLUSIONS OF LAW

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

2. Under the provisions of The Clean Streams Law 35 P.S. §691.1 *et seq.* DER has authority to investigate groundwater contamination problems associated with violations of The Clean Streams Law.

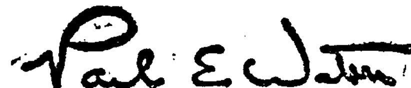
3. Where, as here, groundwater contamination is proven and where substantial evidence establishes a probable source and need for additional testing, DER may require the person responsible for apparently related discharges to conduct reasonable tests at his own expense to allow a determination of the extent of the contamination or pollution.

4. The board will not allow such testing to be more extensive and costly than is clearly mandated by the evidence.

ORDER

AND NOW, this 29th day of May, 1981 the appeal of A. H. Grove & Sons, Inc. is hereby Remanded to DER for further action consistent with this adjudication. The board will retain jurisdiction.

ENVIRONMENTAL HEARING BOARD



BY: PAUL E. WATERS
Chairman

DENNIS J. HARNISH
Member

DATED: May 29, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

HAWK CONTRACTING, INC.
and ADAM EIDEMILLER, INC. : Docket No. 80-072-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

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

By: Dennis J. Harnish, Chairman, December 2, 1981

This matter arises from an order issued on March 28, 1980 jointly against two corporations identified below as Hawk and Eidemiller which had conducted surface mining operations on contiguous parcels of property located in Unity Township, Westmoreland County. The order attached liability for three discharges of acid mine drainage emanating on the Hawk site to both corporations and required both corporations to abate said discharges. Both corporations appealed.

FINDINGS OF FACT

1. Appellants are Hawk Contracting, Inc. (Hawk) and Adam Eidemiller, Inc. (Eidemiller).

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources (Department).

3. The action appealed from is an order issued by the Department to Hawk and Eidemiller dated March 28, 1980. This order was corrected by letter dated April 2, 1980, to make reference to all relevant Eidemiller mining permits. Paragraph 10 of the order was withdrawn during the hearings. The terms of said order were as follows:

> "a. With respect to Eidemiller, directing Eidemiller to completely backfill and revegetate all areas affected by the above referred to Mining Permits and Mine Drainage Permit, and in accordance with the rules and regulations of DER;
>
> b. With respect to Hawk, directing Hawk to remove certain accumulated solid material from the upper settling pond in one of the discharge areas and to dispose of it in accordance with the Solid Waste Management Act and the rules and regulations promulgated thereunder;
>
> c. With respect to Hawk and Eidemiller, directing that they jointly:
>
> > (i) Submit a plan of monitoring wells along the property line between the Hawk and the Eidemiller Sites, which wells were to reach a depth of at least the depth of the coal and be evenly spaced along the property line;
> >
> > (ii) Maintain interim treatment facilities so as to neutralize the acid content of all mine drainage on the Hawk Site until permanent treatment was placed in operation;
> >
> > (iii) Submit to DER a plan for permanent treatment or abatement of all acid mine drainage on the Hawk Site
> >
> > (iv) Take necessary steps to gain consent of adjacent landowner(s) required for the construction of permanent treatment facilities;
> >
> > (v) To maintain any treatment facilities in working condition so long as any mine drainage exceeds the effluent limitations permitted by DER."

4. The Hawk site and the Eidemiller site are adjacent to each other, with the Eidemiller site being uphill and upgradient of the Hawk site.

HAWK

5. Hawk is a Pennsylvania corporation with its registered office located at R. D. #1, Kittanning, PA 16201.

6. Hawk is engaged in the operation of surface mining activities in the Commonwealth of Pennsylvania pursuant to surface mining license No. 1259.

7. Hawk conducted surface mining activities in Unity Township, Westmoreland County at a mining site covered by Mining Permit No. 1259-4 and Mine Drainage Permit No. 3475SM54 (Hawk Site).

8. Mining Permit No. 1259-4 was issued to Hawk by the Department, effective April 13, 1976.

9. Mining Permit No. 1259-4 required, *inter alia*, that mining activities on the Hawk Site be conducted in accordance with all conditions contained in Mine Drainage Permit No. 2375SM54.

10. The last amendment to Mine Drainage Permit No. 3475SM54 was issued to Hawk by the Department on September 9, 1976.

11. Hawk accepted and agreed to abide by the special conditions contained in Mine Drainage Permit No. 3475SM54 on September 15, 1976.

12. Mine Drainage Permit No. 3475SM54 contains, *inter alia*, the following conditions:

a. "Gravity drainages, encountered from previous mining, shall be treated to neutrality until eliminated."

b. "No tipple refuse shall be returned or deposited in the strip area."

c. "The permittee shall at no time discharge to the waters of the Commonwealth mine drainage from any source the pH of which is less than 6.0, or greater than 9.0."

d. "The permittee shall at no time discharge to the waters of the Commonwealth mine drainage from any source containing a concentration of iron in excess of 7 milligrams per liter."

13. Hawk was required to leave a 50-foot barrier of unmined land between its surface mining operation and the Eidemiller site (property line separating Lemmon/Roos from Fritz-Nicholson/Sanderson surface estates).

14. Two water discharges existed on the eastern side of the Hawk Site prior to mining, flowing from a rock ledge; these discharges combined to form a single stream.

15. The two discharges were sampled at Hawk's request, prior to the surrounding area being affected by mining and were found to have the following parameters:

	pH	iron	sulfate	
one discharge	4.9	0.35	<10	(#975)
other discharge	7.0	3.10	<10	(#976)
combined flow	5.0	0.25	<10	(#977)

16. Hawk conducted mining activities directly through the said rock ledge from which the discharges emanated.

17. A spring existed on the western side of the Hawk Site prior to mining which was used as a private water supply.

18. The spring was sampled prior to mining and had the following parameters: pH - 5.1, iron - .05, sulfate - 30.

19. Hawk mined very close to the area of the spring, and affected the recharge area of the spring which area now is covered with backfill material.

20. The entire 76 acres comprising the Hawk Site was completely back-filled and revegetated by the year 1978, to the satisfaction of the inspectors of the DER. However, there existed and now exist on the Hawk Site three (3)

discharges of acid mine drainage, all of which exceed the effluent limitations set forth in the rules and regulations of the DER, more specifically set forth in 25 Pa. Code §§95.2, 99.33, and 77.92. One discharge is in the area of pre-mining discharges on the eastern side of the Hawk property (discharge 1). A second discharge, (discharge 2), is in the area of the spring on the western side of the Hawk property and a third discharge, (discharge 3), is near the middle of the Hawk property near the township road which road forms the southern and topographically lowest edge of said property.

EIDEMILLER

21. Eidemiller is a Pennsylvania corporation with registered office located at R. D. #8 Greensburg, PA 15601.

22. Eidemiller conducted surface mining activities in Unity Township, Westmoreland County at a mining site covered by Mining Permit Nos. 578-25, 578-25A, 578-30A and 578-30A2 and Mine Drainage Permit No. 3474SM4 (Eidemiller Site).

23. Mining Permit No. 578-25 was issued to Eidemiller by the Department, effective May 10, 1974.

24. Mining Permit No. 578-25A was issued to Eidemiller by the Department, effective January 24, 1975.

25. Mining Permit No. 578-30A was issued to Eidemiller by the Department, effective April 20, 1978.

26. Mining Permit No. 578-30A2 was issued to Eidemiller by the Department, effective April 20, 1978.

27. Mining Permit Nos. 578-25, 578-25A, 578-30A and 578-30A2 contained, *inter alia*, the following provisions:

a. "Mining shall be done in accordance with all general and special conditions contained in the Mine Drainage Permit."

b. "Restoration shall be concurrent with mining as nearly as possible."

c. "Restoration of the surface will be completed within one year after the mining phase is completed."

28. The last amendment to Mine Drainage Permit No. 3474SM4 was issued to Eidemiller by the Department on July 15, 1976.

29. Eidemiller accepted and agreed to abide by the special conditions contained in Mine Drainage Permit No. 3474SM4 on July 19, 1976.

30. Mine Drainage Permit No. 3474SM4 contains, *inter alia*, the following conditions:

a. "The permittee shall fully comply with the mine closure procedures set forth in the plan of drainage in an expeditious manner after mining has been completed."

b. "Backfilling shall be done concurrently with the progress of the stripping operation to the highest degree possible."

c. "Restoration will be as nearly concurrent with the operation as is practical."

31. The portion of the Eidemiller Site directly adjacent to the Hawk Site was in a partially backfilled state for a period of at least 2 years, and in some places for a period of almost 4 years.

a. Coal was last removed from the 8.9 acre portion of Mining Permit No. 578-25 located adjacent to the Hawk Site on Roos property in November 1975.

b. The 8.9 acre area was not completely backfilled until August 1978; and topsoil was not completely replaced and said area revegetated until May 1980.

c. Coal was last removed from the ground on the mining area covered by Mining Permit No. 578-25A in June 1976.

d. A portion of the surface land covered by Mining Permit 578-25A was not completely backfilled until June 1978.

e. The remaining portion of the surface lands owned by Roos covered by Mining Permit No. 578-25A was not completely backfilled and revegetated until May 1980.

f. Coal was last removed from the ground on the mining area covered by Mining Permit No. 578-30A in June 1978.

g. The surface lands owned by Roos covered by Mining Permit No. 578-30A were not completely backfilled and revegetated until May 1980. (This portion of Mining Permit No. 578-30A lies directly above Mining Permit No. 578-25A, and above the Hawk Site.

32. As of July 1980, the entire 245.3 acres comprising the Eidemiller Site was backfilled, topsoiled and revegetated.

33. Eidemiller was required to leave a 50-foot barrier of unmined land between its surface mining operation and the entire Hawk Site (property line separating Lemmon/Roos from Fritz-Nicholson/Sanderson).

34. Eidemiller did not leave a 50-foot barrier of unmined land between its surface mining operation and the entire Hawk Site.

HYDROGEOLOGY OF THE SITES

35. The Hawk and Eidemiller Sites are situated on a hill, directly adjacent to each other, with the Eidemiller Site being uphill and upslope of the Hawk Site, and the Loyalhanna Creek being the topographic low of the hill.

36. The Hawk and Eidemiller Sites are situated close to the Fayette Anticline, a structural high. The Eidemiller Site is on the structural geologic high; the rocks dip down from Eidemiller across the Hawk property to the Loyalhanna Creek.

37. The overburden on the Hawk and Eidemiller Sites is essentially the same, being predominantly sandstone (sandrock), with some shales.

38. There is a hydrogeological connection between the Hawk and Eidemiller Sites; the flow path of the groundwater is from the Eidemiller to Hawk Sites and thence to the Loyalhanna Creek.

a. The Hawk and Eidemiller Sites constitute a localized recharge/discharge area, where the Eidemiller Site is the groundwater recharge area, the Loyalhanna Creek is the related groundwater discharge area, and the Hawk Site is the transition zone between recharge and discharge.

b. The recharge consists primarily of rainwater infiltrating on the Eidemiller Site.

c. The groundwater flow path is downhill, across the Hawk Site.

d. The groundwater flow system across the two sites must be viewed as an interdependent system.

e. The source of discharges 1 and 2 is an artesian aquifer which lies below the clay layer underlying the lowest seam of coal removed by Eidemiller. This aquifer has a basic chemistry being composed of limey shales or shaley limestones.

39. The presence of a 50 foot barrier of unmined land between the two sites does not change the groundwater flow patterns since the barrier was permeable to water before mining and was fractured by blasting on both sides during mining making it even more permeable after mining.

40. The absence of a portion of the barrier of unmined land between the two sites, directly uphill of the discharge at Area No. 1 could only accelerate any flow of groundwater (if any) from the Eidemiller Site to the Hawk Site above the clay barrier; it would not create such a flow or change its quality.

Moreover, no groundwater flow above the clay barrier has been demonstrated in this case.

41. The pre-mining samples obtained at Areas No. 1 and 2 are generally indicative of background water quality in a sandstone aquifer prior to mining. No pre-mining sample was obtained at Area No. 3 because this discharge did not exist prior to mining. The source of discharge 3 is localized recharge on the Hawk Site.

42. The discharges at Areas No. 1, 2 and 3 represent a significant deterioration of groundwater quality from its pre-mining quality.

NATURE OF ACID MINE DRAINAGE

43. Acid mine drainage is the result of a chemical reaction between air, water and overburden material which causes various minerals to leach out of the overburden material and into the water passing through it.

44. Acid mine drainage is characterized by low pH, no alkalinity, high acidity, sulfates greater than approximately 600 mg/liter, iron greater than 7 mg/liter, manganese greater than 4 mg/liter, and specific conductance greater than approximately 700 micromhos.

45. Acid mine drainage is a natural by-product of mining, and can even occur on sites where mining has been conducted properly.

46. The post-mining discharges at Areas No. 1, 2 and 3 are indicative of acid mine drainage.

47. Hawk's mining activities near or through Areas No. 1, 2 and 3 caused or contributed to the production of acid mine drainage at these areas in that they allowed the overburden materials to become exposed to air.

PRESENT DISCHARGES OF ACID MINE DRAINAGE

48. Mine drainage presently exists on the eastern side of the Hawk Site (Area No. 1).

49. The mine drainage at Area No. 1 flows out of the backfill material in three discrete locations, and combines above-ground to form one discharge.

50. The majority of the flow of mine drainage at Area No. 1 continues throughout the seasons at a rate from 35 to 40 gpm.

51. The discharges at Area No. 1 are in approximately the same location as the discharges which existed prior to mining, more fully described in Findings of Fact No. 14 and 15.

52. The mine drainage at Area No. 1 discharges to a tributary of and thence to the Loyalhanna Creek, which are waters of the Commonwealth.

53. The mine drainage at Area No. 1, without treatment, has a pH less than 6, a concentration of iron greatly in excess of 7 mg/liter, and a concentration of manganese greatly in excess of 4 mg/liter, sulfates in excess of 2000 mg/liter as well as high levels of aluminum and specific conductivity.

54. Hawk has intermittently provided treatment for the mine drainage at Area No. 1; this has consisted of the application of neutralizing agent to the mine drainage before it flows through two settling ponds and discharges to the Loyalhanna Creek.

55. The mine drainage at Area No. 1 can be treated to increase pH and decrease iron and manganese levels and therefore to comply with Hawk's permit and DER's regulations.

56. Such treatment must be continuous 24-hours per day, 7 days per week treatment, unless and until the discharge is abated.

57. Mine drainage presently exists on the western side of the Hawk Site (Area No. 2).

58. The mine drainage at Area No. 2 flows out of the backfill material at a single location.

59. The volume of mine drainage at Area No. 2 fluctuates with the seasons, and has at times dried up completely.

60. The discharge at Area No. 2 is in the same general location as the Fritz spring which existed prior to mining, more fully described in Findings of Fact No. 17 and 18.

61. The mine drainage at Area No. 2 discharges to a tributary of and thence to the Loyalhanna Creek, which are waters of the Commonwealth.

62. The mine drainage at Area No. 2, without treatment, has a pH of less than 6, a concentration of iron in excess of 7 mg/liter, and a concentration of manganese in excess of 4 mg/liter.

63. The mine drainage at Area No. 2 has a high sulfate and aluminum content, and has a high specific conductivity.

64. Hawk has intermittently provided treatment for the mine drainage at Area No. 2; this has consisted of the application of neutralizing agent to the mine drainage before it flows through two settling ponds and discharges to the Loyalhanna Creek.

65. The mine drainage at Area No. 2 can be treated to increase pH and decrease iron and manganese levels.

66. Such treatment must be continuous, 24-hours per day, 7 days per week treatment, unless and until the discharge is abated.

67. Mine drainage presently exists at the southern edge of the Hawk Site (Area No. 3).

68. The mine drainage at Area No. 3 flows out of the backfill material in one general location, but the actual point of discharge has changed several times.

69. The mine drainage at Area No. 3 discharges via a road ditch and culvert to the Loyalhanna Creek, a water of the Commonwealth.

70. There were no water discharges in the general location of Area No. 3 prior to mining.

71. The mine drainage at Area No. 3, without treatment, has a pH of less than 6, a concentration of iron in excess of 7 mg/liter, and a concentration of manganese in excess of 4 mg/liter.

72. The mine drainage at Area No. 3 has a high sulfate and aluminum content, and has a high specific conductivity.

73. Hawk has intermittently provided partial treatment for the mine drainage at Area No. 3; this has consisted of the application of neutralizing agent to the mine drainage before it discharges to the Loyalhanna Creek.

74. The mine drainage at Area No. 3 can be treated to increase pH and decrease iron and manganese levels and thus to meet the conditions of Hawk's permit and DER's regulations.

75. Such treatment must be continuous, 24-hours per day, 7 days per week treatment unless and until the discharge is abated.

ULTIMATE FINDING OF FACT

76. The acid mine drainage emanating on the Hawk Site at Areas No. 1, 2 and 3 resulted from mining operations on the Hawk Site.

77. The acid mine drainage discharges on the Hawk Site contribute to the deterioration of the Loyalhanna Creek, a stream of the Commonwealth. The discharges are deleterious to fish life, and constitute a nuisance, all of which constitutes violation of §§3, 301, 307, 315 of The Clean Streams Law.

78. No acid mine drainage has ever been or is now reported to be emanating from the Eidemiller Site.

79. The fact that Eidemiller erroneously removed a section of the 50-foot wide coal barrier (that was required to be left in place by the mining permit) at a point along the easterly line of the properties was not and is not a substantial contributing factor to the acid mine drainage now emanating from the Hawk Site.

80. No credible evidence was offered that the source of the acid mine drainage in discharge Areas No. 1, 2 and 3 was the Eidemiller Site.

DISCUSSION

The present matter arises from the appeal by appellants' Hawk and Eidemiller of DER's order of March 28, 1980. This order, *inter alia*, required both appellants to effect interim and then permanent treatment or abatement of all discharges of acid mine drainage emanating on the Hawk Site. Although this order did not designate the number or locations of the discharges of acid mine drainage (AMD) on the Hawk Site, the testimony developed and Hawk admitted to, the existence of three such discharges. The discharges were designated as discharges and/or discharge Areas 1, 2 and 3. Area 1 is located toward the eastern side of the Hawk Site at or near the 1100 foot (above sea level) contour line on the Hawk Site. Area 2 is located toward the western portion of the Hawk Site near to a gas well at the head of a ravine. Area 3 is located towards the middle of the Hawk Site from an east-west orientation but at the down-gradient, down-dip, most southerly, portion of the Hawk Site adjacent to Township Road T-835.

While the third party in this matter, Eidemiller, did not formally join in Hawk's admission as to the existence of such discharges, Eidemiller, on the first page of its brief admits that "...DER has met its burden of proof to show that there are three acid mine discharges emanating from the Hawk Site, the quality of which do not meet the minimum standards..."

The reason that this matter consumed 18 days of hearing which generated some 3200 pages of transcript nearly 100 exhibits and over 200 pages of brief (all carefully reviewed by the hearing examiner) is that the parties vigorously

disagreed as to the source of said discharges. Clearly, the existance of a discharge of AMD even upon a mining site does not *per se* demonstrate a causal connection between mining and the discharge.

DER's extremely knowledgable and articulate hydrogeologist, Mr. Roger Hornberger, testified that when he investigates the source of an AMD discharge he first reviews the geography, topography and stratigraphy of the area then examines as potential causes of AMD, active and abandoned surface mines as well as deep mines in the area of the discharge. Other causes of pollution in the area such as gas or oil wells and the natural background quality of aquifers in the area as well as surface waters hydraulically connected thereto are also investigated. There was at least tacit agreement among the parties that the cause of the AMD on the Hawk Site had to be one of those causes enumerated by Mr. Hornberger.

To evaluate Mr. Hornberger's testimony and to compare it to the testimony of the experts for Hawk and Eidemiller, it is necessary to locate the Hawk and Eidemiller Sites geographically, topographically, geologically and stratigraphically.

Geographically, both sites are located about 1 to 1 1/2 miles from Latrobe Borough, in Unity Township, Westmoreland County. Loyalhanna Creek which first flows through Latrobe parallels Township Route T-835 in the area of the sites and forms the topographic,geologic and hydrogeologic low point of the area. T-835 and the Loyalhanna run in a generally southwest to northeast direction in this area forming the southern and topographically lowest edge of the Hawk Site; the township road roughly parallels the 1000 foot (above sea level) contour line on the USGS map. The Hawk Site forms a rough rectangle running at a relatively steep pitch uphill from the township road to roughly the 1200 foot level where a common property line divides the Hawk and Eidemiller Sites. The Eidemiller

Site is much more extensive in area than the Hawk Site (some 345 acres for the former compared to 76 acres for the latter) but it pitchs uphill at a relatively lower rate. The top-most portion of the Eidemiller Site, a knob projecting to some 1340 feet above sea level, also comprises the top of the hill on which both sites are located.

The eastern boundary of the Hawk Site is formed by an abandoned township road. The Eidemiller Site extends in a northeasterly direction along the line formed by the common boundary with Hawk further east of the township road along the property of the Anna M. Mayer Estate (also known as the Zominsky property) and thence in a northwesterly direction to the top of the hill.

Mr. Hornberger testified and the experts for Hawk and Eidemiller agreed, that the major geologic feature in the area of said sites is the Fayette Anticline. This anticline represents the high point of the rock strata underlying the sites. It runs in a generally southwest to northeast direction, i.e., roughly paralleling the Loyalhanna Creek and is so arranged *vis á vis* the sites that the top of the Eidemiller Site lies at or near the top of the said anticline while the Hawk Site lies on the flank of said anticline where it dips to the southeast towards Loyalhanna Creek.

The stratigraphy of the Hawk and Eidemiller Sites, i.e., the composition, thickness, pitch, roll and dip of the various layers of basically sedimentary rock which underlie the Hawk and Eidemiller Sites was much debated among the various experts. This is because, as the experts agreed, the stratigraphy of an area has a marked influence on the quantity and direction of groundwater flow under that area. The experts could not even agree on how many coal seams there were in the area yet alone the names of these seams. There did, however, appear to be substantial agreement that prior to mining the first rock layer below soil on each site was a relatively massive sandstone some 40-60 feet in thickness.

In addition, there was agreement that the lowest seam of coal Eidemiller mined on its site was the same seam of coal Hawk mined on its side of the common property line.

From a point at approximately the 1100 foot above sea level contour line down to the township road there are at least four markedly differing versions of how the rock lies. These versions will be discussed below with regard to Eidemiller's liability.

All parties seem to agree that underlying each seam of coal is a seam of plastic clay some 6 feet thick which acts as an aquatard i.e., this layer, generally, prevents or restrains rainwater which may percolate down through backfilled spoil from passing through to the next lower level, and causes said rainwater to form a perched water table. As to what may lie under the clay seam this too will be discussed below.

Having set the stage at the sites, the various possible causes of the AMD on the Hawk Site will next be evaluated. None of the experts tried to tie any of the discharges to oil or gas wells even though discharge 2 was located in physical proximity to a gas well. This was probably because Hawk's and Eidemiller's experts agreed with Mr. Hornberger that the chemical signature of all three discharges, low pH, acidity much higher than alkalinity, high iron and other metals and high sulfates was indicative of AMD rather than, for example, the brine discharged from a gas well (e.g. there was no evidence of chlorides which forms part of the chemical signature of oil and gas well brines). The experts also agreed that the discharge at Area 1 (at least) could not be traced to any abandoned surface or deep mine and the lack of any indication of deep mining in this immediate area helps to support this view.

Before turning to the complicated testimony regarding the source of the AMD in question, the less complex issue of whether any or all of the said dis-

charges predate mining on the sites will be dealt with. Mining on the Eidemiller Site began in 1974 but backfilling and revegatating of the site were not entirely completed until July of 1980. On the Hawk Site, mining began in April of 1976 while backfilling and reseeding were completed by December of 1977.

In accordance with DER practice a DER mine inspector conducts a pre-mining survey of each site. Mr. John Bates testified that he was the DER inspector who conducted the pre-mining survey of the Hawk Site. Although Mr. Bates took some 35 samples of discharges from abandoned deep and surface mines in the general area of the Hawk Site, he took no samples directly at any of Areas 1, 2 or 3.

Mr. Bates suggested that this was because at least the seeps at Area 2 and 3 did not exist prior to Hawk's mining; he testified that he would have seen and sampled these discharges had they existed. It appears that Mr. Bates was at least very near to the area where discharge 2 now emanates prior to mining because he took a sample of water from the Fritz pond which is located in the same ravine which today holds the treatment ponds for discharge 2. Indeed, Mr. Bates, on his own intiative, made a return trip to the Hawk Site after his initial testimony in this matter and when he was recalled as a witness, he acknowledged that the present discharge Area 2 is very near the spring which provided the Fritz's water supply and thus probably represents the same discharge. Moreover, it appears that Mr. Bates would have seen discharge Area 3 during his pre-mining survey since this discharge lies closely adjacent to Township Road T-835 at the toe of the Hawk Site, a locale Mr. Bates would have had to pass, on a number of occasions, while conducting his pre-mining survey.

It is less likely that Mr. Bates was in the vicinity of what is now discharge Area 1 prior to Hawk's mining. This area was somewhat removed from areas Mr. Bates would have traversed by vehicle and would have been screened

by vegation from the roads he used. Thus, especially in the absence of his testimony on this subject, Mr. Bates failure to sample discharge 1 does not indicate that this discharge did not exist prior to Hawk's mining.

Perhaps the most convincing testimony concerning the pre-mining condition of area 1 came from Mrs. Violet Sanderson, the owner of the surface rights in the northeast portion of the Hawk Site. Mrs. Sanderson, a totally disinterested witness, testified that she had "beautiful springs" on her property prior to Hawk's mining. She located one of these springs on Commonwealth exhibit 10 at a location very near the present location of discharge 1. Moreover, Mrs. Sanderson described the source of these springs as the bottom of a rock wall or ledge in this area which testimony was supported by many other witnesses.

Finally, Mrs. Sanderson testified that not only did her cattle drink from this spring without apparent ill affect but further, that this spring had been tested and found of acceptable quality for human consumption.

Mrs. Sanderson's testimony concerning the pre-mining condition of discharge number 1 was largely supported by the testimony of Mr. Jacob Leighty. Mr. Leighty was a witness with obvious competence and a lack of interest or bias. He has been in mining some 44 years and had had extensive experience as an inspector for DER (he retired from DER prior to the hearings in this matter). Mr. Leighty testified that at the request of the supervisor at the Hawk Site, Mr. Charles Ohlinger he visited the Hawk Site on September 28, 1976 and took samples at the spring bubbling up from the rock ledge at what has become known as discharge Area 1. The purpose of this sampling was to determine the quality of the spring described by Mrs. Sanderson before Hawk mined near and above this discharge. At this point the land above this discharge up to the property line had not been disturbed by Hawk but the area above the common property line had been completely mined by Eidemiller. Mr. Leighty estimated the quantity of

this discharge at some 35 gallons per minute (gpm). The quality of the discharge as shown in Commonwealth's exhibit 10 (Finding of Fact 15) is best represented by Sample No. 977, a sample of the combined discharges emanating from under the rock ledge.

Sample No. 977 had a pH of 5.0, and total iron of .25 ppm, less than 10 ppm of sulfate and an acidity greater than alkalinity. While this sample did not meet DER's discharge criteria for pH (6-9 pH), the lack of high iron or sulfate numbers show (as per Mr. Hornberger's testimony) that it lacks the chemical signature of AMD. Moreover, the quality of this discharge is indicative of sandstone springs in this area according to Dr. Donald Streib, Eidemiller's highly qualified expert. Indeed, the pre-mining sample of the Fritz's drinking water taken by Mr. Bates as discussed above, shows very similar quality (pH-5.1, low total iron and a sulfate of 30 ppm) to that of the Sanderson spring and Samples 2739 and 2740 on the Eidemiller's exhibit 11 (both of tributaries in the area) also show similar quality.

In view of the above evidence this board finds that the discharge at Area 1 did exist prior to Hawk's (or Eidemiller's) mining and had a quality as demonstrated in sample 977 and a quantity of approximately 35 gpm. The board also finds that the discharge at Area 2 existed before mining and formed the source of Fritz's water supply and had a quality as per sample 2744. Finally, the board finds that discharge 3 did not exist prior to Hawk's mining.

As to discharge Areas 1 and 2 the board further finds that the post-mining quality of these discharges is substantially lower than the pre-mining quality. On June 5, 1978 after Hawk had mined up to the common property line with Eidemiller, Mr. Leighty returned to the Hawk Site to sample discharge 1. His sample of the combined discharge as reported on Commonwealth's exhibit 11 as sample 1250, demonstrates that the pH of the discharge had dropped to 2.5, that

alkalinity was outweighted by acidity by 2600 to 1, that total iron was 420 mg/l and that sulfates were 2100 mg/l. These numbers coupled with the quantity being discharged were characterized by Mr. Hornberger not just as AMD but as the worst AMD from a surface mine he had witnessed in his inspection of hundreds of sites. Moreover, Mr. Hornberger's samples taken in 1980 validated Mr. Leighty's samples and showed that discharge 1 had not improved in quality.

The post-mining sampling of discharges 2 and 3 by Messers. Leighty and Hornberger demonstrated equivalent (lack of) quality to discharge 1 although at lower quantity.

On the basis of this evidence it is clear that the pre-mining or "natural" condition of the aquifer does not account for its post-mining quality. The only remaining rational cause of discharges 1, 2 and 3 from Mr. Hornberger's list is the mining activities of Hawk and/or Eidemiller.

Before examining this final issue of whose mining is responsible, it is desireable to remember that the present action involves an appeal from an order issued by DER to Hawk and Eidemiller. Therefore, pursuant to this board's rules (25 Pa. Code §21.101(b)(3)) the burden of proving that the discharges are caused by the mining of either or both of said companies is upon DER. However, the board agrees with DER that the instant case falls within the exception to 25 Pa. Code §21.101(b)(3) carved out by 25 Pa. Code §21.101(d). The latter section reads as follows:

> "(d) Where the Department issues an order requiring abatement of alleged environmental damage, the private party shall nonetheless bear the burden of proof and the burden of proceeding when it appears that the Department has initially established:
>
> (1) that some degree of pollution or environmental damage is taking place, or is likely to take place, even if it is not established to the degree that a *prima facie* case is made that a law or regulation is being violated; and

(2) that the party alleged to be responsible for the environmental damage is in possession of the facts relating to such environmental damage or should be in possession of them."

We agree that the Department has demonstrated that "...some degree of pollution or environmental damage is taking place..." and has thus met the requirement of §21.101(d)(1). However, the conjunctive "and" is used between §21.101(d)(1) and §21.101(d)(1), i.e., DER must also prove that "...the party alleged to be responsible for the environmental damage is in possession of the facts relating to such environmental damage or should be in possession of them."

Here, we are dealing with mining sites upon which mineral extraction was completed prior to DER's order. Whereas the DER inspector was present at the sites on only limited occassions, Hawk and Eidemiller personnel were present each day during the respective mining operations. Thus, evidence concerning such matters the numbers of seams of coal mined, old deep mine workings encountered, the condition of the barrier between the properties, and groundwater encountered during mining (all matters brought up by Hawk and Eidemiller in their defenses) should be in the possession of these parties.

The board also agrees with DER (and Eidemiller) that as between Hawk and Eidemiller, the burden is upon the former to causally connect the discharges of AMD emanating on the latter's site to the former's mining activities.

HAWK

It is clear that DER has met its burden with regard to Hawk and that Hawk has failed to extricate itself from any of the 3 discharges in question.

As discussed in detail above, the evidence establishes that discharge 3 did not exist prior to Hawk's mining. Moreover, the testimony of Hawk's foreman, Charles Ohlinger and of George Mehalic, Hawk's dozer operator, establishes

that some limited deep mine entries existed in the area of present location of discharge 2[1] prior to mining, that Hawk blasted in this area and that said mine openings were mined out by Hawk in violation of the conditions of Hawk's permit, and that a fair amount of groundwater was encountered during this mining. Thus, the evidence establishes as clearly as is possible that Hawk's mining operations caused the discharge 3.

With regard to the discharges 1 and 2 we have found as discussed above that a flow of water emanating from these areas predated Hawk's mining, however, the evidence clearly demonstrates that Hawk affected each of these areas during mining.

Mrs. Violet Sanderson, a disinterested witness called by Hawk, testified that Hawk removed the rock ledge from which bubbled up prior to Hawk's mining. Her testimony was corraborated by that of Mr. Ohlinger who agreed that he supervised the drilling and shooting (blasting) of the entire rock ledge and the removal of the coal underlying this ledge.[2] Indeed, Mr. Ohlinger admitted that Hawk mined the entire 800 feet of coal lying uphill from discharge 1 up to the property line

The testimony and drill hole data does confirm that in an uncertain but limited area not exceeded approximately 100 feet <u>downhill</u>[3] from the rock ledge Hawk did not mine.[4] However, Mr. Leighty's testimony, the drill hole data,

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1. Compare the location of deep mine openings on Hawk exhibit 3 to the location of discharge 3 shown as seep 981.20 on Hawk exhibit 4.

2. Mr. Howard Shoemaker, a Hawk employee, acknowledged that he actually performed this drilling and shooting.

3. All the expert witnesses acknowledged, the important area for affecting the quality of discharge 1 was <u>uphill</u> from the discharge, mining downhill from the discharge would not effect this discharge 2.

4. This may have been because there was no coal in the area. See N.T. 3149.

and other exhibits and the view clearly demonstrate that Hawk did affect even this downhill area by depositing spoil over it during backfilling.

Thus, the evidence establishes that Hawk's mining contributed to the deterioration of the quality of discharge 1--a deteroriation resulting as stated above in the worst single discharge of AMD yet witnessed by DER's experienced hydrogeologist.

With regard to discharge 2 it is again the testimony of Hawk's own witnesses which demonstrate that Hawk's mining affected this area. Mr. Donald R. Klepfer now General Superintendant of Hawk, testified that as the Hawk foreman he stripped all the coal above discharge 2 and up to 25 feet from the hollow or ravine in which this discharge is located and that he backfilled the stripped area with spoil. Thus, again it can clearly be seen that Hawk's mining at least contributed to the deterioration of the quality of discharge.

Before moving on to determine the liability of Eidemiller, if any, for any of the three discharges it is important to note that the order to Hawk is sustainable even if this board were to find that all of the flow of any or all of the 3 discharges and all the acidity thereof arose on the Eidemiller Site and merely passed through the Hawk Site to emanate thereupon. While this may seen unfair, it is clearly the law in Pennsylvania.

In *Commonwealth v. Barnes and Tucker Coal Company*, 319 A.2d 871 (1974), *Barnes and Tucker 1*, 353 A.2d 471 (1975), and *Barnes and Tucker 2*, 371 A.2d 461 (1977), the Pennsylvania Supreme Court upheld an injunction issued by Commonwealth Court requiring the Barnes and Tucker Coal Company to treat the AMD discharging from its mine even though some 85% of that drainage came from abandoned mines upgradient in the Barnesboro Basin from the Barnes and Tucker mine. A similar result on similar facts was reached by the Pennsylvania Supreme Court in *Commonwealth v. Harmar Coal Company*, 306 A.2d 308 (1973).

Both these cases stand for the proposition that, "[I]t is not the source of the polluted water itself, but the source of the discharge of the acid mine water into the waters of the Commonwealth with which we are presently concerned". *Barnes and Tucker 2*, at 479.

Hawk attempts to distinguish *Barnes and Tucker* asserting that in that case the mining company did something to alter the status quo but that here no conduct or activity of Hawk caused any of the discharges. Hawk's argument fails both on the facts and the law. As discussed above this board has found that Hawk's mining activities did cause or contribute to the discharges. Moreover, under section 315 of The Clean Streams Law, 35 P.S. §691.315 responsibility may be placed upon a mine operator to abate discharges of AMD or other pollutants emanating from the mine site or other real property regardless of the conduct of the operator in the operation of the mine. *Adam Greece d/b/a Cherry Run Fuel Company v. DER*, EHB Docket No. 79-149-B (issued August 8, 1980). Even where the owner or occupier of land has not created a condition on his land he is, nevertheless, responsible to abate that condition under Section 316 of The Clean Streams Law if he engages in some affirmative conduct indicating his adoption of the condition *Philadelphia Chewing Gum Corporation v. Commonwealth*, 35 Pa. Commonwealth Ct. 443, 387 A.2d 142 (1980).[5] Here the testimony of Hawk's foreman indicated that he knew in advance of the water discharges at Areas 1 and 2 and the deep mine openings at Area 3 yet mined in or near each of these areas, this constitutes affirmative conduct adopting the condition.

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5. Since the Pennsylvania Supreme Court affirmed only the Commonwealth Court's conclusion and did not adopt the Commonwealth Court's restrictions, it is not clear that affirmative conduct adopting the condition is required to impose abatement responsibility on a landowner under §316, but it is clear that where, as here, such affirmative conduct is present, responsibility attaches.

EIDEMILLER

The topography and geology of the Hawk and Eidemiller Sites, as described above were quite important to Mr. Hornberger in forming his opinion that the surface mining conducted by both Hawk and Eidemiller on their respective sites caused the discharges of AMD at Areas 1, 2 and 3. In fact, Mr. Hornberger's main reasons for involving Eidemiller in the Hawk discharges were that the Hawk Site lay downhill and down dip i.e., down rock strata, from the Eidemiller Site and that the aquifers in the area followed the surface contour and generally the dip of the rock, i.e., water runs down hill. Thus, Mr. Hornberger reasoned that rain water falling on the Eidemiller Site should, to the extent that it is not absorbed on that site, follow the clay aquaclude underlying the common seam of coal on the Hawk and Eidemiller Sites downhill and emerge on the Hawk Site (at Areas 1, 2 and 3).

Not surprisingly Hawk's experts were in general agreement with Mr. Hornberger except that they concluded that <u>all</u> or at least most of discharges 1, 2 and 3 could be attributed to Eidemiller while Mr. Hornberger implicated Hawk as well as Eidemiller. It is also not surprising that the experts for Eidemiller disagreed with that portion of Mr. Hornberger's testimony which would connect their client with any of the said discharges.

With all due respect to Mr. Hornberger, the board does not feel that his testimony provides the causal connection necessary to implicate Eidemiller. In *A. P. Weaver and Sons v. Sanitary Water Board*, 3 Pa. Commonwealth Ct. 499 (1971) Commonwealth Court was reviewing whether the record in a hearing before the Sanitary Water Board supported the board's finding that Weaver's mining operations had caused the deterioration of a spring located on the property of one Lillian Kaiser which was located adjacent to the said mining operations. Water samples showing the polluted condition of said spring were admitted, and

the Department's expert witness, Mr. Walter V. Kohler, explained that geological conditions in the area were such that the ground water in this area would have to move from the mined area toward the spring. The Court, however, rejected this as "...an insufficient showing of a causal connection between the pollution of the Kaiser Spring and A. P. Weaver's operations..." Thus, the Court remanded the matter to the Sanitary Water Board. The parallels between the A. P. Weaver situation and the instant situation are striking. Thus, we find that we are constrained by the *A. P. Weaver* decision.[6]

We also find that Hawk has failed to support its burden of linking Eidemiller to any of said discharges and we so hold, without regard to the stratigraphy extant on the Hawk Site. As discussed above the stratigraphy of the Hawk Site produced the most heated controversy among the witnesses of any issue in the matter. At least four versions of the stratigraphy were presented by the various witnesses. In Mr. Hornberger's version the post-mining stratigraphy of the Hawk and Eidemiller Sites, i.e., the first undisturbed layer underlying topsoil and backfilled spoil, would resemble a continuous sheet of plastic clay dipping at approximately surface contour from a high point on the Eidemiller Site and (more steeply) across the Hawk Site towards the Loyalhanna Creek. The Commonwealth in its brief, also seems to adopt the Hawk position that there was prior to mining a washout or absence of coal in circular area encompassing discharge 1.

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6. We do not mean to require dye tests to establish causal connections in mining cases. Nor do we infer that Eidemiller could not have been linked to discharges 1, 2 or 3 had they occurred or worsened in the absence of Hawk's mining. However, since Hawk did mine very close to each of said discharges we feel that it would require more than Mr. Hornberger has presented to <u>also</u> link Eidemiller to these discharges.

The second version of stratigraphy, that sponsored by Hawk through its experts Edward Hilovsky and Robert Anderson, is similar to the Commonwealth's version except that in this version instead of a hole in the coal at discharge 1, Hawk describes an outcrop line which (it says) ran generally to the east of the Hawk Site but bent into the site just above discharge 1. In other words, Hawk suggests that a penisula lacking coal projected into the Hawk Site in such a manner as to encompass discharge 1.

Hawk's experts tried to support their version of stratigraphy on the Hawk Site by comparing it to a map prepared by the Pennsylvania Bureau of Topographic and Geological Survey entitled "Greater Pittsburgh Region Thickness of Rocks over the Upper Freeport Coal". This map which was entered as Hawk exhibit 34-A does show an outcrop of Upper Freeport coal generally paralleling the east and western boundaries of the Hawk Site. Such a configuration would in general support the Hawk version of stratigraphy except that it would not explain the intrusion of the outcrop line around discharge Area 1.

Eidemiller's expert, Dr. Donald Streib, took strong exception to the use of Hawk 34-A to locate the outcrop line on the Hawk Site. He noted that this map itself bears a legend advising that it was developed by projecting down from a non-existant seam of Pittsburgh Coal to locate the Upper Freeport Seam and because the interval between these two seams could vary (at least 100 feet in either direction) as the legend states, "...the reliability of this data is questionable".

Dr. Streib also demonstrated that varying the coal seam location by only 50 feet would produce a rough match with the Eidemiller rather than the Hawk version of stratigraphy.

To be sure, Hawk's experts attempted to fine tune the outcrop depicted on Hawk 34-A through the use of site specific drill hole data but the problems

with using this drill hole data are enumerated below and it seems to this board that the use of 2 sets of unreliable data still does not produce a scientifically accurate stratigraphy.

Eidemiller's version of the stratigraphy, sponsored by its experts Dr. Donald Streib and Mr. Edward Steele, is that Hawk mined two seams of coal on its site; an upper seam, being the same seam Eidemiller mined which seam out-cropped around 1100 feet contour line and a lower seam which outcropped at the Townshp Road T-835 (which second seam Hawk mined uphill to near the 1100 foot contour).

Finally, Mr. Charles Ohlinger who was Hawk's foreman during much of its operation on the site in question and who is now a DER mine inspector, testified that Hawk mined but a single seam of coal and that this coal formed a continuous sheet up the middle third of the Hawk Site.

Mr. Ohlinger, however, further testified that this seam of coal was discontinuous between the 1100 foot and 1080 foot contour lines along both the eastern and the western thirds of the Hawk Site. More specifically, Mr. Ohlinger asserted that the coal outcropped under the same rock ledge discussed above with regard to discharge 1 as well as under the continuation of that rock ledge on the western side of the property and also outcropped along the 1080 foot contour line.

Which of the four above stated versions most nearly represents the stratigraphy on the Hawk Site? This question is not easy to answer in spite of or perhaps because of the extreme competence of all counsel in this matter and the cogent theories presented by their respective experts.

The board, however, has decided to adopt the Ohlinger version. This version has the advantage over the others of being based upon daily eyewitness observations of the exposed coal rather than a *post facto* analysis of a reclaimed

hillside. Indeed, if there was one thing the expert witnesses did agree upon it was that they all desired to have more data. The methods they did employ, post-mining drill hole data and observation of deep mine entries, are both subject to considerable doubt. The drill data is suspect because the experts generally assumed that the post-mining contour of the Hawk Site was identical with the pre-mining contour as shown in the U.S.G.S. maps. Given the nature of strip mining this does not seem likely and indeed there is testimony that the back-filled surface in and about discharge 1 did differ from pre-mining contours.

Secondly, there were simply not enough drill holes, especially in the critical 1100 foot to 1080 foot zone, to substantiate anything except the absence of coal in an area near discharge 1. By way of analogy the experts trying to map the coal seam(s) with their limited drill holes were like the blind observers of an elephant trying to describe the creature by feeling a trunk or tail. As to the deep mine entries, there is no doubt that a number of these existed near the 1000 foot level at the Township Road T-835 and up through an adjacent ravine to the east. But old strip mine workings and deep mines also existed to the northwest of the Hawk Site at about the 1200 foot level. Do these respective workings demonstrate 2 seams or a single seam running up the hill? The answer is they can support either theory.

Eidemiller also introduced evidence that it had mined "the lower seam" to the east of the Hawk Site prior to the operations here in question and had even received a completion approval on this tract from DER. The board finds this evidence credible but not determinative. It merely proves that coal lies at shallow depth (10-15 feet) near the Township Road T-835 and no party denied this fact. It did not, however, prove how steeply that coal runs up the hill.

Finally, there was eyewitness testimony concerning the two seams of coal. Mr. Michael Mehalic testified that he had hauled coal every day during

the Hawk operation and that Hawk had two pits open at the same time, and that the coal in the upper pit was "crop coal" indicative of an outcrop. Mr. George Lloyd, another trucker who hauled coal from the Hawk Site, confirmed Mr. Mehalic's testimony but added that he actually saw both seams in the same highwall at the same time. Both these gentlemen as well as Mr. Gerald G. Pritts, who had worked as Eidemiller's foreman, but who no longer works for Eidemiller, testified that Mr. Ohlinger had bragged to them about his "gold mine" on the Hawk Site in that he had 2 seams of coal and thus had low cover throughout the job.

The board is inclined to believe the testimony of the above witnesses in large measure but it finds that testimony not to be inconsistent with the Ohlinger version of stratigraphy.

Mr. Ohlinger admitted that he had two pits operating at once and that he mixed the crop coal from the 1080 foot level with the coal from the lower pit so these facts are not at variance with his version. Moreover, in at least one sense Mr. Ohlinger did have 2 seams of coal because on two-thirds of the Hawk Site the coal was discontinuous at the 1100 foot level. The lay of the coal described by Mr. Ohlinger would have been surprising to him and would have been a pleasant surprise because the discontinuity of the coal ensured that it lay below thinner cover than expected. Thus, it is likely that he would have discussed this matter with the witnesses above. Indeed, Mr. Ohlinger himself might have thought at one point that he did have two seams of coal and would not have known differently until he stripped the same seam up the hill. (The middle third of the site was stripped later than the western and eastern thirds.)

Having adopted the Ohlinger version of stratigraphy, the board, nevertheless, adopts Eidemiller's version of groundwater flow. The apparent inconsistency of this approach will, hopefully, be resolved below.

Besides four versions of stratigraphy this case produced at least 3 versions of groundwater flow across the Hawk Site.

The DER version, based upon Mr. Hornberger's testimony posited the Eidemiller Site as the recharge area of a shallow groundwater flow system lying above the clay seam with the discharges 1, 2 and 3 representing short circuits in a flow path which ultimately ends in the Loyalhanna. Essentially, Mr. Hornberger's version suggests that rainfall percolates to the clay layer under the backfill and flows down along this clay.

The Hawk version, as supported by Mr. Hilovsky and Mr. Anderson, agrees, in essence, with DER's version, however, Mr. Hilovsky was candid enough to admit that neither the DER nor the unmodified Hawk version accounted for the steady and heavy flow from discharge 1. This steady flow was noted by every witness who discussed the discharge and was noted even after prolonged periods of drought. Mr. Hilovsky tactily agreed with Dr. Streib that such a steady flow could not be maintained by flow above the clay layer alone. The Hawk and DER versions also fail to explain what is perhaps one of the most crucial facts in the entire 3200 plus pages of evidence, the absence of water on the Eidemiller Site. All of the witnesses for all of the parties agreed that they never saw water in the open cut which paralleled the Hawk-Eidemiller boundary in the northwest portion of the Hawk Site. According to the DER-Hawk version water would have to flow through this cut on its way from the Eidemiller to the Hawk Site yet during wet weather and dry for the period of several years during which this cut remained open not one witness saw any water in this cut. Indeed, all witnesses saw the clear dry clay at the bottom of the cut along which the theoretical groundwater was supposedly passing. Moreover, in preparation for litigation both Hawk and Eidemiller engaged in extensive drilling along their common boundary yet neither party introduced any evidence of water in any hole ending above the clay and Eidemiller's witness George Dutrow testified that he inspected the drilled holes on a weekly basis for water flow but found none.[7]

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7. While these findings may be questioned due to the cave-in of some holes at least 2 holes had been cased and they too were dry.

Hawk's attempt to overcome the above-stated objective evidence was by a theory. Hawk's experts posited that groundwater ran off the Eidemiller tract across the Zominsky (Anna A. Mayer) property towards the east where it encountered unmined coal and overburden, was trapped and was directed back to the southwest towards discharge 1. This theory could explain the high steady volume of discharge 1 and its low quality. However, this theory has at least two serious faults. First of all this theory assumes that the unmined coal and overburden would act as a dam to the groundwater. This assumption is at variance with the testimony of Mr. Hornberger and of Eidemiller's experts, all of whom testified that water passes through both coal and the sandstone overburden even when those layers have not been fractured by blasting. Indeed, even Mr. Hilovsky seemed to change his mind from time to time regarding the permeability of these layers.

Perhaps, even more fatal to Hawk's theory is the complete lack of any objective evidence to support it. No drill holes data demonstrated the projected flow of water and no witness testified as to water flow during Eidemiller's mining of this area.[8]

Having somewhat discredited the DER and Hawk versions of groundwater flow it remains to describe the Eidemiller version. This version sponsored by Dr. Streib and Edward Steele, suggests that a aquifer underlies the plastic clay which remains after mining on the Eidemiller and Hawk Sites. They suggest that this aquifer is recharged by rainwater percoloating through topsoil and spoil on the Eidemiller Site and penetrating the clay layer through pressure cracks.

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8. Hawk did attempt by way of a dye test to prove that water flows along the clay layer from the Eidemiller to the Hawk Site. However, this dye test had no scientific reliability and in any event since the dye was introduced on the Hawk property it could at most prove the existance of a small localized perched water table (located on the Hawk Site) which might contribute to the flow of discharge 1.

They further opine that this aquifer is artesian, i.e., under pressure by the time it reaches the 1100 foot contour, under the afore-described rock ledge. Thus, any breach of this layer at this point or perhaps a geological washout of the layer will result in a spring or seep. The artesian nature of the aquifer was demonstrated by 2 holes drilled through the clay layer on the Eidemiller property. Not only did these holes fail to encounter any water, the water level in these holes rose above the clay layer after it had been breeched. This limited drill hole data and water samples, also lends support to Eidemiller's assertion that this aquifer was a limey shalestone or a shaley limestone which has a neutralizing affect on recharge water so that the pre-mining quality of the spring emanating from this aquifer would have been as found by Mr. Leighty and Mrs. Sanderson.

While one could ask for more data to support the artesian aquifer theory, this theory at least has some data and hard evidence to support it. Moreover, neither DER nor Hawk seriously attempted to rebut this theory.

Hawk's only quibble with Eidemiller's theory is that if the aquifer produces "good water" there wouldn't be time enough for it to go bad by running through Hawk's spoil before discharging to the ground surface. However, Hawk presented no evidence to support its position whereas Dr. Streib, on the basis of tests he had conducted, testified that the discharge would be in contact with spoil for at least a few hours to a few days before encountering the surface and that this was more than sufficient time for it to become deteriorated. The spoil analysis run by both Hawk and Eidemiller show that at least some of the overburden on each site is capable of producing AMD if exposed to water and air and the acidic condition of discharges from abandoned surface and deep mines in the area as sampled by Mr. John Bates more than supports this conclusion. Thus, it is clear that there has been no effective rebuttal of this theory.

In addition, the Eidemiller aquifer theory along with the Ohlinger version of stratigraphy explains why there are more or less continuous discharges on the eastern and western thirds of the Hawk Site (discharges 1 and 2, respectively, at the site of pre-mining springs) while discharge 3 located in the middle of the Hawk Site, drys up from time to time. The explanation is that in the middle of the site the clay barrier is continuous while it is at least thin and probably discontinuous at localized areas along the eastern and western sides of the site allowing artesian water to reach the surface. The source of discharge 3 would then be (not an overflow from discharge 1--another unsupported Hawk theory) but rather a very localized discharge from a small recharge area located on Hawk's Site.

Since the board has adopted Eidemiller's groundwater theory we cannot find any hydraulic connection between mining on the Eidemiller Site and any of discharges 1, 2 or 3, there being no evidence that Eidemiller's mining affected the said aquifer in any way. This finding stands even though the evidence is clear that Eidemiller did remove a (150 foot) portion of the coal barrier which was supposed to extend across the common boundary between the sites.[9]

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9. Apparently, the mine map of each company showed a 50 foot setback from their common property line, a setback once encouraged by DER. It is interesting that such a barrier is no longer required because even DER admits that a 50 foot to 100 foot natural barrier (especially one fractured by blasting) does not dam up groundwater but at best merely restrains the flow rate of this groundwater. In any event, Hawk stripped to or near the property line so that the barrier shown on its mine map did not exist anywhere across the common boundary. This was the result of a misunderstanding--Hawk's field personnel thought the yellow ribbon marking the line was 50 foot back on Hawk's property. But, according to the testimony of Mr. Pritts it was right on the common boundary. Thus, when Mr. Pritts in accordance with the instructions of his supervisors, removed the Eidemiller portion of the barrier on his side--no barrier was left in the 150 foot space. Again however, there is no evidence of any water passing through this breach in the barriers.

While this board has exonerated Eidemiller from involvement in discharges 1, 2 and 3 and thus relieves that company of further compliance with the order under appeal we do not condone Eidemiller's tardiness in backfilling and revegetating the Eidemiller Site and we do support that portion of DER's order which required Eidemiller to completely backfill and revegetate its site. We also, however, note that according to the testimony of Mr. C. R. Green, DER's present mine inspector for the site, backfilling and reclamation has been completed in accordance with Eidemiller's reclamation plan.

CONCLUSIONS OF LAW

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

2. The Department is the agency with authority to administer and enforce the Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1 *et seq.* (Clean Streams Law); the Act of May 31, 1945 P.L. 1198, *as amended*, 52 P.S. §1396.1 *et seq.* (Surface Mining Act); §1917-A of the Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §510-17 (Administrative Code); and the rules and regulations under each statute.

3. The Department has the initial burden of proof to show that environmental harm is occurring or is likely to occur, and that the person to whom the order is issued is reasonably connected to such environmental harm, it supported this burden with respect to both Hawk and Eidemiller.

4. Pursuant to 25 Pa. Code §21.101(d), the burden of proof with respect to responsibility for the acid mine drainage shifted to Hawk and Eidemiller.

5. Eidemiller but not Hawk supported its burden that it bore no relationship to the discharges. Moreover, as between Hawk and Eidemiller, Hawk

bore the burden of proving Eidemiller's relationship to the discharges emanating on the Hawk Site and Hawk failed to support this burden.

6. Issuance of the subject order to Hawk was a reasonable and necessary exercise of the Department's enforcement powers, and was not an abuse of discretion.

7. Acid mine drainage constitutes a nuisance.

8. Pursuant to the Clean Streams Law, the Department may require Hawk to treat or abate discharges from its permit area which constitute violations of its mine drainage permit and of the effluent criteria contained in the Department's regulations.

9. Pursuant to the Surface Mining Act, the Department may require Hawk to treat or abate discharges from its permit area which constitute violations of its mining permit and the effluent criteria contained in the Department's regulations.

10. Hawk is legally responsible for treating or abating <u>all</u> the acid mine drainage emanating from its site, regardless of its source.

11. Hawk is legally responsible for treating or abating acid mine drainage which discharges from land which it owns or occupies, irrespective of wrongdoing on the part of Hawk.

12. Economic hardship is not a valid defense to the lawful issuance of a Department order to abate a public nuisance.

O R D E R

AND NOW, this 2nd day of December , 1981, the appeal of Hawk is dismissed and DER's order is sustained in full with regard to Hawk, the appeal of Eidemiller is sustained and DER's order is dismissed with regard to Eidemiller to the extent that it requires Eidemiller to participate in the treatment or abatement of any discharges of AMD emanating on the Hawk Site.

ENVIRONMENTAL HEARING BOARD

Dennis Jay Harnish

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DATED: December 2, 1981

B-43: 12/79

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Harrisburg, Pennsylvania 17101
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INTERSTATE TRAVELLER'S SERVICES, et al. :

:

: Docket No. 79-158-W

Pa. Sewage Facilities Act
Clean Streams Law

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and MID-CENTRE COUNTY AUTHORITY, Intervenor

ADJUDICATION

By: Paul E. Waters, Chairman, March 12, 1981

This matter comes before the Board as an appeal from an order by DER requiring Boggs Township Authority (Township Authority) to abandon its sewage treatment plant, which DER considered to be an interim plant, and connect to the newly constructed Mid-Centre Authority Sewage treatment plant. Township Authority and Interstate Traveller's Service (ITS) which actually constructed the plant, allege that the plant is adequate, was not an interim plant, and therefore should not be closed during its useful life. In addition, ITS argues that two other potential users, should be made to connect to the Township Authority plant.

FINDINGS OF FACT

1. Appellants are Interstate Traveller's Service (formerly Tri-County Oil Corp.) the corporation which constructed the treatment plant and appellant Boggs Township Authority.

2. Appellee is the Department of Environmental Resources hereafter DER.

3. Intervenor is Mid-Centre County Authority, formerly Milesburg-Boggs Township Authority, Inc.

4. In 1970 Centre County completed the Centre County Comprehensive Water and Sewer Plan which recognizes the regional concept in the Mid-Centre County area, contemplates the creation of the Mid-Centre County Authority and includes the interchange as part of its service area.

5. In 1971 ITS commenced construction of a truck plaza at Milesburg Interchange on Interstate 80 and which used holding tanks for at least one year as a sewage disposal system.

6. Early in 1973, ITS applied to DER for a Sanitary Sewerage Permit. On this date, ITS wrote DER proposing a designed capacity based upon ITS's estimates of gallonage flow required for its operation.

7. On or about June 15, 1973 an agreement was consummated between ITS, DER and Boggs Township. The date of the agreement is in dispute and could have been executed October 10, 1973.

8. On October 16, 1973 DER issued the permit for the ITS package treatment plant with standard condition number 26 which provides:

> "If facilities become available for conveying the sewage to and treating it at a more suitable location, upon Order from Department of Environmental Resources, the permittee shall provide for the discharge of the sewage to such facilities and shall abandon the use of the herein approved treatment works."

9. In 1974 the ITS treatment plant was constructed and put into operation at a cost of approximately $250,000. On October 10, 1973 an agreement was entered between Boggs Township Authority and Tri-County Oil wherein Boggs Township Authority agreed to purchase the ITS treatment plant at whatever figure it cost ITS to construct, which construction costs were to be determined solely by ITS.

10. At all times relevant to this proceeding, Mid-Centre County Authority held a DER permit to construct a sanitary sewerage system including Milesburg interchange at I-80 in its service area and which also provided for a treatment plant to be located in the same general area where it was finally constructed. Mid-Centre County Authority continued to work toward fruition of the project, which was recently completed in 1980 after a number of changes along the way.

11. On September 13, 1979 DER issued an Order to Boggs Township Authority to abandon the ITS package plant and discharge all sewage to Mid-Centre County Authority plant thereby revoking its permit.

12. In the event that Sheraton and ITS do not connect to the regional facility, the cost to each residential user will increase from $190.00 to $199.70 per year, and the cost to each commercial user will increase from $316.00 per EDU to $427.30 per EDU.

13. Boggs Township Authority has not consistently made payments to ITS for the plant which it is obligated to purchase.

14. DER has issued orders to Roadway and Baldeagle Joint School District, similar to the one issued to ITS, requiring them to connect to the new Mid-Centre County Authority treatment plant.

15. Neither Roadway nor Baldeagle Joint School District appealed the DER order, but ITS did, based on an intention to have them use its plant.

16. The Mid-Centre County Authority plant has a treatment capacity for 1.0 MGD and has duplicate units for emergency service and is a thoroughly modern facility located just across the road from the ITS plant.

DISCUSSION

The Boggs Township Authority is the owner of a treatment plant which was constructed by ITS off route I-80, at the Milesburg Interchange. The plant was originally projected for a capacity of 125,000 gpd but is presently capable of treating only 60,000 gpd.[1] The plant is presumed to have a life expectancy of more than 15 years and was placed in operation in 1973. It presently serves the ITS facilities at the Interchange but was intended to also serve a Roadway trucking facility.[2] In fact, ITS was under the impression that DER would require Roadway and others to connect to the ITS plant.[3] We are satisfied that this was at one time contemplated, but the closer the time came for the larger Mid-Centre County Authority plant opening, the less DER was interested in this solution. ITS now argues that DER should be required to order Roadway and other customers in the immediate area, to hook onto the ITS plant, rather than the Mid-Centre County Authority plant. DER contends that ITS should not even be permitted to mount such an argument, for want of standing. We disagree. In *Interstate Traveller's Service, et al. v. Comm.* 486 Pa. 536 (1979) involving the same parties as here, the Court said:

> "Although the complaint speaks in terms of harrassment, coercion and interference with contractual rights, it is clear from the complaint that DER (and the regional authority) exercised administrative judgment that was allegedly injurious to appellants, and it is this judgment which is being collaterally challenged by means of the complaint in equity. Whether or not DER's authority was exercised improperly is a matter that could have and should have been heard by the EHB, the body with the requisite administrative expertise to competently resolve the matter in the first instance."

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1. ITS had expected greater growth in the area than has actually occurred to date, and the projection was based on this anticipation. The plant can easily be upgraded to meet a higher figure.

2. Roadway was also ordered by DER to hook onto the new Mid-Centre County plant, and has not appealed that order.

3. The Baldeagle Area Joint School District and Sheraton Hotel were also to be customers of ITS. Although we refer to the plant as ITS's, in fact it is owned by Boggs Township Authority but is not yet fully paid for.

We therefore conclude that the issue is properly before us. We do not agree however, that DER was in error in failing to order Roadway and others to connect to ITS's plant. There is ample evidence that indicates ITS has failed to meet the requirements for phosphate removal and that there are other operational problems at the plant.[4] While we do not deem these to be serious violations, in the context of other facts elicited, and regardless of whether we would have had a different view *prior* to the availability of the Mid-Centre County Authority plant, we can find no abuse of discretion by DER.

We come now to the key issue in this case. The parties have debated long and well the question of whether this is an "interim plant", and thus to be phased-out when the new Mid Centre County plant became available—which it now is. Although this is an interesting question and there is some supporting evidence on both sides, we believe it is largely irrevelant.

We believe that DER has the authority to order, under proper circumstances, a consolidation of a small package sewage treatment plant into a larger more comprehensive area plant whether or not the small plant has been specifically designated as "interim" by the parties.[5]

In construing the Pa. Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, *as amended*, 35 P.S. §750.1, *et seq.* and the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1, *et seq.* DER can properly decide as a policy

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4. The removal level to a concentration of 0.4 mg/l of phosphorous based on a 5-day average has not been achieved. The monthly inspection reports have not been filed regularly with DER as required by Standard Condition 18 of the permit.

5. Although the ITS plant was not so designated by an agreement entered with DER in 1973, it seems clear, as time elapsed, that all parties began to see it as such. We refused, based on the parol evidence rule to allow DER to show that the parties *originally* intended the plant to be "interim" in nature. It is the changed circumstances, not the original agreement which are now relevant.

matter to oppose the proliferation of sewage treatment plants. Much has been said about standard condition No. 26 of the ITS permit, which provides that the ITS plant will be abandoned when treatment facilities become available at a "more suitable location." Because the new Mid-Centre County Authority plant is virtually at the same location as is the ITS plant, ITS argues that the condition does not apply here. We believe that it does. In making a determination of whether a particular place for sewage treatment is "more suitable" we do not believe one is bound to look only at the situs of the property. The emphasis should be placed more on the word "suitable" than "location". Again, we believe DER must have considerable discretion in this matter of consolidating area-wide treatment facilities. In *Pocono Haven Truck Plaza v. DER* 1 EHB 139 this board allowed a business operated at a truck stop on I-80 to construct and operate a private treatment plant under given conditions, with the understanding that he would connect to a new treatment plant and abandon his own, when it became available. In *Bedford Springs Hotel v. DER* 1977 EHB 284 at page 285, appellant wanted to construct a private plant rather than continue to have its sewage treated at the Borough plant. We there said:

> "As a matter of policy, all things being equal, the DER and this board would prefer to have sewage given secondary treatment at a newly constructed municipal plant, which is possible in this case."

Although we are convinced that the ITS plant is, or can become, minimally adequate, having seen both plants and considering all of the expert testimony, we believe the Mid-Centre County Authority plant to be a more suitable location, within the meaning of standard condition No. 26.

The final, and most difficult question raised by these proceedings, is— what should be done with the ITS plant, which does, we believe, still have some useful life. We believe it would be unreasonable in these inflationary times, to simply abandon immediately a plant which has some useful life and which is not yet paid for.[6] Considering all of the evidence, including the fact that this plant has

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6. Boggs Township Authority is purchasing the plant from ITS, but payments have been sporatic.

not been operated at peak efficiency, we believe a reasonable period of 24 months should be allowed for a phase-out of the ITS plant and connection to the Mid-Centre County Authority plant.

CONCLUSIONS OF LAW

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

2. Appellant ITS has standing to raise the question of whether two other parties, which were served with the same order as here under appeal, can be ordered to connect to the ITS plant, notwithstanding the fact that they have filed no appeal from said order.

3. Pursuant to the Pa. Sewage Facilities Act, Act of January 24, 1966, P.L. 1525, *as amended*, 35 P.S. §750.1, *et seq.*, the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1, *et seq.* and Rules and Regulations DER may properly order a small municipal treatment plant which has only minor operational problems, to discontinue operation and to connect to a larger more modern facility, at a more suitable location.

4. Where a small treatment plant is phased-out by DER, reasonable consideration must be given to the urgency of environmental factors, as well as the remaining useful life of the older plant, and the economic implications of the decision.

5. Under the facts of this case, DER should allow appellant ITS 24 months from the date hereof to connect to the new Mid-Centre County Authority treatment plant.

O R D E R

AND NOW, this 12th day of March, 1981, the appeal of Interstate Traveller's Service, et al. filed to EHB No. 79-158-W is hereby dismissed. DER is hereby ordered to amend its order of September 13, 1979, and to allow appellants at least twenty-four (24) months to phase-out their sewage treatment plant and to connect to the Mid-Centre County Authority Sewage Treatment plant, conditioned upon the proper maintenance and operation of the plant.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

DENNIS J. HARNISH
Member

DATED: March 12, 1981

EHB-43: 12/79

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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Harrisburg, Pennsylvania 17101
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LACKAWANNA REFUSE REMOVAL, INC., et al : Docket No. 79-024-B

: Solid Waste

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By the board, February 3, 1981

The following adjudication was drafted by Thomas M. Burke, Esquire, a former member of the Environmental Hearing Board, who has been retained as a hearing examiner.

This matter arises out of appeals by Lackawanna Refuse Removal, Inc. (Lackawanna Refuse) and Northeastern Land Development Company (Northeastern Land) from two separate actions of the Department of Environmental Resources (DER). On March 2, 1979, the DER issued an order to Lackawanna Refuse Removal, Inc. suspending Solid Waste Permit No. 100920 and requiring the immediate cessation of operation of the landfill for which the permit was issued, the Old Forge Landfill in Old Forge Borough, Lackawanna County. The order also required Lackawanna Refuse to dig up and dispose of drums containing hazardous wastes buried at the

landfill and all soils contaminated by the hazardous wastes. A subsequent order was issued by the DER on August 13, 1979 requiring Lackawanna Refuse and Northeastern Land to construct and operate leachate collection and treatment facilities at the Old Forge Landfill.

Lackawanna Refuse filed a petition for supersedeas from the March 2, 1979 shutdown order. Five days of hearings were held on the petition and on May 10, 1979 we issued an order denying the supersedeas. (See Opinion and Order Sur Petition for Supersedeas dated May 10, 1979, 1979 EHB 300.)

By order dated December 12, 1979 we consolidated the appeals of Northeastern Land and Lackawanna Refuse from the DER August 13, 1979 order with the appeal of Lackawanna Refuse from the March 2, 1979 order under this docket. On March 24, 1980 we denied a DER motion, pursuant to Board Rule 21.42, to place the burden of proof and burden of proceeding on appellants.

Three days of hearings were held in Harrisburg on the consolidated appeals and, by order dated March 24, 1980, the testimony recorded at the supersedeas hearing was incorporated into the hearing on the merits. The parties have filed post-hearing briefs. Based thereon we hereby find as follows:

FINDINGS OF FACT

1. Appellant, Lackawanna Refuse is a corporation licensed and registered to do business in the Commonwealth of Pennsylvania with its principal corporate offices at 600 N. St. Francis Cabrini Avenue, Scranton, PA 18504.

2. Appellant, Northeastern Land is a corporation licensed and registered to do business in the Commonwealth of Pennsylvania, with its principal corporate offices at 600 N. St. Francis Cabrini Avenue, Scranton, PA 18504.

3. Peter C. Iacavazzi, Sr. is the president, chief executive officer and majority shareholder of Lackawanna Refuse and Northeastern Land.

4. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources which has the duty and obligation to enforce The Clean Streams Law, the Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1 *et seq.*; the Pennsylvania Solid Waste Management Act, the Act of July 31, 1968, P.L. 788, *as amended*, 35 P.S. §6001 *et seq.* (now repealed and supplanted by the Solid Waste Management Act of July 7, 1980, No. 1980-97).

5. Lackawanna Refuse is the permittee of DER Permit No. 100920, issued pursuant to Section 7 of the PA Solid Waste Management Act, *supra*, on March 21, 1973.

6. Permit No. 100920 was issued to Lackawanna Refuse for a sanitary landfill located in the Borough of Old Forge and in Ranson Township, both of Lackawanna County, officially known as the Northeastern Land Development Company Sanitary Landfill (Old Forge Landfill).

7. Northeastern Land owns the land on which the Old Forge Landfill was located and operates the landfill for Lackawanna Refuse.

8. Lackawanna Refuse's Solid Waste Permit No. 100920 approves the disposal of residential and commercial garbage and refuse at the Old Forge Landfill.

9. Solid Waste Permit No. 100920 does not approve or authorize the disposal of industrial wastes or hazardous wastes at the Old Forge Landfill.

10. Appellants are prohibited from disposing of hazardous wastes at the Old Forge Landfill without prior approval for its disposal from the DER.

11. Appellants were aware of the prohibition against disposal of hazardous wastes at the Old Forge Landfill without prior approval from the DER.

12. Solid Waste Permit No. 100920 provides that an approved leachate collection system would be installed within sixty (60) days after notification by the DER that a leachate collection system is necessary.

13. The leachate collection system approved by Solid Waste Permit No. 100920 contemplates the installation of 1,500 gallon holding tanks at the

toe of each pit to drain cutoff ditches collecting leachate from each pit.

14. The only industrial or hazardous waste approvals granted by the DER to Lackawanna Refuse pertained to certain specified wastes from Charmin Paper Products (also referred to as Proctor and Gamble) and GTE Sylvania sludge.

15. Permit No. 100920 was amended in 1977 to add a new portion of Northeastern Land's property to the landfill site. The new area was referred to as Pit No. 5.

16. The Old Forge Landfill received industrial wastes from Simon Wrecking Company, S & W Waste, Inc., Topps Chewing Gum, Chamberlain Corporation, Elliot Corporation and Owens Illinois.

17. Paul Iacavazzi, the bookkeeper for Lackawanna Refuse, admitted to disposing of 11,550 fifty-five-gallon drums in the Old Forge Landfill from Simon Wrecking Company.

18. S & W, Inc. is certified by the Department of Environmental Protection of New Jersey to handle hazardous wastes.

19. Pit No. 5 was used for the disposal of 55-gallon drums picked up at Simon Wrecking.

20. Edward Cherkoski, a Lackawanna Refuse employee who drove a truck and suspervised the transfer of barrels from Simon Wrecking facilities in Williamsport and Reading, PA, estimated that many times the number of barrels admitted to have been disposed of by appellants were actually buried at the Old Forge Landfill.

21. There is visual evidence of extensive outbreaks of leachate from various locations at the Old Forge Landfill.

22. A DER hydrogeologist observed that surface water running upland of Pit No. 5 was clear and without odor or discloration in contrast to the surface water after passing through the landfill which was described as smelling like "old apples" and of red, green and black colors.

23. A uranine dye survey positively demonstrated that there is a direct hydrological route from a pond of leachate 800-feet downslope of Pit No. 5 to the St. John's Creek which is a tributary of the Lackawanna River.

24. Four of the drivers who delivered barrels of industrial waste to the Old Forge Landfill from Simon Wrecking Company gave corroborated testimony to the hazards posed by exposure to many of the materials in the barrels, including headaches, caustic malodors, shortness of breath, eye irritation, and unconsciousness.

25. Although the content of most of the barrels is not directly known, many of the barrels disposed of at the landfill had cautionary labels on them such as "poison" or skull-and-crossbones, "hazardous", and "flammable".

26. Chemical analysis of leachate seepages at the Old Forge Landfill revealed the presence of numerous chemicals, including toluene, xylene, tetrachloroethylene, styrene, chromium, cadmium, mercury, cyanide, arsenic, a pyridine derivative, a cyclic diether compound, isoproply-1, 3-diorolane, methylisobutyl ketone, camphor, phenol, copper, zinc, silver, barium, lead, vinyl chloride, trichlorethylene-1, 1-dichloroethane, trans. 1, 2-dichloroethylene, 4-methylphenol, benzene propanol, and dichloroflurומethane.

27. Many of the chemicals referred to in finding of fact No. 26 are not found as breakdown products from conventional commercial and residential waste landfills.

28. Of the chemicals detected in the leachate seeps both in Pit No. 5 and elsewhere in the Old Forge Landfill, three are known carcinogens and six are suspected carcinogens.

29. Any exposure to a carcinogen causes a risk of increased incidence of cancer in the exposed population.

30. Exposure to the carcinogens or suspected carcinogens detected in the leachate seeps at the Old Forge Landfill can occur through ingestion, inhalation or skin absorption.

31. All of the inorganic chemicals and several of the organic chemicals identified in the leachate seeps are included in the 1978 edition of the NIOSH "Registry of Toxic Effects of Chemical Substances". Inclusion of a chemical in the NIOSH Registry indicates that "the substance has the documented potential of being harmful if misused and care must be exercised to prevent tragic consequences".

32. The materials from which the chemicals referred to in finding of fact No. 26 were leaching constitute "hazardous wastes" as the term is defined by 25 Pa. Code 75.1 of the DER's regulations.

33. Appellants do not have a water quality permit under The Clean Streams Law authorizing the discharge of leachate from the Old Forge Landfill.

34. DER discarded the samples of leachate taken at the landfill after analyses were run on the samples.

35. Approximately 50% of Lackawanna Refuse's business was from industrial plants. Lackawanna Refuse never checked the waste from industrial plants to determine whether it was garbage or refuse or wastes generated by the industrial process itself.

36. The records of Lackawanna Refuse show that Lackawanna Refuse received 115,507 dollars from Simon Wrecking Company from August 1978 until December 1978 for disposing of 55-gallon drums containing unknown substances from Simon Wrecking Company at the Old Forge Landfill.

37. Simon Wrecking Company paid Lackawanna Refuse $10.00 per every barrel it buried at the Old Forge Landfill.

DISCUSSION

This case is illustrative of the state of haphazard disposal of hazardous wastes which prompted, and in fact necessitated, the recent passage of legislation and administrative rule-making to govern the handling and disposal of hazardous wastes. The facts here demonstrate a chilling disregard for, and ignorance of, the consequences that illicit and haphazard disposal of dangerous substances can have on human health and habitat.

Appellant, Lackawanna Refuse has a solid waste management permit from the DER, issued under the Solid Waste Management Act, the Act of July 31, 1968, P.L. 788, No. 241, *as amended*, by the Act of July 7, 1980, 35 P.S. 6001 *et seq*. to operate a sanitary landfill in Old Forge Borough and Ranson Township, Lackawanna County, known as Old Forge Landfill. Appellant, Northeastern Land owns the land on which the Old Forge Landfill is located and operates the landfill for Lackawanna. Both companies are controlled and operated by Peter C. Iacavazzi; he is president, chief executive officer and majority shareholder of both. "I run everything. I'm a one-man gang, all right."[1] The permit for the Old Forge Landfill, No. 100920, approves the disposal of municipal and commercial waste.[2] It specifically prohibits the disposal of liquids and hazardous wastes.

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1. Notes of Testimony, Vol. 1, p. 177, lines 17 and 18.

2. Commercial waste is defined at 25 Pa. Code §75.1 as:

   "Commercial waste --All solid waste emanating from establishments engaged in business. This category shall include, but is not limited to, solid waste originating in stores, markets, office buildings, restaurants, shopping centers, and theatres."

The terms of the permit notwithstanding, Lackawanna operated the landfill without concern for the type of substances that were disposed of there. Iacavazzi testified that Lackawanna received approximately 50% of its wastes from industrial sources, yet he never felt any responsibility to check to see if the wastes received were garbage and rubbish or instead were wastes actually generated by the industrial processes, which he was not permitted to take. Lackawanna's industrial customers included Chamberlain Corporation, Elliot Corporation, Topps Chewing Gum and Owens Illinois. Iacavazzi admits to burying twelve truckloads of 55-gallon drums, approximately 79 drums to a load, containing various amounts of unknown substances, from S & W Waste, Inc., a company certified by the Department of Environmental Protection of New Jersey as a handler of hazardous wastes. He never thought it necessary to determine the contents of the drums or to ask S & W why they would transport wastes to his landfill all the way from Jersey City, New Jersey.

Besides ignoring the nature of the wastes they received, appellants, themselves transported and disposed of 55-gallon drums containing unknown wastes at the landfill. They also emptied tank trucks of 5500 to 6500 gallons of unknown wastes at the landfill. Edward Cherkoski, worked as a foreman for Lackawanna until December 1978. His duties included the loading and driving of trucks and tractor-trailers. He was responsible for the loading of 55-gallon drums on trucks and having them driven from Simon Wrecking Company's facilities in Reading and Williamsport to the Old Forge Landfill as well as transporting tank trucks containing liquid wastes to the landfill. He also collected the receivables due Lackawanna Refuse from Simon Wrecking for disposing of the drums and wastes. He testified that 6 or 7 truckloads of drums, 60-80 drums per load, were hauled to the Old Forge Landfill and buried each day from September 1, 1978 until December 1978. Appellants admit that 55-gallon drums containing wastes were buried at

Old Forge Landfill and that some liquid wastes from tankers were discharged there; they dispute Cherkoski's recollection only as to the amount. They contend that no more than 11,500 waste laden drums from Simon Wrecking Company were buried from August 16, 1978 until December 24, 1978.

Appellants' principle contention in defense of the DER's orders is that the DER failed to show that the wastes buried at Old Forge are hazardous.[3] It is true that DER has not been able to identify the contents of the drums or tank trucks. Nevertheless, there is sufficient circumstantial evidence for this board to conclude that the buried wastes are hazardous and present a substantial risk to human health and environment.

Drivers of the trucks for Lackawanna Refuse testified at the hearings. Although unable to identify the contents of the drums and tankers, they were able to read warning labels. Some were marked with the skull and crossbones emblem; others were marked as "HAZARDOUS", "POISONOUS" and "FLAMMABLE". Also, the surreptitious nature of the transport of the wastes clearly evidences that Lackawanna was attempting to keep the disposal operation a secret.

Donald Sandly was hired by Peter Iacavazzi as a tank truck driver. From September, 1978 until January, 1979 he hauled liquid wastes from the Simon Wrecking Company yards in Reading and Williamsport and the AVCO Chemical Company

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3. Hazardous wastes are defined by 25 Pa. Code §75.1 of the DER's regulations as:

> "A solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed."

plant in Williamsport to either the Old Forge Landfill or a facility in Scranton known as the Scranton yard which was used by Lackawanna and Northeastern to house and maintain trucks and other equipment. All his trips were made at night. Sandly was instructed to stop in transit at the Skyline Diner and call Iacavazzi. He would then be directed to go to either Old Forge Landfill or Scranton yard. If Sandly took the truck to the landfill he would turn off its lights as he left the highway and proceed to a designated area. He would open a valve and let the wastes flow into a previously dug ditch which would be covered with dirt. When he took the truck to the Scranton yard he would park it and leave. One night between Christmas and New Years, 1978, after he had driven a tractor trailer to the Scranton yard, Sandly watched Iacavazzi attach a hose to a valve on the tractor and drain its green-colored contents into a floor sewer drain. The liquid backed-up and pooled on the floor, spilling over Sandly's shoes. The liquid, after a couple of days, "started to eat the leather off around my shoes where they are sewed to the sole. So, it was pretty potent stuff."[4] After that incident, Sandly quit Lackawanna Refuse's employ.

Sandly also hauled 55-gallon drums to the landfill. The procedure was the same. The trips would be at night. He would stop, in transit, at the Skyline Diner to call Iacavazzi for instructions on where to take the drums. When instructed to deliver them to the landfill, he would put out the lights upon approaching the landfill, drive to a pre-determined spot and roll the drums off the back of the truck. Usually the drums would be immediately buried by another Lackawanna Refuse employee operating a bulldozer. Each load would contain 60 to 80 drums, except for one particular load of 11 or 12 extremely heavy drums packed in sand. At times the drums would break open when rolled off the truck. The fumes from the open drums would sometimes cause Sandly to suffer headaches

4. Notes of Testimony, Supersedeas Hearing, Vol. 2, p. 247, lines 13-16.

and shortness of breath. After rolling 10 or 12 drums off the truck, he would be forced to leave the truck to get his breath back.

Jack Hunsinger also worked for Lackawanna Refuse. He also drove a tank truck hauling liquid wastes from the Simon Wrecking Company lots and the Avco Chemical Company plant. He made two trips per night, five or six days a week. He would also stop in transit and call either Iacavazzi or a foreman employed by Lackawanna known as "Birdie" for instructions on whether to take the waste to the Old Forge Landfill or the Scranton yard, depending on whether or not an inspector was present at the landfill. Once, Hunsinger did arrive at the landfill with a load to discharge when DER inspectors were there. He left quickly when a Lackawanna employee yelled "Get going". The DER inspector followed and a 65-70 m/p/h chase ensued.

Hunsinger also discharged liquid wastes from his tank truck into a sewer drain and he also hauled drums to the landfill.

Richard Cherkoski was employed by Lackawanna Refuse from November 1977 until January 1979 as a tractor-trailer driver. His duties included hauling loads of 55-gallon drums containing liquid and gaseous wastes to the Old Forge Landfill from the Simon Wrecking Company sites.

The toxic nature of the wastes is apparent from their effect on the drivers who were exposed to them. The drivers were, in fact, victims of the dumping. Hunsinger testified to having his eyes burned by the wastes and not being able to open his eyes the next morning. His eyes remain blurry. Edward Cherkoski complains of a burning pain in his side from working with the wastes. He stated that his "kidneys or whatever it is on my sides are like on fire, like if you take a knife and scraped me or a fork internally."[5] Fumes from the wastes caused Sandly to suffer from headaches and a shortness of breath. Richard Cherkoski also suffered headaches from the fumes.

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5. Notes of Testimony, Supersedeas Hearing, p. 333, lines 13-15.

Two incidents concerning the handling of these wastes vividly illustrate their toxicity and their potential for harm. On the night of September 1, 1978, Edward Cherkoski was dumping a load of drums off the back of his truck. One of the drums burst as it hit the ground releasing a gaseous cloud. Edward Cherkoski described what took place.

> "Q. What did you do when you arrived at the dump?
>
> A. I backed up to a big pit that Birdie had dug out, like a trench. He told us to dump the load there -- for me to dump the load there. There were a lot of trucks behind me. Anyway, I backed up. I started raising the body, and a drum opened up. I was in the tractor now, this tractor-trailer. I was watching my body go up, and this drum broke loose in the trailer and the drum split open.
>
> Out of the drum came a white fog. It would take your breath away. I was afraid to get out of the truck, because it creeped right towards the front of the tractor, and I couldn't get out of the truck.
>
> Q. Were you inside the van at this point?
>
> A. I was in the tractor. This was a dump trailer. I was in the cab. I was afraid to get out, because this cloud just enveloped the whole truck. I had never seen nothing like this in reality. It looked like death to me.
>
> Q. You said, 'It would take your breath away'. What effect did it have on you?
>
> A. Right then and there, I couldn't breath. I got awful headaches. I still get the headaches from it."
>
> [Objection entered and overruled]
>
> "Q. Mr. Cherkoski, after this cloud came out of one of the drums, what happened to the cloud?
>
> A. It started going down the mountain towards Old Forge. It finally blew away from my tractor in about an hour or so. Well, it was more than that. We were up there a long time. It stayed right there.
>
> When I saw it starting to thin out, I jumped out of my truck. I fell on the ground. I almost crawled my way out of there.

We waited up on the bank. It seemed to go down into the valley. It got away from my tractor. When it did that, I was able to get back in my truck and drive to the bottom of the dump.

I got down there, and the cloud started coming down. This was already late at night, because we waited a long time up in the dump for that cloud to go to be able to even get in the pit.

We got down there, and Pete Iacavazzi was down at the bottom.

Q. Did you have any discussion about that incident with Mr. Iacavazzi?

A. Yes, I did. I told him. I said, 'What the heck is this stuff?' I said, 'Geez, I have never seen nothing like this in my life.' I said, 'My head is busting.' I said, 'I can't breath.' The smell by then had starting coming down the dump."[6]

Mrs. Tony Cusumano lives in Old Forge Borough approximately 1/4 mile from the entrance to the landfill. She had just put her children to bed and was watching television when the odor described by Cherkoski penetrated her home. It caused her eyes to burn and her 4-year-old daughter to cry from a burning sensation in her nostrils. The odor became so unbearable that the Cusumano's left their home and spent the night elsewhere. John Victor, a police officer for Old Forge Borough, was on duty the night of September 1, 1978, when calls complaining about a strong odor in the borough were placed to the borough communication center and relayed to him. He proceeded to the area of the borough permeated by the odor, which he described as horrendous, and traced it to the Old Forge Landfill.

The release of gas from the drum occurred at approximately 7:30 p.m. It was still present in the Borough of Old Forge after midnight.

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6. Notes of Testimony, Supersedeas Hearing, p. 302, lines 3-25, p. 303, lines 1-25 and p. 304 lines 1-3.

The second incident occurred at Simon Wrecking Company's Reading yard on or about December 17, 1978. This time a drum burst during the loading of a truck for shipment to the landfill. Edward Cherkoski relates the details:

> "THE WITNESS: When I hit it with the bulldozer, one of the drums that were buried in this dirt broke and something came out of there that you couldn't see, and I passed out on the bulldozer, and I couldn't catch my breath, and I thought my heart stopped and thank God the bulldozer was automatic.
>
> I had it in reverse after I hit the pile, and it built up the transmission fluid enough to start backing up out of the smell. Whatever that was, it was like hitting a stone wall.
>
> I went into Simon's office then. They took me in the office. They gave me some aspirins, and they were giving me air and everything, and they were worried about —"
>
> [Objection entered and overruled]
>
> "You were about to put this stuff on the truck to take it up to the dump; is that correct?
>
> THE WITNESS: Yes. When this drum broke wasn't the first time, in other words. You know what I mean. When I went over to the pile, I had trailers loaded already when that drum broke, but that wasn't the first time I just hit the pile.
>
> Some of the stuff that was in that pile went to the dump already. It was loaded on the trucks to go to the dump. Then I hit that barrel. Holy God, you wouldn't —
>
> BY MR. KRILL:
>
> Q. What did it smell like?
>
> A. Like rotten eggs. It was funny; I never smelled nothing like that. I never in my life, and I still don't know. It is like rotten eggs. It is hard to describe it because you couldn't see nothing. It was just you walked in and it was just like walking into a wall.
>
> Q. Did you lose consciousness when that happened?
>
> A. Yes.

THE EXAMINER: It was invisible?

THE WITNESS: It was invisible. Honest to God, I never saw nothing like that. It was just I was on the dozer and you couldn't see nothing. It was just like if somebody went like this to you and you just couldn't breathe, and that is fact; that is the truth.

BY MR. KRILL:

Q. Was anyone working with you on that occasion at the Simon site?

Q. A. Yes, they were.

Q. Who was it?

A. Jack Hunsinger and one other kid. Some of it got splashed on Hunsinger, whatever was in that barrel.

Q. On that occasion, did anyone else come in contact with that material either in liquid form or gaseous form?

A. Yes, another driver. I wouldn't care to mention his name right now.

After I come out of Simon's office, the other kid, his lips were purple, his skin had a purplish complexion and he was walking around in a daze. I don't know if I could say this in front of — could I?

THE EXAMINER: Say it.

THE WITNESS: I was in the office a couple of hours there, and when I come back, I walked in front of the truck and my head was busting. I felt pains in my chest and my sides.

I needed to take a leak, but the other kid was like in a fog and he walked over and I said, 'What the heck is going on?' He is looking at me like this, really gone; he's just in a daze. He didn't even know where he was at.

I told him, I says —I don't want to mention the driver's name. If you want, you can talk to him. I asked him, I said, 'What's wrong with you?' I said, 'You're all purple.' I said, 'Go look in the truck mirror.' He walked over and his lips were real purple and his skin was purplish.

BY MR. KRILL:

Q. Do you know where this person was when you hit the drum with the bulldozer?

A. He was standing about — he was on the left side. I was on the pile this way. He was about 25 feet to my left, 20 feet to my left at the bulldozer.

Q. So, how close was he to the drum that burst?

A. About 20, 25 feet. That was him. I think Hunsinger was closer than that. He was sort of towards the front of the bucket on the dozer.

Q. After you regained consciousness on that occasion, what did you do? Did you haul your truck to the landfill?

A. Yes, but it took us almost all night. I was sick and everything. I was throwing up. It was like the dry heaves. It took me almost all night to get back home."[7]

Mr. Cherkoski's testimony of the December 17, 1978, release of toxic gas was corroborated by Jack Hunsinger. Petitioner offered the testimony of two present employees to dispute the severity of the December 17, 1978, incident. However, neither employee was present when it occurred.

Thus, although the Lackawanna employees were unable to identify the wastes as toxic, they were able to describe in rather vivid terms the actual affect of the wastes on themselves.

Further evidence corraborating the hazardous nature of these wastes are analysis performed on samples taken of leachate seeping from an area where drums are known to be buried. Leachate is a liquid waste resulting from the interaction of water or other liquid waste with solid waste containing disolved and/or solid matter. See 25 Pa. Code 75.1 Definitions. Samples of leachate were taken by inspectors from the PA DER and the United States Environmental Protection Agency and analyzed at their respective laboratories. The analysis revealed the presence of various chemical substances not normally found in garbage. Included in the samples were known carcinogens: vinyl chloride, tetrachloroethylene, trichloaoethylene, hexavalent chrome and arsenic; suspected carcinogens: 1, 1-dichloroethane

7. Notes of Testimony, Supersedeas Hearing, pp. 319-323.

and trans-1, 2-dichloroethylene, 4-methly-phenol, benzane propanal and dichloro-fluoro-methane; and toxic metals: cadmium, lead, mercury, zinc, copper, cyanide and nickel. Dr. Samuel L. Rotenberg, an environmental physiologist and environmental toxicologist for the EPA offered the expert opinion that, based on the analysis results, the material in the leachate is hazardous to the public health and the environment.

Appellants presented the testimony of two chemists from the University of Scranton, Dr. Morton Appleton and Dr. Charles Thoman for their opinion that the chemicals identified in the leachate were not toxic at the concentrations found in the samples. Their opinion was based on a comparison of the identified levels with toxic levels reported in the 1978 Registry of Toxic Effects published by NIOSH. Neither chemist had the expertise to independently assess the effect of these chemicals on humans.

Their opinions are not given any weight because the basis therefore, the NIOSH registry, cannot be used in any meaningful way to determine whether the concentration of chemicals identified in the leachate samples poses a potential hazard to human health. The NIOSH registry contains a specific disclaimer precluding such a use. The disclaimer reads: "Under no circumstance can the toxic dose values presented with these chemical substances be considered definitive values for describing safe versus toxic doses for human exposure."[8] The need for the disclaimer is apparent from the method used by the registry for reporting toxic dose values and the use made of the registry by appellants' witnesses. Two methods used by the registry for quantifying toxicity of substances are the LD_{50} dose level and the LD_{LO} dose level. The LD_{50} dose level is defined as a point on a dose response curve where 50% of the animals used in the test die

8. NIOSH Registry of Toxic Effects, 1973 edition, p. 3.

as a result of ingestion of the substances. The LD_{LO} dose level is defined as the lowest lethel dose reported in the literature for the animal being tested. Neither dosage level can be extrapolated to determine non-toxic human dosages; nevertheless, Drs. Appleton and Thoman used the LD_{50} and the LD_{LO} dose levels as a basis for an opinion on whether the chemicals identified in the leachate were toxic. For example, Dr. Appleton testified that the concentration of trichloroethylene found in the leachate sample was non-toxic, and he based his opinion on the fact that the concentration in the sample was significantly lower than the LD_{50} level reported in the NIOSH registry, that is, 35 milligrams per kilogram of body weight, the amount that killed one-half of a test group of mice. Dr. Appleton could not give a reasoned medical opinion of the dosage that would cause the first mouse to die; nor could he extrapolate the results from mice to humans. Thus we find the testimony to be meaningless.

Also the LD_{50} and LD_{LO} dosage levels are lethal dosages; they do not predict non-lethal harmful effects. Nor are they concerned with the potential carcinogenic effects of the chemicals. Further, Doctors Appleton and Thoman looked at each substance as if it existed independent of the others found in the sample. They did not consider any synergistic effect.

Appellants question the procedures the DER used to identify, and determine the concentration of, the chemical substances in the leachate. Dr. Appleton argued that the samples taken by the DER of the leachate were not representative because the leachate was partly frozen from the cold weather; he contends that a frozen sample will contain less of the chemical substance than would exist in its liquid form. We do not discard the DER results for this reason; if a bias does exist, it results in the DER reading a lower concentration in the sample than actually exists in the liquid leachate at the landfill.

Appellants also contend that the DER's chain of custody of the samples was broken. The DER's practice for insuring that a sample taken in the field reaches its laboratory without being tampered with is to require the inspector to seal the sample by placing tape over the lid and down the container. If the tape is intact when the laboratory receives the sample the chemist knows the container has not been opened. When the sample is received by the laboratory a person records on a computer the sample number and the location the sample was taken; he also states whether the legal seal was received intact. Appellants argue that the procedure is flawed because the lab person does not identify himself to the computer and therefore his name cannot later be determined. We disagree. The testimony showed that in the normal course of business a person under the supervision of the chief chemist determines the condition of the seal and records it, and that in this case the seal was marked "intact". That testimony is sufficient to establish the integrity of the seal. See *Commonwealth of Pennsylvania, DER v. Rushton Mining Company, et al*, 1976 EHB 117, where we overruled an objection to the admissibility of laboratory evidence based on breach of chain of custody because we found that the DER established "the regularity of its procedure" for collecting, identifying, shipping and handling samples and no evidence was offered to indicate the samples had, in fact, been tampered with.

Appellants offer as a further basis for a finding that the DER recording procedure is deficient the fact that the computer lacks the capacity to record the condition of the seal when more than one container is used per sample. We again disagree as DER's chief chemist testified that when the report, in the form of a computer readout, states "seal intact", it means all containers of that sample had seals intact.

Appellants wish us to find a break in the chain of custody because the form sent to the lab attached to the sample by the inspector includes a section captioned "custody log" which was not filled in. The evidence does not support a finding of a break in the chain of custody. Although the form was not filled out, we know who had custody from the testimony of the inspector, as he testified that he shipped the samples to the laboratory by the Purolator Company delivery service.

In sum, we find that the DER clearly established the regularity of its procedure for collecting, identifying and shipping the samples to the laboratory and for receiving and handling the samples by the laboratory; and no evidence was offered to indicate that the samples were tampered with or were likely to have been tampered with.

An additional objection to DER's procedure for analyzing samples concerns DER's practice of disposing of what is left of a sample after it performs its analysis. Appellants contend that DER should have saved the remainder of the sample to allow appellants the opportunity to analyze it, and since the samples have been discarded, the result should not be received into evidence. Appellants are mistaken. The DER had no obligation to retain the residual from the tests. Appellants certainly are able to take their own samples as the leachate continues to flow from the site.

Our review of a DER action is to determine whether the DER has committed an abuse of discretion or an arbitrary exercise of its duties or functions *Warren Sand and Gravel Company, Inc. v. Commonwealth of PA, DER*, 341 A.2d 556, 20 Pa. Commonwealth Ct. 186 (1975); *Diehl v. Commonwealth of PA, DER*, EHB Docket No. 78-037-B (issued May 14, 1979). The DER's orders dated March 2, 1979 and August 13, 1979 impose three principal requirements: (1) suspension of solid waste permit for Old Forge Landfill and the concomitant cessation of all dis-

posal operations at the site; (2) excavation and proper disposal of all hazardous wastes now buried at the site and the removal from the site of all contaminated soil; and (3) construction and operation of leachate collection facilities at the Old Forge Landfill. Authority for the orders is given to DER by Section 6(9) of the Solid Waste Management Act, effective on the date of the order, which provides that the DER has the power and the duty to "issue such...orders as may be necessary to implement the provisions of this Act and the rules and regulations and standards adopted pursuant to the Act".

It appears to us that the suspension of the permit for the landfill was justified. When Lackawanna filed an application to DER for a permit to operate the Old Forge Landfill it warranted to the DER that it would operate the landfill in accordance with the plan set forth in its application; when Lackawanna was issued a permit it contracted with DER that, in consideration of the issuance of the permit, it would operate the landfill in accord with the conditions placed on the permit. Appellants' disposal of the hazardous wastes at Old Forge was precluded by the plan of disposal Lackawanna described in its permit application and was violative of a condition of its permit which states that the disposal of hazardous wastes without prior DER approval is prohibited. It also violated DER regulation 25 Pa. Code 75.26(S) which prohibits the disposal of hazardous wastes without prior DER approval. Thus, appellants' operation disregarded its plan of disposal and the terms of its permit and a DER regulation. Such conduct could and should result in a suspension of the permit, particularly since the appellants have deliberately and intentionally misused the permit and jeopardized the health of the surrounding community for their own financial gain. Moreover appellants were forewarned by a provision of their permit that any violation of the permit could result in its suspension or revocation.

There is no doubt that appellants' disregard of the permit terms was intentional. Appellants knew they were required to seek prior DER approval as

they had done so in the past when required to do so by the companies that generated the wastes.[9]

The imposition upon appellants of the responsibility for excavation and removal of the hazardous wastes and the soils contaminated by wastes is fully justified by finding that appellants buried hazardous wastes at the landfill. It is fundamental that a person may be held responsible for the conditions he creates. *COA Pallets, Inc. v. Commonwealth of PA, DER*, 1979 EHB 267.

With respect to the requirement to install leachate collection facilities, appellants have known, or should have known since the permit was issued, that if leachate occurred, they were bound to collect and provide for its treatment. In its application for the permit Lackawanna stated that in the event that leachate developed, it would install the appropriate collection facilities. Also, a provision requiring the installation of leachate control facilities upon the occurance of leachate is a condition of the permit. Admittedly, the constituents

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9. The following colloquy between counsel for DER and Peter Iacavazzi is illustrative:

> "Q. You submitted several analyses, though, from companies for Department approval, did you not?
>
> A. Right.
>
> Q. So you had some knowledge that you did have to regulate what was going into your landfill?
>
> A. Well, the companies that asked me to get approval from the DER knew their stuff was bad. It was hazardous. Like RCA and Sylvania. So I had to ask for their approval. They were honest. They were honest; let's put it that way.
>
> Q. In what way were they honest that other companies that you dealt with weren't?
>
> A. Well, I don't know. I'm not saying. But I'm saying that these companies asked me to ask the DER for permission to take it down my landfill."
>
> N.T. p. 150, lines 22-25 and p. 151, lines 1-10

of the existing leachate is much different than what would be expected to result from the degradation of garbage, but again, the character of the leachate is the result of appellants' actions.

Appellants contend that a leachate collection system is not needed because the leachate can be disposed of by burying it at the site as they have done in the past.[10] Burying the leachate has not in the past and will not in the future control leachate discharges from the site. The burial of a liquid substance does not result in its distruction. It must flow somewhere. When the hazardous wastes were buried there were no safeguards taken to prevent the wastes from entering either the ground waters or the surface waters. As a result there is a definite need for a system to intercept and collect for treatment the leachate with its harmful constituents before it flows from the site and contaminates the waters of the Commonwealth.

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10. The following testimony of Peter Iacavazzi describes Lackawanna's control of its leachate problem by burying it.

> "Q. Did Lackawanna Refuse or Northeast Land Development collect any samples themselves for analysis by a water quality laboratory?
>
> A. No, because I know this water comes from the mines. And leachate is a common thing on every landfill. When we used to see leachate when we were operating — see, when we're operating we never saw leachate. Because as soon as we see it, we bury it with dirt, that's how you get rid of leachate. But since the dump has been closed 15 months — you understand? It's been closed 15 months, so now the leachate is coming through. There's nobody there to treat it or take care of it or bury it.
>
> Q. Who advised you to bury leachate as a method of controlling —
>
> A. We always did it. Nobody advised me. We always did it. That's how you get rid of leachate.
>
> Q. How does that get rid of it?
>
> A. The dirt absorbs it, and that's it. When it comes out again, you throw more dirt on it.
>
> N.T. p. 165, lines 8-25 and p. 166, line 1

Finally, the DER is warranted in imposing the requirements of the order on both Lackawanna Refuse Removal, Inc. and Northeastern Land Development Company. Lackawanna is the permittee and as such is responsible, as a matter of law, for the proper operation of the landfill. Northeastern operates the landfill and as the operator it must take joint responsibility for the existing condition. Also, Northeastern owns the land on which the landfill is operated. Section 316 of The Clean Streams Law, the Act of June 22, 1937, P.L. 1987 *as amended*, 35 P.S. §691.316 empowers the DER to order a landowner to correct a condition of pollution or danger of pollution which exists on his land. *National Wood Preservers, Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources*, affirmed _____ Pa. _____, 414 A.2d 37 (1980).

In sum, the requirements imposed upon appellants by the DER do not constitute an abuse of discretion, in fact, they provide the minimum steps necessary to respond to appellants' actions and abate the existing condition resulting from the improper disposal of hazardous wastes.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and the subject matter of these proceedings.

2. Lackawanna Refuse and Northeastern Land have violated the Solid Waste Management Act, *supra*, the terms of Solid Waste Permit No. 100920 and 25 Pa. Code of DER's regulations by disposing of hazardous wastes at the Old Forge Landfill without DER approval.

3. DER has the authority to issue orders to Northeastern Land and Lackawanna Refuse requiring the abatement of the condition existing at the Old Forge Landfill pursuant to Section 6(9) of the Solid Waste Management Act.

4. The DER has the right to suspend a solid waste management permit where it determines that the permittee is operating the landfill contrary to the terms of the permit particularly where the permittee has misused the permit to the potential hazard of the community.

5. The DER has the authority to require Northeastern Land and Lackawanna Refuse to excavate and remove the hazardous wastes they buried at the landfill and the soil contaminated by the hazardous wastes as a person may be held responsible for a condition he creates.

6. The DER has the authority to require Northeastern Land and Lackawanna Refuse to install leachate collection and treatment facilities at the Old Forge Landfill because a condition of Permit No. 100920 required the installation of the facilities upon notification of the occurrance of leachate.

7. Lackawanna Refuse was a proper recipient of the orders as it was the permittee for the Old Forge Landfill and thus responsible for its operation.

8. Northeastern Land was a proper recipient of the orders as it operates the landfill and owns the land on which the landfill is operated.

9. The DER's laboratory analyses were properly admitted into evidence in this case.

O R D E R

AND NOW, this 3rd day of February, 1981, it is hereby ordered that the appeals of Lackawanna Refuse Removal, Inc. and Northeastern Land Development Company from the Orders of the DER dated March 2, 1979 and August 13, 1979 are

dismissed and the March 2, 1979 order and August 13, 1979 order are sustained.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

DENNIS J. HARNISH
Member

DATED: February 3, 1981

EHB-43 12/79

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

LYNCOTT CORPORATION : Docket No. 81-038-H

Hazardous Waste--Permitted Acreage

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and SUSQUEHANNA COUNTY

PARTIAL ADJUDICATION

By: Dennis J. Harnish, Chairman, November 19, 1981

This matter arises from the appeal by Lyncott Corporation of an order issued to said corporation by DER on March 31, 1981. The order *inter alia* directed Lyncott to cease accepting waste at its landfill located in New Milford Township, Susquehanna County. The County has intervened as a party appellee.

At the request of Lyncott and by agreement of the parties this matter has been bifurcated. This adjudication deals solely with the issue of the areal extent of Lyncott's permit.

FINDINGS OF FACT

1. On or about November 14, 1980, Lyncott Corporation was purchased by Stabatrol Corporation. At this time, Arthur Scott ceased to have any connection with the corporation.

2. On or about April 5, 1976, Arthur Scott submitted an application for a solid waste management permit to operate a sanitary landfill in New Milford Township, Susquehanna County, Pennsylvania.

3. On or about July 19, 1976, the Commonwealth of Pennsylvania, Department of Environmental Resources (DER) issued Solid Waste Management Permit No. 101025 to Arthur Scott. The permitted acreage was 70 acres, of which 59 acres was to be used for disposal and 11 acres as borrow material.

4. As a result of an appeal filed with the EHB by a citizen's group and docketed to EHB #76-117-C, the initial operational area of the Arthur Scott permit was limited to approximately 10 acres. These ten acres were located within the first four modules described on the plans submitted to DER by Albert Jones, P.E. The horizontal coordinates on the grid system developed by Jones of said four modules were -3+00 to 1+00.

5. Prior to January 28, 1977 Arthur Scott incorporated Lyncott Corporation of which he became the president.

6. On or about January 28, 1977, Lyncott Corporation submitted an application for a permit to operate a sanitary landfill in New Milford Township, Susquehanna County, Pennsylvania.

7. It was Mr. Scott's intention to transfer everything over to the Lyncott Corporation from Arthur Scott including his permit and the 112 acre site.

8. Mr. Scott did deed and/or lease his site to Lyncott.

9. Solid waste permits are not transferable. Consequently, DER required a new Lyncott permit application but DER referred to this application as a transfer application.

10. Both Permit 101025 issued to Arthur Scott and Permit 101025 issued to Lyncott reference the same site.

11. The Lyncott application for permit did not have the coordinates for the latitude and longitude filled in and nor the four corners of the facility located. This information was filled in by the DER, specifically, Larry Sattler by reference to the Scott permit.

12. The four corners of the facility location for Lyncott were the same as that of the permit for Arthur Scott.

13. The contemplated life of the facility of Arthur Scott and the life of the facility as shown on the Lyncott application was 30 years.

14. The Lyncott application did not include any new plans, modules or limitations, instead DER accepted and specifically incorporated the plans, modules and limitations of the Scott permit.

15. The original permit 101025 was issued to Arthur Scott for 59 acres of disposal and 11 acres for borrow for a total of 70 acres.

16. Commonwealth's exhibit 8 designated "Scott Sanitary Landfill, New Milford Township, Susquehanna Drainage and Final Finish Plan, Sections and Details" was among the plans attached to Arthur Scott's original permit submission and incorporated into the Lyncott permit.

17. This plan included a note 18 which restricted development of the 59-acre tract past the first four modules which contained approximately 10 acres pending the construction of on-site leachate treatment facilites.

18. The 10-acre limitation on the Scott landfill arose from the calculations of leachate done by John Rosso. The Jones' plans showed that two acres per year would be filled with rubbish and at that rate in five years the leachate generated on these 10 acres would equal the holding capacity of the leachate tanks installed or proposed to be installed on the site.

19. John Rosso did not review the Lyncott application because there were no plans submitted with it which would have prompted his review.

20. The Scott permit was appealed by George Campbell, et al. at EHB Docket No. 76-117-C. Supersedeas hearings were held in this matter on September 24, 1976 and October 20, 1976 and this matter was terminated, following negotiations by a stipulation and order.

21. Frederick Karl did not attend nor participate in negotiations between counsel during a supersedeas hearing in 76-117-C held in 1976.

22. Frederick Karl never saw a copy of the stipulation entered into on November 18, 1976, by the parties in 76-117-C after the 1976 supersedeas hearing.

23. Frederick Karl never saw a copy of the Environmental Hearing Board Order, decreed in 76-117-C, after the supersedeas hearing.

24. The stipulation entered into November 18, 1976, and signed by Ernest Preate, Jr., Esquire, and Ernest Gazda, Sr., Esquire, and referenced in the present proceeding did not address the acreage issue presently before this board except to imply that the holding tanks were merely an interim measure.

25. Counsel for DER and the appellants agreed on the record at the said supersedeas hearing that the stipulation was not meant to alter or amend the Scott permit.

26. The Lyncott application indicated that it was submitted for "59 total acres, 10 acres proposed for permit". The permit application was signed by Arthur Scott as president of Lyncott Corporation. The rate of use of the municipal landfill proposed in 1977 was two acres a year so that the site would last only 5 years if the permit was for 10 acres. Yet the Lyncott aplication form showed an anticipated 30-year use consistent with a 59-acre site. A 30-year planned life out of a 10-acre facility would be virtually impossible at the Lyncott site.

27. The permit application submitted by Lyncott Corporation was submitted by its attorney, Mr. Gazda. Mr. Gazda had represented Arthur Scott in the EHB proceeding at #76-117-C.

28. Mr. Scott relied upon his consultants and attorney totally in all his transactions with DER.

29. Scott claimed that Mr. Gazda made a mistake in filling out the permit application submitted by Lyncott Corporation. Mr. Gazda died prior to the hearing in this matter and his affidavit was excluded as hearsay.

30. The original bond for the Arthur Scott permit was for a 59-acre 30-year disposal site.

31. Subsequent to the issuance of the Lyncott permit, Lyncott changed the mode of operation at the site from a municipal waste site to an industrial waste site.

32. The department approved specific waste streams to be disposed at the Lyncott landfill by separate approval letters. The approvals by specific waste streams was the only method the department used at that time for approving of the disposal of industrial wastes at individual landfills.

33. The Department of Environmental Resources has approved plans for the disposal of industrial waste at the Lyncott site.

34. Lyncott submitted plans and requests to DER which showed the types of wastes to be brought on site as well as where the vaults were to be physically located on the property.

35. DER approved Lyncott's plans and proposals for the location and construction of vaults 1, 2, and 3, as well as a storage area.

36. Each time Lyncott or Stabatrol would make a request to dispose of waste at the Lyncott site, they would submit plans which showed the location of the constructed or to be constructed vault and where the waste would be placed

in the vault. At present two vaults have been constructed at the site, as well as stabilized sludge vault for IBM slude, a storage area and a third vault was also approved.

37. The municipal garbage disposal area of the Lyncott site was closed in March of 1979. The closure plan for the municipal garbage site included a plan for the collection and recirculation of leachate generated by that site and amended note 18 for the collection and treatment of leachate such that the 10-acre restriction was no longer applicable after the April 27, 1979, order to close. The department approved the closure plan for the municipal garbage site.

38. DER required Lyncott to submit a new bond to cover its industrial wastes disposal areas.

39. Lyncott attempted to transfer its Scott (59-acre bond) to support the industrial waste facilities.

40. Robert Orwan, Chief of the Compliance Section for Bureau of Solid Waste Management, became involved with the Lyncott site in July, 1979. At the time, his duties included summary review of permits to ensure statewide consistency and review of bonds. He reviewed Lyncott's proposal to transfer the Scott municipal waste bond to cover its industrial waste facilities.

41. On at least two separate occasions, Mr. Orwan denied Lyncott's bond submittals as unacceptable because Lyncott was attempting to bond 59 acres, rather than the 10 acres it had under permit.

42. Scott was aware that, at least as of November 5, 1979, DER's position was that the Lyncott permit was issued for 10 acres.

43. Scott signed several collateral bond forms which were submitted to and denied by Mr. Orwan before signing the collateral bond form dated April 29, 1980, which Mr. Orwan accepted.

44. The reason Lyncott submitted a bond for 12.5 permitted acres is because DER refused to accept its submittal listing 59 acres.

45. DER agreed to accept a collateral bond from Lyncott for 12.5 permitted acres to include the following operational areas: Vaults 1-3, two storage pads, a stabilization area, the former sanitary landfill site, and two storage barns. The storage barns were added to the permitted acreage because of a decision by the Environmental Hearing Board in *COA Pallets, Inc. v. DER*, EHB #78-144-D, which suggested that DER had the authority to include the storage of hazardous wastes in solid waste management permits.

46. DER's decision to accept a collateral bond for 12.5 acres was an alteration of DER's earlier position that the Lyncott permit covered 10 acres because the bond included acreage to reflect the storage areas. In Mr. Orwan's view, the collateral bond was a practical measure to include in the bond what was really taking place at the site.

47. The 12.5-acre bond submitted to support the Lyncott permit was for the purpose of bonding the 12.5 acres actually affected by Lyncott or approved for use at that time by DER. The 12.5 acres referred to in the bond had no relevance to establish the actual number of permitted acres under Lyncott Solid Waste Permit No. 101025.

DISCUSSION

Since the excellant post-hearing brief filed by the Commonwealth in this matter clearly and succinctly defined the issue to be resolved herein as well as the factual background of this matter, portions of said brief will be paraphrased at length below.

The instant matter is an appeal by Lyncott Corporation from the issuance by DER of an administrative order dated March 31, 1981. At the request of Lyncott Corporation, and by agreement of the parties, the issues in the Lyncott appeal were bifurcated. Six days of hearings were held on the issue of the acreage under permit, which issue was framed by Lyncott in its Notice of Appeal at page 13 as follows:

> "Appellee's Order states that the operation of the landfill is authorized by Solid Waste Management Permit No. 101025, which was issued to Lyncott on or about April 29, 1977, for a ten-acre sanitary landfill. Appellant specifically objects to Appellee's reference to a ten acre site. Appellant contends that the permit was issued for a 59 acre landfill."

On about July 1, 1976, DER issued a solid waste management permit to Arthur H. Scott, an individual residing at R.D. #1, Box 43, New Milford, Pa. for the operation of a 70-acre sanitary landfill in New Milford Township, Susquehanna County.

On or about September 3, 1976, several concerned citizens in the New Milford area filed an appeal with the EHB from the issuance of the permit to Scott. This appeal, *George Campbell et al. v. DER*, was docketed to EHB #76-117-C. Prior to these hearings, the initial phase of the Scott landfill operation had been limited to 10 acres as evidenced by a Note 18 placed on the design plans for the Scott landfill which plans were incorporated as part of the permit.

One reason for the limitation on operation at the Scott site was that a facility to treat the leachate anticipated from the operation of the landfill had to be constructed and prior to the development of the said treatment facilities leachate was to be contained in a holding tank. Since the amount of leachate generated at a landfill site varies proportionately with the acreage used for disposal at that site it was deemed necessary to limit the initial development of the site to an acreage which would not generate more leachate than the holding tank could hold.

After two days of supersedeas hearings in EHB #76-117-C, during which extensive testimony was heard on the proper method of calculating the amount of leachate anticipated to be generated, the parties reached a stipulation that a 17,500 gallon holding tank would be constructed for the collection of the leachate from the intial portion of the site.

Subsequent to the stipulation of the parties and board order at EHB #76-117-C, Scott formed Lyncott Corporation and, on or about January 28, 1977, Scott submitted an application for a permit on behalf of Lyncott. At Block No. 7 of the permit application, Lyncott requested "10 acres proposed for permit, 59 acres of the property". (This block also anticipated a 30-year useful life for the site.) The application was signed by Scott as president of Lyncott.

The issue to be decided in this matter is what is the permitted acreage in the Lyncott permit. DER and Susquehanna County contend that the Lyncott permit on its face is for 10 acres. Lyncott contends and Mr. Scott testified that the 10-acre number in block 7 of the Lyncott application was a mistake; that what Mr. Scott intended was a mere transferal of his 70-acre permit (59 disposal acres) to the Lyncott Corporation which he had formed and of which he was the president.

DER and Susquehanna County, which has intervened in the above matter as an additional appellee, further argue that a reduction in the Scott permit to 10 acres was agreed to in resolution of the above-referenced citizen's appeal and provided for by the stipulation in EHB #76-117-C and that the Lyncott permit was for the truncated Scott permit acreage.

Before assessing the evidence introduced in this matter to decide which party is correct, it is first necessary to determine whether there is any ambiguity in the Lyncott permit as to the acreage granted thereby. This board has held that permits issued by DER constitute contracts. *Middletown*

Township Municipal Authority v. DER, EHB #71-111 (issued May 2, 1972) 1 EHB 8. It is a basic maxim of contract law that parol evidence will not be considered with regard to a contract which is clear and unambiguous on its face. *Lever v. Lagomarsino*, 282 Pa. 110, 127 A. 452 (1925). Thus, if the permittees' acreage is clear on the face of the permit we need proceed no further.

In the instant matter, as noted above the permit at issue, Permit No. 101025, issued April 20, 1977 to Lyncott Corporation, does not contain an acreage figure on its face. This permit does, however, incorporate, by reference, the provisions of application No. 101025. Application 101025, in block 7 "General Information" designates the number of acres proposed for the permit as "10" and the total acres of the property as "59".

Since this application was prepared by Mr. Scott's attorney, Mr. Ernest Gazda, acting as Lyncott's agent and the facts in said application were attested to as true and correct by Mr. Scott as president of Lyncott, this board would have no difficulty in concluding that the Lyncott permit was for 10 acres in the absence of conflicting provisions in the same permit. There are conflicting provisions.

First of all in block 7 itself the planned life of the facility is listed as 30 years. Lyncott's well-qualified professional engineer, Mr. John R. Rosso, (who had formerly worked for a number of years for DER), testified that one would expect that the Lyncott landfill, if used as per the application as a sanitary landfill, would be consumed at a rate of 1 3/4 to 2 acres per year (he also testified to the same effect on behalf of DER in EHB #76-117-C). Thus, he testified, that the landfill would have to contain approximately 59-60 acres of useable disposal area to support a 30-year life and that a 10-acre site could not support a 30-year facility life. No witness contradicted this testimony.

A 30-year landfill life comports quite well with the 59 acres of disposal area which all parties agreed was contained within the sanitary landfill permit issued to Arthur Scott on or about July 19, 1976 (this permit was issued for 70 acres including 59 acres of disposal area and 11 acres of borrow area on a total property of approximately 112 acres). Moreover, with DER's knowledge and acquiescence, the Lyncott permit included no new site application groundwater module, U.S.G.S. topo map, site plans or large scale map. Rather, these documents were merely taken from the Scott permit.

DER acknowledges that the Scott plans and so forth have been incorporated into the Lyncott permit but it argues that Note 18 on sheet 4 of said plans limits the permitted acreage from the 59 acres of disposal area drawn on that plan to approximately 10 acres (being the first 4 of the modules into which said 59 acres was separated according to said plans). The Note in question reads as follows:

> "10,000 GALLONS (sic) HOLDING TANK WILL BE USED TEMPORARILY TO COLLECT AND HAUL THE LEACHATE TO TRI-BORO MUNICIPAL AUTHORITY FOR TREATMENT. THE TANK SHALL BE USED FOR FIRST FLOOR MODULES (-3+00 TO 1+00), APPROXIMATELY 10 ACRES. WHEN THE LANDFILL OPERATION EXPANDS MORE THAN FIRST FOUR MODULES, THE LEACHATE SHALL BE TREATED ON THE PREMISES AND SPRAYED THE DILUTED EFFLUENT ON THE TOP OF THE LANDFILL COVER. IN THE EVENT IF THE LANDFILL PRODUCES MORE THAN 3,000 GALLONS/WEEK LEACHATE BEFORE COMPLETION OF FIRST FOUR MODULES, THE TREATMENT SHALL BE PROVIDED ON THE PREMISES AND THE USE OF HOLDING TANK SHALL BE DISCONTINUED."

Without, at this point, rehearsing what Note 18 may have been meant by the parties to express (which requires consideration of parol evidence) it is clear from its face that Note 18 does not categorically limit the site to 10 acres. Rather, the operation on the 59-acre site is initially limited by this Note to 10 acres subject to the construction of on-site treatment works. Finally, in this regard, the Arthur Scott permit was supported by a performance

bond insuring construction of leachate treatment facilities for the site. This bond was for a 59-acre site having a 30-year expected life and this bond was accepted by DER in support of the Lyncott permit.

The above evidence clearly demonstrates the ambiguity of Lyncott's permit. On the one hand the Lyncott application is for a 10-acre site but the Lyncott permit specifically incorporates the limitations of the Scott permit as issued on July 19, 1976 and as of that date, at least, the Scott permit was for a 59-acre site notwithstanding Note 18. Moreover, the Lyncott permit also calls on its face for a 30-year life which is inconsistent with a 10-acre permit and includes a bond referencing a 59-acre site.

Since the permit is ambiguous on its face we may consider parol evidence to explain its terms. As noted above, Mr. Arthur Scott testified that he intended the Lyncott application to merely transfer his 59-acre Scott permit to the Lyncott Corporation which he had formed, as he had transferred the 112-acre property upon which said site is located to Lyncott. Mr. Scott, further testified that he did not understand that the Lyncott site would be reduced to 10 acres because of the proceedings at EHB #76-117-C or for any other reason but that his attorney Mr. Ernest Gazda, upon whom he heavily relied, merely made a mistake in filling out the Lyncott application, a mistake which he, Arthur Scott, overlooked in his cursory review of the application.

Mr. Frederick Karl, then DER's Region II Solid Waste Manager, sharply contested Mr. Scott's recollection. Mr. Karl remembered telling Mr. Scott that the Lyncott permit would cover only 10 acres (Mr. Scott did not remember such a conversation and urged that he would not have meekly agreed to the loss of much of his site). Mr. Karl also testified that Note 18 incorporated the understanding reached during negotiations held at the supersedeas hearing in EHB #76-117-C to the effect that the site would be limited to 10 acres.

Clearly, Mr. Karl's memory has failed him concerning the source of Note 18. Note 18 appears upon a plan prepared more than a year before the Scott permit issued and, of course, before appeal at 76-117-C which was taken from the issuance of the Scott permit post-dated its issuance.

Contemporaneous documents and other witnesses also refute Mr. Karl's memory of the settlement in EHB #76-117-C. Mr. Karl testified that part of the settlement in this case was a reduction in the acreage covered by the Scott permit from 59 to 10 acres. As noted above, Mr. Scott disagreed with this testimony. Also in disagreement was Mr. John Rosso, a professional engineer who at the time of EHB #76-117-C worked for DER and was its chief technical advisor regarding EHB #76-117-C. Unlike Mr. Karl, Mr. Rosso attended some of the negotiating sessions in EHB #76-117-C and helped to provide the technical basis for settlement.

Mr. Rosso testified that the leachate issue in EHB #76-117-C was resolved by Scott's agreement to install 2 holding tanks which had a combined capacity of 17,500 cubic feet. Mr. Rosso further testified that it was understood by the parties that this holding capacity would be sufficient to handle the leachate from approximately 10 acres or about 5 years of facility life.

Within this 5-year period it was further contemplated that Scott would install treatment facilities and a nine million gallon leachate lagoon on the site at which time use of the holding tanks would be discontinued and the remaining 49 acres of the site would be opened for development as a sanitary landfill.

The contemporaneous documents strongly support Mr. Rosso's testimony and refute Mr. Karl's. The agreement which resolved the appeal at EHB #76-117-C was set forth in the stipulation entered by the parties to the action at said caption on November 18, 1976. This stipulation was incorporated in an order

issued by this board on January 11, 1977. The board has taken official notice of both said stipulation[1] and said order[2] which contain identical provisions (both documents are set forth in the margin).

If the agreement which terminated EHB #76-117-C was, as Mr. Karl testified, based upon a limitation on the 59-acre tract to a 10-acre tract one would certainly expect this limitation to appear in the stipulation and order. No such limitation appears in either document, and, to the contrary, the documents clearly contemplate that the holding tanks will be used for leachate collection purposes only "...during the intial phase of the operation of the landfill". Again, this language clearly contemplates that there will be subsequent phases of operation at the landfill.

Notwithstanding the stipulation and order, Mr. Karl testified that EHB Administrative Law Judge Cohen (the hearing examiner in the said matter) stated, following off the record negotations in EHB #76-117-C and upon returning to the hearing room, that the permit would be limited to 10 acres. In an attempt to confirm Mr. Karl's remembrance (and to avoid the hearsay nature of his testimony) the board reviewed the transcript of the supersedeas hearing in EHB #76-117-C (which took place on September 24, 1976 and October 20, 1976). This review demonstrated that the parties did go off the record to negotiate during the October 20, 1976 hearing. However, contrary to Mr. Karl's remembrance, Judge Cohen said nothing on the record regarding a limitation in acreage of the 59 acre Scott permit. This matter was discussed by the Commonwealth's counsel, Ralph Kates, on page 59 of the notes of testimony (during a discussion concerning Mr. Scott's ability to accept trash at the site). Mr. Kates said:

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1. See attached.

2. See attached.

"MR. KATES: Your Honor, from the information presented to the Department with regard to this stipulation, there is no indication that there would be required any change in the permit already issued or permits, I should say, both industrial waste and solid waste permits already issued.

In that sense, this stipulation does not affect the permits issued by the Commonwealth. The only effect it would have would be for Intervenor Scott to either have a Supersedeas or a Conditional Supersedeas to his ability to act on those permits."

The attorney representing the appellants in EHB #76-117-C, Mr. Ernest Preate, agreed with Mr. Kates with regard to the fact that the Scott permits would not be affected by the agreement. He stated:

"MR. PREATE: It was my understanding that the permits would not be touched as such, but that approval by DER for acceptance of solid waste would not be forthcoming until these matters were, in fact, resolved."

The board is convinced from the above that Mr. Rosso more accurately recollected the circumstances surrounding the agreement which terminated EHB #76-117-C than did Mr. Karl. Thus, we have found that the Scott permit, even after the said stipulation and order entered in EHB #76-117-C, was for 59 acres of disposal area subject to a limitation that only 10 acres of that permit could be used before leachate facilities were constructed on site.

In view of this finding we are further disposed to believe Mr. Scott's testimony that when he applied for the Lyncott permit he intended merely to transfer his 59-acre permit to the corporation he had founded. We can also understand in view of the above agreement why Mr. Gazda, Mr. Scott's attorney, put the numbers "10" and "59" in the two spaces in block 7 of the Lyncott permit application for respectively, number of acres proposed for permit and total acres of the property (even though the total area of the property remained as 112 acres). To be sure, these spaces were not filled in in accordance with the instructions which accompanied the application, nor was Mr. Gazda's error caught

by Mr. Scott when he glanced over the application before signing it. However, the entire procedure by which the Lyncott application was prepared and reviewed was somewhat informal.

For example block 6 of the Lyncott application was left entirely blank by Mr. Gazda and was filled in by Lawrence M. Sattler, DER's Solid Waste Specialist, by merely carrying forward the information concerning facility location from the Scott application. It is of interest that Mr. Sattler's memo of February 2, 1977 in which he fills in the said information (appellant's exhibit H) is entitled a Transfer of Ownership. Similarly, Mr. Karl's February 3, 1977 memo to his superior regarding the Lyncott application is entitled "Change of Ownership" (appellant's exhibit O) and reads in its entirety as follows:

> "Enclosed is a request to file a change of ownership form on the Scott Landfill. Is it necessary to file an affidavit to say they will comply with the plan? In this case, Mr. Scott has just taken in a partner and formed a corporation."

This contemporaneous documentary evidence convinces the board that in 1977 both Scott/Lyncott and DER intended the Lyncott permit to be merely a transferral of the Scott permit. Since, as the board noted above, we have held that the Scott permit was for 59 disposal acres we also find that the Lyncott permit authorizes disposal of municipal waste of 59 acres as per the Scott plans as incorporated in the Lyncott permit.

Considerable testimony and documentation was introduced by both Lyncott and DER by which each party attempted to show that after the issuance date of the Lyncott permit the parties treated the site as either a 10 or a 59-acre site. Upon reflection the board is inclined to agree with DER's able attorney, Louis A. Naugle, Esquire, who, on page 101 of the notes of testimony in this matter stated that:

"The Department objects to the attempts by Lyncott to create a 59-acre permit issuance in 1977 by referring to acts subsequent to that permit.

The question before this Board, I submit, is whether or not the permit in 1977 was issued for 10 or 59 acres."

In any event, the post-1977 evidence is conclusive only of the point that by November of 1979 at least, DER had adopted the position that the Lyncott permit was for a 10-acre site and that Lyncott steadily disputed this assertion. DER official, Mr. Robert Orwan, testified that pursuant to new regulations DER had required Lyncott to provide bonding for the chemical waste disposal areas it was operating at the Lyncott site and that Lyncott responded by proferring the industrial waste (59-acre) bond discussed above which attempt Mr. Orwan rejected on November 5, 1979.

DER suggests that Lyncott should have taken an appeal from the letter of DER's Mr. Robert Orwan dated November 5, 1979.[3] DER is correct that Lyncott cannot now challenge DER's refusal to accept its 59-acre bond (in the absence of development plans for most of that site) or challenge the 12.5-acre bond which it did submit (and which DER accepted).

Lyncott, however, is not, in this action, challenging Mr. Orwan's determination concerning its bonds. Rather, Lyncott here challenges DER's March 31, 1981 order in which DER for the first time is seeking to limit Lyncott's operations. Only in the March 31, 1981 order were Lyncott's rights with regard to the remainder of the site affected by a DER action, i.e., only as of this date was DER's action "final" so as to start the operation of the 30-day appeal period appearing in 25 Pa. Code 21.52. Thus, Lyncott's appeal on the acreage issue is timely.

Lyncott also introduced evidence attempting to demonstrate that DER had tacitly acknowledged that the Lyncott permit exceeded 10 acres. Lyncott's

3. Mr. Orwan's position was repeated in a January 8, 1980 letter which again provoked no appeal and this matter was resolved by Lyncott's submission and DER's approval on April 29, 1980 of a bond covering 12.5 acres.

evidence did demonstrate and Mr. Orwan admitted on behalf of DER that some of the existing facilities at the Lyncott site lie at least partially off the first four modules. There is no evidence, however, that any DER official knowingly permitted any facilities to be located off the approximately 10 acres contained in the first four modules; to the contrary, Mr. Sattler of DER recommended refusal of plans showing location of facilities off these modules. In any event, we again agree with Mr. Naugle that the post-1977 course of conduct is not relevant as to the issue of acreage in the 1977 permit. For this reason we also discount Lyncott's submission of a 12.5 acre collateral bond on or about April 29, 1980 as an admission by Lyncott that its permit covers only that acreage. In any event the 12.5-acre bond was required by DER for operation of Lyncott's facilities and DER refused two attempts by Lyncott to bond a 59-acre area so Lyncott's submission of such a bond cannot be considered an admission.

The 12.5-acre bond and DER's approvals of at least 20 waste stream approvals as well as its approval of an IBM stablized sludge disposal area, 3 vaults (2 constructed or partially constructed) for accepting chemical wastes, a storage pad, 2 storage sheds, and the closure of the municipal waste portion of the landfill with leachate recirculation through this closed site, all represent DER's approval of Lyncott's change of its mode of operation from a municipal waste site to a chemical waste site.

The intervenor questions DER's authority to have permitted this change of operation without requiring Lyncott to file a new permit and the board in this partial adjudication will not reach this issue or any of the others raised by Lyncott with regard to DER's March 31, 1981 order. We do hold, however, that if the procedures used by DER to control Lyncott's acceptance of chemical waste are legally valid, Lyncott may take advantage of these procedures with regard to the remaining (approximately 49) disposal acres of its site. In so holding,

we acknowledge that DER has waived Lyncott's construction of leachate facilities by approving Lyncott's leachate recirculation facilites as its closure plan for the municipal waste site.

CONCLUSIONS OF LAW

1. This board has jurisdiction over the subject matter of and parties to this action.

2. The permit issued by DER to Lyncott on or about April 29, 1977 permitted Lyncott to utilize 59 acres of its site for the disposal of solid wastes in accordance with the plans, limitations and terms and conditions set forth in said permit.

O R D E R

AND NOW, this 19th day of November, 1981, a partial adjudication as set forth above is entered in the above-captioned matter.

ENVIRONMENTAL HEARING BOARD

Dennis Jay Harnish

BY: DENNIS J. HARNISH
Chairman

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

DATED: November 19, 1981

COMMONWEALTH OF PENNSYLVANIA

BEFORE THE

ENVIRONMENTAL HEARING BOARD

IN THE MATTER OF: GEORGE CAMPBELL, ET AL., Appellants -vs- COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES AND ARTHUR H. SCOTT, Appellees	:	DOCKET NO. 76-117-C

STIPULATION

It is hereby agreed and stipulated between the private parties in the above case, to wit, George Campbell, et al., Appellants, (Appellants) and Arthur Scott (Scott) Intervenor, that the appeal instituted by Appellants will be discontinued without prejudice based upon the following conditions which Scott agrees to perform:

1) Scott will install a 7500 gal. holding tank at his Sanitary Landfill so that the leachate collection capability during the initial phase of operations will total 17,500 gallons. Further, Scott will install measuring and monitoring devices, as required by the Dept. of Environmental Resources, so that leachate collection can be ascertained and pollution of waters of the Commonwealth prevented.

2) Scott agrees to begin excavation and site preparation for a 9 million gallon PVC lined, leachate collection lagoon at the Landfill during the fall, and winter of 1976 and the

spring of 1977 when weather conditions permit. Scott further agrees that the said Liner will be installed by June 1 and that the lagoon will be operating by July 1, 1977.

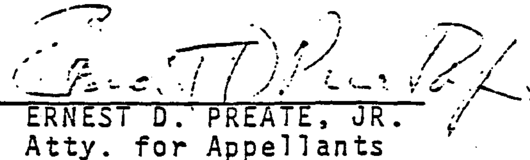
3) Scott agrees to install and maintain proper monitoring wells as required by DER.

4) Scott agrees that immediately upon execution of this Agreement he will obtain the services of a professional engineer or the U.S. Soil Conservation Service to conduct a sedimentation and erosion study at the landfill site and to implement the recommendations of said study within 15 days of the completion of said study. DER is to receive a copy of said study.

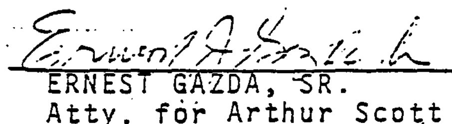
5) Scott agrees that the Environmental Hearing Board shall retain jurisdiction over this Appeal and that this Stipulation shall become an Order of the Environmental Hearing Board, and that a failure by Scott to adhere to the terms of this Stipulation may result in the enforcement of this Stipulation by appropriate action by the Board.

6) Scott agrees that Appellants are not precluded by this Stipulation from instituting and maintaining actions at law or in equity in the appropriate court for damages or infringement of their rights caused by the operation and maintenance of the landfill site by Scott, now or in the future.

WHEREFORE, the Attorneys for the Appellants and Scott set their hands and seals this 15th day of November, 1976.



ERNEST D. PREATE, JR.
Atty. for Appellants



ERNEST GAZDA, SR.
Atty. for Arthur Scott

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

GEORGE CAMPBELL, et al

Docket No. 76-117-C

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and ARTHUR H. SCOTT, Intervenor

ORDER

AND NOW, this 11th day of January, 1977, on the basis of a stipulation by and between Ernest D. Preate, Jr., counsel for appellants, and Ernest Gazda, Sr., counsel for intervenor, Arthur H. Scott, it is hereby ordered:

(1) Arthur H. Scott shall:

(a) Install at his landfill site in New Milford, Susquehanna County, Pennsylvania, a holding tank with a 7,500 gallon capacity such that the leachate collection capability during the initial phase of the operation of the landfill will total 17,500 gallons.

(b) Install at his landfill site measuring and monitoring devices, as required by the Department of Environmental Resources, to ascertain the extent of leachate collection and to prevent pollution of the waters of the Commonwealth.

(c) Continue the excavation and site preparation already commenced at the time of this order for a leachate collection lagoon with a capacity of 9 million gallons and lined with a polyvinyl chloride liner during the winter and spring of 1977, weather conditions permitting, so that the liner is installed on or before June 1, 1977, and the lagoon will be operational on or before July 1, 1977.

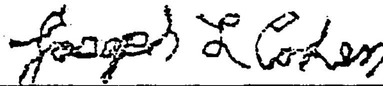
(d) Install and maintain monitoring wells as required by the Department of Environmental Resources.

(e) Engage the services of a professional engineer or the United States Soil Conservation Service to conduct a sedimentation and erosion study at his landfill site. Arthur H. Scott shall implement any recommendations set forth in the study within 15 days of its completion and shall transmit a copy of the study to the Department of Environmental Resources.

(2) Unless any party to the above captioned matter shall otherwise inform the board in writing on or before July 15, 1977, the board shall enter an order on or after that date marking this matter settled and discontinued. Pending the entry of such an order, this board shall retain jurisdiction in this matter and may enter supplemental orders, if necessary, to enforce the provisions of this order entered this 11th day of January, 1977.

(3) Nothing in this order is intended to estop appellant from commencing and maintaining actions at law or in equity, now or in the future, against Arthur H. Scott for injury to their personal or property rights arising from the operation or maintenance of his landfill site in New Milford, Susquehanna County, Pennsylvania.

ENVIRONMENTAL HEARING BOARD



JOSEPH L. COHEN
Member

cc: Bureau of Administrative Enforcement
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For the Commonwealth:

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COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD
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112 Market Street
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MASKENOZHA ROD AND GUN CLUB,
et al.,

Appellants

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL
RESOURCES,

Appellee,

and

MARCON, INC., AND DELAWARE
SEWER COMPANY,

Permittee
Interveners.

Docket No. 79-155-S

Appeal From Issuance of
NPDES Permit No. PA.0060160

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

BY: The Board, September 4, 1981

HISTORY OF THE PROCEEDINGS

Maskenozha Rod & Gun Club, (Maskenozha Club) Mink Pond Club, Little Bushkill Rod & Gun Club, (Little Bushkill Club) Lehman Lake Rod & Gun Club (Lehman Lake Club) and the Township of Lehman have filed appeals to this Board from the action of the Commonwealth of

Pennsylvania, Department of Environmental Resources, (DER) in issuing a National Pollutant Discharge Elimination System (NPDES) permit to Marcon, Inc. (Marcon). Under the terms of this permit, Marcon was authorized to discharge treated sewage effluent from its sewage treatment facility in Delaware Township, Pike County, to an unnamed tributary to Little Bushkill Creek which was later identified as Sand Spring Run.

Shortly after these appeals were filed, counsel for Marcon and for Delaware Sewer Company, a wholly owned subsidiary of Marcon, to which said NPDES permit had been transferred, entered an appearance.

On November 27, 1979, Marcon and Delaware Sewer Company filed a motion to dismiss the appeal of Maskenozha Club on the ground that Maskenozha Club had failed to comply with a pre-hearing order of this Board under the terms of which said appellant was required to file a pre-hearing memorandum. We denied this motion on December 10, 1979.

On December 4, 1979, Marcon and Delaware Sewer Company filed a motion to quash the appeals of Mink Pond Club, Little Bushkill Club, Lehman Lake Club and the Township of Lehman on the ground that these appellants did not timely file or perfect their appeals. We denied this motion on December 27, 1979.

At the first hearing on the merits of these appeals on April 17, 1980, Marcon and Delaware Sewer Company formally intervened in each appeal without objection, the parties stipulated that said appeals were consolidated for hearing and adjudication, the parties stipulated that certain documents from the files of DER were authentic and said intervenors stipulated that the manner of sampling and testing which

was performed by DER and appellants was done in accordance with regular procedures.

Further hearings on these consolidated appeals were held on the following dates in 1980: April 18, 28, and 29; May 20; June 23 and 24. At the conclusion of the hearing held on June 24, 1980, counsel for DER moved that the record in this matter should remain open to permit DER to enter testimony and exhibits as to certain sampling and testing which was performed earlier in June, 1980. This motion was initially opposed by Marcon and Delaware Sewer Company. When, by the fall of 1980, this motion had neither been granted nor denied, the parties agreed that there should be further hearings with regard to said sampling and testing. These hearings were held on January 7 and January 8, 1981, and the record was closed.[1]

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1. Appellants were initially represented in this matter by Dennis J. Harnish, Esquire. Prior to the conclusion of the hearing in this matter, Mr. Harnish was appointed as a member of this Board. Mr. Harnish has taken no part in the review of this matter and has not participated in the process by which this adjudication is being issued. Since there are at present only two members of the Board, the parties also stipulated that this adjudication can be issued by the Chairman of this Board, Paul E. Waters, acting alone.

OBJECTION TO THE JURISDICTION OF THE BOARD

Marcon and Delaware Sewer Company have contended, both prior to the hearings on the merits of these appeals and subsequent to said hearings, that the Board does not have jurisdiction to entertain and adjudicate these appeals because the appellants failed to exhaust an available administrative remedy.

They contend that this remedy is provided in Chapter 92, Section 92.61 of the Rules and Regulations adopted by the Environmental Quality Board for and on behalf of DER relating to NPDES permits, 25 Pa. Code §92.61. In that Section, it is provided that DER must give public notice of every complete application for an NPDES permit in the Pennsylvania Bulletin, that such notice must contain certain defined information with regard to the project for which approval is sought, that for 30 days after such notice is published, written comments may be submitted before DER makes its final determination on said application, that during said 30 day period, persons affected by or interested in said application may request a public hearing before DER and that DER should grant such a request in most cases.

They submit that although DER followed the above procedure, none of the appellants availed themselves of the "remedies" provided therein. They contend that this inaction by the appellants is fatal to their respective appeals to this Board under and by virtue of the provisions contained in Section 5 (a) of the Administrative Agency Law, as amended, Act of April 28, 1978, P.L. 202, 2 Pa. C.S.A. § 703 (a), which are as follows:

"703. Scope of review

(a) General rule - A party who proceeds before a Commonwealth agency under the terms of a particular statute shall not be precluded from questioning the validity of the statute in the appeal, but such party may not raise upon appeal any other question not raised before the agency (notwithstanding the fact that the agency may not be competent to resolve such question) unless allowed by the court upon due cause shown."

We reject this contention. The statute above quoted applies only to appeals to a court following a proceeding before a Commonwealth agency such as this Board. This is evident when one looks at the title of the chapter of the Administrative Agency Law, supra, in which said statute is found, to-wit, "Chapter 7, Judicial Review" and at the title of the subchapter of the Administrative Agency Law, supra, in which said statute is found, to-wit, "Subchapter A, Judicial Review of Commonwealth Agency Action".

The Appellants had the right to appeal the grant of said NPDES permit to Marcon under and by virtue of the provisions contained in Section 1921-A of the Administrative Code, Act of April 9, 1929, P.L. 177, added December 3, 1970, 71 P.S. §510-21 (c), in which it is provided as follows:

"§510-21 (Adm. Code §1921-A). Environmental Hearing Board

.

.

(c) Anything in any law to the contrary notwithstanding any action of the Department of Environmental Resources may be taken initially without regard to the Administrative Agency Law, but no such action of the department adversely affecting

any person shall be final as to such person until such person has had the opportunity to appeal such action to the Environmental Hearing Board; provided, however, that any such action shall be final as to any person who has not perfected his appeal in the manner hereinafter specified."

We hold that it is not mandatory that one, who otherwise would have the right to appeal the grant of an NPDES permit to this Board, must participate in the process as outlined in 25 Pa. Code §92.61, supra in order to later appeal said permit. Appellants have properly perfected their respective appeals.

FINDINGS OF FACT

A. Marcon and its concepts for sewage disposal in Section 19 through 22 of Wild Acres

1. Marcon is a real estate development corporation which has its principal office in the State of New Jersey.

2. Marcon or its parent company, All American Realty, Inc., owns a tract of land in Delaware Township, Pike County, Pennsylvania, which is known as Wild Acres.

3. Marcon has developed Wild Acres into a residential, mostly second home community. In the initial phase of this development, in an area designated as Sections 1 through 18, 588 homes were built.

4. Sewage disposal for these 588 homes is by individual on-lot disposal systems.

5. Marcon has, since at least 1974, sought to develop an additional portion of Wild Acres to accommodate the construction of an additional 500 homes. These homes would be constructed in an area designated as Sections 19 through 22.

6. Sections 19 through 22 of Wild Acres are located in the watershed of Little Bushkill Creek, and more specifically in the watershed of what is officially known as an unnamed tributary to Little Bushkill Creek; this unnamed tributary is commonly known as Sand Spring Run.

7. On a date which was prior to December, 1977, Marcon concluded that neither on-lot sewage disposal nor spray irrigation sewage disposal were feasible methods of sewage disposal for the population of Sections 19 through 22 of Wild Acres.

8. On a date which was prior to December, 1977, Marcon concluded that central sewage disposal was the most feasible method of sewage disposal for the population of Sections 19 through 22. Marcon decided that an interim sewage treatment plant should be built along Sand Spring Run, with a discharge of effluent therefrom to that body of water.

9. Such an interim sewage treatment plant and the point of discharge therefrom are in Delaware Township, Pike County.

B. Marcon and DER, the permit process.

10. Two permits were required from DER for this proposed project, a water quality management permit approving the construction of sewage conveyance and treatment facilities and a NPDES permit approving the discharge.

11. Among the first of the reports and other documents which were submitted to DER by engineering consultants for Marcon, in support of this project were:

A. A report entitled Waste Water Disposal and Treatment Alternatives (Waste Water Report), which was received by DER personnel in the Wilkes-Barre Office of the Bureau of Water Quality Management (WQM Bureau) of DER in December, 1977.

B. A report which dealt with planning requirements and with social and economic justification for the development of Sections 19 through 22 of Wild Acres (Planning & Social Justification Report), which was received by DER personnel in the Wilkes-Barre Office of the WQM Bureau of DER sometime after January 12, 1978.

12. In both these Reports, the engineering consultants for Marcon presented evidence, compiled by a soil scientist, in support of their earlier conclusion that neither on-lot sewage disposal nor spray irrigation sewage disposal were feasible methods of sewage disposal for the population of Sections 19 through 22 of Wild Acres.

13. In both these Reports, the engineering consultants for Marcon took the position that the proposed Sand Spring Run sewage treatment plant would be an interim facility.

14. In both Reports, the engineering consultants for Marcon addressed the question of whether central sewage disposal, with a discharge to Sand Spring Run would be consistent with the Official Plan for sewage services for Delaware Township, which was approved by DER on June 24, 1976.

15. In the Official Plan for sewage services for Delaware Township, it was provided that by the mid-1980's, all of the sewage generated in the entire Wild Acres tract would be pumped to a pump station to be located along Hornbeck's Creek in said Township; from that pump station the sewage would be pumped to a sewage treatment plant to be located along Dingman's Creek in said Township; from that plant the treated effluent would be discharged to Dingman's Creek.

16. In both Reports, the engineering consultants for Marcon again took the position that the proposed Sand Spring Run sewage treatment plant would be an "interim facility". By "interim facility", they meant that it would facilitate central sewage collection and treatment for Sections 19 through 22 of Wild Acres until the sewage treatment plant to be located along Dingman's Creek, the concept for which was outlined in the Official Plan for sewage services for Delaware Township, was built.

17. In both the Waste Water Report and the Planning & Social Justification Report, the engineering consultants for Marcon stated that the proposed Sand Spring Run treatment plant could become the final sewage treatment facility for Sections 19 through 22 of Wild Acres if Delaware Township would determine that it should be so used and if Delaware Township would succeed in a revision of said Official Plan to reflect such a change.

18. In both the Waste Water Report and the Planning & Social Justification Report, the engineering consultants for Marcon contended that the plan of Marcon to build the Sand Spring Run

sewage treatment plant and to discharge treated effluent therefrom to Sand Spring Run was consistent with said Official Plan. They concluded, therefore, that a supplement to said Official Plan to reflect the addition of this interim facility, rather than a revision to said Official Plan, was appropriate.

19. Marcon did not suggest to DER any alternate sites for said sewage treatment facility to serve Sections 19 through 22, nor did Marcon suggest any alternate discharge points.

20. In both these Reports, the engineering consultants for Marcon discussed the development of effluent limitations for the proposed discharge.

21. In Chapter 93 of the Rules and Regulations adopted by the Environmental Quality Board for and on behalf of DER, 25 Pa. Code §93.1, et seq., there are set forth in-stream limits for the various components in a discharge to the waters of the Commonwealth.

22. In that version of Chapter 95 of the Rules and Regulations, supra, Section 95.1 (b), 25 Pa. Code §95.1 (b), which was in effect at the time when Marcon first sought a permit to construct, operate and discharge effluent from said proposed sewage treatment plant, it was provided, as follows:

> "§95.1 General requirements.
>
> . . .
>
> (b) Waters having a better quality than the applicable water quality criteria as of the effective date of the establishment of such criteria shall be maintained at such high quality unless it is affirmatively demonstrated that a change is justified as a result of necessary economic or social development and will not preclude uses presently possible in such waters.

(c) Any industrial, public or private project or development which would constitute a new source of pollution or an increased source of pollution to high quality waters shall be required to provide the highest and best practicable means of waste treatment to maintain high water quality."

23. At all times material to these consolidated matters, the chemical and biological quality of the waters in Sand Spring Run has been better than the applicable Chapter 93 water quality criteria.

24. In both the Waste Water Report and the Planning & Social Justification Report, the engineering consultants for Marcon, and, in particular, VEP Associates, Inc., stated that the Sand Spring Run sewage treatment plant would initially be designed to handle 25,000 gallons per day (GPD) of sewage effluent and/or waters which infiltrated the sewer lines, which converts to .038 cubic feet per second (CFS) of effluent.

25. In both said reports, VEP Associates stated that as the build-out of Sections 19 through 22 of Wild Acres progressed, the proposed sewage treatment plant would be expanded in order to enable it to handle 175,000 GPD of effluent, which converts to .271 CFS of effluent.

26. In said Waste Water Report, VEP Associates suggested that the following limitations should be included by DER as to the discharge from this proposed sewage treatment plant, based upon an ultimate effluent volume of 175,000 GPD or .271 CFS:

a. pH — 6 to 8.5

b. Dissolved Oxygen — minimum 7.0 milligrams per liter (MG/L)

c.	Iron	maximum 1.5 MG/L
d.	Temperature	Not more than 5° rise
e.	Dissolved Solids	Not more than 500 MG/L monthly average and not more than 750 MG/L at any time
f.	Fecal Coliforms	200/100 milliliter maximum
g.	Ammonia Nitrogen (NH_3-N)	.5 MG/L maximum

VEP Associates also suggested a 5 day Biochemical Oxygen Demand (BOD_5) of 10 to 20 MG/L as an effluent criteria.

27. In its Waste Water Report, VEP Associates described Sand Spring Run over a length of 6,150 feet. It was stated that 4,000 feet of Sand Spring Run, beginning at a point 600 feet below the dam of said lake was surrounded by a dense swamp. It was stated that for the next 2,150 feet downstream, the stream bed was poorly to moderately defined with approximately 20% of the flow being underground. It was stated that there was no evidence of Sand Spring Run being used for water supply, bathing, stock watering, fishing, industrial supply, irrigation or boating.

28. Sand Spring Run drains directly into Lake Maskenozha. Lake Maskenozha is approximately 6,000 feet downstream from the point at which Marcon's proposed sewage treatment plant would discharge into Sand Spring Run. Marcon did not discuss the water quality of Lake Maskenozha in its Waste Water Report.

29. VEP Associates stated in its Waste Water Report that with the implementation of the effluent limitations which it set forth therein that:

A. No adverse impact on Lake Maskenozha or any usage downstream of Lake Maskenozha will occur.

B. Most of all of the NH_3-N discharge to Sand Spring Run would be assimilated by the 4,000 feet of stream through the swamp area and deposited as particulate organic nitrogen.

C. The receiving stream would quickly replace the oxygen demand created by the treatment effluent.

30. At the time when DER was reviewing the application for the NPDES permit submitted on behalf of Marcon, it was the policy of DER, when establishing effluent limitations for any stream which would receive a discharge from a sewage treatment facility, that it was necessary to maintain in-stream water quality even during the lowest flow in such stream which would occur for seven consecutive days once every ten years. This flow, expressed in cubic feet per second (CFS) is called the "Q (7-10)" flow.

31. The Q (7-10) flow in a stream is taken by DER to be the critical value of that stream to be protected in establishing effluent limitations. DER uses the Q (7-10) flow and the volume of the discharge (expressed in CFS) in a mass balance used to determine the effluent limitations.

(effluent limitation)(discharge volume) = (in-stream criteria)(discharge volume + Q (7-10) flow) or

$$\text{effluent limitation} = \frac{(\text{instream criteria})(\text{discharge volume} + Q\ (7\text{-}10)\ \text{flow})}{\text{discharge volume}}$$

(here effluent limitation for NH_3-N) $= \frac{(.5\text{mg/l})(.27 \times \text{CFS} + .61\ \text{CFS}}{.27} = \frac{1.}{\text{mg}}$

as per finding 41, <u>infra</u>.

or $= \frac{(.5\text{mg/l})(.27\ \text{CFS} + .06\ \text{CFS})}{.27} = .5\ \text{mg/l}$

as per finding 40, <u>infra</u>.

32. In its Waste Water Report, VEP Associates reached the conclusion that the Q (7-10) flow in Sand Spring Run was not less than .11 CFS and that it was probably greater than .11 CFS. VEP Associates reached this conclusion on the basis of the following:

A. The total drainage area to Sand Spring Run at the point of discharge is .067 square miles.

B. Since there were no measurements of Sand Spring Run to determine the Q (7-10) flow therein, it was necessary to revert to known Q (7-10) flows in the drainage areas of three streams in proximity to Wild Acres, to-wit:

(1) Brodhead Creek at Analomink - 66,000 gallons per day (GPD) per square mile - which converts to .1031 CFS per square mile.

(2) Brodhead Creek at Minisink Hills - 97,000 GPD per square mile - which converts to .1501 CFS per square mile.

(3) McMichael Creek - 159,000 GPD per square mile - which converts to .2460 CFS per square mile.

C. The average of the above three CFS per square mile figures, .1664 CFS per square mile, was utilized as the base flow to determine the Q (7-10) flow in Sand Spring Run.

D. By multiplying the average base flow figure as found above for said three drainage areas, .1664 CFS per square mile, by the drainage area to Sand Spring Run, .067 square miles, the figure of .11 CFS as the Q(7-10) flow in Sand Spring Run was obtained.

E. Since the drainage area to Sand Spring Run contained a natural underground spring which supplies water constantly to said stream and has not gone dry in times of drought, it would appear that the Q (7-10) flow in Sand Spring Run is higher than .11 CFS.

33. In May, 1977, some seven months prior to the date when Marcon submitted its Waste Water Report to DER, Marcon filed an application with the Dams and Encroachments Division of DER for a permit(dams and encroachments permit) to construct and maintain

a dam at a point which is approximately 1,500 feet upstream from the point where the treated sewage effluent from said proposed sewage treatment plant would first enter Sand Soring Run.

34. In this application for said dams and encroachments permit, Marcon indicated that by virtue of such a dam a lake with an area of 38.8 acres would be created.

35. In this application for the dams and encroachments permit, Marcon indicated that the lake which would be created by such a dam would be utilized for recreational purposes.

36. DER issued the dams and encroachments permit to Marcon on October 4, 1977, and Marcon accepted the terms and conditions set forth therein on October 11, 1977.

37. In its Waste Water Report, VEP Associates suggested that if it became necessary in a drought situation to increase the flow in Sand Spring Run, the dam from said lake, which was under construction in December, 1977, could be opened.

38. VEP Associates stated in its Waste Water Report that the lake would have a volume of 67,000,000 gallons, that 3/4 of that volume could be utilized to augment the flow in Sand Spring Run without damaging the fish life in the lake and that utilizing 3/4 of that volume, a flow of .5 CFS could be maintained in Sand Spring Run for 155 consecutive days.

39. On January 4 and January 5, 1978, DER, by Richard Stepanski, a sanitary engineer in the Planning Section of the Wilkes-Barre Regional Office of WQM Bureau of DER, prepared a document called a "pollution report" with regard to the proposed discharge from Marcon's proposed sewage treatment plant.

40. In this pollution report, Mr. Stepanski concluded that the Q (7-10) flow in Sand Spring Run was .06 CFS. He reached this figure by reverting to the known Q (7-10) flow per square mile in Little Bushkill Creek. He utilized flow conditions in Little Bushkill Creek rather than in those streams which were utilized by VEP Associates because Little Bushkill Creek was closer to Sand Spring Run than the other streams and because he believed that its flow characteristics were similar to those in Sand Spring Run.

41. In this pollution report, Mr. Stepanski set forth various effluent limitations as to the discharge from Marcon's proposed sewage treatment plant, seemingly based upon the calculation by VEP Associates that the Q (7-10) flow in Sand Spring Run was .11 CFS and based upon the stated intent of VEP Associates to provide an additional .50 CFS flow in Sand Spring Run by releasing water from the lake which was then under construction upstream from the proposed point of discharge; i.e., Mr. Stepanski used .61CFS as the Q(7-1[illegible] flow.

42. On January 6, 1978, Mr. Stepanski mailed a letter to an employee of VEP Associates in which he set forth recommended effluent limitations as to the discharge from Marcon's proposed sewage treatment plant which differed from those effluent limitations which were contained in his pollution report only as to NH_3-N. In his pollution report, Mr. Stepanski established an NH_3-N limitation of 1.0 MG/L between June 1 and October 31 of any given year and an

NH_3-N limitation of 3.0 MG/L at all other times. In his letter of January 6, 1978, Mr. Stepanski established an NH_3-N limitation of .5 MG/L between June 1 and October 31 and an NH_3-N limitation of 1.0 MG/L at all other times.

43. The reason for the more stringent limitation on the NH_3-N content in said effluent, as expressed in the letter of January 6, 1978, was that Mr. Stepanski used the figure of .06 CFS for the Q (7-10) flow in Sand Spring Run and did not take into account the proposal of Marcon to augment the flow in Sand Spring Run.

44. On January 12, 1978, Mr. Stepanski mailed a second letter to the same employee of VEP Associates to whom the letter of January 6, 1978, was sent. In this second letter, Mr. Stepanski re-established the NH_3-N limitations which were set forth in his pollution report, (1 and 3) and he re-affirmed the same other effluent limitations as had been set forth in both his pollution report and in the letter of January 6, 1978, to-wit:

5 day Biochemical Oxygen Demand (BOD_5)	10 MG/L (7 day average)
Total Suspended Solids	10 MG/L (7 day average)
Phosphorus	0.5 MG/L (7 day average)
D.O.	6.0 MG/L Minimum

45. In the Planning & Social Justification Report, the engineering consultants for Marcon advanced numerous arguments in an attempt to satisfy the requirements, contained in 25 Pa. Code,

§95.1 (b), supra, that the change in the high water quality of Sand Spring Run which will occur by reason of the discharge from Marcon's proposed treatment facility is justified as a result of necessary economic or social development. These arguments are summarized as follows.

A. As to necessary social development:

(1) The Wild Acres development will enhance public recreational opportunities.

(2) The Wild Acres development will relieve the mental and physical stresses of people who live in crowded living conditions and promote an emotionally healthier population.

(3) The increased population created by Sections 19 through 22 will tend to attract more physicians and more hospital services and cultural programs will be provided.

(4) The homes to be built in Sections 19 through 22 will aid in the effort to cope with the existing housing deficiency in the area.

B. As to necessary economic development:

(1) The recreation environment can lead to economic re-birth in the area.

(2) New industrial development could be attracted to the area.

(3) The area would be able to capture a substantial portion of the second home/recreation market.

(4) The Wild Acres development could provide new recreational neighborhoods to support the Scranton/ Wilkes-Barre metropolitan area.

(5) Job opportunities in a variety of trades, including construction and related industries, will be created for local residents.

(6) The increased tax revenues which will be created by virtue of the development of Sections 19 through 22 of Wild Acres will more than offset any necessary increase in municipal services.

(7) A development such as Wild Acres will greatly benefit the resort-recreation-vacation-tourist industry, which is the main industry in this area of the Poconos.

46. On April 19, 1978, the Pike County Planning Commission, to which the engineering consultants for Marcon had also sent the Planning & Social Justification Report, sent written comments thereupon to said engineering consultants and to a representative of DER.

47. In said written comments, the Pike County Planning Commission expressed concern over the relationship between this proposed project and the Official Plan of Delaware Township, over the statement in said Planning & Social Justification Report that the homes in Sections 19 through 22 of Wild Acres would help to cure the existing housing deficiency in the area and with several other statements in said Report dealing with the lack of need for additional governmental services.

48. The engineering consultants for Marcon sent a written reply to the Pike County Planning Commission in which they attempted to allay the concerns raised by that entity.

49. On April 28, 1978, Marcon filed written applications with DER for the issuance of both the water quality management permit and the NPDES permit for this project.

50. The sewage treatment plant proposed to be constructed by Marcon is an advanced wastewater treatment facility designed to provide tertiary treatment of the influent flowing thereto.

51. The treatment process in this proposed plant involves comminution, which is the reduction of the size of the solids entering the plant, then settling, wherein solids are settled in tanks and removed, then pre-aeration of the wastewater, then treatment in bio disk units to achieve nitrification, then further removal of solids, then filtration and, finally, chlorination.

52. In its application for the water quality management permit, Marcon sought authority to construct only a first stage sewage treatment plant, the components of which are designed to treat 25,000 GPD of influent.

53. In its application for the NPDES permit, Marcon sought authority to discharge 175,000 GPD of effluent, which is the ultimate expected effluent at projected build-out of Sections 19 through 22 of Wild Acres.

54. In Chapter 71, Section 71.15 (c) of the Rules and Regulations adopted by the Environmental Quality Board for and on behalf of DER, 25 Pa. Code § 71.15 (c), it is provided that if the official plan of a municipality adequately provides for the sewage

disposal needs of a proposed subdivision, a supplement to the official plan, containing certain required information, may be submitted to DER for its review.

55. Marcon prepared a supplement to the Official Plan of Delaware Township in which Marcon's plan to build a sewage treatment plant to serve Sections 19 through 22 of Wild Acres along Sand Spring Run and to cause the treated effluent therefrom to be discharged to Sand Spring Run was incorporated.

56. The governing body of Delaware Township approved this supplement on June 16, 1978.

57. On August 18, 1978, Mr. Stepanski sent a memorandum to the Acting Chief of the WQM Bureau of DER in which he stated that this project has sufficient social and economic justification as to "allow a change in the water quality of the Little Bushkill Creek basin".

58. Joseph P. Smurda is employed by DER as the Delaware-Potomac River Basin Engineer. Since Sand Spring Run, the receiving stream for the effluent to be discharged from Marcon's proposed sewage treatment plant, is in the Delaware River Basin, which is his responsibility, and since the waters in Sand Spring Run are of high quality, he became personally involved with the reviewing of the applications submitted by Marcon.

59. On September 19, 1978, Mr. Smurda sent a memorandum to Mr. Stepanski, which is summarized as follows:

A. On the basis of his review of the Planning & Social Justification Report, he concluded that Marcon had not

"justified this project" from a social standpoint and had probably not "justified" it from an economic standpoint.

B. He was not clear as to whether either the Pike County Planning Commission or the governing body of Delaware Township found that the implementation of this project constituted necessary economic or social development so as to justify the project.

C. He construed the plan of Marcon to augment the flow in Sand Spring Run by releasing water from the lake, hereinafter referred to as "Sand Spring Lake", which Marcon was creating per its dams and encroachments permit as an unacceptable substitute for good waste treatment.

D. He was not satisfied that the engineering consultants for Marcon had proved that spray irrigation as a method for sewage disposal in Sections 19 through 22 of Wild Acres was not feasible.

E. He was unclear as to why Marcon discussed both the construction of a 25,000 GPD and a 175,000 GPD treatment plant.

F. He stated that Marcon was incorrect in assuming that an average discharge of 500 MG/L dissolved solids from said proposed plant would be permissible.

G. He wanted information with regard to whether the engineering consultants for Marcon made waste assimilation studies and he wanted to know the dissolved oxygen concentration in Sand Spring Run after discharge from said proposed sewage treatment plant.

60. Mr. Stepanski summarized the concerns of Mr. Smurda in a letter which he sent to VEP Associates on October 10, 1978.

61. In response to said letter of October 10, 1978, representatives of VEP Associates and other representatives of Marcon met with Mr. Smurda and Mr. Stepanski on November 1, 1978; and, on December 18, 1978, a representative of VEP Associates responded in writing to the concerns set forth in the Stepanski letter of October 10, 1978. This response is summarized as follows;

A. They provided additional information and data with regard to their contention that there was a significant social and economic need for this expansion of Wild Acres and they re-emphasized earlier data with regard to their contention.

B. They attached correspondence from Delaware Township in which the governing body thereof indicated its approval for the development of Sections 19 through 22, in which the governing body stated that the Official Plan of the Township had been supplemented on June 16, 1978, to reflect the proposed sewage treatment plant and the proposed discharge therefrom and in which the governing body stated that the development of Sections 19 through 22 will provide economic and social benefits for the Township and area generally.

C. They contended that the best available waste treatment was being planned for Sections 19 through 22. They did not discuss their plan for flow augmentation from Sand Spring Lake, apparently because Mr. Stepanski did not include the objection raised by Mr. Smurda to flow augmentation in the letter which VEP Associates received.

D. They reiterated their conclusion that spray irrigation as a method for sewage disposal in Sections 19 through 22 was not feasible.

E. They explained that they were required by DER regulations and good planning practice to include plans for a treatment plant which would serve the ultimate population of Sections 19 through 22, that ultimate build-out would not occur in the forseeable future and that a reasonable projection of build-out for Sections 19 through 22 over a 30 year period would be only as to one half the ultimate population.

F. They agreed with the statement that an average discharge of 500 MG/L of dissolved solids from said proposed plant would not be permissible.

G. They stated that DER had done waste assimilation studies, the results of which DER used to establish the effluent criteria which DER communicated to VEP Associates on January 12, 1978.

62. By January 27, 1979, Mr. Smurda found that Marcon had complied with the social and economic requirements contained in 25 Pa. Code §95.1 (b), supra. In a memorandum to the Director of the WQM Bureau on the above date, he recommended approval of the construction of the proposed sewage treatment plant and of the discharge to Sand Spring Run.

63. On February 27, 1979, Maxine Woelfling, an attorney for DER who had been asked to review the recommendation of Mr. Smurda, together with other supporting documents, raised the following concerns with regard to this project:

A. She did not understand why the effluent limitations for the proposed sewage treatment plant were calculated assuming a discharge of 175,000 GPD while Marcon was initially planning a plant which would treat only 25,000 GPD.

B. She was not satisfied with the information supplied by the engineering consultants for Marcon as to operation of said plant.

C. She was not satisfied that the technical staff of DER had independently reviewed this project in order to determine whether the planned discharge to the high quality waters of Sand Spring Run was justified by reason of necessary economic and social development.

64. On March 12, 1979, ten days after a meeting attended by DER technical personnel, among them Mr. Smurda and Mr. Stepanski, Mr. Smurda wrote to Mr. Stepanski and requested that he communicate to VEP Associates the concerns as manifested by Attorney Woelfling as well as some questions relating to the drainage area above the proposed plant, the Q (7-10) flow of Sand Spring Run, the entire concept of flow augmentation to Sand Spring Run from Sand Spring Lake (including the effect on the Lake itself and whether flow augmentation was a substitute for waste treatment) and waste treatment in general.

65. On March 13, 1979, Mr. Stepanski sent a letter to VEP Associates wherein he requested clarification, comments and information with regard to the following:

A. The manner and mechanism by which continued responsibility for the operation of the proposed treatment plant would be implemented.

B. The legal mechanism by which Marcon would transfer ownership of the proposed plant to Delaware Township.

C. The correct figure for the drainage area tributary to Sand Spring Lake.

D. The DER position that flow augmentation is not a substitute for waste treatment and a resultant position that the NH_3-N effluent limitation, as communicated to VEP Associates on January 12, 1978, should be lowered.

E. The effect of a drawdown of Sand Spring Lake on the recreational value of said Lake.

66. On March 29, 1979, Val Manov, president of VEP Associates, sent a reply to Mr. Stepanski from his letter of March 13, 1979. On April 4, 1979, legal counsel for Marcon also replied to said letter. These replies are summarized as follows:

A. The owner and operator of the proposed sewage treatment plant and treatment system would be Delaware Sewer Company, a Marcon subsidiary, which was then seeking a Certificate of Public Convenience from the Public Utility Commission.

B. Marcon and/or Delaware Sewer Company had no plans to transfer ownership of said proposed sewage conveyance and treatment facilities to Delaware Township.

C. The drainage area tributary to Sand Spring Lake is .67 square miles.

D. Flow augmentation had been agreed to by DER in early 1978 and effluent requirements based upon it were issued at that time. Flow augmentation from Sand Spring Lake can be maintained for 120 consecutive days without any rainfall. Flow augmentation from Sand Spring Lake is environmentally beneficial to Sand Spring Run since flow augmentation will assure that Sand Spring Run will never be "bone dry".

67. Neither Mr. Manov nor legal counsel for Marcon addressed themselves to the question, in said March 13, 1979, letter, of the effect of a drawdown of Sand Spring Lake on the recreational value of said Lake.

68. On April 12, 1979, Mr. Stepanski, in a memorandum to Mr. Smurda, again supported the plan of Marcon to provide flow augmentation to Sand Spring Run via Sand Spring Lake. Mr. Stepanski again recommended that with flow augmentation the NH_3-N limitation could be 1.0 MG/L between June 1 and October 31 of any given year and 3.0 MG/L at all other times. He again recommended approval of this project.

69. It would appear that on April 13, 1979, Mr. Smurda again approved this project, with the caveat that flow augmentation was to be mandatory.

70. On May 9, 1979, a representative of the Bureau of Community Environmental Control of DER sent a letter to the Township Secretary of Delaware Township in which it was provided that approval for the Marcon project as a supplement

to the Official Plan of Delaware Township could be granted if Marcon took any one of the following steps:

A. Revised the dams and encroachments permit to include an obligation to provide a minimum flow from Sand Spring Lake to Sand Spring Run of 0.5 CFS; or

B. Include such a minimum flow requirement in the NPDES permit, monitor the flow in Sand Spring Run, cease the discharge from the sewage treatment plant if the flow is less than 0.5 CFS and impound the discharge until stream flow equals or exceeds 0.5 CFS; or

C. Revise the effluent limitations as to NH_3-N as follows:

(1) 0.5 MG/L (6-1 to 10-31)

(2) 1.5 MG/L (11-1 to 5-31)

71. Marcon submitted an application to DER to amend its dams and encroachments permit by the addition of a requirement that a continuous flow of not less than 0.5 CFS, equivalent to 323,000 GPD, is to be maintained at all times in Sand Spring Run below Sand Spring Lake.

72. On June 4, 1979, DER approved this application and the dams and encroachments permit previously issued to Marcon was amended to include the requirement set forth in the next preceding finding.

73. On August 31, 1979, DER issued Water Quality Management Permit No. 5278404 to Marcon and/or to Delaware Sewer Company. Under the terms of this Permit, Marcon was authorized to construct said

sewage treatment plant and other sewage conveyance facilities which were designed to handle an influent of 25,000 GPD.

74. On August 31, 1979, DER issued NPDES Permit No. PA 0060160 to Marcon. Under the terms of this Permit, Marcon was authorized to discharge 175,000 GPD of treated sewage effluent from said sewage treatment plant to Sand Spring Run.

75. In said NPDES Permit, there was contained effluent limitations which, inter alia, included those effluent limitations which were established by Mr. Stepanski on January 12, 1978.

76. Marcon accepted both said permits.

C. The Appellants

77. The Township of Lehman is a municipal corporation situate in Pike County.

78. Shortly below the proposed discharge point for the effluent proposed to be treated in Marcon's proposed sewage treatment plant, Sand Spring Run passes out of Delaware Township and into Lehman Township.

79. Mink Pond Club is a non-profit organization which owns and maintains over 2,339 acres of land partly in Delaware Township and partly in Lehman Township. The Club has 49 member families.

80. Mink Pond Club uses its land, Mink Pond which is located on its land and other waters which are located on its land for the propagation of fish and game, for fishing and hunting and as a recreation area.

81. Sand Spring Run flows through Mink Pond Club property for a distance of 4,269 feet, all of which is below the proposed discharge point for the effluent proposed to be discharged from Marcon's proposed sewage treatment plant.

82. Mink Pond Club does not utilize Sand Spring Run for fishing.

83. Maskenozha Club is a non-profit Pennsylvania Corporation which owns and maintains a 900 acre park in Lehman Township, Pike County. The membership of the Club is 60 families.

84. Approximately one third of the property of the Maskenohza Club is composed of a lake which is named Lake Maskenozha.

85. Maskenozha Club uses its land and its waters in much the same fashion as Mink Pond Club uses its land and waters.

86. Sand Spring Run drains into the northeast corner of Lake Maskenozha at a point which is approximately 6,000 feet downstream from the point of discharge from Marcon's proposed sewage treatment plant.

87. Lehman Lake Club is a non-profit Pennsylvania Corporation which owns and maintains a tract of land in Lehman Township, Pike County. The membership of the Club is 75 families.

88. Lehman Lake Club uses its land and Lehman Lake which is located on its land in much the same fashion as Mink Pond Club uses its land and its waters.

89. Waters which flow out of Lake Maskenozha, including the contribution of Sand Spring Run to Lake Maskenozha, discharge directly into Lehman Lake.

90. Little Bushkill Club is a non-profit Pennsylvania Corporation which owns and maintains 1007 acres of land in Lehman Township, Pike County. The membership of the Club is 20 families.

91. Little Bushkill Club uses its land, and the Little Bushkill Creek, a part of which flows through said land, in much the same fashion as Mink Pond uses its land and its waters.

92. That portion of Little Bushkill Creek which flows through the land of said Club is downstream from Lehman Lake. As such, said waters receive waters flowing, inter alia, from Sand Spring Run.

93. The Township of Lehman, Mink Pond Club, Maskenozha Club, Lehman Lake Club, and Little Bushkill Club took timely appeals to this Board from the action of DER in issuing NPDES Permit No. Pa. 0060160 to Marcon.

94. These various appeals were consolidated for hearing and adjudication and Marcon and Delaware Sewer Company intervened in said consolidated proceedings.

95. None of the appellants appealed to this Board from the action of DER in issuing the dams and encroachments permit to Marcon or from the action of DER in issuing the amended dams and encroachments permit to Marcon.

96. No official notice was given to the public with regard to the submission of said supplement to the Official Plan of Delaware Township to DER or with regard to the approval thereof by DER.

97. None of the appellants appealed to this Board from the action of DER in approving said supplement to the Official Plan of Delaware Township.

D. Determinative Findings

98. Marcon convincingly demonstrated that the only feasible method to dispose of sewage which would be generated by the population in the homes which would be built in Sections 19 through 22 of Wild Acres is central sewage disposal via sewers and a sewage treatment plant to treat such sewage.

99. Although in its Official Plan, as unsupplemented, Delaware Township provided for such central sewage disposal for Sections 19 through 22, it did not provide for the utilization of Sand Spring Run either as the location for a sewage treatment plant or as the waters into which the effluent discharged from such a sewage treatment plant would flow, either on a temporary or on a permanent basis.

100. If this litigation had not ensued and given the approvals necessary at the municipal level, Marcon would have developed Sections 19 through 22 of Wild Acres at least six years sooner than the mid-1980's date, when, according to its Official Plan, Delaware Township would have caused sewage conveyance facilities and a sewage treatment plant along Dingman's Creek to be built.

101. In its Official Plan, as unsupplemented, Delaware Township seemingly recognized that such a major development as Sections 19 through 22 could precede its central sewage disposal plan for such development. On page V thereof, it was recommended that "The Township should require any new developments of MAJOR size (those containing more that 200 lots and marketed, generally,

as second home - see p. 5 thereof) . . . to provide central sewage facilities or assure such facilities when needed."

102. Marcon had no feasible alternative, given its desire to develop Sections 19 through 22 prior to the mid-1980's, but to develop a plan to provide central sewage facilities to serve Sections 19 through 22.

103. No representative of Marcon and no representative from DER offered an explanation as to why Marcon chose to utilize Sand Spring Run as the waters into which effluent from Marcon's said sewage treatment plant would be discharged.

104. No representative from DER considered an alternate site for the construction of said sewage treatment plant and for the discharge therefrom, except to the limited extent that DER knew that the unsupplemented Official Plan of Delaware Township, as it applied to Section 19 through 22 of Wild Acres, provided that the sewage generated in these Sections might, by the mid-1980's, be treated at a proposed sewage treatment plant to be built along Dingman's Creek.

105. Sand Spring Run is a headwater stream which drains 1.03 square miles. Sand Spring Run flows into Lake Maskenozha, providing approximately 3% of the annual average surface water inflow to Lake Maskenozha.

106. The lower stretches of Sand Spring Run consist of a riffle-pool sequence with a rocky substrate. In the spring of 1980 and after a heavy precipitation event, in the lower stretches,

water depths of between 12 and 18 inches have been observed. However, in December, 1979, water depth in the lower stretches ranged from 0 to 12 inches.

107. The upper stretches of Sand Spring Run are markedly different from the lower stretches. The gradient is reduced, the substrate is primarily sand and the surrounding vegetation consists of tussock sedges, (a swamp grass) and small red maple trees. In the upper stretches, which cover an area to a point which is approximately 1/2 mile upstream from the confluence of Sand Spring Run and Lake Maskenozha, the stream has a reasonably uniform width and an average depth of 2 to 3 inches.

108. Although it was reported that there are native trout in Sand Spring Run, the only species of fish which were confirmed by DER to exist in Sand Spring Run are minnow, golden shiner and blacknose dace.

109. There is no evidence that Sand Spring Run is utilized for fishing or for generalized recreational activity.

110. Lake Maskenozha has a total area of 191 acres. The sources of surface water to the Lake are Little Bushkill Creek, Bear Trap Run and Sand Spring Run. The Lake can be proportioned into two major sections, the eastern and western sections. The maximum depth, occurring in the western section, is approximately 10 feet. The mean depth is approximately 5 1/2 feet. The most shallow portion of the Lake is in the northest corner thereof. It is to that northeast corner which Sand Spring Run flows.

111. Lake Maskenozha is a dystrophic lake (see Finding 124, infra) in which there is a fluctuating B.O.D. due to organic loadings from surrounding vegetation. There are low nutrient levels in the Lake, low suspended solids and little algae growth. The Lake is brown in color which is a characteristic color for a dystrophic lake.

112. Lake Maskenozha is used by the members of Maskenozha Club and their guests for fishing, swimming, boating and other water-associated recreational activities. The Lake is an excellent warm water fishing lake.

113. Although it is clear that both DER and Marcon recognized early in the permit review process that the chemical and biological quality of the waters in both Sand Spring Run and Lake Maskenozha were of a high quality, Marcon did not provide any analyses of the quality of these waters to DER, DER did not require Marcon to provide such analyses and DER did not do any studies of the quality of those waters prior to the time when it issued the NPDES permit to Marcon.

114. The first study which gave any insight into the quality of the above mentioned waters was published by a consulting firm, Betz, Converse, Murdoch, Inc., (BCM) hired by Appellants after their appeals were filed. This study was prepared just prior to the commencement of the hearings in this consolidated matter.

115. BCM obtained samples of the water quality of Sand Spring Run and Lake Maskenozha in November and December, 1979.

116. As the result of this sampling, it was determined that except for a high total phosphorus reading in Sand Spring Run

just prior to the point where Sand Spring Run enters Lake Maskenozha, which was obtained in the December, 1979, sampling, the chemical and biological quality of both said waters was better than the Chapter 93 water quality criteria.

117. In said study published by BCM, six major potential pollutants, all of which would be discharged from Marcon's proposed sewage treatment plant, were cited as possible contaminants to Sand Spring Run and to Lake Maskenozha. They are: nitrogen, phosphorus, residual chlorine, bacteria, oxygen demanding substances and suspended solids.

118. The concern of BCM as to the suspended solids is that the deposit of same during construction of said sewage treatment plant would have a deleterious effect on fish spawning areas and existing fish eggs and larvae, This concern can easily be obviated if sediment and erosion controls are properly implemented.

119. The concern of BCM as to oxygen demanding substances, that the presence of excess quantities of same will harm fish embryonic and larval stages, would be a valid concern if there were repeated plant malfunctions, which given the proposed construction and operation policies of Delaware Sewer Company, cannot be presumed to occur or if DER established effluent limitations as to oxygen demandi substances which are too high, (which may be the case).

120. The concern of BCM as to bacteria, that high bacteria levels will limit recreation in Lake Maskenozha, would only be a valid concern if the chlorination system in the proposed sewage treatment plant malfunctions. It cannot be speculated that such a malfunction will occur to the degree that high bacteria levels will result.

121. The concern of BCM as to residual chlorine, that fish and aquatic life in Sand Spring Run immediately downstream from the discharge point from the proposed sewage treatment plant will be severly limited or eliminated by reason of the presence of residual chlorine, is valid.

122. In the BCM study, Carol R. Collier, an able senior biologist, concluded that the increased levels of phosphorus which would be present in Lake Maskenozha by reason of the discharge from Marcon's proposed treatment plant would adversely affect Lake Maskenozha.

123. Ms. Collier concluded that during the period when 25,000 GPD was being discharged from said treatment plant, there would be an adverse impact on Lake Maskenozha if there were three plant malfunctions per year. Ms. Collier concluded that during the period when 175,000 GPD was being discharged from said treatment plant, there would be an adverse impact on Lake Maskenozha at all times.

124. The bases for the conclusions of Ms. Collier and the nature of the adverse condition which she predicted are summarized as follows:

A. Lake Maskenozha is presently a dystrophic lake. She defined a dystrophic lake as one in which there is a fluctuating BOD due to organic loadings from surrounding vegetation and one in which there are low nutrients, low suspended solids and little algae growth. A dystrophic lake may also be considered a candidate for eutrophication if the appropriate nutrients are added in sufficient quantities.

B. Eutrophication is a natural aging process wherein over thousands of years the gradually increased nutrient load to a lake, especially phosphorus compounds, will cause so much planktonic growth in a lake as to eventually cause the water therein to disappear. Man can greatly enhance nutrients load and thus accelerate eutrophication.

C. Although Lake Maskenozha has a total area of 191 acres, there is a 50 acre area in the Northeast corner thereof, the average "depth" of which is 2 feet, which is "separated" from the rest of the Lake, by many stumps and logs. By reason of this "separation" the water in this 50 acre area, described as the "embayment",does not mix with the other waters in the Lake.

D. All the water which is contributed to Lake Maskenozha from Sand Spring Run flows into the embayment.

E. The embayment is presently phosphorus limiting, which means that eutrophication will not be enhanced unless danger level of phosphorus in the embayment are exceeded.

F. Danger levels of phosphorus in the embayment will be exceeded during the period when 25,000 GPD is being discharged from said treatment plant if there are three plant malfunctions per year. Danger levels of phosphorus in the embayment will be exceeded at all times during the period when 175,000 GPD is being discharged from said treatment plant.

G. The process of eutrophication in the embayment, as enhanced by the addition of such excess phosphorus, will at

first produce unsightly algae growth; subsequent thereto it will cause a change in the fish population and will eventually destroy the embayment as an environment for fish by removing dissolved oxygen from the water.

125. The validity of the conclusions of Ms. Collier as to the dangers of phosphorus loadings to Lake Maskenozha depends entirely upon her conclusion that the water in the embayment is not mixed with the other waters in the Lake.

126. Able biologists called to testify on behalf of DER and Marcon did not agree with the conclusion that the water in the embayment is not mixed with the other waters in Lake Maskenozha.

127. These latter mentioned experts took the position, based on field observations, that the water in the embayment was well mixed with the main body of the Lake and buttressed this position by pointing to the fact that the wind at the Lake blew from west to east into the embayment, thus enhancing mixing.

128. None of the experts in this matter were able to conclude, with a reasonable degree of scientific certainty, that the water in the embayment does or does not mix with the other waters in Lake Maskenozha.

129. Neither Appellants nor Marcon caused a biological survey to be performed of Lake Maskenozha.

130. In September, 1980, DER caused a chemical and biological survey to be performed of Lake Maskenozha.

131. That this survey was performed, long after the NPDES permit was issued and long after hearings in this consolidated matter commenced was clearly motivated by the testimony of Ms. Collier,

on behalf of Appellants, with regard to the dangers of phosphorus loadings to Lake Maskenozha.

132. By reason of this survey, DER concluded, in addition to its concept that all the waters in Lake Maskenozha were well mixed, that Lake Mashenozha was nitrogen limiting, that eutrophication of the Lake would not be enhanced by the addition of phosphorus generated by the effluent being discharged from the proposed sewage treatment plant and that the increased nitrogen which would flow into Lake Maskenozha by reason of the effluent from said sewage treatment plant would not be sufficiently high as to create the conditions for eutrophication.

133. The biologicial survey which DER caused to be performed is called an algal assay. The results of this algal assay clearly showed that Lake Maskenozha was nitrogen limited. The samples which were assayed were from the embayment area of the Lake.

134. Although this algal assay result cannot be properly challenged, there is no question that it is reflective only of the conditions in Lake Maskenozha on one given day and that on any other given day a different result could obtain.

135. Ms. Collier, on behalf of Appellants, challenged the technique which was utilized by DER to form the conclusion that Lake Maskenozha was nitrogen limiting by reason of the fact that the algal assay was performed only on one day's samples and by reason of the fact that DER did not compare total nitrogen to total phosphorus or inorganic nitrogen to orthophosphorus, which are approved techniques, but rather it compared inorganic nitrogen to total phosphorus, which is not an approved technique.

136. If an algal assay had been run on samples taken in the embayment in each of the four seasons of the year, it could have been determined with a reasonable degree of scientific certainty whether the embayment area, at the very least, is nitrogen limiting or phosphorus limiting.

137. Since DER establishes effluent limitations as to such components as ammonia nitrogen present in a sewage treatment plant discharge by utilization of a mass balance of the effluent and the stream flow, it was crucial for DER to know what the stream flow was in Sand Spring Run in the critical Q (7-10) period.

138. At no time prior to the issuance of the NPDES permit had the flow in Sand Spring Run ever been directly measured to determine the Q (7-10) flow therein.

139. Given the lack of flow data for Sand Spring Run, it was necessary to revert to known Q (7-10) flow data in streams which were climatically and geologically similar to Sand Spring Run and then to mathematically relate that known Q (7-10) flow data to Sand Spring Run. Furthermore, it was necessary to determine the drainage area tributary to the proposed point of discharge in Sand Spring Run.

140. The Q (7-10) flow in Sand Spring Run, as given by VEP Associates on behalf of Marcon, of .11 CFS, is not correct. This is because VEP Associates was mistaken in its calculation that the drainage area tributary to said proposed point of discharge was .67 square miles and because McMichael Creek, one of the streams the Q (7-10) data from which it used is so dissimilar geologically

to Sand Spring Run as to make the data produced as the result of such usage unreliable.

141. The Q (7-10) flow in Sand Spring Run, as given by Dr. Ousey, on behalf of Appellants, of .06 CFS is the most credible conclusion. In his calculations, Dr. Ousey determined that the drainage area tributary to the proposed point of discharge was .57 square miles and he utilized three comparison streams which were geologically and climatically comparable to Sand Spring Run. Although Mr. Stepanski originally concluded that the Q (7-10) flow in Sand Spring Run was .06 CFS, he did not utilize three comparison streams and he incorrectly calculated the drainage area tributary to the proposed point of discharge to be .90 square miles.

142. Under the terms of the dams and encroachments permit, as amended, Marcon is required to maintain a continuous flow of not less than .50 CFS from Sand Spring Lake to Sand Spring Run at all times.

143. Although DER assumed, in prescribing effluent limitations for the discharge from this proposed sewage treatment plant, that there would be a flow of .61 CFS in Sand Spring Run in a Q (7-10) period, .50 CFS from Sand Spring Lake and .11 CFS otherwise than from Sand Spring Lake, said effluent limitations would not have to be altered, perhaps subject to problems relating to phosphorus, which were discussed previously, even if the flow in Sand Spring Run, as augmented, was only .30 CFS.

144. DER relied on the calculations of VEP Associates as to whether a continuous flow of .50 CFS from Sand Spring Lake could be maintained to Sand Spring Run at all times. DER did not independently determine whether such a continuous flow could be maintained.

145. There was wide divergence of opinion among the expert witnesses as to the ability of Sand Spring Lake to produce a continuous flow of .50 CFS to Sand Spring Run at all times.

146. Even with the most optimistic calculation with regard to whether a continuous flow of 0.5 CFS can be discharged from Sand Spring Lake to Sand Spring Run, there will be at least fifty-one days in a once in ten year drought year, some of which days will occur in a Q (7-10) period, when it will not be possible for Sand Spring Lake to provide such a continuous rate of flow without reducing the capacity of Sand Spring Lake to a point where it is less than 25% full.

147. There will be times in a Q (7-10) period when there will be little or no flow from Sand Spring Lake to Sand Spring Run. At those times,the flow in Sand Spring Run will only be augmented by the flow from the drainage area between Sand Spring Lake and the proposed point of discharge of said sewage treatment plant. The rate of flow from this drainage area during such a Q (7-10) period, was not computed.

148. By reason of the fact that the flow in Sand Spring Run during some part of a Q (7-10) period will be at a rate which is not significantly higher than .06 CFS, the final effluent

limitations for the proposed discharge, as prescribed by DER, are excessive, at least as to ammonia nitrogen, even assuming only a 25,000 GPD discharge from said proposed sewage treatment plant.

149. A discharge of effluent from said proposed sewage treatment plant, the components of which are within such finally prescribed effluent limitations will, for that part of a Q (7-10) period in which there will be little or no flow augmentation, harm aquatic life in Sand Spring Run, would create a substantial risk of harm to aquatic life in Lake Maskenozha and could easily accelerate the undesirable process of eutrophication as to Lake Maskenozha.

150. Even if the effluent limitations as to such sewage treatment plant, as finally prescribed by DER, would have been appropriate under the facts in this matter, the effluent being discharged to Sand Spring Run would have changed the high water quality of Sand Spring Run and made that quality less high.

151. As such, it was necessary for Marcon to engage in an effort to affirmatively demonstrate that such a change in water quality was justified as the result of necessary economic or social development and would not preclude uses presently possible in such waters.

152. Marcon did not establish that the social development of this area as the result of the construction of these homes was necessary.

153. Marcon did establish that the development of Sections 19 through 22 of Wild Acres into homes was economically necessary. Marcon established that this development would help to alleviate an existing housing deficiency in the Pike County area, that this

development would provide additional jobs, additional income to area residents and additional municipal revenue.

154. The advanced bio disk tertiary treatment plant proposed by Marcon was properly designed and was capable of providing proper treatment to meet the effluent limitations as finally prescribed by DER at an effluent flow of not more than 25,000 GPD (which effluent limitations we have found to be unsatisfactory).

155. There is no indication that such treatment plant, as designed, is capable of meeting more stringent effluent limitations than those which were finally prescribed, especially as to ammonia nitrogen.

DISCUSSION

This Board has held a lengthy *de novo* hearing on these consolidated appeals. We are required to determine whether the issuance of the water quality management permit and the issuance of the NPDES permit [2] were actions which can be supported by the evidence which we received, and whether in issuing these permits, DER committed an abuse of descretion or an arbitrary exercise of its

2. Appellants did not formally appeal from the issuance of the water quality management permit to Marcon and/or to Delaware Sewer Company. They appealed only from the issuance of the NPDES permit to Marcon. Neither Marcon nor DER ever raised the issue as to whether separate appeals were necessary. It would appear that all parties believed that the NPDES permit was a two-part permit, encompassing the water quality management permit. Although we have reservations in that regard, we will refrain from raising that issue *sua spontè*.

duties or functions. Warren Sand & Gravel Co., Inc. vs. Commonwealth of Pennsylvania Department of Environmental Resources, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975). Doris J. Baughman, et. al. vs. Commonwealth of Pennsylvania, Department of Environmental Resources & Bradford Coal Company, EHB Docket No. 77-180-B (issued January 26, 1979).

We are required to assess these actions to determine whether DER has performed its constitutional mandate as trustee of the public natural resources of Pennsylvania. This mandate is set forth in Article I, Section 27 of the Pennsylvania Constitution, in which it is provided as follows:

> " 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 the 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."

In Payne vs. Kassab, 11 Pa. Cmwlth 14, 312 A.2d 86 (1973), aff'd, 468 Pa. 226, 361 A.2d 263 (1976), the Commonwealth Court held that this Constitutional provision was intended to allow a controlled development of resources rather than no development, while at the same time affixing a public trust concept to the management of those resources. The Commonwealth Court recognized that there would be constant and difficult conflicts between the social concerns attendant to such controlled development and the concerns that such controlled development would do environmental harm to those resources. The Court assumed that any agency which was faced with the decision as to whether to authorize such

controlled development would be balancing such environmental and social concerns and it formulated a threefold standard by which such decisions were to be tested, to-wit: (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 incursions 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. This threefold standard for testing compliance with Article I, Section 27 of the Pennsylvania Constitution has been consistently utilized by the Commonwealth Court (See, e.g. Mignatti Construction Company, Inc., v. Commonwealth of Pennsylvania, Environmental Hearing Board, 49 Pa. Cmwlth. 497, 411 A.2d 860 (1980) and by this Board (See, e.g. Township of Middle Paxton, et. al. v. Commonwealth of Pennsylvania, Department of Environmental Resources, EHB Docket No. 80-127-W et. al., (issued June 30, 1981)

During the course of this hearing, Appellants vigorously attacked virtually every aspect of the entire process which culminated in the issuance of these permits and Marcon just as vigorously defended the actions of DER in this regard. DER also participated, initially to a somewhat limited extent, as is its usual practice when third parties challenge the issuance of a permit to another, and, later to a greater extent when it appeared to DER that certain aspects of the challenge might have merit.

We have attempted to assess the actions of DER by addressing this permit process in detailed findings of fact in order that every aspect thereof can be exposed to scrutiny.

One aspect of the challenge by Appellants to the issuance of these permits is the allegation that neither Marcon in its planning documents or in its applications for these permits nor DER in its permit review process considered an alternate site for the construction of said sewage treatment plant and for the discharge therefrom. Although we are quite satisfied that the method of sewage disposal chosen by Marcon, approved by Delaware Township and approved by DER, to-wit, central sewage disposal and treatment, was the only feasible method to dispose of the sewage which would be generated by the population in the homes which would be built in Marcon's proposed new development, this allegation by Appellants is correct.

Appellants contend that this failure to consider alternative treatment plant and discharge locations is a violation of Article I, Section 27 of the Pennsylvania Constitution and of the provisions contained in Section 5(a)(1) of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.5(a)(1), wherein it is provided, inter alia, that DER, in issuing permits is required to consider water quality management and pollution control in the watershed as a whole. In our adjudications in Mrs. Cyril G. Fox and Natural Lands Trust v. Commonwealth of Pennsylvania, Department of Environmental Resources and Community College of Delaware County, EHB Docket No. 73-078 (issued June 12, 1973 and

June 18, 1973), 2 EHB 62 and 2 EHB 69 (1973), we held that "any planning process that does not give serious consideration to . . . (b) alternative methods of attaining the objective sought by the permit applicant, does not constitute an exercise of reasonable care." In so stating, we found that DER was not fulfilling its Article I, Section 27 obligation as a trustee of the public natural resources of Pennsylvania. However, on appeal from these adjudications, the Commonwealth Court stated, in Community College of Delaware County v. Fox, 20 Pa. Cmwlth. 335, 342 A.2d 486, 480 (1975), that in ruling that DER is bound to consider alternative methods of achieving the objectives sought by the applicant for a permit, this Board reached a much broader interpretation of the Clean Streams Law than was intended by the General Assembly in its enactment and held, in effect, that the failure to consider such alternative methods did not render the action of DER constitutionally infirm. In Concerned Citizens For Orderly Progress v. Commonwealth of Pennsylvania, Department of Environmental Resources and Emerald Enterprises Limited, 36 Pa. Cmwlth. 192, 387 A.2d 989, 993-994 (1978), the Court seemingly upheld this somewhat constricted view by stating that DER, as trustee of the Commonwealth's public natural resources under Article I, Section 27 of the Pennsylvania Constitution must address the direct impact of issuing a permit on those public natural resources. We find nothing in The Clean Streams Law, supra, or in the regulations adopted pursuant thereto wherein DER

is required to consider alternative sites for sewage treatment plant construction and effluent discharge to that site chosen by the applicant for a permit[3] Accordingly, we reject this initial allegation by Appellants.

A second aspect of the challenge by Appellants to the issuance of these permits relates to the Official Plan of Delaware Township, the municipality in which Marcon's proposed treatment plant would be built and in which the discharge therefrom would first reach Sand Spring Run.

Under and by virtue of the provisions contained in Section 5 of the "Pennsylvania Sewage Facilities Act," Act of January 24, 1966, P.L. (1965) 1535, 35 P.S. §750.5, every Pennsylvania municipality is required to have an "Official Plan", which is defined in Section 2 of said Act, 35 P.S. §750.2 as "a comprehensive plan for the provision of adequate sewage systems adopted by a municipality or municipalities possessing authority or jurisdiction over the provisions of such systems and submitted to and approved by the State Department of Environmental Resources as provided herein."

In the Official Plan of Delaware Township, which was approved by DER on June 24, 1976, it was provided, in parts pertinent to

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3. We note for purposes of contrast, that under the provisions contained in the Act of May 6, 1970, P.L. 356, as amended, 71 P.S. §512 (a) (15), which applies to the Pennsylvania Department of Transportation, no highway, transit line, highway interchange, airport, or other transportation facility shall be built or expanded on land from, inter alia, any recreation area, wildlife refuge, public park or historic site unless there is no feasible and prudent alternative to the use of such land. Clearly a failure to consider alternative highway sites, inter alia, would not only violate this statute but would run afoul of Article I, Section 27 of the Pennsylvania Constitution. <u>See</u> <u>Payne</u> v. <u>Kassab</u>, <u>supra</u>, 468 Pa. 226, 361 A.2d 263, 271 (1976).

the Marcon Wild Acres Tract, that by the mid-1980's all of the sewage generated therein would be pumped to a pump station to be located along Hornbeck's Creek in said Township; from that pump station, the sewage would be pumped to a sewage treatment plant to be located along Dingman's Creek in said Township; from that plant, the treated effluent would be discharged to Dingman's Creek.

In Chapter 71, Section 71.15 (b) (1) of the Rules and Regulations adopted by the Environmental Quality Board for and on behalf of DER pursuant to the provisions contained in the "Pennsylvania Sewage Facilities Act", 25 Pa. Code § 71.17 (b) (1), it is provided that a municipality is required to revise its official plan whenever a single tract or other parcel of land, or part thereof, is subdivided into two or more lots or whenever any person applies for a permit such as that for which Marcon has applied. However, in Sections 71.15 (b) (2) and 71.15 (c) of said Rules, and Regulations, 25 Pa. Code §71.15 (b) (2) and 71.15 (c), it is provided that a revision is not required where DER determines that the official plan adequately meets the sewage disposal needs of the proposed subdivision. In such a case, the municipality is required to submit a supplement to its official plan to DER for its approval.

Although in its Official Plan, Delaware Township did not provide for the utilization of Sand Spring Run either as the location for a sewage treatment plant or as the waters into which the effluent discharged from such a sewage treatment would flow,

either on a temporary basis or on a permanent basis, Marcon took the position that its plan to build the Sand Spring Run sewage treatment plant and to discharge treated effluent therefrom to Sand Spring Run was consistent with said Official Plan. It concluded, therefore, that a supplement to said Official Plan to reflect the addition of this facility, which it deemed an interim facility, was appropriate. Marcon caused such a supplement to be prepared, the governing body approved it and, somewhat later, DER conditionally approved it.[4]

Appellants contend that DER should never have considered the change in the Official Plan of Delaware Township made necessary by the proposals of Marcon to be allowable by supplement thereto rather than by revision thereof and that, in any event, DER so inadequately reviewed such supplement that it violated the provisions contained in Article I, Section 27 of the Pennsylvania Constitution.

We have no quarrel with the decision of DER to consider the change in the Official Plan of Delaware Township to be allowable by supplement thereto rather than by revision thereof. As we held in Maxwell Swartwood and Concerned Citizens of Falls Township v. Commonwealth of Pennsylvania, Department of Environmental Resources, Falls Township and Milnes Co., EHB Docket No. 79-068-W (Issued November 1979 and affirmed at ____ Comwlth. ____) "it is our view that the final decision as to which procedure to use (supplement vs. revision) should be made

4. The conditions imposed for the approval of this Supplement are set forth in our Finding of Fact No. 70, infra, and are in the alternative. Marcon complied with one of said conditions and it is assumed that the Supplement was finally approved by DER.

by DER on this purely administrative matter. It is clear that DER may rely initially upon the municipality in reaching its decision, but once made, we today decide that this is a discretionary matter properly left to DER to which this board will give wide latitude. The regulations contemplate the use of a plan revision where the changes from the base plan cannot adequately be covered by a supplement. We acknowledge that this line is, of necessity, imprecise and ad hoc decisions are called for. Once this administrative decision has been made by DER, this board will, of course, then review the approval or denial itself, whether a supplement or a revision as to its substantive provisions."

It is clear that in its Official Plan, Delaware Township contemplated central sewage disposal via sewers and a sewage treatment plant to treat the sewage generated by the population of Marcon's proposed development. We have found that in its Official Plan, as unsupplemented, Delaware Township seemingly recognized that a major development of the scope as proposed by Marcon could precede its central sewage disposal plan for such development and provided that the Township should require such a developer to provide central sewage facilities or assure such facilities when needed. We take this to mean that in said Official Plan, Delaware Township was literally authorizing Marcon, which clearly desired to cause its proposed development to be built long prior to the mid-1980's date when the Dingman's Creek sewage treatment plant might be built, to build its own plant at a different location.

We hold that DER did not act arbitrarily when it decided, in effect, that the Official Plan of Delaware Township adequately met the sewage disposal needs of the area which Marcon proposes to develop so as to require a supplement to said Official Plan to reflect the sewage disposal plans of Marcon rather than the more detailed revision thereof. Since we will address the issue of whether DER met its constitutional responsibilities in issuing the permits to Marcon by which its sewage disposal plans would have been implemented later in this Discussion, we will not explore the adequacy of the DER review of the Supplement in that light at this posture.

We now direct our attention to the direct impact of the issuance of these permits by DER to Marcon on the waters of the Commonwealth.

In our Findings of Fact, we stated that in Chapter 93 of the Rules and Regulations, supra, 25 Pa. Code §93.1 et. seq., there are set forth in-stream limits for the various components in a discharge to the waters of the Commonwealth. By reason, alone, of the existence of these in-stream limits, it is clear that DER had to have accurate information with regard to: (1) the amount of effluent expected to be discharged from Marcon's proposed sewage treatment plant; (2) the rate of flow of that effluent; (3) the components of that effluent; and, (4) the flow in Sand Spring Run.

We have found that at all times material to these consolidated

matters, the chemical and biological quality of the waters in Sand Spring Run (except for a high total phosphorus reading obtained on one day which was almost four months after these permits were issued) and of the waters in Lake Maskenozha has been better than the applicable Chapter 93 water quality criteria. By virtue of this finding, the truth of which was known to DER, the constraints contained in Chapter 95, Sections 95.1 (b) and (c) of the Rules and Regulations adopted by the Environmental Qaulity Board, 25 Pa. Code §95.1 (b) and (c) were applicable to this matter. By reason of these Sections, these high quality waters had to be maintained at such high quality unless it could be affirmatively demonstrated that a change in such high quality was justified as the result of necessary economic or social development and would not preclude uses presently possible in such waters; furthermore, the highest and best practicable means of waste treatment to maintain such high water quality had to be provided. By reason of the applicability of these regulations, it was that much more necessary for DER to have accurate information in order that it could establish proper effluent limitations.

We have found that it was the policy of DER to establish effluent limitations which would protect Sand Spring Run from adverse pollutional consequences during a Q (7-10) period.[5] This was

5. This "policy" is now set forth in a regulation, to-wit, Chapter 93 of the Rules and Regulations adopted by the Environmental Quality Board, Section 93.5 (b), 25 Pa. Code §93.5 (b), effective October 8, 1979.

the critical value of the stream, or any other stream over which DER had jurisdiction, which was to be protected.

The engineering consultant for Marcon submitted a Waste Water Report to the sanitary engineer employed by DER who was assigned the task of establishing these effluent limitations in which information was provided with regard to the amount of effluent expected to be discharged from Marcon's proposed sewage treatment plant, the rate of flow of that effluent and the components of that effluent. This engineering consultant also submitted information that the Q (7-10) flow in Sand Spring Run was .11 CFS.

In October, 1977, two months before this Waste Water Report was submitted, Marcon received a dams and encroachments permit from DER, under the terms of which Marcon was authorized to construct and maintain a dam at a point which is approximately 1,500 feet upstream from the point where the treated sewage effluent from its proposed sewage treatment plant would first enter Sand Spring Run and to create a lake, Sand Spring Lake, behind that dam.

In its Waste Water Report, the engineering consultant for Marcon suggested that if it became necessary in a drought situation to increase the flow in Sand Spring Run, this dam could be opened and, without consideration of rainfall or flow into Sand Spring Run from any other source, by utilizing not more than 3/4 of the volume of Sand Spring Lake, a flow of .50 CFS could be maintained from Sand Spring Lake to Sand Spring Run. This engineering consultant concluded that "the minimum 7-day flow will never be below 0.61 CFS (.50 CFS from the lake and .11 CFS from theoretical 7-day Flow Occurring Once in 10 Years) under the worst possible conditions".

Although said sanitary engineer employed by DER h
determined that the Q (7-10) flow in Sand Spring Run wa
he chose to rely on the determination of said consultin
that the Q (7-10) flow was .11 CFS. Furthermore, said s
engineer accepted the conclusion that a flow of water at
rate of .50 CFS could be maintained from Sand Spring Lak
Spring Run during a Q (7-10) period without any independe
analysis whatsoever as to whether that conclusion was cor

Said sanitary engineer established effluent limitati
especially as to the ammonia nitrogen, which would be pres
said effluent being discharged from Marcon's proposed trea
by utilization of a mass balance of the discharge effluent
Q (7-10) flow in Sand Spring Run, as augmented by the flow f
Spring Lake, to-wit, .11 CFS plus .50 CFS or a total Q (7-1
of .61 CFS. It must be stated, however, that said sanitary
built into his effluent limitations such a safety factor tha
if the Q (7-10) flow in Sand Spring Run, as augmented, was or
CFS, he believed that said effluent limitations would not hav
altered and that there would be no adverse pollutional consequ
to either Sand Spring Run or to Lake Maskenozha.

There was significant conflict in the ranks of DER as to
whether these permits should be issued. It would appear that
most significant areas of conflict were as to: (1) whether th
development of the homes as proposed by Marcon constituted "ne
economic or social development" so as to justify a change in t

existing high quality of Sand Spring Run under the anti-degradation provisions contained in Chapter 95, Section 95.1 (b) of the Rules and Regulations, supra, and (2) whether the flow augmentation as proposed by Marcon, which enabled DER to prescribe a higher ammonia nitrogen effluent limitation, was not merely an unacceptable substitute for good waste treatment.

Clearly, both these conflicts were resolved in favor of Marcon, but not before, as to the second conflict above mentioned, DER required Marcon to secure an amendment to its said dams and encroachments permit to include an obligation that it would provide a minimum flow from Sand Spring Lake to Sand Spring Run of .50 CFS at all times. Marcon complied with this requirement.

We have found that Marcon and, therefore, DER were wrong in the determination that the unaugmented Q (7-10) flow in Sand Spring Run is .11 CFS. We find that such unaugmented flow is .06 CFS.

We have found, after laboriously reviewing the divergent testimony of well qualified experts, that even with the most optimistic calculation with regard to whether a continuous flow of .50 CFS can be discharged from Sand Spring Lake to Sand Spring Run, there will be at least fifty-one days in a once in ten year drought year, some of which days will occur in a Q (7-10) period, when it will not be possible for Sand Spring Lake to provide such a continuous rate of flow without reducing the capacity of Sand Spring Lake to a point where it is less than 25% full, below which point there would be harm to fish and aquatic life in that Lake.

We have found that there will be times in a Q (7-10) period when there will be little or no flow from Sand Spring Lake to Sand

Spring Run. At those times, the flow in Sand Spring Run will only be augmented by the flow from the drainage area between Sand Spring Lake and the proposed point of discharge of said sewage treatment plant. Although the rate of flow from this drainage area during a Q (7-10) period was not computed, it is obvious that it would be nowhere near .50 CFS.

We have found that by reason of the fact that the flow in Sand Spring Run during some part of a Q (7-10) period will be at a rate which is not significantly higher than .06 CFS, the final effluent limitations for the proposed discharge as prescribed by DER are excessive, at least as to ammonia nitrogen,[6] even assuming only a 25,000 GPD discharge from said proposed sewage treatment plant, which is the highest volume as to which the plant is now designed to handle.

We have found that a discharge of effluent from said proposed sewage treatment plant the components of which are within such finally prescribed effluent limitations will, for that part of a Q (7-10) period in which there will be little or no flow augmentation, harm aquatic life in Sand Spring Run. Furthermore, for that part of a Q (7-10) period in which there will be little or no flow augmentation, with the effluent limitations as finally prescribed, the highest and best practicable means of waste treatment will not be provided.

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6. It may very well be that the effluent limitations as to other components of this discharge would also be excessive during this Q (7-10) period. We simply were not given any insight as to which other limitations, with the possible exception of that as to phosphorus, would be included in that category.

These problems can have immediate adverse environmental consequences, since a Q (7-10) period can occur at any time.

The conflict among the various experts called to testify in this matter was, as to the potential for environmental harm to Lake Maskenozha by reason of the discharge for Marcon's proposed sewage treatment plant, even more pronounced than the conflict among them as to what was the unaugmented and augmented Q (7-10) flow in Sand Spring Run.

Marcon, by its consultant, took the position, when its Waste Water Report was submitted to DER, that with the implementation of appropriate effluent limitations, there would be no adverse impact on Lake Maskenozha or any usage downstream of Lake Maskenozha. The consultant indicated that most or all of the ammonia nitrogen in the discharge from said plant would be assimilated in Sand Spring Run and deposited as particulate organic nitrogen and that Sand Spring Run would quickly replace the oxygen demand created by the treated effluent. It would appear that the consultant was stating that by the time the effluent from said treatment plant reached Lake Maskenozha, which is 6,000 feet downstream from the point of discharge from said treatment plant, there would be no adverse impact therefrom on Lake Maskenozha.

Unfortunately, Marcon did not provide analyses of the water in Lake Maskenozha, DER did not require Marcon so to do and DER did not independently do so during the permit review process.

The first study which gave any insight into the quality of the waters in Lake Maskenozha was performed on behalf of Appellants by representatives of a consulting firm just prior to the commencement of the hearings in this consolidated matter.

Several significant conclusions were made by an able biologist from this consulting firm. The first was that the northeast corner of the Lake, into which Sand Spring Run flows, was separated from the remainder of the Lake by many stumps and logs and that as the result of such separation the waters in this northeast corner, described as the "embayment" did not mix with the other waters in the Lake. The second was that the embayment area is presently phosphorus limiting, which means that the destructive process of eutrophication in the Lake will not be accelerated unless danger levels of phosphorus are exceeded. The third was that danger levels of phosphorus in the embayment will be exceeded during the period when 25,000 GPD of effluent is being discharged from said treatment plant if there are three plant malfunctions per year and at all times during the period when 175,000 GPD is being discharged therefrom.

Equally able biologists called to testify on behalf of DER and Marcon did not agree with the basic conclusion of the biologist who represented Appellants that the waters in the embayment were not mixed with the other waters in Lake Maskenozha.

This conflict was never resolved with such a reasonable degree of scientific certainty that this Board can make a finding as to the validity or invalidity of said basic conclusion.

DER, however, was so sufficiently concerned about the conclusions of the Marcon consultant-biologist with regard to phosphorus being the limiting nutrient in Lake Maskenozha, that at a point when it appeared that the hearings in this matter would be concluded, DER requested that the record remain open in order that a chemical

and biological survey of Lake Maskenozha, and especially of the embayment area, could be performed.

This survey was performed and water samples from the embayment area were algal assayed. The results of this algal assay clearly showe that the embayment area was nitrogen limiting and not phosphorus limiting. Unfortunately, even this investigation is not conclusive, since this algal assay result is reflective only of the conditions in the embayment on one given day. All the experts agreed that on any other given day a different result could obtain. The only proper method to resolve the dispute as to what is the limiting nutrient or nutrients in Lake Maskenozha is to perform an algal assay on samples taken therefrom during each of the four seasons of the year. This was not done.

At this point, it is appropriate to assess the constitutional, the statutory and the regulatory significance of what we have found.

In prescribing excessive effluent limitations for this discharge, especially as to ammonia nitrogen, which limitations would be in force during the critical Q (7-10) period, DER has created a situation where Marcon would be in violation of Chapter 95, Sections 95.1(b) and (c) of the Rules and Regulations, supra, 25 Pa. Code §§95.1(b) and (c) in that uses presently possible in Sand Spring Run would be precluded and in that the best practicable means of waste treatment would not be provided. Also, at this time the in-stream criteria for ammonia nitrogen would be violated which constitutes a violation of 25 Pa. Code §95.1(a). Furthermore, for that part of a Q (7-10) period in which there will be little or no flow augmentation in Sand Spring Run, there would be a substantial risk of harm to aquatic life in Lake Maskenozha, and the undesirable process of eutrophication as to Lake Maskenozha could easily be accelerated. The latter effects violate Section 401 of The Clean Streams Law, 35 P.S. §691.401 as well as Artic I, §27 of the Pennsylvania Constitution. We arrive at these latter conclusions notwithstanding the unresolved

questions with regard to the potential for environmental harm to the Lake because we have little doubt that excessive quantities of ammonia nitrogen will cause some degree of harm to the Lake and to the uses thereof.

In prescribing excessive effluent limitations for this discharge, especially as to ammonia nitrogen, DER has literally guaranteed the eventuality that Marcon will be in violation of Sections 201 and 202 of "The Clean Streams" Law, supra, 35 P.S. §§ 691.201 and 691.202 [7].

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7. In these Sections, as they were written on the date when these permits were issued, it is provided as follows:

> " § 691.201. Prohibition against discharge of sewage.
>
> No person or municipality shall place or permit to be placed, or discharge or permit to flow, or continue to discharge or permit to flow, into any of the waters of the Commonwealth any sewage, except as hereinafter provided in this act."
>
> " §691.202. Sewage discharges.
>
> No municipality or person shall discharge or permit the discharge of sewage in any manner, directly or indirectly, into the waters of this Commonwealth unless such discharge is authorized by the rules and regulations of the board or such person or municipality has first obtained a permit from the department. Such permit before being operative shall be recorded in the office of the recorder of deeds for the county wherein the outlet of said sewer system is located and in case the municipality or person fails or neglects to record such permit, the department shall cause a copy thereof to be so recorded, and shall collect the cost of recording from the municipality or person. No such permit shall be construed to permit any act otherwise forbidden by any decree, order, sentence or judgment of any court, or by the ordinances of any municipality, or by the rules and regulations of any water company supplying water to the public, or by laws relative to navigation. For the purposes of this section, a discharge of sewage into the waters of the Commonwealth shall include a discharge of sewage by a person or municipality into a sewer system or other facility owned, operated or maintained by another person or municipality and which then flows into the waters of the Commonwealth. A discharge of sewage without a permit or contrary to the terms and conditions of a permit or contrary to the rules and regulations of the board is hereby declared to be a nuisance."

By virtue of our finding that there will be at least fifty-one days in a once in ten year drought year, some of which days will occur in a Q (7-10) period, when it will not be possible for Marcon to continuously augment the flow in Sand Spring Run from the waters in Sand Spring Lake at the rate of .50 CFS, there will be a violation of the amended dams and encroachments permit which Marcon received.

Finally, we must conclude that in prescribing these excessive effluent limitations, DER has failed to properly consider the present and possible future uses of Sand Spring Run and Lake Maskenozha, which it had the duty to do under the provisions contained in Section 5 (a) (2) of The Clean Streams Law, _supra_, 35 Pa. §691.5 (a) (2).

Given the existence of the above mentioned violations, the action of DER in which these permits were issued must be deemed to be violative of the provisions contained in Article I, Section 27 of the Pennsylvania Constitution; this is because the action does not "pass" the threefold _Payne_ v. _Kassab_ test of compliance with the mandate contained in that provision in that there was not compliance with an applicable statute and an applicable regulation; furthermore, by reason of the environmental harm which will occur given these violations, it cannot be said that the record demonstrates a reasonable effort to reduce the environmental incursion to a minimum; finally, even though we have found that this proposed development is economically necessary, the environmental harm which

will result from the issuance of these permits clearly outweighs the benefits which will be derived therefrom.

It is clear from our findings and our discussion to this point, that we cannot sustain the issuance of these permits in their present form. It is not clear that the problems with which we are dealing that the action of DER in granting these permits cannot be cured. If it were true that these problems arise strictly because we have found that Marcon cannot sustain a continuous flow of .50 CFS in Sand Spring Run from Sand Spring Lake during a Q (7-10) period, a rate of flow which Mr. Stepanski, the reviewing DER sanitary engineer testified was unnecessarily high and because we have found that the ramifications of our above described finding are that DER has prescribed effluent limitations which are improper, we would seriously consider whether we should remand this matter to DER. By such a process, DER could investigate whether Marcon could sustain a continuous Q (7-10) flow from Sand Spring Lake to Sand Spring Run of less than .50 CFS, perhaps .30 CFS, and/or whether the effluent limitations, as prescribed, should be made more stringent so as to reduce, inter alia, the amount of ammonia nitrogen entering Sand Spring Run and Lake Maskenozha and/or whether Marcon is capable of re-designing its proposed treatment plant to meet any such more stringent limitations. Our consideration of this alternative to a decision that the appeals filed by Appellants should be sustained without more, would be motivated by the fact that Marcon has proved to us that the development of Sections 19 through 22 of Wild Acres is economically necessary.

However, these problems do not arise strictly as the result of our findings as to flow augmentation continuity and effluent limitations. Even if it were determined that all of the above "corrective measures" could be taken, there would still be no resolution of what we believe is the serious and substantial question of whether the high quality waters of Lake Maskenozha will be irrevocably harmed by the discharge from Marcon's proposed treatment plant.

Was it the burden of Marcon and DER to prove that no such environmental harm would be caused or was it the burden of Appellants to prove that environmental harm would be caused? In our adjudication in Concerned Citizens For Orderly Progress vs. Commonwealth of Pennsylvania, Department of Environmental Resources and Emerald Enterprises, Limited, EHB Docket No. 75-161-W (issued February 11, 1976) affd, supra, we held that where a sewage treatment plant permit is granted to allow a discharge into a high quality low-flow tributary, the burden of proof as to the legality and propriety of that permit, must be upon DER and the permittee. Earlier, in Beitman vs. Commonwealth of Pennsylvania Department of Environmental Recources, Docket No. 72-385-B (issued August 20, 1974), 3 EHB 297 (1974), 67 D & C2d. 499 (1974), we held that where an appellant had sufficiently alerted us to the environmental problems which could arise by virtue of a decision to locate a sewage treatment plant on a site which was subject to flooding, it was the duty of either the permittee or DER to come forth with clear and concise evidence as to whether such decision was prudent.

We adhere to our conclusions in those cases and, as we stated earlier, neither Marcon nor DER has provided sufficient evidence to us from which we can conclude that there will be no environmental harm to Lake Maskenozha even assuming the institution of the above described "corrective measures". This is unfortunate since this issue might very well have been resolved in favor of Marcon if the "embayment non-mixing theory" could have been scientifically tested and if additional algal assaying work had been performed on samples taken from the embayment area of Lake Maskenozha in each of the four seasons of the year.

Because we have no indication that this additional testing has been performed and because this litigation has already been quite protracted, we must sustain these appeals.

CONCLUSIONS OF LAW

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

2. In issuing Water Quality Managment Permit No. 5278404 to Marcon and/or to Delaware Sewer Company and in issuing NPDES Permit No. PA 0060160 to Marcon, DER has violated the provisions contained in Section 5 (a) (2) of "The Clean Streams Law", supra, 35 P.S. § 691.5 (a) (2) and the provisions contained in Sections 95.1 (b) and (c) of the Rules and Regulations adopted by the Environmental Quality Board for and on behalf of DER, 25 Pa. Code §§ 95.1 (b) and (c).

3. In issuing the above permits to Marcon, DER has literally guaranteed the eventuality that Marcon will be in violation of Sections 201 and 202 of "The Clean Streams Law", supra, 35 P.S. §691.201 and 691.202.

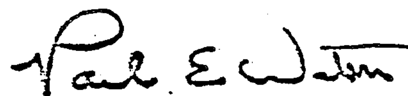
4. In issuing the above permits to Marcon, DER has violated the provisions contained in Article I, Section 27 of the Pennsylvania Constitution. This is for the reason that such action by DER does not survive the Payne v. Kassab tests for compliance with said Constitutional provision in that (1) there was not compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources; (2) the record does not demonstrate a reasonable effort to reduce the environmental

incursion to a minimum; (3) the environmental harm which will result from the issuance of these permits clearly outweighs the benefits which will be derived therefrom.

O R D E R

AND NOW, this 4th day of September, 1981, the consolidated appeals of Maskenozha Rod & Gun Club, Mink Pond Club, Little Bushkill Rod & Gun Club, Lehman Lake Rod & Gun Club, and the Township of Lehman are hereby sustained, the action of the Commonwealth of Pennsylvania Department of Environmental Resources in issuing National Pollutant Discharge Elimination System Permit No. 0060160 to Marcon Inc. is hereby reversed, the action of the Commonwealth of Pennsylvania Department of Environmental Recources in issuing Water Quality Management Permit No. 5278404 to Marcon Inc. is hereby reversed and said permits are hereby set aside.

ENVIRONMENTAL HEARING BOARD

BY: 

PAUL E. WATERS
Chairman

DATED: September 4, 1981

EHB—43: 12/79

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

TOWNSHIP OF MIDDLE PAXTON :
PENNSYLVANIA ENVIRONMENTAL MANAGEMENT SERVICES, INC.
MIDDLE PAXTON CONCERNED CITIZENS :

: Docket No. 80-127-W
80-128-W
80-129-W

v. : Solid Waste Management Act

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

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

By: Paul E. Waters, Chairman, June 30, 1981

This matter comes before the board as three appeals from a decision by DER granting a permit under the Penna. Solid Waste Management Act, Act of July 31, 1968, P. L. 788, *as amended*, 35 P.S. §6001, *et seq.* to Pennsylvania Environmental Management Services, Inc. for a landfill to be located in Middle Paxton Township, Dauphin County. Both the township and a group of concerned citizens have appealed arguing that DER has failed to comply with Article I Section 27 of the Constitution and raising a large number of other issues. PEMS has also appealed. The permittee argues that certain conditions in the permit are improper. The matters were consolidated for hearing and a view of the premises was conducted.

FINDINGS OF FACT

1. Appellant Pennsylvania Environmental Management Services, Inc. (PEMS) is a corporation, engaged in the business of landfill operations, and is the permittee.

2. Appellant, Township of Middle Paxton is a township in Dauphin County, the governmental unit in which the proposed landfill is to be located.

3. Appellant Middle Paxton Concerned Citizens, Inc., herein Citizens, is composed of a group of residents in the general landfill area who are opposed to the landfill siting.

4. On August 8, 1977, PEMS submitted to the Commonwealth of Pennsylvania, Department of Environmental Resources, Bureau of Solid Waste Management an application for a sanitary landfill facility to be located in Middle Paxton Township, Dauphin County. The application was marked as I.D. No. 10118.

5. Between March 28, 1978, and January 3, 1979, DER reviewed the application, additional submissions and the public comments.

6. Also between March 28, 1978, and January 3, 1979, during the pendency of the PEMS application, DER extensively revised its policies regarding the management of leachate generated at landfills.

7. As a result of this revision, DER currently requires an applicant to propose a satisfactory, permanent solution for the treatment and disposal of leachate which does not depend upon a party other than the applicant. This requirement is referred to as the "no third party" requirement.

8. On July 17, 1979, DER denied PEMS' application.

9. On August 15, 1979, PEMS filed an appeal from the denial.

10. On November 27, 1979, Middle Paxton Township and Middle Paxton Township Concerned Citizens were permitted to intervene, and PEMS' Motion to Remand was denied.

11. On March 6, 1980, DER's Motion to Remand was granted by Order of the Environmental Hearing Board (EHB) which Order permitted a remand period of 60 days for the purpose of DER to consider additional information from PEMS relating to leachate management and to conduct an environmental assessment.

12. PEMS' application was the first application prior to August 19, 1980, for which a solid waste management permit was subsequently issued by DER, that was reviewed pursuant to DER's Environmental Assessment Procedure (Module 9). Such procedure is presently deemed necessary by DER to fulfill its obligation under Article I, Section 27 of the Pennsylvania Constitution (Stipulation of DER and PEMS, January 22, 1981).

13. At the DER meeting of May 2, 1980, at which PEMS' Module 9 submission and the agencies' review of those responses were considered, representatives of appellants Township and Citizens were invited, but they did not attend.

14. On May 6, 1980, the remand period ended.

15. On July 11, 1980, DER approved and issued to PEMS Solid Waste Permit No. 101118, which permit contained a number of conditions governing the operation of the facility.

16. On August 8, 1980, PEMS appealed certain of the conditions contained in the Permit, Docketed as No. 80-128-W.

17. On August 8, 1980, Township appealed the issuance of the Permit, Docketed as No. 80-127-W and on August 11, 1980, Citizens appealed the issuance of the Permit, Docketed as No. 80-129-W.

18. On November 5, 1980, EHB entered an Order of Partial Settlement Adjudication wherein PEMS and DER agreed to modify certain of the Conditions for which an appeal had been taken by PEMS.

19. On November 14, 1980, the County of Dauphin and the City of Harrisburg filed Petitions to Intervene.

20. On December 2, 1980, EHB entered an Order denying the Petition to Intervene of Dauphin County and entered an Order granting the Petition to Intervene of the City of Harrisburg.

21. On February 27, 1981, the Hearing Examiner and Counsel conducted a visit to the site of the permitted PEMS landfill in Middle Paxton Township.

22. The following DER staff, in conjunction with their review of PEMS' application, inspected the site in Middle Paxton Township: Mr. Steigman and

Mr. Snyder; Mr. Simmons, on four occasions; Ms. Glotfelty; Mr. Krempasky; Mr. Peffer, on two occasions; Mr. Curran; Mr. Tritt, on two occasions; and Mr. Merchant.

23. PEMS' application was the first application for a leachate treatment system, with a spray application of leachate, that was approved through the one-permit review process.

24. The chief variable with regard to how soon the landfill would generate leachate is the operating procedure of the landfill.

25. Experts for PEMS testified that no leachate will be generated at the landfill for a period of years.

26. The characteristics of leachate varies over time, depending on the precipitation, temperature and other environmental conditions, and that is why some flexibility is necessary for leachate treatment facilities, as, for example, whether or when to add a second clarifier or nitrification/denitrification unit.

27. The proposed leachate treatment system consists of a lagoon or equalization basin, with aeration; a clarifier unit; an ammonia stripping unit; a biological treatment unit; a nitrogen removal unit, if necessary; and a settling basin. DER determined that the treatment system could achieve the applicant's predicted BOD and ammonia nitrogen removal rates.

28. Expert professional opinion indicates that the proposed treatment facility will meet the effluent criteria for nitrogen without the nitrification/denitrification unit and that this unit was added as a safety measure.

29. From the settling basins the treated leachate will be pumped to the spray field, Area 5.

30. For the appropriateness of the Spray Irrigation System, DER made its determination on the basis of site specific soil, geological and hydrological characteristics.

31. The spray irrigation system is designed to apply treated leachate at the rate of only one-third of an inch per day, even though the soils in the spray

field are capable of accepting an inch per day, and spraying will not be done during inclement weather, both of which provisions are to insure that treated leachate will not run off the spray field and into Ditch 3.

32. If the progression of landfilling indicates that there will not be sufficient spray area for the leachate to be generated, then PEMS would not be permitted by DER to develop the full site until adequate spray is provided.

33. The landfilling will commence at the southwesterly corner of the site and proceed northerly and easterly, i.e., begin with Area 1 then to Area 2, Area 3, then Areas 6 and 4. Within each area, filling will proceed from the southeasterly corner (Pad 1) and proceed in a northwesterly direction (Pads 2, 3 and 4).

34. DER determined that the site has existing swales that carry off natural precipitation and that after construction of the landfill the runoff will continue to be carried by the natural swales.

35. During the period of operation of the landfill, erosion and sedimentation control procedures have been proposed in detail but the exact timetable and location to employ these procedures depends on the operation stage, time of year and actual tonnage of waste being deposited.

36. DER determined that the erosion and sedimentation control measures to be employed for interim slopes, which measures include temporary cover, sodding, and mulching, were sufficiently detailed and met the requirements of DER.

37. The drainage ditches are designed to divert stormwater away from the working area of the landfill in order to prevent erosion, to prevent water from mixing with the refuse and to minimize problems with working conditions.

38. The application included details as to the depths of the groundwater in Wells Number 1, 2, and 3 and the date when the depths were measured.

39. Dr. Earl testified that his studies revealed the presence of localized fragipans which are puddles or ponds of shallow water found laying on top of tight or highly impermeable soil, and that these fragipans cause local, seasonal high water

phenomena, occurring particularly in the spring. He further testified that said fragipans are not part of the regional water table and they are found in the soil profile at a level where they will be excavated during construction, but these assertions were not clearly established.

40. On the February 27, 1981 site visit, three flows of water were observed near Test Pit No. 6 and all were located within the central swale, an area which will not be disturbed by the operation of the landfill.

41. The application includes information that the monitoring wells will be drilled to a depth that will allow monitoring of the upper part of the groundwater system, which part is the first to be affected if there is any problem.

42. The application includes details as to Monitoring Wells M-3 and M-5 which are located so as to monitor the shallow groundwater that emerges at Fishing Creek.

43. PEMS has submitted on its application that it will use one of three liners, all of which are approved by DER regulations; said liners are of sprayed asphalt or manufactured membrane.

44. The purpose of the subdrain system is to monitor the integrity of the liner and, therefore, is not to be connected to the leachate drains.

45. DER has no requirements as to the amount of cover material that must be available on-site.

46. Manufacturing of soil, for cover material, is possible at any landfill site, and a vibrating screen can be used for this purpose.

47. DER regulations do not require that an applicant specify where on-site haul roads are to be located.

48. Actual routing of on-site haul roads is within the discretion of the permittee, as long as DER regulations as to their construction characteristics are followed.

49. DER regulations require that the on-site haul road be shown only from the public approach road to the fill area because the exact location of the

haul road within the individual areas of the landfill itself depends on the configuration of the fill as it develops and the time of year when construction must occur.

50. The gas vent pipe detail, shown on page 89 of Exhibit C-6, indicates a four-inch perforated PVC pipe which is designed to provide a flow path for gas to be vented from the landfill mass. After the total refuse height reaches about twenty-four feet, the intermediate cover between the second and third lift will be penetrated by a thirty-six inch diameter corrugated metal pipe which is ten foot long. The four-inch perforated PVC pipe will be placed in the center of the corrugated metal pipe and the corrugated pipe will be filled with crushed stones. As the landfilling proceeds, the pipe will be lifted and additional sections of PVC will be added until the PVC vent pipe is brought through the final cover of the landfill.

51. In developing the Environmental Assessment Module 9, DER referred to specific significant natural scenic, historic and esthetic resources which had been identified pursuant to relevant State and Federal statutes and regulations.

52. The Environmental Assessment Module 9, as applied to PEMS, consisted of 22 questions.

53. DER determined that only if substantial environmental impact could not be mitigated, would it be necessary to balance the harm against the social and economic benefits to be derived from the project.

54. The Environmental Assessment Module 9 was required for all solid waste permits beginning only on and after August 1, 1980.

55. The PEMS landfill is not located in the vicinity of any identified national, state or local wildlife, natural or scenic area except for a state game land, which is located on the opposite side of a ridge line from the landfill site.

56. As a result of the February 27, 1981 site visit, it was agreed that at the location of Test Pit No. 4, the height of the final contour will be only forty

feet above its current height, and that at the location Test Pit No. 2 the height of the final contour will be sixty-eight feet above its current height.

57. Applicant PEMS indicated and DER review substantiated that virtually all of the hauling trucks would approach the site from the west along Rte. 443.

58. Route 443, known as Fishing Creek Valley Road or Legislative Route 22005, is a state road.

59. After reviewing PEMS' Module 9 submission, DER determined that there was no significant environmental harm associated with the landfill and so DER did not consider it necessary to weigh the social and economic benefits of the project.

60. The service area for the PEMS landfill includes all of Dauphin County, and parts of Cumberland, York and Perry counties.

61. The PEMS Landfill will receive residential, commerical, dry industrial and demolition materials but will not handle wet industrial wastes.

62. There is presently no way of getting to the proposed site without the necessity of crossing either bridges or roads some of which are restricted by weight limitations, as low as 14 tons (on the east of the site, and some being at 19 and 20 tons, on the west of the site.

63. The acoustics of the valley are such that the use of a chain saw on the applicant's property can be heard from as far away as a quarter of a mile indicating that a substantial noise impact will be suffered by surrounding owners when a constant use of heavy machinery is initiated.

64. The current Dauphin County Solid Waste Plan has been funded at the cost of $101,000.00. $50,500.00 of which was supplied by Dauphin County and $50,500.00 which was supplied by the Department of Environmental Resources. The plan is not finished, but will take into account the planning, zoning, population and economic necessities of the waste shed in accordance with the statute.

65. The placement of the facility in the proposed area would adversely affect the economic development of the neighborhood, and, has already begun to affect the economic development in that some land developers are now withholding plans pending the outcome of the decision of this board.

66. The existence of the regional water table at the level indicated Citizens' water table map may be a more plausible reason for explaining the presence of water under the site than a perched table on one or more fragipans. This is the depth at which water was struck in the monitoring wells, Test Well 6, and the spring in the central swale. Each of these are within two (2) feet of one another, and thereby suggest a water table as opposed to a perched or fragipan.

67. The water table may fluctuate as much as twenty (20) feet in the ground during the year.

68. DER's engineer did not consider the effect of the concentration of flow into the central swale during landfill operations as opposed to the flow which it now has to carry; however, he admits that there will be more flow in the central swale. The reason for the change in flow is because the contours of the final fill will direct all discharge into the central swale whereas the present contours of the land will discharge much of the storm water in a sheeting action down slope.

69. DER's engineer did agree that the existence of a layer of ice or a thin layer of frozen snow could possibly result in high runoff up to 100 percent.

70. The local soil conservation service is routinely involved in any matter involving erosion and sedimentation control; however, the Department did not involve this service in this particular application.

71. It is not unreasonable to expect leachate to continue to be produced for a period of 15 to 25 years after closure of the facility.

72. Contrary to the experience of applicant's consultant, Dr. A. A. Fungaroli, applicant has projected a BOD influent content of 7,500 milligrams per liter; when, in fact, applicant's consultant's experiences for BOD range from approximately 10,000 to 13,000 milligrams per liter having an average of approximately 11,000 milligrams per liter of BOD.

73. With respect to the second phase of the treatment schematic, the 33 percent removal of ammonia nitrogen appears to be optimistic at best in view of the existing studies established by DeWalt and Chaine which found removals to be in the range of zero percent to 26 percent with the average BOD removal being 13 percent. Moreover, one other facility designed by applicant's consultant, the North Hempstead facility, showed a maximum BOD removal of 23 percent.

74. Based upon all reasonable and fair assumptions including the data of the applicant itself, it would appear that the nitrogen/denitrification process (step no. 5) will be essential to this treatment facility. The present permit gives the applicant the opportunity of not developing such a treatment capability unless its effluent exceeds 25 milligrams per liter of nitrogen.

75. Pit 6 has water at 60 inches which is the regional water table rather than a "perched water table" as claimed by applicant's geologist.

76. Applicant's geologist could not locate to within 150 feet the sources of springs in the center swale.

77. Using the water table map of the Citizens' geologist, the well elevations are within two feet of the geologist's predictions.

78. Fragipans could be expected in areas mapped on the soils map as AoB, AbB2, BtB2, AbA, known as Albrights, Brinkerton and Armagh and Andover soils. There is no real typical characteristic of fragipan forming in soils over Catskill or Pocono type formations.

79. Mottling is usually found above a fragipan.

80. Pit 10 has a fragipan, no mottling is noted in pit 10. No mottling noted in pit 9 although a fragipan noted. No mottling is noted in pit 20 although fragipan is noted. Pits 25 and 26 on opposite sides of approximately 150 feet seep area show no evidence of fragipan.

81. Three pits show mottling. Eight show fragipan.

82. If fragipan exists as applicant's geologist claims, then he concedes a real need for interceptor trenches at edges of pads. However, there are no specifications or mention of these in plans.

83. Of 30 test pits, 16 had entries of "damp", moist", or "wet" or a combination of them.

84. Applicant's geologist concedes it is possible for groundwater to pass under a swale to the other side.

85. Groundwater will follow fracture zones.

86. At least one source of water in the central swale was unmapped by the applicant's geologist as observed on the view of February 27, 1981.

87. The longevity of the site is determined by how many tons of material will be deposited there per day. 75 tons/day would equal 231 years landfill life. 150 tons/day would equal 116 years. 300 tons/day would equal 58 years. 600 tons/day would equal 29.5 years. These factors are based on one cubic yard of compacted refuse weighing 1,000 pounds, and the landfill receiving refuse 300 days per year.

88. Of the three principal types of liners, the sprayed-on asphalt type liner is temperature dependent and can only be applied at certain times of the year. In view of the limitations of the permit that only 5 acres may be worked on at any one time, this liner may not be useable at certain times of the year.

89. Some of the leachate transmission pipelines leading from the lined landfill areas were laid in shallow creep zones. Such zones are located on colluvial soils (slopes covered by soil that moves down slope). Shallow pipelines located in such zones can break when the soil moves. If the pipes were to break there would be an uncontrolled discharge of leachate from the landfill and a pollution problem can exist.

90. The ammonia nitrogen removal of 80 percent appears to be misleading in that the applicant used average percentages that obscures the fact that the applicant's supporting documentation shows that during half the tests these levels were not nearly achieved.

91. Mr. Rosso, the only DER engineer who reviewed the plans did not review any plans with respect to gas venting. This means that no engineer had reviewed the gas venting plan.

92. No one in the Department confirmed the effluent content or volumes stated by the applicant.

93. There are three bridges to the west of the site which have been posted with weight limitations on Pennsylvania Route 443 and two bridges to the east of the site which have been so posted. The three bridges to the west of the site have weight limitations of 19 tons, 20 tons and 20 tons, respectively, and the bridges to the east of the site have weight limitations of 14 tons and 19 tons. The Blue Mountain Parkway, a Township Road, giving some access from the south and Linglestown area to the site has a posted weight limitation of 5 tons.

94. Exhibit T-16 demonstrated one of the most dangerous curves on Route 443, which is posted with reduced speed signs and dimensioned with rather narrow pavement. T-17 shows another dangerous curve on Pennsylvania Route 443, which also reflects reduced speed limit signs. Both of said curves are located on the western (approach) side of the proposed landfill site.

95. Pennsylvania Route 443 has been closed during times of flooding when water would cross the highway. This has happened two or three times a year since 1972. Route 443 becomes impassable when, instead of water going under bridges, the volume of water is such that it spills out over the roadway. This condition does not only happen at flood times, but rather it can happen once or twice in the spring. During the past ten years the road has become impassable approximately 8 times. The road may become impassable from one day to as long as five days.

96. No inquiry was made with regard to fire protection and the location of fire equipment.

97. The head of the environmental assessment unit, when she did her environmental assessment, was not aware of the fact that the fill height above

grade would exceed 45 to 50 feet. In fact, it will exceed 80 feet. Eg., C-7, p. 3, grid 3200 (horizontal) and 2600 (vertical) shows 85 feet above original grade.

98. The Township Board of Supervisors, its Planning Commission and its professional planner all agreed that the Pennsylvania Route 443 was undesireable as an access road for placement of a substantial industrial use such as a landfill use.

99. The Middle Paxton Township community has no present or anticipated future need for the use of a landfill in its community inasmuch as it has ready access to the Harrisburg incinerator.

100. From the planning perspective, the idea of having a sanitary landfill in a residential neighborhood abutting residential uses would be a negative influence not only to the existing residential uses but would have the effect of discouraging further residential development of the area.

101. There are virtually no commercial uses in the entire Fishing Creek Valley.

102. The Township's planner did a study and determined that the applicant's landfill would have an adverse economic impact on the Fishing Creek Valley community.

103. There are many fine residential homes which are unique in the area located in and among the many trees and bushes along the valley road and toward the mountains on each side of the valley.

104. The abutting valley to the north of Fishing Creek Valley in the Township contains Stoney Creek which is designated as a part of the Pennsylvania Scenic Rivers system by Act of General Assembly.

105. Middle Paxton Township participates in the regional system disposing of its waste at the Harrisburg incinerator.

106. The use of bulldozers and other heavy equipment, including compactors, will have a severe noise impact upon the tranquil environment of Fishing

Creek Valley. A witness, who is familiar with the noise that equipment such as the equipment to be used on the landfill might make, expects to be able to hear the operation of the equipment on the landfill from at least one mile away. This is based upon his awareness of the acoustics in Fishing Creek Valley.

107. The application was not reviewed on the basis of any social or economic impact of the site. Social and economic aspects of the application would only be considered by DER where responses to the environmental assessment show that some aspects could not be mitigated.

108. The Department never attempted to balance any particular harm to the environment against the importance of the project. This was determined because they felt there were few significant impacts and that mitigating measures could be employed to offset them.

109. Chairman John E. Minnich of the Dauphin County Commissioner's testified that the County had adopted a resolution on March 15, 1978, requesting DER to delay action on the proposed landfill site until the solid waste management study of the County was completed. Said study is a revision of the 1971 County plan, which does not recognize a need for a landfill use in Middle Paxton Township.

110. On March 3, 1980, the County Commissioners adopted a resolution opposing the establishment of a solid waste landfill in Middle Paxton Township.

DISCUSSION

On August 8, 1977, Pennsylvania Environmental Management Services, hereinafter "PEMS", submitted to DER an application for a permit to construct and operate a sanitary landfill facility in Middle Paxton Township, Dauphin County, pursuant to the Act of July 31, 1968, P.L. 788, No. 241, *as amended*, 35 P.S. §6001, the Solid Waste Management Act. This action is a consolidation of appeals of "PEMS", the Township of Middle Paxton "Township" and the Midldle Paxton Concerned Citizens, Inc. "Citizens" from the grant by Department of Environmental Resources "DER" of a solid waste management permit No. 10118 on July 11, 1980, to PEMS. The permit contained numerous conditions, governing the operation of the landfill facility.

The permittee has appealed certain conditions which are contained in the permit. The Township and the Citizens have also appealed the issuance of the permit by DER to PEMS. The main thrust of PEM's appeal is that the conditions are unreasonable and illegal, *per se*. The basis of the appeal of the Township is that the issuance of the permit constitutes an abuse of discretion by the Department and would seriously affect the health and welfare of citizens of Middle Paxton Township, adequate enforcement of the Township's laws and the general safety of residents and visitors to the Township. The Citizens' appeal is founded on the same grounds as the Township's appeal with the exception of the municipality's special concerns. The Department had previously denied the issuance of a permit to PEMS in 1980, and after many months of litigation before this Board, the Department agreed to a remand and, thereafter, issued the permit on July 11, 1980.

During the proceedings before the Board, the City of Harrisburg was granted the right to intervene and has raised certain issues relating to the economic impact on its incinerator of the grant of the permit to PEMS at the location in Middle Paxton Township.

PEMS sought to have the appeal of the Township dismissed on the basis of lack of standing to appeal. On November 3, 1980, the Board entered an Order deferring PEMS' motion to dismiss the appeal of the Township until after the testimony was taken. A partial settlement was approved by the Board with respect to the appeal of PEMS; thereby leaving only three conditions of the permit still under appeal by PEMS: Condition B.I concerning subsequent approvals necessary to fill areas 2, 3, 4 and 6, Condition B.IX requiring Departmental approval of any acceptance of waste other than as noted in the permit documents, and Condition B.XIV, restricting the hours of operation of the facility. The final evidentiary proceeding was held on February 27, 1981, which included a view of the proposed site for the facility.

The first question we are called upon to decide is whether this case is to be reviewed under the old Solid Waste Management Act of 1968 No. 241 or the new Act of July 7, 1980, Act No. 97. PEMS argued that inasmuch as the permit here in question was issued on July 11, and the new Act did not, by its own terms, become effective until September 5, 1980, the old act must control.[1] Middle Paxton Township, hereinafter "Township", contends that the new Solid Waste Act must govern, inasmuch as the hearing before the Board was a *de novo* proceeding. There is only one other position that can be logically argued on this issue, and Middle Paxton Concerned Citizens Inc., hereinafter "Citizens", assured of being at least half right, has argued that *both* Acts apply.[2] There clearly are some cases which indicate that a change in the law during some proceeding in which permits are involved, requires an application of the latest

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1. A portion of the Act, not relevant here, dealing with hazardous waste, became effective immediately upon passage.

2. This position allows Citizens the flexibility to select from each Act, only those provisions which are deemed supportive of its particular argument.

provisions. *Altland v. Sprenkle*[3] *et al.* 427 A.2d 275, (1981). It is also true that the Board has wide latitude in hearing evidence in a *de novo* proceeding even though it was not made available previously to DER. *Warren Sand & Gravel Co., Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources* 341 A.2d 556 (1975). Township cites *Universal Cyclops S.C. v. Krawzynski* 9 Comlth Ct. 176 to support its contention that the new Act should here be applied. In that case however, the general rule on the subject is stated to be--"Legislation which affects rights will not be construed to be retroactive unless it is declared so in the Act. But where it concerns merely the mode of procedure, it is applied as of course, to litigation existing at the time of its passage..." citing *Kuca v. Lehigh Valley Coal Co.* 268 Pa. 163, and *Smith v. Fenner* 399 Pa. 633. There is no doubt that the new comprehensive Solid Waste Act is not merely procedural in scope. Indeed, it repeals the prior Act. More importantly, the new Act specifically provides: "---all permits---issued---and regulations promulgated under the Act (Act 241) shall remain in full force and effect unless and until modified, amended, suspended or revoked." It is therefore our opinion, that the legislature did not intend to have this Board apply any of the provisions of the new Act, Act 97, to this solid waste management permit issued prior to September 5, 1980. We turn next to the question of standing, to determine who are the proper parties to this action. PEMS has consistently taken the position that Township has no standing to appeal the decision of DER in this matter. It was with reluctance that the Board, operating with an abundance of caution in this hotly contested matter, deferred action on PEMS' Motion to Dismiss the appeal of Township. It was our view in light of *Strasburg Associates v. Newlin Township* 415 A.2d 1014 (1980) that a Township ordinarily

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3. In the *Altland* case, a Mandamus action, plaintiff sought to compel a zoning official to issue building permits based on a subdivision plan that had been approved. The Zoning laws were subsequently amended and the Court ruled that plaintiff had to comply with the new provisions notwithstanding his prior approved plan.

does not have standing to appeal from a decision involving a solid waste landfill permit.[4] Township has made a valiant effort to distinguish itself on the facts, but we must look beyond them, to the law, and find that it does lack standing to appeal. Township, no doubt sensing the tenuous nature of the terrain upon which its standing depended, has also filed a petition to intervene in the other appeals consolidated in this proceeding. As we decided in *George Campbell, et al. and Susquehanna County Board of Commissioners v. DER and Lyncott Corporation and Arthur Scott* EHB Docket No. 76-117-H issued January 9, 1981, 25 Pa. Code §21.62 of our rules which sets forth standards for intervention, allow us, notwithstanding our decision on the appeal, to admit Township as a proper party intervenor.[5] The petition to intervene, filed on behalf of the City of Harrisburg was also allowed, and we will discuss their evidence later in this adjudication.

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4. For the sake of clarity as well as candor, we should state that the Board does not agree that the decision in *Strasburg* was a proper one, but we deem ourselves bound to follow it, and it is for this reason that we did so in *Busfield v. DER* 77-128-W and do likewise now.

5. Board Rule 21.62(e) states that our rules of intervention supplement the General Rules of Administrative Procedure. Rule 31.3 1 Pa. Code §31.3 provides the definition of "intervenors" and states "admission as an intervenor shall not be construed as recognition by the agency that such intervenor has a direct interest in the proceeding or might be aggrieved by any order of the agency in such proceeding." Rule 35.28 1 Pa. Code §35.28, provides that a petition to intervene may be filed by anyone claiming a right or interest "of such nature the intervention is necessary or appropriate", and such "right or interest may be...An interest... not adequately represented by existing parties" and "Any other interest of such nature that participation of the petitioner may be in the public interest." Similarly, under the Pennsylvania Rules of Civil Procedure, intervention has been granted to parties who did not have standing to initiate legal actions. Pursuant to Pa. R.C.P. 2327(4) a person not a party to an action shall be permitted to intervene therein if "...(4) the determination of such action may affect any legally enforceable interest of such person..."

As per Goodrich-Amran 2d §2327:7 p. 374, discussing Pa. R.C.P. 2327(4):

> "The exact boundaries of the legally enforceable interest are not clear. It owes its origin to the desire of courts to prevent the curious and the meddlesome from interfering with litigation not affecting their rights. The result is a flexible, although uncertain rule whose application in a given case calls for careful exercise of discretion and a consideration of all the circumstances involved."

The County of Dauphin filed a petition to intervene and this was denied after a discussion revealed that it had no admissable evidence to offer.

One of the few, if not the only, matter on which there is unanimity of opinion between the parties, is that Article I Section 27 of the Pennsylvania Constitution must be applied in this case. The agreement evaporates here, as the question of *how* it is to be applied, comes on for discussion. The Constitutional provision with which we are concerned[6] has been interpreted in the landmark case of *Payne v. Kassab* 461 A.2d 263 (1976). Our Commonwealth Court there identified three things that must be determined when a DER permit is at issue, the first;

(1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?

Township argues that both the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1, *et seq.* and the Storm Water Management Act 32 P.S.C.A. §680.1 *et seq.* will be violated by the landfill operation. The leachate which is to be collected and treated at the site is one area of major concern.[7] Township fears that the leachate collection lines and collection ponds present a clean stream hazard because any improper discharge will find its way to the streams in the area or, in the worst case, to the water wells of neighboring properties. It is envisioned that a large leachate generation in the first year or so, perhaps 775,000 gallons, would overwhelm the facility and lead to violation of law. The same argument is made regarding treatment of ammonia in the effluent. DER and PEMS contend that most of the fears of gloom and doom are ill founded. To a large extent they concede that unknown future developments will have to be confronted as the project proceeds.

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6. Article I Section 27 provides:

> "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 the 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."

7. There is extended discussion as exactly when leachate generation will begin. Various opinions from one to five years were offered. We believe the time will be closer to one than to five years, and any effort to be more precise would require a guess.

DER is satisfied that with their watchful eye during development and future inspection, the many possible clean streams violations will never in fact occur. In our review of the DER's decision it would be inappropriate for us to assume, as Township does, that the calamities it forsees can not be prevented through timely and thoughtful action. It goes without saying that this Board is unable to now determine whether by future actions PEMS will violate the statute, we are satisfied that it need not necessarily do so. We have reviewed the laundry list of possible shortcomings[8] with the future operation of this site, but find nothing that compels us to reverse DER's conclusions with regard to the Clean Streams Law.

Another statute to which our attention has been drawn, is the Storm Water Management Act *supra*. Although both Township and Citizens raise this issue, neither has offered testimony to show that the Township has developed a watershed storm water plan as required by Section 680.5 of the Act.[9] PEMS argues that its plans do adequately deal with the problems of quantity, velocity and direction of storm water flow. The primary concern here, seems to be the fact that the natural flow is now a sheeting or broad based flow, but the landfill will redirect and concentrate this flow in such a way that erosion and flooding potential will be increased many fold. PEMS has done a storm water study and proposes to use as much as possible the center swale which is presently a natural drain channel. Rip rap will be used to lessen the velocity, and we believe the water flow, to the adjacent Berger property[10] and to Fishing Creek *can* be controlled. On this record

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8. a. Inadequate hydrogeological survey b. Specificity as to spray operation i.e. application rates, nozzle size not adequate, etc.

9. 32 Pa. C.S.A. 680.6 provides: "Prior to adoption, each plan shall be reviewed by the official planning agency and governing body of each municipality---".

10. PEMS contends that the present flow of 46 cubic feet per second will be reduced to 16 cubic feet per second. The storm discharge for the entire site is projected to be 497.5 cubic feet per second. There could be a higher run-off than calculated if the site were covered with a layer of ice.

we see no basis to conclude that there will be a violation of the Storm Water Management Act.

Much, indeed too much, of the hearing consisted of testimony regarding what the DER reviewed or failed to review.[11] The Board on more than one occasion was explicit in its position that the hearing was *de novo*, and any shortcomings regarding evidence presented to or "reviewed" by DER on technical aspects could be supplemented by evidence before the Board. *Warren Sand and Gravel Co. v. DER* 341 A.2d 556.

With this background then, we turn to the question, also posed under the first *Payne* test as to whether all regulations were complied with. Township argues that in many instances, PEMS has simply met the minimum requirements for the landfill.[12] The quick answer is, that that is enough. We do not believe the regulations are unreasonable or arbitrary. It may be that study would reveal some changes that could be made for the better in the landfill regulations at Chapter 75 this is not the time or forum in which to accomplish them. Most of the objections raised regarding the regulations, concern minor operational features such as §75.24 (c)(1)(vii) which requires that a beginning point for fill sequence be clearly identified. There are a number of acceptable materials for construction of the liner to be used in the landfill. PEMS has indicated that it will use one of the three approved materials. Township, nevertheless complains that 75.25 (b)(c) and (d) have been breached, as it requires an indication of the type of proposed liner. Witnesses were grilled concerning the allegedly insufficient amount of cover material available on site,[13] though this is an unlikely problem. In any event the problem can be easily solved.

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11. The hearing lasted for 16 days and covers over 2,000 pages of testimony. Too often the information elicited was simply, to paraphrase, "what did you fail to do--and when did you fail to do it."

12. 75 Pa. Code 75.24 (b)(4)(i) for example requires a minimum of three wells and monitoring for each dominant direction of flow.

13. The suggestion was made that regulation 75.24 (c)(2)(ixii) was being violated. In fact, the regulation requires only that if there is insufficient suitable cover material on site, permittee must obtain the amount needed from off-site.

There are, however, in the long, long list of alleged violations,[14] some which do deserve further attention. The regulations require that all private water supplies be located on a map (§75.24(b)(2)(ii)). PEMS has failed to complete this task.[15] Answers to Interrogatories were being given, up to and including the time of the hearing. Some of the necessary information was being obtained by PEMS at the very time it was being called for at the hearing. It is not easy to assess the blame for this problem because each party in his turn bears some of the responsibility. In any event, it now appears that substantially all of the available essential technical data has been presented before the Board. Some information is not yet available because, as previously indicated, decisions will be made as the project progresses and DER is satisfied that the benefits of this flexibility will outweigh the need for present specificity. We accept this procedure, and find that the regulations have been substantially complied with.

This brings us to the closely related problem concerning, what has become known as Module 9. As previously indicated, this case was once remanded to DER for further review. At that time, DER concluded, and we think rightly although belatedly, that Article I Section 27 required broader con-

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14. Provisions for weighing or measuring waste or location of a scale 75.24 (c)(2)(vii), 75.21(j). All weather road for unloading area not shown 75.24(c)(2)(v). No cross section of access roads with identification of construction materials 75.24(c)(1)(xx). Elevation of fences 76.26(j). Right of way restrictions not given for Texas Eastern Utility, 75.24(c)(1)(xiv).

15. A DER witness made the following admission in testimony: (p. 330 lines 1-25 and p. 331 lines 1-6).

"Q. ...I ask you if the large scale map illustrates all water wells wells within 0.25 miles of the site?

A. No, it does not.

Q. And you are looking at the large scale map, which is a part of Exhibit C-7 at this point, is that not correct?

A. Yes I am. I am specifically looking at Map Sheet 231.1(1).

Q. Which is the first sheet below the cover page, which is now removed from the sheet?

siderations than previously engaged in under DER's permit policy. Citizens have raised a question as to whether Module 9 is appropriate at all, in that, it was never promulgated as a regulation by DER. This is an interesting legal question but inasmuch as it is intended to further protect the environment and perhaps to help reduce the incursion to minimum,[17] we have no doubt that it falls within DER's discretionary powers. In the Gettysburg Tower case 302 A.2d 886 (1973) the Court decided that Article I §27 is self-executing. It would seem that any reasonable questions asked in the permit application process, instituted to meet the demands of that Article, would be acceptable.

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15. continued.

A. Yes, I'm just checking all the other sheets. Did I answer your question?

Q. Unless you found something in checking through the sheets.

A. No.

Q. Is this particular matter within the scope of your general review and concern of the location of wells?

A. Yes, it is.

Q. Can you explain why you did not request this information of the Applicant?

A. An oversite.

Q. There is a reference on that same page of Exhibit C-6. I'm referring to that Page No. 23 to springs. If I am not mistaken, the same requirement is made with regard to Springs as with regard to wells, is that a correct interpretation?

A. It is.

Q. And it also indicates there, that the large scale map is what contains this information. Does the large scale map contain that information with regard to springs within a quarter of a mile of the site?

A. No, it does not."

16. Module 9 consists of 4 pages and contains many questions aimed at the environmental impact of the proposed action. The project is then assessed by looking not only at the statutes and regulations involved, but also the answers to Module 9 questions.

17. We wonder why appellants would object to the use of this Module, inasmuch as it is intended to benefit the environment and makes it more, rather than less difficult to obtain a solid waste permit.

The second *Payne* test requires consideration of whether a reasonable effort has been made to reduce the environmental incursion to a minimum. We have reviewed the testimony together with module 9 and it is clear that DER and permittee have expended innumerable man hours in an effort to discover and prevent any future deleterious evnironmental effects. We see module 9 as an appropriate tool in identifying and reducing such environmental incursions. It should be noted that we are not here talking about the total *elimination* of such incursions. For example, we believe that such things as fencing, retaining basins, and monitoring points are all properly considered in this regard. Once the effort has been made and the second test is met, how does this affect the third test? This is a question which has only been indirectly dealt with by our cases heretofore. DER has concluded that there would be no harmful environmental effects and that therefore it was unnecessary to make the third inquiry. We disagree. It is possible in a given case that even though all statutes and regulations have been complied with and even though the environmental consequences of a project are minimized these consequences may substantially exceed the benefits to be derived from the project. To hold otherwise would reduce the three-prong *Payne* test to a two-prong test. We are unwilling and unable to deviate from the law as so clearly set forth by Commonwealth Court.

The third *Payne* test is stated to be: 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? It is here that the Board sees great difficulty with the DER decision to issue a permit. DER acknowledges that it made no effort to determine the relative harm and benefit or to balance the social and economic benefits against the environmental harm. A related issue was discussed in *C. Citizens for Orderly Progress v. DER* 36 Commonwealth Ct. 192 (1979). There the Court said:

> "Further clouding the resolution of this issue is Emerald's contention that the third standard enunciated in *Payne* should not be applied in the instant case since Emerald is a private developer. Specifically, Emerald argues that neither the DER nor the Board have the authority to require a private developer to prove benefits. The developer, however, is not required to

> prove benefits. It is the obligation of the agency or instrumentality of the Commonwealth involved to balance benefits against environmental damages, where an action of that instrumentality or agency might cause a diminution of Pennsylvania's public natural resources as set forth in Article I, Section 27.
>
> The Board, in its adjudication, and the DER, in its brief, admit that the required balancing of social and economic benefits against environmental harm was not conducted in the instant case."

The Court goes on to state emphatically---"such an inquiry should have been undertaken--".

PEMS also acknowledges that the third *Payne* test was not fully applied to the facts in this case by DER, but argues nevertheless that the record would support a finding of benefit and that the board can itself properly carry out the mandate of *Payne* if found to be applicable.[18] We have searched the record in vein for substantial evidence indicating the benefits which will flow from this landfill.[19] On the other hand, the record is replete with fully detailed harmful effects which can reasonably be anticipated by the citizentry if we allow this permit to stand. Putting aside the esthetic values, which we are the first to concede, are too subjective for detailed analysis by any tools available to us, we turn to the other evidence.[20] There are water wells in the area which are placed at risk for decades into the future, at a time when water is becoming one of our most precious and endangered resources. The traffic safety can not help but be adversely effected by the large number[21] of dump trucks using the roads, one of which (#443) is, in some places so winding and the berms so constructed as to be properly

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18. *Warren Sand & Gravel Co., Inc. v. Comlth DER* 341 A.2d 556.

19. The record does indicate 10 people will be employed and that the landfill will pay its taxes.

20. There is ample testimony regarding the acoustics in Fishing Creek Valley and the annoyance that comes from the sound of heavy equipment operating for long hours. The unsightliness of tremendous contour changes that are planned for building huge piles of refuse into what is now a beautiful mountainside.

21. Between 10 and 100 per day each carrying between 5 and 7 tons of refuse.

characterized as hazardous at times. PEMS has suggested that there is a present need for this landfill in Dauphin County, but all of the evidence is to the contrary. We allowed the City of Harrisburg which operates an incinerator that is available to serve the solid waste disposal needs of the same area, to intervene. PEMS strongly contests this intervention. PEMS relies upon our decision in *Agosta, et al. v. DER* 1977 EHB 88 for the proposition that the evidence offered by the City should not be considered by the board. In the *Agosta* case we said:

> "The examiner excluded all evidence regarding the Chrin landfill, beyond the fact that it was a permitted site, on the grounds that evidence regarding its adequacy and desirability could be argued *ad infinitum* moving the hearing away from the central and more relevant issues."

We also noted there, that the owners of the competing Chrin landfill were not parties and made no objection to the permit which the appeal concerned. We, of course, have a far different situation in this case, and we did strictly limit the participation of the City. Evidence regarding the economic impact of the DER decision when properly offered, therefore should not be totally excluded. The Clean Streams Law 35 P.S. §691.5 (a)(5) specifically provides for consideration of the "---immediate and long-range economic impact upon the Commonwealth and its citizens." Even if we had not received the evidence from the City of Harrisburg regarding the availability of its incinerator, if there is one thing that is crystal clear in this case, it is that the landfill in question is not needed or wanted in Middle Paxton Township.

The law in our view does not require that a prospective landfill operator win a land use popularity contest among the area residents. If this were true it is likely that long ago we all would have been inundated with solid waste, in this throw-away society, for want of permitted disposal sites. On the other hand, our constitution does require that in giving over the land in question to such a

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22. The question has been raised as to whether the haul roads are a proper area for consideration by DER in its permitting process. We believe that such evidence is clearly proper when it is alleged there are no adequate roads available. Even when some roads are adequate and others are not, we believe that Article I Section 27 is extended by the third *Payne* consideration to permit inquiry into this area which would otherwise appear to be limited to the jurisdiction of PennDOT. *DER v. Glasgow Quarry, Inc.* 23 Pa. Commonwealth Ct. 270, 351 A.2d 689 (1976) where possible damage to homes from blasting was upheld as a reason to deny a permit.

permitted use, there be some constitutional benefit to outweigh the environmental price theoretically paid by all of us.[23] DER would have us disregard this last consideration in ruling upon the propriety of this landfill permit. Our Courts have not taken this position, and neither do we. In *Mignotti Cons. Co. Inc. v. Comlth.* 49 Commonwealth Ct. 497 Judge Mencer, after discussing the first two *Payne* tests where a quarry permit was under challenge, said:

> "Finally, we believe that the record demonstrates that benefits of the quarry are substantial and outweigh the environmental harm which will result from the quarry construction."

In reviewing the voluminous record in the instant case, we can not say the same. We must therefore, reverse the decision of DER. Because of our disposition of this matter, we deem it unnecessary to reach the questions raised in the appeal of PEMS to No. 128-W, regarding the conditions imposed upon the permit.[24]

One final issue deserves mention. Appellant Citizens during the hearing made repeated efforts to introduce testimony concerning alleged misconduct of the owners of PEMS, in another state.[25] Although this testimony was not allowed, the brief filed on behalf of Citizens nevertheless explores the facts in some detail. We have previously decided in *Newlin Township v. DER* 1979 EHB 33 that such testimony is not admissable. This, however was prior to the new solid waste act, Act of July 7, 1980 P.L. No. 97, 34 P.S. §6018.502 which does specifically allow consideration of such information.[26] Inasmuch as we have already decided *supra* that the new

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23. There is an old adage which is appropriate: "Always remember the price you pay for what you get." Some might even observe "There is no such thing as a free lunch.", No pun intended.

24. Having reviewed the conditions, however, we see nothing objectionable in condition B.1 requiring compliance before proceeding further or B.9 limiting the solid waste disposal to that identified in the application (which presumably could be amended). We would however require more information on how DER arrived at the operating hours as limited by B.14.

25. Some of the same principals in PEMS were allegedly engaged in a landfill operation in New Jersey under the name of Jersey Environmental Management Services, Inc.

26. Section 503 (c) authorizes DER to deny a permit if it finds that the applicant--"has failed, to comply with any provision of this act or--any other state federal statute--."

Act has no application to these proceedings, we have given those allegations no consideration.[27]

CONCLUSIONS OF LAW

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

2. Appellant Township has no standing to bring the appeal filed to EHB docket No. 80-127-W and the same must be dismissed, although the Township remains as a party intervenor to No. 80-129-W.

3. Because of our disposition of the appeal to No. 80-129-W filed on behalf of Middle Paxton Township Concerned Citizens it is unnecessary to decide the moot questions raised in the appeal of PEMS to No. 80-128-W.

4. The Environmental Assessment form (Module 9) developed by DER is a reasonable instrument for measuring whether a landfill operation will have an impact on the resources of the Commonwealth that are protected by Article I, Section 27 of the Pennsylvania Constitution, but should also consider benefits to be derived from issuance of any such permit.

5. PEMS has properly complied, insofar as possible, at this stage with The Clean Streams Law, The Storm Water Management Act and all of the statutes and regulations necessary for the issuance of solid waste management permit No. 101118, as required by Article I Section 27 of the Pennsylvania Constitution.

6. PEMS has made efforts to reduce the environmental incursions to a minimum, as required by Article I Section 27 of the Pennsylvania Constitution, but substantial environmental harm can be expected from the landfill.

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27. Citizens also raises a question about the inadequacy of the bonding requirements for permittee under the provisions of the new Act, 35 P.S. §6018.505. Again, our decision is the same.

7. DER has failed to weigh the meager benefits indicated in the record against the environmental harm which the testimony reveals to be substantial; as required by *Payne v. Kassab supra* the board has done so, and concludes that inasmuch as the record shows no need for the landfill, it would be an abuse of discretion to proceed further.

8. Our decision in this case is governed by the old Solid Waste Management Act (Act 241), and not the new Solid Waste Management Act (Act 97) which did not become effective until September 5, 1980 after the permit here in question was issued by DER.

ORDER

AND NOW, this 30th day of June, 1981, the decision of DER in appeal to No. 80-129-W filed on behalf of Middle Paxton Concerned Citizens, Inc. is hereby reversed. The appeal filed on behalf of Middle Paxton Township to No. 80-127-W is dismissed. We need not reach the issues in appeal filed on behalf of Pennsylvania Environmental Management Services, Inc. to No. 80-128-W.

ENVIRONMENTAL HEARING BOARD

Paul E. Waters

PAUL E. WATERS
Chairman

Dennis Jay Harnish

DENNIS J. HARNISH
Member

DATED: June 30, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

WILLIAM V. MILESKY : Docket No. 81-027-H

: Mine Safety

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

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

By: Dennis J. Harnish, Member, August 26, 1981

This matter arises from DER's revocation of appellant's assistant mine foreman's certificate.

FINDINGS OF FACT

1. Appellant is William V. Milesky. On July 18, 1980 he was an assistant mine foreman, certified by DER and was the night-shift foreman at the Mathies Mine.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, which has the duty and responsibility of administering the Pennsylvania Bituminous Coal Mine Act, 52 P.S. §§701-101 *et seq.* and which, under authority of said Act, revoked appellant's assistant mine foreman's certificate.

3. The Mathies Mine is a gassy, deep bituminous coal mine.

4. On July 18, 1980, Wayne Travika was electrocuted when he came in contact with an energized trolley wire in the Mathies Mine; he died shortly thereafter.

5. The trolley wire in question was located in the area of the back action switch in the West Mains area of the Mathies Mine, by the one south belt starter box. It was a 550 volt DC bare conductor wire.

6. At the site of the electrocution, the trolley wire was 67 inches above the rail of the track. Beneath the wire were a track mounted supply car and locomotive. The end of the supply car was approximately ten feet from an intersection in the outby direction.

7. The end of the trolley wire had been cut close to the end of the supply car. The wire hung 11 inches down from the roof of the mine and 21 inches up from the top of the supply car. At that height, the wire would be close to eye level of a person entering the supply car, and it would be close to the waist of a person stepping into the upper portion of the car. The wire ran generally along the edge of the supply car. There was nothing around the wire to prevent some one from coming into contact with it.

8. To prevent contact with a trolley wire, permanent guards, consisting of wood or plastic flanking the sides of the wire, are sometimes used in the mining industry. Where people are working near a trolley wire for short periods of time, temporary guards are sometimes used. At the Mathies Mine, a plastic device is now used as a temporary guard. Turning off the power and placing a danger tag on the switch is also a temporary safety measure, approvable under Section 328 of the Act. There was a trolley switch located 90 feet or less from the site of the electrocution in the outby direction.

9. At the beginning of the midnight shift on July 18, 1980, William Milesky was advised that two persons from the prior shift, Rod North and William Koday, were supporting some bad roof near the one south belt starter box. He directed Wayne Travika and Angelo Sabatini to obtain a supply car filled with cribbing blocks, so that they could relieve North and Koday and continue the work of supporting the roof.

10. William Milesky directed Daniel Bennett, section foreman of the West Mains, to see that the trolley switch was off, to check the roof, and to cut the trolley wire if necessary. Mr. Bennett examined the area and directed his mechanic to turn off the trolley switch, put a danger tag on it, and then cut the trolley wire. Approximately one hour later, Mr. Bennett checked the trolley switch and saw that his instruction had been followed. This occurred before Wayne Travika and Angelo Sabatini arrived.

11. William Milesky arrived at the West Mains back action switch (before Wayne Travika and Angelo Sabatini) at approximately 3:00 a.m. He inspected the trolley switch and the place at which the trolley wire had been cut and noted that the trolley power switch had been turned off and tagged. At this time, Rod North and William Koday were working near the one south belt starter box, using their own supply car parked near the intersection. Mr. Milesky discussed roof support with Travika and Sabatini, but left while North and Koday were still present.

12. To comply with Mr. Milesky's instructions, it was necessary for Angelo Sabatini to turn on the trolley switch so that Rod North and William Koday could remove their supply car, and so that Sabatini and Travika could place their car near the intersection. Mr. Milesky was aware that this would have to be done and that the power would have to be turned on to do so, he was

also aware that the switch had been tagged and that Sabatini and Travika had been instructed at weekly safety meetings to cut off the trolley switch.

13. Angelo Sabatini turned on the power in order to bring his supply car into place and kept the power on to maintain radio communication.

14. To comply with Mr. Milesky's instructions, it was necessary for Angelo Sabatini and Wayne Travika to unload their supply car, Mr. Milesky was aware that this would have to be done. In order to unload the supply car, it was necessary to climb inside it. Wayne Travika and Angelo Sabatini had occasion to enter the supply car to unload it.

15. William Milesky returned to the site with Mr. William Hamilton at approximately 6:00 a.m. At that time, Angelo Sabatini and Wayne Travika were working on their last crib. Mr. Milesky stayed with Hamilton, Sabatini, and Travika for 15 to 20 minutes. During this time, he spoke to no one about the trolley wire; he assumed that Travika and Sabatini had followed the general rule regarding a tagged safety switch and their specific instructions at safety meetings.

16. The general rule regarding a tagged safety switch is to check to see that no one is in danger before turning it on. General instructions on working with electrical equipment were given to Wayne Travika and Sabatini during weekly safety talks given on June 9, 1980 and May 5, 1980, and Mr. Sabatini admitted that he knew that he was supposed to turn the power off.

17. The locomotive motor radio and light were off at 6:00 a.m.; there was no visual indication that the trolley wire was energized.

DISCUSSION

Since the instant matter has resulted from the tragic loss of a human life and since it imperils the professional status of the appellant, it is not

surprising that the parties have couched their sharp disagreement in strong rhetoric. Nevertheless, there is very little disagreement between the parties concerning the facts. Rather, their disagreement centers on the legal implications to be drawn from these facts.

The instant appeal is from the revocation by Walter J. Vincinelly,[1] DER's Commissioner of Deep Mine Safety, of the assistant mine foreman certificate of William V. Milesky.

Mr. Vincinelly's action was based upon a complaint filed by DER mine inspectors and a subsequent investigation. The charges and investigation arose from the accidental death of Mr. Wayne Travika on July 18, 1980. Mr. Travika was electrocuted when he came into contact with an energized trolley wire in the Mathies Mine where he was working as a general laborer.

This accident took place at approximately 6:15 a.m., i.e., during the midnight to 8:00 a.m. shift. The appellant was the shift foreman in charge of the entire Mathies Mine, a deep bituminous mine, on this shift.

When Mr. Milesky came on duty as the shift foreman on July 18, 1980, he faced several specific problems. The mine was experiencing some (apparently intermittant and localized) power outages. In addition, the roof of the mine was cracked and weakened in the area of an intersection in the mine adjacent to the back action switch in the West Mains of the Mathies Mine. One leg of the said intersection led to a room which housed the starter box for the one south (coal conveyor) belt and it was in this room, as well as in said intersection, that the roof was weak. The said roof condition had been noted prior to the midnight shift and the prior shift foreman had directed Rod North and William Koday, two laborers on his shift, to install cribs (6" x 6" x 20" blocks) and crossbars to support the roof. These workers had traveled to the intersection

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1. Mr. Vincinelly is the individual to whom has been delegated DER's authority to revoke the certificates of assistant mine foremen.

and had transported their cribs to this location with a track mounted supply car drawn by an electric locomotive. (The Mathies Mine contains some 75 miles of track as well as 75 miles of overhead trolley wires carrying 550 volt DC current for powering the locomotives which operate on said track).

A switch controlling power to the trolley wire leading into the intersection is located about 90 feet "outby" of the said intersection ("outby", being the opposite of, "inby" in mining parlance indicates the direction leaving the mine). This switch was in the off position when Messers. Koday and North arrived at this area and Mr. North turned the switch to the "on" position so that he could back the supply car in towards the intersection.[2] After the supply car was in place Mr. North walked back to the said electric switch and turned it "off" consistent with the general rule in the mine and the specific instructions he had received from Mr. Milesky during at least two recent weekly safety meetings.

North and Koday then climbed into the supply car, removed the cribs and began to construct the crib work support for the roof.

When he came on duty Mr. Milesky was alerted about the weak roof and learned that Koday and North were being held over from the 4:00 p.m. to midnight shift to correct this unsafe condition. He instructed Mr. Daniel Bennett, a section foreman at the Mathies Mine, to inspect the area around the one south belt starter box and to cut the trolley near said intersection if, in his judgment, this wire posed a danger to the men working in this area or posed a danger of a mine fire in the event the sagging roof gave way.[3]

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2. To reach the said intersection Koday and North had traveled outwards from the interior of the mine, via an adjacent tunnel, switched to another track at the West Mains back action switch and backed in towards the intersection through the tunnel in question.

3. The trolley wire ran through the intersection from the outby to the inby direction. By cutting and removing this wire in the intersection, the workers were provided with a path to the one south belt starter box from the supply car which did not pass under a trolley wire.

Mr. Bennett made an inspection of the said intersection and directed his mechanic to make sure the trolley switch was off and was tagged with a danger tag. He also told the mechanic to cut the trolley wire at both its inby and outby ends at the respective hangers nearest the said intersection and to remove the trolley wire from the intersection. Mr. Bennett later returned to the said intersection and determined that the trolley switch had been turned off and tagged and that the wire had been cut and removed as per his instructions.

By 3:00 a.m. on the morning of July 18, 1980 Messers. Koday and North had made progress in constructing cribwork at said intersection, however, they had not completed this task and they had already worked 3 hours of overtime. Thus, Mr. Milesky, who had arrived at the said intersection between 2:30 and 3:00 a.m.[4] released Koday and North and Mr. Milesky requested that general laborers, Wayne Travika and Angelo Sabatini, replace Koday and North and bring with them a new supply of cribs in a new supply car. Mr. Milesky discussed roof support measures with Travika and Sabatini but did not specifically instruct either of these persons to deenergize the said trolley switch; he left the intersection before they arrived.

When Travika and Sabatini arrived at the intersection, outby from the one south belt starter box intersection i.e., the place where the trolley switch was located, Mr. Sabatini turned this switch on. After North and Koday pulled out, Sabatini backed his supply car into approximately the same spot that North's car had occupied, i.e., some 10 feet from the said intersection on the outby side.

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4. Mr. Milesky, upon arriving at the intersection had checked the trolley switch and found that it was cut off and tagged.

Mr. Sabatini had been instructed during recent weekly safety lectures not to leave the trolley power on, and he remembered these instructions, however, he intentionally failed to turn off the trolley switch because he knew about the power failure problem in the mine and he wanted to leave the radio in the locomotive on so that he would know if the trolley power failed.[5] Mr. Sabatini never informed Mr. Milesky or any other supervisory personnel of this divergence from the mine rule.

Messers. Sabatini and Travika then took turns removing cribs from their supply car. In doing so each would occasionally step up into the car. Although there was some dispute as to the exact location of the trolley wire *vis á vis* the car, there is no doubt that it was close to a worker entering the car--perhaps at eye level when said worker was standing on the mine floor and waist high when standing in the car and no more than 6" to 8" away from said car to the wall (or outby) side of the car. Moreover, there is no doubt that the wire was not guarded by either permanent wooden guards or temporary plastic guards.

In spite of the proximity of the wire, however, Travika and Sabatini continued to unload cribs from their supply car for three hours without incident.

By approximately 6:00 a.m. all the cribs had been unloaded and the installation of the cribwork was almost complete. At this time Messers. Travika and Sabatini were joined by Mr. Milesky and a Mr. William Hamilton. All of these persons were working inside the one south belt starter box room completing the cribwork. They had all the tools and material necessary to complete this task in the starter box room but, nevertheless, Mr. Travika, for reasons never to be explained, left the starter box returned to the supply car, came into contact with the trolley wire and was electrocuted.

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5. He also wanted to have a quick means of escape (via the locomotive) in case the roof gave way or at least a means of signaling for help i.e., the radio.

DER maintains that the conduct set forth above demonstrates that Mr. Milesky is in violation of the Pennsylvania Bituminous Coal Mine Act, the Act of July 17, 1961, P.L. 659, *as amended*, 52 P.S. §701-101 *et seq*, (Act).

DER's complaint asserts that by failing and refusing to provide protection or guarding on the trolley wire in the back action switch entry, and/or to specially instruct Messers. Sabatini and Travika to deenergize said trolley wire, Mr. Milesky evidenced an intentional and negligent disregard of the safety of persons in the Mathies Mine and of his responsibility to see that others comply with the said Act.

DER has identified three alleged separate violations of the Act arising from the above conduct; 1) failure to provide guarding for the trolley wire as provided in Section 328 of the Act; 2) directing and permitting persons under his supervision to work in an unsafe place and 3) failure to instruct persons working under his supervision as the procedures for working safely in the vicinity of a trolley wire.

A review of the Act clearly demonstrates that the duties imposed upon assistant mine foreman are substantial.

> "When assistant mine foremen are employed, their duty shall be to assist the mine foreman in complying with the provisions of this act, and they shall be liable to the same penalties as the mine foreman for any violation of this act in parts or portions of the mine under their jurisdiction." [52 P.S. §701-226c].

The mine foreman, in turn, is responsible for seeing that the Act is complied with:

> "The mine foreman shall have full charge of all the inside workings and the persons employed therein, ...in order that all the provisions of this act so far as they relate to his duties shall be complied with, and the regulations prescribed for each class of workmen under his charge carried out in the strictest manner possible." [Section 218, 52 P.S. §701-218].

> "It shall be the duty of the operator, superintendent, mine foreman, assistant mine foreman,

> mine examiners and other officials to comply with and to see that others comply with the provisions of this act." [Section 279, 52 P.S. §701-279].

His duties also include seeing that the people under his supervision are working in a safe place:

> "The mine foreman or his assistant shall direct and see that every working place is properly secured and shall see that no person is directed or permitted to work in an unsafe place, unless it be for the purpose of making it safe." [Section 222a, 52 P.S. §701-222a].
>
> "The officials in charge shall examine for unsafe conditions, the roof, faces, ribs, and timbers or supports of all working places each time they visit a place. Unsafe conditions found by them shall be corrected promptly." [Section 252, 52 P.S. §701-252].

Section 328 of the Act, the section specifically relating to "Guarding", reads as follows:

> "At all landings and partings or other places where men are required to regularly work or pass under trolley or other bare power wires, which are placed less than six and one-half feet above top of rail, a suitable protection shall be provided. This protection shall consist of placing boards along the wire, which boards shall not be more than five inches apart, nor less than two inches below the lowest point of the wire: Provided, That the distance between boards on curves may exceed five inches, but shall not exceed eight inches. This does not prohibit the use of other approved devices or methods furnishing equal or better protection." [52 P.S. §701-328].

As to the count based upon Section 328 of the Act there is no doubt that the portion of the trolley wire in question was not protected with boards. Neither, was it protected by plastic shielding which was apparently adopted by the Mathies Mine after July 18, 1980 for providing temporary shielding of trolley wires.

On the other hand, there are approximately seventy-five miles of trolley wire in the Mathies Mine and in this mine (as in all other mines) the vast majority of this wire is not shielded. Thus, DER, tacitly agrees with appellant that bare wire is the standard in the industry and that "suitable protection" need only be provided in those instances where men are required to work or pass under trolley wire. Milesky suggests that the portion of trolley wire in question was not a place where men <u>regularly</u> worked and, of course, this is correct. Men were working at this location (apparently only for 2 shifts) solely to correct an unsafe roof (and thus, incidentally, to comply with Sections 222a and 252 of the Act). We do not accept, however, Milesky's narrow interpretation of Section 328. This section and indeed the entire Act, must be liberally construed to achieve the salutory purpose of the Act; miner safety. Thus, we hold that even where men are temporarily or intermittently required to work under a bare trolley wire which is within six and one-half feet above the top of the trolley rail (as it was here), "suitable protection shall be provided".

On the question of what constitutes suitable protection, however, Mr. Milesky's argument is more convincing. He argues that severing and physically removing part of the trolley wire from the intersection and turning off and tagging the switch which controlled power to the line in question was an even more effective means of insuring worker safety adjacent to this wire than merely providing a plastic or wooden shield (which still would allow contact with the hot wire through the opening between the shields). This theory not only appeals to our common sense; it was ratified by DER's mine inspector Robert Fulton who stated that had the wire in question been deenergized it would not have been a violation of Section 328.

There is no controversy in this case that Mr. Milesky gave orders to Mr. Bennett to deenergize the wire in question, that Mr. Bennett instructed his

mechanic to deenergize the said wire or that this wire had been deenergized and the switch controlling the power to this wire had been turned off and tagged. Indeed, DER does not challenge the testimony of Messers. Milesky and Bennett that each man (at around 3:00 a.m. and prior to that, respectively) separately checked to see that Mr. Milesky's instructions had been carried out and each determined that the switch in question had been turned off and tagged.

But for Mr. Sabatini's failure to turn off the switch after he backed in the supply car, it is obvious that the trolley wire would have been sufficiently guarded and the working area near the one south belt starter box would have been safe, i.e., there would be no basis for counts 1 and 2 of DER's complaint. Therefore the issue here is whether Mr. Milesky had a duty to specially instruct or check up on Mr. Sabatini. In other words, Mr. Milesky's fault must reside, if anywhere, in his admitted failure to specifically instruct Messers. Travika and Sabatini on July 18, 1980 to turn off the said switch and/or in his admitted failure to personally inspect the power switch at around 6:00 a.m. when he returned to one south belt starter box.

The parties have not directed our attention to any standard by which to guage Mr. Milesky's conduct but DER did use the term "negligence" in its complaint. Thus, it would seem that the ancient but honorable "reasonable man" standard should be applied.[6]

Applying this standard to the instant matter we do not find that Mr. Milesky's failures rise to the level of negligence. We think that Mr. Milesky had reason to anticipate that Messers. Sabatini and Travika would deenergize

6. Of course, the reasonable man in question must be the reasonable assistant mine foreman, a person inimately familiar with conditions and dangers in the mine.

the trolley wire after moving their supply car into place. They had both received safety training (as recently as one month prior to July 18, 1980) from Mr. Milesky to this effect. And Mr. Sabatini testified that he remembered this training and knew that he was supposed to deenergize the line in question. Moreover, as Mr. Milesky knew from personal observation, the switch for this trolley line had been tagged with a danger warning tag and this switch was in the "off" position when Messers. Sabatini and Travika arrived at this area.

As Dean Prosser notes in his classic dissertation on the reasonable man there are situations "...in which the hypothetical reasonable man would be expected to anticipate and guard against the conduct of others...[this duty]...becomes most obvious when the actor has reason to know that he is dealing with persons whose characteristics make it especially likely that they will do unreasonable things" Prosser, Law of Torts 4th Ed. p. 170 *et seq*. Here, of course, the workers in question were extremely unlikely to leave the power switch on due to their recent instructions and experience in the mine.

To complete the tort analogy, assuming, arguendo, that Mr. Milesky was negligent in failing to specially instruct Messers. Sabatini and Travika to cut off the power switch, this negligence was not the proximate cause of Travika's electrocution. Rather, it was Mr. Sabatini who turned on the power and failed to turn it off. Thus, Mr. Sabatini's act was an "intervening force" as that is defined in the Second Restatement of Torts §441; as "[a]n intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed".

Similarly, the late Mr. Travika had also received safety training; he, too, knew about the necessity to deenergize the said trolley wire. Thus, if he knew that Sabatini had left the switch on, yet did not insist that this wire be deenergized and he failed to exercise extreme caution when working near a "hot" wire, it is possible that Mr. Travika's negligence contributed to his demise.

The above concepts are not presented to exonerate Mr. Milesky. It is possible that a mine foreman could utilize the above concepts to avoid a civil action yet could be properly decertified by DER. Nevertheless, the above concepts represent the product of hundreds of years of legal reasoning applied to unfortunate situations and they do help to emphasize the extremely limited extent of Mr. Milesky's fault in the instant matter.

In conclusion, the board agrees with appellant that:

> "The Appellant did everything in his power to ensure that a safe condition was provided in an unsafe situation in which his men had to work. He was faced with an emergency situation on several fronts and still found the time to ensure that a trolley wire, which could provide possible harm to his men, was guarded in the best possible way; that is de-energized, tagged, and removed from any area in which they would have to pass directly underneath the same. He ordered this to be done and inspected that it was done before going on to his other duties. He had instructed his men in how to perform in such a situation and could only expect them to do so. That Wayne Travika died is indeed a tragedy. But to place blame on the Appellant, based on the facts and the testimony presented to this Board and to allow the Appellant to be decertified as an assistant mine foreman for breaching his duties as to the safety of his men, is to compound the tragedy."

CONCLUSIONS OF LAW

1. The board has jurisdiction over the subject matter and the parties.

2. The department, under the Act of June 3, 1943, P.L. 848, *as amended*, 52 P.S. §11 *et seq.*, is authorized to revoke the certificate of an assistant mine foreman who fails to perform duties imposed by law or interferes in the safe and lawful operation of a mine.

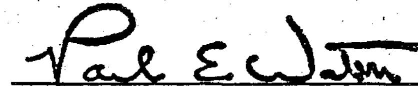
3. The department, as part of its power to issue certificates, is authorized to revoke the certificate of a person demonstrating either an inability or unwillingness to perform the duties of persons holding the certificate.

4. The appellant did not violate any duties under the above Act, did not indicate any unwillingness or inability to perform those duties and did not interfere with the safe and lawful operation of the Mathies Mine; consequently DER's revocation of the appellant's assistant mine foreman certificate was not authorized by law but rather was arbitrary and capricious.

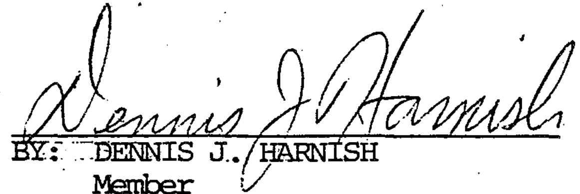
O R D E R

AND NOW, this 26th day of August , 1981, the appellant's appeal is sustained and DER's revocation of appellant's assistant mine foreman certificate is set aside and said certificate is reinstated.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman



BY: DENNIS J. HARNISH
Member

DATED: August 26, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

MORCOAL COMPANY : Docket No. 79-189-B

: Surface Mining

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

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

By the Board, April 30, 1981

This matter involves appeals by Morcoal Company from three separate actions of the Department of Environmental Resources (DER) under the Surface Mining Conservation and Reclamation Act, the Act of November 30, 1971, P.L. 554, 52 P.S. §1396.1 *et seq.* (Surface Mining Act). Appellant appeals from an action of the DER forfeiting bonds posted for four mining sites in Westmoreland County and from a separate action of the DER forfeiting the bond Morcoal posted for a special reclamation project in South Huntingdon Township, Westmoreland County. Also, appellant appeals a DER denial of its application for a 1980 surface mining license.

The bonds were forfeited and the license was denied because of appellant's alleged failure to reclaim and restore previously mined areas.

All three appeals were consolidated for hearing. Six days of hearings were held in Pittsburgh, Pennsylvania. Both parties have filed post-hearing briefs including proposed findings of fact and conclusions of law. Based on the record developed at the hearings and after consideration of the parties' briefs, we hereby find:

FINDINGS OF FACT

1. Appellant, Morcoal Company, is a Pennsylvania corporation engaged in the coal business with offices located at 100 West Otterman Street, Greensburg, Pennsylvania 15601.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, the Commonwealth agency which has the duty and the obligation to enforce the Surface Mining Act.

3. Morcoal until 1979 operated surface mining sites in Pennsylvania under the authorization of the following mining permits and mine drainage permits:

Mining Permits	Mine Drainage Permits	Township	County
1189-1 and 1(A)	3474SM37	N. Huntingdon	Westmoreland
1189-2	34(A)76SM2	Donegal	Westmoreland
1189-3	3474SM64	S. & E. Huntingdon	Westmoreland
1189-5	3477SM28	S. Huntingdon	Westmoreland
Special Reclamation Project No. 506		S. Huntingdon	Westmoreland

4. Morcoal submitted reclamation plans along with its application for the mining permits named in finding of fact no. 3. The reclamation plans were approved by the DER upon issuance of each permit.

5. The DER issued surface mining permits no. 1189-1 and no. 1189-1(A) to Morcoal which authorized surface mining on a tract of land owned by Lydia Altman (Altman site).

6. Morcoal has not mined the Altman site since 1977.

7. Morcoal abandoned the Altman site in 1977, that is, Morcoal removed all its mining equipment therefrom.

8. Morcoal was cited by the DER on September 16, 1977 for the following violations of the Surface Mining Act and regulations adopted thereunder at the Altman site:

(a) water accumulation in pit;

(b) inadequate sediment and erosion controls;

(c) inadequate sediment basins;

(d) failure to construct treatment facilities;

(e) failure to save topsoil;

(f) failure to backfill concurrent with the stripping operation.

9. Morcoal has not corrected any of the violations cited on September 16, 1977.

10. The Altman site has deteriorated since 1977 and is in worse condition today than it was in 1977.

11. Morcoal has permitted landslides to occur on land adjacent, and contiguous to, the Altman site.

12. Morcoal has permitted untreated acid discharges to leave the Altman site.

13. Morcoal removed all backfilling equipment from the Altman site prior to the date on which the DER forfeited the bonds on the site.

14. Morcoal's coal mining activities at the Altman site affected areas not covered by the mining permits and not covered by the surety bonds.

15. Accelerated erosion is continuing at the Altman site.

16. Morcoal improperly disposed of acid bearing material while mining the Altman site.

17. Morcoal's mining activities at the Altman site affected approximately 17 acres, including the off-permit areas.

18. The Commonwealth cannot reclaim the Altman site and adjacent affected areas for the amount of the bond posted by Morcoal.

19. Morcoal posted $10,750 in bonds for the Altman site; $5,000 for the area authorized by permit no. 1189-1 and $5,750 for the area authorized by permit no. 1189-1(A).

20. The DER issued surface mining permit no. 1189-2 to Morcoal which permit authorized surface mining on a tract of land owned by Aubrey and Viola Kalp (Kalp site).

21. Morcoal abandoned the Kalp site on or about November 1, 1978.

22. Morcoal was cited by the Department on November 1, 1978, for the following violations of the Surface Mining Act and the regulations adopted thereunder on the Kalp site:

(a) mining off the limits of mine drainage and mining permits;

(b) affecting an area within one hundred (100) feet of a road;

(c) burying topsoil, which was already scarce.

23. The violations cited against Morcoal on the Kalp site on November 1, 1978 still existed on March 25, 1980 and in June of 1980.

24. An inspection by the DER on August 8, 1979 at the Kalp site uncovered the following violations of the Surface Mining Act or the regulations thereunder:

(a) acid bearing material not properly disposed of;

(b) silt leaving the mine site; and

(c) failure to backfill.

25. Morcoal is permitting an attractive nuisance to exist and endangering the lives of young children by maintaining water accumulations and unsafe highwalls at the Kalp site.

26. Morcoal has permitted the discharge of acid mine drainage into Indian Creek from the Kalp site since at least August 8, 1979. The acid mine drainage continued as recently as June 16, 1980.

27. The Kalp site has never been reclaimed.

28. Morcoal's mining permit for the Kalp site was for nine and one-half (9-1/2) acres.

29. Morcoal's mining activity at the Kalp site affected approximately fifteen (15) acres.

30. On October 10, 1980, the Commonwealth Court of Pennsylvania issued an injunction against Morcoal requiring it to pump, collect and treat acid mine drainage on the Kalp site.

31. Morcoal failed to comply with the October 10, 1980 injunction entered by Commonwealth Court.

32. Morcoal posted a bond in the amount of $5,750 for the Kalp operation.

33. The Commonwealth could not reclaim the Kalp site and adjacent affected areas for the amount of the bond.

34. The DER issued surface mining permit no. 1189-3 to Morcoal which authorized surface mining on a tract of land in South Huntingdon Township, Westmoreland County, at a location known as Chaintown (Chaintown site).

35. Morcoal abandoned the Chaintown site in 1979.

36. The following violations of the Surface Mining Act existed at the Chaintown site in 1977:

(a) removal of backfilling equipment;

(b) absence of sediment and erosion controls;

(c) affecting an area within one hundred (100) feet of a stream; and

(d) failure to revegetate.

37. The violations set forth in finding of fact no. 36 continue to exist today.

38. The Commonwealth might not be able to reclaim the Chaintown site and adjacent areas for the amount of the bond posted by appellant.

39. Morcoal posted a bond in the amount of $6,000 for the Chaintown site.

40. The DER issued surface mining permit no. 1189-5 to Morcoal which authorized surface mining on a tract of land owned by John and Mildred Labasky (Labasky site).

41. Morcoal abandoned the Labasky site in 1979.

42. An inspection by DER in December, 1978 at the Labasky site revealed the following violations of the mining act:

(a) mining off of the permit area;

(b) mining within one hundred feet of a road;

(c) construction of ponds off the permit area.

43. Morcoal has removed all mining and reclamation equipment from the Labasky site. The Labasky site has never been reclaimed.

44. Morcoal posted two bonds totalling $10,000 for the Labasky operation.

45. The Commonwealth could not reclaim the Labasky site and adjacent affected areas for the amount of the bond.

46. A permit for special reclamation project no. 506 was issued to Morcoal on August 17, 1977 by the DER.

47. The regulations of the Department require the special reclamation project to be completed within six (6) months of issuance of the project permit.

48. Special reclamation project no. 506 has never been completed, and still has an open pit and highwall.

49. Prior to Morcoal's mining at special reclamation project no. 506, the landowner could have used part of the property for farm land. Today, more reclamation needs to be done than before the permit was issued.

50. The Commonwealth might not be able to reclaim special reclamation project no. 506 for the amount of the bond.

51. The DER never approved, nor was its approval requested for a transfer of surface mining permit no. 1189-2 for the Kalp site from Morcoal to Armel Coal Company.

52. Morcoal never escrowed or otherwise saved any monies to assure reclamation of these sites.

53. When Morcoal applied for its 1980 mining license, it had outstanding violations of the mining act on mining permits nos. 1189-1, 1189-1(A), 1189-2, 1189-3, 1189-5 and special reclamation project no. 506.

54. Morcoal posted a bond in the amount of $10,000 for the special reclamation project site.

DISCUSSION

The Surface Mining Conservation and Reclamation Act (Mining Act) was enacted to provide for the orderly mining of coal by the surface mining method while conserving and improving the land affected by the mining. Too often in the recent past surface mining left the Pennsylvania countryside scarred, despoiled,

ugly and unfit for any purpose and left streams sterile from acid runoff. The Mining Act's licensing provisions are an attempt to ensure that surface mining will be performed by competent operators who historically have obeyed the mandates of the Mining Act. Its bonding provisions are intended to provide for reclamation of land even if the operator is unable or unwilling to do so.

Here, DER has refused to renew appellant's license and has forfeited the bonds appellant posted for five operations because of appellant's method of operation at the five sites. The following is a synopsis of appellant's activities and the results of those activities at each of the five mining sites.

Kalp Site

Surface mining permit no. 1189-2 was issued to Morcoal authorizing mining on a tract of land in Donegal Township, Westmoreland County, in the heart of the Laural Highlands. The permit was issued for 9 1/2 acres. When Morcoal removed its mining equipment in November of 1978, 15 acres had been despoiled. Little reclamation work was ever performed at the site. Presently, two deep pits sit open, exposing highwalls over thirty feet high. Scarce topsoil and subsoil were buried during mining; as a result, none remains for reclamation. Acid producing materials remain piled at the site, exposed to water and air and consequently producing acid mine drainage to an extent that a DER geologist characterized the site as an "acid factory". An acid discharge from the site now enters and pollutes Indian Creek. The same DER geologist testified that the acidity of these discharges is "as bad as you can get". Ph readings of samples of the discharges show values of 3.7, 3.6, 3.0 and 4.4. Siltation and erosion control measures were never satisfactorily implemented and rains wash dirt and silt from the site onto Township Route 339.

The open pits, in their present state, abandoned and accumulating water, present an attractive nuisance. On one inspection, the DER mining inspector found four young boys diving off rocks into a pit filled with eight feet of water.

The site now sits ignominiously, as barren landscape, scarred with gulleys and refuse piles, in the midst of the green mountain slopes of the Laural Highlands.

Appellant contends it is not responsible for reclamation of the Kalp site because it has sold its coal rights and the mining permit for the site to Armel Coal Company. Appellant is mistaken. Appellant did contract with Armel Coal Company on September 28, 1977 for the transfer of its lease and property rights in the Kalp site. However, no one ever applied to the DER to approve a transfer of the permit to Armel. The mining permit and the surety bond continue to be in Morcoal's name. Appellant, as a matter of law, cannot vitiate its obligations and liabilities for damages under the Mining Act by a contract to which the Commonwealth is not a party.

Appellant argues that the DER is estopped from denying the existence of the contract because the DER inspector in the area was aware of the transfer. The facts do not support appellant's contention. There was no showing that the inspector knew of the transfer. Further, such imputed knowledge by a DER employee cannot release appellant from its responsibilities under the law. The Commonwealth cannot be estopped from enforcing its laws under the facts of this case. See *Commonwealth v. Western Maryland R. R. Company*, 377 Pa. 312, 105 A.2d 326 (1954).

The reason these mining permits are not transferrable is obvious. Licensing and permitting are the key provisions of the Mining Act. They enable the DER to make pre-mining judgments on the likelihood and success of reclamation based on the permit application, including reclamation plans and surety bonds. If the

permittee, who is by law committed to perform the reclamation and post the bond, is allowed to transfer the permit to a third party without the DER approval, the permitting provisions and the pre-mining review provisions of the Mining Act become meaningless.

Altman Site

Appellant also operated a surface mine on a tract of land in North Huntingdon Township, Westmoreland County, owned by Lydia Altman. The permits for the operation, nos. 1189-1 and 1(A) approved mining at a specified area; however, as it did at the Kalp site, appellant ignored the permitted boundaries and affected areas which were neither permitted nor bonded. An inspection on September 16, 1977, while the mining operation was ongoing, revealed numerous violations of the Mining Act. The violations included water accumulations in the pit; inadequate sedimentation and erosion controls; inadequate sediment basins; failure to construct discharge treatment facilities; failure to segregate and save topsoil and subsoil; and failure to backfill concurrent with the progress of the stripping operation. Shortly thereafter appellant abandoned the site, that is, it simply left, taking its mining equipment with it. Predictably, the violations uncovered in September 1977 remain today, and as no reclamation work was performed, they have grown progressively worse. The site was not stabilized, and consequently landslides are progressing at three different locations on the site. Accelerated erosion has washed away earth and formed runoff ditches six feet deep. Acid forming materials were never properly disposed of, but were left exposed to air and water and have produced an acid discharge. Altogether, the site is now 17 acres of despoiled wasteland. DER estimates the cost of reclamation to approach $64,000.

Chaintown Site

Morcoal was also able to procure mining permit no. 1189-3 from the DER for a site in South Huntingdon Township known as the Chaintown site. Morcoal sub-

contracted the Chaintown operation to one Paul Rutledge. Rutledge extracted five or six "loads" of coal, found that his prospective buyer would not accept the coal because it was "too dirty" and abandoned the site.

The site has never been reclaimed and sedimentation and erosion measures were never implemented. As a result the site is marked by erosion ditches and gulleys. The mining that was done occurred closer to Jake Creek than permitted by law. As a result of the proximity of the site to the stream and the failure to provide erosion control measures, rain washes silt from the site into Jake Creek.

Labasky Site

In November or December of 1978 appellant started an operation in South Huntingdon Township under mining permit no. 1189-5 known as the "Labasky" operation. However, in early 1979 the DER refused to issue Morcoal a 1979 operator's license because of existing violations of the Mining Act at Morcoal's operations. Morcoal in turn stopped payment on its earthmoving equipment and the equipment at the Labasky site was repossessed by the secured creditors. The site remains unreclaimed.

While mining the site, Morcoal paid less than close attention to the perameters of its permit. An inspection in December 1978 showed appellant to be mining off the permitted and bonded area, mining within 100 feet of a road and to have constructed treatment ponds off the permitted area.

Special Reclamation Project No. 506

Appellant was also issued a permit in South Huntingdon Township for a "special reclamation project". Special reclamation project permits are issued for sites where mining has previously taken place and the land left unreclaimed. The purpose is to encourage restoration of despoiled land by the relaxation of otherwise applicable surface mining regulations. In this case the landowner re-

quested the project for the purpose of stabilizing the site in order that he might ultimately locate a trailer park there. Appellant's permit, which was issued on August 17, 1977, required that it mine the coal, stabilize and restore the land within six months. Appellant again removed the coal, then abandoned the site. An open pit and highwall now exist and the condition of the site is significantly worse than ever. The landowner has lost land that he had been able to cultivate prior to appellant's arrival on the scene. It is clear from the record that appellant has no intention of returning to the site to restore it.

Our review of a DER action is to determine whether the DER has committed an abuse of discretion or an arbitrary exercise of its duties or functions. *Warren Sand and Gravel Company, Inc. v. Commonwealth of Pennsylvania, DER*, 341 A.2d 556, 20 Pa. Commonwealth Ct. 186 (1975); *Lackawanna Refuse Removal, Inc., et al v. Commonwealth of Pennsylvania, DER*, EHB Docket No. 79-024-B (issued February 3, 1981); *Diehl v. Commonwealth of Pennsylvania, DER*, 1979 EHB 105.

DER's denial of the 1980 surface mining license was based on Section 3.1(b) of the Mining Act which prohibits the DER from issuing a mining license to persons who fail to comply with the provisions of the Mining Act. Appellant's documented inability to comply with the Mining Act and underlying regulations justifies the DER license denial as a necessary and minimum response. At the Kalp operation appellant violated 25 Pa. Code 77.92(a)(1) by failing to confine its operation to the area under permit. 25 Pa. Code 77.92(a)(5) was violated when appellant's operation moved to within 100 feet of a road. Appellant also removed the mining equipment prior to reclamation contrary to 25 Pa. Code 77.92(b)(2); buried the available topsoil contrary to 25 Pa. Code 77.92(f)(5); discharged acid mine drainage into Indian Creek contrary to Section 4(a)(2)(K); of the Mining Act and finally, it abandoned the operation without restoration contrary to the cardinal

purpose of the Mining Act. Most of these same violations were committed at appellant's Altman, Labasky, Chaintown and special reclamation project sites. At one or more of these operations Morcoal failed to backfill concurrent with mining affected areas not permitted or bonded, buried topsoil, caused acid mine drainage to discharge from the site, failed to construct acid mine drainage facilities or siltation and erosion control facilities and affected areas within 100 feet of a road or stream. At all of the sites, Morcoal removed its equipment and abandoned the operations without performing restoration. Accordingly, this recurring history of noncompliance justifies the DER's refusal to issue Morcoal the surface mining license.

The forfeiture of the bonds was done under the authority of Section 4(h) of the Mining Act which provides in part:

> "If the operator fails or refuses to comply with the requirements of the Act in any respect for which liability has been changed on the bond, the secretary shall declare such portion of the bond forfeited..."

The bonding provisions of the Mining Act are intended to compensate for the very type of operation displayed here. It is a means whereby the Commonwealth can restore a site despoiled by mining where the miner is either unwilling or unable to act. Here, the evidence is conclusive that Morcoal is not going to proceed on its own to reclaim these sites.

Morcoal argues that it was precluded from restoring the Labasky site by the action of the DER in not renewing its 1979 license. It contends that it lost the ability to reclaim when it lost the license to mine. Morcoal's argument is not supported by either the facts of record or the provisions of the Mining Act. A DER representative testified that the DER would not have prevented Morcoal from performing the required reclamation work after the application for mining license was denied.

Appellant also argues that the value of the bonds on some of the sites exceeds the cost of reclamation. Again, appellant's argument is not supported by the record. The cost for restoration of the Kalp and Altman sites is estimated at $64,000 for each site. The surety bonds posted by appellant are worth only $5,700 for the Kalp site and $10,750 for the Altman site.

An experienced surface mine operator testified on behalf of appellant that he could reclaim the Chaintown, Labasky and special project sites for less than the amount of the posted bonds. The Chaintown site is bonded for $6,000 and the Labasky and the special reclamation project sites are each bonded for $10,000. The surface mine operator opined that he could reclaim Chaintown for $2,000, Labasky and the special reclamation project for $7,500. His estimate however is not necessar relevant to the costs that the Commonwealth would sustain. The Commonwealth will incur higher costs because, unlike a surface mining operator, it does not have the earthmoving equipment readily available and the Commonwealth must prepare engineering specifications and conform to statutory bidding requirements. Moreover, the credibility of appellant's witness suffers because he has never seen the reclamation plans approved for each site.

The difference between the cost of restoration estimated by appellant and the amount of the bonds is not great and we are certainly not disposed, based on the conflicting testimony, to order the DER to return part of the bond to appellant prior to the actual expenditure of monies for reclamation of the sites.

Also, this board has recently held that the DER may forfeit the total amount of a surety bond because of noncompliance with the provisions of the Mining Act without proving the actual cost of restoration. We reasoned that the bonds filed by the operators are to ensure compliance with the Mining Act and are penal rather than idemnification bonds. See *American Casualty of Reading v. DER*, EHB Docke

No. 78-157-S (issued January 16, 1981) and *Rockwood Insurance Company, et al v. DER*, EHB Docket No. 78-168-S (issued Febuary 18, 1981).

Therefore, we find that the DER has not abused its discretion by the forfeiture of the bonds in question.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and the subject matter of these proceedings.

2. The DER properly refused to issue Morcoal a 1980 Surface Mining License.

3. The DER properly forfeited the surety bonds for surface mining permits 1189-1 and 1(A), 1189-2, 1189-3, 1189-5 and special reclamation project 506.

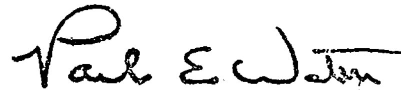
O R D E R

AND NOW, this 30th day of April, 1981, it is ordered that:

1. The DER action denying a 1980 surface mining license to Morcoal Company is sustained and the appeal therefrom is dismissed.

2. The DER action forfeiting the bonds posted for sites permitted by surface mining permits 1189-1 and 1(A), 1189-2, 1189-3, 1189-5 and special reclamation permit no. 506 is sustained and the appeal therefrom is dismissed.

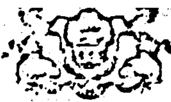
ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman

DENNIS J. HARNISH
Member

DATED: April 30, 1981



COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

NEWBERRY TOWNSHIP BOARD OF SUPERVISORS

Docket No. 81-044-W

v.

Sewage Facilities Act
25 Pa. Code 71.15

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By: Paul E. Waters, Chairman, September 15, 1981

This matter comes before the board as an appeal from an order requiring appellant, Newberry Township Board of Supervisors, to revise its Act 537 sewage plan. A section of the township is experiencing on-lot sewage disposal problems in a number of residential systems. Although the problem is not presently widespread, it does not appear to be getting any better, and a few homes have severe problems. Appellant does not believe a revision is called for and argues that it sees only minor repair problems.

FINDINGS OF FACT

1. Appellant Newberry Township (hereinafter township) is a second class township located in York County, Pennsylvania.

2. Appellee Commonwealth of Pennsylvania, Department of Environmental Resources (herein after DER) is the administrative agency with the authority to

enforce the provisions of the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, No. 537, as amended, 35 P.S. §§750, *et seq.*

3. Cragmoor Village is a fifty-two (52) lot residential subdivision located in the township which was approved by the Township Board of Supervisors in 1975.

4. A planning module for land development was submitted by the township to DER for Cragmoor Village in 1975. The module was submitted as a revision to the township's official sewage facilities plan.

5. After reviewing the planning module, DER approved Cragmoor Village for on-lot sewage disposal systems by letter dated October 16, 1975, from Gary German, supervising sanitarian for DER, to the township.

6. Twenty-one (21) lots in Cragmoor Village were developed as single-family residences utilizing on-lot sewage disposal.

7. Each developed lot was issued a sewage permit by the township authorizing the installation of an on-lot sewage disposal system.

8. The sewage permits issued by the township were reviewed by DER.

9. In the fall of 1976, DER officials conducted an official inspection of the sewage disposal systems located in Cragmoor Village.

10. The DER officials discovered that the soils on Lot #35 (the Bobb Lot), were not adequate for on-lot sewage disposal.

11. The township was not notified of the inspection by DER nor were they informed by DER of the results of the soils examination.

12. The township prepared and submitted a plan revision in August, 1979.

13. DER approved a portion of the plan but rejected that part of the plan that encompassed the southeastern section of the township.

14. After consultations with township officials, DER approved the plan revision with the exception of Cragmoor Village.

15. DER issued an order dated March 13, 1981, to the township requiring the township to revise the official sewage facilities plan for Cragmoor Village.

16. Gilbert Longwell, Jr. currently resides on Lot #45, Cragmoor Village and has resided on Lot #45 since August 19, 1978.

17. Lot 45 utilizes an elevated sand mound sewage disposal system that began malfunctioning shortly after Mr. Longwell occupied the house on the lot, and the system continues to malfunction.

18. Cragmoor Village subdivision at present has twenty-one lots which have been developed in a subdivision with total planned development of fifty-two lots, and there are no present plans for completion of the development.

19. DER's order of August 31, 1978, was based in part upon its receipt of complaints of malfunctioning on-lot sewage systems in Newberry Township.

20. The September 28, 1979 DER letter states that the plan revision was not approved for Cragmoor Village for a number of reasons, including, *inter alia*, a lack of information as to the soil conditions which would lead to successful repair of malfunctioning systems on a lot-by-lot basis, a lack of information as to the location and soil conditions for possible group treatment systems and nonconventional systems, and alternatives for financing.

21. The DER inspections indicated that the following sewage systems in Cragmoor Village were actively malfunctioning at the time of the inspections:

a. The elevated sand mound on Lot #35, the Bobb residence.

b. The elevated sand mound on Lot #36, the Kinsey residence.

c. The elevated sand mound on Lot #38, the Woulfe residence.

d. The elevated sand mound on Lot #41, the Wagner residence.

e. The sewage disposal system on Lot #43, the Sweger residence.

f. The elevated sand mound on Lot #45, the Longwell residence.

g. The elevated sand mound on Lot #52, the Ely residence.

22. The DER inspections also indicated the following sewage systems showed

indications of previous malfunctioning or effluent ponding which would soon result in a malfunction:

a. The elevated sand mound on Lot #43, the Intrieri residence.

b. The elevated sand mound on Lot #49, the Roof residence.

23. The Bobb, Kinsey, Woulfe, Wagner, Longwell, Intrieri, Ely, and Roof properties in Cragmoor Village all have an elevated sand mound sewage disposal system.

24. The Bobbs added an aerobic system to their sand mound upon recommendation of Newberry Township. Although the aerobic system removed the odor and the black sludge discharge, the mound continues to malfunction.

25. The June 17, 1981 inspection by DER indicated that a considerable area of fresh earth had been placed on the western portion of the elevated sand mound. The sewage discharging from the mound had already darkened the fresh earth, and on virtually the entire western side of the mound sewage leaks from the berm.

26. The sewage effluent in the Bobb system backs up and ponds on the top of the elevated sand mound, as well as seeps from the base and sides of the berm material.

27. The malfunction in the Woulfe system will most likely continue to deteriorate and eventually will result in a more direct discharge of effluent from the system onto the road.

28. The soils maps for the Cragmoor Village area are not accurate. Soils such as Montalto soils indicated on the maps did not in fact exist at the locations where they were mapped. Terrace material indicated on the soil maps also did not in fact exist at locations where it was mapped.

29. Near the Bobb lot, soils which were mapped as moderately well drained to well drained soils were in fact poorly drained or somewhat poorly drained soils.

30. At the upper elevations in the Cragmoor Village subdivision, soil

conditions are generally not suitable for sand mounds, due to mottling at less than twenty inches below the surface.

31. Although the precise cause of individual sewage malfunctions has not been determined, it is likely that the limited permeability of the soils and subsoils in Cragmoor Village is the cause of the malfunctions.

32. The probability of successfully repairing the malfunctioning sand mounds inspected by DER officials is not good. Any number of factors, including soil conditions, lot size, and proximity to other dwellings, may preclude repair.

33. Newberry Township has done no soils tests or other studies to indicate that on-lot repairs will be successful.

34. The determination as to the viability of on-lot repairs in Cragmoor Village can only be made after proper studies of the soils conditions and an assessment of the various other alternative solutions to the sewage problems.

35. Although Newberry Township had indicated in September, 1980 that it was moving into the final stages for issuing a contract for a survey of Cragmoor Village, by letter dated February 4, 1981, the township indicated that it had not engaged the services of Martin and Martin, the consulting firm which had been recommended by the Advisory Committee.

36. All of the residents who have malfunctioning sewage systems in Cragmoor Village have private water wells.

37. As the malfunctions in the Cragmoor Village subdivision continue and as improperly treated sewage effluent travels along the ground or below the ground, the residents' water wells may become contaminated.

38. The Planning Module submitted by Newberry Township in 1975 and the Plan Revision submitted in 1979 do not adequately address the sewage disposal needs of Cragmoor Village.

39. The plan revision adopted by Newberry Township on August 14, 1979 does not contain an adequate analysis or evaluation of the soil conditions or

other information necessary to establish that repair of sand mounds will likely be successful.

40. Any proposed solution for Cragmoor Village is not necessarily limited to twenty-one lots; Cragmoor Village subdivision has been and continues to be officially approved for fifty-two lots.

41. The economic feasibility of the alternative solutions to the Cragmoor Village sewage malfunctions has not yet been adequately evaluated by the township.

42. An analysis of the possible alternatives to the Cragmoor Village sewage problems and their economic feasibility is the proper subject of the plan revision ordered by DER.

43. A revision to the townships' Official Sewage Facilities Plan within the timetable established in DER's Order of March 13, 1981 is necessary because of the present danger to public health and safety in Cragmoor Village.

D I S C U S S I O N

On March 13, 1981, DER issued an order requiring appellant Newberry Township to prepare a revision to its Official Sewage Facilities Plan that adequately addressed the existing and future sewage disposal needs within the Cragmoor Village subdivision.[1] The order also required appellant to submit a schedule of implementation and a progress report within forty-five (45) days.

At the outset we note that there is no dispute as to whether there are presently at least seven or more on-lot sewage disposal systems malfunctioning in the Cragmoor Village area of Newberry Township. The dispute between the parties does concern the question of the extent of malfunctions, but more importantly, it seems, the real issue is, what, if anything, is to be done about it, and by whom.

At first blush, it would appear that appellant's position is a reasonable one. It contends simply, that any malfunctioning on-lot sewage disposal system should be repaired. Beyond this, their solution becomes a little more vague, as to exactly who should make these repairs and when.[2]

Section 71.15(a)(2) of DER's regulations (25 Pa. Code §71.15) provides:

> "(2) When the Department determines that an official plan or any of its parts, is inadequate for the needs of a municipality to which it relates because of changed or newly discovered facts, conditions, or circumstances, the Department may upon written notice require a revision of the plan to be submitted within 120 days."

There was, as indicated, extensive, graphic and thoroughly convincing evidence that indicates the sewage disposal needs of at least *some* of the residents of Cragmoor Village are not presently being <u>adequately</u> met.[3] There can be no doubt, and even

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1. DER originally had ordered Newberry Township on August 31, 1978, to prepare an Act 537 plan revision for a larger area which included Cragmoor Village. This was later altered.

2. Indeed, if the issue were so easily resolved one might ask, without impertinance, why has the matter not been resolved over the many months that this case was in litigation?

3. We will not here review the abundant evidence presented by an impressive parade of witnesses who live with this problem on a daily basis, as well as by a soils scientist.

appellant would have to admit, that there were at least some new discovered facts or changed conditions in the area in question. Appellant seems to believe that inasmuch as DER did not prevent the appellant from issuing on-lot sewage permits for the homes which presently experience malfunctions, DER is somehow foreclosed from ever again enforcing §71.15(a)(2) of the regulations. This argument is patently erroneous.

The Sewage Facilities Act 35 P.S. §750.5(d) deals with the very situation in which appellant unfortunately finds itself. The Act requires that the plan or revision delineate areas experiencing problems with sewage disposal and a description of those problems.[4] Provision must be made for adequate treatment facilities which will prevent the discharge of inadequately treated sewage into the waters of the Commonwealth. And finally, there must be a time schedule and proposed method of financing the construction and operation of the method of sewage disposal to be used.

Appellant also argues that DER has acted improperly in ordering a plan revision because it (DER) has not first discovered the *cause* of the on-lot malfunctions here at issue. We find this argument too, is fallacious. Appellant misconstrues the purpose of a plan revision. Appellant is apparently convinced that the malfunctions do not and will not go beyond the small number discussed at hearing.[5] By accepting this as true without any investigation on its part, appellant then concludes that repairs are the way to go. The problem with this is that appellant may be right---but also, may be wrong.[6] The very *purpose* of a plan revision is to outline the problem and acceptable methods of solving it. Contrary to appellant's implicit thesis, there is nothing wrong with a proposal for system repairs so long

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4. 35 P.S. §750.5(d)(1).

5. Only seven lots were discussed in great detail.

6. DER is, of course convinced that the malfunctions are or will be more extensive and spring from an underlaying soils problem. Something not correctable by minor repairs.

as the available facts indicate that this will permanently solve the sewage disposal, and consequently the health, problems in the area. In short, the issue at this point is not, which proposed solution is viable and who should pay for it, but rather, it is, whether some organized municipal effort is presently required to find a viable solution. We believe that a plan revision represents a proper step in the solution process.

In *East Cocalico Twp. v. DER* 79 EHB 183 on related facts we said:

> "The appellant has selected based in part on cost considerations, and the limited area involved, to move from conventional to alternate on-lot disposal and require repair of any systems needing it. The basic question raised by DER is whether the plan is feasible. There is no dispute that DER can require a plan revision to deal with the changed conditions existing at Lakeside Estates."

It may be that appellant here, anticipates facing the same problems as did *East Cocalico supra.* and wants to have it out, here and now. Unfortunately for appellant, our laws and procedure require that we proceed one step at a time. When and if the required plan revision is submitted, and when and if it is found wanting, there will be time enough for the board to hear and resolve any further dispute that may arise between the parties. As we concluded in *East Cocalico Twp., supra.* "When only a very small number of residential homes are involved and only a few of them have experienced on-lot sewage disposal problems, a municipal plan revision, which considers many options, but proposes to start with the least expensive solution, should be approved, when the other more costly solutions are still available if needed." It is clear that the order issued by DER on March 13, 1981 under the facts of this case, was proper.[7]

CONCLUSIONS OF LAW

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

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7. While other issues were raised by appellant, most notably as to DER's operation methods, we do not deem further discussion of them necessary at this time.

2. A plan revision is properly called for when the number and severity of sewage system malfunctions in an area have a significant adverse impact on the environment or create a hazard to public health.

3. DER has the authority to order a plan revision pursuant to the Penna. Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, *as amended*, 35 P.S. §750.1, *et seq*. if it properly determines that the present plan is inadequate for the needs of the community, and it may require the revision to be submitted within 120 days. 25 Pa. Code 71.15 (a)(2).

4. DER properly exercised its authority under the Sewage Facilities Act in ordering appellant Newberry Township to revise its Official Sewage Plan for the Cragmoor Village subdivision on March 13, 1981.

ORDER

AND NOW, this 15th day of September, 1981 the appeal of Newberry Township is hereby dismissed. The order issued by DER on March 13, 1981 is hereby sustained and the time periods set forth therein, shall run from the date hereof.

ENVIRONMENTAL HEARING BOARD

Paul E. Waters

PAUL E. WATERS
Chairman

Dennis Jay Harnish

DENNIS J. HARNISH
Member

DATED: September 15, 1981

EHB—43: 12/79

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

OHIO FARMERS INSURANCE COMPANY : Docket No. 80-041-G

Surface Mining
Bond Forfeiture

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By the Board: The following adjudication was drafted by Edward Gerjuoy, Esquire and is issued by this board with minor modification.
August 25, 1981

This matter involves the appeal of Ohio Farmers Insurance Company (Farmers) from the forfeiture by the Commonwealth of Pennsylvania, Department of Environmental Resources (DER) of 19 bonds, identifying details of which are listed below. The bonds were submitted by Ralph A. Veon, Inc. (RAV). Farmers was surety on each of the aforementioned 19 bonds. The bonds were forfeited because of RAV's alleged failure to reclaim and restore previously mined areas.

This matter was given a hearing in Pittsburgh, Pennsylvania, on June 2, 1981. DER, but not Farmers, filed a post-hearing brief.

FINDINGS OF FACT

1. Appellant is the Ohio Farmers Insurance Company, whose address is Westfield Center, Ohio 44251.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, which has the duty and responsibility of administering the Surface Mining and Reclamation Act, 52 P.S. §1396.1 et seq. (SMCRA) and the regulations duly promulgated thereunder by the Environmental Quality Board.

3. On February 13, 1980, DER notified Jack Courtney, President of RAV, that DER was declaring forfeit a number of bonds posted by RAV under various mine permits issued to RAV, because (DER alleged) RAV had failed to reclaim the mining sites covered by those bonds.

4. A copy of this forfeiture notice was sent to Farmers.

5. Farmers was surety on 19 of the bonds declared forfeited in DER's February 13, 1980 letter.

6. These 19 bonds, which are the subject of this appeal, are identified as follows.

Mining Permit Number	Surety Bond Number	Amount (Dollars)
40-9 and Amendments	373961	$ 1,400
	395869	480
	407980	18,000
	454228	5,000
40-16 and Amendments	398094	34,000
	415883	6,250
	421202	22,500
	455525	11,000
	458501	2,000

40-17 and Amendments	415817	24,000
	415882	20,000
	445983	32,000
40-19 and Amendments	435721	14,000
	455443	3,000
40-20 and Amendments	435720	16,000
	451283	11,250
	451284	14,000
	451285	2,250
	454229	17,500

7. During the hearing, DER stipulated that reclamation had been completed on the mining sites covered by surety bonds 373961 and 395869 (the first two bonds listed above), and therefore further stipulated that DER no longer claimed forfeiture of those two bonds.

8. During the hearing, Farmers stipulated that reclamation had not been completed on the mining sites covered by the other 17 surety bonds listed above, namely the mining sites covered by the 15 bonds (listed above) posted under mining permits 40-16, 40-17, 40-19 and 40-20 and amendments, plus the sites covered by the two surety bonds 407980 and 454228 posted under mining permit 40-9 and amendments.

9. On October 30, 1979, DER notified Jack Courtney, President of RAV, that DER was suspending mining permits numbers 40-9, 40-16 and 40-20, because (DER alleged) RAV had failed to comply with the backfilling reclamation requirements which were part of the conditions set forth in those permits.

10. This same October 30, 1979 letter ordered RAV to cease and desist from all mining activities at the surface mines authorized by mining permits numbers 40-9, 40-16 and 40-20, with the exception of those operations necessary for the backfilling and restoration of the mining sites covered by the aforementioned mining permits.

11. DER did not send Farmers a copy of this October 30, 1979 letter.

12. On October 31, 1979, RAV filed a voluntary petition of bankruptcy in the United States Bankruptcy Court, Western District of Pennsylvania.

13. Up to about October 1979, the mining sites covered by mining permits numbers 40-9, 40-16, 40-17, 40-19 and 40-20 and Amendments, and by the 19 surety bonds listed supra, were being actively mined.

DISCUSSION

In this bond forfeiture appeal, the burden of proving the facts that can justify forfeiture falls on DER, for reasons this board has explained in Rockwood Insurance Company v. Commonwealth of Pa., DER, EHB Docket No. 78-168-S (issued February 18, 1981). This burden is spelled out in section 4(h) of the SMCRA, which provides in part:

> "If the operator fails or refuses to comply with the requirements of the act in any respect for which liability has been charged on the bond, the department shall declare such portion of the bond forfeited..."

Reclamation of mining sites is required under section 4(a)(2) of the act. DER stipulated that the required reclamation had been performed on the mining sites covered by surety bonds 373961 and 395869, and declared it was willing to rescind the forfeiture with respect to those two bonds (N.T. p. 9). Farmers stipulated that the required reclamation had not been completed on the mining sites covered by the other 17 surety bonds (of the 19 which are the subject of this action and have been identified supra) (N.T. pp. 6-7). Therefore the board concludes that DER has not met its burden of proof with respect to surety bonds 373961 and 395869, but has met its burden under section 4(h) of the act with respect to the other 17 surety bonds.

Our review of a DER action is to determine whether the DER has committed an abuse of discretion or an arbitrary exercise of its duties or functions. Warren Sand and Gravel Co., Inc. v. Commonwealth of Pa., DER, 341 A.2d 556, 20 Pa. Cmwlth. Ct. 186 (1975); R. Czambel, Sr. v. Commonwealth of Pa., DER, EHB Docket No. 80-152-G (issued April 30, 1981); Diehl v. Commonwealth of Pa., DER, 1979 EHB 105, 108. The facts and conclusions presented in the preceding paragraph imply that DER's forfeiture of the aforementioned 17 surety bonds (the surety bonds listed supra, excluding bonds 373961 and 395869) was not an abuse of discretion or an arbitrary exercise of DER's duties or functions. It follows that forfeiture of these 17 surety bonds must be sustained unless Farmers can fashion a successful legal defense, sufficient to negate forfeiture even though DER has met its burden of proof that reclamation had not been completed on the mining sites covered by those 17 bonds. Because Farmers did not file a post-hearing brief, the best the board can do for Farmers in this regard is to consider the defenses Farmers raised in its pre-hearing memorandum. There were two such defenses, namely:

I. DER failed to inspect RAV's mining operations and to require proper reclamation during a long period of time prior to October 1979, during which period RAV was in operation and had the financial resources to carry out the required reclamation.

II. During this same period of time prior to October 1979, DER failed to inform RAV's surety, Farmers, that RAV was in danger of defaulting on its obligation to reclaim the mining sites covered by Farmers' bonds.

Each of these defenses is examined infra.

Because Farmers failed to file a post-hearing brief, the legal theory underlying its first defense is unclear. Seemingly, Farmers is maintaining that DER had a duty to enforce reclamation during the period prior to October 1979, and that DER's failure to perform this duty released Farmers from its liability as surety. However, a legal theory of precisely this sort was examined and rejected by the board

in Rockwood, supra. As Rockwood explains, there is no authority supporting the proposition that DER had a duty to actively enforce reclamation against RAV. Rather, it is the rule in Pennsylvania that:

> "A creditor owes no duty of active diligence to the principal debtor's surety...a mere delay in suing the principal or a mere omission or forbearance of the creditor to sue the principal debtor will not discharge the surety."

35 P.L.E. Suretyship, §86.

An alternative legal theory of Farmers' defense I, namely that DER's failure to actively enforce reclamation now estops DER from forfeiting the bonds, also can be rejected on the basis of established law and this board's rulings in Rockwood and in American Casualty Co. of Reading, Pa., v. Commonwealth of Pa., DER, EHB Docket No. 78-157-S (issued January 16, 1981). To maintain this estoppel theory, it must be established that Farmers relied on DER enforcement of reclamation, and that this reliance caused Farmers to change its position, to its prejudice. 14 P.L.E. Estoppel, §§ 23-25.

The burden of establishing these facts, in this affirmative defense of Farmers', falls on Farmers under the board's rules and regulations, 25 Pa. Code §21.101, that the party asserting the affirmative of any issue bears the burden of proof on that issue. Farmers presented no evidence whatsoever tending to prove that it relied on DER enforcement of reclamation, or that this reliance caused it to change its position in any way. The board concludes that Farmers' first defense to bond forfeiture must be rejected.

Farmers' second defense appears to be based on the theory that DER had a duty to give Farmers notice that RAV was in danger of default. There was no such duty, however, as this board has explained in American Casualty, supra. The Pennsylvania rule on this issue is:

"Unless so required by the contract itself, no demand or notice of default is required in order to fix the surety's liability."

35 P.L.E. Suretyship, § 60. An alternative version of this rule is:

"Ordinarily, a creditor is not bound to give the surety notice of the principal debtor's default, and a surety will be discharged upon the creditor's failure to notify the surety of such default only if the contract of suretyship requires that the notice of default be given."

35 P.L.E. Suretyship § 79. In other words, not only is there no general requirement that the creditor give the surety notice that the principal debtor is in danger of default, the creditor doesn't even have to give the surety notice of the principal debtor's actual default unless required to do so by the suretyship contract. In the instant action, DER did give Farmers notice that there had been default, and that the bonds were forfeited, in its February 13, 1980 letter to RAV copied to Farmers. DER, by not sending Farmers a copy of its October 30, 1979 letter to RAV, failed at that time to give Farmers even implicit notice that RAV was in danger of default; it was this letter--ordering RAV to cease and desist from all mining activities under mining permits 40-9, 40-16 and 40-20, with the exception of those operations necessary for the backfilling and restoration of the mining sites--which was immediately followed by RAV's filing of its bankruptcy petition on October 31, 1979. However, Farmers presented no evidence whatsoever that its suretyship contract obligated DER to give Farmers notice that RAV was in danger of default at times when RAV would have the financial resources to carry out its reclamation obligations; indeed, there was no evidence that there were any times when DER was obligated to give Farmers notice RAV was in danger of default.

It follows that the legal theory seemingly underlying Farmers' defense II, namely that DER had the duty to give Farmers notice that RAV was in danger of default, must be rejected. The alternative legal theory of Farmers' second defense,

to the effect that DER's failure to give Farmers sufficiently early notice that RAV was in danger of default estops DER from forfeiting the bonds, can be rejected for reasons very similar to those offered supra for rejecting the estoppel theory of Farmers' first defense. Farmers presented no evidence tending to prove that it relied on such early notice by DER, or that this reliance caused it to change its position in any way. The board therefore concludes that Farmers' second and last proffered defense to bond forfeiture also must be rejected.

In sum, this board has determined that for each of the surety bonds listed supra, with the exception of bonds 373961 and 395869, DER's imposition of forfeiture was not an abuse of discretion or an arbitrary exercise of DER's duties or functions.

CONCLUSIONS OF LAW

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

2. The burden of proving the facts that can justify forfeiture of the surety bonds which are the subject of this appeal falls on DER.

3. DER did not meet its burden for surety bonds 373961 and 395869.

4. DER did meet its burden for surety bonds 407980, 454228, 398094, 415883, 421202, 455525, 458501, 415817, 415882, 445983, 435721, 455443, 435720, 451283, 451284, 451285 and 454229.

5. Farmers has the burden of proof to establish the facts necessary to support its affirmative defenses to DER's claimed forfeiture of Farmers' surety bonds.

6. DER had no duty to actively enforce reclamation against Farmers' principal, the mining operator RAV.

7. In the absence of proof that Farmers relied on DER enforcement of reclamation, and that this reliance caused Farmers to change its position to its prejudice, DER's alleged failure to actively enforce reclamation against RAV during the period RAV was in operation and had the financial resources to carry out the required reclamation would not estop DER from forfeiting Farmers' surety bonds.

8. Under the established facts of this appeal, Farmers' claim that DER failed to inspect RAV's mining operations and to require proper reclamation during the period when RAV was in operation and had the financial resources to carry out the required reclamation was not a defense to DER's forfeiture of Farmers' surety bonds.

9. DER did not have the duty to give Farmers notice that Farmers' principal RAV was in danger of default.

10. In the absence of proof that Farmers relied on early notice by DER that RAV was in danger of default, and that this reliance caused Farmers to change its position to its prejudice, DER's alleged failure to inform Farmers that RAV was in danger of defaulting on its obligation to reclaim the mining sites covered by Farmers' bonds would not estop DER from forfeiting Farmers' surety bonds.

11. Under the established facts of this appeal, Farmers' claim that DER failed to inform Farmers that RAV was in danger of defaulting on its obligation to reclaim the mining sites covered by Farmers' bonds was not a defense to DER's forfeiture of Farmers' surety bonds.

12. The board's review of this bond forfeiture imposed by DER is to determine whether DER has committed an abuse of discretion or an arbitrary exercise of its duties or functions.

13. Forfeiture of surety bonds 373961 and 395869 was improper, i.e., an abuse of DER's discretion.

14. Forfeiture of surety bonds 407980, 454228, 398094, 415883, 421202, 455525, 458501, 415817, 415882, 445983, 435721, 455443, 435720, 451283, 451284, 451285 and 454229 was proper, i.e., neither an abuse of discretion nor an arbitrary exercise of DER's duties and functions.

ORDER

AND NOW, this 25th day of August , 1981, it is ordered that:

1. Appellant's appeal of DER's forfeiture of appellant's surety bonds 373961 and 395869 is sustained.

2. Appellant's appeal of DER's forfeiture of appellant's surety bonds is rejected for the following bonds:

a) Under mining permit #40-9 and amendments, bonds:

407980	$18,000
454228	$ 5,000

b) Under mining permit #40-16 and amendments, bonds:

398094	$34,000
415883	$ 6,250
421202	$22,500
455525	$11,000
458501	$ 2,000

c) Under mining permit #40-17 and amendments, bonds:

415817	$24,000
415882	$20,000
445983	$32,000

d) Under mining permit #40-19 and amendments, bonds:

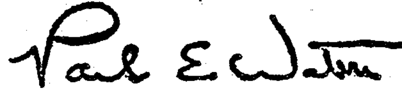
435721	$16,000
455443	$ 3,000

e) Under mining permit #40-20 and amendments, bonds:

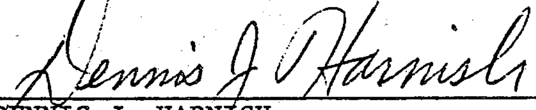
435720	$16,000
451283	$11,250
451284	$14,000
451285	$ 2,250
454229	$17,500

3. Appellant is ordered to make full and prompt payment to DER of each of the amounts listed immediately above, totaling $254,750.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman



DENNIS J. HARNISH
Member

DATED: August 25, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

PENNSYLVANIA ENVIRONMENTAL MANAGEMENT SERVICES, INC. :

Docket No. 79-153-W

Pa. Solid Waste Management Act
35 P.S. §6007

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and ALEX and ANNE duPONT,
NEW GARDEN TOWNSHIP, RALPH LAFRANCE and
the COUNTY OF CHESTER, Intervenors

ADJUDICATION

By: Paul E. Waters, Chairman, February 13, 1981

This matter comes before the board as an appeal from the denial of a solid waste permit for operation of a landfill in New Garden Township, Chester County, Pennsylvania. The proposed landfill is to be located about one-quarter mile from a small privately owned airport and the intervenors Alex and Anne duPont allege that the landfill will attract birds and create a bird hazard for aircraft. DER's denial of the permit was based on this fact alone, primarily on a recommendation from PennDOT. Appellant, PEMS, has developed a bird control program which it believes will allow the airport to continue its safe operation.

FINDINGS OF FACT

1. Appellant is Pennsylvania Environmental Management Services, Inc. (PEMS). PEMS is appealing the denial of its application for a permit for a sanitary landfill in New Garden Township, Chester County.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources (DER).

3. Intervenors are New Garden Aviation, Inc., Alexis I. dupont and Anne duPont (Intervenors). New Garden Aviation, Inc. operates the New Garden Flying Field (hereinafter the Airport) or (New Garden Flying Field), a public use general aviation airport located in New Garden Township. The Airport has been in operation since 1967. Mr. and Mrs. duPont are the sole stockholders of New Garden Aviation, Inc. and lease to the corporation the real estate on which the Airport is located, having purchased it in parcels between 1965 and 1972. The other intervenors are New Garden Township, Ralph LaFrance and County of Chester.

4. The landfill application at issue herein is one of two applications filed by PEMS for landfill permits in New Garden Township (hereinafter Site No. 1 and Site No. 2).

5. Site No. 1 was to have been located approximately 2,000 feet off the edge of the Airport's main runway to the northeast and Site No. 2 was to have been located within 4,200 feet of the main runway and 3,200 feet of the secondary or crosswing runway to the northwest.

6. The application for Site No. 1 was denied by DER by letter dated October 27, 1978 on the basis of twelve design and environmental deficiencies. PEMS appealed this denial, *PEMS v. DER*, EHB Docket No. 78-146-D, which appeal was voluntarily discontinued by PEMS in December, 1979.

7. The present appeal involves the denial of PEMS' application for Site No. 2. The Site No. 2 application was denied by DER by letter dated September 7, 1979 which stated *inter alia*, as follows:

> "The operation of New Garden Facility No. 2 will serve to attract birds to the landfill site and surrounding area. The attraction of birds by a land disposal site located in close proximity to the New Garden Flying Field, increases the probability of a birdstrike to aircraft and constitutes or risks creating a public nuisance in violation of the Pennsylvania Solid Waste Management Act, Act 241, the Act of July 31, 1968, P. L. 788, *as amended*, 35 P. S. §6001 *et seq*. and the rules and regulations adopted thereunder.
>
> Therefore, the application for Solid Waste Permit No. 10111 is hereby denied."

A similar reason was given by DER as one basis for the denial of Site No. 1.

8. Site No. 2 and the Airport are located approximately 16 miles northwest of the Delaware River at its closest point, and 20 miles north/northeast of the Chesapeake Bay at its closest point.

9. U.S. Route 1, a major multilane highway, runs almost adjacent to the northernmost boundary of Site No. 2 and the White Clay Creek crosses the western side of the site.

10. The area immediately surrounding the Airport and Site No. 2 consists of mixed development. The nearby municipalities of Toughkenamon and Avondale are densely developed. Most of the remainder of the immediate area is mixed agricultural use and open fields. Several individual residences are located along Glen Willow Road adjacent to Site No. 2's western edge and others are scattered around the area of the site.

11. The Airport is an active general aviation facility averaging 40,000 annual operations (take-offs and landings). Any member of the public may use the airport. There is a nominal $3.00 landing fee collected on an irregular basis.

12. The Airport is used by turboprop, pure jet, and piston engine (propeller-driven) aircraft for business, training, and recreational flights. A turboprop aircraft is powered by a turbine engine with a propeller on the front. It is a kind of jet aircraft and flies at a faster speed than a piston engine aircraft.

13. Aircraft may land and take-off at the Airport 24 hours a day since the main runway is lighted.

14. The importance of the Airport to the regional transportation system is officially recognized at the federal and state levels. The Airport is designated as a reliever airport for Philadelphia International Airport by the FAA in the National Airport System Plan (National Plan) developed pursuant to the Airport and Airway Development Act (the ADA ACT), 49 U.S.C. §1701 *et seq.* The Airport was so designated on or about April 25, 1978. It is also included in PennDOT's State Aviation System Plan (State Plan) as part of the Commonwealth's recommended general aviation system.

15. Various kinds of aircraft damage can result from birdstrikes. Such damange may affect aircraft performance requiring a hard landing or resulting in a crash, or it may involve a situation where structural repair work is necessary.

16. Although damaging birdstrikes may occur on any part of an aircraft, the most critical situations involve damage to the aircraft engine resulting in a loss of power or the penetration of a bird through an aircraft window injuring the pilot so that he is unable to continue the flight. Both of these situations have resulted in accidents and loss of life.

17. Among types of aircraft, the smaller class of civilian aircraft is the most susceptible to birdstrike damage and personal injury. This is the class of aircraft, also referred to as general aviation aircraft, that utilizes the Airport. These aircraft are not as structurally strong as the larger air carrier and military aircraft and are not designed with the redundancy of systems (e.g. multiple engines, hydraulic and electrical systems) that these latter two classes have to enable them to continue to operate effectively in the presence of substantial damage.

18. The different stages of aircraft flight are take-off, climb-out, cruising, approach and landing. The highest risk phases of flight from the standpoint of birdstrikes are take-off, climb-out, approach and landing. Most aircraft activity in these phases of flight takes place below the altitude of 1,000 feet which is also the altitude below which most bird activity occurs.

19. "Traffic pattern" refers to aircraft flight maneuvers approaching and departing from airports. The typical VFR traffic pattern altitude is flown at 800 to 1,000 feet above ground level. The VFR traffic pattern at the Airport is closer to the 1,000 foot altitude.

20. The basic daily needs and activities of birds are (1) eating, (2) drinking and bathing, (3) loafing and socializing, (4) roosting and (5) seeking shelter. Nesting and migration are other important bird activities which are engaged in on a seasonal basis. Not all birds are migratory, however, and may remain in the same area throughout the year.

21. Feeding is the most essential of birds' daily needs because of the importance of food to survival, and a source of food is one of the strongest bird attractants. Birds are extremely persistent and tenacious in searching out and obtaining food and feeding is a highly competitive and antagonistic activity.

22. It is common for gulls to travel up to fifty miles from their roost to a source of food. Starlings, blackbirds, and cattle egrets may travel up to fifteen miles and crows up to thirty miles.

23. Gulls leave their overnight roosts about dawn to go feeding. They may travel singly, in pairs, or in flocks. After travelling to a food source and feeding for an hour or two they will travel to a neaby area to loaf and then return later in the day to feed again before departing for their roosting area about an hour before sunset.

24. Starlings and blackbirds also leave the roost in the morning to feed. They move out in all directions, flying flocks and aggregations rather than by individual flight, and range widely looking for food and roost sites.

25. Most daily bird flight activity takes place below five hundred feet and can be expected to occur between one hundred and seven hundred feet, although birds may fly to higher altitudes in order to obtain an unobstructed view of their feeding destination.

26. In addition to gulls, several other species of birds regularly feed upon putrescible waste material at sanitary landfills. These include (1) starlings, (2) blackbirds, (3) cattle egrets, and (4) crows.

27. Certain standard sanitary landfill practices may reduce a landfill's attractiveness to birds relative to open dumps. These practices include the dumping and compaction of waste material on a limited working face by large tractors and compaction equipment and the placement of a soil cover layer over any exposed waste material at the end of each day's operations. This type of operation is consistent with DER's regulations.

28. The number of birds presently found in the vicinity of the Airport and Site No. 2 is not significant in terms of bird hazards to aircraft.

29. The major kinds of birds that could be expected to feed at Site No. 2 would include herring gulls, ringbilled gulls, laughing gulls, great black backed gulls, blackbirds, starlings, grackles, cowbirds, cattle egrets and crows. Members of all of the foregoing species, except laughing gulls, were sited either at the proposed landfill site or within the usual feeding flight distances for these birds.

30. A Bird Management Program was prepared in response to the owner's request for a detailed bird control program.

31. The Bird Management Program proposed to accomplish the following: (1) identify problem bird species and monitor the populations of these species throughout the program, (2) devise a pilot bird control program for the species of concern through a process of testing, through trial and error, a wide variety of bird management techniques, (3) evaluate the results of the pilot program, (4) devise a revised program, and (5) recommend additional research.

32. The Management Program will have to maintain a continuous level of bird control as the effects are short-term.

33. The proposed site for the landfill is located northwest of the Flying Field, and the site or portions thereof are within 4,200 feet of the main runway and 3,200 feet from the threshold of the secondary, or cross-wind, runway, which is seldom used.

34. It is estimated that, in terms of total operations, five percent of the aircraft using the Flying Field are turbo-prop, less than one percent are pure jet and the remainder are piston-engine.

35. Neither the number of birds which the landfill might attract nor the places from which they would be flying can be determined.

36. The only duly adopted criteria for the siting of solid waste disposal facilities in Pennsylvania in the vicinity of airports are those of the EPA contained in 40 C.F.R. §257.3-8(c), which provides:

> "A facility or practice disposing of putrescible wastes that might attract birds and which occurs within 10,000 feet (3,048 meters) of any airport runway used by turbojet aircraft or within 5,000 feet (1,524 meters) of any airport runway used by only piston-type aircraft shall not pose a bird hazard to aircraft."

37. The Strasburg Landfill, which is situated in Chester County, is well within the flying distance of birds from the Chesapeake and Delaware Bays. Since the landfill, which accepts putrescible wastes, began operations in April 1979, its manager has observed gulls only in the six-week period from mid-February 1980 to late March 1980. No number of birds have been observed there either prior to or since that time.

38. According to the testimony of the intervenors, seagulls have been seen flying over the Flying Field only once or twice since 1965.

39. Through the scheduling of man hours, a pair of men have been able to implement the Bird Management Program at the Milliken Landfill site in California located near an airfield seven days a week from sunrise to sunset while averaging 40 hours per week.

40. The program must be operated only seasonally from September through April or May. It is discontinued for the year only after no birds appear at any of the other landfill sites in San Bernadino County.

41. From the commencement of the program the Milliken Sanitary Landfill has experienced an almost total elimination of its bird population. Though the program concentrated on seagulls in the beginning because they were in the greatest number, the landfill ended up controlling all birds with the same program. As a result of the Bird Management Program, the bird population at the site has almost ceased to exist.

42. In the opinion of Dr. George, PEMS expert witness, a program similar to that used at the Milliken Landfill to control birds on the East Coast, can be successful.

43. PEMS proposes that a trained ornithologist with experience in management of problem birds and alleviation of bird problems at airports serve as project director and that a resident ornithologist serve as project ornithologist on the site. Two full-time litter-pickers, who will be trained as bird technicians, will be on site during daylight hours to keep the area clean, maintain constant vigil and institute control measures immediately if problem birds appear. During the early phases of the program the bird technicians will be on site seven days a week.

44. The simultaneous use of several different control methods should prevent birds from becoming acclimated to any one of them and can achieve permanent control.

45. The intensity of the level of management upon a limited working area and the combination of control techniques, designed to avoid an attenuation effect, should insure the success of PEMS' proposed Bird Management Program.

46. The Pennsylvania Department of Transportation (PennDOT) had originally advised DER that it had no objection to the approval of the site for Facility No. 2 by letter dated July 17, 1979.

47. PennDOT subsequently purported to adopt a policy which would have the effect of excluding landfills within a 10,000-foot radius of an airport. The only documentation to which the Deputy Secretary of Transportation, who is responsible for the activities of the Bureau of Aviation, referred in formulating PennDOT's purported policy was FAA Order 5200.5. The only written embodiment of PennDOT's purported policy in opposition to landfills near airports is a letter dated August 15, 1979, from PennDOT Secretary Larson to Secretary Jones of DER.

48. PennDOT has neither advertised nor held hearings in conjunction with the adoption of the purported policy contained in the letter dated August 15, 1979, nor does PennDOT have rules or regulations concerning the siting of landfills near airports.

49. PennDOT's change of position from the letter of July 17, 1979 was based in part upon contact by the duPonts and Representative Pitts at a meeting on August 9, 1979 with the Deputy Secretary of Transportation.

50. None of DER's review letters to PEMS mentioned the issue of potential bird hazards to aircraft. Aside from the issue of potential bird hazards, DER had concluded as of September 7, 1979 that PEMS' application met all of DER's regulations with respect to the issuance of a solid waste permit.

51. The main reason for denying PEMS' application was the position taken by PennDOT in its letter dated August 15, 1979.

52. The Milliken Sanitary Landfill, located in San Bernadino County, California, serves an area having a population of over 200,000, has a working face measuring 300 feet by 300 feet, operates from 8 a.m. to 5 p.m. six days a week and receives an average of 1,500 tons of trash per day. Its required daily cover is 6 inches, with a final cover of two feet. The nightly cover is 6 inches.

53. The FAA objected to the proposed expansion of the Milliken Sanitary Landfill on the ground that it would pose a bird hazard for Ontario International Airport, also located in San Bernadino County, California. The end of the nearest runway is about 5,200 feet from the expansion site.

54. Since the institution of the Bird Management Program at the Milliken Landfill, San Bernadino County has received no complaints from either Ontario International Airport or the FAA, and most significantly, no complaints about bird problems.

D I S C U S S I O N

Burden of Proof

The burden of proof at the hearing in this matter was placed upon appellant, Pennsylvania Management Services, Inc., hereinafter, PEMS. Our rules provide: 25 Pa. Code §21.101(c)1

> "(c) A party appealing an action of the Department shall have the burden of proof and burden of proceeding in the following cases unless otherwise ordered by the Board: (1) refusal to grant, issue or reissue any license or permit."

Notwithstanding our application of the above rule, appellant argues that the burden should be placed upon DER and intervenors because the basis for the permit denial is the allegation that the location of the landfill near the airfield will create a birdstrike hazard condition. Appellant argues, with some justification, that inasmuch as DER is asserting a public nuisance, it should bear the burden of proof, rather than placing appellant, in the position of having to prove a negative i.e. — that the landfill will not create a public nuisance. We believe, though not without some reluctance, that appellant overstates the case. Actually, appellant seems more concerned with the nuisance doctrine than are DER or intervenors. They also take the base position that under the language of the Pa. Solid Waste Management Act[1] 35 P.S. §6007(e) DER has the authority to consider every aspect of a proposed landfill, and must deny the permit where it believes health, or safety of citizens will otherwise be impaired. Appellant, PEMS, is really not disputing[2] the fact that a bird hazard would be created *but for*—its intended program of bird control. It then seems proper that appellant go forward with the burden of proof, on this issue. The real dispute in this case is whether or not PEMS can, in fact, control bird populations on its landfill, to the necessary degree.[3] We have reviewed *Glasgow*

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1. The Act was repealed by the new Solid Waste Management Act of 1980, which has an effective date of August 1980.

2. We do not know, but assume that even appellant would agree that a permit would properly be denied if it were not willing to make some effort to control the bird population.

3. We will, of course, discuss further the implications of this term, later in this adjudication.

Quarry Inc., v. DER 3, EHB 308, 23 Pa. Comwlth Ct 270, *Diehl v. DER*, EHB 78-037-B, 1979 EHB 105 and other cases cited by appellant and conclude that they offer no support contrary to our decision.

Much of the testimony presented at the lengthy hearing held in this matter was offered to show that the location of a landfill near an airport could or would attract birds of various kinds[4] and create a hazard to aircraft.[5] As previously indicated, we are satisfied that this is true as far as it goes. We believe the real issue, however, must be joined on the question of whether the Bird Management Program proposed by PEMS is sufficient to justify the issuance of a Solid Waste permit. Having listened to many eminent authorities and detailed expert testimony on birds, their habitat and propensities, we conclude that no one can presently say with absolute assurance that the proposed bird control program[6] will or will not succeed at New Garden Facility No. 2. We come then to the real nub of this controversy. Is the interim risk to life and limb so great from a birdstrike at this proposed landfill that it would be unreasonable to allow PEMS the opportunity to demonstrate that it can control the bird population at the site? The evidence of birdstrikes does command our attention and grip our emotions because it is so dramatic. The term itself, conjurs up horrible images and could very easily lead one to say that *any* risk is too great. The fact is, however, that there are and will be birds in the

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4. The kinds of birds that might appear at some time at the landfill are: Herring gulls, ringbilled gulls, laughing gulls, great blackbacked gulls, blackbirds,starlings, grackles, cowbirds, cattle egrets, crows and Canada geese.

5. A bird can be sucked into the engine or damage a propeller and cause the plane to lose power, and other damage to the aircraft is possible.

6. Or one that may grow out of the various combination of control methods. Perhaps only God has the power to guarantee a birdfree sky. PEMS here made no such impersonation. Indeed, some might even be so bold as to argue that birds have as much right to the sky as airplanes.

area from time to time regardless of our decision.[7] We cannot help but note, in our effort to bring some objective reality to the situation, that there was only one major birdstrike incident mentioned which led to the loss of life in the United States.[8] This must be considered along with the knowledge that there

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7. A revealing discussion on this point took place at the hearing when Mr. Godin of the Fish and Wildlife Service testified: N.T. page 727 lines 3-25 and page 728 lines 1-4.

> "A The second part of your question was about bird hazards. It only takes one bird to bring down an aircraft, so if they use all of these techniques at the dump and if they repel all of the birds, all of the birds, then that is effective.
>
> But if there is one or two birds that remain, and if one of those birds collides with an aircraft, then it is not effective.
>
> THE EXAMINER: Can anything ever be effective, because there are always going to be birds everywhere?
>
> THE WITNESS: That is correct.
>
> THE EXAMINER: Then nothing is effective ever to prevent hazards to aircraft?
>
> THE WITNESS: That is correct.
>
> THE EXAMINER: Whether there is a landfill there or not?
>
> THE WITNESS: But a landfill would attract the birds at the airport.
>
> THE EXAMINER: The problem is with your logic it seems to me if you say that only one bird is all you need — and you are going to have one bird whether there is a landfill there or not; so therefore nothing can prevent the hazard to aircraft. If your logic is then, therefore, there is always going to be a hazard, then it isn't the landfill that is doing it necessarily. It is just the fact that there are birds in the world.
>
> THE WITNESS: That is correct."

8. On March 10, 1962, 62 persons were killed in a crash at Logan Airport in Boston when Lockheed Electro turboprop struck a flock of starlings. There have been as many as 770 birdstrikes reported by aircraft in 1978. It does not appear that these were in anyway related to landfill operations, and although there were injuries fortunately there was no loss of life.

are hundreds of flights and countless millions of birds in our skies on a daily basis.

Intervenors have placed great weight on Federal Aviation Administration (FAA) Regulation No. 5200.5 which indicated a policy against having airports being located within 5,000 feet of a landfill.[9] Appellant points out correctly, not only that this regulation does not govern the DER but also that a more logical place to look for federal guidance, is section 8002(k) of the Resource Conservation and Recovery Act 40 U.S.C. §6982(b). This simply sets a policy to further study the problem of landfills in close proximity to airports.[10] It appears that the single most important factor which led DER to deny the permit here in question, was a letter received from the Secretary of PennDOT on August 15, 1979 which for the first time outlines a policy similar to that of the FAA for Pennsylvania. We are also convinced that the single most important factor which led PennDOT to enunciate this new "policy"[11] was a

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9. The 5,000 feet limit is from the runway and applies where airplanes of the type here in question are in service.

10. "Classification of Solid Waste Disposal Facilities and Practices," codified at 40 C.F.R. Part 257, EPA states that:

> "...it should be made clear that neither this regulation nor the proposed standard prohibited the disposal of solid waste within the specified distances [of 10,000 and 5,000 feet]. Instead, the distances define a "danger zone" within which particular care must be taken to assure that no bird hazard arises."

11. Less than one month prior to this meeting, PennDOT had advised DER:

> "In reply to your recent request for a statement of the Bureau of Aviation's position pertaining to the proposed landfill in the close proximity of the New Garden Flying Field at Toughkenamon, Pennsylvania, the Bureau's position is as follows.
>
> The Bureau of Aviation believes Site #1 presents a hazard to the airport because of its location in the approach and departure lanes of the runway. Based upon information available to date, the Bureau does not object to the approval of Site #2. However, although specific hazard information is lacking, landfills anywhere in the vicinity of airports should be discouraged due to the lack of precise information on which bird activities may be predicted."

There was no promulgation of a regulation in accordance with the Public Documents Law, nor notification in the Pennsylvania Bulletin.

meeting which intervenor Alex duPont and Representative Pitts held with the Deputy Secretary of PennDOT on August 9, 1979, at which neither appellant nor his representative was present.

Appellant has outlined an impressive array of techniques which it intends to employ in the battle of the birds.[12] Intervenors, DER and their experts have assembeled an equally impressive list of reasons why they believe the project is doomed to failure---no matter how hard PEMS might try. As previously indicated, reasonable minds can differ on who will ultimately be right, but there should be no disagreement on whether PEMS has proved by a preponderance of the evidence, that such control *can* be exercised. We believe the interim risks to be minimal to non-existent because it will early appear whether appellant meets success or failure. If success comes, there will be no problem, if failure, we have no doubt that intervenors will waste little time in noting this fact and bringing it to the attention of DER. DER is, of course authorized to revoke this permit under proper circumstances and order the closure of the landfill.[13] With this in mind, the risk of failure is placed squarely upon PEMS, where it belongs. The most difficult problem which we can foresee will be faced by DER in determining whether the birdstrike hazard is reduced to the necessary degree. It is unrealistic to expect that there be *no* birds in the area. At the same time we can find no absolute numerical standard which can be applied

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12. PEMS proposes a Bird Management Program for Facility No. 2 which utilizes the following techniques: (1) limiting the daily working area to half an acre initially, with possible future expansion to at most one acre; (2) compacting and covering the refuse as soon as possible; (3) covering the working area daily with six (6) inches of subsoil; (4) avoiding open bodies of water by including the use of enclosed holding tanks for wastewater; and a combination of; (5) sonic deterrents (including shell crackers, whistle bombs and distress calls); visual deterrents (such as mounts of birds in distress, flashing lights, metal reflectors and silhouettes of birds of prey); lethal control (e.g. shotguns); and modification of habitat, so as to remove sites for roosting, nesting and resting, by eliminating tree cover and farming operations and planting low vegetation.

The simultaneous use of several different control methods is proposed to prevent birds from becoming acclimated to any one of them and to achieve permanent control.

13. Section 503(e) Solid Waste Management Act (Act No. 97). In addition, we will retain jurisdiction.

to the situation.[14] We must, therefore, look to the public nuisance doctrine.[15] A nuisance is:

> "An unreasonable use of property which causes injury or damage to another in the legitimate enjoyment of his rights of person or property. 28 P.L. §21, *Alexander v. Kerr,* 1828, 2 Rawle 83 *Comm. v. Baird,* 1958, 41 Erie 200."

The distinction between a public nuisance and a private nuisance is that a public nuisance is common to all the neighborhood where it is committed, as well as those of the public who may be traveling in that vicinity. A private nuisance inflicts injury which is personal to the party complaining. We have no doubt that a public nuisance could be created, absent sufficient bird control measures at the New Garden Landfill. Here we are dealing with a situation where DER proposes, not to abate, but to *prevent* a nuisance from coming into existence. In this regard our cases have said that the threatened injury must be certain and not merely probable to warrant enjoining a nuisance. *White v. Old York Road Country Club,* 32 Pa. 147. It must clearly appear that a nuisance will necessarily result from the contemplated act which is sought to be enjoined. A court cannot anticipate an improper use of premises and sanction a restraining order founded on surmise and speculation as to future conduct. *Essick v. Shiilam,* 32 A.2d 416, 374 Pa. 373, *City of Erie v. Gulf Oil Corp.,* 42 Erie 98, affd. 150 A.2d 351. *Knipple v. Stahler,* 1959, 74 Dauph 17. If and when a public nuisance is created

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14. It is interesting to note, for example, that if we assume that the chances of a birdstrike are presently 1 in 50,000 and this risk is tripled, it is then only 3 in 50,000, which could still be well below the tolerable risk level. Therefore simply knowing that the risk has <u>increased</u>, is not enough information.

15. We also note that a public nuisance may give rise to a criminal prosecution 28 P. L. §273, *Fabian v. Snyder,* (1904) 78 York 59.

that will be time enough to abate it. If an act or use can be carried on in a legal manner, a court may, instead of prohibiting the act, prescribe necessary limitations. There is ample evidence that appellant PEMS can (whether it will, remains to be seen) control the birds at the landfill. This has been done with some success at the Milliken Landfill in California,[16] and we see no reason why a similar result cannot be attained here. *Liddell v. Swarthmore Swim Club*, 2 D&C 2.d 468. The Milliken Landfill located 5,200 feet from the Ontario International Airport has successfully controlled the bird population through some of the techniques to be employed at New Garden. Thus, we conclude that DER should not have denied the permit sought by PEMS based only on the possibility that a nuisance might be created at the landfill site at some unspecified future time.

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16. The Bird Management Program has been conducted since 1977 and the landfill has experienced almost a total elimination of its bird population.

CONCLUSIONS OF LAW

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

2. Under 25 Pa. Code §21.101(c) the appellant has the burden of proof on the issue of whether its proposed bird control techniques can prevent any hazard to aircraft in the area of the landfill.

3. Federal Aviation Administration (FAA) order No. 5200.5 regarding airport siting is advisory only, and it has not been properly adopted as a regulation by either DER or PennDOT.

4. The bird control techniques proposed by appellant, PEMS, have a reasonable chance of success, and the interim risk is very low. If they are unsuccessful DER and intervenors have an adequate remedy under §503(e) of the Solid Waste Management Act (Act No. 97).

5. A public nuisance is created by an unreasonable use of property which causes injury or damage to others in the legitimate enjoyment of rights of person or property.

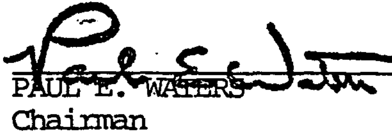
6. If and when a public nuisance is created by PEMS due to birds, DER is authorized under the Solid Waste Management Act of 1980 to revoke the landfill operation permit and order proper closure.

7. Appellant, PEMS, has carried the burden of proving that it can control birds at its lanfill operation at New Garden Site #2 in a way that will prevent a birdstrike hazard or a public nuisance.

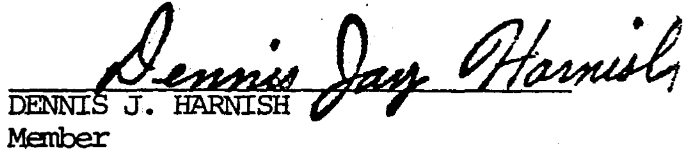
ORDER

AND NOW, this 13th day of February, 1981 the appeal of Pennsylvania Management Services, Inc. to No. 79-153-W is hereby remanded to DER for further action consistent with this adjudication. The board will retain jurisdiction.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman



DENNIS J. HARNISH
Member

DATED: February 13, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

RICO, INC.
and
McDONALD'S CORPORATION

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Docket No. 81-104-H
and
81-122-H

Clean Streams Law
Sewage Facilities Act
Chapter 94

ADJUDICATION

By: Dennis J. Harnish, Chairman, December 17, 1981

McDonald's Corporation intends to develope a parcel of property located at 2425 Route 286 in Plum Borough, Allegheny County as a franchise restaurant. To implement this intent McDonald's entered into an agreement with Rico, Inc. for the exchange of a parcel of property owned by McDonald's for the said parcel adjacent to Route 286. This agreement was contingent upon Rico's obtaining all permits and approvals necessary for the construction of a McDonald's Restaurant on the said parcel located adjacent to Route 286.

Rico, Inc. obtained a building permit for this restaurant on April 21, 1981 but on or about May 6, 1981 Plum Borough imposed a prohibition on connections to the Holiday Park Sewage Facilities system pursuant to 25 Pa. Code 94.21. This prohibition *per se* did not preclude Rico, Inc. from connecting to the said sewer system. However, on or about September 2, 1981 DER refused to accept a supplement to Plum Borough's Official Act 537 Sewage Facilities Plan covering the said

restaurant because the borough had yet to submit to DER a wasteload plan to correct the perceived overload of said sewer system. Rico and McDonald's have appealed from DER's stated refusal and this matter, by agreement of all counsel, has been submitted on the basis of briefs and stipulated facts.

STIPULATED FINDINGS OF FACT

1. On April 21, 1981, a building permit for a McDonald's Restaurant was issued by Plum Borough to Rico, Inc.

2. On or about May 6, 1981, Plum Borough imposed a prohibition on connections to the Holiday Park Sewage Facilities System in accordance with 25 Pa. Code 94.21.

3. On or about June 12, 1981, Plum Borough submitted to the department a plan supplement to its official sewage plan for the development of a McDonald's Restaurant.

4. On or about July 16, 1981, the department returned the plan supplement to Plum Borough.

5. On or about August 15, 1981, an amended plan supplement was resubmitted by Plum Borough to the department.

6. On or about September 2, 1981, the department refused to accept the supplement, pursuant to 25 Pa. Code 94.14 and 25 Pa. Code 71.16(e)(5), because Plum Borough failed to submit a Wasteload Management Corrective Plan as required by 25 Pa. Code 94.21(a)(3).

7. The parties agree this appeal presents the single issue of whether the department may reject a plan supplement based on a municipality's failure to submit a corrective plan to the department pursuant to 25 Pa. Code 94.21(a)(3) when a building permit for the development was issued prior to the imposition of a prohibition on connections to the sewage system.

8. The parties hereto agree to submit the issue stated in paragraph 7 above to the Environmental Hearing Board on briefs.

DISCUSSION

The sole issue presented to the board in the instant matter is:

> "Whether the Department may reject a plan supplement based on a municipality's failure to submit a corrective plan to the Department pursuant to 25 Pa. Code 94.21(a)(3) when a building permit for the development was issued prior to the imposition of a prohibition on connections to the sewage system."

This issue is one of first impression with this board but the board has dealt with the consequences of overloaded municipal sewage treatment systems on a number of occasions. In *Commonwealth v. Borough of Carlisle*, 16 Pa. Commonwealth Ct. 341, 330 A.2d 293 (1974) and in *East Pennsboro Township Authority v. DER*, 18 Pa. Commonwealth Ct. 58, 334 A.2d 798 (1975) Commonwealth Court upheld adjudications of this board which had modified sewer ban orders issued by DER due to overloaded conditions in the sewer systems of said respective municipalities.

As the attorney for DER in *Carlisle Borough*, *supra*, the board's present chairman strennously argued that neither DER nor this board could allow a single additional connection to the Carlisle Borough sewage treatment system since that system was hydraulically and organically overloaded and was, indeed, polluting the waters of the Commonwealth in violation of *inter alia*, Sections 201, 202 and 401 of The Pennsylvania Clean Streams Law, the Act of June 22, 1937, *as amended*, 35 P.S. 691.201, 691.202 and 691.401, respectively. This argument did not prevent this board from modifying DER's sewer ban order by allowing the connection of some four homes per month to the said system nor did it prevent Commonwealth Court from upholding said adjudication upon appeal.

A similar result was reached in *East Pennsboro Township Authority v. DER*, EHB Docket (73-287-W issued August 9, 1974) 3 EHB 33 which adjudication was also upheld by Commonwealth Court at *East Pennsboro Township Authority v. DER*, 18 Pa. Commonwealth Ct. 58, 334 A.2d 798 (1975). Both of these decisions evidence this board's long standing attempt to support DER's efforts to abate pollution from overloaded sewage systems while yet building enough "give" into the sewer ban system to protect other public interests and to withstand the type of constitutional attack which completely undercut a DER program in *Commonwealth v. Trautner*, 19 Pa. Commonwealth Ct. 116, 338 A.2d 718 (1975).

The board also built "give" into the sewer ban system by fashioning certain exceptions to sewer bans. Actually in *Moon Nurseries, Inc. v. DER*, EHB Docket 72-395-B (issued December 31, 1973) 2 EHB 271 and other adjudications cited therein this board did not so much fashion a new policy but rather raised DER's policy concerning sewer bans to the level of rules which the department was obliged to follow. The pertinent sewer ban exception to the instant matter carved out by those early adjudications was that those structures for which building permits had been issued prior to the date of receipt of the sewer connection ban were not covered by that ban. This exception was specifically approved by Commonwealth Court in *F and T Construction Company v. DER*, 6 Pa. Commonwealth Ct. 59, 293 A.2d 138 (1972).

It is no secret that the department's vigorous issuance of sewer ban orders to municipalities across the Commonwealth created the type of backlash which no public agency desires or can long endure. Thus, in order to shift the burden of anticipating and addressing sewer overload problems to the municipalities which experience such problems the Pennsylvania Environmental Quality Board promulgated Chapter 94 of DER's regulations. Pursuant to Chapter 94 of DER's regulations, 25 Pa. Code 94.1 *et seq.*, municipalities have the responsi-

bility of total wasteload management planning. Furthermore, pursuant to 25 Pa. Code 94.21(a)(1) of said regulations a municipality is required to impose a prohibition on connections to its sewerage system if its annual wasteload report establishes (or DER determines) that the sewerage system or any part thereof is either hydraulically or organically overloaded.

As originally promulgated, 25 Pa. Code 94.21(a)(1), like DER's original sewer ban procedures, had no "give", but after this board questioned the constitutionality of this regulation in *Lancaster v. DER*, 6 D & C 3d 159 (EHB 1978), it was amended, to its present form, which requires a municipality to:

> "[p]rohibit new connections to the overloaded sewerage facilities <u>except as approved by the permitee pursuant to the standards for granting exceptions contained in §§ 94.55-94.57 of this title (relating to building permit issued prior to ban, replacement of a discharge, and other exceptions)</u>. (Emphasis added.)"

Even DER admitted that this regulation, "...if read in isolation, [would] appear to dictate the result that a building permit should provide an exception in this case" (p. 6 DER's brief). However, DER argues that the above regulation should be read *in pari materia* with 25 Pa. Code 71.16(e)(5) and 25 Pa. Code 94.14.

Said sections provide as follows:

"71.16. Approval of plans and revisions

> (e) In approving or disapproving an official plan or revision, the Department will consider the following:
>
> . . .
>
> (5) whether the plan or revision is consistent with the requirements of Chapter 94 of this title (relating to municipal wasteload management)."
>
> 25 Pa. Code §71.16(e)(5).

"94.14. Approval of official plans and revisions

> No official plan or revision will be approved nor will a supplement be considered adequate by the Department pursuant to Chapter 71 of this title (re-

lating to administration of the sewage facilities program) that is inconsistent with the requirements of this chapter."

25 Pa. Code 94.14.

These sections, argue DER, required it to deny the plan supplement submitted by Plum Borough on behalf of Rico, Inc. for the said McDonald's Restaurant because Plum Borough had not satisfied the mandatory requirements of 25 Pa. Code 94.21(a)(3) by submitting to DER a correction plan to reduce the overload on its sewerage system.

Rico and McDonald's counter by asserting that since the exceptions contained in §§94.55-94.57 are within Chapter 94, a plan supplement or revision can be "...consistent with the requirement of Chapter 94..." where it authorizes connection of units with prior building permits to overloaded systems.

The appellants also argue that the document at issue is (and should be) a plan supplement rather than a plan revision so that the provisions of §§71.16 and 94.14 do not apply. Taking this second issue, first, we agree with the appellants. The decision of whether a project requires a revision or a supplement is a matter within the discretion of DER and will not be lightly set aside by this board; *Maxwell Swartwood, et al v. DER*, No. 2435 C.D. 1979 (decided January 23, 1981); *Butera v. DER*, EHB 80-114-H, issued March 10, 1981.

However, it is one of the functions of this board to check abuse of discretion by DER. According to 25 Pa. Code 71.15(c)(2) a plan revision is called for only where the official sewage plan is inadequate to meet the sewage disposal needs of the proposed facility.

DER alleges that Plum Borough's sewage facilities plan is "inadequate" because (and solely because) of the alleged overload of the Holiday Park sewage system, but by virtue of 25 Pa. Code 94.21(a)(1) appellants, as building permit holders, are entitled to connect to said system notwithstanding its alleged in-

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adequacy. Thus, as to appellants the Plum Borough plan is "adequate" and a plan supplement rather than a plan revision is what is required to comply with the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, No. 537, *as amended*, 35 P.S. §750.1 *et seq*. To hold otherwise would be to take away the building permit exemption granted by 25 Pa. Code 94.21(a)(1) and we do not believe that the Environmental Quality Board intended such a result.

Since 25 Pa. Code 71.16(e)(5), on its face, applies only to sewage facilities plans and revisions thereto rather than to plan supplements, this section does not pertain to the instant matter. 25 Pa. Code 94.14 does still pertain since it deals with plan supplements as well as plans and revisions thereto. But this section also deals with the adequacy of the original plan pursuant to 25 Pa. Code 71.15(c)(2) so what we have stated above concerning that section applies with equal force here.

Moreover, contrary to DER's argument, our construction of 25 Pa. Code 94.21 does not render 25 Pa. Code Chapter 71 meaningless. The information required by Chapter 71 of a plan supplement must still be supplied even where a building permit exception is recognized. To be sure, construed in this manner, the requirements of Chapter 71 may not be used to frustrate the holder of a building permit exception (he will be allowed to connect to the overloaded system once he complies with the requirements for a plan supplement) but we believe that the appellants have correctly construed the *East Pennsboro, supra*, adjudication as standing for the proposition that the building permit exception is supposed to overcome the all related legal hurdles to connection to the sewer system.

DER argues that the 25 Pa. Code 94.21(a)(1) exemption should only be available where the would-be developer had obtained sewage facilities planning approval under Chapter 71 and had also obtained his building permit prior to the imposition of a connection prohibition. While this might be a prudent

course for a developer to follow it is not required by any cited authority and, to the contrary, as DER notes, many municipalities refuse to process developers' requests for sewage facilities plan revisions and supplement unless and until the developer has first obtained his building permit. Clearly, developers in such municipalities would be exposed to the same type of catch 22 which brought down an entire DER regulatory effort in *Trautner, supra*. Thus, our decision today far from rendering 25 Pa. Code Chapter 71 meaningless, helps to build enough give into the system to ensure that in the cases where no exception is permitted by the Chapter 94 regulations, these regulations will be applied to sewage facilities plans and revisions and supplements thereto as well as connections to an overloaded sewer system.

Before closing we feel compelled to mention that the alleged overload which underlies all of DER's actions in this matter has yet to be clearly demonstrated to this board. In *Toro Development Company v. Commonwealth of Pennsylvania, DER*, EHB 81-034-H where DER's determination of an overload in Plum Borough's Holiday Park system was challenged, the evidence presented left a considerable doubt that the alleged overload existed or was imminent.

CONCLUSIONS OF LAW

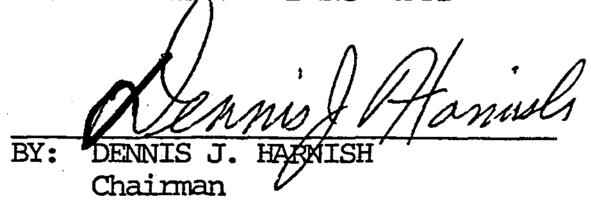
1. The board has jurisdiction over the subject matter and the parties.

2. DER's rejection of appellants' plan supplement was arbitrary and capricious where appellant held a building permit issued prior to the imposition of a prohibition on connections to the sewage system.

O R D E R

AND NOW, this 17th day of December, 1981, appellants' appeal is granted and DER is directed to promptly approve the sewage facilities plan supplement at issue, denial of which by DER on July 16, 1981 gave rise to the instant appeal.

ENVIRONMENTAL HEARING BOARD



BY: DENNIS J. HARNISH
Chairman

ANTHONY J. MAZULLO, JR.
Member

DATED: December 17, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

ROCKWOOD INSURANCE COMPANY (BLUE COAL COMPANY) & ROCKWOOD INSURANCE COMPANY (NORTHWEST MINING COMPANY) v. COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Docket No. 78-168-S 78-166-S Mining - Mine Drainage Permit Bond Forfeiture

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

By: Dennis J. Harnish, Member, February 18, 1981

Docket No. 78-168-S involves the appeal of Rockwood Insurance Company (Rockwood) from the forfeiture by the Commonwealth of Pennsylvania, Department of Environmental Resources (DER) of Surety Bond No. 1006 submitted by Northwest Mining Company, Inc. (Northwest) to DER in Mining Permit 81-7; Docket No. 78-166-S involves the appeal of Rockwood Insurance Company of DER's forfeiture of Surety Bonds Nos. 1004 for Permit 30-6 and 1001 for Permit 30-83. These bonds were submitted by Blue Coal Corporation (Blue Coal). Rockwood was surety on each of the above three bonds.

FINDINGS OF FACT

No. 78-168-S

1. Appellant is the Rockwood Insurance Company, a Pennsylvania corporation with principal offices located in Rockwood, Pennsylvania.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, which has the duty and responsibility of administering the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 *et seq.* (SMCRA) and the regulations duly promulgated thereunder by the Environmental Quality Board.

3. On or about October 29, 1973, Northwest applied to DER for an amended surface mining permit pursuant to the SMCRA for an operation located in Carbondale Borough and Carbondale Township, Lackawanna County, at the Powder Colliery, also referred to as Savage Stripping (#81-7).

4. The mining operation at Permit #81-7 had been an active stripping operation prior to the date of the amended permit application.

5. The amendment added five acres to the pre-existing ten acre permit and also indicated that the operator would be stripping at a depth of over sixty feet on four of the fifteen acres which required increased bonds.

6. Northwest submitted Rockwood Bond No. SM 1006 in the amount of $4,500 as a surety bond to cover the increased scope of the mining operation at Permit #81-7. Bond SM 1006 was to cover approximately nine acres at a rate of $500.00 per acre.

7. A permit was issued to Northwest on February 22, 1974 by the DER for this revised operation.

8. Said permit transferred the pre-existing bonding including SM 1006 posted by Northwest to the new revised permit which consisted of fifteen acres.

9. The condition of the surety's obligation on Bond SM 1006 was that Northwest comply with, *inter alia,* all the requirements of Act 418 (SMCRA) and Permit #81-7.

10. Northwest operated at Permit #81-7 after the permit was issued in 1974 and affected the entire 15 acres of the permit including the nine bonded acres.

11. On the date the Bond SM 1006 was declared forfeit--November 21, 1978--none of the fifteen acres comprising Permit #81-7 had been reclaimed by Northwest in accordance with its permit or the SMCRA.

12. The permit application submitted by Northwest contained a timetable for reclamation which complied with the requirements of the SMCRA.

13. Northwest was current with its backfilling operation at Permit #81-7 when the revised permit was issued in February 1974.

14. The last mining activity by Northwest on Permit #81-7 took place in the latter part of 1974.

15. After ceasing active operations in 1974, Northwest gave assurances to the DER that it still wanted to operate at Permit #81-7.

16. Northwest moved its mining equipment off Permit #81-7 at some time after April, 1975.

17. There are two open pits remaining on Permit #81-7 with an estimated size of 7628 cubic yards and 4950 cubic yards, respectively.

18. In addition to the two pits remaining, the entire fifteen acres under permit has yet to be graded and planted.

No. 78-166-S

1. Appellant is the Rockwood Insurance Company, a Pennsylvania corporation with principal offices located in Rockwood, Pennsylvania.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, which has the duty and responsibility of administering the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 *et seq.* (SMCRA) and the regulations duly promulgated thereunder by the Environmental Quality Board.

3. On or about August 23, 1973, Blue Coal Corporation applied to DER for an amendment to an existing surface mining permit pursuant to the SMCRA for an operation located approximately one (1) mile northeast of Glen Lyon, Newport Township, Luzerne County, also referred at as Wanamie #19 Colliery - 14 Plane (#30-83).

4. Prior to amendment, Permit #30-83 consisted of 22.5 acres with existing bonding of $22,500.

5. Blue Coal by its August 1973, application proposed to increase the size of the permit area to 53.7 acres, adding 31.2 acres to the permit.

6. Of the 31.2 acres added, 23.2 acres were bonded by Bond SM 1001 at $1,000 per acre for the purpose of allowing Blue Coal to strip coal at depths greater than sixty feet; the remaining 8 acres were bonded at $500.00 per acre.

7. Blue Coal submitted to DER Rockwood Bond SM 1001 in the amount of $27,200 in order to bond the operation at Permit #30-83, which was calculated as per finding of fact 6, on the basis of the 31.2 acres amendment.

8. A permit was issued December 13, 1973 by the DER for this amended permit.

9. A copy of the permit was sent to Rockwood and received by Rockwood on December 17, 1973.

10. Said permit memorialized the 31.2 acre amendment and indicated that the increased acreage and mining plan was bonded in part by Bond SM 1001 in the amount of $27,200.

11. Rockwood sent a letter to DER on February 26, 1974 requesting a confirmation on the amount of Bond SM 1001.

12. The DER responded to Rockwood's letter on March 6, 1974 indicating that the correct amount of the bond held by the DER was $27,200 and enclosed a copy of the bond.

13. Rockwood introduced a Bond SM 1001 bearing a face amount of $20,400.00. There are signs of erasure in the amount section of both the Rockwood and DER bonds but only DER's bond has a face amount which is consistent with the permit application filed by Blue Coal and the permit issued by DER.

14. Rockwood's practice in 1973 consisted of issuing blank surety bonds to its agents to fill in, in accordance with the mine permittee's requirements.

15. Rockwood did not communicate in any manner with DER or Blue Coal after receiving the DER's March 6, 1974 letter.

16. The condition of Rockwood's obligation on Bond SM 1001 was that Blue Coal comply with, *inter alia*, all the requirements of Act 418 (SMCRA) and Permit #30-83.

17. On or about June 8, 1973, Blue Coal applied to DER for an amendment to an existing surface mining permit for an operation in Newport Township, Luzerne County approximately 0.5 miles northeast of Glen Lyon, Pennsylvania, also referred to as Retreat Mountain West (#30-6).

18. Prior to amendment, Permit #30-6 consisted of 33.8 acres with existing bonding of $22,900.

19. Blue Coal by its June 1973 application proposed to increase the size of the permit area to 42.3 acres, adding 8.5 acres.

20. The mining plan submitted by Blue Coal indicated that the new 8.5 acres would all be stripped at depths greater than sixty feet with appropriately higher bonding at $1,000 per acre provided by Bond SM 1004.

21. Blue Coal submitted Rockwood Bond SM 1004 in the amount of $8,500 in order to bond the operation at Permit #30-6.

22. A permit was issued on December 6, 1973 for this amended permit.

23. The condition of Rockwood's obligation on SM 1004 was that Blue Coal comply with, *inter alia*, all the requirements of Act 418 (SMCRA) and Permit #30-6.

24. Permits #30-6 and #30-83 were active mining operations prior to the 1973 amendments and continued to be active thereafter until approximately November and March 1976 respectively.

25. From 1973 to the date of bond forfeiture, the DER made numerous attempts to keep Blue Coal in compliance with its backfilling operations.

26. Inspector William Sanders issued Blue Coal a written order on December 17, 1973.

27. Said order stated that the backfilling at Permits #30-6 and #30-83 was falling behind and needed to be increased.

28. As the result of Blue Coal's continued failure to comply with its backfilling obligations at, *inter alia*, Permits #30-6 and #30-83 and its removal of backfilling equipment, the DER initiated official enforcement action in June of 1974 in Luzerne County.

29. The DER entered into a consent decree with Blue Coal in settlement of its enforcement action.

30. The consent decree provided that Blue Coal would either work its sites and bring backfilling into compliance or cease work and reclaim the sites, including Permits #30-6 and #30-83.

31. The consent decree further required Blue Coal to keep certain equipment on site.

32. Because of Blue Coal's failure to comply with the terms of the consent decree, the DER filed a contempt petition in Luzerne County Court of Common Pleas in April 1975.

33. Blue Coal's ownership and officers changed shortly after the contempt petition was filed, and DER agreed to a temporary moratorium in order *inter alia* to allow the company to reorganize.

34. As the result of the DER's enforcement efforts, additional restoration work was performed by Blue Coal on all its permits, including Permits #30-6 and #30-83.

35. Blue Coal was not in official violation at the time the Permits #30-6 and #30-83 were amended in December 1973.

36. Blue Coal failed to reclaim Permit #30-83 in the manner required by its permit and the SMCRA.

37. The unfulfilled reclamation obligation at Permit #30-83 includes two open stripping pits of 52,500 cubic yards and 145,000 cubic yards; several small pits; spoils piles of 200,000 cubic yards; and grading and planting of the entire 53.7 acres including the area covered by Bond SM 1001.

38. Blue Coal affected the entire area of Permit #30-83 after it was amended in December 1973 by its surface mining activities including the area covered by Bond SM 1001.

39. Blue Coal further failed to reclaim Permit #30-6 in the manner required by its permit and the SMCRA.

40. The unfulfilled reclamation obligation at Permit #30-6 includes a large open stripping pit of 435,600 cubic yards and spoil piles of 630,000 cubic yards, both of which occupy approximately 14.33 acres on the westerly side of the permit area; and grading and planting the entire 42.3 acres including the area covered by Bond SM 1004.

41. Blue Coal affected the entire area of Permit #30-6 after it was amended in December 1973 by its surface mining activities including the area covered by Bond SM 1004.

42. The large unreclaimed pit shown by Commonwealth's exhibit 17 is within the 8.5 acres added to Permit #30-6 by Amendment #1 in December 1973 and bonded by Bond SM 1004.

DISCUSSION

The starting point for this discussion is the assignment of the burden of proof concerning the forfeiture of the bonds (upon which Rockwood is surety) to DER. Pursuant to 25 Pa. Code §21.101 the party asserting the affirmative of any issue bears the burden of proof on this issue. In its letter of November 21, 1978 DER asserted that it was forfeiting *inter alia* Bonds SM 1001 and SM 1004 because Blue Coal had affected bonded areas during surface mining and had failed to reclaim these areas in accordance with the Surface Mining and Conservation and Reclamation Act, 52 P.S. §1396.1 *et seq.* (SMCRA). Similar assertions were made by DER when it forfeited Bond SM 1006 (wherein Northwest was the Principal). Thus, DER bears the burden of proof on these issues.

Moreover, bond forfeitures, while not specifically addressed in 25 Pa. Code §21.101(b), are similar to the types of enforcement activities listed therein (civil penalty complaints; license and/or permit revocations, orders) with respect to which DER is assigned the burden of proof. In addition, in *American Casualty Company of Reading, Pennsylvania v. DER*, EHB 78-157-S issued January 16, 1981, this board also assigned the burden of proof on the above issues to DER.

Having decided that DER has the burden of proof on the above issues, the next consideration is whether it has properly shouldered this burden. In

this regard, DER relied largely upon the testimony of Mr. William A. Sanders as well as certain aerial photographs and overlays.

Mr. Sanders testified with regard to each of the pertinent permit areas that Northwest or Blue Coal, respectively, had affected all portions of the permitted area and had failed to reclaim any portion of any of the permitted areas in accordance with SMCRA.

Mr. Sanders' testimony was bolstered by aerial photographs with overlays of Permit areas 30-83, 30-6 and 31-7, Exhibits 2, (78-168), 5 and 3, (78-166), respectively, which clearly show that as of October 30, 1978 each of these permit areas had been affected by mining and that none of these permit areas had been replanted or in part even regraded. Commonwealth's exhibit 17, a photograph which shows a large open pit on permit area 30-6, is also strong proof of the operator's failure to reclaim that site, at least as of June 1977 when it was taken.

Rockwood objected to the entry of these photographs since the bonds were not forfeited until November of 1978 and all photographs were taken prior to this date. However, in view of Mr. Sanders' uncontroverted testimony that mining had ceased and that mining equipment had disappeared from each permit area prior to November 1978 and his further testimony that conditions did not change at any of the permit areas between the dates the photographs were taken and the forfeiture date, and, finally, in view of Rockwood's failure to introduce any testimony to show that conditions had improved at any of the said permitted areas between the photograph dates and the forfeiture date, this board finds that DER has successfully borne its burden of proof that the bonded areas were affected by Rockwood's mining activities and were not reclaimed as per SMCRA--the obligation specified on each bond.

Rockwood maintains that DER must prove an additional element in order to sustain its bond forfeitures, i.e., the actual costs of restoration for each

of the permit areas. Although DER did present testimony concerning restoration unit costs, its evidence in this regard is not site specific. However, DER argues that since bonds filed by mine operators to ensure compliance with SMCRA are penal, rather than indemnification, bonds it does not need to demonstrate damages to claim the full face value of these bonds.

The cases cited by DER and Rockwood are those cited and discussed in *American Casualty, supra*. Moreover, the provisions of SMCRA relating to the bonds and the language of the bonds themselves are virtually identical to the bonds and provisions of the Anthracite Act construed in *American Casualty, supra*. Thus, the conclusion reached in *American Casualty, supra*, that the bonds therein were penal bonds, pertains with equal vigor here.

Rockwood raises another argument with regard to the nature of the bonds not addressed in *American Casualty, supra*. Rockwood correctly points out that liability accrues upon its bonds in proportion to the area of land affected at a rate set forth per acre in the bond and that liability can be released upon said bonds on a proportional basis. Rockwood argues that this is an indication that the bonds are not intended to be penal. However the rate of accrual, has no affect where, as here, the entire bonded area has been affected by mining operations. As to the release of a portion of the bond, the board notes that, pursuant to 52 P.S. §1396.4(g) of SMCRA, an operator who has completed a separate step of his approved reclamation plan may request the release of the portion of the bond which relates to the completed portion of the reclamation plan. Conversely, unless or until released by the DER, the bonds remain in full force and effect and, of course, there is no testimony here that any portion of any of the bonds at issue has been released.

Having determined that DER has borne its burden of proof in this matter the only remaining issue is whether Rockwood has fashioned a successful defense

out of DER's alleged failure to adequately enforce SMCRA against Blue Coal and Northwest.

The board has some difficulty in addressing this issue because Rockwood's allegations have been discussed by counsel for DER and Rockwood in the context of two very separate legal theories. Rockwood's brief discusses a maxim of surety law, i.e., release of the surety by conduct of the obligee, while DER's brief discusses estoppel by laches. We shall attempt to evaluate both theories.

Assuming for the sake of exploring Rockwood's theory, that DER failed to enforce SMCRA against Blue Coal and Northwest in a timely and effective manner, it is, nevertheless, not clear that Rockwood has stated an adequate defense in the instant action.

A surety is discharged from liability under a bond when the creditor violates or injures the rights of the surety whether such injury arises from some positive act of the creditor or the creditor's failure to perform some act that it was the duty of the creditor to perform. 72 C.J.S. Principal and Surety §148. On the other hand, the same section of C.J.S. states that mere indulgence, forbearance, or passiveness on the part of creditor where there is no duty to act, will not release the surety. Thus, the question for resolution here is what, if any, specific duty did DER owe to Rockwood to expeditiously enforce SMCRA as against Blue Coal or Northwest.

None of the cases cited by Rockwood sheds any light on this subject. *Girard Trust Company v. Aetna Casualty and Surety Company*, 11 D & C 247 (1928) involved performance bonding on a mineral lease rather than a bond given to insure compliance with a statute. Moreover, in *Girard, supra*, the obligee had committed clear breaches of its duty to the surety, first, by not informing the surety of the principal's past history of defaulting on the same lease and secondly, by ejecting the principal from the leased premises thereby making it impossible

for the principal to perform. Obviously, this case does not support the proposition that DER owed some specific duty to Rockwood.

The other cases cited by Rockwood do not even involve mining as did the *Girard* matter. In *First National Bank and Trust Company v. Stolar*, 130 Pa. Superior Ct. 480 (1938) the creditor-bank affected the value of the surety's undertaking by subordinating the Judgement Lien of the surety to a (later-filed) mortgage on the same property. In *Beaver Trust Company v. Morgan*, 259 Pa. 567 (1918) the creditor-holder of a note applied collateral pledged as security for a note upon which there was a surety to the payment of another obligation of the maker, without consent of the surety, thereby releasing the surety from liability under the note *pro tanto* the amount of collateral.

Obviously, none of the above cases supports Rockwood's proposition that DER had a duty to Rockwood to enforce SMCRA against Blue Coal or Northwest. The only other case cited by Rockwood to support this position *Koehler v. Schwartz*, 382 Pa. 352 (1955) is woefully off point. In *Koehler, supra*, the court held that the plaintiff motorist who was struck by a truck which had run a red light was not contributorily negligent because he had the right to rely on the truck-driver's compliance with the law (by stopping at the light).

Despite the fact that some persons may feel that they have been run over by DER, DER is not a truck nor is Secretary Jones a truck-driver. To state the, would be, analogy clearly demonstrates its weakness. Moreover, even if DER has a duty not to violate SMCRA or any other law this does not mean that DER has a duty to actively enforce SMCRA. More to the point would be *George Eremic v. DER and Chambers Development Company, Inc.*, 1976 EHB 324 wherein this board held that DER's exercise of its prosecutorial discretion was not a reviewable action, i.e., no party had a right to force DER to enforce a law against a third party.

DER's characterization of Rockwood's theory as estoppel by laches also fails to provide Rockwood an adequate defense.

DER's simple assertion that estoppel cannot be utilized against DER is not supported by *Commonwealth, DPW v. UEC, Inc.*, 483 Pa. 503, 397 A.2d 779, 785 fn. 6 (1979). In fact, on page 785 of *UEC, supra*, the Pa. Supreme Court specifically sanctioned the use of estoppel by laches even against the Commonwealth. *Commonwealth v. Western Maryland R.R. Company*, 377 Pa. 312, 105 A.2d 336 (1954), cited in footnote 6 on that page and all the other cases cited therein, involved attempts to estop the Commonwealth from collecting taxes where the Commonwealth had, through mistake or indulgence failed to collect such taxes in the past.

In other words, the Commonwealth's agents through their conduct cannot change the law. One who is subject to regulation, like one who is subject to tax, cannot avoid it on the basis of past indulgence. Likewise, neither Blue Coal or Northwest could avoid the present application of SMCRA against them even if they proved that SMCRA had not been applied to them in the past. Perhaps, however, Rockwood, is in a different position. It does not seek to prevent the exercise of a governmental function *per se* but merely to escape liability on its bonds. Moreover, the Pennsylvania Supreme Court actually applied the doctrines of estoppel, laches and waiver against the Commonwealth in *Commonwealth, DER v. Barnes & Tucker Coal Co.*, 455 Pa. 392, 319 A.2d 871 (1974) (although in *Barnes & Tucker* the Court held that on the facts stated therein no laches had been made out). Thus, it is not clear that Rockwood is legally stopped from raising this argument.[1]

Rockwood still has two insurmontable problems regarding its estoppel by laches argument. First, in order to make out an estoppel, Rockwood must show *inter alia* that it relied on DER's "promise" to enforce SMCRA against Blue Coal and Northwest, that Rockwood changed its position in reliance upon this

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1. As to Rockwood's standing to raise this argument, the case cited by DER simply does not support the proposition for which it is stated. Clearly, Rockwood's interest in the bond forfeiture, unlike that of the township in the cited case, is immediate, direct and substantial.

"promise" and that it was prejudiced thereby. See 14 P.L.E. Estoppel, §523, 24 and 25.

All of DER's alleged failures to enforce SMCRA occured after October 29, 1973, the latest date of execution of any of the three bonds by Rockwood. Thus, Rockwood could not have relied upon or been prejudiced by the alleged conduct.

Moreover, estoppel is an affirmative defense which must be pleaded and proven by the party claiming the estoppel 14 P.L.E. Estoppel §31. Here, Rockwood introduced no witnesses of its own to demonstrate DER's alleged non-feasance or malfeasance but rather attempted to make out its case on this point by cross-examining DER's witnesses. However, a fair summary of the evidence on this issue reveals that DER repeatedly issued verbal and written orders to the recalcitrant principals and, with regard to Blue Coal, initiated and pursued constant enforcement actions which were, at least partially, effective in restoring a portion of the total acreage affected by Blue Coal's operations. Moreover, Blue Coal was not in official violation at the time Permits #30-6 and #30-83 were issued in December 1973 nor was Northwest at the time its permit was issued. Given all of these uncontraverted facts it is clear that Rockwood has failed to meet its burden of proving either the affirmative defenses of surety release of or estoppel by laches.

The remaining issues raised by Rockwood may be easily disposed of. Rockwood argues that DER is seeking to impose liability on it for areas in addition to those covered by the bonds in question. Rockwood's argument might have some force except that Mr. Sanders' uncontraverted testimony establishes that Rockwood affected all of the area covered by each bond and failed to reclaim all of the area covered by each bond. Thus, this board need not and does not consider the state of completion off the bonded areas.

Finally, Rockwood seeks reformation of Bond SM 1001 from the face value of $27,200.00 which appeared on the bond turned in to DER by Blue Coal to $20,400.00 which appeared on a copy of a bond bearing the same number introduced into evidence by Rockwood.

Rockwood does not dispute that DER received the $27,200.00 bond or that the amount thereon was the proper amount to cover the 31.2 acres of land mentioned therein or that DER never received the $20,400.00 bond or that the $27,200.00 bond included the signature of David N. Oppenheim, Secretary of Rockwood Insurance Company and a Power of Attorney empowering Mr. Oppenheim to bind Rockwood. Moreover, the evidence shows that Rockwood's bonds, including Bond SM 1001, were released blank to Rockwood's agent, Robert Price, to be filled in by him to cover the permit requirements so that the board can infer that any mistake concerning the bond amount was caused by Rockwood's agent. Finally, it is clear that DER gave notice to Rockwood of the face amount of $27,200.00 by copying Rockwood with the Permit 30-83. In response to this notice Rockwood did send DER a letter of inquiry. However, after sending DER said letter of inquiry concerning the face amount of Bond SM 1001 on February 26, 1974 and receiving DER's reply and a copy of the $27,200.00 bond on March 6, 1974, Rockwood took no further action. Given these facts it is clear that Rockwood does not qualify for reformation of Bond SM 1001 even assuming that this board could grant it.

Reformation might be granted where both parties intended the bond to bear a face value of $20,400.00. But here it is clear that DER always intended the face amount of Bond SM 1001 to be $27,200.00. Moreover, it is clear here that no conduct on the part of DER or any of its agents can be characterized as misleading Rockwood regarding the face amount of the bond.

CONCLUSIONS OF LAW

1. This board has jurisdiction over the subject matter of these proceedings and the parties thereto.

2. Surety Bonds SM 1001, SM 1004 and SM 1006 relating, respectively, to Mining Permits 30-83(A2), 30-6 and 81-7(c) were properly forfeited by DER in their full face amounts.

3. DER's conduct did not release Rockwood as surety on any of the said bonds.

4. DER is not estopped to forfeit any of the said bonds.

5. Rockwood is not entitled to reformation of Bond SM 1001.

ORDER

AND NOW, this 18th day of February, 1981, appellant is ordered to make full and prompt payment to DER of each of the following amounts:

a) Bond SM 1001 Permit #30-83(A) $27,200.00

b) Bond SM 1004 Permit #30-6 $8,500.00

c) Bond SM 1006 Permit #81-7(c) $4,500.00

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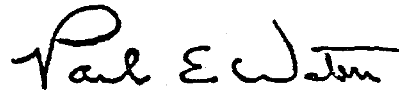
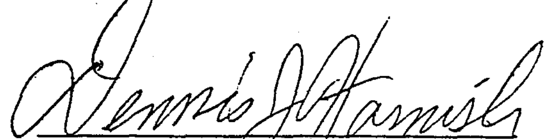


PAUL E. WATERS
Chairman



BY: DENNIS J. HARNISH
Member

DATED: February 18, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

BOARD OF SUPERVISORS OF SOLEBURY TOWNSHIP

Docket No. 80-183-W

Pa. Sewage Facilities Act
25 Pa. Code §71.17

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
PAUL, JOHN and WILLIAM BENTLY, Intervenors

ADJUDICATION

By: Paul E. Waters, Chairman, April 30, 1981

This matter comes before the board as an appeal from an order issued by DER pursuant to the Penna. Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, *as amended*, 35 P.S. §750.1, *et seq.* and regulation §71.17 granting a private request by Paul C. Bently, et al., Intervenors, to require appellant Solebury Township, to amend its township sewage plan. Although a preliminary plan for the Intervenor's development had been approved by the Township, the final subdivision plan was rejected. That decision is presently on appeal to the Common Pleas Court. It is the fact that the subdivision plan was not approved, that serves as the basis for the township's appeal from DER's previously mentioned order.

FINDINGS OF FACT

1. The appellant is Solebury Township, a township of the Second Class, located in Bucks County, with offices on Sugan Road, Solebury, Pennsylvania.

2. The appellee is the DER, the agency of the Commonwealth authorized to administer the provisions of the Penna. Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, Section 1 *et seq., as amended.*

3. The Intervenors, owners of the tract on which the Highland Woods subdivision was proposed, were permitted to intervene in the township's appeal.

4. On May 21, 1975, the Board of Supervisors of Solebury Township, passed a resolution adopting the "Official Sewage Facilities Plan Revision Study", dated April, 1975, as the Official Sewage Facilities Plan for the township.

5. On January 28, 1976, the Department of Environmental Resources approved the plan as the Official Sewage Facilities Plan for the township.

6. On October 4, 1978, the Board of Supervisors of appellant, by resolution, approved the preliminary subdivision plan submitted by the Intervenors for a development known to be Highland Woods, consisting of 61 lots on which single family residences were to be constructed. The aforementioned resolution, provides in pertinent part:

> RESOLVED, that the Preliminary Plan of Highland Woods, being Plan A-240, be approved as being in accordance with the Solebury Township Zoning Subdivision Ordinance approval, however, is conditioned in that Solebury Township reserves the right to question the proposed sewage disposal and, further, reserves the right not to amend its Official Sewage Facilities Plan as provided under the Pennsylvania Sewerage (sic) Facilities Act, known as Act 537.

7. On November 29, 1979, Highland Woods petitioned the DER pursuant to 25 Pa. Code, Section 71.17 and the Sewage Facilities Act to order the township to revise its Sewage Facilities Plan to provide for Highland Woods Development. The proposed method of sewage disposal was a community subsurface disposal system.

8. On or about April 11, 1980, the developers submitted final subdivision plans for the Highland Woods Subdivision to the Township of Solebury.

9. On September 2, 1980, the Board of Supervisors of the Township of Solebury adopted a resolution rejecting the final plans of Highland Woods. Said resolution lists 27 failures of the plan to comply with the Township Subdivision and Land Development Ordinance. Six of the reasons for denying the final plan were sewage related, and 21 were non-sewage related.

10. On September 25, 1980, the DER issued an order directing the Township of Solebury to revise its Official Sewage Facilities Plan to provide for sewage facilities services for the Highland Woods subdivision.

11. Prior to September 25, 1980, the DER was aware of the fact that the Board of Supervisors of Solebury Township had denied final subdivision approval to the intervenors for the Highland Woods Subdivision.

12. On September 29, 1980, the developers perfected a timely appeal from the decision of the Board of Supervisors of Solebury Township, rejecting their proposed final plan for Highland Woods, which appeal is presently pending before the Court of Common Pleas of Bucks County.

13. The 21 non-sewage related reasons for denying the final plan of Highland Woods were all "engineering" reasons.

14. The site in question is currently a farm with a farmhouse that is served by an on-lot system that is presently adequate to serve that farmhouse.

D I S C U S S I O N

The question that we are called upon to answer by this proceeding, simply stated, is whether DER may properly order an Act 537 plan amendment notwithstanding the fact that the final subdivision plan in question is in litigation. In *Borough of Sayer v. DER* 1979 EHB 25 we discussed a similar question. In that case it was a building permit that was in litigation, and DER ordered a revision to the Borough's Official Sewage Facilities Plan. We there said:

> "In May of 1978, the borough revoked the building permit and the legality of that action is now before the Bradford County Court. Appellant would bootstrap its way in this matter by arguing that we should sustain the appeal because intervenors have no permit and the proposed construction would violate local zoning laws. We are urged to disregard the court order, as appellant has done, and "...not simply to take the Court Order at face value". We find this argument all the more incredible because appellant cites the *Fox* case[5] for the proposition that the department is not to second guess the validity of local decisions properly made in the areas of planning and zoning. Yet, that is exactly what it asks us to do with regard to the Bradford County Court. We will not. When and if the local court enters a new order on the action now before it, we would expect the DER to act consistantly [sic] with it.[6]
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> ---
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> 5. *Community College of Delaware County v. Fox* 20 Pa. Commonwealth Ct. 335, 342 A.2d 468 (1975).
>
> 6. If the Bradford County Court upholds the building permit revocation and denies the zoning change, the Act 537 amendment will be of no help to intervenor. If, on the other hand, the court upholds its prior order, we would expect all parties to act accordingly."

It was and is our view that local subdivision matters must be resolved by the County Court and not this board. The real question has to do more with procedure than substance. It is a question of *when* and in what order the various legal issues should be addressed. A case perhaps even more to the point is *Betz v. DER* EHB Docket No. 79-173-W (issued July 23, 1980). There, as in this case, the subdivision plan had been rejected by the Township, for a number of reasons, some of which were related to sewage disposal and others which were not. The subdivision issue was on appeal to the Common Pleas Court as here. We decided in *Betz* that an

appeal to this board is proper when some of the issues involved in the subdivision dispute still in litigation, are sewage related problems.

In discussing this issue, we said:

> "If the municipality's refusal to approve appellant's subdivision plan is because of sewage disposal problems, then appellant would be in the "Catch 22" situation which Commonwealth Court deemed unconstitutional in *Commonwealth of Pennsylvania, DER v. Trautner* 19 Pa. Commonwealth Court 116, 338 A.2d 718 (1975). Thus, the first question addressed in this adjudication is whether the Township's controlling reason for refusing to approve appellant's subdivision plan was a sewage disposal problem.
>
> We believe the question raised does not lend itself to a categorial answer. In the first instance, it is the Township that is given the authority for land use planning, under the Municipalities Planning Code 53 P.S. §10101 *et seq. Community College of Delaware County v. Fox* 342 A.2d 468 (1975). Thus, it is clear that generally DER could not reach the question of whether a particular sewage disposal method for a development is appropriate unless and until the local municipality has approved the basic land use or subdivision plan itself. The complicating factor in this case, is that one of the reasons the subdivision proposal was rejected was because of the sewage disposal method that was indicated. As to the other stated reasons, it was unclear whether these were considered as important as the sewage disposal issue. Under these circumstances, a request to DER pursuant to 25 Pa. Code 71.17 does seem appropriate for the purpose of resolving that issue."

In light of the foregoing, we are satisfied that the best procedure requires that we consider an appeal from a DER order concerning a private request under §71.17 whenever there are sewage disposal issues outstanding. The fact that there are also other non-sewage disposal issues will not defeat our jurisdiction, and conversely our exercise of jurisdiction can not defeat the jurisdiction of the Common Pleas Court in regard to the subdivision issues being there litigated. We do believe, however, that the DER order in such cases, should be conditioned on a satisfactory resolution of the subdivision matters. Rather than a remand for that purpose, we will add this condition to our order.

CONCLUSIONS OF LAW

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

2. When a municipality rejects a subdivision plan for reasons, some of which are sewage related under the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1, *et seq*. and this rejection serves as the basis to deny an Act 537 plan amendment, an aggrieved party may properly pursue the procedure set forth in Regulation 25 Pa. Code §71.17.

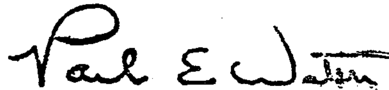
3. When DER orders a municipality to amend its Act 537 Plan pursuant to a private request, such order is subject to any limitations properly placed on the municipality by its subdivision ordinances and orders of the local Court of Common Pleas.

4. Under the facts of this case, DER properly ordered appellant Solebury Township to revise its Official Sewage Facilities Plan to provide sewage services for intervenors' development. That order is subject to any subsequent order of a Court of proper jurisdiction which could alter this requirement, and should be so conditioned.

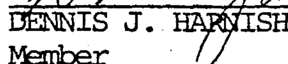
ORDER

AND NOW, this 30th day of April, 1981 the order of DER issued on September 25, 1980 is hereby amended to be conditional upon the issues raised in the Court of Common Pleas of Bucks County being adjudicated in intervenors' favor, and as so amended the order is sustained and the appeal of Solebury Township is hereby dismissed.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman



DENNIS J. HARNISH
Member

DATED: April 30, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

ALBERT M. COMLY AND
ELIZABETH H. STEELE

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and WICHARD SEWER COMPANY, INC., Permittee

Docket No. 80-160-H

Clean Water Act
Clean Streams Law
NPDES Permit

ADJUDICATION

By: Dennis J. Harnish, Member, May 13, 1981

This matter is before the board on the appeal by certain residents of Horsham Township, Montgomery County from DER's issuance of NPDES permit 0050253 and water quality management permit 4680407 to the permittee, Wichard Sewer Company, Inc. These permits allow the permittee to construct a sewage treatment plant to service a proposed subdivision known as Country Springs Development. DER's plan approval for this plant was challenged and upheld at *E. Arthur Thompson, et al v. Commonwealth of Pennsylvania, DER, et al*, EHB Docket No. 79-185-H issued October 16, 1980. Reference can be made to this adjudication for a further description of the development and area. Hearings were held on this matter on February 2 and 3, 1981 and briefs were received from the parties on or about April 1, 1981.

FINDINGS OF FACT

1. Appellant, Albert M. Comly, is an adult individual and resident of Horsham Township, with an address of 954 Limekiln Pike, Maple Glen, PA 19002.

2. Appellant, Elizabeth H. Steele, is an adult individual and resident of Horsham Township with an address of 711 Oak Terrace Drive, Ambler, PA 19002.

3. Appellee-permittee, Wichard Sewer Company, Inc., is a duly organized Pennsylvania corporation with offices located at P.O. Box 546, Willow Grove, PA 19090 and is a public utility chartered to provide sewer service to a certain residential housing development for 648 dwelling units on approximately 8,000 square foot lots which development is known as Country Springs.

4. In September of 1979 DER received a NPDES application from permittee. Notice as to the 30-day comment period pertaining to this NPDES application was published in the Pennsylvania Bulletin, Volume 9 Number 40 on October 6, 1979 pursuant to 25 Pa. Code Section 92.61.

5. Following said 30-day comment period on November 30, 1979, DER issued to permittee, NPDES permit number 0050253.

6. Notice of the issuance of the NPDES permit was published in the Pennsylvania Bulletin, Volume 9, Number 51 on December 22, 1979.

7. The NPDES permit is also called a Part-I permit being the first permit issued in a two step procedure the second phase of which is the water quality management permit or construction permit. The Part-I permit authorizes a discharge to the waters of the Commonwealth; Part-II is a construction permit for the facilities designed to achieve the discharge authorized by the Part-I permit.

8. Appellee made application for its construction permit (Part-II permit) on January 21, 1980.

9. Appellants filed their instant appeal as it pertains to the NPDES permit some nine to ten months after the time period for taking such appeal provided by the board's rules had lapsed.

10. Appellants have presented no evidence that DER representatives did not properly issue both the NPDES or construction permit in accordance with the standards set down by the Clean Streams Law and the rules and regulations of the Department of Environmental Resources.

11. The effluent from the proposed package treatment plant, the criteria for which is contained in the NPDES permit, will be as good as or better than the quality of the stream water presently in Park Creek.

12. Pursuant to the construction permit issued to permittee, the sewage treatment plant has been designed so as to enable it to meet the standards for effluent quality as set forth in the NPDES permit.

DISCUSSION

The instant appeal is from two separate actions of DER. The first of these actions was the issuance of NPDES permit 0050253 to the permittee. This action took place on or about November 30, 1979. The second action was the issuance of water quality management permit 4680407 on or about October 3, 1980 to the same permittee. The NPDES permit authorized a discharge of approximately 227,000 gpd (.23 mgd) of sewage at a specified level of treatment into Park Creek at a location where the Philadelphia Electric Company right-of-way

crosses Park Creek near Limekiln Pike. The water quality management permit authorized construction of sewage treatment facilities designed to achieve the level of treatment set forth in the NPDES permit.

There has been no allegation that the appeal of the water quality management permit was untimely and consequently, the permittee doesn't challenge the appellants' right to raise issues about the construction of the proposed sewage treatment facilities. However, the focus of the appellants' attack is upon the proposed discharge of sewage into Park Creek; they introduced no evidence concerning the construction of the plant.

The permittee has moved to quash this part of the appellants' appeal. The permittee's initial motion to quash was addressed in an Opinion and Order of this board entered at the above-caption on December 4, 1980. While this Opinion and Order is incorporated herein, the gist of the opinion is that the permittee had failed to establish proof of publication of the issuance of the said NPDES permit in the Pennsylvania Bulletin and therefore had failed to establish a condition precedent to the operation of 25 Pa. Code §21.52(a), this board's rule regarding the appeal period.

The permittee renewed its motion and offered in support thereof proof of publication of the issuance of NPDES permit no. 0050253 in the December 22, 1979 Pennsylvania Bulletin. Appellants did not challenge the accuracy of this proof of publication and appellants acknowledge that their appeal was filed long after the expiration of the 30-day appeal period.

It seems clear therefore that pursuant to §21.52(a) this board has no jurisdiction to consider the NPDES permit unless appellants' appeal can be considered *nunc pro tunc*.

In *Sharon Steel Corporation v. DER*, 1978 EHB 205, this board discussed the showing necessary to establish a right to appeal *nunc pro tunc*. Although

the board's holding in *Sharon, supra*, was directed to §21.21(e) of its old rules rather than §21.53 of its present rules, a comparison of these sections reveals that they are virtually identical. Therefore, the authority and reasoning from *Sharon, supra*, set forth immediately below controls the present matter.

> "...Under and by virtue of the provisions contained in Section 21.21(e) of the Rules of Practice and Procedure before the Environmental Hearing Board, 25 Pa. Code §21.21(e), we have the authority to grant the relief requested. In that section, it is provided, as follows:
>
> > '(e) The board upon written request and for good cause shown may grant leave for the filing of an appeal nunc pro tunc; the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in Courts of Common Pleas in the Commonwealth. No petition may be granted where a statutory period for filing an appeal with the Board has passed.'
>
> In the leading case of *Nixon v. Nixon*, 329 Pa. 256, 198 A. 154 (1938), the Supreme Court of Pennsylvania, speaking through Chief Justice Kephart, provided insight into what events would and would not amount to good cause for the allowance of an appeal *nunc pro tunc*. It was stated, pp. 259-260, as follows:
>
> > 'But, as this Court has indicated, the legislative purpose is not to foreclose a party who satisfactorily explains his delay. However, the occasion must be extraordinary and must involve fraud or some breakdown in the court's operation through a default of its officers, whereby the party has been injured. There can be no extension of time as a matter of indulgence: *Schrenkeisen v. Kishbaugh*, 162 Pa. 45, 48. Such excuses as a client's illness (*Marcus v. Cohen, supra*), or neglect of an attorney (*Ward v. Letzkis*, 152 Pa. 318; *Wise v. Cambridge Springs Borough, supra*, at p. 144) are insufficient. Fraud, on the other hand (*Zeigler's Petition*, 207 Pa. 131; *York County v. Thompson*, 212 Pa. 561) or its equivalent, 'the wrongful or negligent act of a court official' (*Singer v. Del., L. & W. R. R. Co.*, 254 Pa. 502, 505) may be a proper reason for holding that, as to the injured person, the

> statutory period does not run and the wrong may be corrected by means of a petition filed nunc pro tunc within a reasonable time. As was stated in *Horn v. Lehigh Valley R.R. Co.*, 274 Pa. 42, 44, in reference to a statute limiting claims for workmen's compensation: 'While the governing sections are mandatory, ...we have held, where a party has been prevented from doing an act through fraud or circumstances that amount to fraud, the court might extend the time within which to do the act: ...' And, in *Scwartz Bros v. Adams Express Co.*, 75 Pa. Super. Ct. 402, 403, it was said: Where a party has been prevented from appealing by fraud or by the ignorant or negligent act of a court official, it has been held that the court has power to extend the time for taking an appeal.''
>
> The principle contained in *Schwartz Bros. v. Adams Express Co., supra*, which is recited in the above quote from *Nixon v. Nixon, supra*, was applied in *Flynn v. Unemployment Compensation Board of Review*, 192 Pa. Superior Ct. 251, 159 A.2d 579 (1960). In *Flynn, supra*, a claimant for unemployment compensation whose claim had been rejected by the Bureau of Unemployment Compensation and who had been given written notice of her right to appeal, claimed that she did not timely perfect that appeal because the representative from said bureau, with whom she had been dealing, told her that she could not make the appeal and that she did not have 'a leg to stand on'. The court held that there should be an evidentiary hearing to determine whether claimant's allegations were true and applied the principle that where a claimant is unintentionally misled by an official who is authorized to act in the premises, the time for appeal could be extended to relieve an innocent party of injury consequent on such misleading act."[1]
>
> *Sharon, supra*, 210, 211 (emphasis added)

A portion of the evidentiary hearing in this matter was devoted to the question of timeliness. The testimony of one of the appellants, Mrs. Elizabeth Steele and several DER employees, demonstrates that in late August or early September, 1979 Mrs. Elizabeth Steele first contacted DER's Norristown Office

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1. The test set forth above was approved by Commonwealth Court at *Sharon Steel Corporation v. DER*, 28 Pa. Commonwealth Ct. 607 (1977) and the matter was remanded to the board for an evidentiary hearing on the question of timeliness.

to express her opposition to the Wichard Sewer Company's proposed sewage treatment plant. Upon visits to the DER office, Mrs. Steele asked for and was shown what was supposedly the entire Wichard file but this file did not contain the permittee's NPDES application which had already been received by DER. During the late fall of 1979, Mrs. Steele continued to contact the Norristown Office. A public meeting concerning the proposed project was scheduled for November 8, 1979 and then cancelled. Mrs. Steele was given notice of 537 plan approval and appealed this action. Following her appeal Mrs. Steele specifically discussed with DER's staff whether such an appeal would stay action on the NPDES permit. During all her discussions with DER employees, Richard L. Hinkle, James P. Ridolfi, Wilbur Paul Stender, Glen K. Stinson and Charles Rehm none of these officials alerted Mrs. Steele to the issuance of the NPDES permit. To the contrary, throughout the Spring of 1980, Mrs. Steele was advised by DER officials orally and in writing that "the permit" was being withheld until the DRBC had approved the project. In fact, it was not until August 27, 1980 that Mrs. Steele received actual notice that the NPDES permit had been issued and she filed an appeal within 30 days of this date.

The permittee points out that the letters of April 17 and 21, 1980 mentioning "the permit", reference the water quality management permit which was, indeed, issued after this date, rather than the NPDES permit. But none of the DER officials informed Mrs. Steele that there was a two-permit system even though Mr. Rehm acknowledged that "Given the time that all this took place, it's quite possible that she was not aware that the two-part system, in fact, came into play."

We feel that by the conduct outlined above the said DER officials unintentionally misled Mrs. Steele into believing that no NPDES permit had

been issued up to August of 1980 when, in fact, such a permit had been issued in November of 1979. Accordingly, under the principles of *Sharon, supra*, the appellants qualify for an appeal *nunc pro tunc*.

Turning now to the merits, the arguments presented in the appellants' post-hearing brief will be addressed in the order raised therein.

The first argument is that DER deprived the appellants of due process under the 14th Amendment to the United States Constitution by failing "to show records, cancelling a public hearing and not notifying appellants of NPDES decision".

Insofar as this argument relates to the records and lack of notice of permit issuance, these omissions do not rise to a constitutional level at least where, as here, DER is not accused of failing to comply with proper discovery requests. These omissions have, however, supported appellants' right to appeal *nunc pro tunc*. As to the lack of a public hearing, the Pennsylvania Supreme Court has held that DER need not hold a hearing prior to its actions due to the opportunity for a hearing before this board. *Commonwealth v. Derry Township*, 351 A.2d 606 (1976).

Appellants' next challenge involves assertions that Horsham Township Well No. 19 which is located within some 200' of the proposed point of discharge (but upstream thereof) would be polluted by backwash from Park Creek after that body of surface water was polluted by permittee's proposed discharge. In the first place Well No. 19 is capped with cement and is double cased to a depth of 21'. The internal casing extends downwards to a depth of 44' thus, the backwash from Park Creek would have to somehow enter the groundwater tapped by Well No. 19 which is at least 150' below the surface.

Since, by the board's rules, the appellants have the burden of proof on this issue they would have to show by substantial evidence that water from Park

Creek would be drawn into Well No. 19 and that Park Creek would be polluted by the proposed discharge before they satisfied their burden.

The only testimony concerning underground flows was that of Mrs. Steele who was not qualified by education or experience to offer opinions on hydrology or hydrogeology. Moreover, even if Mrs. Steele's testimony is totally credited it still doesn't suffice since she testified that neither she nor anyone else could tell from what acquifier Well No. 19 drew water. (N.T. 61) Of course, the same lack of proof undermines the appellants' argument based upon Horsham Township's potential water supply wells 8, 12 and 13.

The main thrust of appellants' case grows out of their obviously sincere and well motivated concern over the impact of the proposed discharge upon the persons using three township parks and one state park abutting Park Creek, as well as upon the residential and industrial wells near to Park Creek, the acquatic life in Park Creek and the wild and domestic animals who utilize the creek for drinking water.

Through the testimony of John T. Carson, Jr., a very well qualified acquatic biologist, appellants attempted to establish that the present water quality of Park Creek is high and that the proposed discharge would pollute the creek. As to the present water quality Mr. Carson testified from a report prepared in the late 60's and early 70's. He admitted that his data was some 12 years out of date and that he would need to do some follow-up work (which he did not do) to see whether the quality of Park Creek had changed. Even conceding, for the sake of argument, however, that the water quality of Park Creek is as high as specified in DER's water quality regulations, 25 Pa. Code Chapter 93, appellants have not carried their burden of showing that the proposed discharge would be likely to cause a violation of the Chapter 93 numbers or would, in any other manner, pollute Park Creek.

Perhaps, because he was retained only very-shortly before the hearing, Mr. Carson had not familiarized himself with the permits at issue or with DER's water quality regulations.

Mr. Carson did testify as to his concern over the discharge of nitrogen, phosphorous and chlorine into Park Creek from the proposed plant. He ably demonstrated that the addition of too much nitrogen and/or phosphorous, especially to a quiet body of water such as Lake Nockamixon, could initiate the biological process of eutrophication which could result in the elimination of a large amount of fish and other acquatic life. However, Mr. Carson was not able to testify that the nitrogen limit set by the NPDES permit would allow the Wichard Sewer Company to put too much nitrogen into Park Creek (N.T. 155 and 156).

Similarly, Mr. Carson could not quantify how much phosphorous would reach Park Creek through the proposed discharge (N.T. 166, 167) nor could he quantify how much phosphorous could be discharged into Park Creek prior to initiation of deleterious effects on fish and other acquatic life (N.T. 164).

Again, with respect to residual chlorine, what is missing in Mr. Carson's testimony is any attempt at quantifying the discharge level of chlorine or connecting that level to the instream level of chlorine necessary to cause harm. Mr. Carson admitted that every sewage treatment plant in Pennsylvania discharges some residual cholorine because chlorine is added by the operators to disinfect the sewage but that the discharge of chlorine does not always cause a problem in the receiving waters (N.T. 158). Mr. Carson offered no testimony concerning the amount of chlorine one could expect from the Wichard plant or upon the concentration of chlorine in Park Creek necessary to cause harm. In fact, to the extent that Mr. Carson testified at all concerning the impact of the proposed

discharge on Park Creek, he admitted that even the Q(7-10) flow of Park Creek at the point of proposed discharge would be 5 to 6 times the discharge flow (N.T. 170) which is much higher than his 1 to 1 rule of thumb (N.T. 143) of stream flow to discharge.

Moreover, Mr. Carson did not assert, let alone establish, that DER violated any statute or regulation in issuing the NPDES permit at issue or that the discharge allowed by this permit would cause any violation of DER's water quality criteria.

For its part DER, through its officials, asserted that it did comply with all relevant law. Mr. Charles Rehm, a qualified sanitary engineer, who worked as DER's chief of planning on the instant permits, testified that Chapter 93 water quality criteria were established by DER for Park Creek in order to protect the use of that creek as a domestic and industrial water supply, as well as for boating, fishing, recreation, stock watering, irrigation and a shelter for the indigenious fish and acquatic life. Moreover, since Park Creek is a water quality limited stream, Mr. Rehm testified DER's permit review process insured that the proposed discharge would not cause any Chapter 93 water quality criteria to be exceeded.

Finally, Mr. Rehm testified as follows on cross-examination:

> "Q And are the criteria established in the Permit, the NPDES Permit, such that the water quality after introduction of the effluent will be as good, if not better, than the present water quality in Park Creek?
>
> A The setting of the effluent quality is to protect all water uses at any given day. The effluent probably will be better than the stream quality.
>
> Q As a result of the criteria which have been established and your knowledge of the quality of the Park Creek and the downstream, do you see any adverse environmental effects which would occur through the operation of this plant provided that it does operate in accordance with the NPDES criteria?

A No. The assumptions that we go under when we are setting up our criteria is that, like I said earlier, the criteria are to protect all water uses and that we have reasonable assurance that under the State's Regulations for maintaining a certified operator at the facility that it — if it functions properly would not have the grade of water quality, then consequently, it would be minimal, if any, adverse environmental effects."

The other arguments raised by appellants merit little discussion. Appellants' arguments concerning the economic impact of exempting Country Springs from Horsham Township's sewer district D were disposed of at Docket No. 79-185-H and cannot be relitigated here.

Appellants' assertion that the instant project does not comport with comprehensive planning fails because under 25 Pa. Code §93.31 the consistency of the Wichard plant with comprehensive planning was validated by the plan approval upheld at Docket No. 79-185-H.

Further, appellants' reliance upon §§71.16 and Article I, §27 of the Pennsylvania Constitution is misplaced since each of these provisions is triggered by at least a modicum of adverse environmental impact which appellants have failed to demonstrate.

Finally, appellants' reliance upon §91.32 is inapposite, first because §91.32 does not operate where there has been compliance with §91.31 and secondly, because §91.32 contemplates the availability of public sewerage facilities within a reasonable period in the area of Horsham Township presently under discussion. No such facilities presently exist and the only thing known about their eventual appearance is that they will not appear before 1984.

CONCLUSIONS OF LAW

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

2. DER has not violated The Clean Streams Law, the Sewage Facilities Act or Article I, §27 of the Pennsylvania Constitution or any other constitutional, statutory or regulatory provision by the issuance of either the NPDES or water quality management permit.

3. DER was not arbitrary or capricious in issuing either of the above said permits.

ORDER

AND NOW, this 13th day of May, 1981, DER's issuance of NPDES Permit 0050253 and water quality management permit 4680407 are sustained and appellants' appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: DENNIS J. HARNISH
Member

DATED: May 13, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

WILMINGTON TOWNSHIP : Docket No. 80-166-H

Sewage Facilities Act
Private Request for Revision

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and C. JOSEPH MOYE, Intervenor

ADJUDICATION

By: Dennis J. Harnish, Member, May 22, 1981

On September 8, 1980 DER, appellee, ordered Wilmington Township, Mercer County, appellant, to revise its Official Act 537 Plan to provide for adequate sewage disposal on a parcel of property located in said Township, and owned by Mr. C. Joseph Moye, intervenor. A hearing was held on March 31, 1981, on the Township's appeal of said order and based on the notes of testimony from said hearing, the exhibits introduced thereat and the briefs of the Township and DER the following adjudication is entered:

FINDINGS OF FACT

1. Mr. C. Joseph Moye is the owner of the real property (Old Miller Farm) which is the subject of the DER order of September 8, 1980 appealed at the above-caption.

2. The Official Mercer County Water and Sewer Plan prepared in 1968 and adopted in 1971 by the Wilmington Township Supervisors, pursuant to the planning requirement of Section 5 of the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §750.1 *et seq.*, designated that the area of the Township on which Old Miller Farm is located, be served by subsurface sewage disposal systems.

3. Seventy-three (73%) percent of the Old Miller Farm lies within a flood plain.

4. The seasonal groundwater table (and/or perched water table) is less than four (4) feet below the bottom of the proposed sewage disposal system on at least seventy-three (73%) percent of the site of the proposed 134 unit development (the development), which is the subject of this proceeding.

5. Because of certain site conditions, including without limitation, groundwater and soil conditions and the location of seventy-three (73%) percent of the Old Miller Farm within a flood plain, the sewage disposal needs of the development cannot be reasonably accommodated by subsurface sewage disposal systems.

6. On May 10, 1980, Clair Robinson, the Sewage Enforcement Officer for Wilmington Township sent a copy of a letter addressed to the Board of Supervisors of Wilmington Township to the department, which acknowledged the inadequacy of subsurface disposal for the said property.

7. In May, 1980, a planning module for land development, calling for a package sewage treatment plant to service the development was submitted to and received by Wilmington Township. This was the only module relating to the development received by Wilmington Township prior to the issuance of the Order which is the subject of this appeal.

8. On July 16, 1980, Wilmington Township (by its solicitor, Joseph J. Nelson) sent a letter to the Department of Environmental Resources rejecting

the planning module for land development relating to the development, and the statement "Concerning the Moye Development", which comprised the Township's comments on the planning module.

9. On July 21, 1980, the department received the letter which is the subject of paragraph 8 above, and Charles Wilt, a Sewage Sanitarian Specialist employed by the department, returned the letter along with the planning module for land development and the statement, to the said Joseph Nelson, on that same date, with a letter advising Attorney Nelson that these documents should have been sent to Mr. Moye and alerting him as to Mr. Moye's likely request for a plan revision order. The letter and attachments were received by Attorney Nelson.

10. The department received a letter from C. Joseph Moye d/b/a Moye Enterprises, dated July 29, 1980, requesting a plan revision.

11. At the time of the issuance of the Order which is the subject of this appeal, no township zoning ordinances were in effect in Wilmington Township.

12. The sewage needs of the development can be accommodated by either of two alternatives to a subsurface disposal system--a package treatment plant or a sewer line extension to the Borough of New Wilmington (Lawrence County) sewage treatment plant.

13. The New Wilmington Borough sewage treatment plant has sufficient capacity to handle the sewage load which would be generated by the proposed development.

14. The Supervisors of Wilmington Township have been informed of the availability of the alternative methods of servicing the sewage needs of the development by Peter A. Yeager, Chief of the Planning Section of the DER's Bureau of Water Quality Management, Meadville Region.

DISCUSSION

On or about August 11, 1979, Mr. C. Joseph Moye purchased two contiguous parcels of land located adjacent to Route 158 in Wilmington Township, Mercer County, comprising, together, approximately 76.3 acres. Mr. Moye d/b/a Moye Enterprises, intends to develop these parcels (known, collectively as the Old Miller Farm) into a residential subdivision eventually comprising some 134 dwelling units.

The Official Mercer County Water and Sewer Plan, prepared in 1968 and adopted in 1971 by Wilmington Township, pursuant to Section 5 of the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §750.1 *et seq.*, designated the area of the Township including the Old Miller Farm as being served by subsurface sewage disposal systems.

Subsurface sewage disposal systems will not adequately handle the sewage disposal needs of the proposed subdivision. Some 73% of the Old Miller Farm lies within a flood plain, i.e., the seasonal high water table is above the ground surface. No type of on-lot disposal system can be used at least in this portion of the Old Miller Farm pursuant to 25 Pa. Code §§73.11, 73.111 and 73.121 and the density of development in the 23 acres of the parcels located above the flood plain precludes the use of on-lot systems in this area. Thus, the Township's Sewage Enforcement Officer, on the basis of the above, acknowledged that the Township's existing sewage facilities plan was inadequate to provide for the sewage disposal needs of the proposed development and that a revision to this plan would be required.

Accordingly, in May of 1980, Mr. Grant W. Farmer, a professional engineer, submitted a planning module for land development to Wilmington Township. This module proposed the construction of a package type sewage treatment plant to treat sewage generated in the proposed subdivision.

On or about July 16, 1980, the Township, through its solicitor, transmitted to DER's Meadville Office an official DER form stating that the proposed planning module would not be approved by the Township as a revision to its official plan. The Township's rejection set forth a number of reasons, many of which related to planning issues. A detailed objection to a sewage treatment alternative not set forth in the planning module (connection to New Wilmington's sewer system) was also included in these comments.

On or about July 21, 1980 DER returned the Township's rejection letter and planning module and informed the Township's Solicitor that this information should have been forwarded to the developer. This letter, also noted that upon such a denial, the developer, pursuant to 25 Pa. Code 71.17, could request DER to order the Township to revise its official plan. On July 29, 1980 Mr. Moye requested DER to order the Township to revise its official plan and on September 8, 1980 DER issued an order which required that:

> "...Wilmington Township, Mercer County shall:
>
> a. Within one hundred and twenty (120) days from the date of this order submit to the Department's Bureau of Water Quality Management, Central Building, 101 South Mercer Street, New Castle, Pennsylvania 16101, a revision of its Official Plan (transmittal letter and resolution for plan revision) to provide for adequate sewage disposal on the parcel of property referred to in this order."

Wilmington Township's only argument on appeal of DER's September 8, 1980 order is that DER failed to comply with conditions precedent to validly issuing said order.

As appellant's counsel correctly points out, DER's authority to issue the order in question comes from Section 5 of the Sewage Facilities Act and 25 Pa. Code §71.17 of DER's regulations. The Act provides that:

"Any person who is a resident or property owner in a municipality may request the department to order the municipality to revise its official plan where said person can show that the official plan is inadequate to meet the resident's or property owner's sewage disposal needs. Such request may only be made after a prior demand upon and refusal by the municipality to so revise its official plan. The request to the department shall contain a description of the area of the municipality in question and an enumeration of all reasons advanced by said person to show the official plan's inadequacy. Such person shall give notice to the municipality of the request to the department."

While 25 Pa. Code 71.17 states as follows:

"(a) Any person who is a resident or property owner in a municipality may request the Department to order the municipality to revise its official plan where said person can show that the official plan is inadequate to meet the sewage disposal needs of the resident or property owner. The request to the Department shall contain a description of the area of the municipality in question and an enumeration of all reasons advanced by said person to show the inadequacy of the official plan.

(b) Upon receipt of a private request for revision or supplement, the Department shall notify the appropriate municipality and shall request written comments from the municipality to be submitted within 30 days.

(c) In arriving at its decision as whether to order a revision or supplement, the Department shall consider at least the following:

(1) The reasons advanced by the requesting individual in comparison with reasons advanced by the municipality, if submitted.

(d) The Department shall render its decision, and inform the person requesting and the appropriate municipality, within 60 days after receipt of all information contained in subsections (b) and (c) of this section. If the Department refuses to order a revision or supplement requested under subsection (a) of this section, it will notify the person in writing of the reasons for such refusal. Any person aggrieved by the action of the Department may appeal to the Environmental Hearing Board pursuant to Chapter 21 of this title (relating to rules of practice and procedure)."

The Township is also correct that Mr. Moye gave no specific notice to the Township of his July 29, 1980 request for revision (as required by Section 5 of the Sewage Facilities Act) and that DER failed to notify the Township of the private request upon receipt thereof as required by 25 Pa. Code §71.17(c). DER, however, argues that this board should overlook these procedural deficiencies because the primary function of the cited authority has been accomplished in this matter, to wit, the Township did have an opportunity to review and comment on the proposed plan revision and DER, prior to issuing its September 8, 1980 order, was able to compare the Township's reasons for denying the requested plan revision to Mr. Moye's showing of the inadequacy of the existing plan.

To resolve this dispute we must consider whether we are empowered to overlook or correct the said procedural deficiencies and, if so, whether we should. In regard to our power, DER has directed our attention to *Warren Sand and Gravel v. DER*, 20 Pa. Commonwealth Ct. 186, 341 A.2d 556 (1975) for the proposition that since hearings before this board are *de novo*, DER's deviations from procedural standards may be overlooked or corrected by this board. The appellant would distinguish *Warren Sand and Gravel, supra*, as not involving procedural conditions precedent. Instead appellant cites *Summerhill Borough v. DER*, 34 Pa. Commonwealth Ct. 574, 383 A.2d 1320 (1978) and *Ramey Borough v. DER*, 466 Pa. 45, 351 A.2d 613 (1976) to prove that this board's role *vis à vis* DER is that of an appellate court *vis à vis* a trial court.

Summerhill Borough, supra and *Ramey Borough, supra*, clearly do not support the proposition for which they were cited by appellant. These cases speak to the test or standard of review which this board applies to a DER action. *Warren Sand and Gravel, supra*, however, does discuss the role created for this board by the General Assembly in Section 1921-A(c) of the Administrative Code of 1929 (added by Act 275) 71 P.S. §510-21(c). As that section plainly

states and Commonwealth Court notes, even if DER holds an initial hearing, an opportunity for a hearing *de novo* before this board still remains. The Court specifically rejects the role of this board as an appellate body with a limited scope of review but rather asserts that this board can substitute its discretion for that of DER. *Ramey Borough, supra*, simply means that we will not substitute our discretion for that of DER unless we find that DER was arbitrary and capricious.

It is true that *Warren Sand and Gravel, supra*, does not pertain to procedural preconditions but Commonwealth Court, in *Commonwealth of Pennsylvania, DER v. Derry Township, Westmoreland County*, 10 Pa. Commonwealth Ct. 619, 314 A.2d 868 (1973) aff'd 466 Pa. 31, 351 A.2d 606, construing the same statutory language, as in *Warren Sand and Gravel, supra*, held that the opportunity for a hearing before this board overcame the alleged procedural defects of lack of notice and hearing prior to issuance of a DER order.

In the same vein, Section 5(a)(5) of The Clean Streams Law, 35 P.S. §691.5(a)(5), specifically requires DER, prior to issuing orders to consider the immediate and long-range economic impact of said orders upon the Commonwealth and its citizens and in *Commonwealth of Pennsylvania, DER v. Borough of Carlisle*, 16 Pa. Commonwealth Ct. 341, 330 A.2d 293 (1974), Commonwealth Court found that DER had failed to comply with this condition precedent to issuing a sewer ban order to said Borough. Yet, Commonwealth Court upheld DER's order as modified by this board because this board had considered the economic impact of said order. Similarly, in *Concerned Citizens for Orderly Progress v. DER*, 36 Pa. Commonwealth Ct. 192, 387 A.2d 989 (1978), Commonwealth Court held that even though both DER and this board had failed to balance social and economic benefits against environmental harm as required by Article I, Section 27 of the Constitution of Pennsylvania with regard to the issuance of a discharge permit under

The Clean Streams Law, this constitutional defect could be corrected by Commonwealth Court's review of the record.

In view of the authority cited and discussed above, it is abundantly clear that this board is empowered to correct the procedural defects of which the Township complains. Moreover, the evidence introduced in this matter strongly induces us to exercise our authority in behalf of Mr. Moye and DER.

In the first place, the Township can hardly argue that it had no actual notice of Mr. Moye's attempts to obtain a revision of its official plan. As early as May of 1979 Mr. Moye was meeting with officials of New Wilmington Borough, Lawrence County, whose sewer lines lay within 3/4 of a mile from the Old Miller Farm, in an attempt to connect into that system. When the Borough officials told Mr. Moye he had to work through Wilmington Township, he promptly went to the Township supervisors only to be rebuffed. Moreover, the Township's Sewage Enforcement Officer, Clair Robinson, by his letter of May 10, 1980 acknowledged Mr. Moye's continuing course of contact with the Township and its officials. Further, Mr. Moye's letter of May 20, 1980 requesting approval of the package plant plan module, clearly constituted the demand for revision of the Township's plan contemplated by Section 5 of the Sewage Facilities Act.

Unfortunately, the Township failed to act as it was supposed to, pursuant to DER's regulations, by returning its disapproval of said plan and comments thereupon directly to Mr. Moye, but the Township did send these comments to DER. The Township admits that if its comments had reached DER after Mr. Moye's July 29, 1980 request for revision all other procedural defects of which it complains would be *de minimus*, however, the Township argues that because these comments came to DER's attention some 13 days prior to Mr. Moye's request, both Mr. Moye and DER must begin again the expensive and time-consuming process of requesting

a sure-to-be-denied plan revision from the Township. We simply cannot accept this argument especially where the Township introduced not one witness at the hearing; where the Township was informed by DER's letter of July 21, 1980 of the likelihood of a private request and where the Township's reasons for denying the requested plan approval either go to a sewage treatment alternative which was not presented in the rejected plan module (connecting to the New Wilmington system) or to various planning matters which have little weight in the absence of any Township land use ordinances. *Fox v. Central Delaware County Authority*, 475 Pa. 623, 381 A.2d 448 (1977).

In conclusion, we note that DER's order still leaves the Township with several options. It may submit to DER a plan revision calling for a package plant for the proposed development or it may submit a plan revision using its agreement with New Wilmington Borough to provide sewerage service to the proposed development.

CONCLUSIONS OF LAW

1. This board has jursidiction over the subject matter and the parties.

2. Wilmington Township's Official Plan is inadequate to meet the sewage disposal needs of Mr. Moye's proposed development.

3. DER and Mr. Moye have substantially and sufficiently complied with the requirements of the Sewage Facilities Act and 25 Pa. Code §71.17 regarding private requests for revision of the Township's Official Act 537 Plan.

ORDER

AND NOW, this 22nd day of May, 1981, the appeal of Wilmington Township, Mercer County, is dismissed and DER's order of September 8, 1980 is upheld.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: DENNIS J. HARNISH
Member

DATED: May 22, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

THE AMERICAN INSURANCE COMPANY : Docket No. 81-040-H
81-041-H
and
FIREMAN'S FUND INSURANCE COMPANY 81-042-H
v. : 81-043-H

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
APPELLANTS' MOTIONS FOR STAY AND SUMMARY JUDGMENT

In each of the four above-captioned matters, DER has forfeited a mine reclamation bond upon which the appellant was the surety. Each forfeiture occurred on or about March 12, 1981.

The appellant has filed a motion for summary judgment in each of the above-captioned matters as well as a motion to stay its obligation to file a pre-hearing memorandum pending our ruling on the motion for summary judgment. Each of the motions for summary judgment is based upon the same legal argument, i.e., that since DER's forfeiture action occurred more than five years after mining ceased upon each tract, the liability on the bond had expired by operation of Section 4 of The Bituminous Coal Open Pit Mining Conservation Act, 1945, May 31, P.L. 1198, §1 *et seq.*, 52 P.S. §1396.1, *as amended*, 52 P.S. §1396.4(c).

The factual underpining of each of appellant's motions seems to be in order since the pre-hearing memoranda filed by DER in each case alleged that

mining had ceased at each site before the end of 1974. However, appellant's argument fails because the quoted section of the law was amended, on October 10, 1980 to read in relevant part, "...Liability under such bond shall be for the duration of the surface mining at each operation, and for a period of five full years <u>after the last year of agumented seeding and fertilizing and any other work to complete reclamation to meet the requirements of law and protect the environment,</u> unless released in part prior thereto as hereinafter provided..." (emphasis added) 53 P.S. §1396.4(d). (1981-1982 Pocket Part).

Appellant has not alleged that five years has expired since each site was completely reclaimed. Therefore, appellant has failed to plead a proper factual basis for its motion for summary judgment.[1]

Appellant will, no doubt, argue that an October 10, 1980 amendment should not be applied to its bonds which were issued in 1971. Appellant is, of course, free to argue and brief this issue concurrent with a hearing on the merits. Nevertheless, the amendment of the mining law described above at least makes it unclear that appellant would succeed on this issue. In fact, even if the law were as quoted by appellant its legal right to a motion for summary judgment would be unclear. (See in this regard, this board's disposition of a similar argument based upon similar language in the Anthracite Strip Mining and Conseration Act in *American Casualty Company of Reading v. DER*, EHB Docket No. 78-157-S (issued January 16, 1981).)

Summary judgement may be granted only in those cases where the moving party has established a clear legal right to the relief requested. This is not such a case and thus the appellant's motion must be denied.

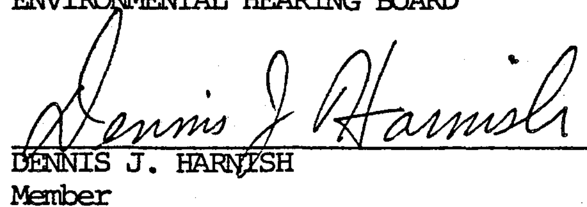
---

1. Of course, since DER has already alleged in its pre-hearing memoranda that each site was not reclaimed, appellant's allegation to the contrary would also preclude the granting of a summary judgment.

ORDER

AND NOW, this 1st day of June, 1981, the appellant's motion for summary judgment is denied in each of the above-captioned cases and the appellant is granted an extension of time to June 22, 1981 to file its pre-hearing memorandum in each of the above-captioned cases.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Member

DATED: June 1, 1981

cc: Bureau of Litigation
Donald A. Brown, Esquire
Robert F. McCabe, Jr., Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

THE AMERICAN INSURANCE COMPANY
and
FIREMAN'S FUND INSURANCE COMPANY

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Docket No. 81-040-H
81-041-H
81-042-H
81-043-H

OPINION AND ORDER SUR APPELLANTS'
PETITION TO RECONSIDER APPELLANTS' MOTION FOR SUMMARY JUDGMENT

On or about May 22, 1981, the appellants filed motions for summary judgment in each of the four above-captioned matters. On June 1, 1981, we issued an opinion and order denying each of the said motions. The appellants have petitioned us to reconsider appellants' motions. Appellants argue that liability on each of the bonds expired before the Surface Mining and Conservation and Reclamation Act was amended as quoted in our June 1 opinion. To impose liability now on the basis of the above amendment would, the argument continues, constitute the impairment of a pre-existing contractual obligation by legislation in violation of the United States Constitution.

There are a number of answers to appellants' argument. The first is that to consider the amendment as changing the contract, one would have to accept that the phrase "open pit mining" as quoted in paragraph 1 of the instant petition (from the limitation clause of each bond) excludes the very reclamation to which the bond is addressed. We are not prepared to accept such a

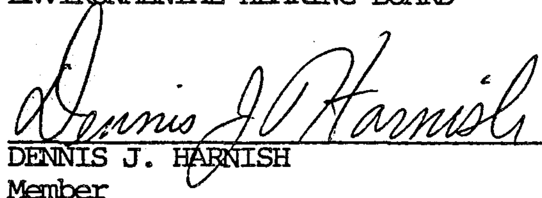
construction at least in this premature posture of the litigation. Secondly, appellants' petition does not discuss or attempt to distinguish the well known exception to the general impairments doctrine carved out for exercise of state police power such as 52 P.S. §1396.4(a)(2)(L)(d) would appear to be.

While the above answers to appellants' arguments are not meant to be determinative, they do demonstrate that appellants have yet to establish a clear right to the summary judgment they seek. Since we may only grant summary judgment in clear cases it follows that appellants have yet to demonstrate their entitlement to this relief.

ORDER

AND NOW, this 11th day of June, 1981, appellants' petition for reconsideration of appellants' motion for summary judgment is denied.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Member

DATED: June 11, 1981

cc: Bureau of Litigation
Donald A. Brown, Esquire
Robert F. McCabe, Jr., Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

CHARLES J. BONZER : Docket No. 80-033-B

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR REQUEST FOR RECONSIDERATION

Following the filing of a petition to review this board's adjudication in the above-captioned matter, the appellant has requested us to reconsider said adjudication. Our review of our rule regarding reconsideration 25 Pa. Code §21.222 demonstrates that this request was timely filed. Moreover, under Pa. R.C.P. §1701(b)(3) this board retains a limited jurisdiction to grant reconsideration after appeal.

However, neither of the above-cited rules mandates the granting of reconsideration by the board, they merely allow it within the exercise of our discretion.

In this matter, we choose not to grant the requested reconsideration. During the hearing appellant alleged that Allegheny County had installed the culverts in question and held an easement to repair same. The appellant would now have us reconsider on the basis of purported minutes from a Baldwin Borough

Council meeting and a Baldwin Borough Planning Commission meeting which he alleges demonstrates that Baldwin Borough had acquired an easement over the culvert.

Accepting for the moment, appellant's characterization of the said minutes we cannot equate an after the fact easement by Baldwin Borough with the alleged prior easement of Allegheny County. We have often held that one may not transfer his obligations to another after they accrue.

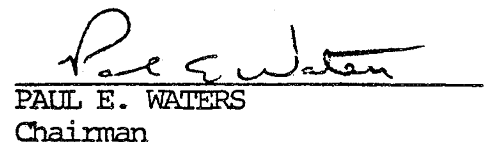
Moreover, the attached minutes do not support appellant's characterization. The minutes of the planning commission meeting of March 25, 1980 clearly evidence the intent of Baldwin Borough that the appellant be responsible for complying with DER's directives. The same is true of the April 28, 1980 Borough Council minutes.

Finally, both sets of minutes were available before the hearing in the above-matter was concluded. Therefore, pursuant to 25 Pa. Code §21.122(a)(2) granting reconsideration on the basis of this evidence is improper.

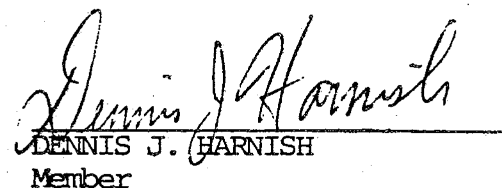
O R D E R

AND NOW, this 17th day of March, 1981, appellant's request for reconsideration is denied.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman



DENNIS J. HARNISH
Member

DATED: March 17, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

FORMER SHAREHOLDERS OF BROOK VALLEY COAL COMPANY, INC.

Docket No. 81-010-H and 80-195-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR COMMONWEALTH'S PETITION
TO QUASH THE APPEAL OF THE
FORMER SHAREHOLDERS OF BROOK VALLEY COAL COMPANY, INC.

This matter is before the board on appeals from DER's forfeiture of several surety bonds upon which Brook Valley Coal Company was the principal. On or about October 20, 1980 DER forfeited four bonds and the former shareholders of Brook Valley Coal Company appealed these forfeitures on or about November 21, 1980 which appeal was docketed at 80-195-H.

On or about December 30, 1980, DER forfeited two additional bonds and the above-referenced appellants appealed these forfeitures at docket 81-010-H. The notices of appeal filed in each of the above-docket numbers raise the same legal issues, thus this board grants the Commonwealth's motion to consolidate the above-captioned appeals at docket 81-010-H.

The Commonwealth has also filed a petition to quash the appeal of the former shareholders of Brook Valley Coal Company which petition attacks appellants'

standing to appeal the forfeitures. Appellants have answered this petition and both parties have filed briefs supporting their respective positions. The parties agree that the operative elements of standing were enunciated by the Pennsylvania Supreme Court in *William Penn Parking, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975). As the Court held in *William Penn, supra*, to have standing one must show his interest in the subject matter of the particular litigation to be: (1) substantial; (2) direct; and (3) an immediate, not a remote, consequence of the judgment.[1]

There also seems to be no substantial disagreement between the parties concerning the pertinent facts. Prior to November 1, 1979, all of the appellants owned shares in, and some of the appellants operated, a strip mining business under the name of Brook Valley Coal Company (Brook Valley) with offices in Jefferson County, Pennsylvania. On or about November 1, 1979, appellants and all other shareholders sold their shares in aforesaid business to Mifflin Energy Sources, Inc. (Mifflin) which acquired all assets of the business.

After eight months of operation, during which Mifflin failed to perform the necessary backfilling and reclamation work at the areas covered by the said permits, Brook Valley was forced into bankruptcy. Shortly thereafter Mifflin initiated litigation in the U.S. District Court for the Western District of Pennsylvania against the former shareholders of Brook Valley, including the instant appellants. The relief sought by Mifflin in that action included *inter alia*, rescission of the contract or agreement of sale, or, as appellants have characterized it, a return to the "status quo" as it existed prior to Mifflin's acquisition of Brook Valley. This federal litigation has been stayed, by agreement of the parties therein, pending the final determination and resolution of the Brook Valley bankruptcy action.

1. The *William Penn, supra*, standing test has been applied to determine standing of appellants before this board in *inter alia, Community College of Delaware County v. Fox*, 20 Pa. Commonwealth Ct. 335, 342 A.2d 468 (1975; *Western Pennsylvania Conservancy v. Commonwealth of Pennsylvania, DER*, 28 Pa. Commonwealth Ct. 204, 367 A.2d 1147 (1977) and *Strasburg, infra*.

While, as discussed above, the parties generally agree concerning the pertinent facts regarding standing and the test to be applied to determine standing, they have obtained different results when applying the same test to the same facts. The question which must be resolved by this board, therefore, is whether on the basis of the above facts, the appellants' interest in the forfeited bonds of Brook Valley is "substantial", "immediate" and "direct".

There seems to be little doubt that appellants' interest is "substantial" as that term was defined in *William Penn, supra*, since appellants' interest in the bond forfeiture issue differs from "...the abstract interest of all citizens in having others comply with the law." 464 Pa. 168 at 195; 346 A.2d 280 at 282. On page 3 of its brief DER agrees that the appellants' interest is "substantial".

DER also seems to admit that appellants' interest is "direct" and therefore DER stakes its petition to quash solely on the ground that appellants' interest is not "immediate". This board, however, is not convinced that the appellants' interest is either "direct" or "immediate" as defined in *William Penn, supra*.

As the Supreme Court held in *William Penn, supra*, "...[t]he requirement that an interest must be 'direct' simply means that the person claiming to be aggrieved must show causation of the harm to his interest by the matter of which he complains" 346 A.2d at 282. Here, the matter complained of is DER's forfeiture of the Brook Valley bonds. Appellants would link their harm to the bond forfeiture by first positing that they would lose their rescission suit with the present shareholders of Brook Valley. This speculative status of the rescission suit may, in itself, be enough to show that appellants' interest is not direct.

The Pennsylvania Supreme Court in *William Penn, supra*, when developing the definition of "direct", cited with approval and discussed *Warth v. Seldin*,

422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 3433 (1975) wherein low-income individuals who wanted to reside in the town of Penfield tried to challenge its allegedly exclusionary zoning. The United States Supreme Court in *Warth, supra,* upheld the dismissal of plaintiffs' complaint for want of standing because the plaintiffs therein had failed to show that the zoning of Pennfield *per se* kept them from locating suitable housing in that town. One would have to speculate that but for the challenged zoning plaintiff's would be able to locate in Penfield. 364 A.2d at 283. Also cited with approval and discussed in *William Penn, supra,* was *Linda R. S. v. Richard D.*, 410 U.S. 614, 93 S. Ct. 1146, 35 L. Ed. 2d 536 (1973) wherein the mother of an illegitimate child was held <u>not</u> to have standing to challenge the failure of the state of Texas to provide criminal penalties for failure to support an illegitimate child similar to the criminal sanctions imposed for failure to support a legitimate child. In *Linda, supra,* the missing link was the fact that relief for plaintiff would require diligence on the part of the Texas prosecutors in enforcing the criminal penalty sought.

In this instant matter, too, an unfavorable decision by the judge and/or jury in the federal rescission case is a necessary precondition to place appellants in jeopardy. The speculative nature of this occurrence is underscored by appellants' characterization of the negative outcome of the rescission suit with the phrase "[i]f and when" (see page 2 of appellants' brief). Note also that the rescission suit is in limbo pending the resolution of the Brook Valley bankruptcy action. Thus, here, we have standing predicated not just upon the speculative actions of third parties but indeed upon the actions of fourth parties (the parties to the bankruptcy action).

Even if we assume that rescission is awarded, harm to the appellants is by no means clear. Appellants state on page 3 of their brief:

"In the event that rescision [sic] is awarded, Appellants, in their capacity as shareholders, would be exposed to the statutory liability for reclamation and its contractual liability to the bonding company for the forfeited bonds. In addition, Appellants, if they wished to operate the business under the current permits, would be required to secure bonds to replace the bonds forfeited. In effect, Appellants, *inter alia* would be faced with a double binding [sic] requirement tainted with a record of forfeited bonds."

The problem with this argument is that appellants, in their capacity as shareholders, are not faced with personal liability on the bonds. It is hornbook corporate law that only the corporate entity, Brook Valley, is so liable (note the appellants' admission to this effect on page five of their brief).

If Brook Valley were a solvent corporation perhaps the appellants' arguments would have more validity because, in that event, the assets of the corporation conceivably could be diminished by reimbursing the bonding company for the forfeited bonds and it might also be possible for the appellants to operate the business at which point "double bonding" might become relevent. In the present, posture, however, with Brook Valley in bankruptcy, it is impossible to see how its shareholders are harmed, for the company has no net assets and cannot be operated. Moreover, even if appellants' interest is "substantial" and "direct" it clearly cannot be considered "immediate" since appellants' harm is at best "...a remote consequence of the judgment" which is not within the concept of "immediate" as defined in *William Penn, supra,* 346 A.2d at 283.

Notwithstanding the above, this board would still be loathe to dismiss the appellants on the basis of standing since we feel that it is our duty to hear appeals rather than to avoid them. However, we have repeatedly and recently been instructed by Commonwealth Court to carefully consider the standing of parties before this board. In *Fox, supra,* and in *Western Pennsylvania Conservancy, supra,* Commonwealth Court suggested that this board's review of standing had been too lenient.

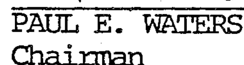
Last summer in *Strasburg Associates v. Newlin Township*, ____ Pa. Commonwealth Ct. ____, 415 A.2d 1014 (1980) Commonwealth Court again found that this board had been too lenient in accepting a party's standing argument. In *Strasburg, supra*, we had held that a municipality had standing to appeal DER's determination on a transfer of ownership of a private landfill located within the said municipality. In reaching this decision we accepted the municipality's argument that should the operator of the landfill fail to comply with law and thereby create a public nuisance because of inadequate management and/or an insufficient financial commitment, the municipality could be called upon to abate this nuisance.

Commonwealth Court, however, determined the municipality's interests to be "hypothetical in nature" 415 A.2d at 1017 because the municipality's interest arose "...only if and when poor management or insufficient financial commitment from township results in economic trouble..." Thus, Commonwealth Court refused to extend standing to the municipality. Here, of course, as outlined above, the interest of the appellants is, if anything, more speculative than that of the municipality in *Strasburg, supra*. Thus, we are constrained by *Strasburg, supra* and the other authority cited above to refrain from extending standing to the appellants.

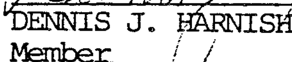
O R D E R

AND NOW, this 26th day of March, 1981, DER's petition to quash the appeal of the former shareholders of Brook Valley Coal Company is granted and the said appeal is dismissed.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman



DENNIS J. HARNISH
Member

cc: Bureau of Litigation
Diana J. Stares, Esquire
M. Bruce McCullough, Esquire

DATED: March 26, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

FORMER SHAREHOLDERS OF BROOK VALLEY COAL COMPANY, INC.

Docket No. 81-010-H and 80-195-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR APPELLANTS'
MOTION FOR REHEARING OR RECONSIDERATION

On March 26, 1981 this board entered an order dismissing the appeal of the former shareholders of Brook Valley Coal Company, Inc. from DER's forfeiture of certain mine reclamation bonds upon which said corporation was the principal. Appellants' argue that the said order was based on the erroneous conclusion that appellants had no personal liability with respect to said bonds. Appellants assert that appellant Howard Brooks provided his personal guarantee and indemnification to the bonding company with respect to said bonds so that he, at least, is personally liable thereupon.

It is interesting, as noted by DER, that appellants refused to answer DER's interrogatory concerning the financial obligation of each appellant with regard to said bonds, asserting that this interrogatory called for a legal conclusion. More determinative is appellants' answer to DER's interrogatory 6 which is set forth below:

"Interrogatory 6.

> Please state in what manner the Appellants will be adversely affected if the Commonwealth is permitted to forfeit the bonds referred to in Interrogatory 5.
>
> Appellants incorporate by reference paragraphs 3(a), (c) and (d) of their Notice of Appeal as its answer to Interrogatory No. 6."

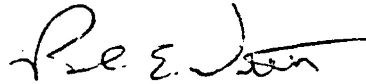
Neither this answer, nor appellants' notice of appeal, which is incorporated therein, specifically discusses any personal liability on the part of any appellant. Paragraph 3d of the Notice of Appeal does state that the said bonds were secured by the said former shareholders but this paragraph 6 also notes that by reason of the sale these shareholders "may not be liable on said bonds". Indeed, appellants appear to be maintaining this position of non-liability in Somerset County litigation (see paragraph 4 of the appellants' motion for rehearing).

Thus, any personal liability of Howard Brooks is as speculative and contingent as the appellants' recission argument rejected in the board's first order and opinion in this matter and, for the reasons detailed in the said opinion, such a speculative liability cannot support standing before this board. A separate reason for denying the requested reconsideration is that it does not comport with 25 Pa. Code §21.122, this board's rule for granting rehearing or reconsideration. Appellants' brief in response to DER's motion to dismiss, on its final page, makes oblique reference to the Somerset County action. However, even here there is no hint that any shareholders are or will be held to be personally liable on the said bonds. Clearly, the personal liability argument could have been raised in the appellants' brief. Appellants' failure to do so now estops them from raising this issue pursuant to the terms of 25 Pa. Code §21.122.

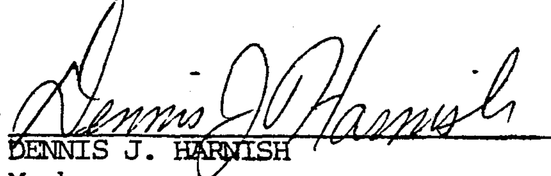
O R D E R

AND NOW, this 21st day of April, 1981, the appellants' motion for rehearing or reconsideration is denied.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman



DENNIS J. HARNISH
Member

DATED: April 21, 1981

cc: Bureau of Litigation
Diana J. Stares, Esquire
M. Bruce McCullough, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

EDWARD WAYNE BUTZ	:	Docket No. 80-144-H
v.	:	

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and EAST LAMPETER TOWNSIP SEWER AUTHORITY, Permittee

OPINION AND ORDER SUR
PERMITTEE'S MOTION FOR SUMMARY JUDGMENT

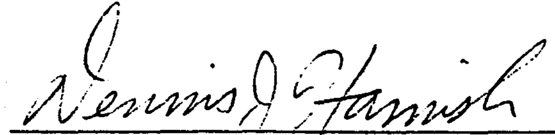
The board had received a pre-hearing memorandum, motion for summary judgment and brief in support thereof from East Lampeter Township Sewer Authority, permittee in the above-captioned matter. The said motion for summary judgment sets forth three arguments. The first argument, i.e., that the appellant did not file a timely appeal is identical to the argument raised by DER in its motion to dismiss and thus this argument is set aside for the reasons set forth in this board's opinion and order of December 15, 1980 denying DER's motion.

The other two arguments both rest upon contested facts. Clearly, summary judgment cannot be granted where there is any outstanding issue as to any material fact. *Borough of Monroeville v. Effies Ups and Downs*, 12 Pa. Commonwealth Court, 279, 315 A.2d 342 (1974).

ORDER

AND NOW, this 18th day of March, 1981, permittee's motion for summary judgment is denied.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Member

cc: Bureau of Litigation
Lynn Wright, Esquire
Edward Wayne Butz
William E. Chillas, Esquire

DATED: March 18, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

GEORGE CAMPBELL, et al and SUSQUEHANNA COUNTY BOARD OF COMMISSIONERS
v.
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and LYNCOTT CORPORATION AND ARTHUR SCOTT

Consolidated Docket No. 76-117-H

* * * *

and

SUSQUEHANNA COUNTY BOARD OF COMMISSIONERS
v.
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and LYNCOTT CORPORATION

Docket Nos. 80-172-H
80-208-H
81-038-H
81-045-H

OPINION AND ORDER SUR PERMITTEE'S MOTION TO DISMISS AND INTERVENOR'S MOTION FOR A JOINT INSPECTION

This is the fourth opinion and order issued by this board with regard to consolidated Docket No. 76-117-H. On or about February 1, 1980 this board granted to Susquehanna County Board of Commissioners the right to intervene as a party in an appeal filed by George Campbell, et al from the issuance by DER of a solid waste disposal permit to Arthur Scott and Lyncott Corporation for a solid waste disposal facility in New Milford Township, Susquehanna County.

In its February 1, 1980 Opinion, the board distinguished the requirements for intervening in an appeal before this board from those of standing to take a direct appeal and held that the County qualified for intervenor status. During the summer of 1980 Commonwealth Court issued *Strasburg Associates v. Newlin Township*, ____ Pa. Commonwealth Ct. ____, 415 A.2d 1014 (1980) and Lyncott

on the strength of this Opinion, asked this board to reconsider its decision *vis à vis* the County's intervention. On October 14, 1980, the board denied Lyncott's renewed motion to dismiss holding that since its February 1, 1980 Opinion did not depend upon the County's standing status, *Strasburg, supra,* did not affect that decision.

Undaunted by the October decision, Lyncott again sought to have this board dismiss the County as a party to 76-117-H and on December 19, 1980 this board again denied the permittee's motion. In its December 19, 1980 Opinion the board further explored the distinction between standing and the qualifications required of a would-be intervenor and in addition, decided that Section 504 of the Solid Waste Management Act (which became effective September 5, 1980) <u>might</u> have modified the County's standing to appeal permits issued under this Act.

Lyncott is now before us for the fourth time, trying to have the County dismissed as a party to consolidated Docket 76-117-H. This time, Lyncott draws its argument from the Commonwealth Court's decision in *Susquehanna County v. DER and Lyncott Corporation,* (No. 490 C.D. 1980 issued April 9, 1981) which involved the same parties and same site as the instant matter.

In *Susquehanna County, supra,* Commonwealth Court specifically applied its *Strasburg* decision to Susquehanna County and specifically rejected the argument that Section 504 of the Solid Waste Management Act modified the County's standing status. In view of this Opinion, there is no longer any question that Susuquehanna County lacks standing to directly appeal any DER decisions concerning Lyncott. Accordingly, Lyncott's motions to dismiss Susquehanna County's appeals docketed at 80-172-H and 80-208-H are granted.

The Susquehanna County opinion however, did not discuss, much less resolve, the question of what interest a would-be intervenor before this board

must have. Therefore, nothing in this recent Opinion affects the authority cited and discussed at our earlier opinions in the above-captioned matter upon which authority this board continues to rely to uphold Susquehanna County's intervention in 76-117-H.

The reasoning set forth above also compels us to deny Lyncott's motion to dismiss the County as an intervenor in EHB Docket 81-038-H (wherein Lyncott has appealed DER's order of March 31, 1981 which *inter alia* suspended Lyncott's permit for the same site) but to grant Lyncott's motion to dismiss the County's direct appeal from the same order as docketed at 81-045-H (in which motion DER joins).

Lyncott compares the County's appeal at EHB Docket No. 81-038-H to the County's appeal from DER's April 27, 1979 order to Lyncott which the County appealed at EHB Docket 79-059-B. The 79-059-B appeal was dismissed by this board on February 1, 1980 and this dismissal was upheld by Commonwealth Court in *Susquehanna County, supra*. Lyncott, of course, would like us to follow the course in 81-038-H, which we followed in 79-059-B.

There is, however, a significant difference between 79-059-B and 81-038-H. In the former matter, the County objected to DER's failure to revoke Lyncott's permit in lieu of issuing said order and both this board and Commonwealth Court upheld DER's discretion to select its enforcement methods. In 81-038-H, on the other hand, DER has suspended the said permit and the essence of the County's peition to intervene is that such suspension should remain in effect. In this regard it is worth noting that DER does not oppose the County's intervention at EHB Docket No. 81-038-H although it does oppose the scope of the County's appeal.[1]

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1. This opinion does not address which, if any, of the allegations set forth in its petition to intervene may be raised by the County at the hearing. The County will be required by this order to submit a pre-hearing memo including contentions of law which should clarify the County's position.

In view of the above, Lyncott's comparision of 81-038-H and 79-059-B is not well taken.

Since the County has been accorded party status in 76-117-H and 81-038-H the question of its Motion for Joint Inspection and DER's and Lyncott's responses thereto must be addressed.

DER questions the board's authority under Pa. R.C.P. 4009(a)(2) to order DER to notify the County of inspections but, nevertheless, offers to notify the County of its inspections subject to certain conditions. Lyncott in a Motion for Protective Order as well as an Objection to Intervenor's Motion for Joint Inspection argues that the County's request is not within the scope of Pa. R.C.P. 4003.1 through 4003.5 and is prohibited by Pa. R.C.P. 4011. No party has briefed this issue.

With the exception of its request that DER give it notice of DER's inspections, the County's request is that it be allowed through its agents, attorney and experts to enter upon the (Lyncott) facility for discovery, inspection and other purposes.

The County apparently contemplates a first joint inspection with DER followed by a subsequent inspection without DER after the County's experts have reviewed all applicable records and files of Lyncott and DER as secured through discovery.

Contrary to Lyncott's position, Pa. R.C.P. 4009(a)(2) clearly permits entry upon the responding party's land for the purpose of inspecting, surveying, measuring, testing, sampling and the like within the scope of Rules 4003.1 through 4003.5 while Pa. R.C.P. 4003.1 clearly permits a party to obtain discovery which is relevant to the subject matter of the pending action including the existance, nature and condition of tangible things. Since the condition of Lyncott's site

is highly relevant to any review of DER's March 31, 1981 order it seems clear that the discovery sought by the County under Pa. R.C.P. 4009 is within the scope of Pa. R.C.P. 4003.1.

Moreover, nothing on the face of Pa. R.C.P. 4011 would seem to prohibit the requested discovery. Lyncott has not alleged bad faith, unreasonable annoyance, or privilege or any other condition in Pa. R.C.P. 4011 which would cause the requested inspection to be prohibited. (Note that pursuant to Pa. R.C.P. 4009(b)(2) a party objecting to a request to enter and inspect must specify the reasons for the objection.)

Finally, far from imposing an unreasonable burden upon Lyncott, joint inspection by the County and DER would impose a smaller burden than separate inspections. In this matter, as in all discovery matters the good faith cooperation of counsel for all parties should result in mutually satisfactory dates and times for all scheduled inspections.

O R D E R

AND NOW, this 15th day of May, 1981, it is ordered that:

a) Lyncott's motion to dismiss the County as a party to 76-117-H is denied.

b) Lyncott's motion to dismiss the County as a party to 81-038-H is denied.

c) Lyncott's motion to dismiss the County's appeal at 80-172-H is granted.

d) Lyncott's motion to dismiss the County's appeal at 80-208-H is granted.

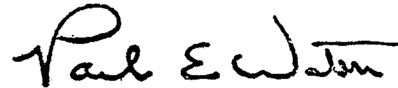
e) Lyncott's motion to dismiss the County's appeal at 81-045-H is granted.

f) DER shall notify the County of scheduled inspections of Lyncott's site in accordance with and as conditioned by the April 27, 1981 letter of DER's counsel which is attached hereto and incorporated herein.

g) The County may enter upon Lyncott's site and inspect, measure, sample, test and conduct discovery thereupon jointly with DER and separately at such other times as are mutually agreeable to counsel for Lyncott and the County. Any disputes concerning scheduling of subsequent inspections shall be resolved by this board upon application of a party.

h) The County shall file its pre-hearing memorandum on or before June 15, 1981.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman

BY: DENNIS J. HARNISH
Member

DATED: May 15, 1981

cc: Bureau of Litigation
Louis A. Naugle, Esquire
Gerald C. Grimaud, Esquire
Robert J. Shostak, Esquire
Stirling E. Lathrop, III, Esquire

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
Office of Chief Counsel
503 Executive House, P.O. Box 2357
Harrisburg, PA 17120
Telephone: 717/787-8790

April 27, 1981

The Honorable Dennis J. Harnish
Environmental Hearing Board
Blackstone Building Annex
Harrisburg, Pennsylvania 17101

Re: George Campbell, et al. and Susquehanna County, by the Susquehanna County Board of Commissioners v. DER, et al., EHB Docket Nos. 76-117-H, 80-172-H, 80-208-H

Dear Mr. Harnish:

This is in answer to the "Motion for Joint Inspection with DER" filed by Susquehanna County in the above-captioned matters.

DER believes that the County's request for notification of DER facility inspections is clearly not within the scope of Pa. R.C.P. 4009(a)(2), since DER is neither in possession nor control of the property. Moreover, in the event that this Board determined to issue an Order granting the County's request, DER questions whether this Board could fashion an effective remedy in the event that a DER inspection was conducted without notification being given to the County.

While DER does not believe that this Board has the authority, pursuant to Pa. R.C.P. 4009(a)(2), to order that DER notify the County, DER is willing, on a purely voluntary basis to notify the County of its inspections subject to the following conditions:

1. DER will agree to provide the County, through its attorney, of notice of any scheduled inspection at least twenty-four hours in advance of the inspection.

2. In the event that the attorney for the County cannot be contacted directly, DER will consider notification to his office staff sufficient.

3. DER will not agree to notify the County of inspections required to respond to unforeseen or emergency situations at the Lyncott site nor to surprise, unscheduled inspections which DER feels necessary to conduct.

RECEIVED
APR 27 1981
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COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

GEORGE CAMPBELL, et al and
SUSQUEHANNA COUNTY BOARD OF COMMISSIONERS : Docket No. 76-117-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and LYNCOTT CORPORATION AND ARTHUR SCOTT

OPINION AND ORDER SUR LYNCOTT'S PETITION FOR
RECONSIDERATION OF ORDER GRANTING COUNTY'S MOTION FOR JOINT INSPECTION

On May 15, 1981 this board entered an Opinion and Order at the above-docket which, in part, permitted the County to enter upon Lyncott's site for purposes of inspection, measurement, sampling and testing pursuant to Pa. R.C.P. 4009. Lyncott has filed a petition for reconsideration and a motion for a stay of this part of the said order.

Lyncott points out, correctly I believe, that the County has failed to follow, exactly, the procedures set forth in the Pennsylvania Rules of Civil Procedure.

According to Pa. R.C.P. §§4009 and 4019 the County should have first served a written request to enter and inspect upon Lyncott and only <u>after</u> receiving a refusal or objection should the County have proceeded before this board via a motion for sanctions. Instead, it appears that the County filed its motion (styled a motion for joint inspection) with this board after it served the said written request but one day <u>before</u> it received an answer to said

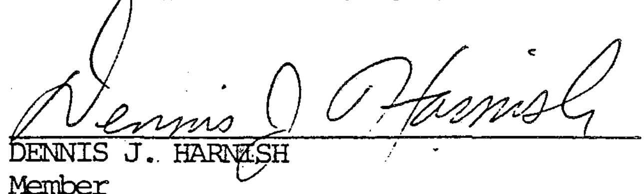
request (note that paragraph 9 of said motion for joint inspection indicates that no response had been received to the County's request as of the date of the motion). In view of the principles of liberal construction embodied in Pa. R.C.P. 126, the board is inclined to overlook this minor procedural defect and to acknowledge the County's motion for joint inspection as, in part, a motion for sanctions *vis à vis* Lyncott.

Lyncott's petition does, however, cite authority (Explanatory Note 1978(1) to Pa. R.C.P. 4009) to the effect that Lyncott should have been provided an opportunity for a hearing on the County's discovery request before this board issued its order.

In view of the present posture of this matter and the allegations of involuntary disclosure of privileged and proprietary matters etc. set forth in paragraph 7 in Lyncott's petition the board had decided to stay the effect of paragraph "g" of its May 15, 1981 order pending a hearing on the propriety of the County's request. This hearing shall take place in Harrisburg on either June 1, 1981 or June 3, 1981 at the time and place for the hearings already scheduled in Docket Number 81-038-H.

Except as stayed above, the order of May 15, 1981 remains in full force and effect. Thus, DER is still required to notify the County of any scheduled DER inspections occuring prior to June 1, 1981. Moreover, DER is instructed to offer to the County's counsel split samples of any material removed from the Lyncott site for testing during any such inspections.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Member

DATED: May 26, 1981
cc: Bureau of Litigation
Louis A. Naugle, Esquire
Robert J. Shostak, Esquire
Gerald C. Grimaud, Esquire
Stirling Lathrop, Esquire

vp

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
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(717) 787-3483

GEORGE CAMPBELL, et al
and
SUSQUEHANNA COUNTY

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and LYNCOTT CORPORATION, et al

Docket No. 76-117-H
and
81-038-H

OPINION AND ORDER SUR
LYNCOTT'S MOTION FOR PROTECTIVE ORDER

A thorough rehearsal of the procedural history of the above-captioned matter is infeasible and, one hopes, unnecessary at this point. Suffice it to say that there have been innumerable pre-hearing motions filed, answered, briefed and decided in this strenuously litigated matter.

Even the issue of the County's right to enter upon and inspect, test, measure, sample etc. the Lyncott site has been the subject of much attention. On May 15, 1981, the board rejected Lyncott's claim that such entry was not provided for by the Pennsylvania Rules of Civil Procedure. The board held and therefore ordered that the County could enter upon Lyncott's site and inspect, measure, sample, test and conduct discovery thereupon both jointly with DER and separately at "...such other times as are mutually agreeable to counsel for Lyncott and the County. Any disputes concerning scheduling of subsequent inspections shall be resolved by this board upon application of a party." The

board, somewhat naively it appears, assumed that counsel for the parties could cooperate to resolve matters such as numbers and scheduling inspections, the type of inspection activities and the number and names of persons attending each inspection. These matters usually are resolved by counsel to the mutual convenience of the parties.

Instead Lyncott petitioned for reconsideration of the said entry order, arguing that a hearing should be held before granting the County's discovery request. Lyncott alleged in its petition that the requested discovery would require involuntary disclosure of privileged and proprietary matters as well as cause unreasonable annoyance, embarrassment, oppression, burden and expense to Lyncott. On May 20, 1981, the board honored Lyncott's petition by staying that portion of its May 15, 1981 order which granted the County's request and by setting a hearing on this issue on June 1, 1981.

During the June 1, 1981 hearing, Lyncott attempted to support the allegations set forth in its petition through the testimony of Mr. Don R. McCombs, Director of Chemical Waste Management, the parent corporation of the successor to Lyncott Corporation.

Mr. McCombs testified that the recipe or mix to be utilized in the construction of the disposal vaults included a secret process[1] and that the company utilized certain handling techniques to which the company's competitors were not privy. Mr. McCombs also testified concerning the health and safety training of on-site personnel and the need for persons on the site to be aware of contigency

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1. Part of this process is apparently patented and therefore is within the public domain. However, proportions of ingredients of mixes apparently constitute trade secrets.

plans in case of an emergency. Most if not all of the dangers discussed seem to arise through the operation of the facility as by the operation of waste handling equipment. Mr. McCombs also noted that when the County's inspection team visited the site it would be necessary to have on-site personnel accompany them and desireable to have Lyncott's counsel also accompany them. Thus, inspections should occur during normal operating hours 7:00 A.M. to 5:00 P.M., Monday through Friday.[2]

Taken together the above testimony given full weight fails to support Lyncott's petition. Granted that handling techniques and disposal techniques which comprise trade secrets may be exposed during the receipt and disposal of wastes, the site is prohibited from receiving wastes pursuant to paragraph 1 of the order appealed at EHB Docket No. 81-038-H. Thus, unless or until the matter at EHB Docket No. 81-038-H is resolved (or the order giving rise to the said appeal is modified) no proprietary information will be disclosed during any inspection.

As to the alleged unreasonableness of the requested entry, none of the reasons set forth by Mr. McCombs would inveigh against some limited entry by the County, the only significant hazards would, again, appear to arise only during operation. During the view, a group of over 10 persons not including Mr. Shostak and on-site personnel was safely conducted around the site by a single Lyncott official.

Thus, the mere fact that the County has identified a list of up to ten persons who may enter the premises at any one time is not *per se* objectionable. As to the dates, time and duration of the entry, the notice of entry and the nature and manner of the inspection, Lyncott's counsel has had an opportunity

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2. An attempt was also made to invoke the alleged proprietary rights of Lyncott's suppliers but no foundation was laid to demonstrate Lyncott's standing to invoke such rights and no examples of proprietary information were developed by the testimony.

to negotiate these matters with the County's counsel and has, apparently, ignored this opportunity.

The board will, therefore, resolve these matters pursuant to the following order but shall remain open to modify this order following the initial inspection provided thereby to protect the parties.

ORDER

AND NOW, this 30th day of July, 1981, the board's orders of May 15, 1981 and June 1, 1981 permitting the County to enter upon Lyncott's New Milford site are modified as follows:

a) entry on behalf of the County shall be limited to those persons listed in the County's letter of June 10, 1981 as well as those persons named in paragraph 10 of the County's New Matter. No more than 10 persons may enter on behalf of the County at any one time;

b) the County shall enter only during normal working days and hours as described in the above opinion and only after giving 5 working days notice to Mr. Zorn, Lyncott's site manager;

c) the County shall limit its inspection to the purposes listed in its June 10, 1981 letter;

d) the County's inspection team shall report to the on-site office upon entering the site, shall allow themselves to be outfitted with hard hats and any other protective garb required by law, by Lyncott's employees, shall stay together as a group to the fullest extent possible during the inspections and shall be accompanied by the person or persons designated by the person in charge of the site at the time of the inspection;

e) inspections shall occur not more frequently than once a week and may last no more than four hours on any given day;

f) this inspection order shall terminate upon the reopening of said site.

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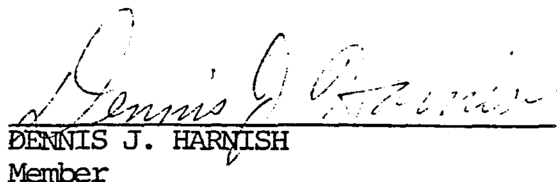


DENNIS J. HARNISH
Member

DATED: July 30, 1981

cc: Bureau of Litigation
Louis A. Naugle, Esquire
Gerald C. Grimaud, Esquire
Stirling Lathrop, Esquire
Robert J. Shostak, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

GEORGE CAMPBELL, et al : Docket No. 81-052-H and 81-053-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and LYNCOTT CORPORATION, Permittee

OPINION AND ORDER SUR THE
MOTION TO DISMISS OF LYNCOTT CORPORATION

On September 3, 1978, George Campbell (Campbell) and others filed an appeal before this Board from the issuance by DER of permits approving the operation of a sanitary landfill located near New Milford in Susquehanna County by Lyncott Corporation's (Lyncott) predecessor as permittee, Arthur Scott. This appeal was docketed at 76-117-B. A petition by Susquehanna County Board of Commissioners (Susquehanna or County) to intervene in that appeal was granted. Subsequently, Susquehanna appealed the Department of Environmental Resources' (DER) approval of the disposal of specified wastes at the Lyncott site. EHB Docket No. 79-121-B. This appeal was consolidated with that of Campbell at Docket No. 76-117-B. See Opinion and Order at Docket No. 76-117-B (February 1, 1980).

Susquehanna later appealed DER approvals of the disposal of specified wastes at the Lyncott site. The docket numbers and companies involved were as follows:

No. 80-012-B (Federal Mogul, Whitmoyer Laboratory, McGraw Edison)

No. 80-031-B (GTE Sylvania, Pfizer, Quaker Alloy Casting

No. 80-105-B (North American Phillips Lightning, IBM (Owego), Allied Chemical (Marcus Hook), BASF Wyandotte, Appollo Metals, Buckbee Mears, Bridon-American, Volkswagen of America, Armstrong Corporation)

No. 80-116-B (ITT Grinnell, IBM (East Fishkill))

No. 80-138-B (Ashland Chemical, Volkswagen of America)

No. 80-172-H (IBM (Endicott))

No. 80-208-H (Rockwell International (Frankford Arsenal))

The dates of these approvals by letter sent from DER range from October 10, 1979 to January 28, 1981. Susquehanna's attorney, Gerald Grimaud, received written notice of these approvals from DER because he had requested to be put on DER's mailing list.[1] All appeals of these approvals were maintained under the consolidated Docket No. 76-117-B with the caption *George Campbell, et al. and Susquehanna County Board of Commissioners v. Commonwealth of Pennsylvania, Department of Environmental Resources and Lyncott Corporation, Arthur Scott and Sybill Scott, Permittee.*

Lyncott Corporation has been persistant in its attempt to remove Susquehanna County as a party to these proceedings. To this affect Lyncott has filed repeated Motions to Dismiss the County as a party. In response to the second of these motions, in its Opinion and Order at Docket No. 76-117-H dated December 19, 1980, this board determined that Susquehanna lacked standing to appeal those approvals appealed at Docket Nos. 79-121-H, 80-012-H, 80-031-H, 80-105-H, 80-116-H and 80-138-H. In its Opinion and Order at Docket No. 76-117-H, dated May 15, 1981, (in response the third of Lyncott's motions to dismiss), this board determined that Susquehanna lacked standing to appeal these approvals

1. It is appellee's understanding that the only parties routinely receiving written notice of these approvals are DER personnel, the permittee, and the county, usually the county planning commission, and the municipality in which a site is located.

docketed at No. 80-172-H and 80-208-H. In both of the above opinions this board drew a distinction between the County's right to appeal in its own behalf (which we have held does not exist) and its right to intervene in matters filed by other parties.

As of April of 1981, Campbell, et al. could see that their expectation that the County would carry the burden of appeal with respect to at least most of the specific waste stream approvals was ill-founded.

However, Campbell, et al, knew that if they successfully appealed the waste stream approvals, then the County could intervene in these appeals and could continue to share in the litigation effort; thus, apparently Campbell, et al, decided to appeal each of the said waste stream approvals.

To effectuate this program, Campbell filed notices of appeal at Docket Nos. 81-052-H and 81-053-H on or about April 24, 1981. Docket No. 81-052-H encompasses those appeals taken by Susquehanna at Docket Nos. 80-012-B, 80-031-B, 80-105-B, 80-116-B, 80-138-B, and 80-172-H. Docket No. 81-053-H encompasses those appeals taken at Docket No. 80-208-H.

In his notice of appeal, appellant Campbell claims he first received written notice of the action for which review is sought on March 24, 1981, thus rendering his appeal timely for purposes of Rule 21.52.

Lyncott in its present motion seeks to dismiss each of Campbell's appeals with regard to DER's waste stream approvals. Lyncott argues that these appeals are untimely under this board's rule 25 Pa. Code §21.52 in that Lyncott alleges that Campbell had actual notice of and had received written copies of each of the waste stream approvals as a party litigant in EHB Docket 76-117-B and as recipient of notices of appeal filed by the County prior to 30 days before the instant appeal was filed. Lyncott also cites Campbell's claim in a brief

filed by Campbell, in defense of an earlier Lyncott attempt to dismiss him as a party, that he had actively participated in the appeal filed at EHB Docket 76-117-B and had closely monitored DER's actions with respect to said landfill.

The wide local publicity concerning said waste stream approvals is also cited by Lyncott as a reason that Campbell had or should have had notice of these approvals long before his filing of the instant notices of appeal.

In his response to the above allegations Campbell does not deny that the instant notice of appeal was filed more than thirty (30) days after he knew or should have known of the actions for which review is sought. Indeed, Campbell admitted as much in paragraph 2 of his answer to Lyncott's motion to dismiss. Campbell does, however, deny that this actual notice of the waste stream approvals or even receipts of copies thereof from parties other than DER constitutes the type of notice which activates the 30 day period in 25 Pa. Code §21.52. (Lyncott admits that no notice of any waste stream approval was published in the Pennsylvania Bulletin and thus, if 25 Pa. Code §21.52 is activated it must be because "...the party appellant has received written notice of such action...")

The starting point for the resolution of this issue is the indisputable fact that this board lacks jurisdiction to hear appeals which are not timely filed *Toro Development Company v. DER*, ____ Pa. Commonwealth Ct. _____, 425 A.2d 1163 (1981); *Lebanon County Sewage Council v. DER*, 34 Pa. Commonwealth Ct. 247, 382 A.2d 1311 (1978); *Rostosky v. DER*, 26 Pa. Commonwealth Ct. 478, 364 A.2d 761 (1976).

On the other hand, neither this board nor Commonwealth Court has precluded an appellant from his day in court where he did not know if the DER action in question even where he had reason to know of such an action *Wrightstown Township v. DER*, EHB Docket No. 75-307-W (1977); *Ravotti v. DER*, EHB Docket Nos. 78-131-B and 78-134-B (1979).

Perhaps the closest analogy to the instant matter occurred in *Comly and Steele v. DER and Wichard Sewer Company, Permittee*, EHB Docket No. 80-060-H (1981). In the *Steele* matter, Mrs. Elizabeth Steele, the permittee, had appealed one DER action relating to the proposed package sewage treatment plant of Wichard Sewer Company but did not appeal the challenged NPDES permit issuance for more than a year after its issuance. *Steele* is distinguishable from the instant matter in that in *Steele* there was no proof that Steele actually knew of the permit at issue and she certainly had not received a copy of this permit. This opinion does, however, evince this board's policy of avoiding imposition of the harsh sanction of 25 Pa. Code §21.52 except in the clearest case. Similarly, in *R. Czambel, Sr. v. DER*, EHB Docket 80-152-B, this board refused to quash an appeal on the ground that it was not perfected as required by 25 Pa. Code §21.51(f)(3) where there had been timely filing of the appeal.

In the instant matter there is no dispute that the appellant did not and has not received written notice from DER of the presently challenged actions. We believe that 25 Pa. Code §21.52 requires that the written notice must be from DER to activate that section. Clearly, this reading of 25 Pa. Code §21.52 is in keeping with the spirit of this board's legislative mandate which is to hold hearings and issue adjudications on final actions of DER, 71 P.S. §510-21. Moreover, it's in keeping with the spirit of Pa. R.C.P. 126 which although not binding upon this board does offer the distilled wisdom of this Commonwealth's judiciary and bar.

Further, it cannot be ignored that this matter has drug on in large measure because of the many pre-hearing motions filed by Lyncott. Instead of being an innocent party which was misled by Campbell's failure to earlier appeal DER's waste stream approvals, Lyncott has known that it would have to defend these approvals since the County filed its timely appeals.

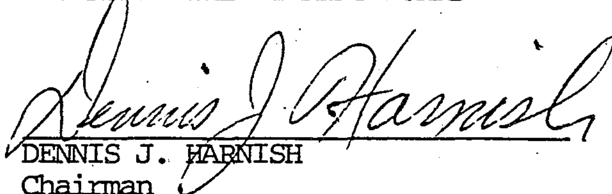
Indeed, Lyncott even knew that Campbell, et al. were likely to appeal the waste stream approvals. Thus, Lyncott could have requested DER to publish its waste stream approvals in the Pennsylvania Bulletin or to directly serve copies of such approvals on the present appellants. Clearly, these are the ways DER could and should preclude the hypothetical problem raised in Lyncott's brief.

Finally, Lyncott raises a laches argument against Campbell but as Campbell correctly notes, on page 8 of its brief, to assert the doctrine of laches in Pennsylvania, one must demonstrate actual prejudice. Neither in its initial nor in its reply brief has Lyncott presented even an argument as to why it is prejudiced by Campbell's delay in filing his appeal. It appears that Lyncott's only prejudice would be to its scheme of avoiding a hearing on the merits regarding the waste stream approvals by disposing of all possible parties to such an appeal.

ORDER

AND NOW, this 6th day of October, 1981, Lyncott Corporation's Motion to Dismiss is denied, the board's order of general continuance dated June 17, 1981 is dissolved and Lyncott and DER are directed to comply with this board's Pre-Hearing Order No. 1 on or before October 23, 1981.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Chairman

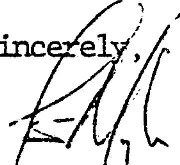
DATED: October 6, 1981

cc: Bureau of Litigation
Louis A. Naugle, Esquire
Robert J. Shostak, Esquire
Stirling Lathrop, Esquire

4. DER will assume no responsibility for assuring the County of actual access to the site.

The above is offered by DER in lieu of a formal Board order and in an effort to be responsive to the County's request despite DER's belief that the County lacks any legal authority for the request.

Sincerely,



LOUIS A. NAUGLE
Assistant Attorney General

LAN/dlh

cc: Gerald C. Grimaud, Esq.
Robert J. Shostak, Esq.
Stirling E. Lathrop, III, Esq.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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CHIPPEWA TOWNSHIP SANITARY AUTHORITY :

: Docket No. 81-115-M

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
MOTION FOR PROTECTIVE ORDER

By: Anthony J. Mazullo, Jr., Member

Chippewa Township Sanitary Authority (appellant) filed its first set of interrogatories upon the Commonwealth (DER), and DER filed its responses thereto, along with its motion for protective order. Appellant filed an answer to DER's motion, and the matter is presently ready for decision.

DER based its motion for a protective order upon the alleged unreasonably oppressive and burdensome nature of providing answers to the questions propounded by appellant in its interrogatories. DER objects to having to provide information on 642 NPDES permits since such information is to be found only in DER's six regional offices, and not in one centralized location.

DER argues that, pursuant to the provisions of Pa. R.C.P. 4006(b), such information as that sought by appellant can be secured by appellant at any, or all, of DER's regional offices, and DER has agreed to permit appellant to review the relevant files, records and documents thereat.

This particular issue has been before the board on other occasions, and it has consistently held that the production of files, as requested by appellant, is unreasonably burdensome, and violative of Pa. R.C.P. 4011(b), and 4006(b). See, for instance, *Mill Service, Inc. v. Comm. of Pa., et al,* EHB Docket No. 80-078-H, opinion dated October 31, 1980.

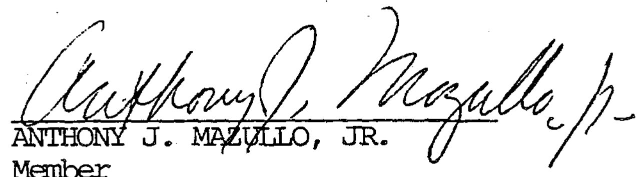
ORDER

AND NOW, this 30th day of November, 1981, it is hereby ORDERED that upon advance notice and request from appellant, Chippewa Township Sanitary Authority, and during normal business hours, DER shall make all municipal NPDES permits, discharge monitoring reports, DER performed effluent analysis, and "modules for land development" for 1980 and 1981 available to appellant, or its representatives, to review, inspect, and copy, if so desired.

Such review, inspection and copying by appellant may be made at any of DER's six (6) regional offices, within forty-five (45) days of date of this order.

DER may impose upon appellant a reasonable charge for use of its duplicating equipment and paper.

ENVIRONMENTAL HEARING BOARD



ANTHONY J. MAZULLO, JR.
Member

DATED: November 30, 1981

cc: Bureau of Litigation
Richard S. Ehmann, Esquire
George A. Verlihay, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

DONALD T. COOPER : Docket No. 81-032-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and HEIRS OF CLARENCE MERCATORIS, Intervenors

ORDER AND OPINION SUR PETITION TO INTERVENE

Donald T. Cooper applied to DER's Bureau of Dam Safety, Obstructions and Storm Water Management for a permit to install and maintain a boat dock on Conneaut Lake at the foot of Oakmere Place in Sadsburg Township, Crawford County. On February 24, 1981 Mr. G. E. Kyle, Director of DER's Bureau of Dams and Waterways Management denied said application. Mr. Cooper has appealed this action of DER at the above-caption.

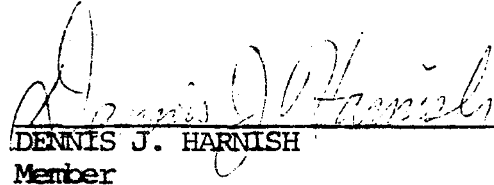
The heirs of Clarence Mercatoris have petitioned to intervene in the above-captioned matter and alleging that they own the property adjacent to the dock in question and that they have not given their permission to the dock.

The appellant in his answer to said petition asserts that he owns the property in question and therefore opposes intervention. DER takes no position on the petition for intervention. Since it appears that the fact at issue on the question of intervention (ownership of the land from which the dock extends) is also the most material fact at issue on the merits and that this issue is hotly contested, the petition shall be granted.

<u>O R D E R</u>

AND NOW, this 23rd day of April, 1981, the petition to intervene (of the heirs of Clarence Mercatoris) is granted.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Member

cc: Bureau of Litigation
Richard S. Ehmann, Esquire
Harvey E. Robins, Esquire
Kenneth C. Thiess, Esquire

DATED: April 23, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

DONALD T. COOPER AND KATHLEEN COOPER : Docket No. 81-032-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and THE HEIRS OF CLARENCE MERCATORIS, INTERVENORS

OPINION SUR PETITIONS FOR
REHEARING AND RECONSIDERATION OF DER AND INTERVENORS

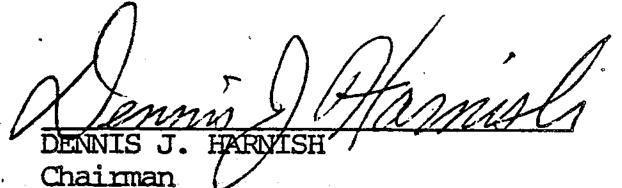
On August 24, 1981 this board issued its adjudication in the above-captioned matter. This adjudication was drafted by the undersigned but was approved by both of the two members of the Environmental Hearing Board, Paul E. Waters and myself.

Mr. Waters resigned from the board during September of 1981 leaving me, at the present time, the sole member of the board. Two other persons have been nominated to fill the board's two vacancies but at this time neither person has been confirmed. Since adjudications are supposed to be issued by a majority of the board, i.e., at least two members, there is some question as to whether a single member can issue an adjudication at least in the absence of a stipulation to that affect by all parties. Moreover, it would seem to make little sense for me to reconsider my own adjudication alone.

Therefore, because I knew that one of the board candidates was having his confirmation hearing during September, I awaited the outcome of this hearing. Unfortunately, action on his candidacy has been postponed until October. In the meantime the 30-day period within which to appeal the August 24, 1981 adjudication passed and on or about September 23, 1981 DER filed a petition to review the said adjudication with Commonwealth Court. The filing of said petition and the passing of time for filing of said petition for review have together deprived this board of jurisdiction to consider the petitions for reconsideration under the terms of Pa. R.A.P. 1701(b)(3).

Because this board no longer has jurisdiction to entertain the said petitions for reconsideration, it will not issue any order with respect to said petitions.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Chairman

cc: Bureau of Litigation
Richard S. Ehmann, Esquire
Harvey E. Robins, Esquire
Kenneth C. Thiess, Esquire

DATED: October 1, 1981
vp

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

DELTA EXCAVATING AND TRUCKING COMPANY, INC. : Docket No. 81-080-H and 81-087-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR DER'S
MOTION FOR A STAY OF DISCOVERY

The above-captioned appeal is from DER's denial on May 15, 1981 of appellant's application to modify its sanitary landfill permit. On the same day that it denied appellant's application the Commonwealth filed criminal complaints against the appellant and its president. (Criminal informations were filed by the Commonwealth on the same charges against the said defendants on July 16, 1981.) The criminal proceeding is based upon the same alleged act which comprise DER's reason for denial and has been rescheduled for hearing beginning on November 16, 1981.

On or about September 2, 1981 DER filed a motion to stay all discovery in the instant proceedings. The Commonwealth argued that as a defendant in the criminal proceedings the instant appellant would not be entitled to take the testimony of the Commonwealth's witnesses and thus, permitting discvoery in the instant matter would be granting appellant discovery which it would not be able to obtain in the criminal proceeding. Appellant has

answered the DER motion and both parties have extensively briefed the issue.

Although, as stated just above, the parties have obviously expended considerable time and trouble in researching and briefing this matter neither party has cited a Pennsylvania precedent to the board. The federal cases which are discussed have been considered by the board in issuing this opinion but since the issue herein involves construction of the Pennsylvania Rules of Civil Procedure these cases do not represent precedent which we are bound to follow. *Western Pennsylvania Conservancy v. DER*, 28 Pa. Commonwealth Ct. 204, 367 A.2d 1147 (1977) (re: discussion of federal caselaw on standing).

Notwithstanding that we are not bound by *Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1962) *cert. denied*, 371 U.S. 955 (1963) which appears to be the only Court of Appeals decision on point we are persuaded that this case enunciates a sound public policy, to wit, that, in certain circumstances, where criminal and civil matters are simultaneously proceeding between the government and one of its citizens, the defendant citizen should not be entitled to make use of the more liberal discovery permitted under the civil rules of procedure to obtain information to prepare his defense in the criminal matter. The Court in *Campbell, supra*, is clear, however, that it is not setting a hard and fast rule that a stay of discovery should not be issued in every situation.

We do agree with the appellant's analysis of *Campbell, supra*, and we agree that instant matter can be factually distinguished from Campbell. For example, it is clear that in Campbell the civil suit was merely "a tactical maneuver to gain advance information on the criminal case" whereas pursuit of the appeal in the instant matter is essential for appellant's business.

Secondly, in *Campbell, supra*, the discovery solicited was overbroad burdensome, and irrelevant to the civil proceeding (but useful in the criminal proceeding) whereas, here the relevancy of the requested discovery is not

denied and no accusations concerning the brealth or burdensome nature of the requested discovery have been lodged. Thirdly, the defendant in *Campbell, supra*was simply not prejudiced by staying discovery in his civil matter pending resolution of the criminal matter since his civil matter solely involved money (it was a tax refund suit and he would get his refund if he prevails). DER's denial of appellant's application, however, precludes him from conducting a solid waste business and even if appellant prevails upon appeal it is hardly likely that he will be able to obtain damages for his expected profits last by virtue of the denial.

Appellant has also urged upon us the distinction that here the Commonwealth initiated both the civil and criminal actions whereas in Campbell the criminal defendant was the civil plaintiff. DER counters with citation in its reply brief to cases where the United States initated both civil and criminal actions yet discovery in the civil action was stayed. We would agree with the Commonwealth on this point; its election of remedies should not be chilled.

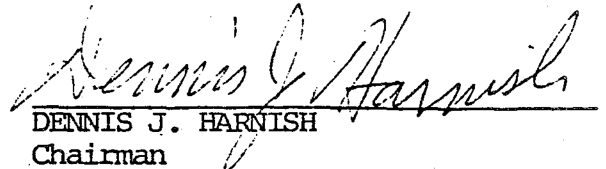
In sum, we agree that the instant action sufficiently differs from *Campbell, supra,* that all discovery in this matter need not be stayed (as requested by DER) "pending the final dispostion of the criminal case" since tis could in appeals and even trials on some or all of the criminal charges.

We do feel, however, that since less than two weeks will expire between the parties' receipt of this order and the trial date in the criminal matter we will stay all discovery until November 17, 1981 just to ensure that the parties' attention will not be distracted from the pending trial.

ORDER

AND NOW, this 6th day of November, 1981, the Commonwealth's motion for a stay of discovery is granted until November 17, 1981 and said stay shall dissolve by its own terms on that date.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Chairman

DATED: November 6, 1981

cc: Bureau of Litigation
Lynn Wright, Esquire
Barbara McDermott, Esquire
John F. Stoviak, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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First Floor Annex
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Harrisburg, Pennsylvania 17101
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DELTA EXCAVATING AND TRUCKING COMPANY, INC.

Docket No. 81-080-H and 81-087-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR DER'S SECOND MOTION FOR A STAY OF DISCOVERY AND MOTION FOR PROTECTIVE ORDER

This matter involves DER's attempts to postpone appellant's noticed deposition of Mr. James P. Snyder, Assistant Director of the Bureau of Solid Waste Management with DER through the filing of motions for a stay of discovery and a protective order. The basis of DER's motions is that the appellant herein is also the defendant to a criminal action arising from the same alleged acts which gave rise to the solid waste disposal application denial appealed herein. DER argues that Mr. Snyder would not be available for a deposition in the criminal action and information obtained in his deposition could be used by appellant as a defendant in the criminal matter.

DER's argument was addressed in the opinion and order issued by this board in the above-captioned matter on November 6, 1981 and the board sees no reason to change that opinion and order but rather a proofed version thereof is incorporated herein and attached hereto. In its new motions DER cites us to

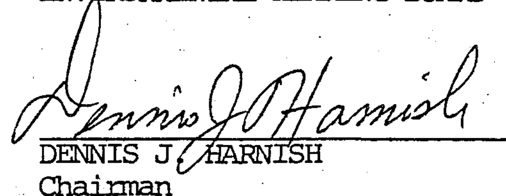
no new authority but does point out that the criminal matter was not tried on or about November 16, 1981 as initially represented and that a new trial date has yet to be scheduled in the Mercer County Court of Common Pleas to which the matter was transferred by appellant's (defendant's therein) request for a change of venue.

Acting upon the said representations, this board on November 6, 1981 had stayed discovery until November 17, 1981, but the board did so as stated in its opinion to avoid the necessity of scheduling depositions on short notice, i.e., as a courtesy to DER's counsel. The board felt then and still feels that the right to full discovery granted by the Pennsylvania Rules of Civil Procedure should not be limited or abridged unless it has been clearly demonstrated that the action before this board is merely a tactical maneuver to gain advance information for a parallel criminal action. Here there has been no such showing.

ORDER

AND NOW, this 22th day of December, 1981, DER's motions for protective order and stay of discovery are denied.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Chairman

cc: Bureau of Litigation
Lynn Wright, Esquire
Barbara McDermott, Esquire
John Stoviak, Esquire

DATED: December 22, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

ELTRA CORPORATION
STANLEY G. FLAGG DIVISION

Docket No. 81-112-W

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
COMMONWEALTH'S MOTION TO DISMISS

On or about June 24, 1981 the present appellant, Eltra Corporation a Stanley G. Flagg Division, received from the Commonwealth of Pennsylvania, Department of Environmental Resources (DER) an NPDES permit including certain new or newly effective conditions. Appellant's appeal from said permit was filed with this board on or about July 27, 1981 some 33 days after appellant's receipt thereof.

DER has filed a motion to dismiss appellant's appeal based upon section 21.52(a) of this board's rules 25 Pa. Code §21.52(a). Appellant admits to the date of its receipt of the NPDES permit and to the date its appeal was received by this board but appellant, nevertheless, denies that §21.52(a) precludes our jurisdiction of the instant matter.

Appellant first argues that §21.52(a) is a nullity because it violates Article I, Section 2 of the Commonwealth's Constitution. In essence appellant

argues that the EQB by promulgating 21.52(a), which reads as follows has unlawfully limited this board's jurisdiction.

> "(a) Except as specifically provided in §21.53 of this title (relating to appeal *nunc pro tunc*), jurisdiction of the Board shall not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of such action or within 30 days after notice of such action has been published in the *Pennsylvania Bulletin* unless a different time is provided by statute, and is perfected in accordance with subsection (b) of this section."

Appellant has acknowledged the problem with this argument, i.e., that the very statute which sets this board's jurisdiction, Section 1921-A of the Administrative Code of 1929, *as amended*, 71 P.S. §510-21, in §510-21(e), specifies that hearings of the board shall be conducted in accordance with EQB rules and regulations including "...time limits for the taking of appeals". Further, as appellant acknowledges Commonwealth Court in *Rostosky v. DER*, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976); *Lebanon County Sewerage Council v. DER*, 34 Pa. Cmwlth. 244, 382 A.2d 1310 (1978) and *Toro Development Company v. DER*, _____ Pa. Cmwlth. _____, 425 A.2d 1163 (1981) has specially approved the 30-day time limit in §21.52(a) and held it to impose limits on this board's jurisdiction.

Not surprisingly, appellant is not pleased by the cited authority and suggests that the Pennsylvania Supreme Court may reverse these decisions. Unless and until that happens we are bound by said decisions and therefore we reject appellant's first argument.

Because we have rejected appellant's first argument, its second argument falls of its own weight. Since §21.52(a) is jurisdictional we have no discretion to exercise regarding a tardy appeal, *Rostosky*, *supra*, and thus we cannot abuse our discretion by denying appellant's appeal.

Appellant's final argument rests upon the uncontested fact that DER published notice of issuance of the NPDES permit at issue in the July 18, 1981 Pennsylvania Bulletin (11 Pa. B. 2585, Vol. 2). Appellant argues that §21.52 should be construed to read that an appellant has 30 days within which to appeal from a DER action and that this period runs from appellant's receipt of written notice of such action or from publication thereof in the Pennsylvania Bulletin which ever is later. Unfortunately for the appellant, the language it would read into §21.52(a) simply does not appear therein. Moreover, as appellant again acknowledges, the construction of §21.52(a) which it sponsors is at variance with other sections of 25 Pa. Code Chapter 21. 25 Pa. Code 21.36, which deals specifically with the effect of publication of notice, states that publication of a notice of action by DER "...in the Pennsylvania Bulletin shall constitute notice to...all persons, except a party, effective as of the date of publication."

In its brief appellant spins an ingenious argument to support its assertion that a permittee is not a "party" within the meaning of §21.36. However, appellant overlooks 25 Pa. Code §21.51(g) which states that:

> "(g) The service upon the recipient of a permit, license, approval, or certification, as required by this section, shall subject such recipient to the jurisdiction of the Board as a party appellee."

Clearly, the appellant became a "party" to the instant matter upon receipt of the NPDES permit.

Prior to that point publication by DER of notice of issuance of said permit would not have affected the appellant's right to appeal (it would still have 30 days from receipt of the NPDES permit to lodge an appeal)[1] and conversely, upon receipt of said NPDES permit its 30-day period began to run regardless of the publication date in the Pennsylvania Bulletin.

---

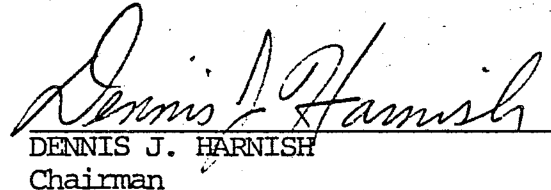
1. Indeed the purpose of §21.36 seems to be to protect permittees from premature publication of their permits by DER.

In conclusion, it may be that DER's publication of notice in the Pennsylvania Bulletin unintentionally misled appellant as to the proper appeal date. If this is true, appellant could qualify for an appeal *nunc pro tunc* pursuant to 25 Pa. Code 21.53. *Sharon Steel Corporation v. DER*, 1978 EHB 205, as affirmed 28 Pa. Cmwlth. Ct. 607 (1977); *Albert Comly and Elizabeth Steele v. DER, et al.*, 80-160-H issued May 13, 1981. Unless this is true, however, this board has no other option than to dismiss appellant's appeal.

ORDER

AND NOW, this 8th day of December, 1981, appellant's appeal is dismissed subject to reactivation if appellant can plead and prove that it's agents were misled as to the appeal date from the said NPDES permit. Appellant shall have 30 days from the date hereof in which to plead in accordance with the cited authority.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Chairman

DATED: December 8, 1981

cc: Bureau of Litigation
Kenneth A. Gelburd, Esquire
Harold J. Wallum, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787 [illegible] 3

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Docket No. 81-081-CP-W

v.

ENVIROGAS, INC.

OPINION AND ORDER SUR APPELLANT'S
PRELIMINARY OBJECTIONS AND OTHER MATTERS

On or about June 3, 1981 the Commonwealth of Pennsylvania, Department of Environmental Resources (DER) filed a complaint for civil penalties with this board. DER accomplished service of said complaint upon defendant, Envirogas, Inc., a foreign corporation registered to do business in this Commonwealth by mailing a copy of said complaint with a notice to defend to defendant's offices in New York state.

DER received a return receipt card indicating that the said complaint had been delivered to defendant's office on or about June 9, 1981.

The defendant has filed preliminary objections to said complaint in the nature of a petition challenging the service of said complaint and consequently the *in personam* jurisdiction of this board over the defendant. The defendant also filed a motion to strike said complaint for the same reasons and a motion for a more specific pleading. DER has responded to said preliminary objections and each party has briefed the issues raised.

After due consideration of the issues presented this board has decided that said preliminary objections lack merit.

The defendant contends that DER failed to comply with the Pennsylvania Rules of Civil Procedure by failing to effect service through the sheriff upon the secretary of the Commonwealth who has been designated as defendant's local agent for receipt of process. The defendant overlooks that the service of a civil penalties complaint is not governed by the Pennsylvania Rules of Civil Procedure but rather by the rules of this board. Specifically, 25 Pa. Code 21.32 of this board's rules provides for service of all pleadings and other documents specially including civil penalties complaints *inter alia* by mailing, properly addressed with postage prepaid.

There is no dispute that DER followed this method in the instant matter, or indeed, that a timely receipt of said complaint was effected by this method.

Perhaps defendant was misled by 25 Pa. Code 21.64(a) of our rules which provides that "the various pleadings described in the Pennsylvania Rules of Civil Procedure shall be the pleadings permitted before this Board". This is indeed true but note that neither this section nor any other incorporates and of the <u>service</u> procedures of the Pennsylvania Rules of Civil Procedure. Thus, we need not reach the parties' arguments regarding the said rules. 25 Pa. Code 21.64(a) does provide that Pa. R.C.P. 1028 governs the form of preliminary objections before this board and Pa. R.C.P. 1028(b) requires that all objections be raised at the same time. Thus, DER is correct that defendant's tardy attempt to raise DER's failure to certify its complaint as a true copy cannot be considered by this board since it was not included with defendant's original objections.

As to defendant's objections in the nature of a motion for a more specific pleading, this matter was resolved by this board's order of August 14, 1981 entered in the above matter.

We also agree with DER that defendant's objections to DER's interrogatories and requests for production are not well-founded. The defendant, a corporation, completely refused to honor either set of discovery on the grounds of an alleged Fifth Amendment privilege against self-incrimination. When DER pointed out that a corporation simply does not enjoy such a privilege defendant shifted its ground to an unreasonable search and siezure claim based upon the Fourth Amendment. Again defendant's argument is inapposite since the instant matter, by definition and by precedent is a civl rather than a criminal proceeding.

Apparently DER has some reservations to defendant's petition for discovery but has yet to articulate the bases of its objections. Rulings, if necessary, upon said objections must await further developments.

Finally, the defendant had petitioned this board to join certain additional defendants, to wit the Erie County Department of Health and certain of its employees has been challenged by DER asserting that this board lacks jurisdiction to authorize such a joinder. Prior to the Commonwealth Court's opinion in *Stevenson v. Commonwealth, Department of Revenue*, (April 25, 1980) 413 A.2d 667 this board had agreed with DER's position. However, our reading of *Stevenson, supra*, in *DER v. Consolidated Rail Corporation and Drake Chemical, Inc.*, 80-069-CP-W (issued July 25, 1980) convinced us that we do have jurisdiction to entertain third-party complaints in civil penalties proceedings. (Note that only full complaints and not praecipes are included.) Of course, we express no opinion as to whether defendant's proposed complaint would be meritorious or even legally sufficient to resist preliminary objections. This issue too, must await future events.

O R D E R

AND NOW, this 8th day of December, 1981, it is hereby ordered that:

a) defendant's preliminary objections are dismissed,

b) defendant shall answer the DER complaint in the above-captioned matter on or before December 31, 1981,

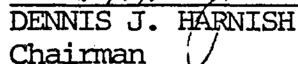
c) defendant's objections and supplemental objections into DER's request for production of documents and interrogatories are dismissed.

d) defendant shall make a full answer to said interrogatories and produce said documents at DER's Erie Offices on or before December 31, 1981, or at such other times and places as may be agreed to between defendant and DER,

e) DER shall answer or object to defendant's interrogatories on or before December 31, 1981 or at such other time as may be agreed to between defendant and DER,

f) defendant may file and serve complaint against third parties as per this board's rules.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Chairman

DATED: December 8, 1981

cc: Bureau of Litigation
Paul F. Burroughs, Esquire
W. Richard Cowell, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

In The Matter Of:	:	
G. E. LANDFILL OPPOSITION COMMITTEE,	:	
Appellant,	:	
vs.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES,	:	Docket No. 80-141-S
Appellee,	:	
and	:	
GENERAL ELECTRIC COMPANY,	:	
Intervener	:	

OPINION AND ORDER SUR APPLICATION FOR SUPERSEDEAS

On July 21, 1980, the Department of Environmental Resources (D.E.R.), by its Regional Solid Waste Manager, issued a permit to General Electric Company (G.E.) under the terms of which D.E.R. authorized G.E. to construct a "Class II" demolition waste landfill on a site in Harborcreek Township, Erie County. This permit was issued pursuant to an application filed by G.E. to which there was appended various supporting exhibits. This permit, No. 101219, was conditioned on the disposal of only "Class I" and "Class II" demolition wastes.

In Chapter 75, Section 75.1 of the Rules and Regulations adopted by the Environmental Quality Board pursuant to the Solid Waste Management Act., Act of July 31, 1968, P.L. 788, No. 241, 35 P.S. §6001, et. seq, said section found at 25 Pa. Code §75.1, the term "construction and demolition waste" is defined as "waste building materials, dredging materials, grubbing waste, and rubble resulting from construction, remodeling, repair and demolition operations on houses, commercial buildings and other structures and pavements".

In Chapter 75, Section 75.33 of said Rules and Regulations, 25 Pa. Code §75.33, construction and demolition wastes are classified into three separate classes, Class I, Class II and Class III. Furthermor in said Section there are landfill design and operational standards provided, depending upon the "class" of the construction and demolition waste to be deposited.

In its application for this permit, G.E. stated that it sought to deposit soil, rock, stone, gravel, brick, furnace brick, concrete block and wood block vacuum impregnated with wood preservative.

An entity known as G.E. Landfill Opposition Committee (Opposition Committee) filed a timely appeal to this Board from the action of D.E.R. by which said permit was granted.

On November 26, 1980, and on December 1 and December 2, 1980, the hearing on the merits of said appeal was held and completed before Louis R. Salamon, Esq., a hearing examiner appointed by this Board.

During the course of this hearing the Opposition Committee, by counsel, attempted to show that wood block impregnated with wood

preservative (creosote) and that furnace brick were not Class I or Class II construction and demolition wastes and that the manner in which said site was planned and designed, per said application, would not cause said site to meet certain of the design and operational standards for a Class II demolition waste landfill as set forth in 25 Pa. Code §75.33.

It appeared, from the testimony of a D.E.R. Regional Solid Waste Facilities Supervisor, that D.E.R. believed that the waste which G.E. intended to dispose of in its proposed landfill was really Class I construction and demolition waste. Notwithstanding this belief, D.E.R. suggested to G.E. that it should apply for a Class II permit, the design and operational standards for which are stricter than those necessary to be implemented and maintained in order to secure a Class I permit, because D.E.R. believed that extra protection was necessary as to the wood block impregnated with creosote.

On December 2, 1980, the final day of the hearing on the merits in this matter, D.E.R. apparently became so sufficiently convinced that the Opposition Committee had established that the G.E. site, as planned and designed, would not meet certain of the design and operational standards for a Class II demolition waste landfill, that it announced, by counsel, and with the apparent acquiescence of G.E., that the G.E. permit would be modified so as cause it to be a Class I permit. This announced modification did not, however, mean that any of the waste which G.E. intended to dispose of at said site would be excluded. Since, according to D.E.R., all

such waste was Class I construction and demolition waste anyway, and since the site, as planned and designed, was satisfactory as a Class I demolition waste landfill, G.E. would not be required to eliminate any of the waste which it planned to dispose of at said site.

On December 24, 1980, we received the written manifestation of this modification in a writing from D.E.R., per its Regional Solid Waste Manager, to G.E. We have no evidence that G.E. has objected to this modification.

On December 26, 1980, we received an application for the issuance of a supersedeas from the Opposition Committee, per its counsel.

According to the unsworn allegations contained in this application, G.E. has commenced the clearing of said proposed landfill site, G.E. has begun to erect fences around said site and G.E. has begun to construct certain drainage ditches at said site.

During the course of a conference call between Hearing Examiner Salamon and counsel for the parties, counsel decided that there was no need to hold a hearing on said application because all the facts necessary to be known with regard to this entire matter had been developed at the hearing on the merits.

On January 5, 1981, we received the answer of D.E.R. to said application. We have not yet received any written response from G.E. thereto, but during said conference call between Hearing Examiner Salamon and counsel for the parties, counsel for G.E. revealed that G.E. opposed said application.

We will dispose of this application, notwithstanding the fact that we have not yet had the opportunity to review the transcripts of those portions of the hearing held on November 26 and December 2, 1980. The bases for our disposition will be our review of the hearing notes of Hearing Examiner Salamon and our review of the transcript of testimony taken at the hearing of December 1, 1980.

In Chapter 21, Section 21.78 of the Rules and Regulations adopted by the Environmental Quality Board which govern the practice and Procedure before this Board, 25 Pa. Code §21.78, the criteria for the grant of a supersedeas are set forth as follows:

"§21.78 <u>Circumstances affecting grant or denial.</u>

(a) The circumstances under which a supersedeas shall be granted, as well as the criteria for the grant or denial of a supresedeas, are matters of substantive common law. As a general matter, the Board will interpret said substantive common law as requiring consideration of the following factors:

(1) irreparable harm to the petitioner;

(2) the likelihood of the petitioner's prevailing on the merits; and

(3) the likelihood of injury to the public.

(b) A supersedeas shall not issue in cases where nuisance or significant (more than de minimis) pollution or hazard to health or safety either exists or is threatened during the period when the supersedeas would be in effect.

(c) In granting a supersedeas, the Board may impose such conditions as are warranted by circumstances including, where appropriate, the filing of a bond or other security."

On the basis of the admittedly limited review which we have made in this matter, we are led to the conclusion that there should be no injury to the public by reason of the disposal of any of the waste which G.E., under the modified permit which it has received,

is authorized to dispose of at said site, given the design and operation of said site per its existing application and plans. There was convincing evidence that there is absolutely no danger that the wood block impregnated with creosote and pitch will leach to the groundwater. The Opposition Committee did not convince us otherwise.

We do, however, believe that there are several components of this appeal as to which the Opposition Committee is likely to prevail. They relate to the classifications provided in Section 75.33 (b), supra, 25 Pa. Code §75.33 (b).

In Section 75.33 (b), supra, it is provided as follows:

"§75.33. Standards for Construction and Demolition Waste Disposal.

. . .

(b) For the purpose of determining requirements for permit, site suitability, and operational compliance, demolition and construction wastes shall be classified.

Classification of Wastes

Class I - waste materials limited to soil, rock, stone, gravel, brick, block and concrete.

Class II - waste materials resulting from land clearing, grubbing, and excavations which may include trees, brush, stumps, vegetative material, and Class I wastes.

Class III - waste materials resulting from the construction or demolition of buildings and other structures which may include, but are not limited to, wood, plaster, metals, asphaltic substances, Class I and Class II wastes."

At this posture, we are led to conclude, from our reading and study of the classification scheme provided in Section 75.33 (b), supra, that wood block impregnated with creosote and pitch, taken from the demolition of flooring at G.E. buildings, is Class III Waste and

not Class I waste. We reach this conclusion notwithstanding our earlier conclusion that this wood block will pose no threat to the public if it is deposited at the proposed G.E. landfill as per the method of disposal and the site standards which have been approved. We reach this conclusion also notwithstanding the fact that D.E.R., the agency which is charged with the duty to enforce and implement Section 75.33 (b), supra, considers this wood block to be a Class I waste. Although it is true that the construction of a regulation by those charged with application is entitled to great weight, it is also true that in the end it is the regulation which is to govern rather than departmental opinions in regard to it. Federal Deposit Insurance Corp. v. Board of Finance & Revenue, 368 Pa. 463, 84 A.2d 495 (1951); Girard School District v. Pittenger, 29 Pa. Cmwlth. Ct. 176, 370 A2d. 420 (1977).

We are also led to conclude that to the extent that G.E. is authorized to dispose of the waste materials which have resulted from its land clearing activities at its proposed site or to the extent that G.E. believes that it is authorized so to do, such authorization is improper because waste materials resulting from any land clearing operation are, under Section 75.33 (b), supra, Class II wastes.

It may very well be that G.E. or D.E.R. can convince us that (1) said wood block impregnated with creosote and pitch is a Class I waste according to said Section and (2) that G.E. can dispose of its own land clearing waste at the very site from which said material

resulted without violation of said Regulation. However, at this stage of the matter we are relatively certain that if we do not grant a limited supersedeas to the Opposition Committee under the terms of which G.E. is estopped from disposing of said wood block and said land clearing materials, at said site, the Opposition Committee may be irreparably harmed.

ORDER

AND NOW, to-wit, this 9th day of January, 1981, upon consideration of the Application For Supersedeas filed by the G.E. Landfill Opposition Committee, Appellant, it is hereby Ordered that a supersedeas is granted in this matter, as follows: General Electric Company may (1) proceed to clear the site of its proposed demolition waste landfill in Harborcreek Township, Erie County. (2) proceed to construct diversion and drainage ditches on said site to serve said demolition waste landfill, according to the terms and conditions of its Solid Waste Disposal Permit No. 101219, as modified on December 18, 1980. (3) proceed to otherwise prepare said site for the operation of said demolition waste landfill according to the terms and conditions of said Permit, as modified (4) proceed to deposit Class I demolition wastes at said site including soil, rock, stone, gravel, brick, uncontaminated furnace brick and cement or concrete block, according to the terms and conditions of said Permit, as modified.

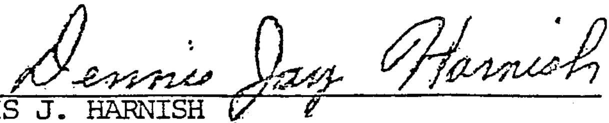
General Electric Company shall not bring onto said site and General Electric Company shall not utilize said site for the deposit of wood or wood block impregnated with creosote or wood block impregnated with creosote and covered with a coating of pitch until further Order of this Board.

General Electric Company shall not utilize said site for the deposit of any waste materials or other materials which result from any land clearing activity whatsoever, including materials cleared from said site itself until further Order of this Board.

ENVIRONMENTAL HEARING BOARD

Date: January 9, 1981

PAUL E. WATERS
Chairman



DENNIS J. HARNISH
Member

cc: Bureau of Litigation
Paul F. Burroughs, Esquire
Bradley H. Foulk, Esquire
Thomas M. Burns, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
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112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

GENERAL INVESTMENT AND DEVELOPMENT COMPANY :

:

: Docket No. 81-120-M

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION TO DISMISS

The Department of Environmental Resources (DER) has filed a Motion to Dismiss the appeal of General Investment and Development Company, et al., which appeal was taken from the action of DER in refusing to allow the construction of thirty-two (32) additional units requiring sewage connections to the Chalfont-New Britain treatment plant. Appellants have filed an answer to that motion.

This board is empowered to grant a motion to dismiss, which is the nature of a motion for summary judgment, when there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law. *Kiskimestas Township v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 78-043-B (issued October 10, 1980), citing various cases.

In order that a motion to dismiss be granted, the right of the moving party must be clear and free from doubt. *Berman & Sons, Inc. v Pennsylvania Department of Transportation*, 21 Pa. Commonwealth Ct. 317, 345 A.2d 303 (1975). The consideration of the motion to dismiss requires that the board accept as true all averments of fact

pleaded, and the record must be viewed in a light most favorable to the nonmoving party. *Schacten v. Albert* 212 Pa. Super. 58, 239 A.2d 841 (1968).

Der's refusal letter of July 8, 1981 cited two reasons for denial of appellant's request for additional sewer connections in its development, namely:

1. Appellants' estimate of anticipated water savings were overly optimistic and;

2. No information had been given to DER which would have waived the requirements of a certain agreement (not of record) entered into between the appellants and DER dated February 8, 1980.

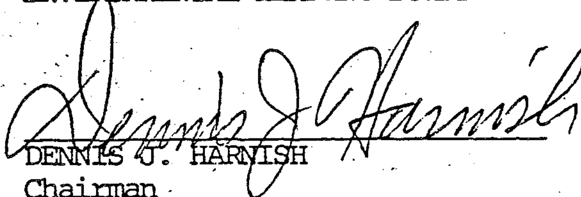
In their appeal, the appellants raise questions of fact regarding anticipated water savings and changed circumstances as regards the Consent Order and Agreement of February 8, 1980.

In order for DER to succeed in its motion to dismiss, the board would be required to overlook these issues of fact presented by the appellants in their appeal which we cannot do according to the above cited authority. Furthermore, since the record must be viewed in a light most favorable to appellants herein, the board must also accept as true all averments of fact pleaded by the appellants. If one accepts as appellants' allege, that the connection they seek will not increase existing flows of sewage, the right of DER to prevail becomes extremely doubtful and unclear. Accordingly, the motion to dismiss cannot be granted.

ORDER

AND NOW, this 16th day of October, 1981, the Motion to Dismiss, filed by DER is denied and dismissed.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Chairman

BY: Anthony J. Mazullo, Jr., Esquire

DATED: October 16, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
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AL HAMILTON CONTRACTING COMPANY :

:

Docket No. 81-051-H

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR
DER'S MOTION FOR SANCTIONS

The above captioned matter involves the appeal by Al Hamilton Contracting Company from DER's denial of an application for a mine drainage permit. DER in preparation for a hearing on the merits has served a set of interrogatories upon the appellant which interrogatories have been answered in part and objected to in part by the appellant.

DER has filed a motion to dismiss appellant's objections, to compel appellant to answer said interrogatories and to impose sanctions including attorney's fees.

The appellant filed an answer to DER's motions and oral argument was held on said motion on October 29, 1981. The interrogatories at issue are numbers 3, 5, 48, 49, 50, 51, 52, 53, 54, 55, 56 and 57.

Interrogatories 3 and 57 solicit information regarding the relationship between appellant and Bradford Coal Company. Appellant objects that since it and not Bradford Coal is the applicant, the relationship between it and Bradford Coal is immaterial and irrelevant. DER, however, notes and the board agrees that relevancy for the purposes

of discovery is much broader than relevancy for the purposes of evidenecy rulings. Moreover, the relationship between appellant and Bradford Coal may be relevant even at the hearing.

Section 3(b) of the Surface Mining Conservation and Reclamation Act *as amended* October 10, 1980, 52 P.S. §1396.3(a)(b) precludes the issuance of a permit not just to entities which engage in unlawful conduct as defined in said act but also where *inter alia* the parent or subsidiary corporation to said entity has engaged in unlawful conduct. Appellant rightly notes that DER's denial letter does not list unlawful conduct by either Bradford or appellant as a grounds for denial of appellant's permit but the proceeding before this board is *de novo* and DER is not limited to grounds set forth in its denial letter.

Furthermore, appellant submitted in support of its application a report on the economic and social impact of the new Bradford Coal Company, Inc. preparation plant and DER in its presently appealed denial letter specifically questioned the adequacy of this report.

For the appellant to claim that Bradford's economic advantage supports its application yet refuse to disclose the relationship, if any, between it and Bradford is an anamolous position. Thus, appellant's objections regarding interrogatories 3 and 57 will be dismissed.

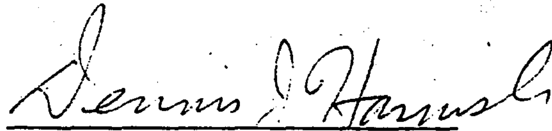
Interrogatories 48 through 51 which explore the dependency of the Bradford Coal preparation plant on appellant's denied mine drainage permit would also be clearly relevant because of the said report and appellant's counsel apparently agreed with this proposition (see p. 27 of the Notes of Testimony). In any event, appellant's objections to these interrogatories are also dismissed for the above reasons.

The remaining interrogatories 5 and 52 through 56 are objected to because they solicit answers on behalf of Bradford Coal as well as the appellant and/or assume so close a corporate connection between these entities as to make Bradford the same "party" as the appellant under Pa. R.C.P. 4005. At this stage there is no conclusive evidence on this point. Unless answers to interrogatories 3 and 57 show this close connection appellant's objections will be upheld.

O R D E R

AND NOW, this 13th day of November, 1981 appellant is directed to answer DER's interrogatories 3, 48, 49, 50, 51 and 57 on or before November 27, 1981 and if the answers to interrogatories 3 and 57 indicate that appellant is a totally owned parent or subsidiary of Bradford Coal Company, Inc. appellant shall simultaneously provide complete answers to interrogatories 5 and 52-56.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Chairman

DATED: November 13, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
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Harrisburg, Pennsylvania 17101
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KING COAL COMPANY

Docket No. 80-159-M

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
MOTION TO DISMISS

By: Anthony J. Mazullo, Jr., Member

By notice dated August 26, 1980, the Bureau of Mining and Reclamation advised appellant that the Bureau considered appellant's operation at Addison Township, Somerset County, Pennsylvania abandoned under the provisions of Section 3 of the Surface Mining Conservation and Reclamation Act, *as amended* October 10, 1980, 52 P.S. 1396.3.

Appellant filed an appeal with this board, and DER thereafter filed a motion to quash the appeal. Appellant filed an answer to the motion to quash, and this board entered an Order, dated November 29, 1980, denying the motion to quash.

DER has since filed a motion to dismiss the appeal, and appellant filed an answer thereto.

The motion to dismiss is based upon the fact that the notice of August 26, 1980, upon which the appeal is based, was rescinded by DER by a notice dated December 5, 1980, which latter notice rescinded the department's finding of abandonment and further advised that forfeiture proceedings would not be initiated against appellant at the affected sites.

Appellant answered the motion to dismiss by admitting *inter alia* that the abandonment finding had been rescinded, and alleged that despite the rescission notice, this Board "must retain jurisdiction pursuant to 71 P.S. 510-21(c)" because of an outstanding equity action in the Court of Common Pleas of Somerset County, Pennsylvania, No. 450, 1980.

A review of the "Memorandum of Preliminary Injunction" issued and dated October 27, 1980 by the said Court reveals, on page 2 thereof, that the Court concerned itself only with appellant's failure to comply with DER regulations requiring backfilling at appellant's Addison Township operation. The Court also stated that it was retaining jurisdiction "for all purposes" (page 4), provided that DER could pursue other remedies not inconsistent with the Court's decree.

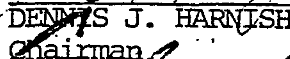
The mere fact that Court of Common Pleas of Somerset County has before it litigation involving appellant and DER is of no consequence with regard to this appeal, especially since the bases of that litigation has nothing to do with the notice of violation of August 26, 1980 which forms the basis of the appeal before this Board.

In order for an appeal to lie, there must have been some final action of DER which has adversely affected some person. The finding of abandoment of August 20, 1980 may have been constituted final action of DER adversely affecting appellant, but that notice has been, admittedly, rescinded.

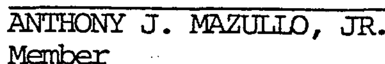
Therefore, no final action of DER is presently before the Board, and an appeal cannot lie without such condition precedent at issue. *DER v. New Enterprise Stone & Lime Co., Inc,* 25 Pa. Commonwealth Ct. 389, 359 A.2d 845 (1976).

The appeal of King Coal Company is therefore dismissed.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Chairman



ANTHONY J. MAZULLO, JR.
Member

DATED: November 13, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

KING COAL COMPANY :

: Docket No. 80-177-M

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
MOTION TO DISMISS

By: Anthony J. Mazullo, Jr., Member

King Coal Company (appellant) filed this appeal from the suspension of its Mine Drainage Permit No. 40775M3 and Mining Permit No. 1566-17 by the Bureau of Mining and Reclamation of the Pennsylvania Department of Environmental Resources. DER's suspension was incorporated in a letter dated September 26, 1980 and was based upon appellant's alleged mining off permitted and bonded area and mining under a Cease and Desist Order.

The appeal was received by this board on October 24, 1980, and appellant filed on the same day, Preliminary Objections, alleging that DER's institution of a suit in equity in the Court of Common Pleas of Somerset County, No. 450, 1980 ousted this board of jurisdiction in this appeal, or, in the alternative, action by the board be stayed until final order of the Court.

The Commonwealth, DER, on November 20, 1980, filed a motion to dismiss, alleging that appellant was issued on October 15, 1980 a mining permit, No. 1566-

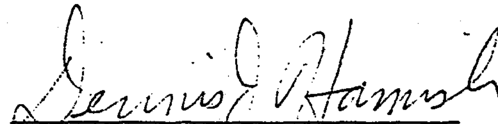
4077SM3-01-1, for the area which appellant had been mining without a mining permit, and that on October 27, 1980 DER reinstated appellant's Mining Permit No. 1566-17 and Mine Drainage Permit No. 4077SM3, and therefore this appeal was moot.

Appellant filed an answer and new matter to DER's motion to dismiss, admitting reinstatement of its mining permit No. 1566-17 and mine drainage permit No. 4077SM3, and issuance of mining permit No. 1566-4077SM3-01-1, and requesting retention of jurisdiction by this board for the purpose of adjudicating appellant's rights and liabilities. DER filed a reply to appellant's new matter, and the cause is ripe for adjudication.

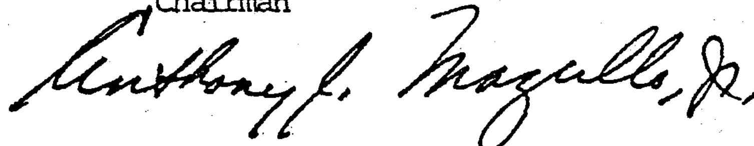
Appellant has admitted, in its answer to DER's motion to dismiss, that its basis for this appeal, namely, the suspension of its permits, is no longer a matter of controversy since the suspensions noted in the letter of September 26, 1980 have been revoked and the permits reinstated. There is, therefore, no relief which this board may offer to the appellant (which is the classic definition of mootness). *Silver Spring Township v. DER*, 28 Pa. Commonwealth Ct. 302, 368 A.2d 866 (1977).

Accordingly, the appeal of King Coal Company is hereby dismissed.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Chairman



ANTHONY J. MAZULLO, JR.
Member

DATED: November 13, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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LAWRENCE COAL COMPANY : Docket No. 81-031-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
APPELLANT'S PETITION FOR SUPERSEDEAS

Petitioner, Lawrence Coal Company, is the permittee of Mining Permit No. 1063-5 Amended and Mine Drainage Permit No. 3376SM15(T) which relate to a surface coal mine known as the Rogers Mill Strip located in Springfield Township, Fayette County near the town of Normalville, Pennsylvania.

From some time in 1977 up to March 6, 1981 petitioner conducted surface mining operations at this site. In the spring of 1980 Mr. Mark Frederick, a DER mine inspector, observed seeps of acid mine drainage (AMD) from a point on or near the area covered by the said mine drainage permit into a ditch on the east side of Township Road 687 (T687) and ordered the permittee to treat this drainage. Permittee installed two ponds and an overflow pipe from the first to the second pond and a soda ash drum to collect and treat this drainage and, apparently, treated this drainage to DER's satisfaction up to March 5, 1981.

On March 5, 1981, however, perhaps because of heavy rains and a higher than average groundwater flow, drainage broke out around the area of the said overflow pipe and flowed at a rate of approximately 30 gpm and a pH of 3.2 into the said ditch on the east side of T687 and thence, via a culvert under T687 (known as culvert 2) to an unnamed tributary of Black Run which runs along the west side of T687.

On March 6, 1981 DER issued an order ceasing petitioner's operations on the basis of the above described breakout. Petitioners appealed from said order and filed the instant petition. A hearing was held on this petition on April 15, 1981 but the Notes of Testimony from said hearing have yet to be received by this board or either party. Nevertheless, at the request of the parties, this Opinion is being issued on the basis of the board's notes, the briefs of the parties, depositions and exhibits entered at the hearing.

While the petitioner stipulated to the above stated factual background, the petitioner also asserted by way of defense that the breakout was not on the permitted area and was not mined by the petitioner. In the deposition of Mr. James Filiaggi, however, he acknowledged that the petitioner had affected this area with its drag line during reclamation and that the breakout point <u>might</u> have been on the permitted area.

The petitioner also asserted, through Mr. Filiaggi, that soon after March 5, 1981, petitioner completely corrected the breakout problem. DER's inspection reports and mine inspector do show that by March 19, 1981 the breakout had been much reduced in volume (to about 3 gpm) and improved in quality (6.5 pH) by the petitioner's efforts but DER's inspector testified that the discharge still failed to meet the mine drainage permit limits for iron, managnese and total suspended solids. Moreover, as late as April 14, 1981, Mr. Frederick testi-

fied that the pH of the flow from culvert 2 was field tested at 4.7 pH which is below DER's standards and that the discharge from culvert 2 continued to lower the pH in said tributary.

Petitioner disputes DER's sampling points, suggesting that the poor sampling results described above are caused by discharge from a WPA mine seal which can also report to the ditch along the east side of T687. However, DER's mine inspector testified that there was no flow from this deep mine source on either March 19, 1981 or April 14, 1981 yet the flow from culvert 2 did not meet DER regulations and the permit requirements on these dates.

Circumstances affecting the grant or denial of a supersedeas by this board are set forth at 25 Pa. Code §21.78. Pursuant to §21.78(b) this board may not issue a supersedeas which would cause or threaten a nuisance or significant pollution or a health or safety hazard. DER's reliance upon this section is not supported by the record at this point. Although DER's acquatic biologist Carl Sheaffer and Waterways Patrolman, James Ansell both testified that the water quality of Buck Run had deteriorated due to mining in the watershed, the testimony of neither witness tied that degradation to the breakout in question or even necessarily to petitioner's mining.

On the other hand, in order to demonstrate an irreparable injury to the public so as to justify a preliminary injunction DER needs only prove a violation of law. *Pa. P.U.C. v. Israel*, 356 Pa. 400, 52 A.2d 317 (1947); *Commonwealth of PA, DER v. Coward*, _____ Pa. _____, 414 A.2d 91 (1980) and thus, it would follow that unless a petitioner for supersedeas could demonstrate that he complied with all applicable rules and regulations he could not make the showing of "no likelihood of injury to the public" as required by 25 Pa. Code §27.78(a)(3).

As set forth above, there is evidence of record that there continue to be discharges from the breakout which discharges violate various provisions of the Clean Streams Law and the Surface Mining Conservation and Reclamation Act (as well as the permit conditions of petitioner's permit).

Petitioner has presented no witness to contradict this evidence. Thus, the petitioner cannot be said to have shouldered its burden under 25 Pa. Code §21.78(a)(3).

For the same reasons, petitioner cannot be said to have shown a likelihood of prevailing on the merits as requied by 25 Pa. Code §21.78(a)(2).

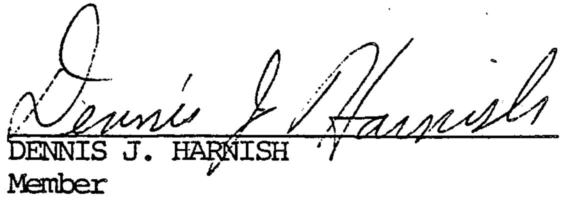
Finally, petitioner has not even demonstrated the "irreparable harm to petitioner" required by 25 Pa. Code §21.78(a)(2). As to the cessation portion of the order, petitioner's brief postulates the laying off of employees and idling of equipment due to cessation of mining but no witness testified with regard to these matters and due to the miner's strike, of which this board takes official notice, it is possible that petitioner would not be operating even if a supersedeas were granted.

Mr. Filaggi did opine, in his deposition transcript, that the costs of permanent treatment would exceed the value of coal remaining at the site. This would not seem to be the proper test of economic feasibility but, in any event, the board is addressing this concern, by postponing the requirement for installation of permanent treatment facilities pending the issuance of an adjudication on the merits. In the interim, however, petitioner must prevent any discharge from the breakout area which violates any applicable statutory requirements, regulation or permit condition.

ORDER

AND NOW, this 7th day of May, 1981, it is hereby ordered that the petitioner's petition for supersedeas is denied and DER's order is modified to the extent that it requires immediate installation of permanent treatment equipment as set forth in the above Opinion.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Member

DATED: May 7, 1981

cc: Bureau of Litigation
Robert P. Ging, Jr., Esquire
William M. Radcliffe, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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Harrisburg, Pennsylvania 17101
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LEHIGH DYEING AND FINISHING, INC. :

:

: Docket No. 79-058-W

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
MOTION FOR SUMMARY JUDGMENT

This matter has come before the board after a rather unusual procedural history, as follows.

On April 27, 1979, DER issued an order requiring Lehigh Dyeing and Finishing, hereinafter appellant, to use certain emission control equipment on its dyeing vessels and to cease and desist any operation not in compliance with the applicable regulations, notably 25 Pa. Code §127.31(b) prohibiting the release of detectable malodors. Appellant appealed this order, and on August 26, 1980 this board issued an adjudication and order concerning said appeal. *Lehigh Dyeing and Finishing, Inc. v. Commonwealth of Pa., DER*, EHB Docket No. 79-058-W (August 26, 1980). The adjudication concluded that DER had not justified its order requiring appellant to install control equipment on its dyeing vessels. Therefore, DER was ordered to monitor odor complaints in the area of appellant's plant during a period wherein appellant operated only activated charcoal filter controlled equipment, to see whether refraining from use of uncontrolled equipment would solve the odor problem. DER was ordered to report the findings of its monitoring program to the board.

DER issued its report on May 26, 1981. This report stated that the results of the monitoring program had not conclusively answered the question whether installation of charcoal filtration emission control equipment on all of appellant's as yet uncontrolled (as of May 26, 1981) dye vessels would solve the odor problem in the area. The report complained that a reason for the report's inconclusiveness was appellant's refusal to permit DER to conduct certain stack tests which DER thought necessary to nail down the effectiveness of the charcoal filtration equipment appellant was employing. The report ended with the recommendation that this board issue another order in this matter, requiring appellant to permit the aforementioned stack tests and forbidding appellant from using equipment not approved by DER until DER was able to evaluate its stack tests and make recommendations based thereon.

Appellant responded to this report by pointing out, notably in letters to the board dated June 9 and June 22, 1981, that no complaints of malodors had been received by DER since January, 1981, when appellant had begun using a new "dye carrier" called "Grant AHT" in its dyeing operations; appellant argued, therefore, that the DER's previous monitoring program was out of date, and that a new monitoring program was called for.

DER's rejoinder to appellant's June letters was a motion for summary judgment, dated August 26, 1981. It is this motion which is presently before the board. In this motion DER concedes that there have been no complaints of malodors since appellant has begun using Grant AHT. However, in disagreement with appellants, DER argues that the absence of complaints implies there is no need for a new monitoring program. Rather, DER asserts, the board should grant DER's motion for summary judgment, which in substance asks the board to order appellant:

1. To employ no other dye carrier than Grant AHT without prior written authorization by DER.

2. To submit information to DER which will enable DER to evaluate the need for operating permits by appellant.

3. To submit an application for an operating permit if DER determines an operating permit is required.

4. To maintain records of its dyeing operation which can be inspected by DER.

Appellant's answer to DER's motion for summary judgment rejects DER's proposed clause 1 above, especially the requirements of obtaining prior written authorization to any changes in dye carrier, as unjustly onerous; however appellant is willing to accept an order not to employ any dye carrier more odoriferous than Grant AHT. Appellant argues that clauses 2 and 3 above are beyond DER's powers, in that these clauses would give DER the uncontested right to decide on its own whether appellant requires an operating permit. Appellant appears to be willing to accept an order embodying clause 4 above. The merits of these objections by appellant to the terms of DER's proposed order are not reached in this opinion, although we do dismiss DER's motion for summary judgment, for reasons explained below.

In essence the board is dismissing this motion of DER's because it does not have the power to grant the motion. Under Administrative Code 71, P.S. §510-21, the jurisdiction of the board is specifically limited to review of actions or orders of DER. *Scott Paper Company v. Commonwealth of Pa., DER*, 1978 EHB 237, 240. The only DER order that the board has been asked to review is the order of April 27, 1979, whose appeal was the subject of the August 26, 1980 adjudication cited *supra*. Apparently DER has decided that its order of April 27, 1979 no longer is germane. In any event, for whatever the reason, DER is not now asking the board to affirm its original order, which was neither sustained nor overturned by the August 26, 1980 adjudication.

Instead, DER is asking the board to sustain, via the device of its motion for summary judgment, a new order, whose terms—except for the requirement of record keeping—bear no discernible relation to the terms of the original April 27, 1979 order. It is true that where DER issues orders pursuant to the exercise of its discretion, this board, based on the record before it on appeal from such orders, may substitute its discretion for that of DER and modify or amend such orders. *Warren Sand & Gravel Co., Inc., et al v. Commonwealth of Pa, DER,* 20 Pa. Cmwlth. 186, 341

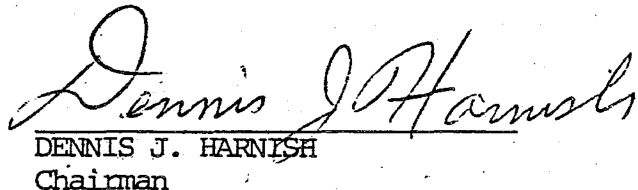
A.2d 556 (1975); *Philadelphia Gum Co., et al. v. Commonwealth of Pa, DER 1976* EHB 269, 303 reversed on other grounds, 35 Pa. Cmwlth. 443, 387 A.2d 142 (1978). However, there is no record before the board which would justify the radical modification of the April 27, 1979 order needed to make the terms of the modified order conform to the terms DER is requesting in its motion for summary judgment. The testimony during the hearing which led to the August 26, 1980 adjudication was not at all concerned with the Grant AHT dye carrier which is a principal subject of DER's presently requested order.

The board concludes that it cannot justify modifying the April 27, 1979 order to make it conform to the terms of the newly requested order, which the board can sustain only after appellant has had the opportunity to appeal it. There is no appeal of this newly requested order before the board, nor is there anything in the record to show that appellant has had the opportunity to file a timely appeal of the new order, but failed to do so. Under the circumstances, the board's granting of DER's motion would amount to an exercise of the board's power in excess of statutory authority, and simultaneously would amount to a violation of appellant's due process rights.

O R D E R

AND NOW, this 12th day of November, 1981, after due consideration of a motion for summary judgment filed by DER in the above captioned matter, the motion is hereby dismissed.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Chairman

DATED: November 12, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Docket No. 80-211-CP-H

v.

LUCKY STRIKE COAL CORPORATION
AND LOUIS J. BELTRAMI

OPINION AND ORDER SUR DER'S MOTION TO
DISMISS DEFENDANTS' OBJECTIONS TO DER'S
INTERROGATORIES AND TO COMPEL
DEFENDANTS TO ANSWER SAME AND TO IMPOSE SANCTIONS

DER is not satisfied with the answers furnished by the defendants to DER's January 29, 1981 Interrogatories and has moved this board to dismiss certain of defendants' objections to said interrogatories, to compel defendants to answer same and/or to impose sanctions upon defendants for their failure to answer.

The first dispute between the parties involves Interrogatory 2--the dispute here is not related to the relevancy of this Interrogatory, which is tacitly admitted, but is related to the dates of the inquiry. Without passing upon DER's argument, it seems clear that defendants should answer Interrogatory 2 for the period between and including November 20, 1979 to July 24, 1980.

Interrogatories 3, 4, 6, 8 and 9 all deal with the amount of coal moving through the Huber Breaker Coal Processing Plant and the dates upon which the presence of this coal at the Breaker came to the defendants' attention. The

defendants' point that it is the alleged violations in the operation of said plant rather than actions regarding the shipment of coal holds some merit. However, DER's answer to this argument is also logical. The concept of wilfulness is relevant to the determination of civil penalties, is raised in DER's complaint, and could relate to defendants' knowledge of coal shipment dates. The board has also concluded that the profitability of a polluting activity while not binding is relevant to the consideration of the amount of the penalty and the information solicited in the said Interrogatories may give some idea as to the gross profitability of the operation. In addition, the information requested in said Interrogatories could act as a cross check on the dates of operation information solicited in Interrogatory 2. Thus, these defendants shall be required to answer these Interrogatories for the period of November 20, 1979 through July 24, 1980.

The final matter in dispute is Interrogatory 24 which solicits the federal and state income tax forms for Louis J. Beltrami. DER has posited no theory as to why this information would be relevant or material and defendants strenously object that it is neither relevant nor material. Since DER has alleged no connection between Mr. Beltrami's income and the profitability of the operation in question the defendants' argument on this issue shall be upheld.

O R D E R

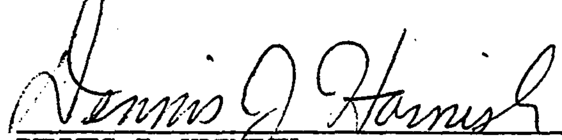
AND NOW, this 1st day of June, 1981, the board orders that:

1. Defendants (within 15 days from the date of this order) shall produce all documents and answer Interrogatories No. 2, 3, 4, 5, 6, 8 and 9 for the time period through and including November 20, 1979 to July 24, 1980.

2. All Answers to Interrogatories including those already submitted to DER by defendants shall be, as the case may be, submitted or resubmitted, signed under oath by the person making them but not by any attorney who intends to represent the defendants in this matter.

3. Defendants' objection to Interrogatory 24 is sustained.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Member

DATED: June 1, 1981

cc: Bureau of Litigation
Joel R. Burcat, Esquire
Raymond J. Sobota, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

LYNCOTT CORPORATION : Docket No. 81-038-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR DER'S MOTION TO QUASH
NOTICES OF DEPOSITION AND DER'S MOTION FOR STAY OF PROCEEDINGS

DER has moved to quash the notices of deposition served by Lyncott on the following DER personnel: Clifford L. Jones; Gary Galida; Douglas Lorenzen; Kirti Shah; Donald Lazarchik; William Adams; Eugene Dice; David Lamereaux; William Tomayko; Barrett Borry; Larry M. Sattler; John Leskosky; Lorie O'Day; Alan Stephens; and Stephen Curran.

The factual averments of DER's Motion have not been answered or contested by Lyncott and are, in general, a matter of record with this board. On the basis of these facts it is clear that the above-described notices were issued more than 60 days after the filing of Lyncott's appeal wherefore said notices require leave of this board pursuant to 25 Pa. Code §21.111(a).

The board hereby treats each of the said notices as a request to depose the person named therein and hereby grants Lyncott to serve new notices upon the above-named and any other persons. The pre-notice petition requirement of 25 Pa. Code §21.111(a) is waived as to the other parties to this matter.

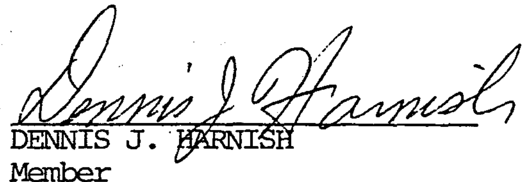
Since new notices are required by the terms of this order, DER's motion for stay of the original notices is moot.

For the sake of clarity it is noted that DER is not precluded by this order from filing motions for protective orders with regard to *inter alia* the deposition of any of the above-named persons. It should also be noted that although the taking of depositions after the beginning of a hearing is rare, where, as here, the proceedings have been bifurcated, depositions concerning the issues not yet litigated have usually been allowed.

O R D E R

AND NOW, this 30th of July, 1981, it is ordered that DER's motion for a stay is dismissed as moot and DER's motion to quash is granted but Lyncott is granted leave to issue new notices of deposition without further leave of the board.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Member

DATED: July 30, 1981

cc: Bureau of Litigation
Louis A. Naugle, Esquire
Robert J. Shostak, Esquire
Gerald C. Grimaud, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

LYNN TOWNSHIP MUNICIPAL AUTHORITY :

: Docket No. 81-068-W

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

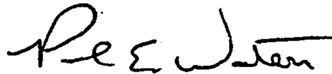
OPINION AND ORDER SUR
MOTION TO DISMISS APPEAL

On November 7, 1980 DER issued a decision which denied appellant's requested changes in a federal construction grant sewer project issued under the Federal Clean Water Act 33 U.S.C. §1251 *et seq*. Appellant Lynn Township Municipal Authority received notice of this action on or about November 9, 1980. On November 25, 1980 appellant sent a copy of an appeal to the DER Bureau of Administrative Enforcement in Harrisburg, and a copy to the DER Wernersville office. Appellant did not send an appeal to this Board until May 4, 1981. We have held consistently in accordance with our Rules 25 Pa. Code 21.52 (a) that the appeal *must* be filed with the Board within 30 days. *Lebanon County Sewage Council v. DER*, 382 A.2d 1310 (1978). Further, appellant has not alleged sufficient grounds for allowance of an appeal *nunc pro tunc*. We must therefore grant the motion filed by DER, to dismiss this appeal. *Rostosky v. DER* 26 Pa. Comth. Ct. 478.

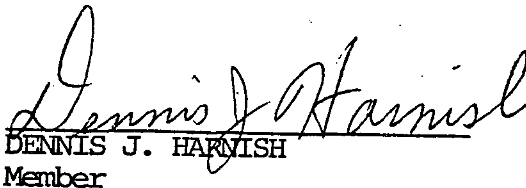
ORDER

AND NOW, this 14th day of August 1981 the Motion filed by DER to dismiss the appeal of Lynn Township Municipal Authority to No. 81-068-W is hereby granted.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman



DENNIS J. HARNISH
Member

DATED: August 14, 1981

cc: John R. Embick, Esquire
David G. Welty, Esquire
Bureau of Litigation

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Docket No. 81-013-CP-W

v.

RUSSELL MAHLER
and KENNETH MANSFIELD, JR.

OPINION AND ORDER SUR MOTION
FOR ENTRY OF JUDGMENT BY DEFAULT

On January 28, 1981 DER filed a Complaint for Assessment of Civil Penalties against Russell W. Mahler and Kenneth Mansfield, Jr. The complaint indicated that defendant Kenneth Mansfield resided at 180 Meadowhill Drive, Guilford, Connecticut 06437. The complaint was sent to defendant Mansfield by certified mail. The letter, sent with return receipt requested, was received by one "Linda Mansfield", on January 30, 1981. On February 19, 1981 a New Jersey attorney (Eugene Callahan) indicated by phone that he represented defendant Mansfield and requested DER extend the time[1] for filing an Answer until March 1, 1981. Without the knowledge or consent of the board this agreement was apparently reached. On July 7 and July 9, 1981 there was correspondence between DER and defendant's present counsel, which indicates that there was some confusion or at least disagreement concerning DER's in-

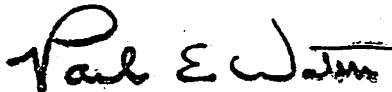
1. A certified letter indicating an intention to request a default judgment if no answer was filed was sent to Kenneth Mansfield at the Connecticut address on April 27, 1981 by DER.

tention to file on July 9 the Motion, presently before us.[2] Another letter and at least one telephone conversation passed between the parties on May 28 and May 29, 1981, concerning pleadings in this case.[3] This board has never favored Judgments by Default. In this case we are not fully satisfied with the delays and failure to Answer the Complaint in a timely fashion. At the same time, it is clear that defendant changed counsel at least once, and has made some effort to obtain agreement from DER on its tardiness. Extending the benefit of every doubt to defendant, we will deny DER's Motion for Default Judgment.

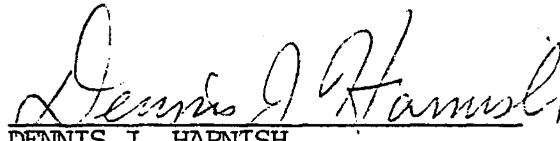
ORDER

AND NOW, this 15th day of September after due consideration of the Motion filed on behalf of DER for Default Judgment in the above matter, the same is hereby denied. Defendant shall file an Answer to the Complaint for Civil Penalties, within 10 days from the date hereof.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman



DENNIS J. HARNISH
Member

September 15, 1981

cc: Bureau of Litigation
Louis A. Naugle, Esquire
Gifford S. Cappellini, Esquire

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2. On July 15, 1981 defendant filed a Motion to Dismiss DER's Motion but this was denied by the board by Order dated August 14, 1981. The board was satisfied that proper service was made by certified mail pursuant to 42 Pa. C.S. §5823(b).

3. DER agreed to delay further action for ten days, to allow defendant time to take appropriate action.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

MARJOL BATTERY & EQUIPMENT COMPANY, INC., et al. :

: Docket No. 80-066-W

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and MICHAEL RICHARDSON and MARY ANN RICHARDSON, Intervenors

OPINION AND ORDER SUR
MOTION FOR RECONSIDERATION

On November 5, 1980, Michael and Mary Ann Richardson filed a Petition to Intervene into the above proceedings alleging ownership of contiguous property to that of appellant and that their private property and personal living conditions will be affected by the outcome of this case.

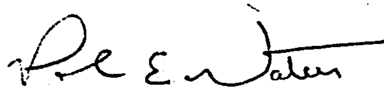
On December 5, 1980, this board granted the Petition to Intervene, over the objections of appellant. On December 19, 1980, appellant filed a Motion for Reconsideration of our decision of December 5, 1980. We have reviewed all of the information filed in this matter. Although there are certain minimum requirements for the granting of a Petition to Intervene, it is largely a discretionary matter. Based on the allegations of petitioner, which allegations are not disputed by appellant, we are satisfied that inter-

vention was properly granted. To the extent that the allegations of harm are ill founded, appellant will, of course, have ample opportunity to explore this at hearing. We therefore enter the following:

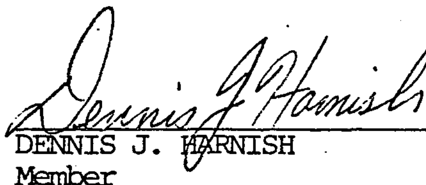
ORDER

AND NOW, this 6th day of January 1981, the Motion for Reconsideration filed on behalf of appellant Gould, Inc., is hereby denied.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman



DENNIS J. HARNISH
Member

DATED: January 6, 1981

cc: Louis A. Naugle, Esquire
Mark J. Casciari, Esquire
Ralph E. Kates, III, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

MAUERSBERG COAL COMPANY

Docket No. 80-267-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
COMMONWEALTH'S MOTION TO DISMISS

The Department of Environmental Resources (DER), on February 2, 1981 filed with this board a Motion to Dismiss appellant's appeal in the nature of a motion for judgment on the pleadings alleging that appellant's grounds for appeal even if factually true were legally insufficient to sustain the appeal, and appellant filed an aswer thereto.

This action arose as the result of the filing of twenty-five (25) separate but identical appeals by appellant. Each appeal contested DER's declaration of forfeiture of a separate reclamation bond which had been tendered by appellant to DER with regard to a separate mining permit..

The board, on its own motion, consolidated all twenty-five appeals at Docket No. 80-267-H. Both parties have submitted briefs in support of their positions, and the matter is now before the board for disposition.

In each appeal, appellant appealed from the action of DER, by letter

dated November 21, 1980 from J. Anthony Ercole, Director, Bureau of Mining and Reclamation, certifying and declaring forfeited the various 25 bonds supplied by appellant by reason of appellant's failure to correct violations and reclaim areas appellant affected in the course of surface mining operations. Mr. Ercole held such acts to be in violation of the Act of November 30, 1971, P.L. 544, No. 147, 52 P.S. §1396.1 *et seq.* (hereinafter "Surface Mining Act, 1971"), and forfeiture of the bonds to be provided for under Section 4 (h) of said Act.

In its appeal, appellant did not contest DER's allegation of violations of law at the sites covered by the 25 forfeited bonds, nor did appellant allege that DER acted unreasonably in forfeiting the bonds, and appellant is therefore estopped from further contesting the fact that violations occurred at the sites in question and that reclamation of the sites affected had not been effected.

In the appeal, appellant contends that DER may not act to forfeit appellant's bonds (one surety and twenty-four collateral bonds) without first securing authority from U.S. Bankruptcy Court for the Western District of Pa; that efforts are continuing to sell appellant's real estate and/or leasehold interests which would provide for the continuation of reclamation proceedings; and that forfeiture of the bonds would irreparably harm appellant.

In their briefs, both parties argue that the disposition of the cause herein hinges upon certain pertinent provisions of the Bankruptcy Reform Act of 1978, P.L. 95-598, 11 U.S.C. §101, *et seq.* (hereinafter "Bankruptcy Reform Act of 1978").

A review of the Bankruptcy Reform Act of 1978" reveals two sections which are pertinent to this appeal, namely, Sections 362 (a) and 362 (b).

Section 362 (a)(1) provides for an automatic stay of proceedings against a bankrupt entity under certain conditions, *except* for the provisions of Section 362 (b).

Section 362(b)(4) provides that the filing of a petition in bankruptcy does not operate as a stay...

> "under subsection(a)(1) of this section (362(a)(1)) of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power..."

In order that either of the above cited sections of the "Bankruptcy Reform Act of 1978" apply at all to this appeal, a determination must first be made at to the nature of the bonds in question. In the event that the bonds are not considered "property" of the appellant, the cited provisions of the "act", *supra*, do not become operative, in which case the appeal must fail.

Section 541(A)(1) of the "Bankruptcy Reform Act of 1978" provides, in part, that:

> "...such an estate (of the bankrupt) is comprised of all the following property, wherever located, all legal or equitable interests of the debtor in property as of the commencement of the case."

In determining what is "all legal or equitable interests of the debtor in property", the nature of the bonds in question must be defined.

A bond has been defined as an evidence of debt. Black's Law Dictionary (revised 4th Ed. 1968). Clearly, then, the bonds in question are not assets of the estate. The bonds, if anything, are liabilities of the estate, and assets in the hands of the Commonwealth. A discussion of the nature of that which comprises the estate of the debtor is contained in 9 Am. Jur. 2d, §239, at page 420, wherein it is stated:

> "...the Bankruptcy Code (Bankruptcy Reform Act of 1978) introduces the concept of "property of the estate", which is a term of art employed to describe <u>those assets which are subject to administration</u> and distribution in the bankruptcy proceeding". (Emphasis added).

A bond, being an evidence of debt, and not an asset, is therefore not property of the estate subject to administration by the bankruptcy court. Thus, the cited sections of the "Bankruptcy Reform Act of 1978" do not apply in this appeal.

Assuming, *arguendo*, that the bonds are the property of the bankrupt's (appellant's) estate, the appeal must, nevertheless, be denied in view of the specific provisions of the "Bankruptcy Reform Act of 1978", and discussed in applicable treatises, and as commented upon in the legislative history of Sections 362(a) and 362(b).

Section 101 (21) of the "Bankruptcy Reform Act of 1978", the definitions portion, states:

> "governmental unit means...department, agency or instrumentality of...a Commonwealth...."

It cannot be questioned that DER is a governmental unit under such a definition as that provided in Section 101(21), *supra*.

Section 362(a) provides an automatic stay of proceedings, subject to the provisions of Section 362(b). Section 362(b) (4) exempts from the automatic stay of proceedings the "commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power".

In the legislative history comment to Section 362(b)(4), it is stated:

> "This section is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety...." 124 Cong. Rec. H 11,092 (Sept. 28, 1978); S 17,409 (Act. 6, 1978).

In further elucidation of the provisions of Section 362(b)(4) it has been stated that:

> "Policy of the Code (Bankruptcy Reform Act of 1978) is to permit regulatory actions to proceed in spite of Section 362(a)(1) but to not permit a seizure of the property without a bankruptcy court order." Collier on Bankruptcy §362.05(4), 15th Edition.

Appellant has not questioned DER's status as a governmental unit. Nor has appellant questioned the forfieture of the bonds in question as a valid exercise by DER of its regulatory power, in furtherance of DER's stated authority to protect

the public health and safety. Indeed, the stated purpose of the "Surface Mining Act 1971, is provided in the Act as follows:

> "This act shall be deemed to be an exercise of the police powers of the Commonwealth of Pennsylvania for the general welfare of the people of the Commonwealth...to prevent and eliminate hazards to health and safety...." As amended 1971, Nov. 30, P.L. 554, No. 147, §1; 1980, Act 10, P.L. 835, No. 155, §1, imd. effective. 52 P.S. §1396.1.

DER, in seeking forfeiture of the bonds in question has acted in accordance with the provisions of the above cited legislation, and its action is a valid exercise of Pennsylvania's police power since it is in the public interest and is not unduly oppressive upon individuals *Lawnton v. Steele*, 152 U.S. 133 (1894).[1]

Appellant cites this board to the cases of *In re: King Memorial Hospital, et al* 2 C.B.C. 2d 639 and *Saugus General Hospital, Inc.*, 651 C.B.C. 19, in support of its argument that forfeiture of the bonds in question is in violation of §362(a)(1) of the "Bankruptcy Reform Act of 1978" and therefore prohibited.

Appellant's contention that the aforecited cases support his appeal is without merit. In review of both cited cases, we are of the opinion that the cases were decided after a finding that the state's actions were based upon financial considerations, and not based upon considerations of public safety and welfare. In *Saugus* the court properly distinguished those matters (exemptions from the automatic stay provisions of Section 362(a)(1)) which are needed to protect the public health and safety and not to exempt those matters which are related to the financial difficulties or the precuniary interest in the property of the debtor, i.e., debtor-hospital's operating license.

In view of the above discussion, we hold that Section 362(b)(4) applies to this appeal, and DER is exempt from the automatic stay provisions of Section 362(a)(1)

---

1. Section 18, 52 P.S. §1396.18 provides that monies realized from forfeiture of bonds shall be used for various purposes, all of which are directly related to enhancing the welfare of the citizens of the Commonwealth, for which purpose(s) DER, in the instant case, is properly exercising the police power of the Commonwealth.

and therefore may seize the bonds in question without first securing a bankruptcy court order. See *Comm. of Pa, DER v. Peggs Run Coal Company, Pa. Cmwlth* ___, 423 A.2d 765 (1980).

The sole remaining issue to be determined in this appeal concerns the prohibition against seizure of the property of the debtor despite the provisions of Section 362(b)(4).

Appellant properly cites *Collier on Bankruptcy,* §326.05(4) (15th Ed.), which cited *Katman v. New Jersey,* 13 C.B.C. 524 (D.C. N.J. 1977) for the principle, discussed hereinbefore, that notwithstanding the provisions of Sutin 362(b)(4), DER does not have the authority to seize property of the appellant without a bankruptcy court order. However, DER's action in forfeiting the bonds is not a *seizure* of property of the appellant within the meaning of the stated principle. As has been discussed hereinbefore in this Opinion, bonds are evidence of debt, a liability of the debtor, which liability someone other than appellant has agreed to assume upon the failure of appellant to perform a stated act. The bonds cannot be classified as assets subject to administration by any stretch of the imagination, and are therefore not "property" of the debtor.

To pursue appellants contention that the bonds are "property" of the appellant-debtor, one could logically conclude that a mine operator could violate the provisions of the "Surface Mining Act, 1971" in failing to reclaim the mined areas, and thereafter petition for reorganization under the "Bankruptcy Reform Act of 1978", and remain immune from forfeiture of the bonds posted with the Commonwealth. Since the "Surface Mining Act, 1971" provisions with regard to the bond program would become totally without force and effect by such interpretation, this board cannot, and does not, accept such an argument as being meritorious.

To summarize, Section 362(a)(6) is not applicable to this proceeding because DER is not attempting "to collect, assess or recover a claim against the debtor". Section 362 (a), and all of the subsections thereof, are clearly limited by the provisions of Section 362(b). Therefore Section 362(a)(6) must be viewed

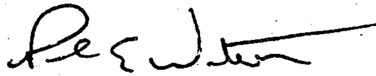
as limited by Section 362(b)(4), which section exempts DER from the automatic stay provisions. To hold otherwise would negate entirely the effect of Section 362(b)(4). Congress cannot be said to have intended that effect. See *Collier On Bankruptcy*, Paragraph 362.06 (15th Edition).

We therefore grant the Motion to Dismiss filed by DER.

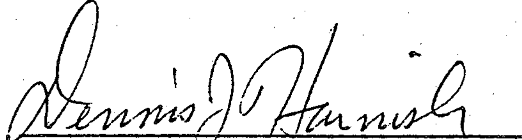
ORDER

AND NOW, this 10th day of September, 1981, it is hereby ordered that the Motion to Dismiss the within appeal filed by the Commonwealth of Pennsylvania, Department of Environmental Resources is hereby granted, and the appeal of Mauersberg Coal Company (now by purchase Wagner Coal Company), appellant is dismissed.

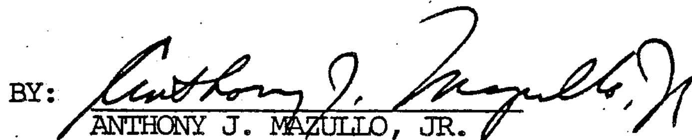
ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman



DENNIS J. HARNISH
Member

BY: 
ANTHONY J. MAZULLO, JR.

DATED: September 10, 1981

cc: Stanley R. Geary, Esquire
Bureau of Litigation
John P. Leemhuis, Esquire
Lawrence C. Bolla, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

MILL SERVICE, INC. : Docket No. 80-078-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and WILLIAM FIORE, d/b/a MUNICIPAL AND INDUSTRIAL
DISPOSAL COMPANY

OPINION AND ORDER SUR DISCOVERY

The above-captioned matter involves an appeal of a solid waste permit issued by DER to intervenor. The appellant is an alleged business competitor of the intervenor. Intervenor served upon appellant interrogatories designed to determine if the appellant has disposed of, with DER approval, wastes for which intervenor sought or received DER's approval to dispose in its permitted facility.

Appellant's failure to answer said interrogatories prompted intervenor to file a motion for sanctions against appellant which intervenor answered with a response and a motion for protective order.

The parties agree that the proffered interrogatories are relevant, if at all, only on the issue of appellant's standing, i.e., is appellant trul the intervenor's competitor. Since relevance is to be broadly interpreted in discovery, since affirmative answers to the said interrogatories could establish

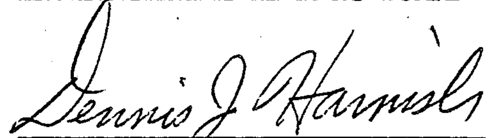
competitor status (even though negative answers wouldn't rule out such status) since the board doesn't feel that intervenor has waived its right to such discovery and since appellant has not objected on trade secret grounds the requested discovery shall be allowed.

The board expects, however, that answers to the said interrogatories will conclude the discovery phase of this matter and that the tests for which a continuance was granted have been concluded. Therefore, the parties are being required to submit availability dates for hearing.

O R D E R

AND NOW, this 18th day of September, 1981, appellant's motion for protective order is denied and intervenor's motion for sanctions is granted to the extent that appellant is required to answer intervenor's interrogatories within 30 days from the date of this order. All parties including DER are also required by the same date to provide this board with their dates of availability for hearing.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Member

DATED: September 18, 1981

cc: Bureau of Litigation
Stanley R. Geary, Esquire
John E. Beard, III, Esquire
Harold Gondelman, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

MORCOAL COMPANY :

: Docket No. 79-189-B

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
PETITION FOR SUPERSEDEAS
POST ADJUDICATION

This matter comes before the board under the following circumstances.

In April of this year, the board issued an adjudication and order upholding a DER action forfeiting surety bonds posted by Morcoal under the Surface Mining Conservation and Reclamation Act, the Act of November 30, 1971, P.L. 554, P.S. §1386.1 *et seq.* *Morcoal v. Commonwealth of Pa., DER*, EHB Docket No. 79-189-B (April 30, 1981). Morcoal appealed the board's adjudication and order to the Commonwealth Court, which docketed the appeal as 1498 C.D. 1981. Morcoal also asked the Commonwealth Court for a supersedeas pending appeal, to stay the effects of the board's adjudication and order, thereby simultaneously staying DER's attempt to collect on the forfeited bonds. The Commonwealth Court has denied this request of Morcoal's without prejudice, informing Morcoal that it first should have petitioned this board for a supersedeas, in accordance with the provisions of Rule 1781 of the Pennsylvania Rules of Appellate Procedure.

Pursuant to this instruction of the Commonwealth Court, Morcoal has petitioned the board for a supersedeas staying the board's April 30, 1981 adjudication and order pending Morcoal's appeal to Commonwealth Court. Morcoal also requested the board to issue a temporary supersedeas until a full evidentiary hearing could be held on the supersedeas petition. On October 2, 1981, Morcoal was given a hearing on this latter request. Morcoal did not present any witnesses, but did have the opportunity to describe fully the legal and intended evidentiary grounds for its supersedeas petition. On the basis of this hearing, the hearing examiner recommends, and the board concurs, that Morcoal's petition for supersedeas be denied without awaiting an evidentiary hearing, for the reasons stated below.

The board's power to issue a supersedeas arises under §1921 A of Administrative Code of 1929, *as amended*, 71 P.S. 510-21(d). Its criteria for so doing, are described in its rules and regulations under the general heading "Supersedeas" (25 Pa. Code §§21.76 - 21.78). Examination of these rules, however, especially of §21.76, clearly indicates that they are concerned solely with issuance of a supersedeas pending appeal to the board from an order or action of DER; Sections 21.76 - 21.78 are not intended to apply to the present circumstances, where Morcoal is requesting a supersedeas pending appeal of the board's ruling to Commonwealth Court.

Nevertheless, the board has decided to adopt the criteria of 25 Pa. Code §21.78 as the criteria for issuance of a supersedeas in the instant action, because--as §21.78 are a reasonable application of the common law regarding supersedeas to the environmental actions with which the board is concerned (see 4A C.J.S. Appeal and Error, §636).

Section 21.78 of the board's rules and regulations reads:

> "(a) The circumstances under which a supersedeas shall be granted, as well as the criteria for the grant or denial of a supersedeas, are matters of substantive common law. As a general matter, the Board will interpret said substantative common law as requiring consideration of the following factors:
> (1) irreparable harm to the petitioner;
> (2) the likelihood of the petitioner's prevailing on the merits; and
> (3) the likelihood of injury to the public."

In regard to these factors Morcoal argued primarily as follows.

(1) Morcoal would suffer harm if the supersedeas were not granted because DER would not use the money gained from the bond forfeitures to reclaim the mining sites for which the bonds were posted, thereby putting Morcoal in jeopardy of additional lawsuits and claimed penalties.

(2) Morcoal was likely to prevail on the merits because it was prepared to prove that DER had a proclaimed policy of not using bond forfeitures to reclaim mining sites, and indeed almost always had failed to reclaim mining sites in the past.

(3) The public would be injured because DER would not use the bond forfeiture funds to reclaim the sites.

Morcoal also made numerous other arguments and offered to present much additional evidence, but these arguments and evidence were deemed either irrelevant or else no more than an attempt to retry, at the instant hearing, Morcoal's previously rejected (as of April 30, 1981) appeal to the board of DER's action. *Morcoal, supra.*

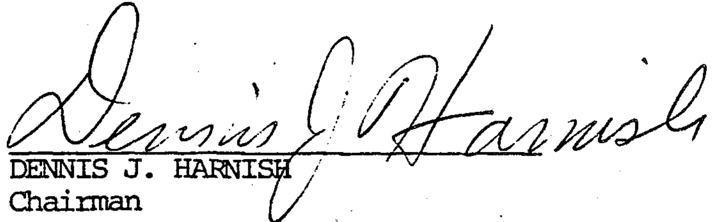
The hearing examiner and the board conclude that Morcoal's arguments that it will suffer irreparable harm if the supersedeas is not granted are purely speculative. Furthermore, Morcoal offered no legal authority to support its argument that DER's failure to use the funds to reclaim the mining sites (even supposing, arguendo, that Morcoal could prove this assertion) would warrant reversal of this board's ruling by Commonwealth Court, i.e., would warrant reversal of the bond forfeitures despite the board's findings that Morcoal failed to reclaim the sites in question and violated the Surface Mining Conservation and Reclamation Act in numerous ways. *Morcoal, supra.* Similarly, because Morcoal certainly has failed to reclaim the sites in the past, despite numerous DER complaints, forfeiture of the bonds hardly is likely to injure the public (again supposing purely arguendo that Morcoal could prove its thesis that DER will not use the forfeited funds to reclaim the sites).

Therefore Morcoal's petition for supersedeas is denied, without awaiting a further evidentiary hearing.

ORDER

AND NOW, this 23rd day of October, 1981, appellant's Petition for Supersedeas Post Adjudication is denied.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Chairman

DATED: October 23, 1981

cc: Bureau of Litigation
Allan E. MacLeod, Esquire
Robert P. Ging, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

PENNSYLVANIA ENVIRONMENTAL MANAGEMENT SERVICES, INC. :

Docket No. 79-153-W

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and ALEX and ANNE duPONT, NEW GARDEN TOWNSHIP,
RALPH LaFRANCE and the COUNTY OF CHESTER,
Intervenors

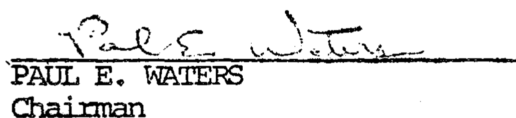
OPINION AND ORDER SUR PETITION FOR
DETERMINATION OF APPLICABLE LAW PROCEDURE
AND SCOPE OF REMAND

On February 13, 1981 this Board remanded the above matter to DER for further action consistent with our adjudication of the same date. This was a general remand. Appellant now seeks by Petition to have this Board further define the scope of proceedings in which DER may properly engage during the remand period. We deem that question to be initially for determination of DER, and any disagreement which arises therefrom would be a proper issue for review when and if that should become necessary. We will however, limit the remand period to forty-five (45) days from the date hereof unless otherwise agreed between the parties.

ORDER

AND NOW, this 15th day of April, 1981 after due consideration of the Petition for Determination of Applicable Law, etc. filed on behalf of appellant in the above matter and Answer thereto, the same is hereby denied without prejudice. The remand period shall expire forty-five (45) days from the date hereof.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman

DATED: April 15, 1981

cc: Randall J. Brubaker, Esquire
Thomas Riley, Jr., Esquire
Hershel J. Richman, Esquire
Bruce Katcher, Esquire
George Brutscher, Esquire
Bureau of Litigation
Paula D. Francisco

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

PERRY BROTHERS COAL COMPANY : Docket No. 81-137-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR DER'S MOTION TO DISMISS

On August 13, 1981, DER by and through Douglas A. Klimchock, Mining and Permitting Compliance Specialist, sent a letter to Perry Brothers Coal Company, which set forth certain alleged violations of the Pennsylvania Surface Mine Conservation and Reclamation Act and proposed that the company make a penalty payment or create an escrow fund to avoid DER's filing of civil penalties. Perry Brothers appealed from this letter and DER filed a motion to dismiss this appeal. The appellant has declined the opportunity afforded by the board to respond to this motion.

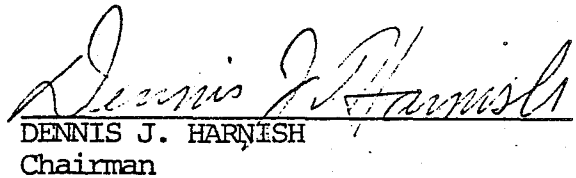
The DER argues that the appealed letter does not represent a final action of DER and is thus not appealable 25 Pa. Code Section 21.2(a)(1). The cases cited by DER do support this proposition but perhaps the most apposite opinion was not cited. In *Sunbeam Coal Corporation v. DER*, 304 A.2d 160 (1973)

the appeal by a mine operator from DER's notice of violation (of SMCRA) was quashed as not being a final action or an adjudication. We believe that *Sunbeam, supra*, is on all fours with the instant matter and is controlling precedent which we must and will apply.

ORDER

AND NOW, this 6th day of November, 1981, DER's motion to dismiss is granted and appellant's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Chairman

DATED: November 6, 1981

cc: Bureau of Litigation
Stanley R. Geary, Esquire
Leo M. Stepanian, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

RICHLAND TOWNSHIP, et al. :

: Docket No. 80-143-W

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and R. and B. McQUIDDY and PETER AND EUGENE DEPAUL, Intervenors

OPINION AND ORDER SUR
MOTION TO DISMISS APPEALS

On June 25, 1980, DER wrote to Richland Township, one of the appellants herein[1] and advised that it wanted to help in solving the problem of hydraulic overload at the Borough of Quakertown sewage plant which was used by Richland and other municipalities. The letter mentioned that an Act 537 plan revision was called for and suggested a meeting--"to review the necessary coordination and the potential alternatives available to you." The meeting was scheduled for July 24, 1980. The meeting was held and DER, on August 13, 1980 wrote to all participants

1. Copies of the letter were sent to Bucks County Health Department, Bucks County Planning Commission, Bucks County Home Builders Association and Bucks County Water and Sewer Authority, another appellant herein.

in a question and answer format summarizing the meeting. It is clear from said letter that DER concludes that the Quakertown Sewage Treatment Plant exceeded its permitted hydraulic capacity from December 1978 to April 1979 and no new sewer connections should be issued.

Appeals were filed within the 30 day period after receipt of the August 13 letter. DER has now filed a Motion to Dismiss these appeals on grounds that there was no appealable action on August 13, 1980 and that certain appeals were untimely filed, based on the July 24 meeting and the June 25 letter. We believe that the letter of August 13, 1980 is appealable. It is clear that an appeal may properly be taken from---

> " Any order, decree, decision determination or ruling by the Department--affecting personal or property rights, privileges, immunities, duties--" etc. 25 Pa. Code Chapter 21 §21.2.

A final decision was made by DER that no building permits should be issued that involve new connections to the Quakertown sewer system. While this decision may have been made at the July 24 meeting, there is no dispute of the allegation that the first final written notice of this decision by DER was contained in the August 13 letter. We are satisfied that for appeal purposes, this was the operative event. This is so, even though the letter itself contains a retroactive date for the cut-off. If the June 25, 1980 letter had not contained statements which seriously call into doubt its finality, our decision in this matter might be different. Dismissal of an appeal should be permitted only in clear cases. This is not such a case. Because there are factual questions which can not be resolved on a motion such as the one before use, we will allow evidence on these issues at the appropriate time. See *Andre Greenhouse Inc. v. DER* 1979 EHB 311 We therefore enter the following:

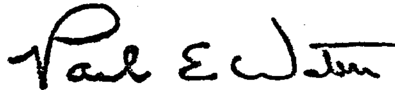
---

2. The letter stated: "This will confirm that effective July 24, 1980 no building permits should be issued that involve new connections to the sewer system."

ORDER

AND NOW, this 19th day of March 1981, after due consideration of the Motion to Dismiss the appeals filed in the above matter, the same is hereby denied without prejudice. The parties shall file pre-hearing memoranda within ten (10) days.

ENVIRONMENTAL HEARING BOARD



PAUL E. WATERS
Chairman

cc: Randall J. Brubaker, Esquire
Kenneth Gelburd, Esquire
C. William Freed, Jr., Esquire
Allan K. Grim, Jr., Esquire
Jeffrey F. Bahls, Esquire
Richard P. McBride, Esquire
Victor S. Jaczun, Esquire
Richard Rosenberger, Esquire
Arthur R. Thompson, Esquire
Bureau of Litigation

DATED: March 19, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

HARRY G. SHEESLEY AND
ALMA JEAN SHEESLEY

Docket No. 81-061-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
DER'S MOTION TO DISMISS

Harry G. and Alma Jean Sheesley, appellants in the above-captioned matter are, they allege, owners of and residents upon a certain tract of land situate in Richland Township, Venango County, upon which surface mining was conducted, under the authority of Mine Drainage Permit 3774SM27 and Mining Permit No. 1253-4, by Equitable Coal Company. On or about March 24, 1981 an internal DER memo stated the decision of certain DER officials that the Equitable's performance bond on said mining tract be released. On or about April 3, 1981 DER notified Equitable that it had released said bond. On April 27, 1981 the board received a letter from appellants' counsel protecting the DER's release of the said bond. A formal appeal followed and both DER and appellants have now filed pre-hearing memoranda.

DER has moved this board to dismiss appellants' appeal on two grounds. DER argues firstly, that appellants have failed to perfect this appeal pursuant to 25 Pa. Code 321.51(f)(3) and, secondly, that appellants have failed to join Equitable, an indispensable party.

With regard to DER's first argument, we hold our opinion in *R. Czambel, Sr. v. DER and Independent Enterprises*, EHB Docket No. 80-152-B (issued December 11, 1980) to be controlling.As we stated in that matter, the requirements of 25 Pa. Code 21.51(f)(3) are not jurisdictional. Once an appeal has been filed with this board within the 30-day limit set forth in 25 Pa. 21.52(a) the jurisdiction of this board attachs. *Rostosky v. DER*, 26 Pa. Comm. 478, 364 A.2d 761 (1976); *Lebanon County Sewage Council v. DER*, 34 Pa. Comm. 244, 382 A.2d 1310 (1978).

It is still necessary for the appellant to perfect his appeal by copying the "recipient of the permit, license, approval, or certification" and this perfection is supposed to be accomplished within 10 days from filing which appellants here failed to achieve. However, appellants have proffered a logical explanation for this failure and their failure to notify has been already corrected by appellants' service on June 9, 1981 of a copy of their notice of appeal upon Equitable. Furthermore, Equitable would not seem to be prejudiced by appellants' delay of no more than 20 days in copying it with a notice of appeal due to the preliminary nature of these proceedings. Indeed, Equitable is given, by the following order, a longer period to submit a pre-hearing memorandum than other parties appearing before this board. Therefore, DER's first grounds for quashing appellants' appeal must be rejected.

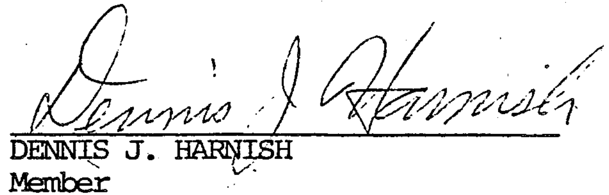
DER's second contention, is easily dispensed with. In the first place, appellants have, to the best of their ability, joined Equitable as a party be copying said corporation with their notice of appeal. Secondly, Equitable, as the "recipient" of the "approval or certification" challenged by appellants, the bond release in question, is, automatically, a party to these proceedings pursuant to 25 Pa. Code §21.51(g).

ORDER

AND NOW, this 22nd day of July, 1981, DER's Motion to Dismiss appellants' appeal is denied.

Equitable shall comply with the attached pre-hearing order on or before August 10, 1981.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Member

cc: Bureau of Litigation
Stanley R. Geary, Esquire
Ralph L. Montgomery, Jr., Esquire
Henry Ray Pope, Equire

DATED: July 22, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3[illegible]3

SUNNY FARMS LIMITED : Docket No. 81-046-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
MOTIONS FOR PROTECTIVE ORDERS AND STAYS

Counsel for appellant has noticed the deposition of the certain DER officials in the above-captioned matter but, by agreement of counsel, the depositions of these individuals have been stayed pending this board's decision on various DER motions for protective orders prohibiting said depositions. Counsel have also agreed that this board should rule upon said motions on the basis of said motions and answers thereto, i.e., the parties have waived the filing of briefs.

The first of DER's motions to be addressed pertains to Clifford L. Jones, Secretary to DER; Donald A. Lazarchik, Director of its Bureau of Solid Waste Management and Eugene E. Dice, DER's Litigation Coordinator. DER bases its motion with regard to these individuals first upon their lack of direct involvement in DER actions under appeal and secondly, upon the alleged unreasonableness of requiring these busy, important persons to make themselves available for depositions concerning matters of which they have little or no knowledge.

Appellant's answer notes that is without information as to the extent of involvement of any of these individuals. Thus, at this point in the proceedings the board is not able to determine if the nature and extent of their involvement would merit the unquestioned burden which appearing for depositions would place upon these officials. The board shall, therefore, stay the depositions of these individuals pending the depositions of DER employees most directly involved in the challenged action. If these depositions indicate a more than *de minimus* involvement of the said individuals in the challenged action their depositions will be allowed upon submission by appellant of a request to dissolve the stay.

The second of DER's motions to be addressed is its request that this board prohibit the depositions of DER's "expert witnesses", William Tomayko, Barrett Borry and Lorie O'Day on the grounds that the facts and/or opinions which they have regarding the subject matter of the instant appeal were acquired in anticipation of litigation. DER's reliance upon Pa. R.C.P. 4003.5(2) to support this motion is misplaced. Said rule specially authorizes a party to inquire into facts and opinions of expert witnesses the other party expects to call as witnesses at trial and DER does not assert in its motion that it does not expect to call any of the named individuals.

It is true that, pursuant to Pa. R.C.P. 4003.5(2), depositions of the other party's experts may be obtained only after a court order and only after cause is shown. However, DER, in its motion avers that each of the said would be deponents is a regular DER employee. As appellant's answer points out, under the Explanatory Note to Pa. R.C.P. 4003.5 a regular employee of a party, although qualified as an expert, is not an "expert" within the meaning of Pa. R.C.P. 4003.5. A review of the relevant case law also supports the appellant's position. In *Moran v. Pittsburgh-Des Moines Steel Company*, 6 FRD 594 (W.D.Pa. 1947) the Court permitted deposition of an expert (engineer) who was a regular employee of the

defendant. Similarly, the statement of the Advisory Committee concerning FR Civ 26(b) (from which Pa. R.C.P. 4003.5 derived) as published at 48 FRD 487, states at p. 504 that FR Civ 26(b) does not apply to a general employee of a party. It is true that in *Seiffer v. Topsy's International, Inc.*, 69 FRD 69 (1965) an in-house expert (accountant) who was specially employed regarding the litigation in question was considered an expert, and thus shielded by FR Civ 26.

From DER's motion, however, it appears that the persons in question while they may be considered to be special employees, i.e., employees serving a particular program cannot be considered to have been specially employed for the instant matter alone. Thus, the depositions of these individuals shall be permitted.

The third DER motion to be addressed here comprises DER's request that we prohibit the depositions of: William Adams; John Leskosky; William Tomayko; Lorie O'Day and Barrett Borry on the grounds that each of these DER employees did not participate in the actions of DER which are the subject of this appeal. According to DER's motion, each of the named individuals, at least during the period of February 1978 to January 1980, worked full or part-time for the Wilkes-Barre Regional Office of DER's Bureau of Solid Waste Management. This was the DER office most closely connected with Lyncott's New Milford landfill site. Since the alleged failure of disposal technology at the said site is referenced in the action appealed at the above-caption, the named individuals may certainly be in the position to give testimony relevant to the instant matter. Therefore their depositions shall be allowed.

The last motion for protection order considered herein requests that we prohibit the depositions of Douglas Lorenzen, Kirti Shah and Stephen Curran. As to Messers. Lorenzen and Shah, who are DER regular employees, DER again relies

upon Pa. R.C.P. 4003.5(2) and its argument fails for the reasons set forth above. As to Mr. Curran who has apparently already departed for the state of Maryland, appellant's offer to depose him in Maryland would seem to remove any unreasonable burden. Thus, the depositions of these individuals shall also be permitted.

O R D E R

AND NOW, this 30th day of July, 1981, DER's motions for protection orders are denied except as to Messers. Jones, Lazarchik and Dice whose depositions are stayed.

ENVIRONMENTAL HEARING BOARD

DENNIS J. HARNISH
Member

DATED: July 30, 1981
cc: Bureau of Litigation
Louis A. Naugle, Esquire
Howard J. Wein, Esquire
Robert J. Shostak, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 7 -3483

SUNNY FARMS, LIMITED, et al. : Docket No. 81-046-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
DER'S PETITION FOR RECONSIDERATION

On July 30, 1981 this board issued an opinion and order disposing of certain motions for protective orders filed by DER in the above-captioned matter. This order *inter alia* required that Messers. William Tomayko, Douglas Lorenzen, Kirti Shah and Barrett Borrie and Ms. Lori O'Day submit to deposition despite DER's claim in its motion for protective order that these persons were expert witnesses and that pursuant to Pa. R.C.P. §4003.5 the appellant was not entitled to proceed with discovery as to the above individuals.

This board's opinion was based upon the exception to Pa. R.C.P. 4003.5 cited in the Explanatory Note of 1978 thereto, which states that regular employees of a party are exposed to discovery even though they would otherwise be considered to be experts. This explanatory note, in fact, on the basis of the board's research seemed merely to carry forward a distinction formulated by federal courts in construing the federal predecessor to Pa. R.C.P. 4003.5.

DER has petitioned for reconsideration of the above opinion. DER asserts again that the said employees are not "regular employees" in the meaning of Pa. R.C.P. 4003.5. DER also argues that even if these persons are to be considered regular employees for the purposes of Pa. R.C.P. 4003.5(a)(3), the provisions of Pa. R.C.P. 4003.5(a)(1), nevertheless, apply and require that discovery of these witnesses must proceed, at least initially, through interrogatories.

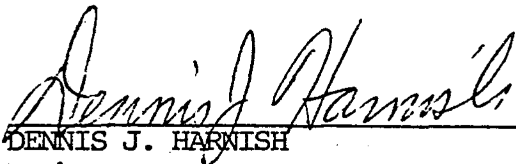
Upon reconsideration, the undersigned still believes that the above named individuals are regular employees of the Commonwealth and thus that the blanket prohibition of Pa. R.C.P. 4003.5(a)(3) does not prevent discovery with regard to these witnesses.

The job description of these persons proferred by DER only points up the fact that these persons are experts but the case law and explanatory note are clear that regularly employed experts do not enjoy Pa. R.C.P. 4003.5(a)(3) immunity. Indubitably as DER asserts, this places it at a disadvantage in litigation *vis à vis* a party who hires outside experts but this competitive disadvantage does not seem to be a relevant consideration under the case law. In fact, DER may be said to enjoy the advantage of employing these experts *vis à vis* a number of party appellants who simply cannot afford to retain such expertise.

The undersigned, is now convinced, however, that the procedural requirement of Pa. R.C.P. 4003.5(a)(1) applies even to regular employees who are also experts. The explanatory note in its regular employee discussion is clearly directed to the phrase "retained or specially employed" which phrase appears only in Pa. R.C.P. 4003.5(a)(3). Thus, it will be necessary for the appellant to seek discovery of the above-named individuals through interrogatories as per Pa. R.C.P. 4003.5(a)(1). Depositions of these individuals may be permitted only

after the use of interrogatories and the showing of cause as per Pa. R.C.P. 4003.5(a)(2).

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Member

DATED: October 7, 1981

cc: Bureau of Litigation
Louis A. Naugle, Esquire
Howard J. Wein, Esquire
Robert J. Shostak, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

SUSQUEHANNA COUNTY BOARD OF COMMISSIONERS : Docket No. 80-172-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and LYNCOTT CORPORATION, Permittee

OPINION AND ORDER SUR DER'S
PETITION FOR AMENDED
ORDER TO ALLOW INTERLOCUTORY APPEAL

Following the issuance of this board's Opinion and Order of December 19, 1980, which in part deferred action on Lyncott Corporation's motion to quash Susquehanna County's appeal, DER filed a petition for an amended order to allow an interlocutory appeal pursuant to 42 Pa. C.S. §702(b). Generally, this board, in response to such a petition, would set a schedule for the filing of responses to the said petition and briefs on the legal issues raised thereby.

In the present matter, however, the board cannot grant the relief requested by DER and thus it would be a needless expenditure of effort and time to require an answer or briefs. Section 702(b) of 42 Pa. C.S.A. does provide a mechanism for expedited review of interlocutory rulings by lower courts and governmental units. However, in order for Section 702(b) to operate the lower court

or governmental unit must have issued an interlocutory ruling. Had this board either granted or denied Lyncott's motion to quash Susquehanna County's appeal on the basis of the County's alleged lack of standing such an interlocutory ruling would have been of the type contemplated by Section 702(b).

But this board neither granted nor denied Lyncott's motion; it merely deferred action on this motion. Thus, there is no ruling for Commonwealth Court to review and, consequently, Section 702(b) of 42 Pa. C.S.A. cannot form a basis for judicial review.

It should also be questioned whether the standing of Susquehanna County is the type of issue which should be certified to Commonwealth Court. In *Lower Paxton Township v. Fieseler Neon Signs*, 37 Pa. Commonwealth Ct. 506, 391 A.2d 720 (1978) the Township appealed to Dauphin County Court from a determination by the Township's Zoning Hearing Board which permitted Fieseler, as Exxon's contractor, to erect a high-rise sign above an Exxon station.

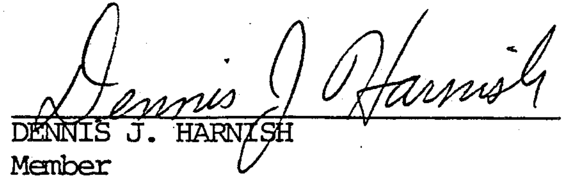
The contractor, Fieseler, filed a motion to quash the Township's appeal on the basis of its alleged lack of standing and when this motion was denied by Dauphin County Court, Fieseler appealed from this ruling to Commonwealth Court.

Commonwealth Court, in a strongly worded opinion, emphasized that a controversy over standing does not involve a true question of jurisdiction (citations omitted) and therefore the Court held that the instant appeal was improper. The Court also noted that, given the increasing number of cases before it, granting interlocutory appeals delayed the expeditious resolution of litigation properly before the Court. It would therefore appear that even if this board had discretion to certify the issue of Susquehanna County's standing pursuant to Section 702(b), it would be well advised to refrain from certifying the question requested.

O R D E R

AND NOW, this 2nd day of January, 1981, DER's petition for amended order to allow interlocutory appeal is denied.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Member

cc: Bureau of Litigation
Louis A. Naugle, Esquire
Gerald C. Grimuad, Esquire
Robert J. Shostak, Esquire

DATED: January 2, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

DAVID A. SWINEHART :

:

: Docket No. 80-014-M

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

By: Anthony J. Mazullo, Jr., Member

David A. Swinehart (appellant) is the owner and developer of a development located in Upper Pottsgrove Township, Montgomery, County, Pa. In the plan submitted for a revision of the Township's Sewage Facilities Plan, appellant decided that nine (9) lots in its development would be services by a community on-lot sewage disposal system.

Subsequent to township's approval of the plan revision, submission was made to the Department of Environmental Resources (DER) for review, and DER issued approval of the revision subject to its review of the final design for the community system "before permit issuance".

After soil testing and review of the final design, DER recommended to the township sewage enforcement officer that a permit for the community sewage system not be issued.

Appellant appealed to this board the recommendation of DER to the township sewage enforcement officer before receiving any official determination on his application for a permit from the sewage enforcement officer.

Despite the fact that a motion to dismiss the action was not filed, and an evidentiary hearing was held in this matter, the question of the jurisdiction of this board must be addressed before an adjudication on the merits may be considered to be appropriate.

In its appeal the appellant contends, *inter alia*, that DER acted capriciously in "withholding approval of appellant's application...".

The essential defect in this appeal is the filing of the appeal to this Board by appellant prior to a decision by the local sewage enforcement officer.

Appellant admits that the Sewage Facilities Act, 1966, Jan. 24, P.L. (1965) 1535, *as amended*, 35 P.S. 750, *et seq.*, authorizes local agencies, through their sewage enforcement officers (SEO), to issue permits for on-lot sewage disposal systems. However, appellant argues that by letters dated July 3, 1979, and December 12, 1979, DER usurped the authority of the local SEO and thereby denied appellant its permit for the construction of the community sewage system in its subdivision. Such an argument is an assumption by appellant of the nature and effect of the two referenced notices, and an analysis of same reveals that the assumption is erroneous.

The letter of July 3, 1979 is an official notice from DER to Upper Pottsgrove Township of the fact that DER had reviewed and approved the proposed revision of the township's official sewage facilities plan, as sponsored by appellant for the Birchwood Terrace Subdivision, Code No. 1-46956-005-3. The notice in pertinent part stated: "Approval is hereby granted if the following conditions are met:

> 2. The Department (DER) has the opportunity to review and approve the final design of the community sewage system before permit issuance.

A copy of this notice was sent to appellant, and appellant did not contest the propriety, nor the effect, of the imposition of this condition by DER. If, as

appellant argues, DER usurped the authority of the local agency by imposing condition no. 2 as a condition precedent to approval of the revision, it could have contested the same, or, appealed the same to this board. Appellant chose not to pursue either course of action.

Thus, it cannot now reopen the July 3, 19[illegible] plan approval (see 25 Pa. Code 21.52) *Rostosky v. DER*, 26 Pa. Commonwealth Ct. 478, 364 A.2d 761 (1976). We add for the sake of completeness that our review does not support appellant's argument. DER did not usurp the Township's authority since the issuance or denial of the permit still remained in the Township but, in any event, this issue cannot be litigated here.

Appellant did file an appeal within 30 days of receipt of DER's letter of December 12, 1979. In this letter, after discussing the report of DER's soil scientist, the writer concluded that the proposed site was unsuitable for a community sewage disposal system primarily because the area had "been disturbed and filled". Thus it was DER's position that "the permit for this system not be issued". This letter clearly allows the SEO the right to make the decision. DER fulfilled its statutory role by reviewing the proposal, arriving at a position, and informing the local agency's representative of its (DER's) position. However, nowhere in the notice does DER deny approval of the proposed on-site disposal permit. The notice merely stated DER's position in the matter, nothing more. The local SEO remained free to make his own evaluation of the application, since DER did not order him to take action in favor of or against appellant's application. To attach any other meaning to the notice would be contrary to all rules of construction and interpretation. We therefore hold that the notice of December 12, 1979 did not constitute a denial of appellant's application for a permit for construction of a community sewage system at the proposed site.

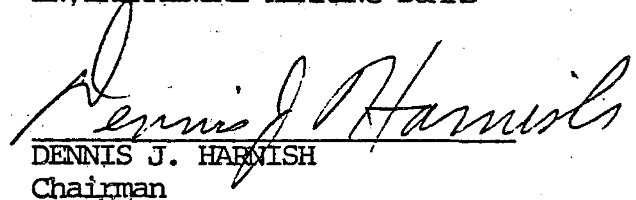
Having held that the contested notices were a valid exercise of statutory authority by DER, the only issue left for decision is whether there remains a remedy for appellant before this board.

DER has not taken any final action which adversely affected appellant, and therefore this board is without jurisdiction to act in this appeal. It would appear, to the board at least, that the proper course for appellant to follow is to seek a decision from the local agency's sewage enforcement officer, and if the application is denied by the SEO, to pursue this matter in accordance with the provisions of the Sewage Facilities Act, §16, *as amended* 1974, July 22, P.L. 621, No. 208, §9, 35 P.S. 750.16 entitled "Hearing and Appeals".

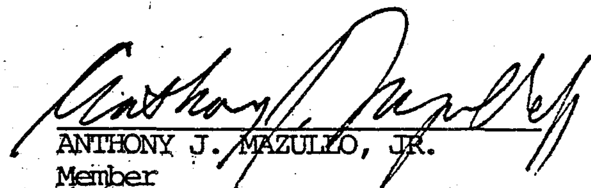
O R D E R

AND NOW, this 16th day of November, 1981, this appeal is dismissed and terminated.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Chairman



ANTHONY J. MAZULLO, JR.
Member

DATED: November 16, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

THORNBURY TOWNSHIP

: Docket No. 81-028-W

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR
PERMITTEE'S PETITION TO
INTERVENE AND PETITION TO QUASH

On or about March 9, 1981, this board received an appeal filed on behalf of the appellant, a second class township existing under the laws of this Commonwealth. This appeal, on its face, was untimely since it was from a permit issued by DER September 19, 1979. This board's rules require that an appeal must be filed within 30 days of receipt of notice of the appealed action or publication of said notice in the Pennsylvania Bulletin 25 Pa. Code §21.52 and this board has no power to extend the appeal period short of a showing meriting appeal *nunc pro tunc*, *Rostosky v. DER*, 26 Pa. Commonwealth Ct. 478, 364 A.2d 761 (1976).

The permittee has moved to intervene in the instant proceedings and to dismiss the appellants' appeal for lack of timeliness. The appellant has answered neither the permittee's petition to intervene or its petition to quash the appeal even though it was instituted to do so on August 24, 1981 by September 8, 1981. Neither has the

appellant requested any continuance in the response schedule set by the board.

On the basis of the instant record there is no doubt that both the permittee's petitions should be granted. The permittee's petition to intervene complies with the requirements of the board rule on intervention 25 Pa. Code §21.62 and indeed, the permittee is automatically granted party status pursuant to 25 Pa. Code §21.51(g).

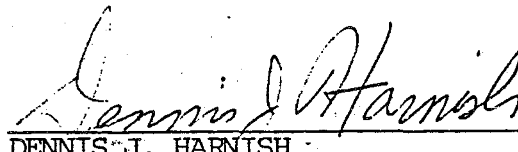
Similarly, permittee's petition to quash correctly cites the law on timeliness. Further, the appellant as a municipality has been held by the Pennsylvania Commonwealth Court not to have standing to appeal a solid waste permit to this board. *Strasburg Associates v. Newlin Township*, ___Pa. Commonwealth Ct. ___, 415 A.2d 1014 (1980). Thus, the township's appeal could not be maintained even if timely.

Finally, the appellant relies upon Section 604 of the Solid Waste Management Act to invoke this board's jurisdiction to terminate a permit for alleged violation of its terms. However, the cited section authorizes certain officials including solicitor's of affected municipalities to bring an action in equity in a court of competent jurisdiction to restrain violations of the act, and regulations promulgated thereunder or permits issued thereunder. This section does not mention the Environmental Hearing Board (in contradistinction to *inter alia* Section 601 of Said Act which does) and therefore imposes no duties nor devolves any power upon this board.

ORDER

AND NOW, this 1st day of October, 1981, the petitions to intervene and to quash appeal filed on behalf of Harry D. Miller are granted and the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Chairman

DATED: October 1, 1981

cc: Bureau of Litigation
Paul A. Logan, Esquire
Michael G. Trachtman, Esquire
K.W. James Rochow, Esquire
Jerry L. Johnson, Esquire
Sondra K. Slade, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

TORO DEVELOPMENT COMPANY : Docket No. 81-034-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR PETITION FOR
SUPERSEDEAS OF TORO DEVELOPMENT COMPANY

Toro Development Company, Inc. (Toro) is the owner and developer of two subdivisions located in Plum Borough, Pennsylvania known as Holiday Park No. 29 and Holiday Park No. 30 (subdivisions). Toro has recently completed the preparation of some 129 lots in said subdivision which preparation included the installation of roads, curbing, electric, gas, cable T.V., water and sewer and grading. The total cost to Toro to develop said lots is roughly $1,000,000.00 or about eight to ten thousand dollars per finished lot exclusive of overhead and profit.

In order to provide sewer service for the said subdivisions Toro, through, Plum Borough, obtained revisions of the Borough's Offical Sewage Facilities Plan indicating that the said subdivisions would discharge through existing interceptors to the Borough's Holiday Park Sewage Treatment Plant. These revisions were approved by DER (the latter approval being issued last summer). DER also

issued Toro sewer extension permits which allowed Toro to extend the said interceptors to service the said subdivisions. Again, the latter of these permits was issued last summer. Toro also obtained all local approvals required by the Municipalities Planning Code.

In order for Toro to recoup its investment in the said lots, it will be necessary for Ryan Homes and other construction companies to sell homes in the said subdivision. Toro only gets paid for the said lots when the houses are sold. In order to sell houses, Ryan Homes, et al. must be able to offer sewerage service to the prospective homebuyer. Thus, DER's letter of February 25, 1981 which advised Plum Borough to prohibit all new connections in *inter alia* the said subdivisions as well as the Falls Village subdivision had an immediate, direct and substantial impact upon Toro as well as Mr. Clois Fears, the developer of Falls Village, an adjacent subdivision tributary to the same system.

Toro filed an appeal from and a petition for a supersedeas of DER's February 25, 1981 action. A hearing was held on this petition on April 14, 1981. At the present time I have not yet received the Notes of Testimony from the said hearing and I have received no briefs. (Indeed, it seems questionable whether DER intends to file a brief within the schedule set by the Board.) Nevertheless, it seems that the evidence presented was clear enough and the law straight-forward enough to permit the issuance of this Opinion on the basis of the board's notes. Of course, either party may take advantage of 25 Pa. Code §21.122 to point out essential facts and law which I might have overlooked.

In order for Toro to gain the supersedeas it seeks, Toro must demonstrate first that it is irreparably harmed by the contested action. The facts recited

above demonstrate that Toro is being harmed. Moreover, further testimony developed that the said subdivisions are the only ones where Toro can presently employ its full-time staff of around 30 plus its part-time summer staff of approximately 125-130, so that the appealed action imperils all the above jobs. Toro also showed that it needs the revenues expected from lot sales in the said subdivisions to finance other projects and that the months of April through June are the most important selling period for the year. Indeed Toro through uncontraverted testimony showed that it stands to lose at least 70 lot sales by Ryan Homes alone in the said subdivisions this summer. Clearly, Toro demonstrated irreparable harm.

Toro also needs to demonstrate that the public will not be harmed by the requested supersedeas in order to support its grant. Again Toro has adequately shouldered its burden. Toro proved and DER did not deny, that the Holiday Park Sewage Treatment Plant, which was recently expanded and upgraded, contains more than enough capacity to handle the sewage flows from the said subdivisions.

DER asserts, nonetheless, that some of the interceptors carrying sewage from the said subdivisions to the said plant may be overloaded at peak periods and that, consequently sewage will be discharged from some of the 12 bypasses on the existing interceptors into the waters of the Commonwealth.

DER's case in this regard is based solely upon its interpretation of certain documents submitted to it by Plum Borough; DER was not able to document a single actual overflow incident. While DER's analysis will be discussed in greater detail below, for the present, it is important to note that DER's own highly qualified expert witness, Mr. Hugh G. Archer, admitted that even if DER's peak flow analysis were correct the excess capacity in the sewer lines themselves could very well contain the excess sewage without overflow. This being the case there would, of course, be no harm to the public health or the environment.

The final showing which Toro must make, likelihood of success on the merits, is less clear than the other two. The facts presented do seem to indicate that there are infiltration/inflow problems in the Plum Borough sewer system and that, perhaps that the Borough has not done everything it could to reduce the chance of a sewage overflow. However, the fact that DER may have grounds to proceed against Plum Borough does not necessarily mean that its "determination" that the Borough's system is presently overloaded (which would trigger §94.21) is sound.

It is interesting to note in this regard, that DER was so unsure of its determination that it filed a pre-hearing motion denying that it had made a determination. Although DER reversed this position at the hearing its early scepticism seems to be well merited. Essentially DER's determination requires its analysis of a document submitted to DER by Plum Borugh entered into evidence as Commonwealth's Exhibit 1. If one multiplies the anticipated flow at 100 gallons per capita figure presented at T1-2 on p. 28 of C-Ex. 1 by a "standard peaking factor of 2 1/2" the present peak flow would exceed the existing capacity of 2.00 M.G.D. set forth for the interceptor at or about manhole T1-2. DER suggests, further, that the 2.00 M.G.D. design capacity is too high. Age and roughness may, in fact, have reduced the line's capacity to 1.6 or 1.7 M.G.D.

On the other hand, Toro's expert suggests that DER's use of the design slope is improper but rather that an actual field slope (and actual inspection for roughness) should be used to calculate capacity. Mr. Archer seemed to agree with these statements.

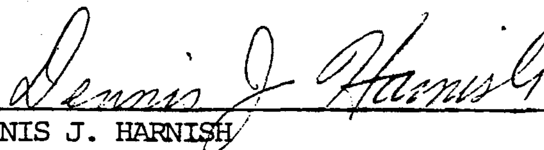
Moreover, Mr. Archer admitted that the use of both the 2 1/2 peaking factor and the 100 gallon per capacity factor, while no doubt proper for the design of a sewerage system, do not necessarily produce an accurate measure of actual

inground capacity. Since, under this board's rules, DER has the burden of proof on the merits, the uncertainty of DER's determination would provide Toro with the third and last showing it needs to support its petition for supersedeas.

ORDER

AND NOW, this 21st day of April, 1981, DER's letter of February 25, 1981 to Plum Borough which forms the subject of this appeal is superseded to the extent that the §94.21(a)(1) connection prohibition is involved. Except as so superseded the letter remains in full force and effect.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Member

cc: Bureau of Litigation
Zelda Curtiss, Esquire
Lawrence A. Demase, Esquire
Charles Herald, Esquire
Robert F. Burkardt, Esquire

DATED: April 21, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

RAY TURNER, et al : Docket No. 80-088-H
and JAMES E. WORK, et al, Intervenors :

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and ELWIN FARMS, INC., Permittee

OPINION AND ORDER SUR PERMITTEE'S
MOTION TO DISMISS AND THE PETITION TO
INTERVENE OF JOANNE BOZEK, ET AL. AND OTHER MATTERS

Elwin Farms, Inc., permittee in the above-captioned matter, has filed several motions to dismiss, the most recent of which is addressed to the appeals of the seventeen persons named in schedule A of the Notice of Appeal filed by Ray Turner on June 5, 1980, as "additional appellants".

The permittee argues that these additional appellants should be excluded because Mr. Ray Turner's letter of May 13, 1980 constituted a "skeleton appeal" and the additional appellants could not become appellants in a matter already under appeal but rather would have to become intervenors in this matter pursuant to 25 Pa. Code §21.62.

Apparently, the permittee does not disagree with the additional appellants' assertion that an appeal filed on June 5, 1980 would have been timely because notice

of the DER action appealed was not published in the Pa. Bulletin until May 24, 1980. (25 Pa. Code §21.51 provides a 30-day appeal period from such publication.)

Thus, permittee is relegated to contesting the form rather than the timing of the additional appellants' appeals. Unlike the situation with regard to timing, this board has discretion concerning the form of appeal. In the exercise of this discretion, the board is not moved to dismiss the appeals of the additional appellants because a) the permittee is not prejudiced by allowing these appeals. (Only one counsel represents Ray Turner and the additional appellants and the issues raised by Mr. Ray Turner in his June 5, 1980 Notice of Appeal pertain as well to the additional appellants.) Furthermore, the only "mistake" any of the additional appellants made was failing to file individual appeals on June 5, 1980 which, in any event, would probably have been consolidated at a single docket number.

With regard to the petition to intervene of Joanne Bozek, et al. (hereinafter the additional intervenors to differentiate them from James E. Work, et al.), only the permittee contests their intervention. Rather inconsistently, the permittee argues that these individuals should not be allowed to intervene because of the presence *inter alia* of the additional appellants (whom the permittee would exclude). In any event, neither this nor any other reason set forth by the permittee is persuasive.

The permittee notes that it has been 8 months since Mr. Ray Turner filed his appeal. While this is true, we are, unfortunately, still involved in pre-trial motions. The board's rules allow intervention at any time prior to hearing and a hearing has yet to be scheduled. Thus, intervention is still timely.

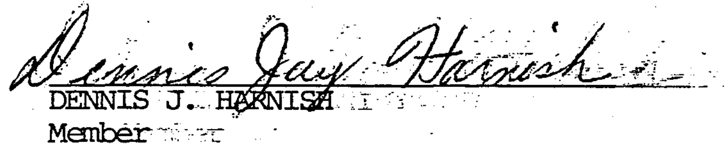
Most of the other reasons cited by the permittee for denying the instant petition to intervene; e.g., cited confusion at trial and a waste of time and

effort; will be minimized by requiring that all the additional intervenors be represented for purposes of the hearing by a single counsel (the board notes that two counsel have entered their appearances on behalf of certain of the additional intervenors). As to another cited reason, delay in discovery, discovery will not be delayed by virtue of the instant order because all parties must complete discovery by February 12, 1981 (the petition of the intervenors James E. Work, et al. to this effect is hereby granted).

To aid permittee in discovery and to respond to the permittee's motion for sanctions against the appellants, all parties must exchange, on or before February 1, 1981, summaries of the testimony of their expert witnesses; copies of these summaries must be simultaneously filed with the board.

No expert witness will be allowed to testify for any party unless a summary has not been received by the board by the above date.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Member

DATED: January 13, 1981

cc: Bureau of Litigation
Howard J. Wein, Esquire
Nicholas J. Cook, Esquire
William M. Radcliffe, Esquire
Robert J. Shostak, Esquire
Robert M. Brenner, Esquire
Lawrence D. McDaniel, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

RAY TURNER, et al and
JAMES E. WORK, et al, Intervenors and
JOANNE BOZEK, et al, Additional Intervenors

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and ELWIN FARMS, INC., Permittee

Docket No. 80-088-H

OPINION AND ORDER SUR MOTIONS FOR ENLARGEMENT AND
PROTECTIVE ORDER OF JAMES E. WORK, et al.,
AND MOTION TO STRIKE OFF PLEADINGS OF ELWIN FARMS, INC.

Again, a flurry of pre-hearing motions requires a response from this board. James E. Work, et al. request that the time for completion of discovery be extended to March 1, 1981 due to the alleged failure of DER to answer propounded interrogatories in a timely manner. James E. Work, et al also move for an order excusing Elizabeth Work and Joanne Work from depositions, scheduled by Elwin Farms, Inc. in Pittsburgh, on the grounds that neither person has any knowledge of events surrounding the matter (and, in the case of Elizabeth Work, also on the grounds of advanced age and failing health). An answer has been received to these motions from Elwin Farms, Inc. and a conference call concerning this matter was conducted among the counsel for these parties and the undersigned.

In addition, Elwin Farms, Inc. has moved this board to strike off the pleadings of Ray Turner for withdrawing his appeal "by inference". Mr. Turner answers that he did not and does not withdraw his appeal as docketed at the caption above.

In the opinion of the board, none of the various motions described above requires further answer or briefing for resolution, especially since this board is very reluctant to further protract a matter which has already been so long in the pre-hearing phase. Thus, the board enters the following:

ORDER

AND NOW, this 28th day of January, 1981, upon consideration of the various motions described above, it is hereby ordered that:

1. The time for exchange of summaries of expert testimony by all parties is extended to and including February 16, 1981.

2. The time for completion of discovery for all parties is extended to and including March 2, 1981.

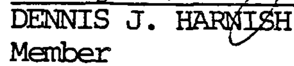
3. The time for filing pre-hearing memoranda by all parties is extended to and including March 16, 1981.

4. The Commonwealth shall reply to the interrogatories propounded by the intervenors (on December 22, 1980) within ten (10) days from receipt of this order.

5. Both Joanne Work and Elizabeth Work are excused from travelling to Pittsburgh for the purpose of giving a deposition and Elizabeth Work is excused from giving a deposition in this matter. James E. Work, et al. shall reply to any interrogatories addressed to Elizabeth Work within ten (10) days of their receipt.

6. The Elwin Farms, Inc.'s motion to strike off pleadings is denied.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Member

cc: Bureau of Litigation
Howard J. Wein, Esquire
Nicholas J. Cook, Esquire
William M. Radcliffe, Esquire
Robert J. Shostak, Esquire
Robert M. Brenner, Esquire
lawrence D. McDaniel, Esquire

DATED: January 28, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

RAY TURNER, et al and
JAMES E. WORK, et al, Intervenors and
JOANNE BOZEK, et al, Additional Intervenors

Docket No. 80-088-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and ELWIN FARMS, INC., Permittee

OPINION AND ORDER SUR ELWIN FARM'S MOTIONS TO DISMISS ADDITIONAL INTERVENORS JOANNE BOZEK, ET AL; FOR ENLARGEMENT OF TIME AND FOR PROTECTIVE ORDERS AND INTERVENOR'S MOTION FOR PRODUCTION OF DOCUMENTS

On January 28, 1981 this board issued its third pre-hearing order in the above-captioned matter, an order which it hoped would set the stage for hearings. Pursuant to this order, the parties were given until February 16, 1981 to exchange summaries of expert testimony and until March 2, 1981 to complete discovery.

The said summaries were exchanged on or about the requested date but instead of resolving discovery, these summaries merely inflamed the curiosity of counsel for Elwin Farms who now seek an enlargement of time so that they can depose some or all of the other parties' expert witnesses. The intervenors, James Work, et al., answer and oppose this request for an enlargement of time arguing that the depositions of experts are not provided for by Pa. R.C.P. 4003.5(a)(2).

Depositions of experts do seem to be contemplated by Pa. R.C.P. 4003.5 but only after receipt and review of summaries of expert testimony and only then following an order of court, upon cause shown.

Of course, in this matter, Elwin Farms has made no showing of cause with regard to its need to depose the said experts so that this board could simply deny the motion of Elwin Farms for this reason. Moreover, to grant any enlargement of time would further protract a matter which has remained too long in a pre-hearing pasture. Nevertheless, the board's constant goal is to be fair to all parties and Elwin Farms would seem to have a legitimate need to evaluate the testimony of those experts who oppose its permit. Requiring a showing of cause in this regard would just delay this matter further.

On the other hand, the convenience of the experts would face depositions and the expense to other parties of requiring their counsel to travel to distant locations for depositions of out-of-town experts must be balanced against Elwin Farms' need to know. Therefore, pursuant to the powers invested in this board under Pa. R.C.P. 4003.5(a)(2), we will permit the identified experts to be deposed in Uniontown or Pittsburgh, Pennsylvania according to the revised schedule below so long as Elwin Farms advances to each deposed expert travel expenses and fees (at the same rates charged by the said experts to their respective parties).

Since the period to conclude discovery must of necessity be extended to permit the above depositions, the force of Elwin Farms' Motion for Protective Order is greatly diminished, i.e., it would not seem unduly burdensome for Elwin Farms to produce the requested documents at its counsel's office on or before March 13, 1981 (30 days following the request for production). Additionally, this board does not find the intervenor's request to be overbroad or to be directed to the wrong party. Thus, Elwin Farms' Motion for Protective Order will be denied.

Finally, Elwin Farms' Motion to Dismiss Intervenors Joanne Bozek, et al, is denied. To the extent that these intervenors (or any other parties) failed to submit summaries of expert testimony as per the board's order of January 28, they will be precluded from introducing expert testimony during the hearing. Thus, their presence would not seem to add significantly to the burden on Elwin Farms to defend its permit. Moreover, there would seem to be no need for these intervenors to adopt pleadings which had already been filed on their behalf as well as on behalf of other intervenors by Southwestern Pennsylvania Legal Aid Society. Of course, these intervenors and all other parties will be required to submit prehearing memoranda according to the modified schedule set forth below.

ORDER

AND NOW, this 5th day of March, 1981, upon consideration of the various motions cited and discussed above, it is hereby ordered that:

a) This board's order of January 28, 1981 issued in the instant matter shall remain in full force and effect except as modified below.

b) The time for completion of discovery for all parties is extended until and including April 3, 1981.

c) Elwin Farms shall produce the documents requested in intervenors' James Work, et al. request for production in Pittsburgh, Pennsylvania or or before March 13, 1981.

d) Elwin Farms may depose any or all of the experts identified to date in this matter who are expected to be called as witnesses so long as all these depositions are scheduled within the general discovery time frame set forth above, and so long as the said depsotions take place in Pittsburgh, Pennsylvania or Uniontown, Pennsylvania or any other location suitable to counsel for all parties

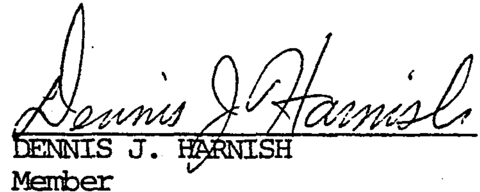
and so long as Elwin Farms pays the travel expenses of each expert from his residence to the place of deposition along with reasonable lodging fees, if an overnight stay is required, as well as the expert's fee as charged to the party planning to call the said witness.

e) The time for filing pre-hearing memoranda by all parties is extended to and including April 17, 1981.

f) Elwin Farms' motion to dismiss certain intervenors is denied.

g) Each counsel on or before March 20, 1981, shall inform the Secretary of this board, Ms. M. Diane Smith, concerning his dates of availability starting with the week of April 27, 1981 and extending through the week of May 25, 1981 as well as his expectations regarding the number of days of hearing and his suggestions concerning the location of the hearings.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Member

DATED: March 5, 1981

cc: Bureau of Litigation
Howard J. Wein, Esquire
Nicholas J. Cook, Esquire
William M. Radcliffe, Esquire
Robert J. Shostak, Esquire
Robert M. Brenner, Esquire
Lawrence D. McDaniel, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

MR. AND MRS. ANDREW WYETH
and THE MILL, INC.

Docket No. 81-131-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR
PETITION TO INTERVENE

DER issued an order on July 10, 1981 to the appellants' pursuant to the Dam Safety Act. Appellants appealed said order to this board which appeal was docketed at the above caption. On or about October 13, 1981 Bayard Taylor, Jr. and Joan Talley petitioned to intervene in the instant matter. The board promptly notified the appellants and DER of said petition and requested a resonse thereto on or before October 26, 1981. Appellants opposed the petition and correctly noted this board's lack of jurisdiction with regard to the easement issue set forth in intervenors' petition. However, intervenors also raise an issue arguably within this board's jurisdiction, accelerated erosion, which issue they further allege was not properly addressed by DER's order.

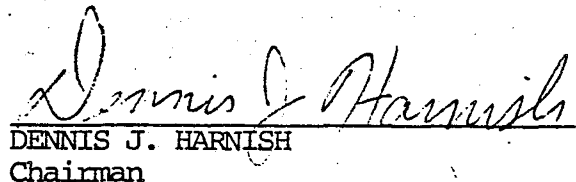
On the basis of this analysis and since DER does not oppose the petition, there seems no reason for this board to deny it. The board notes,

however, that appellants and DER have entered a consent order and agreement and have requested this board to publish same in the Pennsylvania Bulletin. Thus, it seems likely that appellants will soon withdraw their appeal which may leave intervenors with no proceeding in which to intervene. The board also notes that a new 20 day appeal period is started upon publication of the notice of settlement.

ORDER

AND NOW, this 26th day of October, 1981, intervenors' petition to intervene is granted.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Chairman

cc: Bureau of Litigation
William Sierks, Esquire
William Prickett, Esquire
John J. Duffy, Esquire

DATED: October 26, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

ZACHERL COAL COMPANY, INC. : Docket No. 80-227-H through 80-266-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR DER'S MOTION TO CONSOLIDATE APPEALS

The board has received 40 separate notices of appeal all of which arise from the letter of J. Anthony Ercole dated November 21, 1980 in which DER forfeited 40 separate performance and collateral bonds on which Zacherl Coal Company, Inc. was the principal covering 40 separate mine permit numbers. Although each forfeiture has been separately docketed at dockets numbering 80-227-H through 80-266-H, the board notes that the same reason for appeal has been set forth in each notice of appeal and that this reason contains no reference to any specific mining site. Rather, the reason for appeal seems to be based entirely on legal grounds. Accordingly, the board, on DER's motion, is consolidating the appeals docketed at 80-227-H through 80-266-H, at least for purposes of pre-hearing practice, at Docket No. 80-227-H. In addition, the board is not following its usual procedure of issuing a pre-hearing order in each of the above docketed numbers but rather, the board is serving a copy of

this opinion and order on DER's counsel of record instructing them to file any responsive motions to the said notices of appeal with this board and upon opposing counsel on or before February 13, 1981.

Upon receipt of DER's motion, the appellant will be given an opportunity to respond and both parties will be given an opportunity to brief the issues raised by the said motion and answer. If DER chooses not to file any motions, a pre-hearing order will be issued and these matters will proceed as per the board's standard practice.

It is noted that separate appeals from the same DER action have been taken and filed at other docket numbers. At this time, these other appeals will not be consolidated with those above since they involve site specific facts and thus, probably, cannot be resolved without a hearing.

ENVIRONMENTAL HEARING BOARD

DENNIS J. HARNISH
Member

cc: Bureau of Litigation
Stanley R. Geary, Esquire
John P. Leemhuis, Esquire

DATED: January 28, 1981

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

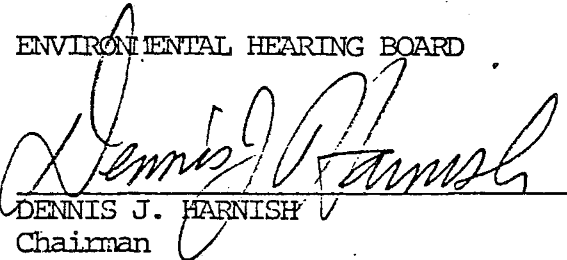
Blackstone Building
First Floor Annex
112 Market Street
Harrisburg, Pennsylvania 17101
(717) 787-3483

ZACHERL COAL COMPANY	:	
v.	:	DOCKET NO. 80-227-H
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	

OPINION AND ORDER

AND NOW, this 20th day of November, 1981, the Opinion and Order issued in EHB Docket No. 80-267-H on September 10, 1981 is hereby incorporated by reference as though fully set forth.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Chairman

cc: Bureau of Litigation
512 Executive House
101 South Second Street
Harrisburg, PA 17120

For the Commonwealth of Pennsylvania,
Department of Environmental Resources:

Stanley R. Geary, Esquire

For the Appellant/Respondent/Defendant:

Lawrence C. Bolla, Esquire

DATED: November 20, 1981