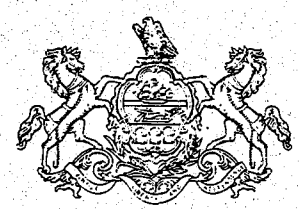
Environmental Hearing Board

Adjudications
and
Opinions



1990

Volume III

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COMMONWEALTH OF PENNSYLVANIA
Maxine Woelfling, *Chairman*

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

DURING THE PERIOD OF THE
ADJUDICATIONS

1990

Chairman.....MAXINE WOELFLING

Member .....ROBERT D. MYERS

Member .....TERRANCE J. FITZPATRICK

Member .....RICHARD S. EHMANN

Member .....JOSEPH N. MACK

Secretary.....M. DIANE SMITH

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FORWARD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1990.

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

1990

ADJUDICATIONS

OPINIONS AND ORDERS

1990 DECISIONS

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

KERRY COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 90-291-MJ**
	:	**(Consolidated with 90-292-MJ**
COMMONWEALTH OF PENNSYLVANIA,	:	**and 90-293-MJ)**
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued September 27, 1990**

OPINION AND ORDER

By Joseph N. Mack, Member

Synopsis

Appeals will be dismissed for lack of jurisdiction where the appeals were filed with the Board more than 30 days after receiving Assessments of Civil Penalties. 25 Pa.Code §21.52(a), Rostosky v. Commonwealth, DER, 26 Pa.Cmwlth. 478, 364 A.2d 761 (1976). The appellant will not be permitted to file an appeal nunc pro tunc where it fails to show there has been fraud or breakdown in the function of the Board. Pierce v. Penman, 357 Pa.Super. 225, 515 A.2d 948 (1986).

OPINION

These cases originated on May 23, 1990 when the Department of Environmental Resources (DER or Department) issued three Assessments of Civil Penalty against Kerry Coal Company (Kerry) for the following alleged violations:

> 1) Failure to operate and maintain adequate water treatment facilities necessary to treat

> discharges from the Daugherty Mine in conformance with applicable effluent limitations. Perry Township, Lawrence County.
>
> 2) Failure to backfill and grade Phase 5 of the Eichorn Mine concurrent with mining. Little Beaver and Darlington Townships, Lawrence and Beaver Counties.
>
> 3) Exceeding the 1500 feet of open pit limitation on the Eichorn Mine. Little Beaver and Darlington Townships, Lawrence and Beaver Counties.

Kerry filed appeals from each of the three assessments. The appeals were received by the Board on July 18, 1990 and assigned docket numbers 90-293, 90-292 and 90-291, respectively. On July 30, 1990 the Board issued a Rule to Show Cause in each of the cases as to why the appeals should not be dismissed as untimely filed. Kerry filed a Response to Rule to Show Cause on August 6, 1990, alleging that each of the appeals had originally been mailed to the Department's Bureau of Litigation and received there June 22, 1990, and that the error was not discovered until the Bureau of Litigation returned the original papers to Kerry on July 12, 1990. In the same Response to Rule to Show Cause, Kerry requests that it be permitted to file its appeals nunc pro tunc.

The Board, on its own motion, consolidated the appeals on August 9, 1990.

These appeals present two issues: Were the appeals timely filed, and, if not, is there basis for allowing the appeals nunc pro tunc?

The rules of the Board, and specifically 25 Pa.Code §21.52(a), read in pertinent part as follows:

> (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...

It is clear from an examination of §21.52 that the jurisdiction of the Board cannot attach to this matter in the usual way, since the appeals were filed with the Board more than 30 days after Kerry received notice of DER's action. Rostosky, supra.

Kerry then asks us to permit it to file its appeals nunc pro tunc. The Board's rules, at 25 Pa.Code §21.53(a), allow for appeals nunc pro tunc as follows:

> (a) 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.

"Good cause" has been interpreted by this Board to include fraud or breakdown of the Board's procedures. Kayal v. DER, 1987 EHB 809. Our Superior Court in a recent ruling, Pierce v. Penman, supra, reviewed the question of allowing the filing of an appeal nunc pro tunc. The Court severely limited it to those cases where there has been fraud or some breakdown in the court's operation, which breakdown had some deleterious effect on the filing of the appeal. In addition, an appeal nunc pro tunc may be allowed when the delay is caused by the non-negligent acts of others, but only when "unique and compelling" circumstances are demonstrated. Marcon v. DER, EHB Docket No. 90-078-E (Opinion and Order issued May 8, 1990), Lancaster Press, Inc. v. DER, 1989 EHB 599.

The "good cause" asserted by Kerry for allowing its appeal nunc pro tunc is that DER's Bureau of Litigation should have immediately upon receipt notified Kerry of the misfiling of the appeal papers. Kerry argues that had DER notified its counsel of the error on June 22, 1990, the appeal could have been forwarded to the Board by overnight mail or telefacsimile transmission before expiration of the appeal period.

The Board dealt with a somewhat similar fact situation in Robert F. Fink v. DER, EHB Docket No. 90-155-W (Opinion and Order issued July 2, 1990), where the appellant filed a notice of appeal and petition for supersedeas with DER's Altoona Office and Office of Chief Counsel. Upon learning that these filings were not forwarded to the Board, the appellant filed a complete set with the Board, but not before expiration of the 30-day filing period. Holding that the filing of a notice of appeal with the Department does not confer jurisdiction upon the Board, the Board dismissed the appeal. See also Rostosky v. Commonwealth, DER, supra, (Commonwealth Court upheld Board's dismissal of untimely filed appeal where appeal was erroneously sent to DER rather than Board) and Cubbon Lumber Co. v. DER, 1989 EHB 160 (Appeal was dismissed as untimely where it was received by DER's Office of Chief Counsel, but not by Board, within 30-day filing period.)

Kerry argues that its appeal would have been timely filed if DER had notified Kerry about the misfiled documents immediately upon their receipt. Whether or not that would have been the case, we cannot speculate. Nevertheless, it does not excuse Kerry's failure to file its appeal with the appropriate office in the first place, and certainly does not amount to a showing of fraud or breakdown in the Board's procedure, which would allow an appeal nunc pro tunc.

We are not convinced that any "good cause" has been shown which would permit a filing nunc pro tunc under the terms of §21.53(a) and the standards adopted thereunder. Therefore, we must dismiss these appeals as untimely.

ORDER

AND NOW, this 27th day of September, it is ordered that the Board's rule of July 30, 1990 is made absolute and the appeals of Kerry Coal Company at EHB Docket Numbers 90-291-MJ, 90-292-MJ and 90-293-MJ are dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
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Administrative Law Judge
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TERRANCE J. FITZPATRICK
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Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
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Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
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DATED: September 27, 1990

cc: See next page

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M. DIANE SMITH
SECRETARY TO THE BOAR

SWISTOCK ASSOCIATES COAL CORPORATION	:	
	:	
V.	:	**EHB Docket No. 88-240-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** October 2, 1990

OPINION AND ORDER
SUR
APPLICATION FOR AWARD OF ADJUDICATIVE FEES AND EXPENSES

Robert D. Myers, Member

Synopsis

The Board awards fees and expenses in the maximum amount of $10,000 under the so-called Costs Act to the prevailing party in an adversary adjudication initiated by DER. The Board refuses to rule that DER's action lacked substantial justification simply because DER failed to make out a prima facie case at the hearing. However, after analysis of the record evidence, the Board rules that DER was not substantially justified in taking the enforcement action. The Board also rules that the $10,000 ceiling in the Costs Act applies to the overall award of fees and expenses and not to the various segments making up that award.

OPINION

On January 5, 1990, Swistock Associates Coal Corporation (Swistock) filed an Application for Award of Adjudicative Fees and Expenses (Application), pursuant to the Act of December 13, 1982, P.L. 1127, as amended, 71 P.S. §2031 et seq.(Costs Act). The Application was filed as a

result of an Opinion and Order, dated December 8, 1989, wherein the Board had granted Swistock's Motion to Sustain its appeals consolidated at the above docket number (1989 EHB 1346). In its Application, Swistock seeks an award of $114,954.72 fees and expenses incurred in connection with the litigation. The Department of Environmental Resources (DER) filed its Answer to the Application on January 30, 1990. Swistock filed a Reply on February 15, 1990, and DER filed a Response on March 8, 1990.

Section 3 of the Costs Act (71 P.S. §2033) provides, in pertinent part, as follows:

> (a) Except as otherwise provided or prohibited by law, a Commonwealth agency that initiates an adversary adjudication shall award to a prevailing party, other than the Commonwealth, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer finds that the position of the agency, as a party to the proceeding, was substantially justified or that special circumstances made an award unjust.
>
> (b) A party seeking an award of fees and expenses shall submit an application for such award to the adjudicative officer...within 30 days after the final disposition of the adversary adjudication...

It is apparent (and DER does not dispute) that Swistock is a "party,"[1] a "prevailing party" and that the Compliance Orders forming the basis of these consolidated appeals each constituted an "adversary adjudication" that was "initiated" by DER, a "Commonwealth agency." It is

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[1] Swistock's Application contains schedules showing its net worth and workforce as of June 30, 1988 to satisfy the eligibility requirements set forth in the definition of "party" in section 2 of the Costs Act, 70 P.S. §2032.

also clear that the Application was filed in a timely manner. With these prerequisites satisfied, the Board is to award "fees and other expenses" to Swistock unless we find that DER's position was "substantially justified."[2]

The basic dispute between Swistock and DER concerned DER's June 1988 assignment of responsibility to Swistock for flooding the Ardell Jacobson property in Lawrence Township, Clearfield County, downstream of Swistock's surface mining operation on the Joseph Lytle farm. For nearly two years prior to June 1988, DER consistently had exonerated Swistock from any responsibility for this condition, based on investigations by a DER mining specialist and hydrogeologist.[3] The change in position came about after Jacobson's persistent letter-writing campaign prompted DER officials to send out an engineer, John Smith, to investigate the matter. Smith concluded that Swistock was responsible for the flooding and DER officials acted in reliance on this conclusion.

When the consolidated appeals went to hearing in April 1989, DER had the burden of proof and the burden of proceeding: 25 Pa. Code §21.101(a) and (b)(3). It presented 10 witnesses - 4 residents of the area and 6 persons employed or retained by DER. Only 2 witnesses gave opinion testimony - John Ritter who testified to infiltration studies, and John Smith who testified concerning his investigation. In the midst of Smith's cross-examination, Swistock moved that Smith's entire testimony be stricken "as being based on speculation and not being supported by substantial evidence and not capable of being used by evidence as part of the record by this Board." When DER did not

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[2] DER has made no argument that "special circumstances" make an award unjust and we will not consider that aspect of the statute.

[3] There were other possible causes of the flooding, including work done by Lawrence Township personnel on a private lane traversing the Jacobson property and on a township road crossing the Lytle farm.

oppose the motion, it was granted. Thereafter, DER rested its case without presenting additional evidence. Swistock's Motion to Sustain its Appeal, in the nature of a motion for a nonsuit, was granted on the ground that DER had not made out a prima facie case.

"Substantially justified" is defined in section 2 of the Costs Act, 71 P.S. §2032, as follows:

> The position of an agency as a party to a proceeding is substantially justified when such position has a reasonable basis in law and fact. The failure of an agency to prevail in a proceeding, or the agreement of an agency to settle a controversy, shall not raise a presumption that the position of the agency was not substantially justified.

The inclusion of the words "as a party to a proceeding" in this definition and in the empowering provisions of section 3, 71 P.S. §2033, convinces us that we are to measure DER's justification by considering its position (legal and factual) during the litigation. Necessarily, this encompasses all of the facts on which DER bases its case, whether or not they all were known at the time of taking the action giving rise to the appeal. Of course, we are limited in our consideration to those specific facts contained in the record of the hearing: Carlisle Electric, Inc. v. Commonwealth, Dept. of Labor and Industry, 101 Pa. Cmwlth. 359, 516 A.2d 437 (1986).

Swistock argues that, since those facts did not make out a prima facie case, we should hold, as a matter of law, that they cannot show substantial justification. We are loath to adopt any such per se rule, preferring to assess each case on the basis of its own peculiar facts.[4] That

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[4] Federal courts also have rejected this approach in cases under the Equal Access to Justice Act (EAJA), Pub. L. 96-481, 94 Stat. 2328, 28 U.S.C.
footnote continued

said, however, it is obvious that DER's failure to make out a prima facie case points up the paucity of evidence supporting its action. DER argues that, since John Smith was an engineer apparently qualified to investigate the flooding problem, DER was entitled to rely on his conclusions. The difficulty with this argument is that Smith's entire testimony was stricken from the record, as the result of a motion to which DER made no objection. Having been stricken, Smith's testimony cannot be used as a basis for justifying DER's action.

DER's remaining evidence consisted of the testimony of 4 area residents - lay persons - 4 DER employees and John Ritter. The residents testified to increased incidents of flooding (which had ceased by the time of the hearing) and to the work done by Lawrence Township on the private lane crossing Jacobson's property and on a township road crossing the Lytle farm. Joseph Lytle testified that his soil is harder, rockier and less productive than before mining; and that erosion is more of a problem. While this testimony graphically described the existing conditions and suggested that runoff on the Lytle farm might be greater than before, it was of little help in establishing the cause of those conditions.

The 4 DER employees did not testify directly to a causal connection, their beliefs having come entirely from the reports of others. This left John Ritter, the Ph.D. candidate at Penn State who performed infiltration tests on the Lytle farm. While these tests showed a greater degree of runoff from areas disturbed by mining, Ritter was careful to limit his conclusions to the specific four test plots, .4 meter by 1 meter in size. He stated

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continued footnote
§2412(d), the statute on which the Costs Act was patterned (Hardy v. Commonwealth, Dept. of Environmental Resources, 101 Pa. Cmwlth. 1, 515 A.2d 366 (1986)). See, e.g., Taylor v. Heckler, 835 F. 2d 1037 (3d. Cir., 1988).

unequivocally that he could not testify to the infiltration characteristics of the entire watershed.

The totality of DER's record evidence raises no more than an inference that Swistock's surface mining operations might be causing the flooding. This same evidence also supports an inference that Lawrence Township created the problem by road and drainage work done on the Lytle farm and on the Jacobson property. Indeed, this was the conclusion reached by DER and defended repeatedly for almost two years prior to reversing itself in June 1988.

To be "substantially justified" DER's position during the litigation had to have a "reasonable basis in law and fact." A similar measurement has been formulated by the Federal Courts in administering the EAJA: Pierce v. Underwood, ___ U.S. ____, 108 S.Ct. 2541, 101 L.Ed. 2d 490(1988). The Third Circuit has stated that the Agency's burden is to show (1) a solid and well-founded basis in truth for the facts alleged, (2) a solid and well-founded basis in law for the theory propounded, and (3) a solid and well-founded connection between the facts alleged and the legal theory advanced: Taylor v. Heckler, supra.

While we do not necessarily subscribe to the Third Circuit's precise phraseology,[5] we do agree with the need for a reasonable connection between the facts alleged and the legal theory advanced. When applying that need to the present appeals, DER's position falls short of substantial justification. Even if we give the agency the benefit of the doubt on the adequacy of the facts, we can find no reasonable connection between those facts and Swistock's

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[5] The Costs Act was patterned on the EAJA, as noted in footnote 4, but the two statutes are not identical. We will give serious consideration to decisions under the EAJA but will not feel bound to follow them.

responsibility. The facts raised inferences against at least two distinct entities and DER had a duty to investigate further before accusing either one of them: cf. Phil Smidt & Son, Inc. v. National Labor Relations Board, 810 F.2d 638 (7th Cir., 1987).

DER argues, however, that circumstantial evidence is adequate to carry the burden of proof (DER v. Lawrence Coal Company, 1988 EHB 561) and also should be considered adequate to show substantial justification. We have no quarrel with this proposition. The character of the evidence (direct or circumstantial) is unimportant; its persuasive power, however, is critical. Circumstantial evidence requires a weighing of probabilities: McCormick on Evidence, 3rd edition, Hornbook Series, Lawyer's Edition (1984) §338. If that weighing clearly favors one inference over another, substantial justification would exist for action taken on the basis of the predominating inference. But if the weighing produces no clear favorite, the evidence is inadequate. As stated by the Supreme Court in Commonwealth v. Woong Knee New, 354 Pa. 188, 47 A.2d 450 (1946) at page 468:

> When two equally reasonable and mutually inconsistent inferences can be drawn from the same set of circumstances, a jury must not be permitted to guess which inference it will adopt, especially when one of the two guesses may result in depriving a defendant of his life or his liberty. When a party on whom rests the burden of proof in either a criminal or a civil case, offers evidence consistent with two opposing propositions, he proves neither.
>
> (Emphasis added)

We recognize that the weighing of probabilities is an exercise in reasoning in which mathematical exactitude cannot be expected. It is not our intent to impose a paradoxical burden upon DER or to dampen its enforcement activities. But where, as here, DER's weighing of probabilities produces one

inference for nearly two years and then, without the addition of any significant facts, produces an inconsistent inference on which DER acts without any attempt to resolve the differences, DER runs a great risk of being unable to show substantial justification.

Since DER's position was not substantially justified in these consolidated appeals, Swistock is entitled to "fees and expenses." Swistock claimed $70,382 in legal fees, $10,132.72 in out-of-pocket expenses of legal counsel and $34,444 in expert witness fees and expenses, all incurred in these proceedings - a total of $114,958.72[6]. Supporting documentation confirms the amounts claimed for legal fees and out-of-pocket expenses, but produces a figure for expert witness fees and expenses some $3,193.25 higher than claimed. This difference is not explained and is not readily resolved by an examination of the documentation. Accordingly, we will use the lower figure.

Hourly rates charged by legal counsel ranged from $50 for a paralegal to $190 for a senior attorney. Hourly rates charged by expert witnesses ranged from $27.72 for a hydrogeologist for $130 for a soil scientist. The definition of "fees and expense" in section 2 of the Costs Act, 71 P.S. §2032, includes limits on hourly rates - $75 for attorneys and, for experts, a rate that does not exceed the highest rate for experts paid by DER. The $75 rate cap for attorneys can be exceeded under circumstances that, Swistock argues, apply here.

The appropriate hourly rate for Swistock's attorneys and experts is academic, in our judgment, because the amount of the claim far exceeds the

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[6] The total cited in Swistock's Application is $4.00 less. The discrepancy is unexplained.

overall ceiling of $10,000 placed on awards by the Legislature. The same definition of "fees and expenses" referred to above, closes with the following sentence:

> No award of fees and expenses shall be made where such fees and expenses are less than $250, and no award shall be greater than $10,000.

Swistock argues that the $10,000 ceiling should be interpreted to apply to each segment of a claim rather than the entire claim. We disagree. The language clearly refers to awards of "fees and expenses," thereby incorporating all elements falling within that definition.

The claim for out-of-pocket expenses ($10,132.72) itself is more than the ceiling. Consequently, the hourly rates for attorneys and experts are irrelevant.

ORDER

AND NOW, this 2nd day of October, 1990, it is ordered that the Application for Award of Adjudicative Fees and Expenses, filed by Swistock Associates Coal Corporation on January 5, 1990, is granted in part and denied in part. The Department of Environmental Resources shall, within 30 days, pay $10,000 to said corporation.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

Board Member Richard S. Ehmann has issued a separate concurring opinion.

DATED: October 2, 1990

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M. DIANE SMI
SECRETARY TO THE

SWISTOCK ASSOCIATES COAL CORPORATION :
:
v. : EHB Docket No. 88-240-M
:
COMMONWEALTH OF PENNSYLVANIA : Issued: October 2, 1990
DEPARTMENT OF ENVIRONMENTAL RESOURCES :

CONCURRING OPINION OF BOARD MEMBER RICHARD S. EHMANN

I concur in the result reached by my fellow Board members in their opinion. I do not agree with reasoning which produces this result.[1]

The core of my concern, which generates this opinion, is how to define "substantially justified" under Section 3 of the Act of December 13, 1982, ("Costs Act"), P.L. 1127, No. 257, as amended, 71 P.S. §2033. I believe that the majority is in error when they write that the definition of "a reasonable basis in law and fact" in Section 2 of the Costs Act, 71 P.S. §2032, is essentially the same measurement formulated by the federal courts in administering the Equal Access to Justice Act ("EAJA"), Pub. L. No. 96-481, 94 Stat. 2328, 28 U.S.C. §2414 . This is not so!

In Taylor v. Heckler, 835 F.2d 1037 (3d Cir. 1988), cited in the majority opinion, the Third Circuit explicitly concluded that "substantially justified" in the EAJA must be defined to make the government's burden tougher than

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[1]I do, however, concur in full with their reasoning in finding a $10,000 ceiling on the overall award of fees and expenses.

merely having a reasonable basis in law and fact. According to the Third Circuit, the EAJA does not define "substantially justified", so that federal agencies and courts are free to supply their own definitions. The footnotes in Taylor, supra, show several definitions have been formulated at the federal level. The definition adopted by the Third Circuit and suggested by the majority here for our use goes beyond the reasonable basis in law and fact definition in the Costs Act. Since the Costs Act does define "substantially justified" as "a reasonable basis in law and fact," we must use this definition, and, by doing so, develop an explanation of its meaning which is not as broad as the proofs mandated by Taylor, supra. Thus, the majority's definition imposes an incorrect test, which I must reject.

Having stated the above, I nevertheless see no need to further define the breadth of "a reasonable basis in law and fact" in this opinion. I leave that task to a future opinion. Based upon the evidence in the record before us and in light of the way this appeal's record has come into existence, I can see no basis for DER's position in this case which could be considered to be reasonably based in fact and law. Accordingly, I must concur that DER's position here is not substantially justified.

RICHARD S. EHMANN
Administrative Law Judge
Member

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M. DIANE SMITH
SECRETARY TO THE BOARD

ED PETERSON JAMES CLINGER	:	
v.	:	EHB Docket No. 90-269-MJ
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: October 4, 1990

OPINION AND ORDER
SUR MOTION TO DISMISS

By Joseph N. Mack, Member

Synopsis

Letters from the Department of Environmental Resources which informed Appellants that they had allegedly violated provisions of the Bituminous Coal Mine Act and warned them that their conduct would be monitored more closely in the future, but which did not order Appellants to take any specific action, do not constitute appealable actions.

OPINION

This matter was initiated with the filing of notices of appeal by Ed Peterson and James Clinger (hereinafter collectively referred to as "the Appellants") on July 5, 1990 from two identical letters of the Department of Environmental Resources ("DER") dated June 5, 1990. The letters advised the Appellants that they had violated certain provisions of the Bituminous Coal Mine Act, Act of July 17, 1961, P.L. 659, as amended, 52 P.S. §701.101 et seq.

(the Act). Mr. Peterson's appeal was docketed at 90-269-MJ and Mr. Clinger's appeal was docketed at 90-270-MJ; the appeals were consolidated on August 9, 1990 at Docket No. 90-269-MJ.

On August 13, 1990, DER filed a Motion to Dismiss the appeals on the basis that the June 5, 1990 letters of DER did not constitute appealable actions or adjudications. The Appellants responded to DER's Motion on August 31, 1990, arguing that DER's June 5, 1990 letters affected Appellants' personal and property rights, privileges, immunities, duties, liabilities, and obligations, and, therefore, are appealable. DER filed its Reply on or about September 20, 1990.

Pursuant to the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7511 et seq., the Board has the power and duty to hold hearings and issue adjudications under 2 Pa.C.S. Ch. 5, Subch. A, on orders, permits, licenses, or decisions of DER. Actions of DER are appealable only if they constitute "adjudications" within the meaning of the Administrative Agency Law, 2 Pa.C.S.A. §101, or "actions" as defined at 25 Pa.Code §21.2(a). Plymouth Township v. DER, EHB Docket No. 90-201-W (Opinion issued August 23, 1990). "Adjudications" are defined as those actions which affect the personal or property rights, privileges, immunities, duties, liabilities, or obligations of the parties. 2 Pa.C.S.A. §101. An "action" is defined in 25 Pa.Code §21.2(a) as follows:

> *Action*--Any order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any person, including, but not limited to, denials, modifications, suspensions and revocations of permits, licenses and registrations; orders to cease the operation of an establishment or facility; orders to correct conditions endangering waters of the

> Commonwealth; orders to construct sewers or treatment facilities; orders to abate air pollution; and appeals from and complaints for the assessment of civil penalties.

The letters in question in the present case originated from DER's Bureau of Deep Mine Safety and allege that the Appellants had committed certain violations of the Act in their positions as foremen at the Keystone Coal Mining Corporation's Emilie No. 4 Mine. Each letter was accompanied by a report prepared by a Commission of mine inspectors who had investigated an incident which had occurred at the Emilie No. 4 Mine on October 22, 1987. The letters stated in pertinent part as follows:

> Based on the findings and report of the Commission, I must conclude that you violated the Act and that your actions posed a threat to the health and safety of miners subject to your supervision. However, I also recognize that the events occurred over two years ago. Therefore, I do not believe it is appropriate at this time to initiate actions to suspend or revoke your certificates. Because you (sic) past conduct indicates that you may not fully comprehend the nature of your responsibilities as a certified mine official, the Bureau will monitor your conduct more closely in the future as you exercise your responsibilities as a certified mine official.
>
> My decision should not be construed to imply that the Bureau considers the Commission's findings to be unimportant or to suggest that the Bureau will not take action in the future if circumstances warrant it. On the contrary, you can expect that any further violations which you are found to be responsible for will result in swift, but appropriate action by the Bureau.

The Appellants argue that the letters, in effect, place them "on probation" in that DER has determined to use the violations against them "by scrutinizing their activities more closely and by committing to take swift enforcement action in the event of any future violations." Appellants further

argue that although the letters do not direct them to take any specific corrective action, it is implicit that Appellants are to "conform their behavior with DER's position as stated in the Commission report."

In the case of Perry Township Board of Supervisors v. DER, 1986 EHB 888, Perry Township appealed a letter from DER which informed the Township that it was operating a landfill without a permit in violation of the Solid Waste Management Act, 35 P.S. §6018.101 et seq. The letter read in pertinent part: "Although the Department has not initiated any form of enforcement action in the past, we will in the near future be taking appropriate action against any municipal waste landfill which is operating without a permit...It is our hope that you will voluntarily comply with this notice, terminate operations and properly close and revegetate your site..." The Board found that the letter was not an appealable action and granted DER's Motion to Dismiss. In doing so, the Board held that "a mere notice of violation, or any other DER letter whose function is to inform the recipient rather than to require compliance with a specific order, is not an appealable action...The above-quoted letter is purely precatory; it 'hopes' for 'voluntary' compliance. Such a letter is not an order or other final action which is appealable..." 1986 EHB 889-890. The case of Basalyga v. DER, 1989 EHB 388, involved a similar issue. In that case, DER issued a letter which advised the appellant that extraction of peat from an alleged wetland area would be in violation of the Dam Safety and Encroachments Act, 32 P.S. §693.1 et seq. The letter concluded with the language, "You are hereby advised that you should immediately cease all peat extraction activity..." The Board held that that portion of the letter was not appealable as the language "merely provided a warning on how DER would view [the appellant's] future activities...", and

imposed no new duties or obligations on the appellant. 1989 EHB at 390. Likewise, the letters in the instant case are merely notifications to the Appellants of the Commission's findings regarding Appellants' alleged violations of the Act. Although the letters warn Appellants that they should conform their conduct to the requirements of the Act, they impose no direct obligations on Appellants nor require compliance with a specific order. As such, they are not appealable actions. Perry Township, supra; Robert H. Glessner, Jr. v. DER, 1988 EHB 773.

As for Appellants' argument that they are now subject to closer scrutiny by DER, Appellants are held to the same standard of compliance with the Act now as they were prior to the June 5, 1990 letters. No new obligations or duties have been imposed on them. Basalyga, supra. Furthermore, as DER correctly points out in its Reply, "what relief would the appellants have the Board grant? Would they have the Board order DER not to scrutinize their conduct?"

Finally, Appellants argue that the violations stated in the letters could be used against them in a possible decertification action and that they might be precluded from contesting the fact of the violations at that time if the letters are not held to be appealable actions. In the event these alleged violations are relied upon by DER in a future appealable action, Appellants would not be precluded by the doctrine of administrative finality from contesting the violations at that time. Basalyga, supra.

In conclusion, since the letters merely inform Appellants of alleged violations, but impose no affirmative duty on Appellants to take some specific action, the letters are not appealable actions. M. C. Arnoni Co. v. DER, 1989 EHB 27. We, therefore, must dismiss this appeal for lack of jurisdiction.

O R D E R

AND NOW, this 4th day of October, 1990, it is ordered that the Motion to Dismiss filed by the Department of Environmental Resources is granted, and the consolidated appeals docketed at 90-269-MJ are dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: October 4, 1990

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
Stephen C. Smith, Esq.
Western Region
For Appellants:
R. Henry Moore, Esq.
BUCHANAN INGERSOLL, P.C.
Pittsburgh, PA

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TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

ALOIS J. POL AND COMPANY OFFICERS	:	
	:	
v.	:	**EHB Docket No. 90-289-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 4, 1990**

OPINION AND ORDER SUR MOTION TO DISMISS

By Richard S. Ehmann, Member

Synopsis

The Board dismisses a portion of this appeal for lack of jurisdiction. Failure to prepay the portion of the civil penalty assessed under Act 101 deprives the Board of jurisdiction over the matter and is grounds for dismissal. Since there is no prepayment requirement for civil penalties assessed under the Solid Waste Management Act, the Motion To Dismiss is denied as to the civil penalty assessed thereunder.

OPINION

This case involves an appeal by Alois J. Pol and Company Officers (collectively "Pol") from a four hundred dollar ($400) civil penalty assessed on June 18, 1990 by the Department of Environmental Resources ("DER"). DER assessed $200 pursuant to the Municipal Waste Planning, Recycling and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, No. 101, 53 P.S. §4000.101

et seq. (Act 101). The remaining $200 was assessed pursuant to Section 605 of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. Section §6018.605. The assessment under Act 101 was based upon an alleged violation of Section 1101(e) of Act 101, 53 P.S. §4000.1101(e): failure to have proper signage on equipment transporting solid waste in Erie County. The assessment pursuant to Section 605 of the Solid Waste Management Act, supra, was based upon an alleged violation of 25 Pa. Code Section 285.211(a): failure to have the wastes covered during collection and transportation. Pol filed their notice of appeal on July 18, 1990, but did not submit prepayment of the civil penalty with the notice of appeal. On August 27, 1990, DER filed a motion to dismiss. In this motion, DER asserts that Pol failed to perfect their appeal in that they did not prepay the assessment; therefore, this Board has no jurisdiction over the entire appeal. Pol was notified of DER's Motion, and, by letter from this Board dated August 27, 1990, was given until September 17, 1990 to file their response thereto. The Board has received no response from Pol.

As to the $200 assessment under Act 101, the appeal was not perfected and we will dismiss this matter for lack of jurisdiction. Act 101, under which DER assessed the penalty, states in relevant part:

> The person charged with the penalty shall then have 30 days to pay the penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, either to forward the proposed amount to the department for placement in an escrow account with the State Treasurer or with a bank in this Commonwealth or to post an appeal bond in the amount of the penalty....Failure to forward the money or the appeal bond to the

> department within 30 days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

35 P.S. §4000.1704(b). The facts indicate that Pol has not submitted prepayment of this $200 penalty. The plain language of Act 101 indicates that this failure resulted in Pol's waiver of their rights to contest the civil penalty asserted under Act 101. Grand Central Sanitation, Inc. v. DER, Docket No. 89-615-F (Opinion and Order issued June 28, 1990)

It is obvious, however, that this is only half the amount assessed by DER. Contrary to the assertion in DER's Motion, only half of the $400 was assessed under Act 101. The remainder was assessed under the Solid Waste Management Act, supra.[1] Nothing in that Act provides for prepayment of the assessed civil penalty as a jurisdictional prerequisite. Accordingly, Pols' failure to prepay that $200 does not deprive us of jurisdiction over this half of the appealed assessment and, in regard thereto, DER's Motion must be denied.

Accordingly, we enter the following Order:

O R D E R

AND NOW, this 4th day of October, 1990, it is ordered that the appeal of Alois J. Pol and Company Officers from the $200 civil penalty assessed under Act 101 is dismissed for lack of jurisdiction. It is further ordered that DER's Motion To Dismiss as to the $200 assessed against Alois J. Pol and

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[1]We received DER's Motion To Dismiss in this case at the same time we received a literally identical motion from the same DER lawyer in the case of Ram Disposal Service v. DER, Docket No. 90-282-E. In Ram Disposal, supra, however, the entire $400 was assessed under Act 101. We assume that counsel's zealousness in representing DER in these two matters accounts for the failure to recognize this factual difference between the two appeals.

Company Officers by DER under the Solid Waste Management Act, supra, is denied.

ENVIRONMENTAL HEARING BOARD

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MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: October 4, 1990

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
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Western Region
For Appellant:
Daniel J. Brabender, Jr., Esq.
Erie, PA

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M. DIANE SMITH
SECRETARY TO THE BOARD

WESTERN PENNSYLVANIA COAL COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 88-213-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** October 5, 1990

OPINION AND ORDER
SUR MOTION TO DISMISS

By Joseph N. Mack, Member

Synopsis

The appeal of Western Pennsylvania Coal Company, Inc. ("Western") will be dismissed for failure to prosecute where Western has not appeared for a prehearing conference nor responded to a Motion to Dismiss filed by the Department of Environmental Resources ("DER").

OPINION

This appeal was filed by Western on May 26, 1988 from DER's April 29, 1988 forfeiture of three surety bonds posted in connection with Western's surface mining operations in Derry Township, Westmoreland County.

Pre-hearing memoranda were filed by Western and DER on October 16, 1989 and March 21, 1990, respectively. On April 9, 1990, the Board received a Motion for Leave to Withdraw filed by Western's counsel. On April 13, 1990, the Board issued a Rule upon Western to show cause why the Motion for Leave to Withdraw should not be granted, which Rule was returnable on or before

April 27, 1990. Having received no response from Western, on May 9, 1990 the Board granted the Motion for Leave to Withdraw.

By Order of July 9, 1990, a pre-hearing conference was scheduled for July 24, 1990 at the office of Board Member Joseph N. Mack at the State Office Building in Pittsburgh,[1] and notice thereof was sent to the parties by certified mail. The certified mail receipts were returned to the Board indicating that both parties had received a copy of the notice.

Western failed to appear at the conference, nor did it in any way contact the Board. Based on Western's failure to appear at the pre-hearing conference and to respond to the earlier Rule to Show Cause, DER filed a motion on August 6, 1990 asking us to dismiss the appeal for failure to prosecute. By letter of August 6, 1990, the Board advised Western that any objections to the motion were to be received by the Board no later than August 27, 1990. No response has been forthcoming from Western.

The Board may dismiss an appeal where the appellant demonstrates no intention to either prosecute or otherwise conclude its appeal. Allied Steel Products v. Commonwealth, DER, 1989 EHB 112.

In the instant case, the Board has attempted to make contact with Western by telephone on three different occasions and has departed from its normal business pattern to provide Western with ample opportunity to respond

---

[1]It should be noted that the Board customarily holds its pre-hearing conferences by telephone and the "in person" conference was a departure to attempt to elicit some response from Western. Previous to the issuance of its order for the "in person" conference, the Board had, on three separate occasions, attempted to make contact by telephone with Western's president, Michael Bizich. These calls were on three separate days to the telephone number stated on the appeal form. Messages were left in each case. Receiving no reply from Mr. Bozich by telephone, the Board on July 9, 1990 ordered an "in person" conference.

to the Board's attempts at scheduling a hearing on this appeal. As we held in Allied Steel, supra, it is not the Board's responsibility to prosecute a party's appeal or to repeatedly encourage appellants to go forward with their cases. Id. at 115. We have no choice but to apply sanctions as contemplated by 25 Pa.Code §21.124 by granting DER's Motion and dismissing this appeal for failure to prosecute.

O R D E R

AND NOW, this 5th day of October, 1990, it is ordered that the Motion to Dismiss filed by the Department of Environmental Resources is granted and the appeal of Western Pennsylvania Coal Company, Inc. is dismissed as a sanction for failure to prosecute.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: October 5, 1990

cc: **Bureau of Litigation**
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Western Region
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Western Pennsylvania Coal Co., Inc.
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TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

MILLER'S DISPOSAL AND TRUCK SERVICE	:	
	:	
v.	:	**EHB Docket No. 89-576-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 9, 1990**

OPINION AND ORDER
SUR RULE TO SHOW CAUSE

By Richard S. Ehmann, Member

Synopsis

Where the Department of Environmental Resources ("DER") fails to respond to a Rule To Show Cause why an appeal should not be sustained, then it is appropriate for the Board to sustain the appeal as a sanction under §21.124 of our Rules.

OPINION

On November 24, 1989 we received an appeal by Miller's Disposal and Truck Service ("Miller") from DER's November 7, 1989 assessment of a $100 civil penalty pursuant to The Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, P.L. 556, No. 101, 53 P.S. §4000.101 et seq. and the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq.

Thereafter, the pro se Appellant filed its Pre-Hearing Memorandum, and, after two notices from us generated by DER's failure to timely do so, DER filed its Pre-Hearing Memorandum, too. The matter was then duly listed for hearing but we cancelled this hearing when we received a proposed Consent Adjudication from the parties by which they proposed to settle this appeal.

In response to this proposal, we held a conference telephone conversation with the parties, in which we advised them to advertise this settlement, as required by Section 616 of the Solid Waste Management Act, 35 P.S. §6018.616. They agreed to do so, but we received no proof that they had done so. Accordingly we issued an Order dated July 18, 1990, which provided in part:

> Since this appeal involves settlement of a civil penalty assessed by the Department of Environmental Resources ("DER") against Miller's Disposal and Truck Service ("Miller's") in part pursuant to Section 605 of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.605 ("Solid Waste Act"), Section 616 of the Solid Waste Act (35 P.S. §6018.616) mandates publication of the settlement's terms at least 30 days prior to the time when such settlement is to take effect. No proof of such a publication was submitted to this Board with the proposed Consent Adjudication and we have not received any since that time. Accordingly, the parties are ordered to submit proof of publication of the proposed settlement as required by Section 616 by August 31, 1990. (emphasis added)

As is obvious from the fact that we are now forced to issue this opinion, the parties did not submit this proof of publication to us by August 31, 1990 and have not done so since that time.

Since such advertising is clearly a joint responsibility under our Order and the proposed Consent Adjudication did not assign responsibility for same to either party, the question naturally arises as to why we then issued our Rule To Show Cause, dated September 6, 1990, only against DER. This was done

because counsel for DER orally agreed to undertake the obligation to advertise this proposed settlement prior to the Rule's issuance but failed to fulfill his commitment to us to do so.

As our Rule To Show Cause indicated, absent a showing of cause by DER, it was our intent to sustain this appeal as a sanction under 25 Pa. Code §21.124. The Rule's issuance gave DER one last chance to advertise and avoid any penalty for its past conduct. DER has not seen fit to respond to our Rule To Show Cause either.

The sole question is thus whether sustaining this appeal is the appropriate sanction. We find that it is. Under this section we have dismissed appeals because of an appellant's non-conformance with rules. George Hapchuk v. DER, Docket No. 90-191-E (Opinion and Order issued September 24, 1990). We have also sanctioned DER when its counsel failed to file DER's Pre-Hearing Memorandum. Wharton Township v. DER, 1989 EHB 1364. It may be that DER's counsel decided the collection of half of this $100 penalty, as provided in the proposed settlement, was not worth his effort; he may have found advertising the settlement would cost more than the $50 DER was to receive; or he may have negligently ignored his obligation as counsel for DER to respond to this Rule. We do not know. We do know DER's counsel has appeared before us previously and from those appearances should be well aware of his obligations vis a vis this Board. One such obligation is to timely respond to our orders and rules. His failure to make even the slightest effort to communicate with us after issuance of this Rule cannot be ignored or inferentially approved by imposing some lesser sanction.

Accordingly, we enter the following Order.

O R D E R

AND NOW, this 9th day of October, 1990, our Rule To Show Cause dated September 6, 1990 is made absolute and the appeal of Miller's Disposal and Truck Service is sustained as a sanction pursuant to 25 Pa. Code §21.124.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

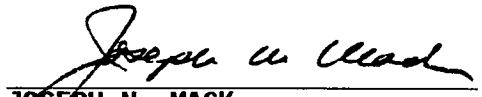
ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: October 9, 1990

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
George Jugovic, Jr., Esq.
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M. DIANE SMITH
SECRETARY TO THE BOARD

PAUL R. BROPHY	:	
GARY METZ	:	
	:	
v.	:	**EHB Docket No. 90-315-MJ**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
SHENANGO, INC., Permittee	:	**Issued:** October 9, 1990

OPINION AND ORDER
SUR PETITION FOR SUPERSEDEAS

By Joseph N. Mack, Member

Synopsis

A petition for supersedeas will not be granted where the petitioners have not met the procedural and substantive requirements for issuance of a supersedeas. Nor will the Board issue a "clarification" which amounts to a declaratory judgment or an advisory opinion.

OPINION

This matter originated with two identical appeals, filed on July 27, 1990 by each of the appellants herein, Paul R. Brophy (EHB Docket No. 90-315-MJ) and Gary Metz (EHB Docket No. 90-317-MJ) (hereinafter collectively referred to as "the Appellants"). The appeals challenge a July 18, 1990 Consent Adjudication entered into between the Department of Environmental

Resources ("DER" or "Department") and Shenango, Inc. ("Shenango") relating to Shenango's NPDES permit, and, particularly, effluent limitations and monitoring requirements contained therein.

On August 20, 1990, the Appellants filed a Motion to Consolidate the two separate appeals, which was subsequently granted by the Board on September 18, 1990. Also on August 20, 1990, the Appellants filed a Petition for Supersedeas or in the alternative, Motion for Clarification that Consent Adjudication Does Not Modify NPDES Permit PA0002437. On September 11, 1990, the Board sought comments from the Department and Shenango. In response thereto, on September 10, 1990, DER filed an Answer and a Motion to Dismiss the Appellants' Petition, together with a Memorandum of Law in support thereof. On September 11, 1990, Shenango filed a Brief in opposition to Appellants' two-pronged Petition or Motion.

Both the Department and Shenango argue that the requirements for the grant of supersedeas have not been met and further challenge whether the Board has the legal authority to issue the "Clarification" order requested. Both responses also question whether either of the Appellants has "standing" to file the appeal. Appellants filed a Reply and Answer thereto on October 1, 1990.

Petition for Supersedeas

We note initially that Appellants have failed to satisfy the procedural requirements of a petition for supersedeas as set forth in the Board's rules at 25 Pa.Code §21.77. Specifically, §21.77(a) states as follows:

> (a) A petition for supersedeas shall plead facts with particularity and shall be supported by one of the following:
>
> (1) Affidavits, prepared as specified in 231 Pa. Code Rules 76 and 1035(d) (relating to definitions and motion for summary judgment), setting forth facts upon which issuance of the supersedeas may depend.
>
> (2) An explanation of why affidavits have not accompanied the petition if no supporting affidavits are submitted with the petition for supersedeas.

Appellants have attached to their petition the Affidavits of their attorney and a Richard Trinclisti, which simply state that Mr. Trinclisti obtained a copy of documents relating to the settlement between DER and Shenango and that Appellants' attorney had requested that he do so. No explanation is given as to Mr. Trinclisti's relation to this action, nor is any further information provided. These affidavits clearly do not meet the requirements of §21.77(a)(1) in that they present no facts to affirmatively support the supersedeas petition. Centreville Borough Sanitary Authority v. DER, 1988 EHB 556.

Moreover, Appellants have failed to meet their burden of demonstrating the substantive criteria for grant of a supersedeas. Pennsylvania Fish Commission v. DER, 1989 EHB 619. The standards for issuance of a supersedeas are set forth in Section 21.78 of the Board's rules, 25 Pa.Code §21.78, which provides as follows:

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

(1) Irreparable harm to the petitioner.
(2) The likelihood of the petitioner prevailing on the merits.
(3) The likelihood of injury to the public or other parties...

The first part of our inquiry is to consider whether the Appellants have demonstrated irreparable harm. The harm alleged by the Appellants is that the Consent Adjudication affects their right to bring a citizens suit under the federal Clean Water Act and the Clean Streams Law for violations of the effluent limitations contained in the permit. However, they then go on to state that they will not hesitate to bring a citizens suit for any violations which may occur. Therefore, we fail to see how Appellants will suffer any irreparable harm if a supersedeas is not granted. The second requirement under 25 Pa.Code §21.78 is that the petitioners must show a likelihood of prevailing on the merits. It is questionable at this point whether Appellants have demonstrated standing sufficient to bring this appeal, much less a likelihood of success on the merits. In order to have standing to appeal the Consent Adjudication, Appellants must show substantial, immediate, and direct interest in the appealed-from action. William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). The primary interest which Appellants appear to assert is that of seeing that the laws are obeyed. The common interest of all citizens in obedience to the law is not enough to confer standing. William Penn Parking Garage, Inc., supra, at 280-281.

The last issue to be considered by the Board in the grant or denial of a supersedeas is the "likelihood of injury to the public or other parties." Appellants have presented no evidence on this matter, other than to assert that "Shenango will continue to discharge pollutants in violation of its NPDES

Permit." However, no affidavits, or other such evidence, are offered to support this assertion.

Because the requirements for granting a supersedeas have not been met, Appellants' Petition must be denied.

Motion for Clarification

Appellants style this part of their Petition as a Motion for Clarification; however, the thrust of their Petition is to ask the Board to rule that the June 1990 Consent Adjudication does not modify the March 1990 NPDES permit. We interpret this to be a request for a declaratory judgment or an advisory opinion.

The Environmental Hearing Board is a creature of statute, and any power or duty it exercises must be set out in the statute creating the Board. The Board's enabling legislation is found in 71 P.S. §510-21, now superseded by the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7511 et seq. Neither that act nor any other legislation grants the Board the right or power to grant a declaratory judgment. On the question of an advisory opinion or "clarification", the Board held in Boyle Land and Fuel Co. v. DER, 1982 EHB 326 at 327, that we are not empowered to give a clarification which amounts to an advisory opinion, and we can find no authority for changing this position.

O R D E R

AND NOW, this 9th day of October, 1990, the Appellants' Petition for Supersedeas or in the alternative Motion for Clarification that Consent Adjudication Does Not Modify NPDES Permit PA0002437 is denied for the reasons set out hereinabove.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: October 9, 1990

cc: **Bureau of Litigation**
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For Permittee:
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rm

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M. DIANE SMITH
SECRETARY TO THE BOAR

JOHN POZSGAI	:	**EHB Docket No. 90-063-W**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 10, 1990**

OPINION AND ORDER SUR
MOTION TO COMPEL

By Maxine Woelfling, Chairman

Synopsis

In a motion to compel discovery where the relevance of the information sought is challenged, the moving party must do more than make an unsupported assertion of relevance to show it is entitled to the relief requested. In addition, where the moving party asserts that compliance history is relevant to the denial of a water quality certification under §401 of the federal Clean Water Act (Clean Water Act), 33 U.S.C.A. §1341, discovery pertaining to compliance history is inappropriate where the 401 water quality certification was waived.

OPINION

This matter was initiated by John Pozsgai on February 7, 1990, with the filing of an appeal from the Department of Environmental Resources' (Department) January 3, 1990, denial of his application for a permit under the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1, *et seq.* (Dam Safety and Encroachments Act), to place

and maintain fill in approximately ten acres of wetlands located in Falls Township, Bucks County, and of a request for water quality certification for Mr. Pozsgai's application to the U.S. Army Corps of Engineers (Army Corps) for a permit under §404 of the Clean Water Act, 33 U.S.C. §1344 to place fill material in the waters of the United States.[1] The Department cited a number of reasons for its denial of the permit and the water quality certification: the proposed site of the activity was wetlands within the meaning of 25 Pa.Code Chapter 105.1; the application did not address alternatives which did not involve wetlands, as required by 25 Pa.Code Chapter 105.14(b)(7) and 105.15(b)(2); and the application failed to demonstrate that public benefits of the proposed activity outweigh any adverse environmental effects.

The present controversy arises out of a discovery dispute between the parties.

On August 8, 1990, the Department filed a motion to compel Mr. Pozsgai to respond to certain requests for admissions and interrogatories which pertained to a federal enforcement action against him. In support of the motion to compel, the Department maintains that prior violations of the Dam Safety and Encroachment Act and the regulations which implement it, 25 Pa.Code Chapter 105, are relevant in both the permit determination and water quality certification.

Pozsgai filed his answer with the Board on August 29, 1990, asserting that the federal enforcement action against him was irrelevant to the appeal, since the Department did not cite his compliance history as a reason for denial of the permit and water quality certification.

---

[1] The water quality certification is required by §401 of the Clean Water Act, 33 U.S.C. §1341.

Discovery practice before the Board is governed generally by the Pennsylvania Rules of Civil Procedure. 25 Pa.Code §21.111. The Rules of Civil Procedure allow the discovery of all information reasonably calculated to lead to admissible evidence. Pa.R.C.P. No. 4003.1.

As the moving party, the Department bears the burden of demonstrating it is entitled to the relief requested. If prior violations of the Dam Safety and Encroachments Act are relevant, a mere allegation of relevance, standing alone, does not show a sufficient nexus between the information sought in discovery and the propriety of permit denial. The Department has provided the Board with an extensive discussion of its view of the law applicable to water quality certifications, but it has not supplied any citation to provisions in the Dam Safety and Encroachments Act which would authorize the denial of a permit application as a result of an applicant's compliance history. Rather, the Department has based its request for relief on its characterization of what "it should be able to consider..." as a result of Pozsgai's application for an after-the-fact permit. This is not a sufficient basis for the Board to grant the Department's motion.

The Department also argues that compliance history is relevant to its denial of the water quality certification sought by Mr. Pozsgai. We need not reach the question of whether compliance history is relevant to the denial of the water quality certification, for it appears that the Department may have waived the water quality certification requirement.

A state must act on a request for a water quality certification "within a reasonable period of time" or else a waiver of the certification requirement will be presumed. 33 CFR §330.9. Specifically, a state must act

on the request within sixty days, unless the review period is altered in response to a request to the Army Corps, or the state waives the certification requirement. 33 CFR §325.2(b)(1)(ii).

The Department's memorandum of law in support of its motion indicates that Mr. Pozsgai's application was a joint application to the Department and the Army Corps; Exhibit 5 to Pozsgai's response to the motion to compel also notes this. According to the Department's Acceptance Review Module (Exhibit 5, Appellant's Opposition to Department's Motion to Compel Discovery), the Department started processing Mr. Pozsgai's completed permit application on or about March 16, 1989. On July 5, 1989, the Department completed its review and recommended that the application be denied. See Exhibit 6, Appellant's Opposition to Department's Motion to Compel Discovery. On November 3, 1989, the Department requested and obtained permission from the Army Corps to extend the period of time the Department had to decide upon the certification. See Exhibits 3 and 4, Appellant's Opposition to Department's Motion to Compel Discovery. However, by the time the Department requested the extension, it appears that it had already waived the certification. Whether the sixty-day period started to run on March 16, 1989 (when the Department started to process the application) or July 5, 1989 (when the Department recommended denying the application), the sixty-day period appears to have ended prior to the Department's request for the extension. It may well be that the time period for granting or denying the water quality certification is measured from a date other than the date of submission of the joint permit application, but the Department has not provided us with any explanation of the process. Since we must regard the Department's motion in the light most

favorable to Pozsgai, the non-moving party, Columbia Park Citizens Association v. DER and Altoona City Authority, 1989 EHB 899, 903, we have no choice but to deny the Department's motion.

O R D E R

AND NOW, this 10th day of October, 1990, it is ordered that:

1) The Department of Environmental Resources' Motion to Compel Discovery is denied; and

2) John Pozsgai shall file his pre-hearing memorandum on or before October 31, 1990.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: October 10, 1990

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

CONCERNED CITIZENS OF EARL TOWNSHIP, et al.	:	
v.	:	**EHB Docket No. 88-516-M (Consolidated)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and DELAWARE COUNTY SOLID WASTE AUTHORITY, Permittee	:	**Issued:** October 12, 1990

OPINION AND ORDER
SUR
MOTION FOR COMPREHENSIVE EXPERT DISCOVERY

Robert D. Myers, Member

Synopsis

Where an appeal involves highly technical and complex issues, the resolution of which will depend upon expert testimony, the Board permits discovery of expert testimony by deposition (on a trial basis) in the hope that the issues will be more closely joined and the expert testimony more narrowly focused.

OPINION

These consolidated appeals contest the issuance by the Department of Environmental Resources (DER) to Delaware County Solid Waste Authority (DCSWA) of permits for the Colebrookdale Landfill situated in Earl Township, Berks County. The remaining Appellants are Concerned Citizens of Earl Township and Dr. Frank J. Szarko. DCSWA and Szarko have been locked in discovery disputes for much of the past year. At issue presently is DCSWA's Motion for Comprehensive Expert Discovery.

DCSWA filed the Motion on May 9, 1990 complaining principally that the expert witness interrogatories had not sufficiently disclosed the substance of the facts and opinions to which Szarko's experts were expected to testify and a summary of the grounds for such opinions. Szarko responded to the Motion on May 31, 1990, alleging (1) that preliminary reports of his experts had now been given to DCSWA and (2) that comprehensive reports could not be prepared until Szarko was able to depose as fact witnesses two individuals identified by DCSWA as experts. On June 16, 1990 the Board issued an Opinion and Order sur Sundry Discovery Motions which, inter alia, permitted Szarko to depose the two individuals as fact witnesses, directed Szarko to file a supplemental Response to DCSWA's Motion within 10 days after completing the depositions, and deferred action on the Motion until that time.

Szarko's status report on July 30, 1990 stated that one of the depositions still had not been completed. DCSWA renewed its Motion on September 11, 1990 and Szarko filed his Response on October 4, 1990.

Pa.R.C.P. 4003.5 provides first for expert witness discovery through the use of interrogatories. It then authorizes the hearing tribunal "upon cause shown" to order further discovery by other means. The "cause" advanced by DCSWA has three segments. (1) the two expert reports furnished by Szarko on August 31, 1990 do not contain a summary of the grounds supporting a number of opinions on matters critical to the outcome of the case. (2) No report at all has been provided by Szarko with respect to a third expert identified for the first time on August 20, 1990. (3) The issues in the case are highly technical and complex. This third element is the most persuasive in our judgment.

Our review of the factual and legal contentions of the parties has convinced us that the ultimate resolution of these consolidated appeals will

depend on the opinion evidence presented by experts. This evidence will be conflicting, if prior cases are a guide, and the Board will be faced with the difficult task of deciding which opinions to believe and which to reject. While this task is not a new one and may be no more arduous in this case than it has been in others, we believe that it might be made easier if the parties are allowed to depose the experts. By such depositions, the parties will have a greater opportunity to probe and challenge the experts, thereby gaining a fuller understanding of their opinions and a better assessment of their soundness. We hope that, by doing so, the parties will be able to narrow the focus of the direct examination of their own experts and the cross examination of the other experts. The potential savings in hearing time, expert witness fees and transcript costs are apparent. The closer joining of the areas of conflict, which will enhance the Board's understanding of the issues, will produce a sounder decision in the end. It certainly is worth a try.

ORDER

AND NOW, this 12th day of October, 1990, it is ordered as follows:

1. DCSWA's Motion for Comprehensive Expert Discovery is granted to the extent consistent with the terms of this Opinion and Order.
2. Each party may depose any person identified by another party as an expert witness expected to be called to testify at the hearing.
3. All such depositions shall be completed no later than January 11, 1990.
4. Each party shall pay the reasonable expenses, including professional fees, of the experts deposed by that party.
5. On or before January 25, 1991, Appellants may supplement their pre-hearing memoranda, if they so desire.

6. On or before February 1, 1991, DCSWA and DER may supplement their pre-hearing memoranda, if they so desire.

7. The Motion for Extension of Time, filed by DCSWA on October 4, 1990, is denied as moot.

ENVIRONMENTAL HEARING BOARD

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: October 12, 1990

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M. DIANE SMITH
SECRETARY TO THE BOARD

WEST CALN TOWNSHIP	:	
	:	
V.	:	**EHB Docket No. 90-332-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and SPRING RUN ESTATES MOBILE HOME PARK, Permittee	:	**Issued: October 12, 1990**

OPINION AND ORDER
SUR
PETITION FOR APPEAL NUNC PRO TUNC

Robert D. Myers, Member

Synopsis

An appeal nunc pro tunc cannot be allowed when the appealing party filed its Notice of Appeal with DER rather than with the Board. Indefinite allegations suggesting that Board personnel may have misled the appealing party are not adequate to warrant the allowance of the appeal. This is especially true when the misleading information allegedly received ran counter to the language of the Board's rules and appeal form and was contrary to normal procedures for lodging appeals.

OPINION

On August 6, 1990 West Caln Township, Chester County (Township) filed a Petition for an Appeal Nunc Pro Tunc from the February 21, 1990 approval by the Department of Environmental Resources (DER) of a revision to the Township's Official Sewage Facilities Plan pertaining to Spring Run Estates Mobile Home Park. Theodore L. Levan, Albert S. Levan and David A. Levan, the owners and developers of the Spring Run Estates Mobile Home Park, filed an

Answer opposing the Petition on August 13, 1990. The Township filed a Response on October 4, 1990.

The Petition alleges, inter alia, that the Township received notice of DER's action on March 5, 1990; contacted the Board for the purpose of securing Notice of Appeal forms; completed and mailed the Notice of Appeal on March 20, 1990 to DER's Office of Chief Counsel, Bureau of Litigation, in Harrisburg; but failed to file the Notice of Appeal with the Board. Having received nothing from the Board after the passage of several months, the Tonwship contacted the Board and learned that the Notice of Appeal had not been filed. Thereupon, the Township filed the instant Petition.

In order for the board to have jurisdiction, an appeal must be filed with the Board within 30 days after the appealing party has received written notice of DER's action: 25 Pa. Code §21.52(a).[1] Filing the Notice of Appeal with DER rather than with the Board does not confer jurisdiction: Appalachian Industries, Inc. v. DER, 1987 EHB 325. Clearly, therefore, the Board has no power to entertain the Township's appeal unless an appeal nunc pro tunc is allowed.

According to 25 Pa. Code §21.53(a), an appeal nunc pro tunc may be permitted "for good cause shown." Board precedents have established that "good cause" involves fraud or a breakdown in the Board's operations: Cubbon Lumber Company v. DER, 1989 EHB 160. Neither element is involved here, although the Township hints that it may have been misled by Board personnel. Paragraph 5 of the Petition reads as follows:

> In filing the Appeal the undersigned, Solicitor for West Caln Township, had contacted the

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[1] A different commencement of the appeal period, which applies where notice of the action is published in the Pennsylvania Bulletin, is not applicable here.

> Environmental Hearing Board and had received the Notice of Appeal forms. He believed that notice only needed to be given to the parties who were notified in the March 20, 1990 letter. A telephone conversation with the persons in the Environmental Hearing Board led him to believe that the arrangements for the appeal were to be made through the office of Chief Counsel, Bureau of Litigation, and consequently the appeal was filed directly with them.

This allegation lacks the specificity necessary to warrant the filing of an appeal nunc pro tunc: Defazio v. DER, docket number 90-186-W, (Opinion and Order issued July 20, 1990). Even to be entitled to a hearing on the point, a petitioner should be able to allege the date on which he contacted the Board, the person he talked to and the substance of what he was told by that person. Any standard requiring less than this would open the door to abuse.

Moreover, we have difficulty accepting the premise that an attorney in possession of our Notice of Appeal form, which states the following in bold black letters on page 2:

THIS FORM AND THE CERTIFICATION OF SERVICE MUST BE RECEIVED BY THE ENVIRONMENTAL HEARING BOARD WITHIN 30 DAYS AFTER YOUR RECEIPT OF NOTICE OF THE ACTION OF THE DEPARTMENT OF ENVIRONMENTAL RESOURCES THAT YOU ARE APPEALING. MAIL OR HAND—DELIVER YOUR APPEAL AND CERTIFICATION OF SERVICE TO:

ENVIRONMENTAL HEARING BOARD
Suites Three — Five
101 South Second Street
Harrisburg, PA 17101

would disregard the unmistakable meaning of these words and file the form with DER solely on the basis of a telephone conversation. We have never, in our collective experience, heard of an appeal procedure which does not require the filing of the appeal with the appeal tribunal. How the Township's attorney

could have concluded otherwise, despite the clear language of our rules and the appeal form, is a mystery unresolved by the amorphous allegations of the Petition.

The Township has not alleged good cause for its failure to file the Notice of Appeal on time. Accordingly, we cannot entertain its appeal.

ORDER

AND NOW, this 12th day of October, 1990, it is ordered that the Township's Petition for Appeal Nunc Pro Tunc is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: October 12, 1990

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M. DIANE SMITH
SECRETARY TO THE BOAF

LANKENAU HOSPITAL	:	
	:	
v.	:	**EHB Docket No. 89-041-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
PENN WYNNE CIVIC ASSOCIATION, Intervenors	:	**Issued: October 17, 1990**
and	:	
LOWER MERION TOWNSHIP, Intervenors	:	

OPINION AND ORDER SUR
OBJECTION TO CONSENT ADJUDICATION

By Robert D. Myers, Member

Synopsis

Where DER and a permittee have entered into a Consent Adjudication providing, inter alia, that the permittee must comply with all requirements of the Air Pollution Control Act and the Solid Waste Management Act and all applicable regulations thereunder before getting approval to reactivate its incinerator, an Objection that the Consent Adjudication does not specifically require the permittee to comply with 25 Pa. Code §127.12(a)(5) will be dismissed. The applicability of that portion of the regulations is not ripe for adjudication because the permittee has not yet applied for reactivation and has no present intention of doing so. If and when DER has made a specific decision to allow reactivation, any affected person or entity will have the right to challenge DER's interpretation of the applicable statutes and regulations in the form in which they then exist.

OPINION

The Lankenau Hospital (Lankenau) filed a Notice of Appeal on February 23, 1989 contesting an Order issued by the Department of Environmental Resources (DER) on January 25, 1989. The Order, after reciting violations[1] at Lankenau's waste disposal incinerator in Lower Merion Township, Montgomery County, (1) suspended Lankenau's waste management and air quality control permits and (2) directed Lankenau to cease operating the incinerator. The Order set forth 6 steps Lankenau would have to take before DER would consider reinstatement of the permits.

By a Board Order, dated May 25, 1989, Penn Wynne Civic Association (Penn Wynne) was permitted to intervene as a party-appellee, but was admonished that it could litigate only issues raised by DER's Order. On June 19, 1989, Lower Merion Township (Township) also was permitted to intervene as a party-appellee.

On January 18, 1990 DER and Lankenau submitted a Consent Adjudication for Board approval. Approval was given on January 26, 1990 and the appeal was dismissed, subject to being reopened (in accordance with 25 Pa. Code §21.120) if an objection is filed within 20 days after notice is published in the Pennsylvania Bulletin. Because Penn Wynne and the Township were parties to the appeal and had not joined in the Consent Adjudication, an Order was issued directing them to specify their objections to the Consent Adjudication (if any) and to specify any other issues they desired to litigate (if any).

Penn Wynne filed its Objection on February 1, 1990. Lower Merion declined to make any objections and was dismissed as a party. Notice of the

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[1] The violations charged Lankenau with operating the incinerator without maintaining a temperature of at least 1800°F in the secondary chamber, and with accepting waste other than Type 0.

Consent Adjudication was published in the February 10, 1990 edition of the Pennsylvania Bulletin and no other objections were filed within the 20 days following publication.

Penn Wynne's only Objection was the absence of any provision in the Consent Adjudication requiring Lankenau to demonstrate, prior to reinstatement of its permits, that the emissions from its incinerator would be the minimum attainable through use of the best available technology (BAT), as required by 25 Pa. Code §127.12(a)(5). Accordingly, the Board issued an Order on March 6, 1990 requiring the remaining parties to brief the following issue:

> Whether Lankenau Hospital is legally required to comply with 25 Pa. Code §127.12(a)(5) before reactivating its incinerator after the incinerator has been out of operation for a period of one year or more, as discussed in 25 Pa. Code §127.11.

Penn Wynne's brief was filed on March 19, 1990, Lankenau's on April 23, 1990 and DER's on April 26, 1990.

Penn Wynne points out that 25 Pa. Code §127.11 prohibits the reactivation of an air contamination source (such as Lankenau's incinerator), after the source has been out of operation for a period of one year or more, without DER's approval. Since Lankenau's incinerator had been out of operation for more than one year[2] when the Consent Adjudication was submitted for approval, the Consent Adjudication should have taken that fact into account. Specifically, according to Penn Wynne, it should have stated that Lankenau had to comply with the requirements of 25 Pa. Code §127.12(a), dealing with the contents of an "application for approval," and especially item (5) thereof which reads as follows:

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[2] The DER Order requiring Lankenau to cease operating the incinerator was issued January 25, 1989. Actually, Lankenau had shut down the incinerator voluntarily on December 27, 1988 and has never resumed operations: paragraph G of Consent Adjudication.

> Show that the emissions from a new source will be the minimum attainable through the use of the best available technology.

The absence of such a statement, Penn Wynne asserts, means that Lankenau can resume operations without measuring up to BAT. Both Lankenau and DER take issue with Penn Wynne's interpretation of the regulations, arguing that Lankenau's incinerator cannot be considered a "new source" within the meaning of §127.12(a)(5). They also claim that the issue is not ripe for adjudication. After giving the matter earnest thought, we agree.

Paragraph 2 of the Consent Adjudication contains four conditions that must be met before the incinerator can be reactivated. The fourth condition is a determination by DER that Lankenau has complied with all requirements of the Air Pollution Control Act,[3] the Solid Waste Management Act[4] and the applicable "regulations accompanying those statutes." Paragraph 4 provides that, if DER determines that Lankenau "has fully complied" with the terms of the Consent Agreement "and all applicable rules and regulations" of DER, it shall promptly reinstate or reissue the permits. Paragraph 5 states clearly and unequivocally that Lankenau will continue to be obligated to comply with "any existing or subsequent statute, regulation, permit or permit condition."

The terms of the Consent Adjudication superimpose the requirements of the statutory and regulatory law upon the reactivation of the incinerator. Obviously, that includes the requirements of §127.12(a)(5), if applicable. Since DER has not yet authorized any reactivation, it has not formally committed itself to the applicability of §127.12(a)(5) in the particular context of a specific application. Until that happens, everything is

---

[3] Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 et seq.

[4] Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq.

theoretical. When that happens, Penn Wynne and every other affected person or entity will have the right to appeal DER's action to this Board.

Deciding the applicability of §127.12(a)(5) at this point may be an exercise in futility, as DER points out, because (1) Lankenau does not presently intend to reactivate the incinerator (paragraph L of Consent Adjudication) and (2) the statutes and regulations (including §127.12(a)(5)) may change before Lankenau applies for reactivation.

Since Penn Wynne's right to challenge DER's interpretation of the statutes and regulations will not be adversely affected by the Consent Adjudication and will be able to be exercised within the specific context of DER's reactivation decision (if and when reactivation is allowed), we will dismiss Penn Wynne's Objection.

ORDER

AND NOW, this 17th day of October, 1990, it is ordered as follows:

1. Penn Wynne Civic Association's Objection to the Consent Adjudication is dismissed.

2. Approval of the Consent Adjudication, granted on January 26, 1990, is confirmed.

3. The appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: October 17, 1990

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

EMPIRE SANITARY LANDFILL, INC.	:	**EHB Docket No. 90-187-W**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** October 17, 1990

OPINION AND ORDER SUR EMPIRE SANITARY LANDFILL'S MOTION TO ENFORCE SETTLEMENT AGREEMENT AND THE DEPARTMENT OF ENVIRONMENTAL RESOURCES' MOTION TO DISMISS EMPIRE SANITARY LANDFILL'S MOTION FOR LACK OF JURISDICTION

By Maxine Woelfling, Chairman

Synopsis

A motion to enforce a settlement agreement is denied and a motion to dismiss that motion for want of jurisdiction is granted. The Environmental Hearing Board lacks jurisdiction to enforce a settlement agreement.

OPINION

This matter was initiated with the May 7, 1990, filing of a notice of appeal by Empire Sanitary Landfill (Empire) seeking review of the Department of Environmental Resources' (Department) April 6, 1990, issuance of a modification to Empire's solid waste permit, which authorizes the operation of a municipal waste landfill in the Borough of Taylor and Ransom Townships, Lackawanna County. The permit modification, *inter alia*, limited Empire from disposing any more than 3,109 tons per day, on a quarterly basis, of solid waste from outside the Commonwealth. Empire challenged the Department action

as *ultra vires*, an abuse of discretion, and a violation of various provisions of the federal and state constitutions.

On May 8, 1990, Empire filed a petition for supersedeas requesting a stay of the permit modification during the pendency of its appeal before the Board. The supersedeas hearing was rescheduled a number of times, at the request of both the Department and Empire, to allow settlement discussions between the parties.

A hearing on the petition for supersedeas was again scheduled for June 21, 1990. At the beginning of the hearing the parties advised the Board that a settlement had been reached and all that remained was putting the agreement in the form of a consent adjudication to be submitted to the Board for its approval pursuant to 25 Pa.Code §21.120. In confirmation of its orders to the parties on the record of the supersedeas hearing, the Board, on June 21, 1990, issued an order staying all further proceedings and requiring the parties to submit their settlement agreement to the Board on or before July 6, 1990.

By letter dated July 2, 1990, the parties requested an extension to July 31, 1990, for the filing of the consent adjudication, and the Board granted that request in a July 5, 1990, order. Again, by letter dated July 30, 1990, the parties requested another extension to September 15, 1990, to file the settlement agreement. Although the Board granted the request in an August 2, 1990, order, it advised the parties that, in the event that the consent adjudication was not filed by that date, the Board would proceed to schedule a hearing on Empire's petition for supersedeas.

Thereafter, relations between the Department and Empire apparently deteriorated, and the parties eventually disagreed over the nature and import of the terms of the proposed settlement agreement. After a September 13,

1990, telephone conference call with Empire and the Department during which Empire made an oral motion to enforce the settlement agreement, the Board ordered Empire to file a written motion to enforce the settlement agreement on or before September 14, 1990, and the Department to respond to the motion on or before September 17, 1990.[1] The Board also scheduled a hearing on Empire's motion for September 20, 1990.

The Department responded to Empire's motion on September 19, 1990, and also filed a motion to dismiss Empire's motion for lack of jurisdiction. Empire responded to the Department's motion to dismiss on September 19, 1990. The hearing on the motion was conducted on September 20, 1990, and the parties, at the close of the hearing, requested the opportunity to file post-hearing briefs. Empire filed its post-hearing brief on September 20, 1990, and the Department filed its brief on October 1, 1990.[2]

Before we may address the issue of whether it is appropriate for the Board to enforce the parties' proposed settlement agreement, we must first decide whether we have the authority to do so. The Department argues in its September 18, 1990, motion to dismiss and its October 1, 1990, post-hearing memorandum of law that the Board has no jurisdiction over the subject matter of Empire's motion because the motion, in essence, requests equitable relief which the Board has no authority to grant. Empire factually distinguishes a number of the cases cited by the Department and urges the Board that the

---

[1] This deadline was later extended to September 18, 1990.

[2] By letter dated September 17, 1990, Empire requested the Board to issue an interim order prohibiting the Department from taking any action to modify Empire's solid waste permit. The Department objected to Empire's request on September 25, 1990. Empire, based upon the Department's representation that it would not take any action regarding Empire's permit until the Board decided Empire's motion to enforce the settlement agreement, withdrew its request for an interim order on October 2, 1990.

authority to enforce settlement agreements reached in matters before the Board is found in its rules of practice and procedure, namely 25 Pa.Code §§21.82 and 21.120.

In order to decide the jurisdictional question, we must first examine what the appropriate remedy is under the circumstances described herein. The Pennsylvania Supreme Court reviewed a situation remarkably similar to that here in Woodbridge v. Hall, 366 Pa. 46, 76 A.2d 205 (1950):

> When the case was called for trial, the parties, with their respective counsel, repaired to a nearby room in the courthouse where they negotiated and approved an agreement of settlement which was to be reduced to writing. Counsel for both parties thereupon went before the court and announced to the chancellor that the case had been amicably settled. Notwithstanding that two drafts of the agreement were subsequently made by plaintiff's counsel and one draft by defendant's counsel, none was signed by all of the parties and the settlement was never carried out. At that impasse, the plaintiffs again put the case down for trial and petitioned the court to enforce the alleged oral agreement.
>
> 76 A.2d at 205-206.

The Supreme Court, noting that a petition to enforce the alleged oral agreement was the proper procedure, went on to sustain the court of common pleas' decision to enforce the agreement.

A later Commonwealth Court decision, Commonwealth, Dept. of Env. R. v. Leechburg Min. Co., 9 Pa.Cmwlth 297, 305 A.2d 764 (1973), is directly on point as to the Board's involvement in actions to enforce agreements. In Leechburg the Department brought a complaint in equity against Leechburg, alleging various violations of environmental regulatory statutes; one of the counts of the complaint averred that Leechburg had violated a partial consent

adjudication entered by the Board. Although Leechburg is usually cited for its discussion of the doctrine of election of remedies, it also discussed the Board's jurisdiction:

> We conclude by observing that inasmuch as the statutory law creating the Environmental Hearing Board and defining its powers and duties makes no specific provision for enforcement of Board orders either by the Board or by the judiciary, a court of law must be available to entertain and act in proceedings to enforce a consent adjudication....
>
> 305 A.2d at 768-769.

More recently, the Commonwealth Court held in Department of Environmental Resources v. Landmark International, Ltd., 133 Pa.Cmwlth 333, 570 A.2d 140 (1990), that the Board had no power to enforce a consent order between the Department and Landmark. Indeed, we have adopted such reasoning in Westinghouse Electric Corporation v. DER, EHB Docket No. 89-058-F (Opinion issued May 14, 1990), where we held that the Board is not the proper forum to compel the Department to reconsider effluent limitations in accordance with an alleged agreement between the Department and Westinghouse. Although neither Leechburg, Landmark International, nor Westinghouse involved an agreement to settle the particular proceeding then before the tribunal, the principle of jurisdiction articulated in the three decisions is, nonetheless, applicable to the instant matter - the Board has no authority to enforce either an alleged or actual agreement.

Empire has made the novel argument that the Board's own rules of practice and procedure provide authority for bringing this motion before the Board. In particular, Empire cites 25 Pa.Code §§21.82 and 21.120. The former rule, which governs pre-hearing conferences and pre-hearing procedures, states, in relevant part, that:

> (a) The Board, on its own motion or on motion of any party, may hold a conference either prior to or during a hearing for purpose of considering offers of settlement, adjustment of the proceeding or any issue therein, or other matters to expedite the orderly conduct and disposition of any hearing.
>
> (b) Any stipulation of the parties or rulings of the Board as a result of such conferences shall be binding upon the parties.
>
> * * * * *
>
> (d) The Board shall, at any time, be authorized to delay a formal hearing and order settlement discussions or stipulations, either on or off the record.
>
> * * * * *

There is nothing in this rule which would provide the Board with authority to enforce a settlement in the event that one was reached as a result of a pre-hearing conference or settlement discussions ordered by the Board. Similarly, 25 Pa.Code §21.120, which relates to termination of proceedings before the Board, provides no authority for the Board to enforce an alleged settlement agreement; the rule only sets forth the procedure to be followed to terminate a proceeding before the Board by a settlement agreement.

Even if one were to interpret these two rules of practice and procedure in the manner suggested by Empire, it is axiomatic that the regulations cannot operate to confer jurisdiction on the Board where none exists in the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7511 *et seq.* There are no provisions in that statute empowering the Board to enforce settlement agreements. Consequently, the rules can neither confer such jurisdiction nor can they be interpreted to confer it. Pennsylvania Human Relations Commission v. School District of Philadelphia, ___ Pa. ___, 462 A.2d 313 (1989).

O R D E R

AND NOW, this 17th day of October, 1990, it is ordered that:

1) Empire Sanitary Landfill's motion to enforce settlement agreement is denied; and

2) The Department of Environmental Resources' motion to dismiss Empire's motion to enforce settlement agreement for lack of jurisdiction is granted.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: October 17, 1990

cc: **Bureau of Litigation**
Library: Brenda Houck
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G. Allen Keiser, Esq.
Northeastern Region
For Appellant:
Charles W. Bowser, Esq.
James P. Cousounis, Esq.
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TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

JOHN MARCHEZAK AND BETH ENERGY MINES, INC.	:	
	:	
v.	:	EHB Docket No. 90-232-MJ
	:	(Consolidated)
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: October 19, 1990

OPINION AND ORDER
SUR COMMONWEALTH'S MOTION TO COMPEL COMPLIANCE
WITH PRE-HEARING ORDER NO. 1

By Joseph N. Mack, Member

Synopsis

The motion of the Commonwealth of Pennsylvania, Department of Environmental Resources (DER) for compliance by the appellant, John Marchezak, with Pre-Hearing Order No. 1 is meritorious and will be granted where the pre-hearing memorandum submitted by Marchezak fails to meet most of our clearly set out requirements and does not inform DER or the Board of his legal or factual position.

OPINION

On June 8, 1990, John Marchezak filed an appeal to this Board from a May 11, 1990 letter of DER to BethEnergy Mines, Inc. (BethEnergy) amending effluent limitations for Treatment Pond #6 (Outfall 008) on Mining Activity

Permit 63831302 (Permit) issued to BethEnergy for its 84 Complex.[1] Shortly thereafter the Board issued its usual Pre-Hearing Order No. 1 to the parties which required Marchezak to file a pre-hearing memorandum by August 27, 1990 requiring the following:

A) Statement of facts each party intends to prove.

B) Contentions of law and detailed citations to authorities including specific sections of statutes, regulations, etc. relied upon.

C) Description of any scientific tests relied upon by any party and summary of testimony of experts.

D) Order of witnesses.

E) List of documents sought to be introduced into evidence and copies thereof.

F) Dates not available for hearing.

On September 17, 1990, DER filed a Motion to Compel Compliance with Pre-Hearing Order No. 1, arguing that Marchezak's memorandum fails to meet the requirements of Pre-Hearing Order No. 1. By letter of October 17, 1990, BethEnergy indicated it had no objection to DER's Motion to Compel.

The pre-hearing memorandum filed by Marchezak is a one-and-one-half-page document which fails to clearly set forth the facts he intends to prove. Nor does it inform the Board of his legal position or the section or sections of acts and regulations relied upon.

Further, the memorandum does not give a description of scientific tests relied upon, nor does it give any notice of experts except the name of a

---

[1]By order of the Board dated September 4, 1990, an appeal by BethEnergy from the same May 11, 1990 letter, docketed at EHB Docket No. 90-236-MJ, was consolidated with this appeal.

veterinarian and that of a dairy science professor without any summary of their testimony.

There is no listing of documents that are proposed to be introduced nor are any documents or exhibits attached to the memorandum.[2] There is a listing of witnesses which includes Marchezak and the above-mentioned veterinarian and professor. It also includes a David J. Danis, without further identification or indication as to why he would be offered for testimony.

This pre-hearing memorandum is not adequate to give DER or the Board notice of the issues factually or legally. It does not comply with Pre-Hearing Order No. 1 in any way other than in a cursory manner. Therefore, the Appellant, Marchezak, is required to file an adequate pre-hearing memorandum in compliance with our original Pre-Hearing Order No. 1 or suffer sanctions pursuant to 25 Pa.Code §21.124. Mid Continent Insurance Co. v. Commonwealth of Pa., DER, 1989 EHB 1299.

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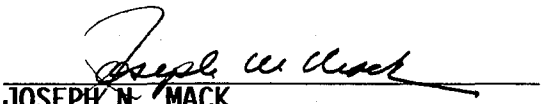
[2]There is a note that a water quality sample taken March 20, 1990 by Microbac Laboratory, Inc. is attached as Exhibit "A" but no such attachment reached the Board.

ORDER

AND NOW, this 19th day of October, 1990, the appellant Marchezak is ordered to file a pre-hearing memorandum in strict compliance with our Pre-Hearing Order No. 1 on or before October 29, 1990, and the Pennsylvania Department of Environmental Resources is to file its pre-hearing memorandum 15 days thereafter.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: October 19, 1990

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M. DIANE SMITH
SECRETARY TO THE BOARD

PEARL MARION SMITH	:	
	:	
v.	:	**EHB Docket No. 87-414-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 22, 1990**
and FLK MINING CO., Permittee		

OPINION AND ORDER SUR
PETITION FOR COSTS AND ATTORNEYS FEES

By Terrance J. Fitzpatrick, Member

Synopsis

A petition for costs and attorney's fees filed by a Permittee under Section 4b of the Pennsylvania Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.4b, is denied. The fact that the Appellant withdrew her appeal prior to a hearing does not provide a sufficient basis for concluding that the Permittee is a "prevailing party."

OPINION

This appeal was filed by Pearl Marion Smith (Smith) from the Department of Environmental Resources' (DER) grant of a stage III bond release to FLK Mining Co. (FLK). The site involved was in East Mahoning Township, Indiana County. On August 18, 1989, prior to a hearing on the merits, the Board granted Smith's request to withdraw her appeal.

This Opinion and Order addresses FLK's petition for costs and

attorney's fees. In support of its petition,[1] FLK states that Section 4b of the Pennsylvania Surface Mining Conservation and Reclamation Act (Pa. SMCRA), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.4b, allows the Board to grant costs to a "prevailing party," including a party which has prevailed because an appeal was withdrawn, citing Martin v. DER, 1986 EHB 101. FLK argues that the clear language of Section 4b allows it to recover its litigation costs which were reasonably incurred; therefore, the Board cannot imply any restrictive interpretations based upon federal regulations or precedents. FLK asserts that it is entitled to recover, from Smith, attorney's fees of $1,223.45 and engineering fees of $763.75 which it incurred in preparing for litigation.

Smith filed a response opposing FLK's petition. Smith claims she withdrew her appeal because she came to realize the time and expense required to litigate the case, not because she believed that DER's release of the bond was appropriate. Smith argues that FLK is not a "prevailing party" because the appeal was withdrawn prior to litigation.

DER also filed a response opposing the petition. However, by letter dated November 1, 1989, DER informed the Board that it wished to withdraw its response because it had previously agreed not to oppose FLK's petition. Therefore, we will officially consider DER as neutral regarding the petition.[2]

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[1] The arguments set out here also include those set out in FLK's reply to the responses of Smith and DER.

[2] DER's withdrawal of its response is probably a matter of form rather than substance since the author of this opinion reviewed DER's response before it was withdrawn. We have not attempted to ignore the precedents cited by DER because some of those precedents are, in our view, dispositive of FLK's petition. In light of these statements, we need not rule on Smith's request to incorporate DER's response, or FLK's motion to strike Smith's request.

For the reasons stated below, we will deny FLK's petition.

Section 4b of Pa. SMCRA provides, in relevant part:

> The Environmental Hearing Board, upon request of any party, may in its discretion order the payment of costs and attorney's fees it determines to be reasonably incurred by such party in proceedings pursuant to this section.

52 P.S. §1396.4b. Since Pa. SMCRA contains no statements of the General Assembly's intent as to how broad the Board's "discretion" is, or what costs are "reasonably incurred," and since there are no regulations on these subjects, the Board has stated that it will look for guidance to federal precedents and to federal regulations implementing the Federal Surface Mining Control and Reclamation Act of 1977, Public Law 95-87, 30 USC §1201 et seq (Federal SMCRA). See Martin v. DER, 1986 EHB 101, 106, Jay Township, et al. v. DER, 1987 EHB 36,42, Kwalwasser v. DER, 1988 EHB 1308, 1311, Big B Mining Co. v. DER, EHB Docket No. 83-215-G (March 12, 1990).[3]

Both federal precedents and prior decisions of the Board indicate that a party seeking to recover costs must be a "prevailing party" - that is, he must achieve at least some degree of success on the merits. Ruckleshaus v. Sierra Club, 463 U.S. 680, 103 S. CT. 3274, 77 L. Ed. 938 (note 9) (1983), Jay Township et al. v. DER, 1987 EHB 36. This success must be substantive in nature - a purely procedural victory will not suffice. Jay Township et al. v. DER, 1987 EHB at 43, Utah International, Inc. v. Department of Interior, 643 F. Supp. 810, 817 (D. Utah 1986).

In Jay Township, et al. v. DER, 1987 EHB 36, the Board confronted the

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[3] The fact that the Board will look to federal law for guidance does not mean that the Board considers itself bound by federal law. See Kwalwasser v. DER, 1988 EHB 1308, 1311, Big B Mining Co. v. DER, EHB Docket No. 83-215-G (March 12, 1990) (concurring opinion) see also Swistock Associates Coal Corp. v. DER, EHB Docket No. 88-240-M (October 2, 1990).

question whether a third-party appellant could collect costs under Section 4b of Pa. SMCRA when the permit which the appellant objected to was revoked by DER, at the request of the Permittee, after hearings on the merits were held, but before an adjudication was issued by the Board. The Board found that, despite the absence of a ruling by the Board disposing of the merits of the case, that the appellant had achieved a substantial measure of success on the central issue of the case; therefore, a fee award against DER was appropriate. Id. at 44. The Board cited the fact that the appellant had obtained a supersedeas of the permit, and that the Permittee had requested DER to cancel the permit after determining that the permit was probably wrongfully issued. Id. at 43.

In the instant case, FLK is not a prevailing party. This appeal was withdrawn before the Board could issue a decision on the merits. In addition, the circumstances which led the Board to conclude that the appellant was a prevailing party in Jay Township are not present here. The Board has not ruled on a petition for supersedeas in this case.[4] Moreover, hearings have not been held, and there is no indication on the record - as there was in Jay Township - that the cessation of the appeal is a result of the lack of merit in the legal position of the party against whom attorney fees are being sought. Indeed, Smith contends that she withdrew the appeal solely because of the time and expense necessary to proceed.

FLK has cited Martin v. DER, 1986 EHB 101, for the proposition that attorney fees may be granted where an appeal is withdrawn. The question in Martin was whether the appellant could recover costs when the appeal was

---

[4] One of the factors which the Board considers in ruling on a supersedeas petition is the likelihood that the petitioner will succeed on the merits of his appeal. 25 Pa. Code §21.78(a).

dismissed as moot following a settlement between the parties. Although the Opinion set out arguments on both sides of the question, it did not resolve the issue.[5] Instead, it invited the parties to file briefs. Id. at 109. Ultimately, the Board dismissed the case for lack of jurisdiction without resolving the question of cost recovery. See Martin v. DER, 1989 EHB 697. Therefore, the 1986 Martin decision does not stand for the broad proposition that cost recovery is appropriate in cases where an appeal is withdrawn. We think that the proper standards for determining whether costs can be granted where an appeal is terminated prior to adjudication by the Board were set out in Jay Township. As stated above, this petition does not meet those standards.

Finally, we disagree with FLK's argument that it is entitled to recover its costs under the clear language of Section 4b of Pa. SMCRA, 52 P.S.§1396.4b. That section provides that the Board, "in its discretion," may order payment of costs and attorneys fees. Obviously, the Board must apply

---

[5] Former Board Member Gerjuoy noted in Martin that the Board had previously followed federal precedent and held that even a non-prevailing party could recover its costs where the party "had made a substantial contribution to a full and fair determination of the issues or had served the objectives of the legislation in some substantial way." Martin, 1986 EHB at 106, see also Sheesley v. DER, et al., 1982 EHB 85. As Mr. Gerjuoy noted, federal law on this subject has changed and now only prevailing parties may recover costs. See Ruckleshaus v. Sierra Club, 463 U.S. 680 (1983). Since FLK does not allege that it meets the special circumstances under which a non-prevailing party may be permitted to recover its costs under Martin, we need not address the continuing validity of this exception to the prevailing party rule.

some standards to determine when such costs will be allowed. The standards set out above are reasonable, and are valid exercises of the Board's discretion.[6]

[6] Since we are resolving this matter on grounds that FLK is not a prevailing party, it is not necessary for us to revisit the question whether a permittee may ever recover its costs under Section 4b. See Big B Mining Co. v. DER, EHB Docket No. 83-215-G (March 12, 1990).

ORDER

AND NOW, this 22nd day of October, 1990, it is ordered that FLK Mining Co.'s petition for costs and attorney's fees is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers
ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick
TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann
RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack
JOSEPH N. MACK
Administrative Law Judge
Member

DATED: October 22, 1990

cc: **Bureau of Litigation**
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For Appellant:
Sanford Kelson, Esq.
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For Permittee:
Stanley R. Geary, Esq.
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M. DIANE SMITH
SECRETARY TO THE BOARD

PLYMOUTH TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 89-039-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 23, 1990**
DRAVO ENERGY RESOURCES, Permittee	:	
and COUNTY OF MONTGOMERY, Intervenor	:	

OPINION AND ORDER SUR
MOTION FOR SUMMARY JUDGMENT
AND MOTION TO DISMISS

By Maxine Woelfling, Chairman

Synopsis

A motion for summary judgment relating to an appeal of the modification of a solid waste permit will be denied where the movant has failed to establish that there are no disputed material facts and has failed to show that it is entitled to judgment as a matter of law. There are disputed material facts concerning whether the Department of Environmental Resources (Department) had good cause to extend an expiration date in a condition of the permit. Although the Department's regulations governing the processing of applications for permit modifications do not require notice and an opportunity for review and comment by the host municipality for this type of permit modification, the regulations do give the Department discretion to require such notice and comment. Even if it were clear that laches applied to administrative proceedings, the appeal here would not be barred.

A motion to dismiss as a sanction for failure to comply with the

Board's order and failure to prosecute is denied where there the appellant has properly perfected its appeal and has filed its pre-hearing memorandum fifteen days after the date mandated by Pre-Hearing Order No. 1, but before the date specified on the Board's letter of default.

OPINION

This matter was initiated with the February 22, 1989, filing of a notice of appeal by Plymouth Township (Township) seeking review of the Department's January 23, 1989, issuance of a minor permit modification to Dravo Energy Resources of Montgomery County, Inc. (Dravo). The modification, which was to Condition No. 11 of Solid Waste Disposal and/or Processing Permit No. 400581 (solid waste permit), granted Dravo a four month extension to obtain sewerage connection approvals for the facility, a 1200 ton per-day municipal waste incinerator.[1]

As grounds for its appeal, the Township alleged that the Department had violated Article I, §27 of the Pennsylvania Constitution; the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. (the Solid Waste Management Act); and the Municipal Waste Planning Recycling and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, 53 P.S. §4000.101 et seq. (Municipal Waste Act) by failing to notify it and provide it with the opportunity to comment upon Dravo's request for a modification. The Township also contended that the grant of the modification was arbitrary and capricious, in general, as well as a violation of the

---

[1] The incinerator was the subject of appeals adjudicated by the Board in TRASH, Ltd. et al. v. DER et al., 1989 EHB 487. The Board's adjudication sustaining the Department's issuance of the solid waste permit and air quality plan approval to Dravo was upheld by the Commonwealth Court in TRASH Ltd. and Plymouth Township v. Department of Environmental Resources, ___Pa.Cmwlth___, 574 A.2d 721 (1990). The Township has also appealed the Department's extensions of Dravo's air quality plan approval at EHB Docket No. 89-040-W and 89-175-W.

Department's regulations.

On March 16, 1989, the County of Montgomery (County) filed a petition to intervene alleging, inter alia, that the incinerator is a critical component of its solid waste management plan. The parties were given the opportunity to respond to the petition and did not respond. The County's petition was granted by the Board in an order dated May 2, 1989.

On July 21, 1989, the County filed a motion for summary judgment, arguing that the Department did not abuse its discretion in issuing the permit modification because it had good cause to do so. The County also argued that the Township had no statutory right to notice and review and comment on the modification request and that the Township's appeal was barred by laches, since it was aware that the County and Dravo intended to close on the financing for the facility on or before May 23, 1989, but never advanced its appeal or filed a petition for supersedeas.

On August 10, 1989, the Township filed its response to the County's motion for summary judgment, alleging that the County failed to plead material, relevant facts in its motion and merely put forth factual conclusions and legal precedents in support of its position. The Township also contended that the matter was not yet ripe for summary judgment.

On August 17, 1989, the County filed a reply memorandum arguing that the matter was appropriate for summary judgment. The County averred that the Township failed to contradict the evidence the County presented of the Department's reasonable behavior in granting the modification.

On September 18, 1989, Dravo joined in the County's motion for summary judgment.

The Department, in accordance with its customary practice, deferred to Dravo to defend the permit modification, although it did assert that the

issuance of the modification was in conformance with relevant requirements.

Pennsylvania Rule of Civil Procedure No. 1035 requires the moving party to establish through affidavits, depositions, answers to interrogatories and admissions that there are no genuine issues as to material fact and that it is entitled to judgment as a matter of law. Summerhill Borough v. DER, 34 Pa. Cmwlth. 574, 383 A.2d 1320. In deciding a motion for summary judgment, the Board must view it in the light most favorable to the non-moving party, Robert C. Penoyer v. DER, 1987 EHB 131. Also, a motion for summary judgment may be filed at any time after the notice of appeal is filed, as long as it does not delay a hearing. Upper Allegheny Joint Sanitary Authority v. DER, 1989 EHB 303, 306.

We must agree with the Township that the grant of summary judgment on the issue of whether the Department had good cause to grant the permit modification is not warranted here, for the County has failed to plead undisputed material facts in its motion.[2] As the Township argued:

> No amount of self-serving documents, legal conclusions, and irrelevant allegations can substitute for factual allegations concerning the Township's burden. Nowhere in the County's motion is there a factual allegation, uncontested, which goes to the issue of good cause for issuance of the extension and the determination of that issue is the only basis upon which summary judgment could be granted.
>
> (Memorandum of Law contra Montgomery County's Motion for Summary Judgment, p.3)

The County misapprehends the relative burdens when a motion for summary

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[2] We note generally that the motions, responses, replies, and memoranda of law were deficient. The parties either failed to cite any law or failed to cite any relevant law in support of their respective positions. Should a party desire relief from the Board, it is the party's responsibility to advance the basis for that relief and not rely on the Board to provide it.

judgment is filed. While the Township would be required by Pa. R.C.P. No. 1035(d) to establish that there are genuine issues of fact for trial if a proper motion for summary judgment were filed, it is not the Township's responsibility to cure the deficiencies in the motion in its response.

As for the issue of whether the Township had a statutory right to notice of the modification request and to review and comment upon the modification request, the parties do not contest that the Township was given no notice of the permit modification request and no opportunity to review and comment on it; the only issue is whether such notice and opportunity for review and comment are required by statute or regulation.

We will first examine the Municipal Waste Act. Section 1101 of the Municipal Waste Act, which is the only provision relevant to this controversy, imposes a duty upon the Department to provide host municipalities for municipal waste landfills and resource recovery facilities with certain categories of information. However, none of these categories of information pertain to permit applications. Consequently, the Municipal Waste Act does not mandate that notice and opportunity to review and comment be given to the Township.

Two other statutory provisions are relevant to the County's argument - §1905-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-5 (the Administrative Code)[3] and §504 of the Solid Waste Management Act. The two provisions address different points in the permit application process.

Section 1905-A (b)(1)(v) of the Administrative Code provides that:

---

[3] This provision, although directly relevant, was cited by neither the County nor the Township.

> The Department of Environmental Resources shall require every applicant for the following permits and permit revisions to give written notice to each municipality in which the activities are located.
>
> * * * * *
>
> (v) Solid waste ... permits applied for pursuant to the Act of July 7, 1980 (P.L. 380, No. 97), known as the "Solid Waste Management Act."
>
> (emphasis added)

However, the statute does not define "permit revision.

Section 504 of the Solid Waste Management Act provides that:

> Applications for a permit shall be reviewed by the appropriate county, county planning agency or county health department where they exist and the host municipality, and they may recommend to the department conditions upon, revisions to, or disapproval of the permit only if specific cause is identified. In such case the department shall be required to publish in the Pennsylvania Bulletin its justification for overriding the county's recommendations. If the department does not receive comments within 60 days, the county shall be deemed to have waived its right to review.
>
> (emphasis added)

The term "permit" is not defined in §103 of the Solid Waste Management Act, so it is unclear whether the review requirements of §504 apply to permit modifications.

Guidance as to the interpretation of whether permit modifications or permit revisions are subject to the notice provisions of §1905-A of the Administrative Code and the review and comment procedures of §504 of the Solid Waste Management Act is provided in the municipal waste management regulations promulgated at 25 Pa. Code §271.1 et seq. These regulations, which were adopted pursuant to §1905-A of the Administrative Code and §105(a) of the

Solid Waste Management Act,[4] set forth the procedures for processing applications for municipal waste disposal or processing facilities.

The term "permit" is defined in 25 Pa. Code §271.1 as "a permit issued by the Department to operate a municipal waste disposal or processing facility. The term includes a permit modification, permit reissuance and permit renewal." The circumstances in which a permit modification is required are described in 25 Pa. Code §271.222(a):

> A permittee shall file with the Department an application for permit modification:
>
> (1) Prior to making a change in the design or operational plans in the application upon which the permit is issued.
>
> (2) Prior to making a change that would affect the terms or conditions of the existing permit.
>
> (3) If required under §271.111(d) relating to permit application filing deadline).
>
> (4) Prior to conducting solid waste processing or disposal activities that are not approved in the permit.
>
> (5) If otherwise required by the Department.
>
> (emphasis added)

Amending the expiration date in Condition No. 11 of the solid waste permit would necessitate a permit modification under 25 Pa. Code §271.222(a)(2).

The municipal waste management regulations distinguish between "major permit modifications" and "minor permit modifications" for purposes of notice and comment. Section 271.141(d) imposes notice requirements on permit applicants and provides in pertinent part that:

---

[4] See 15 Pa. Bulletin 1681 (April 9, 1988).

> An applicant for a new permit, permit reissuance, permit renewal or major permit modification, and a person or municipality submitting a closure plan shall, immediately before the application or plan is filed with the Department, give written notice to each municipality in which the site or proposed permit area is located. If the applicant proposes a design alternative under §271.231, the notice shall so state and briefly describe the alternative design. The applicant shall file with the Department a copy of the notice as part of the application or plan. The Department will not issue a permit for a period of 60 days from the date of this notice unless each municipality to which this notice is sent submits a written statement to the Department expressly waiving the 60-day period.
>
> (emphasis added)

Public notice requirements are also imposed on the Department in 25 Pa. Code §271.142 which, in relevant part, states:

> (a) The Department will publish a notice in the Pennsylvania Bulletin of the following:
>
> (1) Receipt of an application for a new permit, permit reissuance, permit renewal or major permit modification.
>
> (2) Receipt of a closure plan.
>
> (3) Final action on an application for a new permit, permit reissuance, permit renewal or major permit modification.
>
> (4) Justification for overriding county or host municipality recommendations regarding an application for a new permit, permit reissuance, permit renewal or major permit modification under Section 504 of the act (35 P.S. §6018.504).
>
> (b) The Department will submit a copy of an application for a new permit, permit reissuance, permit renewal, major permit modification or closure plan to the host municipality and the appropriate county, county planning agency and county health department, if one exists.

> (c) The Department will provide written notice of final action taken on an application for a new permit, permit reissuance, permit renewal, permit modification or closure plan to the host municipality and the appropriate county, county planning agency and county health department, if one exists.
>
> (emphasis added)

So, if the amendment to Condition No. 11 is a major permit modification, the notice and comment procedures of §§271.141 and 271.142 would be applicable to it.

Section 271.144(b) defines what would constitute a major modification for a municipal waste processing facility:

> An application for a permit modification for a municipal waste processing facility shall be considered an application for a major permit modification under §271.141-271.143 if the application involves the following:
>
> (1) Changes in specifications or dimensions of waste storage or residue storage areas.
>
> (2) Change in the approved groundwater monitoring plan, except for the addition of wells or parameters.
>
> (3) Change in approved closure plan, if applicable.
>
> (4) Acceptance for processing of types of waste not approved in the permit.
>
> (5) Change in residue disposal area, if applicable.
>
> (6) Change in approved design under §271.231.

An extension of time to obtain sewerage approvals is not included in the categories of modifications characterized as major modifications. However, although the amendment to Condition No. 11 at issue here is not a major modification as that term is defined in §271.144(b), the Department still has

the discretion in 25 Pa. Code §271.144(b) to require public notice for a permit modification not described in subsection (b) if the Department believes such modifications should be subject to public notice.

Although public notice and comment were not mandated by the regulations for the permit modification, the Department still had the discretion under §271.144(d) to impose those requirements in appropriate circumstances. Since the County's motion does not address the Department's discretion under 25 Pa. Code §271.144(d), we can hardly conclude that the County is entitled to judgment as a matter of law on this point.

Finally, the County alleges that the Township's appeal is barred by laches and waiver, since the Township knew of the County and Dravo's intention to close on the financing for the facility on or before May 23, 1989, and yet it did not advance the appeal or file a petition for supersedeas. The Township denies it had knowledge of the financing arrangements and contends that laches is not an appropriate basis for the grant of summary judgment.

Laches is an equitable defense which bars relief when the complaining party is guilty of a want of diligence in failing to initiate his action to another's detriment. Beaver Cemetery v. Human Relations Commission, 107 Pa. Cmwlth 190, 528 A.2d 284 (1987). The appellate courts have questioned the application of the laches defense in administrative proceedings other than disciplinary actions, Department of Transportation v. Human Relations Commission, 84 Pa. Cmwlth 98, 480 A.2d 342 (1984). Even if it were clear that the doctrine of laches is applicable to administrative proceedings, we must, like the Commonwealth Court in Beaver Cemetery, supra, conclude that the defense of laches is unwarranted here. In Beaver Cemetery, the appellant alleged that an eight year delay between the filing of a complaint before the Human Relations Commission and the scheduling of a hearing by the Human

Relations was prejudicial; the appellant conceded, however, that the complainant had timely filed its complaint. The Commonwealth Court, in refusing to consider the defense of laches, noted that the delay was not attributable to the complainant and worked just as much to the detriment of the complainant. Here, the Township timely filed its notice of appeal and pursued it in accordance with the Board's pre-hearing order. Although the Township did not file a petition for supersedeas of the contested permit modification, it is under no obligation to do so. As a result, the motion for summary judgment on the grounds of laches must be denied.

The County also, on June 9, 1989, filed a motion to dismiss the Township's appeal on the grounds that the Township failed to specify the nature of its objections in both its February 22, 1989,[5] letter and the notice of appeal form which was subsequently filed on March 10, 1989, and that the Township had failed to prosecute its appeal in that it had not sought discovery and had not filed its pre-hearing memorandum by the date specified on Pre-Hearing Order No. 1. Dravo joined in the County's motion on June 16, 1989.

The Township responded to the County's motion on June 16, 1989, denying the County's allegations and arguing that it was indeed prosecuting its appeal and complying with the Board's orders.

The County's motion to dismiss is utterly without merit. The Township's February 21, 1989, letter was docketed as a skeleton appeal pursuant to 25 Pa. Code §21.52(c), and the Township filed a notice of appeal containing all required information in compliance with the Board's request of March 3, 1989. Furthermore, although Pre-Hearing Order No. 1 required the

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[5] The letter was dated February 21, 1989, but received by the Board on February 22, 1989.

Township to file its pre-hearing memorandum on or before June 1, 1989, the Board, as was its practice at the time, advised the Township of its default by notice dated June 9, 1989, and set a date of June 19, 1989, for submission of the memorandum. The Township filed its pre-hearing memorandum on June 16, 1989. This is hardly the situation where a sanction of dismissal is warranted. Finally, we are aware of no requirement under our own rules of practice and procedure or the General Rules of Administrative Practice and Procedure, 1 Pa. Code §31.1 et seq., which requires an appellant to pursue discovery in the prosecution of its appeal. Therefore, we will deny the County's motion to dismiss.

O R D E R

AND NOW, this 23rd day of October, 1990, it is order that:

1) The County of Montgomery's motion for summary judgment, which was joined in by Dravo Energy Resources, is denied; and

2) The County of Montgomery's motion to dismiss, which was joined in by Dravo Energy Resources, is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: October 23, 1990
cc: See following page.

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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Eastern Region
For Appellant:
Herbert F. Rubenstein, Esq.
Broad Axe, PA
and
Anthony J. Mazullo, Jr., Esq.
Doylestown, PA
For Permittee:
Ronald S. Cusano, Esq.
Pittsburgh, PA
For Intervenor:
Sheryl L. Auerbach, Esq.
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M. DIANE SMITH
SECRETARY TO THE BOARD

COLUMBIA PARK CITIZENS' ASSOCIATION	:	
	:	
v.	:	**EHB Docket No. 88-449-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 25, 1990**
and ALTOONA CITY AUTHORITY, Permittee		

OPINION AND ORDER SUR
MOTION TO DISMISS

By Terrance J. Fitzpatrick, Member

Synopsis

A motion to dismiss filed by the Department of Environmental Resources (DER) is denied. DER's satisfaction of the public participation requirements under federal regulations for a plan approval under §201 of the Federal Clean Water Act, 33 USC §1281, does not serve as notice of a plan approval sufficient to trigger the appeal period under 25 Pa. Code 21.52(a).

OPINION

This proceeding involves an appeal filed on November 1, 1988, by Columbia Park Citizens' Association, John Hunter Orr and Bernard M. Shapiro (Citizens' Association) from various permits and approvals granted by DER. The permits and approvals were granted to allow construction of a sewage treatment plant and combined sewage overflow storage facility by the Altoona City Authority (Authority) in Altoona, Blair County. The Authority has intervened in this matter.

In its notice of appeal, the Citizens' Association stated that it had

been advised of various permits issued by DER, but that it had not received written notice of them, nor did it have specific knowledge of their issue dates or terms and conditions. The Citizens' Association added that DER had not adequately notified the public of the permits, and so the appeal period had not expired.

On November 14, 1988, the Citizens' Association responded to the Board's request for additional information, specifying that the appeal was from a Water Quality Management Permit issued on February 23, 1988, as well as from "other approvals which may have been issued by the Department for this project, including, without limitation, any Sewage Facility Plan Approval, NPDES Permit, Dams and Waterway Management Permit or Air Quality Permit."

DER filed a motion to dismiss the appeal on December 2, 1988. In that motion, DER established that it had published notice of the Water Quality Management Part II permit in the Pennsylvania Bulletin more than thirty days before the Citizens' Association filed its appeal. On that ground, DER moved to dismiss the appeal as untimely. This Board ruled on the motion to dismiss on August 7, 1990, holding that the appeal was untimely as to the Water Quality Permit. However, because DER had made no showing of untimeliness as to other permits and approvals - indeed, DER had not come forward and stated what other approvals or permits had been granted in connection with the project - the appeal was not dismissed. See, Columbia Park Citizens Association v. DER & Altoona City Authority, 1989 EHB 899.

This opinion and order addresses a second motion to dismiss filed by DER on February 15, 1990. In its motion, DER again argues that the appeal should be dismissed as untimely. The motion centers on DER's approval of the project under Section 201 of the Federal Clean Water Act (CWA) 33 U.S.C. §1281(g). On October 9, 1987, DER sent a letter to the Authority advising it

that the sewage facilities plan was approved. DER states in its motion that it approved the project under CWA §201, which involves public works proposed for federal grant assistance.[1] As required in the federal regulations promulgated under the CWA, the development of the plan for the project was subjected to several years of public comment and participation, including three public meetings and recommendations from a public advisory group.[2] DER argues that, because the public participation requirements of CWA §201 were met throughout the approval process, the Citizens' Association's claim that the approval of the project was not subject to public notice is frivolous.

The Citizens' Association responded to the motion to dismiss, averring that the mere fact that publicity was associated with the approval does not constitute effective notice as mandated by law (citing 25 Pa. Code §21.36). Thus, the Citizens' Association contends, DER has not established that the Citizens' Association ever received notice of the §201 plan approval.

It is settled law that the Board lacks jurisdiction over appeals which are filed more than thirty days after notice of DER's action. 25 Pa. Code §21.52(a), Borough of Bellefonte, et al v. DER, 1989 EHB 599, Rostosky v. Commonwealth, DER, 26 Pa. Commw. 478, 364 A.2d 761 (1976). The question here is whether the public participation afforded in the §201 approval process sufficed to serve as notice for purposes of triggering the 30-day appeal

---

[1] Federal regulations pertaining to implementing the construction grant program authorize the Environmental Protection Agency (EPA) to delegate review and certification functions to states. 40 C.F.R. §35.912. The EPA has accordingly delegated review of sewage facilities plans to DER via an agreement between the EPA and Pennsylvania. DER Motion to Dismiss, Exhibit B.

[2] DER cites to 44 C.F.R. §25 as setting forth the public participation requirements relating to approval of §201 facilities.

period.

We will deny the motion to dismiss. The Board's regulations provide:

> [J]urisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of the action or within 30 days after notice of the action has been published in the Pennsylvania Bulletin... .

25 Pa. Code §21.52(a). The regulation clearly provides that it is either written notice to the party appealing the action or constructive notice through publication in the Pennsylvania Bulletin that commences the thirty-day appeal period. That the public was informed of and allowed to participate in the approval process under CWA §201 does not substitute for the notice requirements of 25 Pa. Code §21.52. The federal law which DER refers to is aimed at affording the public greater participation in the approval process of pending public works, not at restraining an interested party's right to appeal a final DER decision. 44 CFR §25.1; DER Motion to Dismiss, Exhibit C. Moreover, the fact that the Appellants may have been aware that the approval process had begun does not mean that they also received notice that final approval had been given.

Finally, we are still not sure of exactly what "permits and approvals" we are reviewing in this appeal. At this point it appears that the appeal does involve an approval under CWA §201. According to a letter from DER's counsel to the Citizens' Association's counsel, the only other permits or approvals associated with the project were a wetlands permit and an approval of an "Act 537 plan" [pursuant to the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, No. 537, as amended, 35 P.S. §750.1 et seq. (SFA)]. DER Motion for Summary Judgment, Exhibit E. The letter states that notice of the wetlands permit was published in the

Pennsylvania Bulletin on February 13, 1988; therefore, the appeal period on this action would have expired before the Citizens' Association filed its appeal on November 1, 1988. With regard to the Act 537 approval, DER's counsel stated in his letter that any approvals or modifications under the SFA "were satisfied by the approvals granted under the federal statutes," apparently referring to the CWA §201 approval. Paragraph nine of DER's motion to dismiss explains that, although DER never officially approved an Act 537 plan or plan revision, the requirements of an Act 537 plan were met when DER granted the CWA §201 approval. It does not appear to us here - although we are not entirely certain - that an Act 537 approval is a subject of this appeal. We mention the foregoing with the expectation that the parties will clarify the scope of this appeal in their pre-hearing memoranda.

Having found that the Citizens' Association did not receive adequate notice of the CWA §201 approval, we deny the motion to dismiss.

ORDER

AND NOW, this 25th day of October, 1990, it is ordered that:

1) The motion to dismiss filed by the Department of Environmental Resources is denied.

2) The deadline for completion of discovery and for the filing of Appellant's pre-hearing memorandum is hereby extended to January 14, 1991.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: October 25, 1990

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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For Appellant:
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M. DIANE SMITH
SECRETARY TO THE BOARD

EASTON AREA JOINT SEWER AUTHORITY, et al.	:	
v.	:	EHB Docket No. 86-559-W
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and BOROUGH OF STOCKERTOWN, Permittee	:	Issued: October 29, 1990

ADJUDICATION

By Maxine Woelfling, Chairman

Synopsis

An appeal must be dismissed where appellants fail to meet their burden of proof under 25 Pa. Code §21.101(c)(3) that the Department of Environmental Resources (Department) erred in issuing a National Pollutant Discharge Elimination System (NPDES) permit. The burden of going forward with the evidence could not be shifted to the Department and the permittee under the rationale set forth in Marcon, Inc. v. Com. Dept. of Environ. Resources, 76 Pa. Cmwlth. 56, 462 A.2d 969 (1983) unless appellants presented evidence that environmental harm will occur from issuance of the permit. Evidence that ammonia in a proposed effluent, when mixed with in-stream ammonia, might approach toxic limits, was insufficient to cause such a shift when there was no evidence as to what that toxic limit is or that it would be met or exceeded. The Department's issuance of the NPDES permit was in compliance with 25 Pa. Code §§95.1(b) and (d), which are applicable to discharges into

high quality waters. The ammonia limitation derived from the application of best available technology under 25 Pa. Code §95.1(d)(2) was more stringent than that derived from the application of water quality standards, so the Department was required by 25 Pa. Code §92.31 to impose the technology-based limitation. The issuance of the NPDES permit was not violative of the Department's obligations under Article I, Section 27 of the Pennsylvania Constitution.

Background

On June 9, 1986, Easton Area Joint Sewer Authority, the City of Easton, the Boroughs of West Easton and Wilson, and the Townships of Forks and Palmer (collectively, Easton) filed a notice of appeal from the May 8, 1986 approval of a Sewage Facilities Plan Revision submitted by the Borough of Stockertown. That appeal was assigned Docket NO. 86-298-W. The revision called for Stockertown to build a sewage collection system and a treatment plant with a discharge to the Little Bushkill Creek (the Little Bushkill). Easton's notice of appeal challenged the Department's decision because of the alleged adverse impact of the discharge on Bushkill Creek (the Bushkill) and also contended that this approval was contrary to a prior plan which would have conveyed this sewage via an interceptor to the Easton Area Joint Sewer Authority's plant for treatment.

Thereafter, on October 3, 1986, Easton filed an appeal from the Department's issuance of NPDES Permit No. PA 0052850 to Stockertown for its discharge from the proposed Stockertown sewage treatment plant. Easton received notice thereof by publication at 16 Pa. Bulletin 3652 (Sept. 27, 1986). This appeal was docketed at No. 86-559-W. The two appeals were consolidated at the latter docket number by order dated October 27, 1986.

On May 23, 1988, Board Chairman Maxine Woelfling conducted a hearing

on the merits of this appeal. At the beginning of that hearing, the parties stipulated that Stockertown had agreed to meet more stringent effluent limitations for dissolved oxygen and chlorine. The parties also agreed that the sole remaining issue in the appeal concerned whether the ammonia nitrate effluent limitation[1] in Stockertown's NPDES permit was stringent enough to protect the Bushkill and, that, as to that limitation, Easton was not challenging the regulation itself, but was challenging the Department's application of the regulation in establishing this particular limitation. (N.T. 6-10)[2]

Easton filed its post-hearing brief on July 18, 1988, and the Department filed its brief on August 18, 1988. Stockertown advised the Board on August 22, 1988 that it would join in the Department's brief rather than file a brief of its own.

FINDINGS OF FACT

1. Appellants are the Easton Area Joint Sewer Authority, a municipality authority, the City of Easton, the Boroughs of West Easton and Wilson, and the Townships of Fork and Palmer, municipalities situate in Northampton County. (Notice of appeal)

2. Appellee is the Department, an administrative agency with the duty and responsibility to administer and enforce the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq.

3. Permittee is Stockertown, a borough in Northampton County. (Ex. A-7)[3]

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[1] Hereinafter referred to as "ammonia limitation."

[2] See also page 2 of the post-hearing brief of Easton.

[3] (N.T.__) indicates a reference to a page in the hearing transcript.
footnote continued

4. Stockertown, which has a population of less than 700, is an older municipality which is fully built out. (N.T. 27, Ex. C-1 and C-5)

5. Sewage in Stockertown is disposed of through on-lot systems, of which up to 75% malfunction. (N.T. 127 and Ex. C-1)

6. Stockertown submitted a revision to its official sewage facilities plan to the Department in 1985, and DER approved it on May 8, 1986. (Ex. C-1, C-2, C-7)

7. The revision considered various options for addressing Stockertown's sewage needs and concluded that a collection system and sewage treatment plant was the best option to serve its modest needs and relieve the problems caused by malfunctioning on-lot systems. (Ex. C-1)

8. On April 17, 1986, Stockertown applied to the Department for an NPDES permit to discharge 86,500 gallons per day of treated wastewater from the proposed sewage treatment plant to the Little Bushkill. (Ex. C-8)

9. The Department issued NPDES Permit No. PA 0052850 to Stockertown on August 8, 1986 (Ex. C-12), and published notice of this action at 16 Pa. Bulletin 3652 (Sept. 27, 1986). (Notice of appeal)

10. The lowest seven consecutive-day average flow that occurs once in ten years ("Q_{7-10}"), for the Little Bushkill at the proposed discharge point is 2.0 cubic feet per second ("CFS"). (N.T. 86-131)

11. The confluence of the Little Bushkill with the Bushkill is approximately one quarter mile downstream from the proposed discharge. (N.T. 29-30 and 146)

12. The Q_{7-10} for the Bushkill at its confluence with the Little

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continued footnote
(Ex. A-__) indicates a reference to Easton's exhibits. (Ex. C-__) indicates a reference to the Department's exhibits. (Ex. S-__) indicates a reference to Stockertown's exhibits.

Bushkill is 17 CFS. (N.T. 146 and Ex. C-10)

13. Downstream of the confluence of the two streams, limestone springs add at least .6 cubic meters per second of flow[4] to the Bushkill. (N.T. 52-53, 87-88)

14. Schoeneck Creek enters the Bushkill approximately one and one half miles downstream from the proposed discharge. (N.T. 35-36)

15. The Little Bushkill is designated as a high quality-cold water fishery at 25 Pa. Code §93.9. (Ex. C-10 and N.T. 124)

16. There are no trout spawning areas in the Little Bushkill from the point below the proposed discharge to the confluence of the Little Bushkill and the Bushkill. (N.T. 43)

17. The Bushkill contains a naturally reproducing brown trout population; trout spawning occurs at a point between three quarters of a mile and a mile below the proposed point for Stockertown's discharge. (N.T. 44, 72 and 73, Ex. A-8)

18. In accordance with 25 Pa. Code §95.1(b), the Department, by means of a mass balance equation, initially modeled the effect of proposed discharge on the receiving stream at the proposed point of discharge to assess whether the discharge would have any impact on the existing water quality of the receiving stream. (N.T. 125)

19. The mass balance equation is expressed mathematically as $C_DQ_D + C_UQ_U = Q_{D+U}C_G$, where

C_D = concentration of the parameter of interest in the discharge;
Q_D = flow of the discharge;
C_U = concentration of the parameter upstream;

[4] Taking official notice that a meter is equal to 3.28 feet and that, therefore, one cubic meter is equal to 35.3 cubic feet, .6 cubic meters per second is equal to 21.2 CFS.

Q_U = flow upstream;
Q_{D+U} = combined flow downstream of the discharge; and
C_G = concentration of the parameter downstream

(N.T. 134-135)

20. The initial mass balance for dissolved oxygen (DO) and ammonia determined that at the point of discharge there would be a slight impact on the existing water quality of the Little Bushkill. (N.T. 125, 139-140)

21. Because of the Department's conclusion that Stockertown's proposed discharge would have a slight impact on the existing water quality of the Little Bushkill, Stockertown was required by 25 Pa. Code §95.1(b)(1) to submit a social and economic justification for its proposed discharge. (N.T. 126-127 and Ex. C-3)

22. Stockertown's proposed discharge will satisfy a significant public need to eliminate on-lot system malfunctions. (N.T. 127, Ex. E-5)

23. Easton offered no evidence to the Board as to the inadequacy of Stockertown's social and economic justification for the proposed discharge.

24. In accordance with 25 Pa. Code §95.1(d), Stockertown evaluated non-discharge alternatives, including land disposal via spray irrigation. (N.T. 126 and Ex. E-1 and C-5)

25. Spray irrigation was not feasible because it would cost two to three times as much as stream discharge and, therefore, may have precluded the resolution of the malfunctioning on-lot system problem. (N.T. 127-128 and Ex. C-5)

26. The Department accepted Stockertown's assessment that spray irrigation was infeasible. (Ex. C-7)

27. Easton offered no evidence showing that rejection of spray irrigation was in error.

28. Where land disposal is not economically feasible, 25 Pa. Code

§95.1(d)(2) requires a discharger to utilize best available technology for the discharge.

29. The effluent limitation for ammonia based on best available technology for a sewage treatment plant such as Stockertown's is 3.0 milligrams per liter (mg/l) as a 30-day average. (N.T. 125-129)

30. As it is required to do by 25 Pa. Code §§92.31 and 95.1(a), the Department calculated water quality-based effluent limitations for ammonia under 25 Pa. Code, Chapter 93 in order to determine and, therefore, impose the more stringent of technology-based or water quality-based effluent limitations in Stockertown's permit. (N.T. 129)

31. 25 Pa. Code §93.7(c), Table 3, sets forth specific water quality criteria for ammonia nitrogen by means of an equation which establishes stream specific in-stream criteria based on median pH and temperature values.

32. For its modeling of the proposed discharge for ammonia, the Department utilized the "ammonia calc" computer program which calculates the in-stream criteria under §93.7(c) and the effluent limitations necessary to achieve the criteria. (N.T. 133-134 and 136)

33. The median pH and temperature values used to calculate the ammonia criteria were as follows:

pH (stream) = 7;
pH (discharge) =7;
temperature (stream) = 20°C; and
temperature (discharge) = 25°C

(N.T. 131)

34. The design criteria used by the Department to calculate the concentration of the ammonia in the discharge (C_D) were as follows:

Q_D = 90,000 gpd;
Q_U = 2.0 CFS; and
C_U = 9.2 mg/l

(N.T. 131)

35. The 0.2 mg/l background value for ammonia (C_U) was based upon

field observations and sampling from other streams in the area, including the Bushkill and Martins Creeks. (N.T. 140-143, Ex. C-10, p. 13)

36. The Department's modeling established an in-stream criteria of 1.87 mg/l as a 30-day average, with a required effluent concentration of 34.77 mg/l total ammonia as a 30-day average to achieve that criteria. (N.T. 132; Ex. C-10, p. 8)

37. Because the water quality-based effluent limitation of 34.77 mg/l of total ammonia as a 30-day average was less stringent than the technology-based effluent limitation of 3.0 mg/l as a 30-day average, the Department imposed the technology-based effluent limitation in Stockertown's permit. (N.T. 128-129)

38. Easton's expert, Patricia T. Bradt, holds a Ph.D in biology from Lehigh University and, at the time of the hearing, was a research scientist at that University's Environmental Studies Center. (Ex. A-20)

39. Over the past fifteen years Dr. Bradt has extensively studied the fish and insect populations in the Bushkill and various chemical and biological impacts on them and their habitat; she has written several scientific papers about the results of her studies. (Ex. A-20)

40. Dr. Bradt has neither expertise nor experience in developing NPDES permit limitations. (N.T. 58-59)

41. Dr. Bradt was unaware until this hearing that the ammonia limitations in Stockertown's permit were technology-based, as opposed to water quality-based. (N.T. 91)

42. She could only "guess" as to how the permit limitations for ammonia were calculated. (N.T. 91)

43. Dr. Bradt did not fully comprehend the ammonia limitations in the permit, and she needed more information in order to determine whether the

ammonia limitations were valid. (N.T. 76)

44. Dr. Bradt was concerned about the impact of ammonia in Stockertown's proposed discharge on the Bushkill's chemical quality and, hence, on its native trout population. (N.T. 70-71, 109)

45. Ammonia toxicity increases exponentially as the pH of a stream increases above 7.0 because, as the pH climbs, the percentage of un-ionized ammonia in the stream increases; it is this un-ionized ammonia which is most toxic to fish. (N.T. 67)

46. Ammonia toxicity is also affected by stream temperature and DO levels. The lower the DO, the more toxic the ammonia, and the higher the temperature, the more toxic the ammonia. (N.T. 67, 92-93)

47. Dr. Bradt's field is not toxicology, and she never conducted any site specific ammonia toxicity tests. (N.T. 58)

48. Dr. Bradt calculated recommended ammonia effluent limitations of 0.15 mg/l as an average and 9.52 mg/l as a maximum solely by plugging a mean pH of 7.79 and a mean temperature of 18.6°C into the Chapter 93 formula. (N.T. 79)

49. Dr. Bradt admitted that this approach resulted in the application of an in-stream water quality criteria directly as an end-of-pipe effluent limitation. (N.T. 80)

50. Dr. Bradt admitted that her approach did not account for any dilution of Stockertown's discharge by the Little Bushkill, the Bushkill or the limestone springs. (N.T. 88-89)

51. Dr. Bradt admitted that Q_{7-10} of the Little Bushkill is 14 times the volume of Stockertown's proposed discharge. (N.T. 96)

52. Dr. Bradt admitted that there was room for flexibility in her recommended effluent limitation for ammonia, in that her concern is that

ammonia not reach levels that would be toxic to trout spawning downstream in the Bushkill. (N.T. 71-72, 76)

53. Dr. Bradt disputed the Department's modeling because the values used in the Department's modeling were not the same as the values she found in her sampling of the streams. (N.T. 77)

54. Dr. Bradt found the mean pH to be 7.6 or 7.8, not 7.0. (N.T. 74)

55. The pH tends to increase downstream of Stockertown's proposed discharge in the vicinity of the limestone springs, since limestone springs are generally high in calcium carbonate. (N.T. 66)

56. Dr. Bradt expressed a "concern" for levels of pH higher than 8.0 in the trout spawning areas during summer months. (N.T. 109)

57. Dr. Bradt found mean ammonia levels to be 0.35 mg/l to 0.4 mg/l, not 0.2 mg/l. (N.T. 74)

58. Dr. Bradt does not know the source of the ammonia levels, but testified that they could be from malfunctioning on-lot septic systems (such as those in Stockertown), ammonia fertilizer runoff, or other sewage treatment plants. (N.T. 83-84)

59. Dr. Bradt found a mean temperature of 18.6°C. (Ex. A-18)

60. Dr. Bradt's mean temperature was less stringent than the 20°C used by the Department in its modeling.

61. The limestone springs and shading from vegetation naturally cool the stream. (N.T. 51-52)

62. The water temperature stays the same or goes down slightly after the Little Bushkill and the Bushkill merge. (N.T. 51)

63. Dr. Bradt admits that temperature may not be a factor in ammonia toxicity in this case. (N.T. 102-103)

64. Dr. Bradt believes the temperature limitations in Stockertown's

NPDES permit are adequate. (N.T. 104-105)

65. Dr. Bradt could not provide a definite ammonia toxicity level for the trout spawning areas. (N.T. 71-72)

66. Dr. Bradt could not find anything on the toxicity of ammonia with respect to macro-invertebrates. (N.T. 73)

67. A recovery zone is the area needed for a stream to recover to its former quality after the introduction of effluent into it. (N.T. 99-102)

68. Dr. Bradt did not calculate a recovery zone for Stockertown's proposed discharge because, as a biologist, she did not feel qualified to do so. (N.T. 99-100)

69. Dr. Bradt would be satisfied with an effluent limitation for the Stockertown discharge which would produce an in-stream un-ionized ammonia level of .03 mg/l. (N.T. 94)

70. Charles Rehm, the Department's expert witness, has a B.A. in civil engineering and an M.A. in environmental engineering and is a registered professional engineer in the field of sanitary engineering. (N.T. 120, 122)

71. Mr. Rehm has been Chief of the Planning Section of the Bureau of Water Quality Management, Norristown Regional Office, since 1971 and has reviewed over 1000 water quality protection reports. (N.T. 119-121)

72. Mr. Rehm personally toured the general area of the receiving streams, reviewed the work of the Department engineer who developed the effluent limitations for the discharge, and performed an independent review of the project. (N.T. 122-124)

73. Substituting the Bradt mean in-stream ammonia level of 0.4 mg/l in the ammonia calc model, Mr. Rehm calculated a summer ammonia effluent limitation of 31 mg/l as a 30-day average in order to meet Chapter 93 standards. (N.T. 132-133)

74. Substituting the 0.4 mg/l mean in-stream ammonia level along with the Bradt mean pH of 7.7 and mean temperature of 18°C, Mr. Rehm calculated a summer ammonia limitation of 23 mg/l as a 30-day average in order to meet Chapter 93 standards. (N.T. 133)

75. Assuming the permit's ammonia limitation of 3.0 mg/l as the effluent concentration, and the more stringent background ammonia, temperature and pH levels of 0.4 mg/l, 20°C, and 8.0, respectively, and, utilizing the mass balance equation to translate the effluent concentration into an in-stream concentration, Mr. Rehm calculated an ammonia in-stream concentration of 0.56 mg/l at the point of discharge, approximately half of the in-stream criteria of 1.0 mg/l under the same design conditions. (N.T. 137)

76. The in-stream ammonia concentration of 0.56 mg/l translates into 0.018 mg/l as un-ionized ammonia at the point of discharge. (N.T. 137)

77. The 0.018 mg/l is more stringent that the 0.03 mg/l un-ionized toxicity level agreed to by Dr. Bradt, not even considering re-aeration and recovery in the Little Bushkill and dilution from the Bushkill and the limestone springs.

78. The DOSAG model predicts what happens to the DO and ammonia downstream from the point of discharge. (N.T. 146)

79. As the DO satisfies itself on ammonia, the stream is re-aerated and recovers. (N.T. 147)

80. Modeling of the Little Bushkill indicates that the ammonia that would be discharged from the Stockertown plant will be dissipated and diluted by the time the Little Bushkill flows into the Bushkill and that the in-stream ammonia concentration at that point would be insignificant. (N.T. 146)

81. The ammonia limitations in Stockertown's permit will not result

in pollution or adversely affect the water quality of the Bushkill. (N.T. 170, 172)

DISCUSSION

Our discussion of this matter necessarily begins with the burden of proof. The Pennsylvania appellate courts have uniformly held that while the burden of proof or persuasion never leaves the party on whom it is originally placed, the burden of producing or going forward with evidence may shift during the course of a hearing. See, e.g. McCloskey v. Nu-Car Carriers, Inc., 387 Pa. Super. 466, 564 A.2d 485, 487 (1989), appeal denied, ___ Pa. ___, 575 A.2d 115 (1990). In the present case, the Board's regulations at 25 Pa. Code §21.101 (c)(3) place the burden of proof (persuasion) upon Easton. However, under the Commonwealth Court ruling in the Marcon, supra, case, once Easton produces evidence that environmental harm will result from the issuance of this permit, it then shifts to the Department and Stockertown the burden of producing clear and concise evidence as to whether the issuance of the permit was prudent. Maskenozha Rod and Gun Club et al. v. DER et al., 1981 EHB 244, 310.[5] For the reasons which follow, we hold that Easton has failed to produce any credible expert scientific evidence which tends to show that the issuance of Stockertown's NPDES permit will cause environmental harm in the Bushkill and, therefore, has failed to shift the burden of production to the Department and Stockertown.[6] And, by failing to even produce sufficient evidence to shift the burden of production to the Department and Stockertown, Easton has also failed to satisfy its burden of persuasion under 25 Pa. Code

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[5] The Board's adjudication in Maskenozha was reviewed by the Commonwealth Court in Marcon.

[6] Another way of stating this would be that Easton has not established a prima facie case.

§21.101(c)(3).[7]

None of the witnesses called by Easton gave any testimony which tended to show environmental harm as a result of the issuance of Stockertown's NPDES permit.

J. Michael Dowd, Executive Vice President of the Two Rivers Area Chamber of Commerce (TRACC), was Easton's first witness. He testified as to the importance of the Bushkill to the area and noted that because of the creek's importance, TRACC engaged in riverside improvement projects. His testimony did not address the alleged deleterious effects of the ammonia effluent limitation and, thus, could not be the basis for shifting the burden.

The second witness called by Easton was Richard Keesler, Jr., the founder of the local chapter of Trout Unlimited. Mr. Keesler told of his fishing for trout in the Bushkill and Little Bushkill and of the fine quality of these streams as trout fisheries, in his layman's opinion. While Keesler did speak of trout spawning areas in the streams and expressed his concerns about possible future damage to the streams as a result of the proposed discharge, he, too, failed to specifically address the ammonia effluent limitation issue which Easton's counsel had previously characterized as "the only matter at issue as I understand it." (N.T. 7) Thus, his testimony was insufficient to provide a basis for shifting the burden under Marcon.

The sole remaining witness for Easton was its expert aquatic

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[7] Easton has also argued that the Department bears the burden of proof (persuasion) here as a result of 25 Pa. Code §21.101(b)(4) (placing the burden of proof on the Department "When it seeks to engage in activities which are objected to as environmentally harmful.") But, that rule is not applicable where the Department has, for example, issued a permit. See Western Pennsylvania Water Company and Armco Advanced Materials Corporation v. DER, EHB Docket No. 88-325-E (Opinion issued May 21, 1990). Even if the burden of proof (persuasion) had been placed on the Department under this rationale, the outcome in this appeal would still be the same.

biologist, Dr. Patricia Bradt. Dr. Bradt is a research scientist at Lehigh University who has conducted various studies of the aquatic biology of the Bushkill over the past fifteen years. Dr. Bradt indicated there is ammonia in both the Little Bushkill and the Bushkill. (N.T. 63-65) She also stated that, in the right quantity, ammonia, and particularly un-ionized ammonia, is toxic to fish. (N.T. 67) Dr. Bradt further correctly stated that the plant's discharge will add ammonia to the Little Bushkill. (N.T. 70-71) Finally, she says that in her opinion, the amount of ammonia in the Little Bushkill is getting close to the toxic level. (N.T. 71) Neither Dr. Bradt nor any other witness testified as to what the toxic level for ammonia is for either the Little Bushkill or the Bushkill. Just as importantly, Dr. Bradt failed to opine that the discharge from Stockertown's plant will push up the level of ammonia in the stream to this toxic threshold. All Dr. Bradt could say was, "we have a potentially dangerous ammonia situation. . . without any ammonia, any additional ammonia in the stream at all." (N.T. 72)

It is this testimony which is crucial, for, even if we suppose that Dr. Bradt added the ammonia from the proposed discharge to that already in the Little Bushkill, she did not testify that it pushes the in-stream ammonia level to the toxic threshold. Rather, with the evidence Easton offered, it still leaves the stream with only a potential ammonia problem, not an actual problem. Evidence which tends to show harm, not a mere potentiality of harm, is required to shift the burden of production to the Department and Stockertown. Because Easton's evidence was so speculative, we cannot shift the burden.

It follows, therefore, that we have no choice but to find that Easton has also failed to meet its burden of proof to demonstrate that the Department committed an abuse of discretion in issuing the NPDES permit to Stockertown.

Although we do not doubt the sincerity of Dr. Bradt's concerns regarding the effects of ammonia on the Bushkill and the Little Bushkill and we have great respect for her academic credentials and accomplishments, her testimony betrayed little knowledge or understanding of the state and federal systems for regulating wastewater discharges. Dr. Bradt admitted on voir dire that she had never developed effluent limitations and had no experience developing effluent limitations. (N.T. 59-60) Although Dr. Bradt was concerned about the ammonia effluent limitation, she did not know how the Department had arrived at it. (N.T. 76 and 91) Moreover, she did not know upon what the technology-based effluent limitation was based (N.T. 112), and she did not know enough about the Department's ammonia effluent limitation to say whether it was valid. (N.T. 76-77)

In contrast to Dr. Bradt's testimony, we have Mr. Rehm's testimony concerning the Department's calculation of the ammonia effluent limitation. This testimony establishes that the Department adhered to the relevant regulations and calculated an effluent limitation for ammonia which was even more restrictive than a water quality-based effluent limitation derived from Chapter 93.

Because Stockertown's discharge would be to a stream classified as high quality-cold water fishery under 25 Pa. Code §93.9, the Department was required to apply the standards set forth in 25 Pa. Code §§95.1(b) and (d). In particular, §95.1(b)(1) provides that:

> (b) Waters having a water use designated as "High Quality Waters" in §§93.6 and 93.9 (relating to general water quality criteria; and designated water uses and water quality criteria) shall be maintained and protected at their existing quality or enhanced, unless the following are affirmatively demonstrated by a proposed discharger of sewage, industrial wastes, or other pollutants;

> (1) The proposed new, additional or increased discharge or discharges of pollutants is justified as a result of necessary economic or social development which is of significant public value.

Thus, the Department must make a threshold determination whether a proposed discharge would degrade the existing quality of a stream designated as High Quality Waters and, if so, the applicant must demonstrate that the proposed discharge is justified under the standards of §95.1(b)(1).

Here, the record demonstrates that the Department did make a threshold determination that Stockertown's proposed discharge would impact the existing quality of the Little Bushkill. (N.T. 125, 139-140) As a result, Stockertown was required to submit a social and economic justification for its proposed discharge (N.T. 126-127 and Ex. C-3) and upon its review of that justification, the Department concluded that the proposed discharge would address a significant public need to eliminate malfunctioning on-lot sewage systems. (N.T. 127) Easton has not challenged this conclusion of the Department's.

Having made these determinations, the Department then addressed the treatment requirements for Stockertown's discharge. Section 95.1(d) requires that any project which would discharge into High Quality Waters:

> (1) Utilize the best available combination of treatment and land disposal technologies and practices for the wastes, where the land disposal would be economically feasible, environmentally sound and consistent with other provisions of this title; or
>
> (2) If the land disposal is not economically feasible, is not environmentally sound, or cannot be accomplished consistent with other provisions of this title, utilize the best available technologies and practices for the reuse and discharge of the wastes.

Again, the record establishes that the Department and Stockertown adhered to

the requirements of §95.1(d). Land disposal was evaluated and found to be economically infeasible (N.T. 126-128, Ex. C-5 and C-7), so Stockertown was required to utilize best available technology[8] for its discharge. The Department, utilizing best available technology for a sewage treatment plant such as Stockertown's, imposed an effluent limitation of 3.0 mg/l ammonia as a 30 day average. (N.T. 128-129)

However, the Department's responsibility did not stop here, for it was still required by 25 Pa. Code §92.31, which is applicable to NPDES permit applications, to impose the more stringent of technology-based or water-quality-based effluent limitations in Stockertown's permit. Although the conventional wisdom is that water quality-based effluent limitations are usually more stringent than technology-based effluent limitations, that was not so in this case (N.T. 128-129), and, as a result, the technology-based effluent limitation was inserted into Stockertown's permit.

It was also demonstrated on the record that Stockertown's discharge would not adversely affect water quality or result in pollution. Dr. Bradt was quite concerned about the level of un-ionized ammonia, the toxic component of ammonia, in the Little Bushkill. She disagreed with the assumptions used by the Department in running its ammonia calc model. (N.T. 77) However, when the Department substituted Dr. Bradt's assumptions into the model, the resultant effluent limitation was less stringent than the ammonia limitation imposed by the Department in Stockertown's NPDES permit. (N.T. 132-133) Moreover, the Department's ammonia limitation of 3.0 mg/l would produce a resultant ammonia in-stream concentration of 0.56 mg/l, which is approximately half of the applicable water quality criterion. (N.T. 137) When one

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[8] As contrasted with "Best Available Technology Economically Achievable" under the Clean Water Act, 33 U.S.C. §1251 et seq.

translates this 0.56 mg/l ammonia into its ionized and un-ionized components, there would be a 0.018 mg/l in-stream concentration of un-ionized ammonia. Dr. Bradt agreed that she would be satisfied if the in-stream level of un-ionized ammonia was 0.03 mg/l, and the Department's calculation of in-stream un-ionized ammonia was well below Dr. Bradt's recommendations.

Finally, Easton asserts that the Department has failed to satisfy its obligations to implement Article I, Section 27, as those obligations are articulated in the three-prong test of Payne v. Kassab, 11 Pa. Cmwlth. 14, 29-30, 312 A.2d 86, 94 (1973). The Payne v. Kassab test requires that:

> 1) there is compliance with all statutes and regulations applicable to the protection of the Commonwealth's natural resources;
>
> 2) there is a reasonable effort to reduce environmental incursion to a minimum; and
>
> 3) the environmental harm which will result from the challenged decision or action does not so clearly outweigh the benefit to be derived therefrom that to proceed further would be an abuse of discretion.

We have already determined that the relevant statutes have been complied with, and the assessment required by 25 Pa. Code §95.1(d) has established that the imposition of the best available technology requirement will minimize the environmental incursion. And finally, the public benefit to be derived from elimination of malfunctioning on-lot systems[9] clearly outweighs any environmental harm (assuming arguendo, in this case, that there is any). The issuance of Stockertown's permit was, therefore, consistent with the Department's obligations under Article I, Section 27.

Having concluded that the Department's issuance of Stockertown's

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[9] And, the environmental incursion as a result of the discharges from those systems into the waters of the Commonwealth.

NPDES permit was in conformance with the applicable law and was not otherwise an abuse of discretion, we must dismiss this appeal.

CONCLUSIONS OF LAW

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

2. Easton bears the burden of proof in this appeal pursuant to 25 Pa. Code §21.101(c)(3).

3. Before the burden of going forward could be shifted from Easton to the Department and Stockertown under the rationale in Marcon, supra, Easton had to offer evidence that the proposed ammonia effluent limitation in Stockertown's NPDES permit would be likely to cause some environmental harm.

4. Easton failed to present sufficient evidence to establish that issuance of the permit would result in environmental harm and, as a result, the burden of going forward could not be shifted to the Department and Stockertown.

5. Stockertown's proposed discharge was socially and economically justified, as required by 25 Pa. Code §95.1(b).

6. Land disposal was not a feasible alternative for Stockertown, so Stockertown was required to utilize best available technology. 25 Pa. Code §95.1(d)(2).

7. The effluent limitation derived from the application of best available technology was more stringent than the effluent limitation derived from the application of water quality standards, so the technology-based limitation was imposed in Stockertown's permit. 25 Pa. Code §92.31.

8. Stockertown's discharge of ammonia would not adversely affect the water quality of either the Little Bushkill or the Bushkill.

9. The issuance of Stockertown's NPDES permit was in conformance

with the Department's obligations under Article I, Section 27 of the Pennsylvania Constitution.

10. Easton failed to meet its burden of proof under 25 Pa. Code §21.101(c)(3).

11. The Department's issuance of NPDES Permit PA No. 0052850 to Stockertown was not an abuse of discretion.

ORDER

AND NOW, this 29th day of October, 1990, it is ordered that the appeal of Easton is dismissed and the Department's issuance of NPDES Permit PA No. 0052850 to Stockertown is sustained.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

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TERRANCE J. FITZPATRICK
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DATED: October 29, 1990

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M. DIANE SMITH
SECRETARY TO THE BOARD

RUSSELL W. JOKI	:	
	:	
v.	:	**EHB Docket Nos. 85-137-G**
	:	**85-138-G**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** October 30, 1990

ADJUDICATION

By the Board

Synopsis

The Department of Environmental Resources (DER) has met its burden of showing by a preponderance of the evidence that site conditions justified bond forfeiture. The existence of any violation of reclamation requirements on a bonded area affected by surface mining operations is sufficient to justify bond forfeiture. Therefore, the bond forfeitures are sustained.

Background

This matter involves two appeals filed by Russell W. Joki (Joki) from DER's forfeiture of three surety bonds posted in connection with Joki's mining activities in Union Township, Washington County.

On April 19, 1985, the Board received an appeal by Joki from a March 20, 1985 letter from DER's Bureau of Mining & Reclamation announcing forfeiture of the following bond:

Type of Bond	Acreage	Amount	Surety Company	Number
Surety	5	$5,000	Fidelity & Deposit Co. of Maryland	9135277

This bond was posted in connection with Joki's mining activities conducted pursuant to Special Reclamation Project Permit (SRP) No. 147-A. In his notice of appeal, which was docketed at 85-137-G, Joki states that the bond should not have been forfeited because "Reclamation of the property is nearly completed. Total reclamation should be complete this summer."

The Board received a second notice of appeal from Joki on April 19, 1985. This appeal was from another March 20, 1985 letter of DER announcing forfeiture of the following bonds:

Type of Bond	Acreage	Amount	Surety Company	Number
Surety	32	$24,000	Fortune Assurance Co., Inc.	374
Surety	1.4	4,200	"	SM-662
Surety	1.2	5,000	"	SM-319

Surety Bonds Nos. 374, SM-662 and SM-319 were posted in connection with Joki's mining activities conducted pursuant to Mining Permit (MP) No. 102102-63800106-01-0, MP No. 102102-63800106-01-1, and SRP No. 689, respectively. In his notice of appeal, docketed at 85-138-G, Joki provided the following reasons as to why the bonds should not have been forfeited:

a. Surety Bond No. 374...
   i. The property is only partially affected (approximately twenty-five (25%) percent).
   ii. The property was stripped prior to Appellant's commencement of stripping and the Appellant is not responsible therefor.

b. Surety Bond No. SM-662...
   i. No stripping has ever been done on this property and this property has not been affected.

c. Surety Bond No. SM-319...

i. This property has been completely restored and has no violations against it.

After both appeals were perfected on April 25, 1985, Pre-Hearing Orders No. 1 and 2 were issued in both cases, setting a schedule for discovery and the filing of pre-hearing memoranda by the parties.

Joki and DER's pre-hearing memoranda were filed with the Board on July 11, 1985 and July 24, 1985, respectively. In addition, by letter dated July 19, 1985, DER advised counsel for Joki that it was withdrawing the forfeiture of Surety Bond No. SM-662 posted in connection with MP No. 102102-63800106-01-1, stating that further review of the site indicated that Joki did not affect the area covered by this bond.

In the interim, on June 17, 1985, DER had filed a Motion for Imposition of Sanctions upon Joki for failure to respond to its interrogatories and produce documents requested. Joki did not respond to the Motion but did serve his answers to the interrogatories on July 1, 1985. In ruling on DER's Motion, the Board, on August 12, 1985, ordered Joki to provide DER with an opportunity to inspect the documents requested, or to face sanctions for failure to do so. On August 27, 1985, Joki provided DER with an Affidavit regarding the documents in his possession, and the Board's order of August 12, 1985 was withdrawn. All discovery was completed at this time.

A consolidated hearing on the merits of both cases was held before Former Board Member Edward Gerjuoy on May 21, 1986. DER's Post-Hearing Brief was filed with the Board on July 23, 1986. Following two requests for an extension of time, giving Joki until September 22, 1986 to file a Post-Hearing Brief, no such Brief was forthcoming. Thereafter, on October 10, 1986, DER filed a Motion to Close the Time Period for Filing Post-Hearing Brief, to

which Joki did not respond. On December 15, 1986, the Board granted DER's Motion, and this appeal was adjudicated without benefit of Joki's Brief. Since a party is deemed to have abandoned all arguments not raised in his Post-Hearing Brief, we may not consider any arguments raised by Joki earlier in this appeal. Laurel Ridge Coal, Inc. v. DER, EHB Docket No. 86-349-E (Adjudication, May 11, 1990). In addition, with Mr. Gerjuoy having resigned from the Board in December 1986, this adjudication has been prepared from a cold record. Lucky Strike Coal Co. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988).

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

FINDINGS OF FACT

1. The Appellant is Russell W. Joki (Joki), an individual residing at R.D. #5, Finleyville, PA 15332 (Joki's Notice of Appeal and N.T. 139[1]).

2. The Appellee is the Department of Environmental Resources (DER), which is the agency of the Commonwealth empowered to administer and enforce the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. ("CSL"), the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. ("SMCRA"), Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 ("Administrative Code"), and the rules and regulations adopted thereunder.

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[1]Reference to "N.T." followed by a number is a reference to a page in the transcript of the hearing on this matter. "C-___" refers to a Commonwealth exhibit.

3. Joki was the permittee of a surface coal mine located in Union Township, Washington County, operated under SRP No. 689 (Exhibit C-1; N.T. 27, 28).

4. Joki was the permittee of a surface coal mine located in Union Township, Washington County, operated pursuant to SRP No. 147-A (Exhibits C-7(a), C-7(b) and C-7(c); N.T. 40, 41).

5. Joki was the permittee of a surface coal mine located in Union Township, Washington County, operated pursuant to Mine Drainage Permit (MDP) No. 63800106 and MP No. 102102-63800106-01-0 (Exhibits C-13 and C-14).

SRP No. 689

6. SRP No. 689 was issued to Joki on May 27, 1980 and authorized him to conduct surface coal mining and reclamation activities on 1.2 acres of land in Union Township, Washington County (Exhibit C-1; N.T. 25).

7. With respect to, and as a condition of obtaining SRP No. 689, Joki submitted to DER Surety Bond No. SM-319, in the amount of $5,000.00, to guarantee compliance with SMCRA, the CSL, DER's regulations and the permit conditions (Exhibits C-1 and C-2).

8. Surety Bond No. SM-319 was non-proportional; liability thereon was for the face amount of the bond but in no case for an amount less than five thousand dollars (Exhibit C-2).

9. By its terms and conditions, Joki was to complete SRP No. 689, including all reclamation, within twelve (12) months of May 27, 1980, the date of issuance (Exhibit C-1; N.T. 32).

10. SRP No. 689 also required that Joki develop, implement and maintain erosion and sedimentation control measures and eliminate any high

walls or subsidence that might occur following mining (Exhibit C-1; N.T. 26, 27).

11. In August 1983, when DER Surface Mine Conservation Inspector John Paxton (Inspector Paxton) visited the site covered by SRP No. 689, most of the 1.2 acre project area had been reclaimed and revegetated; however, there still remained a section of highwall approximately fifty (50) feet in length and ranging between five (5) and ten (10) feet in height (N.T. 28).

12. As of August 1983, very little growth was occurring where the highwall was located, and the area was subject to erosion (N.T. 28, 172).

13. By letter dated October 25, 1983, DER warned Joki that if the violating conditions on SRP No. 689 were not corrected, the Department would "take action to declare a forfeiture of the bond" for the project area (Exhibit C-5(a)).

14. Inspector Paxton again inspected the site on February 6, 1984, and on February 8, 1984 issued Joki Compliance Order 84G040, citing him for four (4) violations: (1) failure to post an identification sign, (2) failure to maintain soil erosion and sedimentation control measures at the site, (3) failure to complete the project within the prescribed time period, and (4) failure to restore the area in accordance with the restoration plan (Exhibit C-3; N.T. 30, 31, 32).

15. Except for the identification sign violation, all of the violations cited in the February 8, 1984 Compliance Order concerned the area of the unreclaimed highwall on SRP No. 689 (N.T. 30, 31, 32).

16. Compliance Order 84G040 required Joki to remove and regrade the existing exposed highwall and to obtain a slope of not greater than 35^{o} on the project area no later than March 8, 1984 (Exhibit C-3).

17. When SRP No. 689 was reinspected on March 12, 1984 by DER Mining Specialist George Hartenstein, Joki had not taken any steps to remove and regrade the exposed highwall (N.T. 33, 34).

18. On March 16, 1984, DER issued Joki a second Compliance Order, 84G138, citing Joki for failing to comply with the February 8, 1984 Compliance Order (Exhibit C-4; N.T. 33-34).

19. Following issuance of the Compliance Orders, Joki took no steps to remove and regrade the exposed highwall (N.T. 34, 37, 39, 86, 87).

20. Joki acknowledged the lack of vegetation in this portion of SRP No. 689 (N.T. 156, 172).

21. DER reiterated its earlier warning that the bond would be forfeited in another letter and notice of violation dated September 5, 1984 from DER Compliance Specialist Robert Greybeck (Exhibit C-5(b)).

22. On March 20, 1985, after Joki still had not removed and regraded the portion of exposed highwall nor replanted the area, DER forfeited Surety Bond No. SM-319 (Exhibit C-5(c)).

23. At the time of the hearingon the merits, over four (4) years from the date the project was to have been completed, Joki had failed to restore and revegetate all of the 1.2 acres of SRP No. 689 (N.T. 34, 37, 38, 39, 156).

SRP No. 147-A

24. SRP No. 147-A was issued to Joki on July 13, 1977 and authorized Joki to conduct surface coal mining activities and reclamation activities on 4.6 acres of land in Union Township, Washington County (Exhibit C-7(a); N.T. 40).

25. Special Condition 4 to SRP No. 147-A required Joki to complete all coal removal and all reclamation within nine (9) months of July 13, 1977,

unless later amended (Exhibit C-7(a)).

26. Joki applied for and received two extensions of the time within which to complete all mining, excavation and reclamation on the project area, extending the project completion deadline to September 30, 1979 (Exhibit C-7(b) and C-7(c)).

27. With respect to, and as a condition of obtaining SRP No. 147-A, Joki submitted to DER Surety Bond No. 913-52-77 ("Surety Bond No. 913"), in the amount of $5,000.00, to guarantee compliance with SMCRA, the CSL, DER's regulations, and the terms and conditions of the permit (Exhibits C-7(a) and C-8).

28. Liability on Surety Bond No. 913 accrues in proportion to the acreage affected at a rate of $1,000.00 per acre or portion thereof, but further provides that in no case shall liability be for an amount less than $5,000.00 (Exhibit C-8).

29. Joki conducted mining activities, including backfilling and grading, on at least 3 of the 4.6 acres within the project area (N.T. 172).

30. As of Inspector Paxton's February 6, 1984 inspection of the site, Joki had not completed restoration of the project area (N.T. 46, 47, 48, 49).

31. During the February 6, 1984 inspection, Paxton observed that the project area was experiencing serious erosion problems, that there was evidence of sediment leaving the mine site, and that large gullies had formed on the southern portion of the project area (N.T. 49); some of the gullies were nearly five feet deep[2] and five feet across (N.T. 49).

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[2]The transcribed testimony of Inspector Paxton at page 49 reads that the erosion gullies occurring on the site were "50 feet deep". The Board believes footnote continued

32. On February 8, 1984, DER issued to Joki Compliance Order 84G039, which cited Joki for three violations: (1) failure to complete restoration of the project area within the specified time period; (2) failure to post an identification sign; and (3) failure to maintain erosion and sedimentation control measures, which violations were to be corrected by March 8, 1984 (Exhibit C-9; N.T. 46-47).

33. On March 16, 1984, Joki was issued a second Compliance Order 84G137 for failure to comply with the previous Compliance Order 84G039 (Exhibit C-10).

34. On September 7, 1984, DER sent Joki a notice of violation and notice of intent to forfeit the bond for SRP No. 147-A for Joki's failure to restore the project area within the prescribed time period and for failure to maintain adequate erosion and sedimentation control measures on the site (Exhibit C-11(a)).

35. On March 20, 1985, when Joki still failed to correct all the violations on the site, DER forfeited Surety Bond No. 913 (Exhibit C-11(b)).

36. Although Joki had done some work to partially fill one of the large diversion ditches on the site, as of Inspector Paxton's visit of May 19, 1986, two days prior to the hearing, there still remained approximately 50 feet of open diversion ditch, an open sediment trap, and several significant rills and gullies, some in excess of two feet deep (N.T. 51, 52, 54, 61, 104-05, 107, 108, 125, 126). Erosion and sedimentation problems had not been corrected (N.T. 52, 54, 61, 104-105).

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continued footnote
this is a typographical or transcription error and that Mr. Paxton's testimony was that the gullies were "5 feet deep".

37. At the hearing, Joki acknowledged that the project area had not been completely restored and that erosion gullies still existed on the project area (N.T. 144, 147, 173, 175) and that he had deliberately not performed the requested restoration work (N.T. 175).

38. Joki failed to restore the project area within the period prescribed in the permit, as amended (N.T. 53).

MP No. 102102-63800106-01-0 ("MP No. 01-0")

39. MP No. 01-0, issued March 10, 1981, authorized Joki to conduct surface mining on 13.4 acres in Union Township, Washington County (N.T. 64; Exhibit C-14).

40. With respect to, and as a condition of obtaining MP No. 01-0, Joki submitted to DER Surety Bond No. 374, in the amount of $24,000.00, to guarantee compliance with SMCRA, the CSL, the regulations thereunder, and the terms and conditions of the permit (Exhibit C-15).

41. Surety Bond No. 374 was non-proportional; liability thereon was for the face amount (Exhibit C-15).

42. Joki's mining activities on MP No. 01-0 affected at least six (6) of the 13.4 permitted acres (N.T. 152, 153).

43. At the time of Inspector Paxton's first visit to the site in August 1983 and up to the time of the hearing on the merits, the following conditions existed on portions of MP No. 01-0 affected by Joki:

(a) An exposed highwall approximately 70 feet in height and an unreclaimed open pit approximately 1200 feet in length (N.T. 65, 77, 78, 137).

(b) Piles of unreclaimed spoil material (N.T. 65, 72, 77, 123, 124, 137).

(c) Failure to perform backfilling, leveling or grading (N.T. 75, 137).

(d) Acid-bearing material and coal-related spoils which had not been segregated and which remained exposed to air and surface runoff (N.T. 73, 80; Exhibits C-20(h) and C-20(j)).

(e) Inadequate erosion and sedimentation controls along the spoil piles to collect and divert runoff (N.T. 73, 80, 81; Exhibit C-20(k)).

44. Joki was issued Abatement Order 83G39 on March 17, 1983 and Compliance Order 84G038 on February 7, 1984 in connection with the above-stated conditions (Exhibits C-16, C-17).

45. As of March 12, 1984, when the site was again inspected, Joki had not taken any steps to comply with the February 7, 1984 Compliance Order (N.T. 74, 75).

46. On March 16, 1984, DER issued Joki Compliance Order 84G139 citing him for failing to comply with its previous order and again ordering Joki to correct the conditions at the site (Exhibit C-18).

47. Joki was again advised of the violations at the site on September 5, 1984, when DER sent him a notice of violation and notice of intent to forfeit the bond covering the site if Joki continued to fail to comply with its orders (Exhibit C-5(b)).

48. Finally, on March 20, 1985, when Joki had not taken any steps to comply with the outstanding administrative orders or to otherwise reclaim the site, DER forfeited Surety Bond No. 374 (Exhibit C-5(c)).

49. Since the March 20, 1985 forfeiture of Surety Bond No. 374 up to the time of the hearing, Joki had not performed any reclamation work at the

site, nor taken any steps to comply with the outstanding administrative orders (N.T. 64-65, 73, 81, 137).

50. The above-stated conditions still existed at the time of the hearing (N.T. 81).

51. Joki acknowledged that he had failed to backfill and otherwise reclaim the affected acreage and further indicated that he purposefully had not completed the reclamation work (N.T. 151, 165).

DISCUSSION

Before the Board is a consolidated appeal by Joki of DER's forfeiture of three surety bonds posted in connection with Joki's mining operation. In bond forfeiture cases, the burden of proof rests with DER and requires that DER demonstrate by a preponderance of the evidence that forfeiture is justified. 25 Pa.Code §21.101; Rockwood Insurance Company v. DER, 1981 EHB 424; King Coal Company v. DER, 1985 EHB 104. According to §4(h) of SMCRA, 52 P.S. §1396.4(h), DER has the mandatory duty to forfeit a bond if the operator fails to comply with the reclamation requirements of SMCRA in any respect for which liability has been charged on the bond. Morcoal Coal Company v. Commonwealth, DER, 74 Pa.Cmwlth. 108, 459 A.2d 1303 (1983). In a mandatory forfeiture situation, the duty of the Board is to either uphold or vacate DER's action based on the evidence before it. Warren Sand and Gravel Company v. DER, 20 Pa.Cmwlth. 186, 341 A.2d 556 (1975). We review DER's decision to forfeit as of the date of forfeiture. Laurel Ridge, supra.

With respect to the three sites covered by the bonds in question, we conclude that none has been properly reclaimed as required by SMCRA, the CSL, DER's rules and regulations, and the terms and conditions of the permits.

SRP No. 689

Surety Bond No. SM-319, written by Fortune Assurance Company in the amount of $5,000, is conditioned upon the complete reclamation of the 1.2 acres covered by SRP No. 689. The bond is written to specifically guarantee compliance with SMCRA, the CSL, DER's regulations and the permit conditions.

The evidence shows that, at the time of forfeiture and the hearing, there existed on the project area a portion of a highwall and an unreclaimed and eroded area. (N.T. 36-37). Inspector Paxton identified Commonwealth Exhibit 6 as a photograph of the unreclaimed area and the remaining highwall. (N.T. 37-38). The photograph was taken on April 29, 1986, demonstrating that reclamation had not been performed although there had been two compliance orders issued in 1984, and finally the bond forfeiture in 1985. The existence of the highwall was also confirmed by Mining Specialist George Hartenstein of DER. (N.T. 134).

In his testimony, Joki admitted that there had not been complete reclamation and that 500 square feet of ground in this project area had no vegetation at the time of the hearing in May of 1986. (N.T. 156).

Joki's failure to remove and regrade the exposed highwall and to complete restoration and revegetation of the project area within the prescribed time period, and his continuing failure to do so, was a violation of the regulations, 25 Pa.Code §§87.141 and 87.147, as well as Standard Conditions 4 and 6 of SRP No. 689. His failure or refusal to comply with DER's February 8, 1984 and March 16, 1984 Compliance Orders constituted unlawful conduct under Section 18.6 of SMCRA, 52 P.S. §1396.24, and Section 611 of the CSL, 35 P.S. §691.611.

These violations constituted a breach of Joki's obligation under the bond and justify forfeiture thereof.

Since Surety Bond No. SM-319 is a non-proportional bond, the full amount of the bond is recoverable in the event of a breach of any obligation under the bond. Morcoal, supra. Therefore, DER was justified in forfeiting the entire amount of the bond.

SRP No. 147-A

This reclamation project involves Surety Bond No. 913, written by Fidelity and Deposit Company of Maryland in the amount of $5,000 and conditioned upon Joki's faithful performance of the requirements of SMCRA, the CSL, the regulations and permit conditions.

This site experienced severe erosion, rills and gullies, and a lack of sedimentation controls, sufficiently so that during a heavy rain the adjoining road (McShane) received runoff. (N.T. 49). Inspector Paxton described gullies on the property which were up to five feet wide and five feet deep.[3] (N.T. 49, 52). This was also confirmed by Mr. Hartenstein of DER. (N.T. 133-134).

The DER photographs (C-12(a)-(f)) taken in April of 1986, two years after issuance of the February and March 1984 Compliance Orders and more than a year after forfeiture of the bond, show an unreclaimed area with a deeply eroded ditch and banks and sedimentation on McShane Road. (N.T. 55-61). These conditions clearly constitute violations of 25 Pa.Code §§87.106 and 87.146 which require that rills and gullies be filled and graded and that adequate sedimentation control measures be maintained. This also constitutes

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[3]See explanation in Footnote two.

a violation of the terms of the permit which required total reclamation of the entire project area. Joki's failure to fully comply with the February 8, 1984 and March 16, 1984 Compliance Orders constituted unlawful conduct under Section 18.6 of SMCRA, 52 P.S. §1396.24, and Section 611 of the CSL, 35 P.S. §691.611. These violations justify forfeiture. As to the amount forfeited, we note that Surety Bond No. 913 is a proportional bond, meaning that liability accrues in proportion to the amount of the permitted area affected by mining activity. Laurel Ridge, supra. However, although liability accrues at the rate of $1,000 per acre, the bond states that in no case shall liability be for an amount less than $5,000. Therefore, DER was justified in forfeiting the entire bond in the amount of $5,000.

Mining Permit 102102-63800106-01-0 ("MP No.01-0")

Bond No. 374, written by Fortune Assurance Company in the amount of $24,000, is conditioned upon complete reclamation of the 13.4 acres covered by MP No. 01-0 and compliance with SMCRA, the CSL, the regulations, and the permit conditions.

DER Inspector Paxton testified that there had been no reclamation work done on this area, leaving an open pit 1200 feet in length, a highwall with a height of up to 70 feet, unreclaimed spoils, and no erosion control. (N.T. 65). This testimony was substantially confirmed by Joki himself, who, when asked if the property had been reclaimed, said, "No, it was never reclaimed...NOT AT ALL." (emphasis added) (N.T. 163). DER also introduced 11 photographs (C-20(a)-(k)) which most graphically show a high wall and pit which resemble a moonscape. Again, these pictures were taken in April of

1986, more than a year after the forfeiture of the bond, and more than two years after issuance of the March 17, 1983 Abatement Order and the February 8 and March 16, 1984 Compliance Orders. (N. T. 76)

Failure to reclaim within the prescribed time period constitutes a violation of Section 18.6 of SMCRA, 52 P.S. §1396.24; Section 611 of the CSL, 35 P.S. §691.611, and the terms of the permit. Furthermore, failure to backfill and grade and to maintain adequate erosion controls are violations of 25 Pa.Code §§87.141 and 87.106. These violations justify forfeiture of the bond.

As to the amount forfeited, liability on the bond is for the full amount. Since the bond is non-proportional, DER was justified in forfeiting the entire bond in the amount of $24,000.

CONCLUSIONS OF LAW

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

2. DER has the burden of proof in a bond forfeiture action. Rockwood Insurance Co. v. DER, 1981 EHB 424.

3. DER 's forfeiture actions were taken pursuant to Section 4(h) of SMCRA, 52 P.S. §1396.4(h), which states:

> 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. . . .

4. The language of Section 4(h) is mandatory; i.e., where DER proves any violation of SMCRA it has a duty to forfeit the permittee's bonds. Morcoal, 459 A.2d at 1308; Southwest Pennsylvania Natural Resources, Inc. v. DER, 1982 EHB 48, 52.

5. On the record before the Board, DER clearly presented uncontroverted evidence that Joki had violated the provisions of SMCRA, the CSL, 25 Pa. Code Chapter 87, and the permits on each of the three sites in question, and that said violations existed at the time of forfeiture.

6. The bonds which are the subject of this appeal are statutory bonds and, as such, are conditioned upon full and faithful compliance with all the requirements of SMCRA, the CSL and the regulations promulgated thereunder. American Casualty Co. of Reading v. Commonwealth, DER, 65 Pa.Cmwlth. 223, 441 A.2d 1383 (1982).

7. The failure of Joki to faithfully comply with the requirements of SMCRA, the CSL, the rules and regulations of DER, and the terms and conditions of the special reclamation and mining permits at the aforementioned mining sites is sufficient cause for DER to declare the bonds for said sites forfeited.

8. Since Bonds No. SM-319 and No. 374, covering SRP No. 689 and MP No. 01-0 respectively, are non-proportional, DER was justified in forfeiting the entire amount of the bonds. Morcoal, supra.

9. Since Bond No. 913, covering SRP No. 147-A, although proportional, states that liability thereon shall not be for less than $5,000, DER was justified in forfeiting the entire bond in the amount of $5,000.

O R D E R

AND NOW, this 30th day of October, 1990, it is ordered that:

1) The appeals of Russell W. Joki are dismissed;

2) DER's forfeiture of Surety Bond No. SM-319 posted for SRP No. 689 in the amount of $5,000 is sustained;

3) DER's forfeiture of Surety Bond No. 913-52-77 posted for SRP No. 147-A in the amount of $5,000 is sustained; and

4) DER's forfeiture of Surety Bond No. 374 posted for MP No. 102102-63800106-01-0 in the amount of $24,000 is sustained.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

Board Member Richard S. Ehmann has recused himself in this matter.

DATED: October 30, 1990

cc: **Bureau of Litigation**
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Western Region
For Appellant:
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Pittsburgh, PA

rm

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717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

COUNTY OF SCHUYLKILL, et al.	:	
v.	:	**EHB Docket No. 90-124-W**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
CITY OF LEBANON AUTHORITY, Permittee	:	**Issued:** October 31, 1990

OPINION AND ORDER
SUR MOTION TO LIMIT ISSUES

By Maxine Woelfling, Chairman

Synopsis

Where permittee's motion to limit issues seeks to preclude an appellant's assertion of a contention which the appellant never raised, there is no basis for the motion, and it must be denied.

OPINION

This matter was initiated with the March 22, 1990, filing of a notice of appeal by the County of Schuylkill (County), seeking review of the Department of Environmental Resources' (Department) February 23, 1990, Report of Decision reissuing a permit for the Christian E. Siegrist Dam (Dam) to the City of Lebanon Authority (Lebanon) pursuant to the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 et seq. (DSEA). In its appeal, the County argued that the Department abused its discretion and acted arbitrarily, capriciously and in

violation of the law by ignoring the Board's directives for re-evaluating the permit on remand set forth in County of Schuylkill v. DER, 1989 EHB 1241 (County of Schuylkill I).

On July 9, 1990, Lebanon filed a motion to limit issues, seeking to preclude the County from asserting that the Department was required on remand to find that the Dam would harm coal mining or other upstream development.

On August 1, 1990, the County responded to the motion, arguing that Lebanon had mischaracterized the County's pre-hearing memorandum and had a fundamental misunderstanding of the nature of the appeal. The County asserted that the appropriate issue is whether the Department complied with the Board's remand order to analyze the scope and impact of the Dam from an economic/regulatory perspective, balancing the impact against the benefits of the Dam in light of reasonably available alternatives.

A motion *in limine* is a pre-trial motion designed to exclude evidence which is potentially inflammatory, prejudicial, without probative value, or irrelevant, Iannelli and Iannelli, Trial Handbook for Pennsylvania Lawyers, §2.15 (2d ed. 1990). The judge has wide discretion to make or refuse to make advance rulings, Cleary, McCormick on Evidence §52 (3d ed. 1984). For the reasons which follow, we will deny Lebanon's motion.

In deciding this motion we must first examine the relevant language in County of Schuylkill I. The section of the adjudication entitled "Evaluation of the Project's Impact on Land Uses in the Watershed," 1989 EHB at 1277-1281, concluded by stating that the Department's assessment was not consistent with the Board's analysis of the controlling regulations, and that no evaluation of mineral reserves or the potential for development of mineral resources in the watershed, from both an economic and a regulatory perspective, was performed. The Board also noted its concern over the Department's evaluation of the public, economic and social benefits of the

project under 25 Pa.Code §105.16(a) in light of the significant impact of the project on natural resources in the watershed. This language was to guide the Department in performing its analysis on remand, and it is this language to which the County refered in its pre-hearing memorandum.

Repeatedly and throughout its pre-hearing memorandum, the County reiterated that the Department ignored the Board's directives and failed to examine ways to reduce the harm of the Dam. Clearly, these were proper issues for the County to raise in its appeal. Furthermore, in its response to the motion to limit issues, the County admited that it is not asserting that the Department is "required" by the Board's remand to find that the proposed project will "harm coal mining." (Response, at p. 2). Rather, the County argues that its appeal is based upon the Department's failure to perform the analysis mandated by the Board on remand.

Because we are unable to conclude that the County made the assertion that the Department was required to find that the Dam would harm coal mining, there is no basis for precluding this as an issue, George W. Yeagle v. DER, EHB Docket No. 89-086-F (Opinion issued June 19, 1990). Consequently, the motion is denied.

O R D E R

AND NOW, this 31st day of October, 1990, it is ordered that the City of Lebanon Authority's motion to limit issues in this appeal is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: October 31, 1990

cc: **Bureau of Litigation**
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TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

JAMES HANSLOVAN, et al.	:	
	:	
v.	:	**EHB Docket No. 90-076-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: November 1, 1990**
and CLOE MINING COMPANY, INC., Permittee	:	

OPINION AND ORDER SUR
MOTION TO DISMISS APPEAL

By Robert D. Myers, Member

Synopsis

A Motion to Dismiss consolidated appeals for lack of jurisdiction, because the appellants did not file written objections to a surface mining permit application within 30 days after the local advertisement was published, will be denied when one of the grounds for appeal is the failure to publish the local advertisement in accordance with law and the regulations.

OPINION

These consolidated appeals seek review of the February 9, 1990 issuance by the Department of Environmental Resources (DER) of Surface Mining Permit (SMP) No. 17890118 to Cloe Mining Company, Permittee, for the Schindley No. 1 Mine in Brady Township, Clearfield County. The appeal originally docketed at 90-076 is concerned primarily with the legal sufficiency of the local advertisement required by 25 Pa. Code §86.31(a). The appeal originally docketed at 90-106 raises, in addition to the local advertisement issue, a number of environmental concerns. The appeals were consolidated, at the

request of the Permittee, on May 4, 1990.

On May 11, 1990 the Permittee filed a Motion to Dismiss the consolidated appeals for lack of jurisdiction. The Appellants filed their Response on May 16, 1990. In its Motion, the Permittee alleges that (1) its local advertisement was completed on September 6, 1989, and (2) Appellants did not file written objections until January 8, 1990, well beyond the period allowed. As a result, Appellants waived their standing to file an appeal to this Board.

While the Permittee makes no reference to the Surface Mining Conservation and Reclamation Act (SMCRA), the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq., its Motion is based upon §4(b), 52 P.S. §1396.4(b), which provides in pertinent parts, as follows:

> The applicant shall give public notice of every application for a permit or a bond release under this act in a newspaper of general circulation, published in the locality where the permit is applied for, once a week for four consecutive weeks. The department shall prescribe such requirements regarding public notice and public hearings on permit applications and bond releases as it deems appropriate . . . . Any person having an interest which is or may be adversely affected by any action of the department under this section may proceed to lodge an appeal with the Environmental Hearing Board in the manner provided by law . . . . In all cases involving surface coal mining operations, any person having an interest which is or may be adversely affected shall have the right to file written objections to the proposed permit application or bond release within thirty (30) days after the last publication of the above notice which shall conclude the public comment period. Such objections shall immediately be transmitted to the applicant by the department. If written objections are filed and an informal conference or a public hearing requested within the public comment period, the department shall then hold an informal conference or a public hearing in the locality of the surface mining operation . . . . In the case of permit applications, such hearings or conferences shall be conducted within sixty (60) days of the close of the public comment period.

> The department, within sixty (60) days of such hearing or conference, shall notify the applicant of its decision to approve or disapprove or of its intent to disapprove subject to the submission of additional information to resolve deficiencies. If there has been no informal conference or hearing, the department shall notify the applicant for a permit, within a reasonable time not to exceed sixty (60) days of the close of the public comment period, of the deficiencies in the application or whether the application has been approved or disapproved. The applicant, operator, or any person having an interest which is or may be adversely affected by an action of the department to grant or deny a permit or to release or deny release of a bond and who participated in the informal hearing held pursuant to this subsection or filed written objections before the close of the public comment period, may proceed to lodge an appeal with the Environmental Hearing Board in the manner presented by law . . . .

Regulations implementing these provisions with respect to permit applications are found at 25 Pa. Code Chapter 86, Subchapter B.

The Permittee obviously interprets the quoted language of §4(b) to restrict standing to appeal to those persons who filed written objections to the application within 30 days after the last publication of the local advertisement. Since Appellants did not file their written objections during this period, they have no standing to appeal (in the Permittee's view). Even if we accept the Permittee's interpretation of §4(b), and we have grave doubts about its validity, we fail to understand its applicability to a proceeding like this where the Appellants' complaint is that the local advertisement was improperly published. How can any appellant be deemed to have waived his standing to appeal if he never received the notice required by §4(b)? The answer is obvious and requires no further discussion.

ORDER

AND NOW, this 1st day of November, 1990, it is ordered as follows:

1. The Motion to Dismiss Appeal, filed by the Permittee on May 11, 1990, is denied.

2. Discovery shall be completed on or before November 15, 1990.

3. The parties may supplement their pre-hearing memoranda on or before November 30, 1990.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: November 1, 1990

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

DAVIS COAL	:	
	:	
v.	:	**EHB Docket No. 90-351-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: November 5, 1990**

OPINION AND ORDER
SUR MOTION TO DISMISS

By Joseph N. Mack, Member

Synopsis

An appeal will be dismissed where it is filed with the Board beyond the statutory period established by 25 Pa.Code §21.52(a).

OPINION

This appeal was filed with the Board by Davis Coal (Davis) on August 20, 1990. The appeal is from Compliance Order No. 90G221, mailed by the Department of Environmental Resources (DER or Department) to Davis on July 9, 1990. The Compliance Order was sent by certified mail, return receipt requested. Although it is not clear on the Board's copy of the return receipt as to whether the date of receipt marked thereon is "7-10-90" or "7-18-90", Davis' Notice of Appeal states that the Compliance Order was received on July 18, 1990, and DER has not disputed this. The records of the Board further indicate that Davis' appeal was not received by the Board until August 20, 1990.

On September 17, 1990, the Department filed a Motion to Dismiss, alleging the above facts, and particularly the service of the Compliance Order and the date of receipt of same. The Department argues that the failure of Davis to file its appeal within the 30-day period following receipt of the Compliance Order deprives the Board of jurisdiction over the appeal by virtue of the language of 25 Pa.Code §21.52(a). Bison Coal Company v. DER, 1989 EHB 358. DER also points out that the receipt of the appeal by the Board is the determinative date to establish timeliness of the appeal. Roaring Brook Township v. DER, 1988 EHB 672.

The appellant was notified of the Motion to Dismiss on September 20, 1990 and given an opportunity to respond. Davis' response consisted of a letter from its proprietor, June Davis. The letter informed the Board that the Compliance Order had been signed for, not by June Davis, but by a member of the Davis family, and that the appeal had been mailed to the Board on the 16th of August. Davis requested the Board to consider the fact that a weekend intervened between the 16th and the 20th, the date of receipt by the Board.

The language of 25 Pa.Code §21.52(a) is clear. The Board has no jurisdiction to hear appeals filed after the 30-day statutory period, Commonwealth v. Joseph Rostosky, 26 Pa.Cmwlth. 478, 364 A.2d 761 (1976), even by one day, The Arcadia Company, Inc. v. DER, 1987 EHB 995. The 30-day period in which Davis could have filed its appeal expired on August 17, 1990, a Friday. Therefore, Davis' request that we consider the fact that a weekend intervened between August 16, 1990, when it mailed the notice of appeal, and August 20, 1990, when it was received by the Board, has no merit.

As for Davis'contention that the Compliance Order was signed for by a member of the Davis family, rather than June Davis, there is no indication

that this interfered with Davis' receipt thereof. Moreover, the Notice of Appeal clearly states that the Compliance Order was received by Davis on July 18, 1990. Regardless of who may have signed for the Compliance Order, the Board must be guided, and Davis must be bound, by the plain language of the Notice of Appeal. Kayal v. DER, 1987 EHB 809, 811; Borough of Lilly v. DER, 1987 EHB 972, 973.

Finally, Davis has not requested consideration of its appeal as an appeal nunc pro tunc nor indicated any basis for such a request. Given these circumstances, we must grant DER's Motion to Dismiss.

O R D E R

AND NOW, this 5th day of November, 1990, DER's Motion to Dismiss is granted and the appeal of Davis Coal at Docket No. 90-351-MJ is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
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Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: November 5, 1990

cc: **Bureau of Litigation**
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June C. Davis
Davis Coal
Ford City, PA

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M. DIANE SMITH
SECRETARY TO THE BOARD

KERRY COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 90-425-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: November 5, 1990**

OPINION AND ORDER
SUR
PETITION FOR SUPERSEDEAS

By: Richard E. Ehmann, Member

Synopsis

A Petition For Supersedeas is denied in a case where the Department of Environmental Resources ("DER") issued an Order to Kerry Coal Company ("Kerry") to drawdown one of the sedimentation ponds at its mine site so that DER could investigate whether Kerry had constructed a subsurface pipe or pipes to convey mine drainage into this pond at a point below the pond's surface from a location on the mine site where such drainage had been previously found. The Petition is denied because Kerry has failed to show a likelihood of success on the merits of its appeal.

OPINION

Kerry is the operator of a surface coal mine in South Beaver Township, Beaver County, known as the "Denardo" Strip Mine. The surface property rights for the mine site are owned by Vernon Y. Kerry (Mr. Kerry) and his brother,

Gail C. Kerry. Mr. Vernon Y. Kerry is also president of Kerry. Kerry's mining operation is conducted pursuant to Surface Mining Permit No. 23006 and Bonding Increment Approval and Authorization To Conduct Surface Mining Activities Nos. 100041-04823006-01 through 100041-04823006-07. Paragraph No. 4 of Kerry's Surface Mining Permit provides in part: "Any modifications to wastewater treatment facilities and erosion and sedimentation control facilities necessary to meet the terms and conditions of this permit require prior written approval."

During the course of mining this site, Kerry mined from the coal cropline into the hillside, with each successive cut being south of the prior cut and with the cuts running east to west. According to Mr. Kerry, this tract was formerly a farm on which, below the cropline and north of the mined area, were located both a silo and an abandoned farm house. More or less adjacent to this house, on a drawing prepared at the hearing by Mr. Kerry, is Kerry Sedimentation Pond H. ("Pond H") The pond is 13 feet deep and one acre in size. If one were to travel from these points south toward the first strip cut, one would go up-hill past two treatment ponds and then past a series of connected topsoil storage piles.

In the area where the southern edge of the topsoil storage piles and the first strip cut meet, John Davidson, a mine conservation inspector for DER, found discharges of mine drainage onto the surface of the area which were about 250 feet apart. These discharges, found in the course of his monthly inspections of the mine in May and June of 1989, were sampled by Davidson. Once surfacing, they flowed on the surface to Pond H, which discharges into Brush Creek, with one of them flowing through a treatment pond before reaching Pond H. DER analysis of Davidson's samples of these two surface discharges

shows they are higher in iron and manganese than is authorized by DER's standards for those pollutants in mine waters to be discharged from the mine site. At the time these seeps were observed by Davidson, Kerry had not completed reclamation of this portion of the mine site, but it had rough backfilled the first, second, and third strip cuts on this phase of its mine site. When Davidson returned in July of 1989 to inspect the mine, the area where the seeps were located was changed. It had been final graded by Kerry and topsoil had been spread on it. The seeps, which had had a combined flow estimated to be of 8 gallons per minute during Davidson's prior inspection, had completely disappeared. Davidson, who had worked 15 years as a water quality inspector for DER before becoming a mine conservation inspector in 1980 and who had been a mine conservation inspector for 10 years, stated it was highly unusual for seeps of this size to dry up completely in only a couple of weeks. DER did not issue Kerry either a Notice of Violation or an Administrative Order in connection with these seeps.

Davidson is also DER's inspector at Kerry's McKee strip mine located between 10 and 12 linear miles away from the Denardo site in Big Beaver Borough, Beaver County. While inspecting the McKee site during the period of Kerry's mining activity there, Davidson discovered two locations near Sedimentation Pond B on the mine site which were discharging acid mine drainage onto the site's surface. The area in which the discharges were located was approximately 200 feet from Sedimentation Pond A ("Pond A"). When Davidson returned to the site the next month, the discharge area, Sedimentation Pond B, and the adjacent area had been final graded and topsoiled by Kerry, and the discharges had disappeared.

Davidson returned to the McKee mine site for a subsequent inspection on June 21, 1990, and he went to the location where he had previously found the discharges. At this time, he found two V-shaped depressions one of which started near the former location of Sedimentation Pond B. When the two depressions came together another V-shaped depression in the reclaimed area ran downhill toward Sedimentation Pond A. Davidson had not observed any such depressions being present during previous inspections. He followed it downhill to the edge of Pond A, where he found a 4 inch diameter flexible plastic pipe which entered Pond A at a depth of 12 to 18 inches below the surface. This pipe's discharge was sampled and was found to be acid mine drainage. Noticing some "iron staining" of the water in another location in this pond, Davidson discovered a 6 inch plastic pipe at that location also discharging acid mine drainage to this pond. This pipe was also buried so that it discharged at a depth of 2 to 3 feet below the surface of the pond. Neither pipe arrangement was previously approved by DER and there is no evidence offered by Kerry at the hearing to show that DER approved the use of Sediment Pond A for mine drainage treatment. Rather, on August 24, 1990, DER issued Kerry Compliance Order No. 90 G 281, which directed Kerry to submit a plan and schedule for providing acceptable treatment of these piped-in discharges. Kerry's proposal in this regard is currently under review by DER. DER's second compliance order to Kerry identified at the hearing is No. 90 G 293. It is dated September 1, 1990, and directs Kerry to treat the discharge from Pond A to meet the effluent limitations in both its permit and 25 Pa. Code §87.102.

This condition at the McKee site relates to the Denardo site because when Davidson reinspected the Denardo site in March of 1990, he observed a linear

depression not dissimilar to that at the McKee site. This linear depression at the Denardo site runs in a straight line from the location of the previously observed seeps at the edge of Kerry's first strip cut directly toward the edge of Pond H. While this linear depression does not cover the entire distance from the seep area to the pond, Davidson says it is clearly discernible for a distance of 20 to 25 feet. The photographs of it offered at the hearing by DER confirm Davidson's suggestion that it looks like the kind of settling which might occur if one had dug up the ground at this location and buried a pipe in a fashion similar to what occurred at the McKee mine.

In its Petition, Kerry raises a shopping list of issues which must be considered against this factual background. It argues that because Pond H is to remain as a permanent post-mining impoundment and is stocked with fish, a drawdown will destroy a fish habitat and will kill fish, subjecting Kerry to criminal and civil penalties. Further, Kerry's Petition states DER's order only gives it one day to comply with the Order. Kerry says its pond's discharge to Brush Run has never been cited by DER, and by its permit, it is required by DER to maintain a 12 to 1 dilution ratio of its discharge to the flow of this Run. Kerry then argues compliance with the Order will force Kerry to modify the pond's dam, which will subject Kerry to criminal and civil penalties under a DER administered statute. Kerry also asserts compliance may cause a pollutional discharge to occur because of the loss of the dilution factor. Next, Kerry says DER's Order is an unconstitutional attempt by DER to conduct a warrantless inspection of Kerry's property and that the Order is an invasion by DER of Kerry's constitutional right against self-incrimination. Kerry urges that compliance with the Order in the time limits set by DER is impossible, thus making the order arbitrary and capricious. Kerry also argues

it will be irreparably harmed (1) by incurring the cost of compliance and of providing interim treatment of the discharge; (2) by DER ceasing to issue further permits to Kerry because of Kerry's alleged "violation" of this Order, thus stopping its operations; (3) by being fined for non-compliance with the Order[1]; and (4) "The time until the hearing is scheduled will be in excess of one (1) year and everything will be held in abeyance until then". Kerry asserts that DER lacks authority to order a mine operator to commit any violations of law and that mere suspicion of a violation of law does not authorize DER to issue an order to dewater this pond.[2] Finally, Kerry also avers no injury to the public or other private citizens and it is likely to prevail on the merits.

Because we believe that if DER's Order is unconstitutional this ends the entire matter, we will address these Kerry arguments first. Kerry asserts that the Order is a violation of its Fifth Amendment right against self-incrimination guaranteed to it in this state proceeding by the Fourteenth Amendment (both of the United States Constitution). DER responds thereto by correctly pointing us to Commonwealth v. L.E. Wilson, Inc., 458 Pa. 470, 328 A.2d 502 (1974). See also United States v. Kordel, 397 U.S. 1, 90 S.Ct. 763, 25 L.Ed.1 (1970). Both of these cases make it clear that since it is Kerry which is asserting these rights, this argument is meritless. These cases both hold that corporations have no Fifth Amendment rights. No appeal was filed on

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[1]Mr. Kerry testified that his company is complying with the Order (by beginning to drawdown the pond) while awaiting a decision on its Petition For Supersedeas.

[2]Kerry also incorporates by reference its objections to the Order set forth in its Notice of Appeal, but they raise no issues not already covered by Kerry's Petition.

behalf of Mr. Kerry as an individual, so we need not address the issue of his rights and any waiver thereof which might have resulted through his written consent, as landowner, to DER's inspection and studying of this mine site set forth in his signed Consent of Landowner form introduced by DER as an Exhibit at the hearing on this Petition. (Comm. Exh. 2)

In response to Kerry's argument that DER's Order forces a warrantless inspection contrary to Kerry's rights under the Fourth Amendment of the United States Constitution, as applied in Commonwealth v. Lutz, 512 Pa. 192, 516 A.2d 339 (1986), DER argues Lutz, supra, is no longer the law in Pennsylvania, and it cites us to Commonwealth, DER v. Blosinski Disposal Service, ___ Pa. ___, 556 A.2d 845 (1989). Blosinski, supra, points out that the United States Supreme Court in Commonwealth v. Lutz, 480 U.S. 927, 107 S.Ct. 1560, 94 L.Ed. 2d 754 (1987) vacated the judgment and remanded this case to the Pennsylvania Supreme Court in light of U.S. v. Dunn, 480 U.S. 294, 107 S.Ct. 1134, 94 L.Ed. 2d 326 (1987). In turn, the Pennsylvania Supreme Court remanded this case to the trial judge. See Commonwealth v. Lutz, 517 Pa. 481, 538 A.2d 872 (1988). Blosinski, supra, concludes that Lutz, supra, is no longer good law and that, at least under the Solid Waste Management Act, 35 P.S. §6018.101 et seq., warrantless inspections of a solid waste transfer station were constitutionally valid. Having reread Lutz, supra, Dunn, supra, and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended 35 P.S.§691.1 (specifically including its Title, declaration of policy in Section 4 (35 P.S. §691.4) and the powers and duties delegated to DER by Section 5 (35 P.S. §691.5)), it appears to us that Kerry could not have the same reasonable expectation of privacy on the site of Denardo strip mine as Vernon Kerry, individually, might have as to his own home, and that warrantless inspections

of the mine site under this statute can occur without violation of the Fourth Amendment. The same review with regard to these opinions and the Surface Mining Conservation and Reclamation Act, the Act of May 21, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. (specifically including its Statement of Purpose (52 P.S. §1396.1), section on general rule making (52 P.S. §1396.4(b)) and section empowering DER to inspect surface mines (52 P.S. §1396.4(c))) leads us to conclude that warrantless inspections under this act are not constitutionally infirm for violating the Fourth Amendment.

As pointed out in DER's response to Kerry's Petition, DER's Order, dated September 28, 1990, provides that by October 2, 1990, Kerry is to begin dewatering the Pond H and to continue same until DER tells Kerry to cease dewatering. Nothing in the order says that Kerry must complete dewatering the pond in one day, or must breach or modify the pond's dam, or must dewater faster than the 12:1 dilution rates in its permit.

A portion of Vernon Kerry's testimony was to the effect that every morning, one of the company's employees from a nearby mine site comes to the Denardo job, checks the volume of flow in Brush Run, and then opens or closes the pond's dewatering valve as needed to adjust the pond's rate of discharge to the flow in Brush Run (to maintain a 12:1 ratio). This suggests that compliance costs are minimal. The result is dewatering without violation of the laws as to dams or the dilution ratio. It is clear from the pleadings, DER's Order and the evidence that compliance with DER's order does not require Kerry to empty the pond in one day, but allows dewatering in the fashion that Kerry is doing it.

With regard to Kerry's argument as to killing fish, DER called Mr. Tom Qualters, the regional director of the Pennsylvania Fish Commission. He

testified that his organization requires Kerry to secure a permit from it to draw the pond down, but the application form is one page and the turnaround time for its review is normally only one day. Qualters further testified that the Fish Commission is not concerned about a limited drawdown in the depth of the pond as long as the fish survive, and that the only fish they worry about are game fish such as bass. Further, he said it would not even be a violation of law if, assuming game fish must be removed from this pond, some of them were to die in transit to the site where they were to be set free. Finally, this witness said there was no fee for his agency's permits. Evidence offered by DER shows that Kerry has secured at least one such permit from the Fish Commission as recently as 1989.

Accordingly, we have no showing by Kerry of violation of the Fish and Boat Code, 30 Pa.C.S. §101 et seq. or a likelihood thereof. We also have no evidence of a possible violation of the Dam Safety and Encroachment Act, Act of November 26, 1978, P.L. 1375, No. 325, as amended, 32 P.S. §693.1 et seq., contrary to Kerry's assertion in its Petition.[3]

With these issues behind us, we turn to the rules governing the granting of supersedeas. In ruling on such a petition, the Board will consider the following factors:

1) irreparable injury to the petitioner,

2) the likelihood of the petitioner's prevailing on the merits, and

3) the likelihood of injury to the public.

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[3]At the close of the hearing on Kerry's Petition, its counsel was asked if he wished to submit any further legal memorandum or brief to support the petition and the evidence and he advised us that Kerry did not wish to do so.

25 Pa. Code §21.78(a). In addition, a supersedeas will not be issued in cases where a nuisance exists, significant pollution can occur, or other hazard to public health exists or is threatened while the supersedeas is in effect. 25 Pa. Code §21.78(b). The petitioner bears the burden of demonstrating that the standards for granting a supersedeas have been met. Lower Providence Township v. DER, 1986 EHB 395; Leech Tool and Die Works, Inc. v. DER, 1989 EHB 177.

Reviewing these factors in terms of the present case, we keep in mind that DER's Order does not aver any discharges from the mine site and does not find that Kerry either has caused any discharges of mine drainage to occur or has hidden them from DER. The Order only seeks limited cooperation from Kerry, i.e., the drawdown of one pond for purposes of DER conducting an investigation. The investigation may show nothing improper occurred, in which case Kerry has no further liability under either the Clean Streams Law, supra, or the Surface Mining Conservation and Reclamation Act, supra, vis a vis this Order. That determination awaits completion of this investigation.

The issue for us at this point, in light of the inspection rights granted DER under these statutes and in Kerry's permit (Condition 8 of Comm. Exh. 9), is whether there is a reasonable basis for DER's order directing a drawdown of Sed Pond H. On this question, Kerry has not shown any likelihood of success on the merits. Indeed, though more evidence on this point may come in at the hearing on the merits of this appeal, evidence placed before us in the hearing on Kerry's Petition suggests DER's desire for a further investigation is not unreasonable considering what occurred at the McKee mine, the conditions at the Denardo mine, and Vernon Kerry's stated belief that Kerry could change its water control facilities whenever it wanted without prior notice or approval from DER. Moreover, DER appears to have ample authority to issue this Order

under Section 5 of the Clean Streams Law (35 P.S. §691.5) and Section 4(c) of the Surface Mining Conservation and Reclamation Act, (52 P.S. §1396.4(c)) supra.

In short, since Kerry has not shown DER abused its discretion by issuing this Order, it cannot be said Kerry has shown us it is likely to prevail on the merits. Since it did not do so, we need not consider whether Kerry will suffer irreparable harm or whether the public is likely to suffer injury if supersedeas is denied. Ralph Bloom, Jr., v. DER, 1984 EHB 685; Leech Tool and Die Works, Inc., supra.[4]

O R D E R

AND NOW, this 5th day of November, 1990, it is ordered that the petition for supersedeas filed by Kerry Coal Company is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: November 5, 1990

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[4]It appears that had we considered the irreparable harm issue, Kerry has not shown it will suffer irreparable harm, either.

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M. DIANE SMITH
SECRETARY TO THE BOAR

COUNTY OF SCHUYLKILL, et al.	:	**EHB Docket No. 90-124-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and CITY OF LEBANON AUTHORITY, Permittee	:	**Issued:** November 6, 1990

OPINION AND ORDER SUR
COUNTY OF SCHUYLKILL'S
MOTION FOR SUMMARY JUDGMENT

By Maxine Woelfling, Chairman

Synopsis

A motion for summary judgment is denied where the moving party fails to properly support it by affidavits or depositions, answers to interrogatories, admissions, or other material of record before the Board. Representations in legal memoranda or exhibits attached to legal memoranda cannot properly form the basis for grant of a motion for summary judgment.

OPINION

This matter was initiated with the March 22, 1990, filing of a notice of appeal by the County of Schuylkill (County), seeking review of the Department of Environmental Resources' (Department) February 23, 1990, Report of Decision reissuing a permit for the construction and operation of the Christian E. Siegrist Dam (Dam) to the City of Lebanon Authority (Lebanon) pursuant to the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 *et seq.* (DSEA). In its appeal, the County argued that the Department abused its discretion and acted

arbitrarily, capriciously and in violation of the law by ignoring the Board's directives for re-evaluating the permit on remand set forth in County of Schuylkill v. DER, 1989 EHB 1241 (Schuylkill I).

Lebanon filed a motion to limit issues on July 9, 1990, requesting the Board to enter an order precluding the County from asserting that the Department was required to find that the Dam would harm coal mining or upstream development. That motion was denied in an opinion and order of October 31, 1990, for the reason that the County never asserted this issue.

On August 24, 1990, the County filed a motion for summary judgment, arguing that the Board's directive on remand, 25 Pa.Code §105.16, and Article 1, §27 of the Pennsylvania Constitution required the Department to first evaluate mitigation measures to the Dam and, absent any possible measure that would eliminate the harm, to perform a balancing evaluation of the benefits of the project versus the harm or impact that would result. The County maintains that the Department failed to make either of these evaluations, citing the Report of Decision and the Environmental Assessment Supplement, and it requests the Board to remand the permit in order for the Department to perform the analyses.

Lebanon filed its response to the motion on September 14, 1990, alleging that the motion contains no factual grounds for determining whether the Department's action in reissuing the permit complied with the law as interpreted in the Board's adjudication in Schuylkill I. Lebanon also argues that the documents of record provide ample support for the Department's conclusions regarding upstream development and benefits of the project.[1]

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[1] Lebanon also filed a motion for summary judgment on October 16, 1990. The Board, on October 19, 1990, denied the motion as untimely pursuant to footnote continued

On September 24, 1990, the County filed its reply brief, alleging that although the parties have conflicting interpretations of the facts and opposing legal arguments, the facts are a matter of record, undisputed, and, therefore, ripe for adjudication.[2] The County contends the parties should not be required to argue the issue of the impact of the project, since that has already been decided.

The Board may grant summary judgment only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Pa.R.C.P. No. 1035(b). The evidence is to be viewed in a light most favorable to the non-moving party. Robert C. Penoyer v. DER, 1987 EHB 131; Ingram Coal Co. v. DER, EHB Docket No. 88-291-F (Opinion issued April 17, 1990). In

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continued footnote
Pa.R.C.P. No. 1035(a), since a hearing on the merits in this matter is scheduled for November 13-15, 1990. Lebanon petitioned the Board to reconsider its order on October 23, 1990, and the Board denied the petition in an October 29, 1990, order. Motions for summary judgment must be filed at least 60 days prior to a hearing to allow opposing parties to respond and to enable the Board to prepare an opinion and, if necessary, in the case of an opinion granting the motion, circulate the draft opinion among the Board Members.

[2] Lebanon makes a similar argument in its motion for summary judgment which was denied. Both parties seem to equate what they term "the record" in this matter with "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any..." under Pa.R.C.P. No. 1035(b). That simply is not the case. Furthermore, the parties appear to assume that because a document was considered by the Department in reaching its decision and, hence, is part of the Department's administrative record, that the document automatically becomes part of the record before the Board.

passing upon a motion for summary judgment, a trial court is simply to determine whether there are triable issues of fact and not to decide any issues of fact.[3]

Motions for summary judgment are to set forth, with adequate particularity, the reasons to support the motion. This is so because representations in legal memoranda or exhibits attached to those memoranda cannot form the basis for a grant of summary judgment. Laspino v. Rizzo, 40 Pa.Cmwlth 625, 398 A.2d 1069 (1979). To the extent the motion relies on pleadings, depositions, answers to interrogatories, and admissions already on file and part of the record of the case, such material can be incorporated by reference in the motion. See Goodrich-Amram 2d §1035(a)(4) (p.428). If affidavits are to be used to supplement the matter already of record, they should be attached to the motion or filed of record simultaneously with it. Commonwealth v. Diamond Shamrock Chemical Co., 38 Pa.Cmwlth 89, 391 A.2d 1333 (1978). Affidavits are often critical to motions for summary judgment because they are used as means to put forth documentary evidence not already a part of the pleadings, answers to interrogatories, admissions, and depositions. See Goodrich-Amram 2d §1035(d):3(p.457).

It is not necessary to deal with the merits of the County's motion, for it is insufficient in light of the requirements of Pa.R.C.P. No. 1035. The County's motion consists of two numbered paragraphs and a request for relief. The two numbered paragraphs do not incorporate the notice of appeal or discovery materials filed with the Board, nor is there an affidavit attached to the motion. There are exhibits attached to the brief in support

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[3] The Courts have routinely admonished litigants on this point, noting large numbers of cases where time and effort are expended on useless motions for summary judgment. See Goodrich-Amram 2d §1035(b):7.

of the motion, but, among other things, we cannot consider the factual assertions therein because they were not part of the County's motion. The affidavit attached to the brief, which is improper under Pa.R.C.P. No. 1035, is also deficient for the reason that it is nothing more than a verification that the exhibits attached to the brief are true and correct copies. These deficiencies alone are grounds for denying the motion, Arthur Richards Jr. v. DER, EHB Docket No. 89-362-E (Opinion issued April 10, 1990).

One final issue merits attention. Both Lebanon and the County contend that the relevant facts are not disputed. While that may be so, they both dispute the inferences to be drawn from those facts, and, as such, the matter is not appropriate for disposition by summary judgment, Helinek v. Helinek, 337 Pa.Super. 497, 487 A.2d 369 (1985). Indeed, it appears from the motions of the parties that what they may be suggesting is, in essence, to have the Board adjudicate the appeal on a stipulated record. If that is the case, they should file the appropriate motion.

O R D E R

AND NOW, this 6th day of November, 1990, it is ordered that the County of Schuylkill's motion for summary judgment is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: November 6, 1990

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M. DIANE SMITH
SECRETARY TO THE BOARD

COALITION OF RELIGIOUS AND CIVIC ORGANIZATIONS, INC. (CORCO), et al.	:	**EHB Docket No. 90-128-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and PFIZER PIGMENTS, INC., Permittee	:	**Issued:** November 7, 1990

OPINION AND ORDER
SUR MOTION FOR SANCTIONS

By Maxine Woelfling, Chairman

Synopsis

Appellants' motion for sanctions is denied to the extent it requests expenses and counsel fees; the party resisting discovery must refuse to obey an order to compel before the Board may consider granting these sanctions. However, to the extent appellants request the Board to compel a permittee to respond to certain requests for documents and inspection, the Board will grant the motion, since the information sought is properly discoverable.

For a party to resist discovery on the basis that a request for documents is overbroad or unduly burdensome, the party must submit affidavits or offer evidence to show why the request has this effect; an unsupported assertion alone is not sufficient. Failure to include the time, place, and manner in a request for inspection does not, in itself, make the request intrusive or unduly burdensome.

The mere fact that a party requesting discovery has another means of access to the information sought does not necessarily mean that the request is not calculated to lead to the discovery of admissible evidence, since discovery is not barred simply because the party seeking discovery already has the information.

Objections to discovery based on relevance are inappropriate where the facts of the case indicate that the information sought is, in fact, relevant. Objections to a request for documents and inspection are waived if not made within 30 days of receiving the request. Finally, a motion for sanctions filed after the close of the discovery period does not violate the discovery schedule where there was no undue delay in filing the motion and the motion was filed soon enough after the close of the discovery period so that it would not delay the hearing.

OPINION

This matter was initiated by the March 26, 1990, filing of a notice of appeal by the Coalition of Religious and Civic Organizations, Inc. (CORCO), Armen Elliot, and Joseph Welsh, seeking review of the Department of Environmental Resources' (Department) February 28, 1990, issuance of plan approvals pursuant to the Air Pollution Control Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 *et seq.* (Air Pollution Control Act), to Pfizer Pigments, Inc. (Pfizer). The plan approvals authorized Pfizer to reactivate two brown oxide muffle kilns in the City of Easton, Northampton County.

On March 30, 1990, CORCO served upon Pfizer a Request for Inspection of Things and Production of Documents. Pfizer mailed its answers to CORCO on April 30, 1990. Pfizer objected to Category II (a request for "all documents or records relating to the construction, operation, testing, sampling, repair,

modification, or maintenance of the sources which are the subject of the plan approvals during the relevant time period."), arguing that, "Because the relevant time period is undefined, this request is vague, overbroad, burdensome, and seeks information not relevant to the subject matter of the appeal." Pfizer also objected to Category IV (a request that Pfizer "permit entry by appellants' representatives on property controlled by Pfizer for the purpose of inspection of the sources subject to the plan approvals."), on two grounds. First, Pfizer maintained that the request was not calculated to lead to the discovery of admissible evidence, since the information relevant to the plan approval decisions was contained in the information submitted by Pfizer to the Department. Next, Pfizer argued that an entry for inspection would be unreasonably intrusive.

Pfizer filed a Supplemental Response to CORCO's Request for the Production of Documents on May 3, 1990. Instead of objecting to Category II because the phrase "relevant time period" in the request was not defined (as Pfizer maintained in its first response), Pfizer argued in the supplemental response that the request was overly broad because of the definition of "relevant time period" provided in the "Instructions" section of the request for documents.

On August 20, 1990, CORCO filed a Motion for Sanctions, requesting that the Board order Pfizer to provide it with the documents requested under Category II and allow its representatives to inspect the Pfizer sources subject to the plan approvals; CORCO also asked the Board to impose sanctions against Pfizer.

Pfizer filed a response to the CORCO's motion on September 11, 1990. In addition to expounding the arguments it listed in its response to CORCO's requests with regard to Categories II and IV, Pfizer averred that because

CORCO filed the motion for sanctions after August 6, 1990, the day the discovery period ended, the motion for sanctions violated the schedule for discovery authorized by the Board and Pfizer also raised new issues concerning the scope of CORCO's request for documents and inspections which were not included in Pfizer's response to CORCO's request.

CORCO did not file a motion to compel prior to moving for sanctions. Under Pa.R.C.P. No. 4019(g), imposition of sanctions involves a two-step process. First, the party seeking discovery must move to compel compliance. If the motion is granted and the party subject to discovery complies, that is the end of the matter as far as expenses and counsel fees are concerned. If the order to comply is not obeyed, the aggrieved party may file a new motion, a motion for sanctions. Because CORCO did not previously file a motion to compel, sanctions are inappropriate here. However, since CORCO's motion also included language asking that the Board compel discovery, the Board will treat CORCO's motion as a motion to compel.

Pfizer is incorrect when it asserts that a motion for sanctions violates the discovery schedule when the motion is filed after the last day of discovery; a motion for sanctions need not be filed before the discovery period ends. The Rules of Civil Procedure impose no time limit on the filing of motions to compel or motions for sanctions. Because the Board employs an abbreviated discovery period, compared to the Courts of Common Pleas, it is sometimes difficult for a party to evaluate responses to discovery requests and then file the appropriate motions before the discovery period ends. Therefore, even after the discovery period ends, the Board will entertain motions for sanctions (or motions to compel) where: 1) the motion is filed soon enough after the discovery period that it will not delay the trial, and 2) there is no undue delay in filing the motion.

Pfizer cannot now raise objections to the scope of CORCO's request for documents and inspection unless Pfizer made the same objection at the time it responded to the request. Ordinarily, a party receiving a request for documents or inspection has 30 days in which to comply with the request or to object to it. Pa.R.C.P. No. 4009. Any objection not made within the 30 day period is deemed waived. Joseph M. Blosenski, Jr., and Ada Blosenski v. DER, 1986 EHB 883, 885. The only objections Pfizer raised in both its responses to CORCO's discovery request and CORCO's motion were: 1) that the definition of "relevant time period" provided in the "Instructions" renders the request in Category II overbroad, unduly burdensome, and irrelevant; and 2) that CORCO's request under Category IV (to inspect sources on the Pfizer property) was not calculated to lead to the discovery of admissible evidence and could be unreasonably intrusive.

With regard to the documents requested under Category II, Pfizer argued that the request was overbroad and unduly burdensome because, under the definition of "relevant time period" provided in the Instructions, CORCO failed to specify the documents subject to discovery with sufficient particularity. See Pa.R.C.P. No. 4009(b)(1). Under the Rules of Civil Procedure, discovery is not permitted where it would require an unreasonable investigation or cause unreasonable annoyance, embarrassment, oppression, burden or expense. Pa.R.C.P. Nos. 4011(b) and (e). Ordinarily, discovery is not presumed to fall within the limitations of Rule 4011; a party that relies on Rule 4011 when it objects to discovery bears the burden of persuading the Board that the rule is applicable under the circumstances. Perkins v. Watsula, 5 D&C 3d 345 (1978).

Pfizer, however, has failed to demonstrate that Rule 4011 is applicable here. The only objection Pfizer makes that was not waived is that

CORCO's request could apply to documents over 10 years old; Pfizer has not submitted affidavits or offered evidence revealing the nature of the burden. Pfizer's unsupported assertion is not sufficient to show that the CORCO request is unduly burdensome or overbroad.

Turning to Pfizer's argument that the documents requested under Category II are irrelevant because of the definition given in the Instructions for the "relevant time period," the Board finds that the requested documents are relevant for discovery purposes. In Category II, CORCO requested "all documents or records relating to the testing, operation, maintenance, repair, and construction of the sources which are the subject of the plan approvals during the relevant time period." The phrase "relevant time period" is defined in Instruction Number One as: "The time period...from the date Pfizer Pigments, Inc. or its parent or subsidiary commenced construction or operation of the sources which are the subject of the plan approvals to the date of [Pfizer's] responses [to the request']." Pfizer's objection to the request was specifically and directly limited to the "relevant time period" definition.[1] See Pfizer Pigments, Inc.'s First Supplemental Response to CORCO's First Request for the Production of Documents, p.2.

The Board has noted elsewhere that "relevancy has been broadly and liberally construed," and "if there is any conceivable basis for relevancy, the discovery should be permitted." Save Our Lehigh Valley Environment v. DER and Chrin Brothers, 1988 EHB 147, at 150. If, in the course of discovery proceedings, a party objects to a discovery request on grounds of relevancy, the objecting party has the burden of establishing his right to refuse to make discovery. Kaylor v. Baran, 5 D&C 2d 567 (1956). Pfizer, however, has not

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[1] As noted *supra*, Pfizer waived any objections it didn't make within 30 days of CORCO's discovery request.

established any grounds to refuse to comply with CORCO's request under Category II. Because these are reactivated sources, construction, testing, and operations records are relevant to a determination of whether the sources are capable of being operated and maintained in accordance with good air pollution control practices under 25 Pa.Code §127.12(a)(10). Documents pertaining to maintenance and repair, meanwhile, will indicate whether the sources were modified in such a way that new source requirements should be required for plan approval.[2] See 25 Pa.Code §127.12(a)(5).

With regard to CORCO's request to inspect sources on the Pfizer property, Pfizer maintains that the request was not calculated to lead to the discovery of admissible evidence and would be unreasonably intrusive.[3] In each instance, Pfizer is incorrect. Pfizer asserts that the request to inspect the source is not calculated to lead to the discovery of admissible evidence since the information relevant to the plan approval decision is contained in the material submitted by Pfizer to the Department. Discovery, however, is not barred simply because the party seeking discovery already has the information. Pottstown Lincoln-Mercury Inc. v. Montgomery County Auto Sales, Inc., 2 D&C 2nd 396 (1954).

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[2] A "new source is:

> A stationary air contamination source which ... (ii) was modified, irrespective of any change in the amount or kind of air contaminants emitted, such that the fixed capital cost of new components exceeds 50% of the fixed capital cost that would be required to construct a comparable entirely new source....
>
> 25 Pa.Code §121.1

[3] In its response to CORCO's discovery request, Pfizer also averred that an inspection of the sources would compromise commercial information. Because Pfizer did not raise this argument in its response to CORCO's motion, however, the issue is not considered in this opinion.

Pfizer is also incorrect when it asserts that the request was unreasonably intrusive. Parties which invoke Rule 4011 must clearly set forth in their objection the manner in which the request violates the rule. Epstein v. Safeway Trails, Inc., 68 D&C 2nd 175 (1974). While Pa.R.C.P. No. 4009 requires requests for entry and inspection to specify the time, place, and manner of the inspection, failure to include this information does not, in itself, make the request intrusive or unduly burdensome. To prevail, Pfizer had to at least submit affidavits or offer evidence showing how CORCO's omission of the time, place, and manner of the inspection constituted a burden to Pfizer.

O R D E R

AND NOW, this 7th day of November, 1990, it is ordered that:

1) CORCO's motion for sanctions is denied to the extent it requests expenses and counsel fees; and

2) CORCO's motion for sanctions is granted insofar as it requests the Board to compel Pfizer to respond to Categories II and IV of Appellants' First Request for Inspection of Things and Production of Documents Directed to Pfizer Pigments, Inc.

a) Pfizer shall produce the documents sought by CORCO in Category II of its Request for Inspection of Things and Production of Documents within thirty (30) days of the date of this order; and

b) The parties shall arrange for CORCO to inspect the sources subject to the plan approvals at a mutually convenient day and time within thirty (30) days of the date of this order.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: November 7, 1990

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

HOUTZDALE MUNICIPAL AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 85-391-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: November 15, 1990**

OPINION AND ORDER SUR
MOTION FOR SUMMARY JUDGMENT, AND
MOTION TO WITHDRAW SUPERSEDEAS

By Terrance J. Fitzpatrick, Member

Synopsis

A motion for summary judgment and a motion to withdraw supersedeas, both filed by the Department of Environmental Resources (DER), are denied. A regulation which was promulgated after DER issued the orders under appeal here, and which requires filtration of water supplies by December 31, 1991, does not establish the legality of DER's orders, which required filtration at an earlier date.

OPINION

This proceeding involves two appeals, which have been consolidated at EHB Docket No. 85-391-F, by Houtzdale Municipal Authority (Houtzdale) from two orders of the Department of Environmental Resources (DER). Houtzdale objected to both orders, which were dated September 9, 1985 and March 31, 1986, to the extent the orders required Houtzdale to institute filtration for its surface sources of water by March 1, 1989.

This Opinion and Order addresses two motions filed by DER: a motion

for summary judgment and a motion to withdraw supersedeas. We will address these motions separately.

1. DER's Motion for Summary Judgment

In this motion, DER contends that there are no material facts in dispute and that it is entitled to judgment as a matter of law. DER points out that the Board has already ruled in this proceeding that Houtzdale may not contest the provisions of an unappealed 1984 DER order which found that water supplied to Houtzdale's customers from Moshannon Creek and from Mountain Branch contained Giardia Lamblia cysts, and that forty-three customers of Houtzdale had been inflicted by giardiasis. See Houtzdale Municipal Authority v. DER, 1986 EHB 1204. Based upon these facts, DER contends that it is now entitled to judgment as a matter of law due to recent revisions to regulations under the Pennsylvania Safe Drinking Water Act (SDWA), Act of May 1, 1984, P.L. 206, 35 P.S. §721.1 et seq. Specifically, DER argues that any public water system which had been contaminated by Giardia cysts before the effective date of the revisions to the regulations (March 25, 1989) must provide filtration of its supplies by December 31, 1991. See 25 Pa. Code §109.202(3)(i)(c)(I).

Houtzdale filed a response opposing DER's motion for summary judgment. Houtzdale contends that filtration is unnecessary since there has not been an outbreak of giardiasis in the past six years.[1] Houtzdale also argues that it lacks the funds to build and operate a filtration plant. Finally, Houtzdale contends that DER's reliance upon 25 Pa. Code §109.202(3)9i)(c)(I) is premature, because that section does not require

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[1] Houtzdale complied with DER's September 9, 1985 order to the extent the order required installation of a chlorination system. DER viewed chlorination as an interim solution, and filtration as a permanent solution.

filtration until December 31, 1991, and DER has not demonstrated that it is impossible for Houtzdale to meet that deadline.

The Board may grant summary judgment only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Summerhill Borough v. DER, 34 Pa. Commonwealth Ct. 574, 383 A.2d 1320 (1978). BVER Environmental, Inc. v. DER, 1989 EHB 97. The Board must read the motion for summary judgment in the light most favorable to the non-moving party. Zinc Corporation of America v. DER, 1989 EHB 117.

Applying these principles here, we must deny DER's motion for summary judgment. Although this requirement has been superseded by the Board,[2] DER's 1986 order required Houtzdale to install and operate a filtration plant by March 1, 1989. The regulation cited by DER in its motion - 25 Pa. Code §109.202(3)(i)(c)(I) - would require filtration by December 31, 1991. The regulations do not justify granting summary judgment to DER as of the present date, because the regulations do not require Houtzdale to provide filtration as of the present date. Moreover, we do not think it would be appropriate to grant summary judgment to DER as of December 31, 1991. The regulation DER relies upon did not exist when DER issued the orders at issue here. This regulation imposes wholly new obligations upon public water suppliers, and it is difficult for us to see how these new obligations can be enforced in the context of appeals from DER's actions in 1985 and 1986. If Houtzdale does not provide filtration by December 31, 1991, DER will be free to bring a separate enforcement action against Houtzdale.[3] That would seem to be a more

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[2] See Houtzdale Municipal Authority v. DER, 1987 EHB 1.

[3] The fact that Houtzdale has appealed DER's 1985 and 1986 orders to the footnote continued

appropriate method for enforcing the regulations against Houtzdale.

2. DER's Motion to Withdraw Supersedeas

In this motion, DER asks the Board to rescind the supersedeas the Board granted to Houtzdale on January 7, 1987. DER raises the same basic arguments it raised in its motion for summary judgment. DER points out that the Board's opinion granting Houtzdale a supersedeas was based on the finding that Houtzdale was likely to prevail on its argument that a filtration plant was not necessary to prevent giardiasis from recurring. DER argues that Houtzdale is no longer likely to prevail on this issue because 25 Pa. Code §109.202(3)(i)(c)(I) will require Houtzdale to provide filtration by December 31, 1991. DER also argues that Houtzdale's ability to afford a filtration plant is not a defense, citing Ramey Borough v. Commonwealth, DER, 466 Pa. 45, 351 A.2d 613 (1976).

Houtzdale filed a response opposing DER's motion. Reiterating the same arguments it raised in opposing DER's motion for summary judgment, Houtzdale contends that DER is not likely to succeed on the merits. In addition, Houtzdale contends that it is likely to prevail because Mountain Branch has been polluted by acid mine drainage caused by Al Hamilton Contracting Corp. Houtzdale further argues that DER has ordered Hamilton to abate the discharge, and that Hamilton has appealed that order to the Board. Houtzdale contends that if the Board upholds DER's order, that Hamilton should be required to install the filtration plant.

We will deny DER's motion to withdraw supersedeas for the same reason we denied DER's motion for summary judgment. Under the regulations, the

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continued footnote
Board does not preclude DER from taking additional actions against Houtzdale based upon the new regulations. See generally, Blevins v. Commonwealth, DER, _ Pa. Commonwealth Ct. ___, 563 A.2d 1301 (1989).

deadline for Houtzdale's installation of a filtration system is December 31, 1991; thus, the regulations do not establish the legality of DER's order which required Houtzdale to provide filtration at an earlier date. Moreover, as stated earlier, the regulation cited by DER in its motion imposes upon public water suppliers obligations which did not exist at the time DER issued the orders under appeal here. The regulation may constitute a basis for a DER enforcement action in the future, but it does not provide a basis for requiring Houtzdale to install a filtration system immediately.[4]

To summarize, DER's motion for summary judgment and its motion to withdraw supersedeas are both based upon a regulation which did not exist when DER issued the orders under appeal here. In addition, the regulation requires filtration by December 31, 1991, while DER's orders required filtration by March 1, 1989. Therefore, the regulation does not establish the legality of DER's orders, although it may provide an independent basis for a future DER enforcement action. Since we hold that the regulation does not establish the legality of DER's orders, it is not necessary for us to address the other arguments raised by DER and Houtzdale.

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[4] The fact that the Board has superseded DER's September 9, 1985 and March 31, 1986 orders to the extent those orders required filtration does not excuse Houtzdale from compliance with 25 Pa. Code §109.202(3)(i)(c)(I). In fact, it appears that these appeals may become moot as a result of this regulation.

ORDER

AND NOW, this 15th day of November, 1990, it is ordered that:

1) DER's motion for summary judgment and motion to withdraw supersedeas are both denied.

2) The Board will schedule a conference call with the parties to discuss whether hearings should be scheduled on this appeal.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: November 15, 1990

cc: Bureau of Litigation
Library, Brenda Houck
For the Commonwealth, DER:
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M. DIANE SMITH
SECRETARY TO THE BOARD

DONALD GASTER	:	
	:	
V.	:	**EHB Docket No. 88-345-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: November 15, 1990**

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

By Robert D. Myers, Member

Synopsis

A landowner obtained local government authorization to conduct earth removal activities on 18.2 acres but actually disturbed more than 25 acres without securing permits from DER, without possessing a complete erosion and sedimentation control plan, and without installing effective erosion and sedimentation control facilities, as a result of which accelerated erosion was created and sediment deposited in waters of the Commonwealth. The landowner also, without permits from DER, placed brush and fill within the floodway of a creek. The Board holds that DER's Order, citing the landowner with violations of the Clean Streams Law, the Dam Safety and Encroachments Act and the underlying regulations and directing him to take remedial action, was authorized by law and an appropriate exercise of discretion. The landowner's argument that a lack of coordination among the governmental agencies involved, especially 3 bureaus of DER, excused the violations is rejected since the violations all occurred prior to that time. The landowner's appeal is

sustained with respect to the requirement to obtain a dam safety and encroachments permit for a detention pond, the embankment of which is less than 15 feet high.

Procedural History

This appeal was initiated by Donald Gaster (Gaster) on September 2, 1988 to obtain review of an Order issued on August 1, 1988 by the Department of Environmental Resources (DER), directing Gaster to establish erosion and sedimentation controls on his property in Concord Township, Delaware County. A hearing was held in Harrisburg before Administrative Law Judge Robert D. Myers, a Member of the Board, on October 4, 1989, January 9 and 10, 1990, at which both parties appeared by legal counsel and presented evidence. Post-hearing briefs were filed on April 12, 1990. The record consists of the pleadings, a Joint Stipulation of Facts (Jt. Stip.), a transcript of 663 pages and 172 exhibits. After a full and complete review of the record, we make the following:

Findings of Fact

1. Gaster is an individual residing on Paxton Hollow Road, Media, Pennsylvania 19063. Gaster, together with his wife, Mary Ann Gaster, owns a 67-acre tract of land in Concord Township, Delaware County (Jt. Stip. par. 2 & par. 3).

2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq.; the Dam Safety and Encroachments Act (DSEA), Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 et seq.; section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510.17; and the rules and regulations adopted pursuant to said statutes.

3. The Gasters' 67-acre tract of land is divided by Concord Road which runs roughly in an east - west direction. Approximately 40 acres situated north of Concord Road constitute the irregularly-shaped area involved in this proceeding (Site) (N.T. 507-508; Exhibits A-1 and C-4).

4. Green Creek flows under Concord Road and follows a meandering northeast course through the Site near the southeast border. An unnamed tributary to Green Creek flows generally southeast through portions of the Site near the northeast border (Exhibits A-1, A-4 and C-4).

5. Before the advent of earthmoving activities, the lowest elevation on the Site (184 ft.) was at the easternmost point where Green Creek and its unnamed tributary meet. From there the topography rose toward the west to an elevation of 304 ft. The nature of the topography and the soils made the site highly vulnerable to erosion (N.T. 203; Exhibits A-1 and C-4).

6. On May 5, 1981 the Gasters entered into a Permit Agreement with Concord Township (Township) providing for the issuance of a soil removal permit applicable to the Site (N.T. 413-414, 510; Exhibit C-2).

7. The Permit Agreement was based, in part, on a soil removal plan prepared by F. Thomas Prusak on December 26, 1980 and revised by the same individual on February 1, 1981. The revised plan, inter alia, contained 8 construction notes and was accompanied by a 3-page narrative of the proposed operation (Exhibits C-2 and C-4).

8. The Permit Agreement, narrative and revised plan called for the construction of a stormwater detention pond which was to be removed after completion of soil removal operations and stabilization of disturbed areas (Exhibits C-2 and C-4).

9. Pursuant to the Permit Agreement, Soil Removal Permit No. 3 was issued by the Township to Gaster on March 24, 1987 authorizing the disturbance

of 18.2 acres of the Site (N.T. 415, 606; Exhibits A-7 & A-12).

10. Vandemark & Lynch, Inc. (V&L), the Township Engineer, began making periodic inspections of Gaster's operations on the Site in July 1987. In October 1987 Joseph R. Harris, V&L's inspector, reported to his supervisor, Laura R. Swiski, that the detention pond appeared to be in a location other than that shown on the approved plan (N.T. 564-575, 579-584; Exhibits A-1, A-4 & A-6).

11. As a result of Harris' statement, Swiski visited the Site on October 22, 1987, accompanied by John W. Cornell (the Township Manager), Robert Mensch (a Township Supervisor), Gaster and an unidentified employee of Gaster (N.T. 584-585).

12. At the Site on October 22, 1987 when Swiski inspected it:

(a) fill material had been placed on the eastern part of the Site near Green Creek in an area that was not to be disturbed;

(b) a great number of trees had been removed from the area where the fill had been placed;

(c) the detention pond had not been constructed in accordance with the approved plan;

(d) silt fences and hay-bales were not being used for erosion and sedimentation control; and

(e) 60%-70% of the Site (24-28 acres) appeared to have been disturbed

(N.T. 586, 591-596; Exhibit A-6).

13. On the basis of these conditions, Cornell orally directed Gaster to cease all activities on the Site (N.T. 588-589; Exhibit A-6).

14. The Township revoked Soil Removal Permit No. 3 as of October 21, 1987, and notified Gaster that "All earth moving, earth removal, and related

activities" on the Site "must cease and desist immediately" (N.T. 416, 432-433; Exhibit A-12).

15. Upon receipt of the revocation letter, Gaster ceased all activities at the Site. Joseph F. Cappelli Sons, Inc. (Cappelli), which had purchased a pile of excavated soil, continued to remove this material from the Site (N.T. 433-436, 521-522, 550-551, 589-590; Exhibits A-6 & A-13).

16. In response to a complaint from an unidentified employee of the Pennsylvania Department of Transportation, Edward M. Megargee, Director of the Delaware County Conservation District and a District Manager for DER's Bureau of Soil and Water Conservation, contacted Gaster and went to the Site with him on February 29, 1988 (N.T. 30, 33-34).

17. At the Site on February 29, 1988, when Megargee inspected it:

(a) disturbed areas appeared to exceed 18.2 acres;

(b) the bank along Concord Road had eroded and sediment had been deposited on or near the roadway;

(c) an area near Green Creek was filled with sediment;

(d) erosion was evident on much of the Site;

(e) brush derived from the removal of multiflora roses that covered the Site was piled along the northwest bank of Green Creek; and

(f) no erosion and sedimentation control measures existed (Jt. Stip. par. 4; N.T. 35-40; Exhibit C-3).

18. Megargee directed Gaster to submit, within 20 days, (a) a plan showing disturbed and non-disturbed areas in order to verify the acreage involved, and (b) a copy of the approved erosion and sedimentation control plan (N.T. 39-40; Exhibit C-3).

19. Gaster informed Megargee that the Township had stopped his activities on the Site (N.T. 40, 212).

20. At Gaster's request, Raymond R. Reganato of G. D. Hautman and Son, Inc., civil engineers, land planners and land surveyors, had the disturbed areas on the Site surveyed on March 5, 1988. The areas were outlined on the soil removal plan on March 15, 1988 and computed to be 24.6 acres, more or less (Jt. Stip. par. 5; N.T. 601, 609, 611-613; Exhibit C-4).

21. Upon receipt of a copy of the revised soil removal plan on March 21, 1988, Magargee informed Gaster that the plan would be sent to Michael Stover in DER's Bureau of Soil and Water Conservation's Harrisburg office for consideration with respect to earth disturbance permit requirements (N.T. 40-41; Exhibit C-5).

22. On a date late in March 1988, Megargee and Reganato walked the Site to examine the areas considered by Reganato to be non-disturbed. Megargee disagreed with Reganato on the following areas:

(a) a strip running nearly the entire length of Concord Road, which was experiencing erosion even though Gaster's equipment had not operated in it;

(b) a portion of the northwest bank of Green Creek where brush had been piled;

(c) the fill area in the southeastern portion of the Site;

(d) a large area in the northwest portion of the Site which had been disturbed and re-seeded but not to the point of stabilization in Megargee's opinion; and

(e) two small islands near the center of the Site which had not been disturbed but which were completely surrounded by disturbed areas (N.T. 40-46, 614-619; Exhibit C-4).

23. Megargee told Reganato that, because the site plan topography did not accurately reflect the field conditions, a revised topographic plan

would have to be prepared. Gaster would not agree at that point to the preparation of a revised plan (N.T. 620, 645).

24. Photographs taken by Megargee on March 30, 1988 justify Megargee's disagreement with Reganato on the areas identified in Finding of Fact 22 (N.T. 50-62, 651-652; Exhibits C-40 through C-55).

25. At the Site on March 30, 1988, when Megargee inspected it:

(a) erosion and sedimentation control measures depicted on the approved site plan were not being installed;

(b) erosion and sedimentation control measures were not being installed in the disturbed areas beyond the scope of the approved site plan;

(c) the detention pond had no outlet and appeared to encroach on the unnamed tributary to Green Creek;

(d) sediment deposits near Green Creek suggested that sediment was entering the Creek; and

(e) gullies existed in the embankment along Concord Road (Jt. Stip. par. 6; N.T. 49-50, 62-65; Exhibits C-6, C-40 through C-56).

26. In his report of the March 30, 1988 inspection Megargee directed Gaster to improve conditions on the Site by April 13, 1988 and to submit a complete erosion and sedimentation control plan by April 19, 1988 (N.T. 64; Exhibit C-6).

27. After being contacted by Megargee, John R. Smith, Jr. of DER's Bureau of Dams and Waterways Management inspected the Site with Megargee on April 14, 1988. At the Site on that date:

(a) brush had been piled along the northwest bank of Green Creek within the floodway; and

(b) the embankment constructed for the detention pond appeared to be in wetlands and to exceed 15 feet in height

(N.T. 392-394).

28. On April 15, 1988 DER's Bureau of Soil and Water Conservation issued a Notice of Violation charging Gaster with violating provisions of the CSL and its regulations by (a) disturbing more than 25 acres without an earth disturbance permit from DER, (b) failing to implement and maintain effective erosion and sedimentation control measures, and (c) causing or allowing accelerated erosion and sedimentation to leave the Site and enter Green Creek (Jt. Stip. par. 7; N.T. 65-66; Exhibit C-7).

29. The Notice of Violation directed Gaster to submit a complete erosion and sedimentation control plan to the Delaware County Conservation District by April 19, 1988, and requested him to attend a DER administrative conference on May 10, 1988 (N.T. 66-67; Exhibit C-7).

30. Gaster failed to submit an erosion and sedimentation control plan as directed (N.T. 67).

31. At the site on May 5, 1988 when Megargee and DER's Michael D. Sherman inspected it:

(a) the disturbed areas continued to appear greater than 25 acres;

(b) sediment was leaving the Site and being deposited in Green Creek and the unnamed tributary;

(c) erosion and sedimentation controls depicted on the approved site plan still had not been installed;

(d) the complete erosion and sedimentation control plan due on April 19, 1988 still had not been submitted; and

(e) several silt fences and stone berms which had been installed as temporary erosion and sedimentation control measures were not effective because of faulty installation or placement

(Jt. Stip. par. 8; N.T. 67-81, 337; Exhibits C-8, C-57 through C-67).

32. To document conditions at the Site during a light to medium rainfall, as requested by Sherman, Megargee went to the Site on May 6, 1988. At the Site on that date:

(a) the brush barrier on the northwest bank of Green Creek was not trapping sediment but allowing it to enter the Creek;

(b) sediment was discharging into the Creek at several other locations, including one where a breach had occurred in the berm of the detention pond;

(c) very little run-off was being impounded;

(d) silt fences installed in the fill area in the southeastern portion of the Site were ineffective; and

(e) stone berms were not filtering sediment as intended but were diverting run-off into other areas and causing erosion
(Jt. Stip. par. 9; N.T. 82-98; Exhibits C-9, C-68 through C-97).

33. The administrative conference referred to in Finding of Fact 29 was held on May 10, 1988 attended by Gaster and representatives of the Township, DER's Bureau of Soil and Water Conservation and the Delaware County Conservation District (Jt. Stip. par. 10; N.T. 99-100; Exhibit C-11).

34. At the administrative conference on May 10, 1988:

(a) Gaster complained that he was prevented from implementing erosion and sedimentation controls on the Site by the Township's cease and desist order of October 21, 1987;

(b) the Township replied that it had no objection to remedial work being done on the Site to control erosion and sedimentation;

(c) Gaster agreed that he would apply to DER for an earth disturbance permit even though he continued to maintain that less than 25

acres had been disturbed; and

(d) it was agreed that representatives of Gaster, the Township and the Delaware County Conservation District would meet at the Site to agree on remedial measures to be taken immediately pending the issuance of the earth disturbance permit

(Jt. Stip. par. 10; N.T. 100-104, 339-340).

35. Also on May 10, 1988 DER's Bureau of Dams and Waterways Management issued a Notice of Violation based on Smith's inspection of April 14, 1988. The Notice informed Gaster that his activities on the Site constituted violations of the DSEA and requested Gaster to contact the Bureau within 30 days to arrange an administrative conference (Jt. Stip. par. 11; N.T. 394-395; Exhibit C-10).

36. When the Notice of Violation was issued, the Bureau of Dams and Waterways Management was unaware of the administrative conference being held that same date under the auspices of the Bureau of Soil and Water Conservation (N.T. 407-408).

37. The meeting of representatives referred to in Finding of Fact 34 (d) was scheduled for May 19, 1988 but was postponed because of rain (N.T. 107).

38. Megargee went to the Site on May 19, 1988 despite the rain. At the Site on that date:

(a) the brush barrier on the northwest bank of Green Creek was allowing sediment to enter the Creek;

(b) silt fences installed in the fill area in the southeastern portion of the Site were ineffective;

(c) stone berms were continuing to cause erosion; and

(d) erosion was occurring on other portions of the Site

(N.T. 107-111; Exhibits C-98 through C-105).

39. The postponed meeting of representatives took place at the Site on May 24, 1988 attended by Megargee, Parley Hess and Susan Carmichael of V&L, Gaster's two sons (Donald, Jr. and Bryan) and Reganato. The representatives agreed on the following interim remedial measures:

(a) a sediment basin would be constructed near the center of the Site about 450 feet west of Green Creek;

(b) swales would be dug to direct run-off into this sediment basin;

(c) the detention pond would be left in place and unused pending a determination by the Bureau of Dams and Waterways Management of the need for a permit;

(d) numerous stone berms would be placed along the drainageways to reduce the velocity of the run-off and filter out some of the sediment;

(e) hydroseeding along the perimeter of the Site would continue, with the swale along Concord Road a priority area;

(f) Reganato would prepare a draft plan of the interim remedial measures by May 27, 1988; and

(g) a site inspection would be held on May 27, 1988 to check on progress

(Jt. Stip. par. 12; N.T. 112-118, 627-628; Exhibits C-12, C-106 through C-113).

40. In response to a complaint, Jonas Carpenter, a Mine Conservation Inspector for DER's Bureau of Mining and Reclamation, inspected the Site on May 26, 1988. At the Site on that date:

(a) Gaster's workmen were using a bulldozer and front-end loader to establish erosion and sedimentation controls;

(b) Cappelli's workmen were using similar equipment to stockpile

fill and load it on trucks; and

(c) approximately 30-35 acres of the Site appeared to have been affected

(Jt. Stip. par. 13; N.T. 456-471, 492; Exhibit C-13).

41. After receiving direction from the Harrisburg office of his Bureau, Carpenter issued a Compliance Order on May 26, 1988 citing Gaster and Cappelli with (a) mining without a license, (b) mining without a permit, (c) mining without an approved erosion and sedimentation control plan, (d) mining within 100 feet of a public road, (e) mining within 100 feet of a stream, and (f) mining on wetlands. Gaster and Cappelli were directed to cease mining operations immediately, to install erosion and sedimentation controls by June 17, 1988, to restore the wetlands and the areas within 100 feet of Concord Road and Green Creek by June 27, 1988, to apply for mining licenses and permits by June 27, 1988 or, failing that, to reclaim the Site by August 26, 1988 (Jt. Stip. par. 13; N.T. 472-473, 492; Exhibit C-13).

42. When Carpenter went over the Compliance Order with Donald Gaster, Jr. on May 26, 1988:

(a) Gaster, Jr. informed him that the Delaware County Conservation District had instructed him not to remove the brush along the northwest bank of Green Creek and a portion of Concord Road and had instructed him not to use the detention pond near the unnamed tributary to Green Creek;

(b) Gaster, Jr. informed him that an erosion and sedimentation control plan had already been demanded by the Delaware County Conservation District;

(c) Carpenter received oral authority from the Harrisburg office of the Bureau to tell Gaster, Jr. to leave the brush in place; and

(d) Carpenter advised Gaster, Jr. to have an erosion and

sedimentation control plan approved before doing more work on the Site in order to avoid having to do the work twice
(N.T. 474-475, 478-479, 481-482, 490-491, 494-495).

43. When Carpenter went over the Compliance Order with Joseph Cappelli on May 26, 1988:

(a) Joseph Cappelli informed him that Cappelli was operating pursuant to a borrow agreement for a Pennsylvania Department of Transportation Project on the Vine Street Expressway in Philadelphia;

(b) Carpenter received oral authority from the Harrisburg office of the Bureau to allow Cappelli's operation to continue pending a review of the borrow agreement by the Bureau; and

(c) Carpenter instructed Cappelli to have a copy of the borrow agreement delivered to the Harrisburg office of the Bureau
(N.T. 476-478).

44. When informed of Carpenter's actions on May 26, 1988, Gaster instructed Reganato to cease working on the design of interim remedial measures agreed to at the Site meeting on May 24, 1988. Gaster was unwilling to do any more work until he was certain about the work that was to be done. As a result, Reganato did not have an interim plan on May 27, 1988 and no Site inspection was held that day (N.T. 118, 648-649, 655-656).

45. When Carpenter visited the Site again during the first week of June 1988, Gaster's workmen were hydroseeding and placing rip-rap in the swale along Concord Road. The rip-rap, they explained, was ordered by the Delaware County Soil Conservation District (N.T. 479-480).

46. After obtaining Gaster's agreement on the preparation of a revised topographic plan, as requested by Megargee late in March 1988 (Finding of Fact No. 23), Reganato ordered the necessary aerial mapping on June 15,

1988 (N.T. 629-630).

47. On June 15, 1988 DER's Bureau of Mining and Reclamation issued a Notice of Proposed Civil Penalty Assessment, informing Gaster that (a) he was potentially liable for a penalty of $41,000, and (b) he could request a meeting to discuss the assessment by contacting the Bureau within 15 days (N.T. 484; Exhibit C-14).

48. On June 17, 1988, Gaster's legal counsel, John W. Nilon, Jr., Esquire, held a conference call involving Carpenter and Walter Dieterle of DER's Bureau of Mining and Reclamation, Sherman of DER's Bureau of Soil and Water Conservation and John McKinstry, Esquire, DER's legal counsel. Nilon requested an extension of time to complete the remedial measures mandated in the Compliance Order issued May 26, 1988 because completing them could result in violating directives issued by the Bureau of Soil and Water Conservation, the Bureau of Dams and Waterways Management and the Township (Exhibit C-15).

49. Sometime between June 17 and June 21, 1988 Nilon was advised that the Bureau of Mining and Reclamation would have primary jurisdiction over the Site and that the Bureau would contact the Township to obtain the necessary authorization for the remedial measures (Exhibit C-15).

50. On June 28, 1988 the Court of Common Pleas of Delaware County issued an Order in the case of Township of Concord v. Donald Gaster and Mary Ann Gaster, his wife, Docket No. 88-8080, which:

(a) preliminarily enjoined the Gasters from engaging in or permitting earth removal activities at the Site;

(b) directed the Gasters to file with the Township and the Court, within 15 days, a revised earth removal plan complying with requirements of the Township and with the requirements of DER's Bureau of Soil and Water Conservation and Bureau of Mining and Reclamation; and

(c) stated specifically that the Gasters were not prohibited from complying with valid orders issued by DER to take corrective action necessitated by the prior earth removal activities (N.T. 129-131; Exhibit C-16).

51. At the request of McKinstry, Megargee inspected the Site on July 14, 1988 to determine the state of compliance with interim remedial measures agreed upon at the May 24, 1988 Site meeting. At the Site on July 14, 1988:

(a) a draft plan of the interim remedial measures had not been submitted;

(b) the sediment basin near the center of the Site had not been constructed;

(c) swales had not been completed;

(d) stone berms had not been placed in the drainageways;

(e) hydroseeding had been done but, because of hot weather, had not resulted in stabilization of the areas; and

(f) the detention pond had been left in place and unused (Jt. Stip. par. 14; N.T. 131-144; Exhibits C-17, C-18, C-114 through C-123).

52. Carpenter also inspected the Site on July 14, 1988 and found that no corrections had been made (N.T. 493-494).

53. During a conference call on July 21, 1988 among DER officials, it was agreed that, since mining activity had ceased at the Site, the Bureau of Soils and Water Conservation and the Bureau of Dams and Waterways Management would exercise jurisdiction over the Site (N.T. 128, 145; Exhibit C-20).

54. On August 1, 1988 DER issued the Order forming the basis of this appeal, listing a number of violations and directing Gaster, inter alia, to:

(a) cease immediately all activities on the Site except for

erosion and sedimentation control measures and activities necessary to comply with orders of the Township or the Delaware County Court of Common Pleas;

(b) file a remedial erosion and sedimentation control plan with Megargee within 5 days, incorporating the measures agreed to at the Site meeting on May 24, 1988 and complying with DER's regulation at 25 Pa. Code §102.5;

(c) implement the measures contained in the remedial plan within 20 days;

(d) remove brush, tree stumps and fill from the floodway of Green Creek and stabilize the affected area within 5 days;

(e) maintain the measures contained in the remedial plan at peak operating efficiency after installation; and

(f) file applications with DER for an earth disturbance permit and a dam safety and encroachments permit within 10 days

(Jt. Stip. par. 15; N.T. 147-148; Exhibit C-22).

55. Megargee inspected the Site on September 13, 1988 accompanied by Gaster and Reganato. At the Site on that date:

(a) the swale along Concord Road had not been completed although a ditch had been dug to direct run-off in the proper direction;

(b) the stone berms had not been installed;

(c) the silt fence installed along Concord Road had been undermined;

(d) the brush barrier had been removed from the northwest bank of Green Creek but the fill had not been removed from the floodway;

(e) sediment along Concord Road near the bridge over Green Creek had not been removed;

(f) the sediment basin had not been constructed; and

(g) re-seeding had not been done in areas where prior hydroseeding had not been successful

(Jt. Stip. par. 16; N.T. 149-157; Exhibits C-23, C-124 through C-134).

56. On September 30, 1988 Gaster submitted to Megargee an interim erosion and sedimentation control plan incorporating the measures agreed upon at the Site meeting on May 24, 1988. Megargee approved the plan on the date submitted (N.T. 165-171, 636-638; Exhibits C-24 and C-34).

57. On October 4, 1988 the Bureau of Mining and Reclamation withdrew the Compliance Order issued to Gaster and Cappelli on May 26, 1988 and informed them that primary regulatory control over the Site would be with the Bureau of Soil and Water Conservation (N.T. 485, 496-497; Exhibit C-25).

58. Megargee inspected the Site on November 18, 1988. At the Site on that date:

(a) the berm of the sediment basin, contrary to the design approved on the interim plan, was lower than the emergency spillway and partially eroded;

(b) the riser in the sediment basin did not have perforations or a crushed stone filter as designed;

(c) the sediment basin was constructed with a smaller capacity than designed;

(d) the swale along Concord Road was not constructed and hydroseeded in conformance to the design; and

(e) fill had not been removed from the area near Green Creek as provided for on the approved interim plan

(N.T. 171-182; Exhibits C-26, C-142 through C-153).

59. Megargee inspected the Site on December 15, 1988. At the Site on that date:

(a) the sediment basin had been modified to conform more closely to the design on the approved interim plan but still did not conform completely;

(b) the riser in the sediment basin had been perforated and surrounded with a stone filter but smaller stones needed to be added;

(c) an additional stone basin had to be installed in order to direct run-off into the sediment basin as constructed on the Site; and

(d) fill had not been removed from the area near Green Creek (N.T. 183-188; Exhibits C-27, C-154 and C-155).

60. Megargee informed Gaster that a silt fence should be placed along Green Creek after removal of the fill, the emergency spillway for the sediment basin should be built according to the approved remedial plan, and a revised remedial plan should be submitted addressing the existing Site conditions (Exhibit C-27).

61. Megargee inspected the Site on January 25, 1989 accompanied by Swiski, Smith, Gaster and Gaster, Jr. At the Site on that date:

(a) the deficiencies noted during the inspection of December 15, 1988 had not been corrected; and

(b) a revised remedial plan had not been submitted (N.T. 189-192, 395-396; Exhibits C-28, C-156, C-157 and C-158).

62. Smith told Gaster either to remove the fill from the floodway of Green Creek or to apply for an encroachment permit. He also advised him to apply for a dam safety and encroachment permit for the detention pond near the unnamed tributary to Green Creek (Exhibit C-28).

63. When Megargee inspected the Site on February 17, 1989, he noted that all deficiencies had been corrected except for the installation of an additional rock berm and the submittal of a revised remedial plan addressing

all of the existing Site conditions (N.T. 192-195; Exhibits C-29, C-30, C-159 and C-160).

64. A final revised remedial erosion and sedimentation control plan was prepared by Reganato on February 28, 1989 and submitted to Megargee on March 1, 1989 (N.T. 193-194; Exhibits C-30 and C-37).

65. When Megargee inspected the Site on June 13, 1989, he noted that the additional stone berm was still needed (an earthen berm that Gaster had installed was ineffective) and that maintenance work needed to be done on the erosion and sedimentation control facilities (N.T. 195-196; Exhibits C-31 and C-161).

66. The erosion and sedimentation control measures incorporated into the final revised remedial plan, after being implemented and periodically maintained, corrected the problems on the Site (N.T. 199, 643-644).

67. Prior to implementation of the erosion and sedimentation control measures incorporated into the final revised remedial plan, Gaster's activities caused erosion of the Site and sediment pollution of Green Creek at rates greater than would have occurred as the result of natural processes alone (N.T. 199).

68. Gaster applied to DER for an earth disturbance permit which was issued late in 1989 (N.T. 197-198, 332-333).

69. Gaster applied to DER for a dam safety and encroachment permit for the detention pond but it was determined that none was required because the embankment, contrary to the plans, was lower than 15 feet in height (N.T. 229, 393, 401-402).

70. The area of the Site disturbed by Gaster's activities exceeded 25 acres. The 24.6 acres calculated by Reganato fall 17,424 square feet short of 25 acres. This shortfall is easily made up by areas excluded by Reganato

and challenged by Megargee. The excluded area along Concord Road alone amounts to more than 1 acre (Exhibit C-4).

DISCUSSION

DER, having the burden of proof (25 Pa. Code §21.101(b)(3)), must establish by a preponderance of the evidence that its Order of August 1, 1988 was authorized by law and was an appropriate exercise of its discretion (25 Pa. Code §21.101(a)).

The Order charges Gaster with 4 violations of the CSL and Chapter 102 of the regulations at 25 Pa. Code, and with 2 violations of the DSEA and Chapter 105 of 25 Pa. Code.

Violations of the CSL

The 4 violations can be summarized as follows:

(1) conducting earthmoving activities on an area exceeding 25 acres without a permit from DER (25 Pa. Code §102.31);

(2) conducting earthmoving activities without an erosion and sedimentation control plan (25 Pa. Code §102.5);

(3) conducting earthmoving activities without erosion and sedimentation control facilities (25 Pa. Code §§102.11-102.13); and

(4) causing accelerated erosion and sediment pollution of Green Creek, a water of the Commonwealth (25 Pa. Code §102.4).

DER asserts in the Order that these 4 violations constitute unlawful conduct under §611 of the CSL and a statutory nuisance under §§503 and 601 of the CSL. Further, DER charges that the violations were willful and subject Gaster to civil penalty liability under §605 of the CSL.

25 Pa. Code §102.31 requires a permit for earthmoving activity, defined in §102.1 as activity which disturbs the surface of the land. Gaster's activity clearly falls within the scope of the definition. A permit

is not required, however, in several circumstances. One of these involves earthmoving activity which disturbs less than 25 acres. Another relates to activity that involves more than 25 acres but which is undertaken on noncontiguous parcels of less than 25 acres which are stabilized before the contiguous parcels are disturbed. Neither exception applies here. Gaster disturbed something more than 25 acres and made no pretense of doing it on smaller noncontiguous parcels. Consequently, a permit was necessary.

Whether or not a permit is required, earthmoving activities may be carried on only in accordance with an erosion and sedimentation control plan meeting the standards set forth in 25 Pa. Code §102.5. Gaster had such a plan in March 1987 when he received the soil removal permit from the Township. That plan covered only 18.2 acres, however, and by October 1987 Gaster's activity had disturbed a considerably greater area. Megargee realized that the plan was inadequate to protect the 25+ acres involved and directed Gaster to submit a new plan by April 19, 1988. Gaster failed to meet this deadline and every subsequent deadline set for him. As a result, there was no erosion and sedimentation control plan for the disturbed area as of August 1, 1988 when DER issued the Order. According to paragraph B of the Order, Gaster was to submit a remedial erosion and sedimentation control plan by August 6, 1988. Gaster missed this deadline also; a plan meeting the standards of §102.5 was not filed until September 30, 1988.

Gaster's argument that he was delayed by conflicting advice received from 3 different DER bureaus, even if true, is no excuse. The violation had occurred sometime during 1987, when Gaster had gone beyond the 18.2 acres covered by his original plan, and continued at least to May 10, 1988, the first date on which more than one DER bureau issued directions to Gaster. It is interesting to note that, even after the jurisdictional tangle had been

resolved on July 21, 1988, it took Gaster until September 30, 1988 to file the plan.

25 Pa. Code §§102.11-102.13 deal with erosion and sedimentation control measures and facilities. Of particular relevance to this case are measures designed to collect surface run-off, reduce its velocity and remove its sediment before discharging it into waters of the Commonwealth. Facilities to accomplish these control measures include interceptor channels and sedimentation basins as well as stone berms, silt fences and hay-bales. Gaster generally employed one or more measures and facilities in an effort to control erosion and sedimentation. The difficulty arose because they were not effective and because Gaster resisted attempts to get him to use effective measures and facilities.

The ineffectiveness was apparent when Megargee first visited the Site on February 29, 1988, found erosion and sedimentation but no control measures. When he inspected the Site on March 30, 1988, after receiving the original erosion and sedimentation control plan, he found that the control measures and facilities depicted on that plan were not in place. On May 5, 1988 Megargee observed that the silt fences and stone berms which Gaster had put in were not functioning because of faulty installation or placement. When Megargee returned to the Site on the very next day during a rainfall, he noticed that the brush barrier was not trapping sediment and that the stone berms were actually causing more erosion rather than reducing it. These same conditions existed on May 19, 1988.

Specific interim control measures and facilities were agreed upon at the Site meeting on May 24, 1988. When Megargee inspected the Site on July 14, 1988 to assess Gaster's compliance, he found that the sediment basin had not been started, the swales had not been completed, the stone berms had not

been placed in the drainageways and the hydroseeding had not been effective. Two months later, on September 13, 1988, only a portion of this work had been done. Even after the remedial erosion and sedimentation control plan had been submitted and approved on September 30, 1988, Gaster continued to have difficulty implementing effective controls. The sediment basin and the swale along Concord Road did not conform to the plan until February 1989. It was not until the Summer of 1989 that all of the agreed upon facilities were properly installed.

Gaster argues that his failure to have effective controls in place on the Site stems, first of all, from the Township's cease and desist order of October 21, 1987 and, secondly, from the conflicting directives he allegedly received from several DER bureaus in the Spring of 1988. Even though the Township's order mandated the cessation of "all earth moving, earth removal and related activities," it is doubtful that the Township would have objected to Gaster's installation and maintenance of erosion and sedimentation control facilities, especially since one of the reasons for revoking his permit was the failure to implement the erosion and sedimentation control measures incorporated into the approved site plan. Cornell, the Township Manager, testified that the cease and desist order was not intended to interfere with Gaster's obligations to DER (N.T. 437-438). Cornell and Swiski, representing the Township Engineer, both testified that Gaster never complained to them that the Township's order was preventing him from implementing and maintaining erosion and sedimentation controls (N.T. 417, 591).

Gaster, in fact, did not raise that argument until Megargee became involved on February 29, 1988. Curiously, Gaster continued to raise the argument even after the administrative conference on May 10, 1988 where the

Township made it clear that it had no objection to the remedial work.[1] Even assuming that Gaster was justified in concluding that the cease and desist order prevented him from implementing erosion and sedimentation control measures, there is nothing in the record that explains Gaster's failure to do that work when it should have been done--before the cease and desist order was issued. The violation of 25 Pa. Code §§102.11-102-13 took place prior to October 21, 1987. Gaster's argument, at best, is that the Township's order prevented him from correcting the violation.

For the same reason, Gaster's exculpatory defense based on allegedly contradictory instructions from DER cannot be accepted. That occurred, if true, during the Spring of 1988 and could have made no contribution to the violation that occurred in 1987.

We also find it difficult to accept the implicit premise in Gaster's argument that, but for governmental interference, he would have had effective erosion and sedimentation controls on the Site late in 1987 or early in 1988. After the Delaware County Court had made it clear (June 28, 1988) that the Township's action had no bearing on Gaster's duty to comply with DER orders and after the jurisdictional uncertainty had been removed from DER's orders (July 21, 1988), it still took Gaster more than 6 months to implement effective control measures. This is hardly indicative of a diligent, responsible party.

25 Pa. Code §102.4(a) provides that earthmoving activities shall be conducted so as to prevent accelerated erosion and the resulting sedimentation of waters of the Commonwealth. Accelerated erosion is defined in 25 Pa. Code §102.1 as the "removal of the surface of the land through the combined action

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[1] The point was raised in the conference call on June 17, 1988, and in the hearing before the Delaware County Court on June 28, 1988.

of man's activities and the natural processes, at a rate greater than would occur because of the natural process alone." Sedimentation is defined in the same section as the "process by which sediment is deposited on stream bottoms." Waters of the Commonwealth is defined in §1 of the CSL, 35 P.S. §691.1, to include "any and all . . . streams, creeks . . . within or on the boundaries of the Commonwealth."

We have found as a fact that Gaster's activities created erosion of the Site and sediment pollution of Green Creek at rates greater than would have occurred naturally. This amounts to accelerated erosion and sedimentation within the definitions contained in DER's regulations. And since Green Creek clearly is one of the waters of the Commonwealth, the violation has been established.

The 4 violations just discussed constitute unlawful conduct pursuant to section 611 of the CSL, 35 P.S. §691.611, are abatable under section 601 of the CSL, 35 P.S. §691.601, and subject Gaster potentially to civil penalty liability under section 605 of the CSL, 35 P.S. §691.605.[2]

Violations of the DSEA

The 2 violations can be summarized as follows:

(1) constructing and maintaining a detention pond with embankments exceeding 15 feet within the floodway of the unnamed tributary to Green Creek (25 Pa. Code Chapter 105 and §6 of the DSEA); and

(2) placing brush, stumps and fill material on the left bank of Green Creek within the floodway of Green Creek (§6 of the DSEA).

DER claims in the Order that these 2 violations constitute unlawful conduct under §18 of the DSEA and a statutory nuisance under §19 of the DSEA.

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[2] Whether or not Gaster's violations were willful is not a relevant issue in this appeal and, accordingly, will not be addressed.

DER maintains that the violations were willful and subject Gaster to civil penalty liability under §21 of the DSEA.

The first violation may be stricken without much comment because it was determined by the Bureau of Dams and Waterways Management that the embankment did not extend to 15 feet. That being the case, a dam safety and encroachment permit was not required (Finding of Fact 69).

The second violation has been clearly established, however. The presence of this material on the northwestern bank of Green Creek was reported by Swiski in October 1987 and by Megargee at the time of his first inspection on February 29, 1988. It was not removed completely until January or February 1989, despite repeated orders calling for its removal. The only conflicting instruction was manufactured by Gaster, Jr. when he told Carpenter, contrary to the fact, that the Delaware County Conservation District had told him not to remove the material. This misinformation, whether deliberately or negligently conveyed, cannot excuse Gaster's disregard of §6 of the DSEA, 32 P.S. §693.6, which requires a permit for such an encroachment.

Gaster's action amounted to unlawful conduct under §18 of the DSEA, 32 P.S. §693.18, and subject him potentially to civil penalty liability under §21 of the DSEA, 32 P.S. §693.21.

Before closing this portion of the Adjudication, we will address more fully Gaster's complaint that Site remediation was impeded by the involvement of 3 separate DER bureaus. The record reveals an unfortunate, perhaps inevitable, lack of coordination among the bureaus during the five-week period following May 10, 1988. Even after Bureau activities were coordinated, it was another month before jurisdiction was finally fixed. As discussed above, these circumstances did not excuse the violations charged in DER's Order, because all of them had been committed prior to May 10, 1988. We also are

unable to conclude that the bureaus gave conflicting instructions (except in the one instance generated by Gaster, Jr.'s misinformation). Nonetheless, the uncoordinated involvement of 3 bureaus created obvious jurisdictional uncertainties that would induce most persons in Gaster's position to do nothing until the line of responsibility was clear.

The jurisdictional problem did not bear on the violations but inevitably delayed remedial action.

In view of the statutory and regulatory violations committed by Gaster and still outstanding on August 1, 1988, DER was fully justified in issuing the Order and in directing Gaster to take the remedial measures itemized in Finding of Fact 54(a) through (f) except for filing an application for a dam safety and encroachments permit which, as already noted, was not required.

CONCLUSIONS OF LAW

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

2. DER has the burden of proving by a preponderance of the evidence that its Order of August 1, 1988 was authorized by law and constituted an appropriate exercise of its discretion.

3. Gaster's earthmoving activities, involving more than 25 acres that were disturbed as a whole rather than in noncontiguous parcels of less than 25 acres, required a permit from DER under 25 Pa. Code §102.31.

4. Gaster's earthmoving activities were conducted without an erosion and sedimentation control plan meeting the standards of 25 Pa. Code §102.5 once they proceeded beyond the 18.2 acres authorized by the site plan. This occurred in 1987.

5. Gaster's earthmoving activities were conducted without erosion

and sedimentation control facilities required by 25 Pa. Code §§102.11-102.13. This occurred prior to the Township's cease and desist order of October 21, 1987.

6. Gaster's earthmoving activities created accelerated erosion of the Site and sedimentation of Green Creek, a water of the Commonwealth, in violation of 25 Pa. Code §102.4.

7. The violations in Conclusions of Law 3, 4, 5 and 6 constitute unlawful conduct pursuant to section 611 of the CSL, 35 P.S. §691.611, are abatable under section 601 of the CSL, 35 P.S. §691.601, and subject Gaster potentially to civil penalty liability under section 605 of the CSL, 35 P.S. §691.605.

8. Gaster did not construct and maintain a detention pond with embankments exceeding 15 feet within the floodway of the unnamed tributary to Green Creek in violation of §6 of the DSEA, 32 P.S. §693.6, and 25 Pa. Code Chapter 105.

9. Gaster placed brush, stumps and fill material within the floodway of Green Creek, without an encroachment permit from DER, in violation of §6 of the DSEA, 32 P.S. §693.6.

10. The violation in Conclusion of Law 9 constitutes unlawful conduct pursuant to section 18 of the DSEA, 32 P.S. §693.18, and subjects Gaster potentially to civil penalty liability under section 21 of the DSEA, 32 P.S. §693.21.

11. The lack of coordination between the Township and DER and among the 3 DER bureaus involved at the Site had no bearing on the violations since they all occurred prior to that time.

12. DER was justified in issuing the Order of August 1, 1988 and in directing Gaster to take the remedial measures itemized therein except for the

filing of an application for a dam safety and encroachment permit which was not required.

ORDER

AND NOW, this 15th day of November, 1990, it is ordered that the appeal is sustained to the extent set forth in Conclusions of Law 8 and 12 and dismissed in all other respects.

ENVIRONMENTAL HEARING BOARD

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ROBERT D. MYERS
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Administrative Law Judge
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JOSEPH N. MACK
Administrative Law Judge
Member

DATED: November 15, 1990

cc: Bureau of Litigation
Library, Brenda Houck
For the Commonwealth, DER:
John McKinstry, Esq.
Eastern Region
For Appellant:
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M. DIANE SMITH
SECRETARY TO THE BOARD

PAUL SHANNON	:	
	:	
v.	:	**EHB Docket No. 89-418-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** November 15, 1990

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

By Robert D. Myers, Member

Synopsis

DER issued an order requiring the owner of a mobile home park to replace the existing on-lot sewage disposal system with a permitted sewage treatment facility. The Board finds that the owner is responsible for repeated violations of the Clean Streams Law by discharging or allowing the discharge of untreated or partially treated sewage onto the surface of the ground and into the waters of the Commonwealth, and rejects the owner's arguments that DER and tenant sabotage are to blame. Finding that the existing system is inadequate, the Board concludes that DER was justified in requiring it to be replaced by a treatment facility.

Procedural History

This appeal was filed by Paul Shannon (Appellant) on September 18, 1989 in order to contest a Department of Environmental Resources (DER) Order dated August 29, 1989. The Order found the on-lot sewage disposal system serving Appellant's mobile home park in Lycoming Township, Lycoming County, to

be inadequate and directed Appellant to take the necessary steps to install and operate a sewage treatment facility under permits from DER.

A hearing was held before Administrative Law Judge Robert D. Myers, a Member of the Board, in Harrisburg on March 6, 1990. Appellant appeared pro se; DER was represented by legal counsel. Post-hearing briefs were filed by Appellant on May 2, 1990 and by DER on June 1, 1990. The record consists of the pleadings, a hearing transcript of 147 pages and 50 exhibits.

After a full and complete review of the record, we make the following:

Findings of Fact

1. Appellant is an individual residing at RD #3, Box 183, Cogan Station, Pennsylvania 17728. He and his wife, Ellen I. Shannon, own the Shannon Mobile Home Park in Lycoming Township, Lycoming County (N.T. 16-18; Exhibits A-3, C-2, C-3 and C-4).

2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq.; section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and the rules and regulations promulgated under said statutes.

3. In 1962 Appellant installed an on-lot sewage disposal system, designed by The Warnick Company, Engineers-Architects, to serve the Mobile Home Park. The system consisted of 52 collection lines, 18 septic tanks and a waste stabilization pond (N.T. 123; Exhibits A-1 and A-2).

4. At the time the system was designed and installed, no permits were necessary (N.T. 124; Exhibit A-1).

5. In 1984, DER found the system to be inadequate and ordered

Appellant to cease using the waste stabilization pond (N.T. 123-124, 128; Exhibits A-1 and A-7).

6. Appellant did not appeal the 1984 order to this Board (N.T. 128-129).

7. On February 20, 1986, DER's Philip M. Zechman and James McClain inspected the Mobile Home Park and found raw sewage ponded on the surface of the ground between two mobile homes (N.T. 19-20, 22-23).

8. As a result of this inspection, DER filed a private criminal complaint against Appellant on May 14, 1986. After a hearing before District Justice James H. Sortman, Appellant was found guilty and paid a fine and costs totalling $152.50 (N.T. 21-22; Exhibits C-5 and C-6).

9. Zechman and McClain inspected the Mobile Home Park again on July 6, 1987 and found raw sewage ponded on the surface of the ground (N.T. 24-26; Exhibits C-7a, C-7b and C-7c).

10. As a result of this inspection, DER filed a private criminal complaint against Appellant on July 6, 1987. Appellant entered a plea of guilty before District Justice Sortman and paid a fine and costs totalling $136.50 (N.T. 26; Exhibits C-6 and C-8).

11. In response to a complaint from a resident of the Mobile Home Park, Zechman inspected the place again on June 22, 1988. He found an open excavation into which a septic tank had been placed. A collection line serving at least one mobile home had not been connected to the tank and, as a result, discharged raw sewage into the excavation filling it nearly to the ground surface (N.T. 28-31; Exhibits C-9a, C-9b and C-9c).

12. As a result of this inspection, DER filed a private criminal complaint against Appellant on September 28, 1988. After a hearing before District Justice Sortman, Appellant was found guilty and sentenced to pay a

fine and costs totalling $227.50 (N.T. 32-33; Exhibit C-10b).

13. Appellant appealed his conviction to the Court of Common Pleas of Lycoming County. After a hearing before President Judge Thomas C. Raup, Appellant was found guilty on March 30, 1989 and sentenced to pay a fine of $200.00 and the costs of prosecution (N.T. 32-34; Exhibit C-10a).

14. On December 6, 1988 Zechman and William R. Bailey, a DER Water Quality Specialist, inspected the Mobile Home Park and found the following:

(a) two mobile homes with broken pipes connecting the mobile homes to the collection lines; and

(b) liquid appearing and smelling like sewage in the drainage ditch that runs along the western and southern boundaries of the Mobile Home Park and that drains eventually to Hoagland Run, a perennial stream hundreds of feet south of the park

(N.T. 35, 39-40, 65-69, 104).

15. After completing the inspection on December 6, 1988, Bailey obtained 6 samples of the liquid in the drainage ditch and introduced uranine dye into the commodes in two of the mobile homes and into a septic tank (N.T. 69, 74).

16. Uranine dye is a fluorescent dye used as a tracer (N.T. 44).

17. Bailey returned the next day, December 7, 1988, saw no uranine dye in the drainage ditch but took another sample of the liquid (N.T. 74-75).

18. Bailey returned the next day, December 8, 1988, saw no uranine dye in the drainage ditch but took another sample of the liquid. He also placed uranine dye in the commodes of several additional mobile homes (N.T. 75-76).

19. Bailey returned the next day, December 9, 1988, saw uranine dye in the drainage ditch, photographed it and took another sample of the liquid

(N.T. 76-79; Exhibits C-11a through C-11i).

20. The samples obtained by Bailey were taken, handled and shipped in accordance with DER protocol. They were analyzed by qualified personnel in DER's Bureau of Laboratories in accordance with established procedures (N.T. 70-73, 83-84, 108-120).

21. Bacteriological analyses performed on 3 of the samples taken from the drainage ditch on December 6, 1988 revealed the following concentrations of fecal coliform:

(a) 22,000 per 100 ml at a point near the upper end of the drainage ditch;

(b) 45,000 per 100 ml at a point along the western boundary of the Mobile Home Park; and

(c) 20 per 100 ml at a point approximately 100 feet above the confluence with Hoagland Run

(N.T. 36-40, 69-72; Exhibits C-12a, C-12b and C-12c).

22. The presence of fecal coliform is evidence of sewage contamination. The concentrations of 22,000 per 100 ml and 45,000 per 100 ml are significant indications of fairly recent contamination. The concentration of 20 per ml is within acceptable limits (N.T. 36-40, 81).

23. Chemical analysis performed on 1 of the samples taken from the drainage ditch on December 6, 1988 revealed a 5-day biochemical oxygen demand (BOD) of 120 mg/l (4 times the maximum amount allowed by DER for secondary treatment) and an ammonia nitrogen concentration of 12.75 mg/l (higher than concentrations--less than 10 mg/l--normally found in background surface water samples). These readings indicate the presence of sewage (N.T. 41-43, 81-82; Exhibit C-13).

24. Chemical analysis performed on the sample taken from the

drainage ditch on December 7, 1988 revealed a 5-day BOD of 42 mg/l, ammonia nitrogen of 10.3 mg/l and a trace (.003 mg/l of uranine dye (N.T. 43-44, 82; Exhibit C-14).

25. Chemical analysis performed solely for the presence of uranine dye in the sample taken from the drainage ditch on December 8, 1988 revealed a concentration of .005 mg/l (N.T. 45, 82; Exhibit C-15).

26. Chemical analysis performed solely for the presence of uranine dye in the sample taken from the drainage ditch on December 9, 1988 revealed a concentration of 4.1 mg/l, well above the level (.1 mg/l) at which the dye is visible to the naked eye (N.T. 45-46, 82-83, 111; Exhibit C-16).

27. The detection of uranine dye in the drainage ditch indicates that the sewage is not being adequately treated by the existing system. If adequate treatment were being provided, the dye would not show up in the discharge (N.T. 86-87).

28. The deficiencies in the existing system create a nuisance and health hazard (N.T. 47-48).

29. The deficiencies in the existing system can be overcome by the installation of a treatment plant, involving mechanical and biological treatment, discharging to a waterway under permit from DER (N.T. 46-47, 86).

30. Appellant has never obtained cost estimates for a sewage treatment plant but is of the opinion that it would be economically infeasible (N.T. 135).

31. On August 29, 1989 DER issued the Order forming the basis of this appeal (N.T. 34-35; Exhibit C-17).

Discussion

DER bears the burden of proof in this appeal: 25 Pa. Code §21.101(b)(3). To carry the burden, it must show by a preponderance of the

evidence that the Order of August 29, 1989 was authorized by law and was an appropriate exercise of discretion: 25 Pa. Code §21.101(a). The Order charged Appellant with the unpermitted discharge of raw sewage and directed him to obtain permits and construct a suitable replacement facility.

The evidence clearly establishes the charges. Appellant was cited in 1986, 1987 and 1988 with discharging or allowing the discharge of untreated or partially treated sewage to the surface of the ground in violation of sections 202 and 611 of the CSL, 35 P.S. §§691.202 and 691.611, and of 25 Pa. Code §73.11(d). Appellant was found guilty on the 1986 citation and pleaded guilty to the 1987 citation. He also was found guilty on the 1988 citation but took an appeal to the Lycoming County Court of Common Pleas where, after a de novo hearing, he was again found guilty. While there may be some question about the effect of the first two criminal proceedings because of their summary character, it is clear that the proceedings on the 1988 citation are final and conclusive with respect to the violation charged and cannot be collaterally attacked in this appeal. See generally Pa. Turnpike Comm v. U. S. Fidelity & Guaranty Co., 412 Pa. 222, 194 A.2d 423 (1963).

The December 1988 facts are equally clear. Liquid having the appearance and odor of sewage was found in the drainage ditch skirting the Mobile Home Park and emptying into Hoagland Run. Bacteriological and chemical analysis proved that the substance was untreated sewage. The use of uranine dye proved that the source of the sewage was the Mobile Home Park. This discharge into the waters of the Commonwealth (defined in 35 P.S. §691.1 to include "ditches") is a violation of sections 201, 202 and 611 of the CSL, 35 P.S. §§691.201, 691.202 and 691.611.

Appellant claims that he has been a victim of regulatory abuse by DER and of tenant sabotage. The first claim relates to DER's 1984 order

prohibiting Appellant from continuing to use the waste stabilization pond. Appellant argues that all of the subsequent problems stem from that order. Whether or not that is the case, the fact remains that Appellant took no appeal from that order and now must live with its consequences: Del-Aware Unlimited, Inc. v. Commonwealth, Department of Environmental Resources, 121 Pa. Cmwlth. 582, 551 A.2d 1117 (1988). By the second claim, Appellant seeks to place the blame for sewage malfunctions on the alleged sabotage of 2 tenants who are in trouble with the law for other reasons. While plugging the collection lines (the sabotage alleged) could have caused the 1986 and 1987 incidents, it could not have created the problems found in 1988. The June episode in that year resulted from careless construction activities which left a collection line unconnected with a newly-installed septic tank. The December occurrence resulted, not from plugged lines which would have kept the sewage from discharging to the drainage ditch, but from open lines and inadequate treatment. Despite Appellant's attempts to shift responsibility for the repeated pollution events at his Mobile Home Park, it is clear that the existing system is inadequate.

By section 5 of the CSL, 35 P.S. §691.5, DER has the power to issue "such orders as are necessary to implement the provisions" of the act. Such orders, according to section 610, 35 P.S. §691.610, may require "compliance with such conditions as are necessary to prevent or abate pollution or effect the purposes" of the CSL. In its Order of August 29, 1989, DER directed Appellant to (1) submit to the Lycoming Township Supervisors, within 60 days, a sewage facilities plan revision for a sewage treatment/stream discharge facility; (2) submit to DER, within 90 days, an application for a National Pollution Discharge Elimination System (NPDES) Permit, and an application for a Part II Water Quality Management Permit; and (3) complete construction and

begin operation of a permitted sewage treatment facility within 90 days after issuance by DER of the Part II Water Quality Management Permit.

Appellant's only objection to these provisions is that they impose upon him the requirement to install a facility that is not economically feasible. He only voiced the objection, however, and never followed it up with solid evidence. Even if proved, economic infeasibility would not be a defense: Ramey Borough v. Commonwealth, Dept. of Environmental Resources, 466 Pa. 45, 351 A.2d 613 (1975).

On the basis of the evidence that does exist, we have no difficulty in concluding that Appellant's sewage system cannot function consistently within legal parameters. Accordingly, the system must be replaced or the Mobile Home Park shut down as a health hazard. We are unable to find that DER abused its discretion in requiring that the system be replaced by a treatment facility.

Conclusions of Law

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

2. DER bears the burden of proving that its Order of August 29, 1989 was authorized by law and was an appropriate exercise of discretion.

3. Appellant's conviction on the 1988 citation, being final and conclusive, establishes that Appellant discharged or allowed the discharge of untreated or partially treated sewage to the surface of the ground in violation of sections 202 and 611 of the CSL, 35 P.S. §§691.202 and 691.611, and of 25 Pa. Code §73.11(d).

4. The evidence establishes that in December 1988 Appellant discharged or allowed the discharge of untreated or partially treated sewage into waters of the Commonwealth in violation of sections 201, 202 and 611 of

the CSL, 35 P.S. §§691.201, 691.202 and 691.611.

5. Since Appellant took no appeal from DER's 1984 order prohibiting him from using a waste stabilization pond, he cannot excuse his violations of the CSL on the basis of the 1984 order.

6. Tenant sabotage in the form of plugging collection lines, even if true, cannot excuse the violations of the CSL in June and December 1988.

7. DER has the power and authority under sections 5 and 610 of the CSL, 35 P.S. §§691.5 and 691.610 to issue an order to Appellant containing conditions reasonably necessary to abate pollution.

8. DER's Order of August 29, 1989 requiring Appellant to replace the existing sewage system with a permitted sewage treatment facility was an appropriate exercise of discretion.

ORDER

AND NOW, this 15th day of November, 1990 it is ordered that the appeal of Paul Shannon is dismissed.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: November 15, 1990

cc: Bureau of Litigation
Library, Brenda Houck
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Jersey Shore, PA
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M. DIANE SMITH
SECRETARY TO THE BOAF

BEAR CREEK TOWNSHIP	:	
	:	
V.	:	**EHB Docket No. 87-428-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: November 19, 1990**

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

By Terrance J. Fitzpatrick, Member

Synopsis

An order of the Department of Environmental Resources requiring a Township to file an adequate plan for disposing of sewage in the Township is affirmed. The order was justified in light of evidence showing the widespread malfunctioning of on-lot septic systems in the Township, which is causing the release of untreated or partially treated sewage to the environment. In addition, a letter from the Township to DER will not be considered a sewage facilities plan where it does not meet the form requirements set by statute and regulation.

INTRODUCTION

This Adjudication involves an appeal by Bear Creek Township (Bear Creek), Luzerne County, from an order of the Department of Environmental Resources (DER) dated September 1, 1987. In the order in question, DER directed Bear Creek to submit "an adequate 201 Facilities Plan which addresses the total sewage needs documented in the Township."

The sewage needs of Bear Creek's residents are currently met, or attempted to be met, through individual, on-lot, septic systems. Bear Creek asserts in this proceeding that DER has not shown a need for a revised plan for providing sewage services in the Township. Alternatively, Bear Creek asserts that it did submit an adequate plan in July, 1986 when it sent a letter to DER proposing to up-grade the individual on-lot systems. DER, on the other hand, asserts that the present plan is inadequate to meet the sewage needs of Bear Creek. DER also contends that the July 2, 1986 letter failed to meet the form requirements for a plan, and, furthermore, was inadequate to meet Bear Creek's sewage needs.

A hearing on the merits was held on June 12, 1989. DER presented testimony from three witnesses, Bear Creek from two. After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. The Appellant in this proceeding is Bear Creek Township, a second class township located in Luzerne County, Pennsylvania.

2. The Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, which is the agency authorized to administer and enforce the provisions of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq.; the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, as amended, 35 P.S. §750.1 et seq; Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and the regulations promulgated under the above statutes.

3. On August 30, 1973, the Township adopted an official sewage facilities plan - this plan was part of the sewer section of the "master plan for water supply and waste water management" prepared by the Luzerne County

Planning Commission. (Stipulation No. 4 - "Stip. 4")

4. The official plan called for construction during the period of 1974 to 1977 of central sewers in portions of the Township known as Llewellyn Corners, Forest Park, and Trailwood, with conveyance of the sewage to the Wyoming Valley Sanitary Authority Sewage Treatment Plant. (Stip. 5)

5. On December 6, 1973, DER gave "qualified" approval to the plan. The Township was required to submit, within 120 days, further studies as to existing sewage problems or the suitability of soils in the developing areas of the township for individual on-lot sewage systems. (Stip. 4)

6. The Township never submitted the studies required by DER's December 6, 1973 letter. (Stip. 4)

7. The Township did not implement its official plan by constructing central sewers in Llewellyn Corners, Forest Park, and Trailwood in 1974-1977, or at any time thereafter. (Transcript - "T" - 94-95, 199-200)

8. On December 10, 1973, DER issued a Notice of Violation to the Township concerning malfunctioning on-lot sewage systems in the areas of the Township known as Country Club Estates, Trailwood, and Forest Park. The notice provided that these malfunctions had the potential to contaminate water supplies, cause disease, pollute surface waters, and attract vectors. (Stip. 6)

9. On December 18, 1973, the Township authorized Chester Engineers, Inc. to prepare a sewage feasibility report covering transportation and treatment of sewage in the Township. (Stip. 7)

10. In February, 1975, Chester Engineers submitted the report to the Township. The report outlined six alternatives to address the Township's sewage problems, and recommended an alternative No. 6 which called for central sewers to serve Llewellyn Corners, Trailwood, Country Club Estates, Forest

Park, Bear Creek Lake, the Highway Building and an Elementary School. The sewage would be conveyed to a treatment plant to be constructed on the east bank of Bear Creek. (Stip. 10, T. 182, Township Exhibit -"Twp. Exh."- D, page VIII-1)

11. On April 28, 1975, DER submitted comments on the Chester Engineer's report. DER recommended that the Township adopt alternative No. 6 (construction of central sewers) - the option recommended by Chester Engineers. DER's comments made it clear that its recommendation was advisory only, since an official review and decision could not be made until the Township chose an alternative and comments were received from planning agencies. (Stip. 11)

12. The Township never adopted any of the alternatives outlined in the Chester Engineers report. (Stip. 12)

13. On February 21, 1977, the Township engaged Smith, Miller and Associates, Inc. (Smith, Miller) to conduct an independent evaluation of the Chester Engineers report. (Stip. 13)

14. On September 19, 1980, the Township accepted a Step 1 Grant Award from the Environmental Protection Agency (EPA) to develop a sewage facilities plan which would act as a revision to the 1973 official plan. This revised plan was to address alternatives for alleviating the sewage problems, which posed public health and environmental hazards, in the Township. (Stip. 14)

15. Smith, Miller issued a proposed facilities plan in November, 1982, and a revised plan in September, 1983. Appendix A of the proposed plan documented the sewage needs and problems of the Township - it found a total of 183 malfunctioning on-lot systems in the study area of the Township. The malfunctions included soil eruptions, liquid visible on the surface of drain

fields, overflow pipes discharging sewage into drainage ditches and separate piping for gray water (wash water) discharges. (Stip. 16)

16. The Smith, Miller plan outlined several alternatives for remedying these problems, and recommended an alternative calling for, among other things, construction of sewage collection systems to transport sewage from areas where the soils were not suitable for on-lot disposal systems. The sewage thus collected would be conveyed to cluster systems of septic tanks located on suitable soils. (Twp. Exh. 6, pp 1-2, 47, 72-74)

17. On November 1, 1983, the Township Supervisors rejected the proposal of the Smith, Miller plan. (Stip. 18)

18. On November 17, 1983, DER informed the Township that it would be required to update its official plan. (Stip 19, DER Exh. H)

19. On November 21, 1983, DER notified the Township that, pursuant to Section 7(b)(4) of the Sewage Facilities Act, 35 P.S. §750.7(b)(4), DER was limiting the Township's ability to issue sewage permits for on-lot disposal systems. (Stip. 20, DER Exh. I, T. 97-98)

20. After rejecting the Smith, Miller plan, the Township and DER agreed that the physical inspection of homes - especially in the developed areas - was warranted to document the scope of the Township's on-lot sewage problems. (T. 26-29, 45-46, 120-121)

21. On March 19, 1985, the Township retained the engineering firm of Michael J. Pasonick, Jr., Inc. to prepare a sewage facility plan which would include walking to each residence within the Township looking for evidence of malfunctioning on-lot sewage systems. (Stip. 21, T. 25-28, 45-46, 120-121)

22. Daryl Pawlush, the project manager for Pasonick, walked to residences within the Township looking for evidence of malfunctioning on-lot systems. He observed residences where sewage was discharging directly to a

ditch or stream via a pipe. (T. 58-62) Water from these ditches and streams flows into lakes which are used as sources of water by Pennsylvania Gas & Water Co. (T. 62-64) He also performed dye tests, took photographs, and talked to residents about malfunctions. (T. 60-61, 65-68, 85-86, Twp. Exh. J, Sec. 6)

23. Of the 1,133 homes studied by Pasonick, 290, or 26%, had malfunctioning on-lot systems. Four areas within the Township had particularly high rates: Trailwood (74%), Forest Park (58%), Country Club Estates (73%), and Llewellyn Corners (32%). (Stip. 24)

24. The on-lot sewage malfunctions in the Township present a threat to public health. The presence of untreated or partially treated sewage on the ground or in groundwater or surface water creates the risk of disease, including giardiasis and hepatitis. (T. 74-75, 81-82, Twp. Exh. J, p. 6-2)

25. The United States Department of Agriculture, Soil Conservation Service, classifies soils according to the limitations the soils place upon use of on-lot septic systems. The three classifications are "slight," "moderate," and "severe." Soils rated "slight" are generally favorable for on lot systems. Soils rated "moderate" have properties that are unfavorable but can be overcome or modified by special planning and design. Soils rated "severe" are so unfavorable that their use is seriously limited. Using soils with severe limitations will increase the probability of failure, add to the cost of installation, and will require special design or intensive maintenance. (Twp. Exh. 6, pp. 20-22, Twp. Exh. J, Sec. 5-9)

26. Of the twenty-one types of soil found in populated areas of the Township, all but one (which makes up a small percentage of the land area of the Township) are rated "severe." (Twp. Exh. G, p. 22, Twp. Exh. J, Sec. 5-9)

27. The Pasonick plan contained alternatives for dealing with the

Township's sewage problems - the plan recommended an alternative involving construction of central sewers to serve the more densely populated areas of the Township where high on-lot system malfunction rates were found: Trailwood, Forest Park, Country Club Estates, and Llewellyn Corners. (T. 77-78,; 86-87; DER Exh. J, Sec. 1-3, 7-1)

28. The Township never adopted or implemented any of the alternatives set out in the Pasonick plan. (Stip. 25)

29. The Township was awarded a total of $43,133 in grants from the Environmental Protection Agency to conduct the Smith, Miller and Pasonick studies. (T. 21)

30. By letter dated July 2, 1986, the Township proposed to address sewage problems in the Township by requiring the systematic upgrading of on-lot septic systems, or for homes which could not be upgraded, either condemnation or the construction of small cluster systems. (DER Exh. O)

31. The Township's letter of July 2, 1986, was not accompanied by either evidence that it had been adopted by the Township Supervisors or a statement from the Luzerne County Planning Commission. (DER Exh. O, T. 104, 126, 130, 203)

32. The July 2, 1986 letter did not contain dates for implementation of the proposal. (DER Exh. O)

33. On September 1, 1987, DER issued the instant order, which required the Township to file by November 1, 1987, a revision to its 1973 official plan which would be adequate to address the sewage needs of the Township. (Stip. 26)

34. The Township has not complied with DER's September 1, 1987 Order. (Stip. 27)

DISCUSSION

The question in the present case is whether DER erred in ordering Bear Creek to file an adequate sewage facilities plan pursuant to Section 5 of the Sewage Facilities Act, 35 P.S. §750.5. DER bears the burden of proof in this appeal. 25 Pa. Code §21.101(a), (b).

Section 5 of the Sewage Facilities Act, 35 P.S. §750.5, provides in relevant part:

> §750.5. Official plans
>
> (a) Each municipality shall submit to the department an officially adopted plan for sewage services for areas within its jurisdiction within such reasonable period as the department may prescribe, and shall from time to time submit revisions of such plan as may be required by rules and regulations adopted hereunder or by order of the department: Provided, however, That a municipality may at any time initiate and submit to the department revisions of the said plan. Revisions shall conform to the requirements of subsection (d) of this section and the rules and regulations of the department.
>
> * * * *
>
> (d) Every official plan shall:
>
> * * * *
>
> (3) Provide for adequate sewage treatment facilities which will prevent the discharge of untreated or inadequately treated sewage or other waste into any waters or otherwise provide for the safe and sanitary treatment of sewage or other waste;
>
> * * * *
>
> (8) Be reviewed by appropriate official planning agencies within a municipality, including a planning agency with area wide jurisdiction if one exists, in accordance with the act of July 31, 1968 (P.L. 805, No. 247), known as the "Pennsylvania Municipalities Planning Code," as amended, for consistency with programs of planning for the area, and all such

> reviews shall be transmitted to the department with the proposed plans ... .

DER contends that the existing sewage facilities plan for Bear Creek Township does not provide for the safe and sanitary treatment of waste in the Township. The existing plan, which was adopted in 1973,[1] provided for construction of central sewers in the portions of the Township known as Llewellyn Corners, Forest Park, and Trailwood to take place from 1974 to 1977. (FOF 3,4) The Township never followed through on its plan to construct these sewers. (FOF 7) DER contends that the present situation in Bear Creek is unacceptable due to the high number of malfunctioning on-lot septic systems. See FOF 15, 22-24. DER points out that these malfunctioning systems are causing untreated or partially treated sewage to be discharged to the surface of the ground, to drainage ditches, to groundwater, and to surface waters. (FOF 22) DER contends that these discharges cause a risk of disease, including giardiasis and hepatitis. (FOF 24)

Bear Creek takes the position that DER did not submit sufficient evidence to establish that its sewage problems are serious and that a revised plan is necessary. Bear Creek cites the lack of evidence that any streams or lakes in the area have become degraded. In the alternative, Bear Creek claims that it did submit a revised plan in a letter to DER dated July 2, 1986. In this letter, Bear Creek proposed to address its sewage problems chiefly by requiring the upgrading of on-lot septic systems. (FOF 30) Condemnation or the construction of small cluster systems were mentioned as possibilities where on-lot systems could not be upgraded. (Id.) With regard to construction of central sewers, which was called for in the more densely populated areas of the Township by each of the three proposed sewage

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[1] Bear Creek contends that it submitted a revised plan on July 2, 1986. We will address this contention below.

facilities plans prepared by Bear Creek's engineering consultants (See FOF 10, 16, 27), Bear Creek objects to the "tremendous economic burden" which construction of central sewers would place on the residents of the Township. (Bear Creek Brief, p. 10)

Evaluating these arguments, it is clear that DER has met its burden of proving that Bear Creek's existing sewage facilities plan is inadequate. In addition, the July 2, 1986 letter from Bear Creek to DER cannot be construed as a "plan."

Bear Creek offered virtually no testimony to rebut DER's evidence that there are serious problems with on-lot system malfunctions in the more densely populated areas of the Township. Daryl Pawlush, project manager for Michael J. Pasonick, Jr., an engineering firm hired by Bear Creek to study problems with on-lot systems in the Township, testified regarding the results of his inspections of on-lot systems in the Township. Among other things, he observed liquids from septic tanks emanating to the surface of the ground and direct discharges of sewage from pipes to ditches outside the homes. (FOF 22) Water from these ditches flows into streams and lakes which are used as sources of water supply by Pennsylvania Gas and Water Co. (Id.) Mr. Pawlush testified that conditions in the more densely populated areas of the Township were not suitable for on-lot septic systems due to the types of soil found there and due to the high groundwater table.[2] (FOF 25, 26, T. 70-72, 80-81) Mr. Pawlush found the following rates of malfunction in the densely populated areas of the Township: Trailwood (74%), Forest Park (58%), Country Club Estates (73%), and Llewellyn Corners (32%). (FOF 23) Overall, he found that

---

[2] Permeable soils and a high groundwater table tend to prevent sewage from being retained in the ground long enough for bacteria to act upon it. (T. 64, 70-71, Twp. Exh. J, Sec. 1-2)

26% of the homes he studied had malfunctioning systems. (FOF 23)

Bear Creek did not refute this evidence at the hearing; in its brief, it simply argues that DER did not show that the Township had a "serious problem." (Bear Creek Brief, p. 8) Apparently, Bear Creek rests its belief that the problem is not serious on the lack of evidence showing degradation of streams and lakes in the area. This reasoning is unacceptable. The Sewage Facilities Act mandates that each municipality "provide for the safe and sanitary treatment of sewage." 35 P.S. §750.5 (d)(3). The Act does not provide for degradation of a water supply as a precondition to requiring a municipality to provide adequate sewage service.[3]

Based upon the above evidence, we conclude that the sewage facilities plan adopted by Bear Creek Township in 1973 is inadequate. It is true that this plan provided for construction of central sewers in three of the more densely populated areas of the Township; however, the dates for construction of the sewers (1974-1977) have long since passed without action by the Township. Moreover, the status quo which exists under the plan does not constitute "safe and sanitary treatment of sewage," as required by Section 5 of the Sewage Facilities Act, 35 P.S. §750.5(d)(3).

We next turn to Bear Creek's allegation that its July 2, 1986 letter to DER constituted an adequate plan for treatment of sewage. If this letter did constitute an adequate plan, then DER did not have a basis for issuing the order at issue here, which directed Bear Creek to file an adequate plan. The

---

[3] With regard to Bear Creek's argument that construction of central sewers would place an unreasonable economic burden on the Township, this argument is not a valid defense to DER's order to file an adequate plan. Such an argument could only be raised if DER ordered Bear Creek to install central sewers, if Bear Creek refused to comply, and if DER then brought a contempt action against Bear Creek. See Ramey Borough v. Commonwealth, DER, 466 Pa. 45, 351 A.2d 613 (1975), Kidder Township v. Commonwealth, DER, 41 Pa. Commonwealth Ct. 376, 399 A.2d 799 (1979).

letter provided, in relevant part:

> The Board of Supervisors therefore conclude that we will submit a plan for the systematic upgrading of on lot septic systems, especially those installed before 1972, to meet title 25 standards.
>
> The Board of Supervisors will also enact an ordinance for mandating cleaning of tanks; and to, support administrative/legal fees, a milling increase will be enacted. The initial step would be to improve those systems that can be improved. The second phase would be to either address the possibility of two tanks (one for sewerage and one for grey water, or retrofitting for those areas where this would be possible (see pages 19-25, Index, 201 Report and attachment 1). A third step would be to either condemn those homes that could not accept either; or if possible, small cluster systems for only those who absolutely must go that route. We will submit a request for grants on a system by system basis. The one acre lot system will be maintained unless additional land is required for technological safety. The plan will carry this township well into the next century when we would all hope the engineering schools of this nation can produce reliable, economical sewerage advancements.
>
> Sincerely yours,
>
> Bonnie J. Masilewski/for
> Bear Creek Township
> Board of Supervisors

DER Exh. O.

This letter was not accompanied by comments from the Luzerne County Planning Commission (FOF 31), as required by Section 5 of the Sewage Facilities Act, 35 P.S. §750.5(d)(8). In addition, the letter did not contain evidence that it had been officially adopted by the Township Supervisors

(FOF 31), as required by the regulations. 25 Pa. Code §71.16(b)[4] Since the letter did not constitute a "plan" or a "plan revision," it did not affect DER's authority to issue the 1987 order which directed Bear Creek to submit an adequate plan.

DER also took the position in its brief (pp 28-30) and through the testimony of one of its witnesses (T. 126-128) that the July 2, 1986 letter - even if it had met the form requirements for a "plan" - did not constitute an "adequate plan" in that it provided for a continuation of the present system of on-lot disposal throughout the entire Township. This conclusion is not surprising in light of the evidence of unsuitable soils in the Township. (FOF 25, 26) We note also, however, that DER's witnesses refused to rule out the possibility that DER might accept as adequate a properly filed plan which provided for some form of continuation of on-lot disposal. (T. 34, 123-124)[5] Since DER has not ordered Bear Creek to install central sewers, we need not rule upon whether that is the only method of adequately addressing the Township's sewage problems.

---

[4] This section of the regulations was repealed in 1989, but it was in effect at the time Bear Creek submitted the letter. The current regulations require adoption of the plan by a "resolution" of the municipality. See 25 Pa. Code §§71.31(b),(f), 71.32(a).

[5] We must take this testimony with a grain of salt in light of the testimony of one of DER's witnesses that a plan which continues on-lot disposal "is like putting a Band-Aid on a cancer sore." (T. 104) In addition, all three engineering firms which studied the Township's sewage problems recommended construction of central sewers for the more densely populated areas of the Township. (see FOF 10, 16, 27)

CONCLUSIONS OF LAW

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

2. DER bears the burden of proving that it was justified in ordering a municipality to file an adequate sewage facilities plan. 25 Pa. Code §21.101(a)(b)

3. To be considered adequate, a sewage facilities plan must "[p]rovide for adequate sewage treatment facilities which will prevent the discharge of untreated or inadequately treated sewage or other waste into any waters or otherwise provide for the safe and sanitary treatment of sewage or other waste." Section 5(d)(3) of the Sewage Facilities Act, 35 P.S. §750.5(d)(3)

4. DER met its burden of proving that it was justified in ordering a municipality to file an adequate sewage facilities plan where it presented evidence of wide-spread malfunctioning of on-lot septic systems, resulting in discharges of untreated or partially treated sewage to the environment, and where the municipality's existing plan, which called for construction of central sewers in certain areas ten to thirteen years before DER's order, was never implemented.

5. To be considered a "plan" or a "plan revision," a municipality's submission must meet the form requirements of the Sewage Facilities Act and the regulations implementing the Act.

6. The Township's July 2, 1986 letter to DER did not constitute a sewage facilities plan or a plan revision because it was not accompanied by either evidence of official adoption by the Township Supervisors or comments from the Luzerne County Planning Commission. 25 Pa. Code §71.16(b)(repealed), Section 5(d)(8) of the Sewage Facilities Act, 35 P.S. §750.5(d)(8)

ORDER

AND NOW, this 19th day of November, 1990, it is ordered that DER's order dated September 1, 1987 is sustained, and the appeal of Bear Creek Township at EHB Docket No. 87-428-F is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers
ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick
TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann
RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack
JOSEPH N. MACK
Administrative Law Judge
Member

DATED: November 19, 1990

cc: Bureau of Litigation
Library, Brenda Houck
For the Commonwealth, DER:
Michael D. Bedrin, Esq.
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For Appellant:
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jm

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M. DIANE SMITH
SECRETARY TO THE BOAI

NEW HANOVER CORPORATION	:	**EHB Docket No. 90-225-W**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** November 20, 1990

OPINION AND ORDER
SUR REQUEST FOR RECONSIDERATION

By Maxine Woelfling, Chairman

Synopsis

A request for reconsideration of the Board's denial of a citizens' group's petition to intervene in the appeal of the Department of Environmental Resources' (Department) denial of a solid waste disposal permit is denied where the petitioner has failed to satisfy the standards for reconsideration set forth in 25 Pa.Code §21.122. The request for reconsideration is nothing more than an attempt to re-argue the petition to intervene.

OPINION

This matter began with New Hanover Corporation's (Corporation) June 5, 1990, filing of a notice of appeal challenging of the Department's May 7, 1990, denial of the Corporation's re-permitting application for a solid waste disposal facility in New Hanover Township, Montgomery County.

A petition to intervene was filed by Paradise Watch Dogs (PWD) on June 25, 1990, and in an opinion and order dated September 21, 1990, the Board denied the petition. Citing the standards for intervention articulated in

BethEnergy Mines, Inc. v. DER, 1984 EHB 873, the Board determined that PWD's general statements regarding its environmental and economic concerns, along with its failure to specify any evidence it intended to produce, did not establish a direct, immediate, and substantial interest in the outcome of the appeal sufficient to warrant intervention. The Board also held that PWD failed to explain how its interests were "separate and distinct" from the Department such that the Department could not adequately represent them and failed to articulate how its involvement in this matter would assist the Board.

On October 1, 1990, PWD filed a request to reconsider the Board's denial of intervention, asserting that the denial was based on inadequate consideration of the petition.[1]

The Corporation filed its brief opposing the request on October 16, 1990, stating that the request merely reiterated PWD's arguments in support of its petition for intervention and did not meet the standards for reconsideration set forth in 25 Pa.Code §21.122.

PWD filed a reply to the Corporation's brief on October 22, 1990, alleging that it had shown compelling and persuasive reasons for reconsideration because crucial facts set forth in the request were not as stated in the Board's opinion.

Section 21.122(a) of the Board's rules of practice and procedure, 25 Pa.Code §21.122(a), provides for reconsideration of a decision for compelling or persuasive reasons, Global Hauling v. DER, EHB Docket No. 90-121-E (Opinion issued August 8, 1990). These instances are generally confined to where:

> (1) The decision rests on legal grounds not considered by any party to the proceeding and

---

[1] In addition to filing a request for reconsideration, PWD has also filed a petition for review of the Board's decision at No. 2143 C.D. 1990.

> that the parties in good faith should have had an opportunity to brief such question.
>
> (2) The crucial facts set forth in the application are not as stated in the decision and are such as would justify a reversal of the decision. In such a case reconsideration would only be granted if the evidence sought to be offered by the party requesting the reconsideration could not with due diligence have offered the evidence at the time of hearing.

PWD's request for reconsideration did not even address why reconsideration was warranted under 25 Pa.Code §21.122. Indeed, this rule was not even cited until PWD filed a reply to the Corporation's response and asserted that the crucial facts set forth in its petition were not as stated in the Board's decision and, therefore, reversal of the decision denying intervention was warranted. Both PWD's request for reconsideration and its reply were nothing more than a recitation of either arguments it should have made in its petition to intervene or arguments which have little to do with the standards for reconsideration. This, alone, justifies denial of PWD's request for reconsideration. Even so, certain of its arguments will be addressed below.

PWD contends that the facts relating to adjacent landowners in its original petition to intervene, when coupled with the allegations in its motion for summary at judgment Docket No. 88-126-W,[2] established, with particularity, the impact of the landfill on the individual members of PWD (Request, at 4). PWD also argues that its involvement over a two-year period in this related appeal translates into an immediate and specific interest in this appeal. PWD cannot use its related appeal to bootstrap its intervention here. The standards for intervention must be satisfied in this appeal, and

---

[2] This appeal, which sought review of the Department's issuance of a solid waste permit to the Corporation, was consolidated with New Hanover Township's appeal of the same permit at Docket No. 88-119-W.

PWD's participation in another separate appeal of a previous Department action relating to the Corporation does not, in and of itself, provide grounds for intervention.[3]

In its petition to intervene, PWD stated only that its interests were "separate and distinct" from those of the Department. PWD now contends that paragraphs 6-12 of this petition provide the reasons why the Department could not adequately represent PWD's interests. Several of these paragraphs relate to the identity and location of PWD's members and their concerns about the project. Several more paragraphs recite the procedural history of the case to date. Only paragraph 11 relates to a possible conflict of interest with the Department, stating:

> The petitioner's members are concerned by the indications of the first permit issued that they will be bound by an agreement with DER and the Appellant similar to the terms in the Permit of March 1, 1988, that will directly affect their homes, lives, environmental and economic well-being without their input.

PWD asserted in its reply brief that this argument was not considered by the Board in its decision to deny intervention. (Reply, at 3). This argument is utter speculation and is unsupported by anything other than the Department's previous issuance of a conditional permit to the Corporation. And, if and when the Department ever enters into a settlement of this appeal with the

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[3] PWD cites Keystone Sanitation Company, Inc. v. DER, 1989 EHB 1287, as support for its contention that its environmental and economic concerns established a direct interest sufficient to warrant intervention. The Keystone decision is distinguishable because, although the interests of the petitioner in Keystone were framed broadly, the group explained why its interests were not adequately represented by the Department and put forth very specific evidence that it intended to offer, thereby demonstrating that it had a peculiar knowledge of local conditions and could provide evidence useful to the Board. PWD did not explain why its interests were not adequately represented by the Department and did not specifically articulate the evidence it intended to present.

Corporation, PWD could file its objections when the settlement is published in the Pennsylvania Bulletin. 25 Pa.Code §21.120(a) and City of Harrisburg v. DER, 1989 EHB 373, at 377.

PWD also urges that its appeal of the Department's issuance of the conditional permit now places it in a direct conflict with the Department, and, as a result, the Department cannot adequately represent its interest in the permit denial. Again, each appeal must stand on its own and the fact that the Department and PWD are on opposite sides in another appeal does not, on its own, indicate that PWD's interests will not be adequately represented here by the Department.

Finally, PWD asserts that despite the Board's statement that PWD failed to discuss a single piece of evidence it intended to produce or explained how its involvement would assist the Board (Board opinion, at 3), it did refer to a 105 page attachment of proposed testimony[4] in the form of April 16, 1990, comments on the proposed modification to the Corporation's permit.

The General Rules of Administrative Practice and Procedure, 1 Pa.Code §35.29, provide that:

> Petitions to intervene shall set out clearly and concisely the facts from which the nature of the alleged right or interest of the petitioner can be determined, the grounds of the proposed intervention, and the position of the petitioner in the proceeding, so as fully and completely to advise the parties and the agency as to the specific issues of fact or law to be raised or controverted, by admitting, denying or otherwise answering, specifically and in detail, each material allegation of fact or law asserted in the proceeding, and citing by appropriate

[4] This portion of PWD's petition to intervene was improperly collated and placed behind the certificate of service.

reference the statutory provisions or other authority relied on.

(emphasis added)

PWD had a burden under this regulation to specifically outline and designate those sections of the commentary that directly related to its interests and concerns in this matter. But, PWD left it to the Board to sift through the 105 page commentary, relate the comments to issues in the present appeal, and ascertain those issues on which PWD could offer useful, relevant, and non-duplicative testimony. It is not the Board's responsibility to make PWD's arguments for it.

O R D E R

AND NOW, this 20th day of November, 1990, it is ordered that the Paradise Watch Dogs' request for reconsideration of the Board's September 21, 1990, order is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: November 20, 1990

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

KENNAMETAL, INC.	:	**EHB Docket No. 87-227-W**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** November 21, 1990

OPINION AND ORDER SUR
MOTION FOR SUMMARY JUDGMENT OR
IN THE ALTERNATIVE TO LIMIT ISSUES

By Maxine Woelfling

Synopsis

The Board rejects a motion for summary judgment in an appeal of an order to implement a closure plan for a hazardous waste facility and, instead, grants a motion to limit issues. The appellant is precluded from raising issues regarding the applicability of hazardous waste management regulations to its facility and its obligation to implement a modified closure plan because of its failure to appeal the Department of Environmental Resources' (Department) previous modification of the closure plan.

OPINION

This matter was initiated by the June 15, 1987, filing of a notice of appeal by Kennametal, Inc. (Kennametal) seeking the Board's review of a May 14, 1987, order of the Department requiring Kennametal, in accordance with its modified closure plan, to close three surface impoundments (lagoons) for the treatment of hazardous waste at its facility in Bedford Township, Bedford

County, and to provide the Department with certification that these lagoons have been closed. The order was issued pursuant to the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, and the rules and regulations adopted thereunder.

On December 11, 1987, the Department filed a motion for summary judgment, contending that because Kennametal had failed to appeal the Department's June 27, 1985, letter modifying Kennametal's closure plan pursuant to 25 Pa.Code §§75.265(o)(6) and (18),[1] it could not collaterally attack the 1985 modification in its appeal of the order to implement the modified closure plan. The Board denied the Department's motion because it could not ascertain whether any material issues of fact remained. Kennametal v. DER, 1988 EHB 1089.

On May 23, 1990, the Department filed a motion for summary judgment, or, in the alternative, to limit issues. The Department asserted again that, under the doctrine of administrative finality, Kennametal's failure to appeal from the June 27, 1985, modification precludes it from now raising any defense it could have raised to the June 27, 1985, modification or from challenging any factual or legal determination made in that modification.[2]

On July 3, 1990, Kennametal responded to the Department's motion, arguing that the Department failed to demonstrate the absence of issues of material fact and that it incorrectly applied the doctrine of *res judicata*. Further, Kennametal distinguished the Department's 1987 order from the 1985

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[1] These sections of the Department's regulations have been renumbered as 25 Pa.Code §§265.112 and 265.118.

[2] The Department, in its brief in support of its motion, argued that Kennametal could not raise certain issues in its pre-hearing memorandum which were not raised in its notice of appeal and also requested the Board to dismiss Kennametal's appeal on the grounds of issue preclusion. Because these claims were not raised in the Department's motion, we will not address them.

closure plan modification, asserting that the 1987 order involves implementation of the closure plan.

It is appropriate for the Board to grant summary judgment where the pleadings, depositions, and other discovery materials on file with the Board, as well as affidavits, demonstrate that there are no issues of material fact and where the moving party is entitled to judgment as a matter of law. However, as Kennametal rightly points out in its response to the Department's motion, the Department has failed to even allege an absence of disputed material facts, much less identify them and demonstrate its entitlement to judgment as a matter of law. Therefore, the motion for summary judgment is denied and we will address the Department's alternative motion to limit issues.

As was recently stated in County of Schuylkill et al. v. DER and City of Lebanon Authority, EHB Docket No. 90-124-W (Opinion issued October 31, 1990):

> A motion *in limine* is a pre-trial motion designed to exclude evidence which is potentially inflammatory, prejudicial, without probative value, or irrelevant, Iannelli and Iannelli, Trial Handbook for Pennsylvania Lawyers, §2.15 (2d ed. 1990). The judge has wide discretion to make or refuse to make advance rulings, Cleary, McCormick on Evidence §52 (3d ed. 1984). ...

For the reasons set forth below, we will exclude evidence relating to certain issues raised in Kennametal's notice of appeal.

The Department contends that under the doctrine of administrative finality, Kennametal's failure to appeal from the June 27, 1985, letter precludes Kennametal from raising in this proceeding any defense or challenge it could have asserted in an appeal of the June 27, 1985, letter. We agree.

Kennametal disputes that the Department's June 27, 1985, letter modifying its closure plan was an appealable action. But, an examination of the letter at issue leads to the conclusion that it was an appealable action. Chester County Solid Waste Authority v. DER, 1986 EHB 116. The letter stated that definitive action was taken on the closure plan Kennametal had submitted and outlined conditions and modifications which "must be implemented" according to schedules contained in the regulations cited. The letter contained directives using the language, "shall be," "shall provide," "will comply," and "will remove" in addressing implementation of the plan. The mandatory nature of the language employed, along with the timing deadlines imposed, confirms that this letter constituted an appealable action.

The doctrine of administrative finality holds that where a party aggrieved by an administrative action of the Department fails to pursue its statutory appeal rights, as Kennametal admits it has not done,[3] neither the content nor the validity of either the Department's action or the regulations underlying it may be attacked in a subsequent administrative or judicial proceeding. Com., DER v. Wheeling-Pittsburgh Steel Corp., 473 Pa. 432, 375 A.2d 320, cert. denied, 434 U.S. 969 (1977). This Board has consistently held that in accordance with the principles of administrative finality, "the factual and legal bases of unappealed administrative orders are final and unassailable." Ingram Coal Co. v. DER, 1988 EHB 800, 803. The question now becomes one of what Kennametal is precluded from raising in this appeal.

Owners or operators of hazardous waste management or disposal facilities are required to prepare and submit closure plans to the Department,

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[3] No. 19, Kennametal's Response to Department's Request for Admissions.

25 Pa.Code §§75.265(o)(3)-(6).[4] The Department may modify the closure plan submitted, and, if it does so, the modified closure plan becomes the approved closure plan, 25 Pa.Code §75.265(o)(6).[5] Closure must then be completed in accordance with both the specifications and the schedule in the approved closure plan, 25 Pa.Code §75.265(o)(7)-(8).[6] Once closure has been completed, a certification must be submitted to the Department, 25 Pa.Code §75.265(o)(10).[7] Thus, the Department's 1985 letter was prepared in response to Kennametal's submission of a closure plan. The letter provides that with regard to the closure plan Kennametal will begin closure within two weeks of the approval of the plan as stated on page 26 of the plan, and that closure will be completed within 180 days as provided by §75.265(o)(8).[8] (Motion for Summary Judgment, Ex. D, p.2) Kennametal was also required by the approved modified closure plan to complete closure of its lagoons within 180 days and to certify closure of the lagoons with 15 days of completion of closure.

The 1987 order at issue in this appeal alleges that Kennametal failed to implement its modified closure plan in accordance with the schedule contained therein and directs it to complete closure of Lagoons 1 and 2 and submit certification of closure to the Department.[9] Kennametal's notice of

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[4] Renumbered as 25 Pa.Code §265.112.

[5] Renumbered as 25 Pa.Code §265.112(d).

[6] Renumbered as 25 Pa.Code §265.113.

[7] Renumbered as 25 Pa.Code §265.115.

[8] Renumbered as 25 Pa.Code §265.113.

[9] The order also directed Kennametal to submit certification that Lagoon 3 footnote continued

appeal sets forth 11 grounds for appeal:[10]

a. The Order is arbitrary, capricious and unreasonable.

b. The Order is not environmentally necessary.

c. The Order is not in accordance with law.

d. The Order is contrary to DER regulations.

e. Appellant has complied with all applicable laws and regulations.

f. Appellant has been denied due process of law.

g. There is no hazardous waste on the site.

h. The hazardous waste regulations are not applicable to the site.

i. The waste in the former lagoons has been removed and disposed of.

j. Closure of Lagoons 1 and 2 has been completed.

k. Waste on the site, if any, should be removed, and not capped on site.

Grounds (a) through (d) and (f) are properly raised in this appeal, as they are general attacks on the validity of the 1987 order. However, it is necessary to examine each of the remaining grounds individually to determine whether Kennametal is precluded from raising these objections.

Objection (e) asserts that Kennametal has complied with all applicable laws and regulations. To the extent that this objection may be interpreted as suggesting that the preparation, submission, and implementation

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continued footnote
had been closed in accordance with the modified closure plan by May 28, 1987. The Department subsequently withdrew this portion of the order (Paragraph 16, Motion for Summary Judgment).

[10] A twelfth ground is set forth which relates to that portion of the order which the Department subsequently withdrew.

of the modified closure plan was unnecessary, Kennametal is precluded from asserting this issue. However, to the extent it may be interpreted as claiming that Kennametal completed closure in accordance with its closure plan prior to the issuance of the 1987 order, it is an objection which is properly raised.

Kennametal's objections that there is no hazardous waste on the site, that the hazardous waste regulations are inapplicable to the site, and that the waste on site should be removed rather than capped are, however, precluded, as they should have and could have been raised in a challenge either to the Department's 1982 directive to submit a closure plan[11] or to the Department's 1985 approval of the modified closure plan.

Kennametal's remaining two objections are that it has removed and disposed of the wastes in the lagoons and that it has completed closure of the lagoons. To the extent that Kennametal is asserting that it completed closure of the lagoons in the manner set forth in the modified closure plan and by the deadlines in the modified closure plan, it may properly raise those issues. To the extent Kennametal is using these objections to question the manner of closure and deadline for doing so, it is precluded from doing so by its failure to appeal the modified closure plan.

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[11] See Paragraph H of the Department's May 14, 1987, order.

O R D E R

AND NOW, this 21st day of November, 1990, it is ordered that:

1) The Department's motion for summary judgment is denied;

2) The Department's motion to limit issues is granted consistent with the foregoing opinion; and

3) This matter is placed on the hearing list.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: November 21, 1990

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Kurt J. Weist, Esq.
Central Region
For Appellant:
Robert W. Thomson, Esq.
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Pittsburgh, PA

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M. DIANE SMITH
SECRETARY TO THE BOA

WILLIAM RAMAGOSA, SR., et al.	:	
	:	
V.	:	**EHB Docket No. 89-097-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: November 21, 1990**

OPINION AND ORDER
SUR
PETITION FOR STAY AND SUPERSEDEAS

Robert D. Myers, Member

Synopsis

Where landowners destroyed vegetated wetlands by placement of fill and removal of peat, without permits from DER, they are not entitled to a supersedeas with respect to a DER Compliance Order requiring them to restore the sites. The Board will not maintain a status quo that preserves unlawful activity. In addition, since the landowners acknowledge that permits were necessary and since the evidence establishes that the wetlands were important and unique, DER was fully justified in requiring restoration.

OPINION

This proceeding arose on April 10, 1989 when a Notice of Appeal was filed by William Ramagosa, Sr., William Ramagosa, Jr., Robert Ramagosa, Sunrise Real Estate, Inc., Sunrise Ventures, Inc. and Sunnylands, Inc. (collectively called Appellants), seeking review of a Compliance Order issued by the Department of Environmental Resources (DER) on March 10, 1989. The Compliance Order charged Appellants with unpermitted activity on a site in

Dingman Township, Pike County, resulting in the loss of wetlands in violation of the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., and the Dam Safety and Encroachments Act (DSEA), Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 et seq. Appellants were directed to cease their unlawful activity and to restore the site to its prior condition.

On October 19, 1990 Appellants filed a Petition for Stay and Supersedeas, in opposition to which DER filed a Memorandum of Law on November 5, 1990. On November 7, 1990 Appellants filed a Motion for Default Judgment on the Petition for Stay and Supersedeas. A hearing on the Petition was held in Harrisburg on November 8, 1990 before Administrative Law Judge Robert D. Myers, a Member of the Board. Both parties appeared by legal counsel and presented evidence in support of their respective positions. On November 16, 1990 they both filed Memoranda of Law. The record consists of the pleadings, a hearing transcript of 195 pages and 39 exhibits.

Before addressing the merits of the Petition, we must dispose of two preliminary matters. The first is jurisdictional. Appellants not only request that we issue a supersedeas with respect to the Compliance Order, they also want us to stay all proceedings pending before Commonwealth Court at No. 360 M.D. 1989 and to prohibit DER from taking any steps to enforce the Compliance Order so long as this appeal is pending. Appellants offer no statutory or judicial citations to establish our power to grant more than a supersedeas and we know of none. It would be novel indeed for an administrative agency operating within the Executive branch to have the power to stay a proceeding pending in a constitutional court operating within the Judicial branch. We make no claim to such power. We also lack the power to enjoin DER from taking enforcement action against Appellants: Raymark

Industries, Inc. v. DER, 1986 EHB 176. The only requested relief we have the power to grant is a supersedeas.

The other preliminary matter is Appellants' Motion for Default Judgment on the Petition for Stay and Supersedeas. Appellants claim to be entitled to this relief because of DER's alleged failure to admit or deny specifically and in detail each material allegation of the Petition as required by 1 Pa. Code §35.35 and 25 Pa. Code §21.64(e). DER's response to the Petition was denominated "Memorandum of Law" but has attached to it a sworn verification of Richard C. Shannon, a DER Water Pollution Biologist, attesting to the truth and correctness of the "averments of fact" contained in the Memorandum of Law.

There are some averments of fact in the Memorandum of Law - few in number and immersed in the narrative - but they are sufficiently specific to meet our procedural standards.[1] In reality, the vast majority of the facts alleged by Appellants in their Petition are not in issue. The legal conclusions to be derived from those facts are very much in issue, however, and DER's Memorandum deals primarily with those conclusions. Moreover, Appellants' allegations that (1) they will suffer irreparable harm, (2) they are likely to prevail on the merits, and (3) there will be no harm to the public are not purely allegations of fact. They are averments of conclusions of law to which a response is not required or, at least, mixed averments of fact and law which are not looked upon with favor in pleadings: Finley Estate, 64 D&C 230 (1948). Accordingly, Appellants' Motion for Default Judgment will be denied.

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[1] We do not recommend this type of response because of the obvious danger that an important averment of fact will not be properly denied.

The evidence produced at the hearing establishes the following factual situation. Appellants own about 2500 acres of land in Dingman Township, Pike County, which they have been developing since the early 1960s. Currently, 800-900 acres have been subdivided and about 550 residences have been constructed. The land is in the Pocono Mountains, is heavily wooded and contains a number of lakes and swamps. It is drained primarily by three creeks - Poison Brook, Rattlesnake Creek and Dark Dwarfs Kill Creek - and their unnamed tributaries.

Beginning in 1982 and continuing at least until 1987, Appellants removed peat from areas designated in the Compliance Order as Site A, Site B, Site D, Site F and Site G which was then stockpiled for sale or future use on residential properties. Prior to the removal of the peat, these Sites were emergent/scrub-shrub bog habitats of good quality. Only Site B had open water - small areas interspersed throughout the Site.[2] After the removal of the peat, Appellants converted Site B, Site D, Site F and Site G into lakes or ponds. Site A was left as a bowl-shaped depression with a mixture of vegetation and open water. Site D (Spruce Lake) has been partially developed with about 50 residences. Site F has been fully developed with 4 residences. None of the other sites has been developed.

Site C and Site E[3] were good quality forested wetlands. On or about 1988 Appellants deposited fill material on portions of Site C for the purpose of constructing 4 residences which currently exist. In addition, they installed in 1985 a culvert in Poison Brook (where it flows out of the wetlands) in the course of constructing a road to provide access to the 4

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[2] The approximate sizes of these Sites are as follows: Site A, 6 acres; Site B, 20 acres; Site D, 24 acres; Site F, 1.3 acres; and Site G, 2 acres.

[3] Site C is 5.5 acres in size; Site E is about 1 acre.

residences. Appellants deposited stumps, trees and fill material onto Site E which remains undeveloped.[4]

Appellants had no permits either from DER or from any other state or federal agency to undertake the activities at Sites A through G. After a May 6, 1986 inspection by a representative of the U.S. Environmental Protection Agency (EPA), EPA issued to Appellants on July 3, 1986 Findings of Violation and Order for Compliance with respect to the placement of fill material in wetlands adjacent to Poison Brook. This action by EPA was not tied specifically to any of the Sites by evidence presented at the hearing. However, a comparison of the coordinates suggests that it was directed at Site D or Site F or both.

After a site inspection on May 5, 1987, DER issued to Appellants on May 28, 1987 a Notice of Violation (NOV) with respect to the installation of a culvert in Site C. After a site inspection on May 17, 1988, DER issued to Appellants on August 16, 1988 two more NOVs. One of them pertained to the fill placed at Site C. The other (despite some uncertainty) apparently involved the removal of peat from Site A. A fourth NOV, issued to Appellants on December 20, 1988, pertained to an earthen dam constructed on Site B to create Sprint Lake. On March 10, 1989 DER issued the Compliance Order involved in this appeal, finding violations at Sites A through G and ordering Appellants to cease their unpermitted activities at these Sites and to restore the Sites to their former condition.

In the meantime, during November 1988 Appellants had submitted to DER Application No. E52-049 for an after-the-fact permit covering the installation

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[4] Appellants propose to restore Site E by removing the material placed there and revegetating the Site. The Petition for Stay and Supersedeas, therefore, does not involve this Site.

of the culvert in Site C. In January 1989 Appellants had submitted to DER Application No. E52-056 for an after-the-fact permit covering the placement of fill in Site C. DER has not acted on these applications at present.[5]

Appellants filed on September 27, 1990 Joint Permit Application No. 52-083 with DER and the U.S. Army Corps of Engineers for after-the-fact permits covering the activities at Sites A, B, D, F and G. DER has not acted on this Application at present.

To be entitled to a supersedeas, Appellants must show (1) irreparable harm, (2) the likelihood of prevailing on the merits, and (3) the unlikelihood of injury to the public. If pollution or injury to the public health, safety or welfare exists or is threatened, no supersedeas may be granted: section 4(d), Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, as amended, 35 P.S. §7514(d); 25 Pa. Code §21.78. Board precedents have created an additional rule. Where the status quo sought to be maintained by the supersedeas involves an unlawful activity, a supersedeas will not be granted.

This rule presented Appellants with an insurmountable obstacle. They acknowledged at the hearing that they needed permits from DER to engage in the activities at Sites A through G. They have now filed applications for permits to cover all of the Sites except Site E which they intend to restore. They, therefore, want us to supersede DER's Compliance Order until the applications have been processed. Granting such a supersedeas would preserve admitted

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[5] It was explained at the hearing that DER will not process permit applications on a piecemeal basis when dealing with a site on which there are multiple unpermitted activities (N.T. 185).

unlawful activities in opposition to Board precedents: Valley Forge Plaza Associates v. DER, 1989 EHB 967 at 975. We are not persuaded to abandon what we consider to be a wise principle.[6]

We also are not persuaded that Appellants are likely to prevail on the merits. Having acknowledged the details of what they did at the Sites and having acknowledged that such actions were unlawful, they are left with only one argument - that DER's order to restore the Sites is an abuse of discretion, especially now that permit applications have been filed. Section 3 of the DSEA, 32 P.S. §693.3, defines "body of water" to include a wetland and defines "encroachment" to include "activity which in any manner changes, expands or diminishes the course, current or cross-section of any...body of water." Appellants' activities at each of the Sites fell within the definition of "encroachment." That being the case, Appellants were required by section 6(a) of the DSEA, 32 P.S. §693.6(a), and by 25 Pa. Code §105.11 to obtain permits from DER before commencing such activities. Their failure to do so constituted unlawful conduct under section 18(a) of the DSEA, 32 P.S. §693.18(a), presenting DER with an enforcement challenge.

Among its powers, DER could proceed by way of abatement of public nuisances as authorized by section 19 of the DSEA, 32 P.S. §693.19, or by issuance of an enforcement order under section 20 of the DSEA, 32 P.S. §693.20, requiring "compliance with such terms and conditions as are necessary to effect the purposes" of the DSEA. One of the purposes of the DSEA set forth in section 2, 32 P.S. §693.2, is the protection of the "natural

---

[6] Our situation here is different from that described in Elmer R. Baumgardner et al. v. DER, 1988 EHB 786, where DER entered upon a new interpretation of its regulations and, at the same time, ordered a cessation of operations. The Board superseded DER's order pending the issuance of permits.

resources, environmental rights and values secured by the Pennsylvania Constitution and conserve the water quality, natural regime and carrying capacity of watercourses." This obviously includes the protection of important wetlands as defined in 25 Pa. Code §105.17(a). DER's evidence established that Sites A through G were important wetlands. Beyond that, the evidence showed that they were "vegetated" wetlands, a "unique resource,"[7] in the words of Richard C. Shannon, a DER Water Pollution Biologist, providing habitat for a variety of fish and wildlife species that cannot exist elsewhere (N.T. 171). Filling in these wetlands to create uplands or converting them to open water sacrifices a unique and scarce resource for another that already exists in abundant quantities. Appellants made no serious attempt to counter this evidence. Based on the limited record before us, we agree with DER that requiring Sites A through G to be restored to their "vegetated" wetlands condition is "necessary to effect the purposes" of the DSEA.[8] The Compliance Order, therefore, is neither unlawful nor an abuse of discretion.

---

[7] Other testimony established that less than 2% of Pennsylvania's land area is in vegetated wetlands (N.T. 136).

[8] The Compliance Order also was based upon the CSL and section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P §510-17; but, since we have sustained it under the DSEA, we see no reason discuss these other statutory provisions.

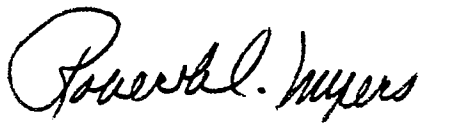
ORDER

AND NOW, this 21st day of November 1990, it is ordered as follows:

1. The Motion for Default Judgment filed by Appellants on November 7, 1990 is denied.

2. The Petition for Stay and Supersedeas filed by Appellants on October 19, 1990 is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: November 21, 1990

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

GEORGE SKIP DUNLAP	:	
	:	
v.	:	EHB Docket No. 89-135-F
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: November 21, 1990

OPINION AND ORDER SUR MOTION FOR SUMMARY JUDGMENT

By Terrance J. Fitzpatrick, Member

Synopsis

A motion for summary judgment filed by the Department of Environmental Resources (DER) is denied where material facts remain in dispute. The Appellant is entitled to a hearing on whether the public benefits of the proposed project outweigh the environmental damage to the important wetlands involved.

OPINION

This case involves an appeal by George Skip Dunlap (Dunlap), from DER's April 18, 1989 denial of a permit application. Dunlap had sought permission from DER under the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, No. 325 as amended, 32 P.S. §693.1 et seq. (DSEA) to construct a dam along Quemahoning Creek at the mouth of Beaverdam Creek on Dunlap's property in Jenner Township, Somerset County. Dunlap wanted to dam the creek to form a shallow recreational lake.

A hearing on this matter had been set for February 5, 6 and 7, 1990.

On January 22, 1990, the parties filed a pre-hearing stipulation of facts, documents, and relevant issues, pursuant to Pre-Hearing Order No. 2. Based on facts agreed to in the stipulation, DER moved for summary judgment on February 20, 1990. Dunlap responded to the motion on March 5, 1990.

This Opinion and Order addresses DER's motion for summary judgment. In its motion, DER maintains that it is entitled to summary judgment based on the following argument: The stipulated facts establish that Dunlap's project will affect "important wetlands" as defined in 25 Pa. Code §105.17(a). The regulations governing important wetlands require the applicant (Dunlap, in this case) to demonstrate that the public benefit of the project outweighs the damage to the wetlands and to submit information which would justify locating the project in the proposed vicinity. Because Dunlap did not do this in his application or in his pre-hearing memorandum, DER was--and is--precluded as a matter of law from issuing the permit.

Dunlap's response to the motion alleges, inter alia, that the motion should be denied because there are genuine issues of material fact in dispute regarding whether or not public benefits of his proposed project outweigh the potential damage to the wetland.

The Board has authority to grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." Summerhill Borough v. Commonwealth, Department of Environmental Resources, 34 Pa. Commw. 574, 383 A.2d 1320, 1322 (1978); Yeagle v. DER, EHB Docket No. 89-086-F, June 19, 1990 (slip opinion at p. 2).

Upon review of the pleadings, affidavits and admissions before us, we will deny the motion for summary judgment because DER has not established that

there is no genuine dispute of material fact.

Based upon the stipulated facts, we tend to agree with DER that the site constitutes an "important wetland" under DER's regulations. Paragraph 12 of the Stipulation provides that the site provides "important natural biological functions such as nesting, spawning, rearing and resting sites for aquatic and land species." This language is virtually identical to the criteria for an "important wetland" stated in 25 Pa. Code §105.17(a)(1). But the conclusion that the site is an important wetland is not the end of our analysis. Under the regulations, permits can be granted for activities in important wetlands when the "public benefits of the project outweigh the damage to the wetlands resource and . . . the project is necessary to realize public benefits." 25 Pa. Code §105.17(b) DER contends that Dunlap did not cite sufficient evidence of public benefits in his permit application or in his pre-hearing memorandum; however, we note that Dunlap claims he will present at the hearing evidence of public benefits as well as evidence of design modifications which can be applied to mitigate the impact of the dam on wetlands. (Dunlap pre-hearing memorandum, sections A, C) Whether this evidence will be "sufficient" to warrant granting the application is a material question of fact, and such questions cannot be resolved in deciding a motion for summary judgment.

Finally, Dunlap points out in his response to DER's motion that a motion for summary judgment should be filed within such time as not to delay trial. See Pa. RCP 1035. In this case, we probably ran afoul of Pa. RCP 1035 by cancelling the hearing scheduled for February, 1990, due to the imminent filing of a motion for summary judgment by DER. Accordingly, we will schedule hearings and decide this matter as expeditiously as possible.

ORDER

AND NOW, this 21st day of November, 1990, it is ordered that the Department of Environmental Resources' motion for summary judgment is denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: November 21, 1990

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M. DIANE SMITH
SECRETARY TO THE BC

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES,	:	
Plaintiff	:	
v.	:	**EHB Docket No. 90-034-CP-W**
U. S. WRECKING, INC.,	:	**Issued: November 21, 1990**
Defendant	:	

OPINION AND ORDER SUR PRELIMINARY OBJECTIONS

By Maxine Woelfling, Chairman

Synopsis

A preliminary objection in the form of a demurrer is sustained in a case involving the appeal of a civil penalty assessment. The Board will treat a motion to strike as a demurrer where the caption of a party's preliminary objection is, in substance, a demurrer. The Board will sustain a demurrer where it is apparent from the pleadings that a defendant cannot prove facts legally sufficient to establish its right to the relief requested. Finally, the Board will sustain a motion to strike impertinent matter where allegations in a counterclaim are immaterial and inappropriate to the proof of the cause of action asserted.

OPINION

This matter was initiated on January 19, 1990, with the filing of a complaint for civil penalties pursuant to the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119 (1959), as amended, 35 P.S. §4001 et seq., by

the Department of Environmental Resources (Department). The complaint alleged that U.S. Wrecking, Inc. (U.S. Wrecking) violated various sections of the Air Pollution Control Act when it removed and disposed of insulation containing asbestos from two buildings at 7 and 9 East King Street in the City of Lancaster, Lancaster County.

On July 3, 1990, the Department filed a motion for default judgment or, in the alternative, for sanctions, based upon U.S. Wrecking's failure to answer the complaint within twenty days of service. The Board denied the motion in a September 27, 1990, opinion, since there was no proof establishing that the defendant was served with both a complaint for civil penalties and a notice to defend by a date certain.

U.S. Wrecking filed an answer to the complaint and new matter on July 30, 1990, arguing that the asbestos removal and disposal were conducted by U.S. Construction, Inc.--not U.S. Wrecking. In addition, under the caption "New Matter," U.S. Wrecking averred it was entitled to judgment on its behalf and $10,000 worth of attorneys' fees because:

> 35. U.S. Wrecking, Inc. did not have the contract for the job in question.
>
> 36. William L. Groeber through his words and actions sought to get revenge as a result of a prior hearing in which the Defendant was found not guilty.
>
> 37. Plaintiff knew or should have known that Defendant was not doing the job in question.
>
> 38. Defendant in the immediate past has file (sic) the proper notices in jobs involving asbestos, copies of which are attached hereto, made a part hereof and marked Exhibit F.
>
> 39. U.S. Construction, Inc. as soon as the asbestos was exposed did all that was required of that company.
>
> 40. On February 13, 1988 and (sic) stated that he wanted a Letter agreement settlement in the

amount of $1,000.00 from the Fulton and $1,000.00 from U.S. Wrecking, Inc. when he was told and he knew that U.S. Wrecking, Inc. was not involved.

41. William L. Groeber when informed that U.S. Wrecking was not involved and would not pay stated that he had three options (1) file criminal charges, (2) file before the board, (3) report the incident to the Federal EPA.

42. On August 30, 1988, William L. Groeber filed criminal violations against U.S. Wrecking, Inc., U.S. Construction, Inc. and Arthur G. Mellinger III.

43. On April 25, 1989 William L. Groeber withdraw (sic) one criminal violation and filed any new criminal violation.

44. On October 25, 1989 at 1:30 P.M., the Defendant was found not guilty.

45. Immediately after the hearing, William L. Groeber again stated its (sic) not over.

46. The Plaintiff did not appeal the not guilty verdict of the District Justice.

47. The Plaintiff at all times herein knew that U.S. Wrecking, Inc. was not involved in the contract but continuously pursued them.

48. The Plaintiff with a phone call to the Fulton Bank could have determined that U.S. Wrecking, Inc. was not involved.

49. U.S. Construction, Inc. filed a certificate of insurance with the Fulton Bank which was made known to the Plaintiff. A copy of said certificate is attached hereto, made a part hereof and marked Exhibit G.

(Answer of U.S. Wrecking, Inc., pp. 4 and 5)

While the material at issue was located under the caption "New Matter" in the U.S. Wrecking's answer, it is actually a counterclaim, and the Board will treat it as such.

On August 20, 1990, the Department filed preliminary objections to U.S. Wrecking's counterclaim. First, the Department moved the Board to strike

off U.S. Wrecking's prayer for relief, averring that it failed to state a claim and failed to comply with the Rules of Civil Procedure. Next, the Department demurred to U.S. Wrecking's request for attorney fees, alleging that U.S. Wrecking failed to plead certain facts necessary for it to establish that it was entitled to the attorney fees. Finally, the Department asserted that the information contained in paragraphs 38, 40 and 41 of Defendant's New Matter was impertinent, and moved the Board to strike these paragraphs.

The Board will treat the Department's motion to strike off as a demurrer. Rule 1017(b)(2) of the Pennsylvania Rules of Civil Procedure authorizes the use of a motion to strike as a preliminary objection on two grounds: (1) lack of conformity to law or rule of court, and (2) the inclusion of scandalous or impertinent matter. A motion to strike, therefore, is employed to attack defects in form, while a demurrer is used to test the legal sufficiency of a cause of action. Where the caption of a party's preliminary objection is a motion to strike, but the preliminary objection is, in substance, a demurrer, the court will treat the motion to strike as a demurrer. Breithoff v. Erie Ins. Group, 45 North Co. Rep. 185, 1 Packard's L. Rep. 433 (1982).[1]

Preliminary objections in the form of a demurrer will be sustained only when it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish his right to relief. Firing v.

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[1] At least one case, Piergallini v. Baxter, 7 D&C 3d 109 (1977), has held that a demurrer may not be used to attack the sufficiency of new matter in an answer--reasoning that a demurrer is appropriate only when it puts the pleader out of court. This Board does not agree. Rule 1017(b) of the Pa. RCP expressly limits the use of motions to strike off a pleading to situations where the pleading fails to conform to law or rule of court, or contains scandalous matter, and it has been held that a demurrer is the proper preliminary objection to test the legal sufficiency of all pleadings. Roth v. Golden Skipper Restaurant & Catering, Inc., 167 Pa. Super. 558, 76 A.2d 475 (1950).

Kephart, 466 Pa 560, 353 A.2d 833 (1976). Based upon the information filed in its new matter, U.S. Wrecking cannot prove facts legally sufficient to establish its right to attorney fees and judgment on its behalf.

The Board requires express statutory authority to award attorney fees.[2] Apart from the general principle of administrative law that administrative agencies have only those powers specifically conferred upon them by the legislature, the Commonwealth Court has noted:

> [B]y passing the Costs Act [Act of December 13, 1982, P.L. 1127, 71 P.S. 2031 et seq.], the Legislature has indicated that it did not intend the Judicial Code, or statutes providing individual agencies with authority to award general relief, to be construed as permitting an agency to award costs and attorney's fees. For this Court to hold that such was the intent and to so interpret the statutes would be to render the Costs Act surplusage . . . .
>
> Lehotzky v. Com., State Civ. Serv. Com'n, 82 Pa. Cmwlth. 612, 477 A.2d 13, 14 (1984)

U.S. Wrecking is not entitled to attorney fees under the Costs Act, regardless of whether it is asserting that it is entitled to costs for the prior criminal litigation or the action currently pending before the Board. U.S. Wrecking cannot obtain attorney fees for the prior criminal litigation because, under §3(a) of the Costs Act, 71 P.S. §2033(a), a tribunal may award attorney fees only for "an adversary adjudication," and §2 of the Costs Act, 71 P.S. §2032, specifically excludes criminal actions from the definition of adversary adjudication. If, on the other hand, U.S. Wrecking means to seek attorney fees for the action currently before the Board, the action is

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[2] For examples of such express statutory authority to award attorney fees see §3 of the Costs Act, Act of December 13, 1982, P.L. 1127, 71 P.S. 2033; §4(b) of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.4(b), and §601(g) of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.601(g).

premature. Fees under the Costs Act are awarded only to a "prevailing party," 71 P.S. §2033(a). Until the action before the Board is concluded, it is impossible to say which party will prevail.

Since U.S. Wrecking has failed to plead facts which would entitle it to the relief requested, the Board will sustain the Department's demurrer for failure to state a cause of action. The Board will not grant U.S. Wrecking leave to amend. While the Board must give a pleader an opportunity to file an amended counterclaim where it is evident that the defective pleading could be cured by amendment, there is, in the case at bar, no reasonable possibility that the pleading could be amended successfully. See 5 Std. Pa. Practice §§24.2, 24.4-24.6.

The Board will also sustain the Department's motion to strike impertinent matter in paragraphs 40 and 41. It is unclear from U.S. Wrecking's answer just how these paragraphs are associated with the counterclaim for attorney fees, but, to the extent the paragraphs are not related to the request for attorney fees, they are immaterial and inappropriate. Offers of compromise and settlement discussions are not pertinent to any counterclaim or defense U.S. Wrecking is asserting under its new matter. DER v. S.S. Fisher Steel Corp., 1987 EHB 564.

As for the Department's other motions and its other demurrer, these apply to the same portion of U.S. Wrecking's answer affected by the demurrer for failure to state a claim, and therefore, it is unnecessary for the Board to address them.

ORDER

AND NOW, this 21st day of November, 1990, it is ordered that:

1. The Department's demurrer to the counterclaim constituting the "New Matter" in defendant U.S. Wrecking's answer is sustained on the grounds that the counterclaim fails to state a cause of action; and
2. The Department's motion to strike paragraphs 40 and 41 of U.W. Wrecking's New Matter is granted.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: November 21, 1990

cc: **Bureau of Litigation**
Library, Brenda Houck
For the Commonwealth, DER:
Michael J. Heilman, Esq.
Central Region
For Defendant:
Thomas E. Harting, Esq.
Lancaster, PA

nb

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M. DIANE SMITH
SECRETARY TO THE BOA

BOBBI L. FULLER, et al.	:	**EHB Docket No. 89-142-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
PARADISE TOWNSHIP SEWER AUTHORITY,	:	
Permittee	:	**Issued:** November 23, 1990

OPINION AND ORDER SUR
MOTION TO SUPPLEMENT RECORD

By Maxine Woelfling, Chairman

Synopsis

A motion to supplement the record is denied where the moving party fails to demonstrate why the documents could not have been, with due diligence, offered into evidence at the hearing on the merits. Furthermore, the opposing party must be given the opportunity to cross-examine on the documents and rebut them.

OPINION

A detailed recounting of the procedural history of this appeal is not essential to resolving the present controversy. This appeal involves a challenge by Bobbi L. Fuller, Darryl Wilson, and the Paradise Township Citizens Association (Appellants) to the Department of Environmental Resources' (Department) issuance of a Part II water quality management permit to the Paradise Township Sewer Authority (Authority). That permit, which was issued pursuant to §207 of the Clean Streams Law, the Act of June 22, 1937,

P.L. 1987, as amended, 35 P.S. §691.207, authorized the construction of a 120,000 gallons per day sewage treatment plant in Paradise Township, Lancaster County. A hearing on the merits was held on June 11 and 12, 1990. On October 31, 1990, after the parties had filed their post-hearing briefs, the Authority filed a motion to supplement the record with final flood elevations prepared by the Federal Emergency Management Agency (FEMA) and with the final, approved sewage facilities plan for Leacock Township.

The parties were directed to respond to the motion on or before November 9, 1990. By letter dated November 7, 1990, the Department indicated that it had no objection to the motion. Appellants responded to the motion on November 9, 1990, opposing any supplement to the record on the grounds that the Authority had failed to satisfy the standards for reopening the record articulated in 1 Pa.Code §35.231(a) and 25 Pa.Code §21.122(a). Further, Appellants argued that the record could not be merely supplemented by the addition of these documents; they would have to be authenticated and the contents subjected to cross-examination by Appellants, thus necessitating additional hearings.

The Authority has not demonstrated why the approved Leacock Township official sewage facilities plan could not have been, with due diligence, offered into evidence at the hearing on the merits and its request to supplement the record in this respect must be denied. Spang & Company v. DER, EHB Docket No. 87-042-E (Adjudication issued March 27, 1990). On the other hand, since the final FEMA flood studies had not been completed until after the hearing, they could not have been offered into evidence at the time.

This issue aside, Appellants' remaining argument does have merit. The Authority seeks merely to "supplement" the record. These documents, absent a stipulation from counsel, cannot simply be added to the record.

Appellants must have the opportunity to cross-examine and rebut the evidence put forth in the documents.

Ordinarily, assuming that the standards for re-opening the hearing are met, there would be no difficulty in scheduling additional hearings. However, in this instance, as Appellants point out, the Authority has requested expedited (before the end of the year) disposition of its appeal because of financing arrangements for the project, and the Board granted its request by order dated November 6, 1990. Scheduling additional hearings and allowing the parties to submit supplemental briefs will make it nearly impossible to adjudicate the appeal by the end of this year. The Authority cannot have it both ways.

O R D E R

AND NOW, this 23rd day of November, 1990, it is ordered that Paradise Township Sewer Authority's motion to supplement the record is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: November 23, 1990

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Lisa E. Comer, Esq.
Central Region
For Appellant:
Eugene E. Dice, Esq.
Harrisburg, PA
For Permittee:
Frank P. Mincarelli, Esq.
BLAKINGER, BYLER & THOMAS
Lancaster, PA

and

Jan P. Paden, Esq.
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RHOADS & SINON
Harrisburg, PA

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M. DIANE SMITH
SECRETARY TO THE BOA

DECOM MEDICAL WASTE SYSTEMS (N.Y.), INC.	:	
	:	
v.	:	**EHB Docket No. 89-358-F**
	:	**(Consolidated appeals)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** November 28, 1990

OPINION AND ORDER SUR
MOTION FOR SUMMARY JUDGMENT

By Terrance J. Fitzpatrick, Member

Synopsis

A motion for summary judgment filed by the Appellant is denied. Under Act 109 of 1990, a "transfer facility" is a facility which receives and processes or temporarily stores waste at a site other than the generation site, and which facilitates the transfer or transportation of the waste for processing or disposal. So long as a facility "temporarily stores" waste, it is not necessary for the facility to "process" waste, in the sense of reducing or converting it.

OPINION

This is an appeal by Decom Medical Waste Systems, Inc. (Decom) from two compliance orders of the Department of Environmental Resources dated September 7 and 8, 1989.[1] In the compliance orders, DER found that the Decom

[1] At the time DER issued its orders, ownership of the facility in question was in the process of changing hands from American Environmental Services, footnote continued

(formerly AES) facility at Delaware Avenue in Philadelphia[2] received and stored medical waste without a permit from DER, allegedly in violation of 25 Pa. Code §279.201 and Sections 201(a) and 501(a) of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, No. 97, as amended, 35 P.S. §§6018.201(a), 6018.501(a). DER ordered Decom to cease accepting and storing waste, and ordered Decom not to remove waste until notified by DER.

Decom filed a petition for supersedeas with its appeal. After a hearing, the Board granted Decom's petition, Decom Medical Waste Systems, Inc. v. DER, 1989 EHB 1079. This decision was based in large part on the conclusion that Decom's facility did not constitute a "transfer facility" as defined in 25 Pa. Code §271.1 because the "bulk transfer" of waste did not occur at the site.

This Opinion and Order addresses Decom's motion for summary judgment filed On December 5, 1989. In this motion, Decom again asserts, as it did at the supersedeas hearing, that there is no "bulk transfer" of waste at the facility; therefore, the facility cannot be a "transfer facility." Accordingly, Decom argues that DER lacked authority to close the facility.

DER filed a response opposing Decom's motion. At the outset, DER concedes that the Board's holding in Colombo v. DER, 1989 EHB 1319 requires a

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continued footnote
Inc. (AES) to Decom. The sale took effect on September 8, 1989. DER was uncertain who controlled the facility, so it issued the September 7 order to AES, and the September 8 order to Decom. AES appealed the September 7 order at 89-358-F, but the Board later granted Decom's motion to substitute itself for AES as the appellant. Decom appealed the September 8 order at EHB Docket No. 89-422-F. These appeals were consolidated on September 25, 1989.

[2] While this appeal was pending, the Board learned that Decom had shifted its operations from Delaware Avenue in Philadelphia to Wheatsheaf Lane in the same city. As a result, the Board issued a Rule to Show Cause why these appeals should not be dismissed as moot. Both parties responded, and on May 2, 1990, the Board issued a decision which found that the appeals were not moot, and which discharged the Rule to Show Cause.

finding that Decom was not required to secure a permit under the SWMA.[3] DER asserts, however, that Colombo was wrongly decided. Moreover, DER argues that in this case, unlike Colombo, it cited the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended 35 P.S. §691.1 et seq., in support of its order. DER contends that Section 402 of the CSL, 35 P.S. §691.402 (entitled "Potential pollution"), authorizes DER to require a permit even if a permit is not required under SWMA.

Decom filed a supplemental brief in reply to DER's response. Decom asserts that a permit cannot be required under Section 402 of the CSL, because that section must be implemented by regulations governing the activity, and the Board held in Colombo that DER's regulations regarding transfer facilities only apply to a site if processing or disposal takes place there.

On July 24, 1990, DER filed a letter informing the Board of the passage of Act 109 of 1990, which includes a definition of "transfer facility" in the SWMA. DER asserts that this definition encompasses facilities such as Decom's which temporarily store waste at a location other than the generation site and which facilitate the transportation of waste to a processing or disposal facility. DER contends that this new definition includes Decom's facility and that summary judgment should be granted to DER, or at least denied to Decom.

Decom responded to DER's letter on July 27, 1990. Decom asserts that the definition of transfer facility in Act 109 does not affect the Board's Colombo decision because the term "transfer facility" still incorporates the term "facility," and Act 109 defines "facility" as a place where disposal or

---

[3] In Colombo, the Board held that processing or disposal of waste must occur at a site for that site to qualify as a "transfer facility" under SWMA and the regulations.

processing takes place. Therefore, Decom argues that processing or disposal must take place at a transfer facility, and that since these activities do not take place at Decom's facility, it is entitled to summary judgment.

The Board may grant summary judgment only when there are no genuine issues of fact and the moving party is entitled to judgment as a matter of law. Summerhill Borough v. Commonwealth, DER, 34 Pa. Commonwealth Ct. 574, 383 A.2d 1320 (1978), County of Schuylkill v. DER, 1989 EHB 918. In the instant case, we must deny Decom's motion for summary judgment because Decom is not entitled to judgment as a matter of law.

Section 1 of Act 109 defines "transfer facility" as:

> A facility which receives and processes or temporarily stores municipal or residual waste at a location other than the generation site, and which facilitates the transportation or transfer of municipal or residual waste to a processing or disposal facility ... .

On its face, this new definition of transfer facility seems to include the Decom facility. The key language is "processes or temporarily stores." Even if Decom does not "process" waste at the site, it is still a transfer facility if it "temporarily stores" waste. In addition, the new definition provides for the "transportation or transfer" of waste - it does not use the term "bulk transfer" which is found in the definition of transfer facility in the regulations. See 25 Pa. Code §271.1. The elimination of both the "bulk transfer" requirement and the requirement that a transfer facility "process" waste seems to bring the Decom facility within the definition of "transfer facility."

Decom refutes the above interpretation, however, by pointing out that a transfer facility still must be a "facility," and that Act 109 defines "facility" as:

> All land, structures and other appurtenances or improvements where municipal or residual waste disposal or processing is permitted or takes place ... .

Decom asserts that this definition still requires disposal or processing at the site for the site to qualify as a "facility," and, hence, a "transfer facility."

We do not agree with Decom's interpretation because it cannot be reconciled with the language "processes or temporarily stores" in the definition of transfer facility. The use of the word "or" can only mean that either activity is sufficient. This conclusion is buttressed when we examine this issue in a historical context. Prior to Act 109, the terms "facility" and "transfer facility" were not defined in the SWMA itself; the terms were defined in the regulations. See 25 Pa. Code §271.1. The inclusion of the definition of transfer facility in Act 109 must be viewed against a backdrop of the Board's decision in Colombo and Commonwealth Court's decision in Commonwealth, DER v. O'Hara Sanitation Co., __ Pa. Commonwealth Ct. ____, 562 A.2d 973 (1989), both of which required processing or disposal activities as a prerequisite to finding a transfer facility. It is reasonable to assume that the General Assembly's definition of "transfer facility" in Act 109 was in response to those decisions.

Our conclusion is also supported by examining the definition of "processing" in Act 109:

> 'Processing.'
>
> (1) The term includes any of the following:
>
> (I) Any method or technology used for the purpose of reducing the volume or bulk of municipal or residual waste or any method or technology used to convert part or all of such waste materials for off-site reuse.

(II) Transfer facilities, composting facilities, and resource recovery facilities.

(emphasis supplied). Prior to Act 109, "processing" was defined as follows in Section 103 of SWMA, 35 P.S. §6018.103:

> 'Processing.' Any technology used for the purpose of reducing the volume or bulk of municipal or residual waste or any technology used to convert part or all of such waste materials for off-site reuse. Processing facilities include but are not limited to transfer facilities, composting facilities, and resource recovery facilities.

Under the definition of "processing" in Act 109, the activities at transfer facilities are placed on a par with the reduction and conversion of waste. This differs from the Board's construction of the old definition of "processing" in Colombo. There, reduction or conversion of waste was viewed as the essence of "processing." The Board viewed the last sentence of the old definition as an indication that transfer facilities would probably involve processing (reduction or conversion) rather than disposal of waste. 1989 EHB at 1330. However, the new definition provides that the activities at a transfer facility are, in and of themselves, activities which constitute "processing." Thus, to determine what processing means in the context of a transfer facility, it is necessary to look at the definition of transfer facility, and, as we stated above, that definition refers to a facility which "processes or temporarily stores" waste.

We recognize the incongruities in the definitions in Act 109. Since "processing" is defined as, among other things, what occurs at a transfer facility, and since a "transfer facility" is defined as a place which, among other things, "processes or temporarily stores" waste, then a transfer facility which is only engaged in temporary storage of waste is engaged in "processing" as the latter term is defined in Act 109, even though it does not

"process" waste as that term is used in the definition of "transfer facility." In addition, the definition of "transfer facility" incorporates the definition of "facility," yet a "facility" is defined as a place where "disposal or processing" occurs, while a "transfer facility" is defined so that processing (probably used here in the sense of reduction or conversion of waste) is not required because of the language "processes or temporarily stores." Despite these incongruities, however, we think our conclusion here effectuates legislative intent, even though that intent may not have been articulated with perfect clarity.

Since there was no dispute at the supersedeas hearing that Decom received and temporarily stored medical waste which it collected from hospitals, and facilitated the transfer of that waste for disposal in South Carolina, it seems clear that Decom's facility meets the current definition of "transfer facility." Therefore, we must deny Decom's motion for summary judgment. At the same time, we will deny DER's request in its letter that we grant summary judgment in its favor. First, DER must file a motion rather than simply request such relief in a letter. Second, even if Decom's facility is a "transfer facility," there is still an issue regarding whether DER may insist upon the closing of the facility or whether it must give Decom a reasonable period of time to secure a permit. See Baumgardner v. DER, 1988 EHB 786, 793-794.

ORDER

AND NOW, this 28th day of November, 1990, it is ordered that:

1) Decom's motion for summary judgment is denied.

2) DER's request for summary judgment is denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: November 28, 1990

cc: **Bureau of Litigation**
Library, Brenda Houck
For the Commonwealth, DER:
Kenneth A. Gelburd, Esq.
Eastern Region
For Appellant:
William H. Eastburn, III, Esq.
Doylestown, PA

jm

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M. DIANE SMITH
SECRETARY TO THE BOARD

MILLER'S DISPOSAL AND TRUCK SERVICE	:	
	:	
v.	:	**EHB Docket No. 89-576-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: November 28, 1990**

OPINION AND ORDER
SUR
PETITION FOR RECONSIDERATION

By: Richard S. Ehmann, Member

Synopsis

DER's Petition for Reconsideration of our Opinion and Order which sustained the appeal as a sanction on DER for its failure to respond to a Rule to Show Cause is denied. Since DER's Petition for Reconsideration was not filed within twenty days after our decision had been rendered, this Board is without jurisdiction to consider it.

OPINION

On October 9, 1990, we issued an Opinion and Order in which we made absolute our Rule to Show Cause why the appeal in the above-captioned matter should not be sustained as a sanction for DER's failure to comply with our Order of July 18, 1990. The Rule to Show Cause was issued on September 6, 1990 and was returnable by September 26, 1990. At the time our Opinion was issued, DER had not responded to the Rule. Thus, we sustained the appeal as a

sanction, pursuant to 25 Pa. Code §21.124, for DER's failure to comply with the Rule to Show Cause.

The Board's rules of practice and procedure provide in relevant part at 25 Pa. Code §21.122(a), "[t]he Board may ... upon application of the counsel, within 20 days after a decision has been rendered, grant reargument..." (emphasis added). Section 21.122(a) requires the filing of the petition for reconsideration within 20 days of the rendering of a final decision by the Board, and not 20 days of the receipt of such decision by the petitioner. Howard D. Will, t/a Will's Construction Company v. DER, 1987 EHB 335; SPEC Coals, Inc. v. DER, 1986 EHB 1140. Accordingly, the last day for filing a petition for reconsideration of our October 9, 1990 Opinion and Order was October 29, 1990. DER, however, did not file its petition until November 5, 1990.[1] Thus, we are constrained by our rules to find we lack jurisdiction over the instant petition because of its untimeliness. Mayer v. Unemployment Comp. Bd. of Review, 27 Pa. Cmwlth. 244, 366 A.2d 605 (1976); Howard Will, supra; Del-Aware Unlimited, Inc. et al. v. DER, et al., 1986 EHB 1179, affirmed, 96 Pa. Cmwlth. 361, 508 A.2d 348 (1986), allocatur denied, ___Pa.___, 523 A.2d 1132 (1986).

We note that it was the failure of counsel for DER to respond to the Rule to Show Cause in a timely fashion which resulted in our making the Rule Absolute and that again it is his inattention to our rules which has resulted in the denial of this petition. The time limits for filing a request for reconsideration contained in our rules have the same force as a statutory provision, Mayer, supra, and cannot be overlooked by counsel for any party or

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[1]On November 14, 1990, we received a letter from the pro se Appellant objecting to our reconsidering same.

this Board. All attorneys appearing before us must adhere to the time limits set forth in our rules and our orders.

O R D E R

AND NOW, this 28th day of November, 1990, DER's Petition for Reconsideration is denied because it is untimely.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: November 28, 1990

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
George Jugovic, Jr., Esq.
Western Region
For Appellant:
David K. Miller, President
Saegerstown, PA

med

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M. DIANE SMITH
SECRETARY TO THE BOARD

MUSTANG COAL & CONTRACTING CORPORATION	:	
	:	
v.	:	EHB Docket No. 89-494-MJ
	:	(Consolidated)
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued December 4, 1990

OPINION AND ORDER SUR MOTION FOR PARTIAL SUMMARY JUDGMENT

By Joseph N. Mack, Member

Synopsis

Where a party has appealed a Compliance Order but does not appeal the subsequent civil penalty assessment, the doctrine of administrative finality does not act as a bar to the appeal of the Compliance Order. Nor does §18.4 of SMCRA, which deals with civil penalty assessments, require dismissal of the appeal of the Compliance Order.

OPINION

On March 1, 1990, the Department of Environmental Resources (DER) issued to Mustang Coal & Contracting Corporation (Mustang) Compliance Order No. 904019 (Compliance Order) in connection with Surface Mining Permit (SMP) No. 17890106 covering a mine site located in Woodward Township, Clearfield County known as the "Henderson Job." The Compliance Order cited Mustang for allegedly conducting surface mining on areas not authorized by an approved bonding increment in violation of the Surface Mining Conservation &

Reclamation Act (SMCRA), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. Mustang filed an appeal from this Order on March 13, 1990 at Docket No. 90-113-MJ. This appeal was subsequently consolidated with a related appeal at Docket No. 89-494-MJ.

By letter dated March 21, 1990, DER notified Mustang that it was subject to a potential civil penalty of $2750 for the violations cited in the March 1, 1990 Compliance Order. Thereafter, on June 11, 1990, DER issued to Mustang an Assessment of Civil Penalty in the amount of $2750. Although the Assessment does not specifically refer to the Compliance Order, it states that the penalty was assessed for Mustang's act of conducting surface mining on an area of SMP No. 17890106 not covered by an approved bond on or about March 1, 1990 and prior thereto. Furthermore, the cover letter accompanying the assessment references the aforesaid March 21, 1990 letter. Mustang did not file an appeal from the Assessment.

On October 31, 1990, DER filed a Motion for Partial Summary Judgment and a Memorandum in support thereof. DER argues that because Mustang failed to appeal the June 11, 1990 Assessment of Civil Penalty, it is precluded by the doctrine of administrative finality from contesting the violations cited in the March 1, 1990 Compliance Order on which the civil penalty assessment was based. DER therefore requests that summary judgment be entered against Mustang with respect to the appeal originally docketed at 90-113-MJ, which contests the violations set forth in the Compliance Order. Mustang has not responded to DER's motion.

The doctrine of administrative finality focuses upon the failure of a party aggrieved by administrative action to pursue his statutory appeal remedy. Dithridge House Assn. v. Commonwealth, DER, 116 Pa.Cmwlth. 24, 541

A.2d 827 (1988). Failure to appeal an order precludes a party from making any subsequent challenge to the factual or legal bases for the order, unless an exception applies. Ingram Coal Co. v. DER, 1988 EHB 800. In its motion, DER is asserting that, although Mustang filed an appeal from the March 1, 1990 Compliance Order, since it did not appeal the subsequent civil penalty assessment, it is now precluded by the doctrine of administrative finality from challenging the violation set forth in the Compliance Order. In essence, DER is arguing the converse of the Commonwealth Court's holding in Kent Coal Mining Co. v. Commonwealth, DER, 121 Pa.Cmwlth. 149, 550 A.2d 279 (1988). In that case, the Court held that a party who has appealed a civil penalty assessment, but who had not appealed the compliance order on which the penalty was based, may challenge not only the amount of the penalty but also the underlying violations. The Court based its holding on the language of §18.4 of SMCRA, 52 P.S. §1396.22, which provides that a person to whom DER issues a civil penalty assessment may "contest either the amount of the penalty or the fact of the violation..."

In support of its argument, DER cites the cases of Commonwealth, DER v. Wheeling-Pittsburgh Steel Corp., 473 Pa. 432, 375 A.2d 320 (1977), cert. denied 434 U.S. 969; Commonwealth v. Derry Township, 466 Pa. 31, 351 A.2d 606 (1976); and Ingram Coal, supra, all of which deal with the issue of administrative finality. However, each of these cases involved a party's failure to appeal a prior order of DER. The parties were then precluded from later attacking the basis or validity of the unappealed order when challenging a subsequent DER action. For example, in Wheeling-Pittsburgh, DER had issued an Administrative Order granting the appellant a temporary variance from enforcement of certain regulations. The appellant did not appeal the Order.

In a subsequent proceeding wherein DER was seeking enforcement of the Order, the court held that since the appellant had failed to appeal the Administrative Order, it was precluded from attacking the validity of the Order in the subsequent enforcement proceeding.

In the present case, Mustang has properly filed an appeal challenging the factual and legal bases of the March 1, 1990 Compliance Order. We cannot accept DER's argument that the doctrine of administrative finality forecloses Mustang from now challenging the Compliance Order because it has not appealed the subsequent penalty assessment.

In our review of this issue, we must also turn to the language of SMCRA. Section 18.4 of SMCRA, 52 P.S. §1396.22, deals with the assessment of civil penalties. That section reads in relevant part as follows:

> ...When the department proposes to assess a civil penalty, the secretary shall inform the person or municipality within a period of time to be prescribed by rule and regulation of the proposed amount of said penalty. The person or municipality charged with the penalty shall then have thirty (30) days to pay the proposed penalty in full or, if the person or municipality wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the secretary for placement in an escrow account...or post an appeal bond in the amount of the proposed penalty...Failure to forward the money or the appeal bond to the secretary within thirty (30) days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

We interpret the above-cited section to read that a party who wishes to appeal a civil penalty assessment must, within 30 days, either forward the amount of the proposed penalty for placement in an escrow account or post an appeal bond in the amount of the penalty. Failure to do so waives the appellant's right to contest the amount of the penalty and the violation in

the civil penalty proceeding. We do not believe that the legislature intended this section to read that a failure to appeal a civil penalty assessment forecloses the appellant's right to challenge the underlying Compliance Order where the appellant has properly filed an appeal from the Compliance Order.

For the reasons set forth above, we hold that Mustang's failure to appeal the June 11, 1990 Assessment of Civil Penalty does not preclude it from challenging the validity of the underlying March 1, 1990 Compliance Order, from which it has properly brought an appeal. Therefore, we must deny DER's Motion for Partial Summary Judgment on this matter.

O R D E R

AND NOW, this 4th day of December, 1990, the Motion for Partial Summary Judgment filed by the Department of Environmental Resources on October 31, 1990 is denied for the reasons set forth herein.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 4, 1990

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Kurt J. Weist, Esq.
Central Region
For Appellant:
Peter R. Swistock, Jr., President
Mustang Coal & Contracting Corp.
Houtzdale, PA

rm

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M. DIANE SMITH
SECRETARY TO THE BOAI

BOROUGH OF GLENDON	:	
	:	
v.	:	**EHB Docket No. 90-100-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 4, 1990
and GLENDON ENERGY COMPANY, Permittee	:	

OPINION AND ORDER SUR MOTION TO DISMISS

By Terrance J. Fitzpatrick, Member

Synopsis

A motion to dismiss a single objection in an appeal is granted. That a party has standing to appeal a Department of Environmental Resources (DER) action does not confer standing as to each supporting ground the party chooses to raise in the Notice of Appeal. The appellant has not established that its interests referred to in the objection lie within the zone of interests protected by the relevant statutory section. Therefore, the appellant lacks standing to raise the objection.

OPINION

This case involves an appeal by the Borough of Glendon, Northampton County (Borough), of DER's issuance of a solid waste permit and air quality plan approval to Glendon Energy Company (GEC), for the construction and operation of a resource recovery facility. The Borough filed its appeal on March 5, 1990, citing thirty-one grounds for objecting to the permit issuance. Of particular concern within the context of this opinion is Objection No. 4,

which avers that DER erred when granting the permit without requiring GEC to first obtain a siting waiver under §511 of the Municipal Waste Planning, Recycling and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, No. 101, 53 P.S. §4000.101 et seq. (Act 101).

This Opinion and Order addresses GEC's motion to dismiss Objection No. 4 for lack of standing, filed on March 20, 1990. The Borough responded to the motion on March 28, 1990. DER also responded, filing a memorandum objecting to the motion on April 9, 1990. Finally, GEC addressed the Borough's and DER's responses in a reply filed on April 18, 1990.

The controversy over the instant motion centers on the application of §511 of Act 101. That section provides, in pertinent part:

> (a) **General rule.**--The department shall not issue a permit for, nor allow the operation of, a new municipal waste landfill, a new commercial residual waste treatment facility or a new resource recovery facility within 300 yards of a building which is owned by a school district or a parochial school and used for instructional purposes, parks or playgrounds existing prior to the date the department has received an administratively complete application for a permit for such facilities. This subsection shall not affect any modification, extension, addition or renewal of existing permitted facilities.
>
> * * *
>
> (d) **Exemption by request.**--The current property owner under subsection (a) in which a new facility is proposed may waive the 300-yard prohibition by signing a written waiver, and, upon such request, the department shall waive the 300-yard prohibition and shall not use such prohibition as the basis for the denial of a new permit.

The following facts are undisputed: On February 26, 1988, GEC applied to DER for permits to construct a resource recovery facility, pursuant to the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380 as amended, 35 P.S. §6018.101 et seq. (SWMA) and the Air Pollution Control Act,

the Act of January 8, 1960, P.L. 2119 (1959), as amended, 35 P.S. §4001 et seq. (APCA). DER accepted the application as complete on August 15, 1988. While DER was still considering GEC's application, Act 101 went into effect. Accordingly, DER required GEC to move the facility's proposed location to a spot further than 300 yards from the boundary between the Borough of Glendon and the Easton City line, because that area appeared to border Heil Park in the City of Easton, according to the maps DER was referring to in its application review. GEC complied with the requirement. Late in the review period, the Borough raised the issue of whether Glendon Woods, located in the Borough of Glendon, was a "park" within the meaning of Act 101, §511. Until the Borough raised this issue, DER had understood from the "official map designation" that Heil Park was completely contained within the City of Easton; thus, DER believed the facility was proposed to be located 300 yards from any park. Upon the Borough's assertion, DER determined that Glendon Woods was actually part of Heil Park, with both parcels (Heil Park and Glendon Woods) belonging in fee to the City of Easton, although the Glendon Woods portion extended as an "extraterritorial park" into the Borough's borders. On February 5, 1990, DER issued Air Quality Permit Plan Approval No. 48-340-003 and Solid Waste Permit No. 101522, authorizing the construction and operation of GEC's facility, but conditioned on the following provision:

> Before construction of the facility can begin, a waiver of the isolation distance regarding Heil Park in the City of Easton must be obtained under Section 511 of Act 101.[1]

GEC bases its motion on the ground that, although the Borough may

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[1] GEC takes exception to this requirement in its related appeal at EHB Docket NO. 90-104-F. The parties apparently construe this language as referring to Glendon Woods in the Borough which is owned by Easton.

have standing to bring this appeal, the Borough does not have standing to raise an objection based on §511 of Act 101. That provision, GEC urges, is aimed at protecting the park owners' interests (in this case, the City of Easton). Hence, the Borough's interests as a municipality fall outside the zone of interests encompassed in §511.

The Borough claims that it has standing to raise Objection No. 4 for the following reasons: 1) The Borough has standing to appeal the DER action generally, and once standing to appeal is established, the standing issue is irrelevant to the objections within the appeal; 2) The Borough's interest as the municipality in which the park is located is within the zone of interests protected by §511; 3) GEC's contention goes beyond procedure and requires, inappropriately, a determination of the merits of Objection No. 4; and 4) It is inappropriate to grant the motion because of the preemptory nature of the SWMA over municipal ordinances.

DER argues that, because Glendon Woods lies within the Borough's jurisdictional boundaries, and because the Borough is to serve as host municipality if the facility is located as proposed, the Borough has standing per se to raise an objection with regard to any Act 101 provision. Specifically, DER argues that, because Chapters 11 and 13 of Act 101 confer on the host municipality the right to inspect the facility for violations of law, this evidences a legislative intent to "provide full involvement in monitoring legal compliance by a local facility" and implies this interest extends to §511.

GEC's reply to the Borough's and DER's responses argues that this Board has repeatedly held that an appellant must establish its standing to assert each one of its objections within an appeal (citing Kwalwasser v. DER, 1984 EHB 886; Simpson v. DER, 1985 EHB 759), and that the Borough's status as

host community does not, in and of itself, create standing to raise Objection No. 4.

Addressing the motion to dismiss, we find that the Borough does not have standing to raise Objection No. 4 in the Notice of Appeal; therefore, we will grant GEC's motion to dismiss it.

Although standing to bring an appeal may exist, it does not follow that, as the Borough asserts, inquiry into the standing to raise individual objections supporting an appeal is irrelevant. The case law, including that which the Borough cites to support its argument, draws us to conclude the contrary: this Board will scrutinize individual allegations within an appeal to determine whether the appellant may raise those issues, even though the appellant has overall standing to appeal the DER action. Porter v. DER, 1985 EHB 741 (an appellant may not raise issues which, although possibly related to the actual deficiencies in a permit, are totally unrelated to the injuries that have conferred standing on the appellant); Commonwealth of Pennsylvania Game Commission v. DER, 1984 EHB 558, 563 (every allegation must be related to the alleged injuries under the standard set forth in William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975)). Therefore, we find that the Borough does not have standing to raise Objection No. 4 simply because it has standing to appeal the permit.

We turn next to consider, then, whether the Borough has standing to raise Objection No. 4 independently of its standing to appeal the permit. Under William Penn, the petitioning party must show that the issue has a direct, substantial and immediate effect upon the party's interests. A party has standing when he has suffered, or will suffer, injury, and when the interest he seeks to protect is arguably within the zone of interests sought to be protected or regulated by the statute in question. William Penn, 346

A.2d 269, 285. We determine that the Borough has no such interest here. Section 511 plainly states that the current owner of a park may exempt a permittee from the isolation distance requirement. The statute is clear on its face as to who may exercise this right.[2] Because this right is limited to current park owners, it follows that it is the park owner (here, the City of Easton) whose interests are protected in §511(d).

We also find the remaining arguments raised by the Borough to be unpersuasive. Therefore, because the Borough's interests as a host municipality are insufficient to establish standing to raise Objection No. 4, we grant GEC's motion and strike it from the appeal.

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[2] DER argues that because Glendon Woods lies within the Borough's municipal limits, that the Borough has standing by virtue of its jurisdiction over the site, despite the fact that the City of Easton owns it in fee. We find nothing on the face of the statute to require looking past the plain meaning of the section, and we are, in fact, precluded from doing so. Harris-Walsh, Inc. v. Borough of Dickson City, 420 Pa. 259, 216 A.2d 329 (1966) (statutes presumed to employ words in their plain sense and the popular meaning must prevail unless the statute defines them otherwise or the context requires another meaning); 1 Pa. C.S. §1921 (b).

ORDER

AND NOW, this 4th day of December, 1990, it is ordered that the Motion to Dismiss filed by Glendon Energy Company is granted, and Objection No. 4 of the Borough of Glendon's Notice of Appeal is stricken.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers
ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick
TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann
RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack
JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 4, 1990

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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Regulatory Counsel
For Appellant:
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John P. Proctor, Esq.
Washington, D.C.
and
David J. Brooman, Esq.
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TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOAR

GLENDON ENERGY COMPANY	:	
	:	
v.	:	**EHB Docket No. 90-104-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 4, 1990

OPINION AND ORDER SUR
PETITION TO INTERVENE

By Terrance J. Fitzpatrick, Member

Synopsis

A petition to intervene will be denied where the prospective intervenor fails to demonstrate that it has a legally cognizable interest in the outcome of the appeal.

OPINION

This case involves an appeal, brought by Glendon Energy Company (GEC) on March 6, 1990, of the Department of Environmental Resources' (DER) issuance of a Solid Waste Permit for the construction and operation of a resource recovery facility proposed to be located in the Borough of Glendon, Northampton County (Borough). The Borough has filed a Petition to Intervene in this appeal. This Opinion and Order addresses the Petition to Intervene.

In its petition, the Borough contends that intervention should be granted because of the Borough's interest as the potential host community for the proposed facility. The Borough adds that intervention in this appeal is warranted because the issue of this appeal is the validity of the condition

requiring GEC to obtain a waiver of the isolation distance regarding Heil Park, which is owned by the city of Easton but which extends into the Borough of Glendon, under §511 of the Municipal Waste Planning, Recycling and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, No. 101, 53 P.S. §4000.101 et seq. (Act 101). Glendon argues that its interest in the application and validity of the §511 requirements is established in its argument regarding that issue in a related appeal filed by the Borough at Docket No. 90-100-F. In a nutshell, this argument is that the Borough has a legally cognizable interest by virtue of the fact that the park is located within the Borough's municipal boundaries.

GEC responded to the petition, stating that it did not object to the Borough's request to intervene, but, in the same breath, reserving its challenges to the Borough's standing to object to the application of §511, as set forth in the Borough's appeal at EHB Docket No. 90-100-F.

Section 4(e) of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, No. 94, 35 P.S. §7514(e), states that "any interested party may intervene in any matter before the Board." This section is not considered to mandate automatic intervention, and is applied through precedent under 25 Pa. Code §21.62. Wallenpaupak Lake Estates Property Owners v. DER, 1989 EHB 446, 449-450. The decision whether to grant intervention is discretionary. Keystone Sanitation Co., Inc. v. DER, 1987 EHB 22. In exercising this discretion, the Board considers five factors:

1. The nature of the prospective intervenor's interest;

2. The adequacy of representation of that interest by other parties;

3. The nature of the issues before the Board;

4. The ability of the prospective intervenor to present relevant evidence;

5. The effect of intervention on administering the statute under which the proceeding is brought.

City of Harrisburg v. DER, 1988 EHB 946, 947 (citing Delta Excavating & Trucking v. DER, 1986 EHB 1010, 1012 and Franklin Township v. DER, 1985 EHB 853). A prospective intervenor bears the burden of demonstrating that it has an interest in the matter before the Board sufficient to warrant intervention. Wallenpaupak Lake Estates at 450 (citing 25 Pa. Code §21.61(e) and Franklin Township v. DER, 1985 EHB 853).

We find that the Borough has failed to demonstrate an interest sufficient for intervention in this appeal. Our reasoning in support of this conclusion parallels closely our opinion issued on this same date in the Borough's appeal at EHB Docket No. 90-100-F. To summarize our analysis in that opinion, Section 511 of Act 101 provides that a facility may not be located within 300 yards of a park unless the park owner signs a written waiver. This section grants rights to the park owner, not to the municipality in which the park is located. Therefore, applying that reasoning here, since the sole issue in this appeal concerns Section 511, we conclude that the Borough does not have a legally cognizable interest in this appeal, and we will deny its petition to intervene.

ORDER

AND NOW, this 4th day of December, 1990, the Borough of Glendon's Petition to Intervene is hereby denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: December 4, 1990

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

GLENDON ENERGY COMPANY	:	
	:	
v.	:	**EHB Docket No. 90-104-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 4, 1990

OPINION AND ORDER SUR
MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT

By Terrance J. Fitzpatrick, Member

Synopsis

A motion for summary judgment filed by the Appellants is denied, and a cross-motion for summary judgment filed by the Department of Environmental Resources is granted in part. The term "new resource recovery facility" in Section 511 of the Municipal Waste Planning, Recycling and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, No. 101, 53 P.S. §4000.511 (Act 101) refers to any facility which has not been granted a permit by DER. The Board lacks jurisdiction to decide whether Section 511 is unconstitutional as to facilities which had entered into contractual commitments prior to the effective date of the Act.

OPINION

This proceeding involves an appeal filed by Glendon Energy Company (GEC) from the Department of Environmental Resources' (DER) issuance of a solid waste permit. At issue is a condition in the permit requiring GEC to obtain a siting waiver, pursuant to §511 of Act 101, before building its

resource recovery facility in the Borough of Glendon, Northampton County.

This opinion addresses GEC's Motion and DER's Cross-Motion for Summary Judgment. The undisputed material facts are as follows: After GEC applied for its solid waste permit, but before the permit was issued, Act 101 went into effect. Section 511 of Act 101 requires, in pertinent part:

> **(a) General rule.**--The department shall not issue a permit for, nor allow the operation of, a new municipal waste landfill, a new commercial residual waste treatment facility or a new resource recovery facility within 300 yards of a building which is owned by a school district or a parochial school and used for instructional purposes, parks or playgrounds existing prior to the date the department has received an administratively complete application for a permit for such facilities. This subsection shall not affect any modification, extension, addition or renewal of existing permitted facilities.
>
> **(d) Exemption by request.**--The current property owner under subsection (a) in which a new facility is proposed may waive the 300-yard prohibition by signing a written waiver, and, upon such request, the department shall waive the 300-yard prohibition and shall not use such prohibition as the basis for the denial of a new permit.

53 P.S. §4000.511 (emphasis supplied).

Late in the review process, DER discovered that the proposed location for the GEC facility is within 300 yards of Glendon Woods, a section of Heil Park, located in the Borough of Glendon.[1] Heil Park (including the Glendon Woods portion) is owned by the City of Easton. DER issued the permit on February 5, 1990, authorizing construction of the facility, but requiring as a condition that GEC get a siting waiver from the City of Easton before

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[1] The Borough has petitioned to intervene in this appeal; by separate order issued on this date, we are denying this petition. The Borough has also appealed this same permit issuance on other grounds at Docket No. 90-100-F.

beginning construction.

The motions for summary judgment raise three common issues: 1) Whether the GEC facility qualifies as a "new" facility for purposes of applying §511 of Act 101; (2) Whether the Glendon Woods portion of Heil Park qualifies as an "existing feature" for purposes of applying §511[2]; and 3) Whether DER acted unconstitutionally in conditioning the permit upon receipt of a waiver of the 300 yard limitation from the City of Easton.

In its motion for summary judgment, GEC asserts that its proposed facility should not be considered a "new" facility under §511 for the following reasons:

(1) When the Act went into effect, the facility met the definition of an "existing" facility as defined in §502(c) of Act 101 (regarding the required content of a municipal waste management plan).[3] As such, under §502(o), the facility was protected from a municipal waste plan's interfering with the proposed facility's design, construction, operation, financing or contractual obligations. The same intent evidenced here towards protecting proposed but yet unpermitted facilities applies to §511, as the Act must be construed as a whole, citing Antanovich v. Allstate Insurance Co., 320

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[2] The parties have agreed, for purposes of resolving the motions for summary judgment, that Glendon Woods is a park or playground located within 300 yards of the proposed processing facility. GEC reserves the right to litigate this issue if its motion is denied.

[3] §502(c) of Act 101 states, in pertinent part:

> For purposes of this subsection, existing facilities shall include:
>
> . . . .
>
> (2) Resource recovery facilities for which the owner or operator of the facility has deposited funds into escrow for financing of the facility or has secured permanent bond financing for the facility or has signed an electric power contract with a public utility and such contract has been approved by the commission.

Pa.Super. 467 A.2d 345, 353; (1983).

(2) Section 511 should be construed to exclude "existing" but unpermitted facilities because the Surface Mining Conservation and Reclamation Act excludes application of a site limitation to lands where substantial legal and financial obligations toward mining operations existed 3 years and 10 months before the effective date of that section. Act of May 1, 1945, P.L. 1198, as amended, 52 P.S. §1396.4e(e).

(3) Federal Air Pollution Control regulations have defined a "new source" to exclude sources which, prior to the publication of the proposed regulations, have, inter alia, entered into contracts concerning their construction. 42 U.S.C. §7411(a)(2); 40 CFR §60.2. Since DER has adopted these regulations, the same definition of "new" should translate as the intent behind "new" in §511 of Act 101.

DER responded to the motion, arguing that the GEC facility should be construed as a "new" facility under §511(a) because the section refers only to two categories: "new facilities" and "existing permitted facilities," evincing an intent to include in the "new" category all facilities except those which already had a permit. The boundary line between new and existing facilities, DER argues, is marked by the issuance of a permit. DER cites the plain meaning rule in support of this construction.

This Board has the authority to grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summerhill Borough v. DER, 34 Pa. Cmwlth. 574, 383 A.2d 1320, 1322 (1978). The Board must read a motion for summary judgment in the light most favorable to the non-moving party. Palisades Residents in Defense of the

Environment v. DER, 1988 EHB 8, 10-11. Applying these principles here, we will deny GEC's motion, and grant DER's motion, in part.

We agree with DER that GEC's facility is a "new" facility under Section 511. Section 1921 of the Statutory Construction Act (SCA), the Act of December 6, 1972, P.L. 1339, No. 290, 1 Pa. C.S.A. §1921 sets out the rules for ascertaining the legislative intent of a statute, which is to control in construing a statute's meaning. First the interpreter must look just to the face of the statute. If, upon examination of the statute, an ambiguity exists, then the court may resort to extraneous sources to determine the intent such as the legislative history, the circumstances occasioning the legislation, and other similar statutory provisions. The rules of statutory construction come into play only when there is a facial ambiguity. They are not to be used to create doubt, only to remove it. In re Kritz' Estate, 387 Pa. 223, 127 A.2d 720, 723 (1957). Applying these principles here, we think it is clear that the term "new resource recovery facility" in Section 511 refers to any facility which has not been granted a permit by DER. Section 511(a) sets out two categories of facilities - "new facilities" and "existing permitted facilities." New facilities are subject to the site limitations; existing permitted facilities are expressly exempted from the site limitations. GEC's argument that it is an "existing" rather than a "new" facility, due to the contractual commitments it has entered into, can only be viewed as an attempt to create yet another category of facilities which would be exempt from the site limitations. However, the fact that the General Assembly articulated an exception for "existing permitted facilities" requires us to conclude that no other exceptions were intended. See 1 Pa. C.S. §1924.

GEC also argues that §511 must be interpreted in light of the definition of "existing facility" in §502. However, §502 clearly states

that its particular definition for "existing facilities" is for purposes of that subsection's requirements of a municipal waste management plan, signaling that the protection given through §502 is limited to the context of the municipal planning function. That the legislature went to great effort to clarify its intent to include proposed facilities in §502 indicates that it would have done the same in §511, had it wished to afford the same protection in §511. Enforcing §511 as it stands does not conflict with §502.[4]

Based on the foregoing, we agree with DER that the GEC facility was a "new" facility under §511.

GEC asserts as a second ground for summary judgment that §511 does not apply to its facility because the Glendon Woods portion of Heil Park was not an "existing feature" for purposes of §511 as of the date of GEC's first newspaper notice. The gist of GEC's argument is that, because the park did not exist as a site limitation at the time of GEC's first newspaper notification, as Act 101 had not taken effect yet, it is not an "existing feature" under §511.

DER argues that the relevant regulation, 25 Pa. Code §283.202(b), is designed to prevent the unfair result of prohibiting facilities because of physical features that are placed within 300 yards of the proposed facility after the application has been made public. See 18 Pa. Bull. 1688 (April 9, 1988). This regulation, DER asserts, goes to the physical existence, not the legal status, of the feature.

GEC's argument is unpersuasive. The statute states plainly that no

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[4] This same reasoning refutes GEC's arguments, outlined above, that "new facility" in Section 511 should be interpreted to be consistent with the Surface Mining Conservation and Reclamation Act and the Federal Air Pollution Control regulations. If the General Assembly had intended in §511 to provide the same protection to parties who entered into financial commitments, it would have said so.

permit shall issue for a new resource recovery facility "within 300 yards of ... parks or playgrounds existing prior to the date the department has received an administratively complete application for a permit for such [facility]." Act 101, §511(a). According to the applicable regulations, any parks or playgrounds (or other designated features) which come into existence after the date of the first newspaper notice of the application do not trigger the siting limitation. 25 Pa. Code §283.202(b). Neither of these provisions applies here. There may be some merit to the suggestion that the park's existence became legally significant only after GEC's first newspaper notification, working a similar effect as if the park had been newly created. But the law does not protect against this effect, as it does against the physical erection of features. Section 511 and the regulations create an exception for physical features, such as parks, which come into existence after the publication of the first newspaper notice, and we may not create another exception to accommodate GEC. See 1 Pa. C.S. §1924. By mere fact of its physical existence at the time of GEC's first newspaper notice, Glendon Woods qualifies as an existing feature under §511.[5]

GEC's final argument is that it is entitled to summary judgment because DER applied §511 in an unconstitutional manner, giving it an impermissibly retroactive effect and impairing its vested rights under contracts made in anticipation of the facility. DER responds, inter alia, that, although the Board has jurisdiction to decide whether a DER action is legal, it has no jurisdiction to determine the constitutionality of a statute.

This Board is a quasi-judicial agency, not a court of law. Therefore, we lack authority to declare legislation unconstitutional.

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[5] This conclusion stands only insofar as the parties have agreed to Glendon Woods' status as a park for purposes of this motion.

Chemclene Corp. v. DER, 1983 EHB 65, 70; St. Joe Minerals Corp. v. Goddard, 14 Pa. Cmwlth Ct. 624, 324 A.2d 800 (1974); Ingram Coal Co., et al. v. DER, EHB Docket No. 88-291-F (Opinion and Order issued April 17, 1990). GEC argues that DER erred when it applied the site limitation in Section 511 to a facility which, although unpermitted at the time the statute became effective, had made "substantial" contractual preparations in anticipation of becoming permitted. GEC urges that this application was unconstitutional because it is retroactive and impairs contracts which must, as a matter of course, be made prior to completing the permitting process. Earlier in this opinion, we held that the Section 511 of Act 101 applies to "new facilities"--facilities which are not yet permitted--which includes GEC's facility. Thus, it is the statute itself, rather than an unintended application of it, that GEC contests. As a result, we find that the constitutional arguments proffered by GEC go to the validity of the statute, and are beyond our jurisdiction to decide.

In summary, we find that §511 of Act 101 applies to GEC as a new resource recovery facility, that Glendon Woods was an existing feature prior to GEC's first newspaper notification, and that the Board lacks authority to rule upon the constitutionality of §511. Therefore, we deny GEC's motion for summary judgment, and we grant partial summary judgment to DER as to the issues discussed above. A hearing must still be held to determine whether Glendon Woods is a park within the meaning of §511.

ORDER

AND NOW, this 4th day of December, 1990, it is ordered that:

1) The Motion for Summary Judgment filed by Glendon Energy Company is denied.

2) The Motion for Summary Judgment filed by the Department of Environmental Resources is granted as to whether GEC's facility is a "new resource recovery facility" under Section 511 of Act 101, and whether Glendon Woods was an existing feature under that same section, and is denied in all other respects.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATE: December 4, 1990

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

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

J. C. BRUSH	:	
v.	:	**EHB Docket No. 87-492-MJ**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and RAMPSIDE COLLIERIES, INC. Permittee	:	**Issued:** December 5, 1990

ADJUDICATION

By Joseph N. Mack, Member

Synopsis:

The Appellant in this third party appeal has failed to meet her burden of proving that DER committed an error of law or abused its discretion in issuing a mining activity permit to the permittee. DER and the permittee have demonstrated by a preponderance of the evidence that the permit application met the criteria set forth in 25 Pa.Code §86.37 and that the permit was properly issued.

Background

This appeal was filed on December 9, 1987 by J.C. Brush ("Appellant") from the Department of Environmental Resources' ("DER" or "the Department") November 19, 1987 issuance of a Mining Activity Permit ("permit") to Rampside Collieries, Inc. ("Rampside") for the purpose of conducting deep mining at a site in Richland Township, Cambria County.

A hearing on this matter was held in Cambria County on May 4, 1990 before Board Member Joseph N. Mack. Appellant appeared pro se. At the close of Appellant's case in chief, DER moved to dismiss the appeal for Appellant's failure to meet her burden of proof. Rampside also joined in the motion. The motion was taken under advisement and the hearing continued.[1]

Appellant's and DER's Post-Hearing Briefs were filed on July 2, 1990. Appellant also filed an Answering Brief on July 16, 1990. Rampside's Post-Hearing Brief was filed with the Board on August 20, 1990.

The record consists of the pleadings, a transcript of 146 pages, and 5 exhibits. Any issues not raised in the parties' Post-Hearing Briefs are deemed to have been waived. Laurel Ridge Coal, Inc. v. DER, EHB Docket No. 86-349-E (Adjudication issued May 11, 1990); Lucky Strike Coal Co. v. Commonwealth, Department of Environmental Resources, 119 Pa.Cmwlth. 440, 547 A.2d 447 (1988).

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

FINDINGS OF FACT

1. The Appellant in this appeal is J. C. Brush ("Appellant"), an individual residing at R. D. #3, Box 314, Johnstown, PA 15904.

2. The Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER" or "the Department"), which is the agency of the Commonwealth empowered to administer and enforce the Surface Mining

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[1]This matter could be disposed of by granting DER's motion to dismiss in light of Appellant's failure to make a prima facie case. However, in view of the fact that we are dealing with a pro se appellant and since DER's testimony was placed on the record, we have chosen to discuss all of the evidence before us rather than simply relying on the deficiencies in Appellant's case.

Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. ("SMCRA"), the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. ("Clean Streams Law"), the Bituminous Mine Subsidence and Land Conservation Act, the Act of April 27, 1966, P.L. 31, as amended, 52 P.S. §1406.1 et seq. ("Mine Subsidence Act"), Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 ("Administrative Code"), and the rules and regulations of the Environmental Quality Board adopted thereunder ("rules and regulations").

3. The Permittee in this appeal is Rampside Collieries, Inc. ("Rampside"), a corporation with a business address of 702 U.S. Bank Building, Johnstown, PA 15901.

4. On or about June 23, 1986, DER received an application from Rampside to conduct mining activities at a site designated as Rampside Mine #1, located in Richland Township, Cambria County. (Permittee & DER Ex. 1)

5. A full review of the application was conducted by DER. (N.T. 92-93)

6. On November 19, 1987, DER issued to Rampside Coal Mining Activity Permit No. 11861301 ("the permit"). (Permittee & DER Ex. 1)

7. Appellant was sent notice thereof on November 19, 1987. (Permittee & DER Ex. 1)

8. Appellant filed an appeal from the permit issuance on December 9, 1987. (App. Notice of Appeal)

9. With respect to Rampside's permit application and DER's approval thereof, based on the evidence before us, we find as follows:

a. Coal mining activities may be feasibly conducted at the permit site. (N.T. 96-97)

b. There is no evidence of potential pollution of the waters of the Commonwealth by the mining activities. (N.T. 97)

c. DER conducted an assessment of the cumulative impact of all coal mining on the hydrologic balance of the area; the mining activities proposed by Rampside and approved by DER include measures to prevent damage to the hydrologic balance within and outside the permit area. (N.T. 97)

d. The permit site is not in an area which has been designated as unsuitable for mining (N.T. 97), nor, at the time of application, was it included in a petition to the Department to have the area determined unsuitable for mining. (N.T. 97-98)

e. The permit area is within 100 feet of a public road and stream and within 300 feet of an occupied dwelling (N.T. 98-99; 110-111); however, the mining facility was in existence prior to August 1977. (N.T. 98)

f. The mining activities will not adversely affect any publicly-owned parks or places named in the National Register of Historic Places. (N.T. 99)

g. The legal owner of the surface area is Berwind Corporation, Wilburn Coal Division ("Berwind"). (N.T. 99) As part of its permit application, Rampside obtained from Berwind a contractual consent for right of entry onto the site. (N.T. 99-100)

h. At the time of the permit issuance, Rampside was not in violation of any act, rules, or regulations of the Department related to the mining of coal or any law, rule, or regulation pertaining to air or water protection enacted pursuant to federal law. (N.T. 101)

i. Prior to issuance of the permit, Rampside submitted to DER a mining and reclamation bond and a subsidence bond. (N.T. 101)

j. In its review of the permit application, DER conducted an investigation with respect to prime farmland; the application satisfied the requirements of 25 Pa.Code §89.121. (N.T. 101)

k. The proposed postmining use of the land fulfills the requirements of 25 Pa.Code §89.88. (N.T. 101-102)

l. There is no evidence of endangered or threatened species of wildlife on the site. (N.T. 103)

m. No discharge was proposed by Rampside from its mining operation. (N.T. 113)

n. Sufficient support for surface structures will be provided during the mining operation. (DER & Rampside Ex. 1)

DISCUSSION

In this appeal of DER's issuance of a mining permit to Rampside, our scope of review is limited to determining whether DER committed an abuse of discretion or error of law. Warren Sand & Gravel Co., Inc. v. Commonwealth, Department of Environmental Resources, 20 Pa.Cmwlth. 186, 341 A.2d 556 (1975). As this is a third party appeal of a permit issuance, the Appellant bears the burden of proof. 25 Pa.Code §21.101(c)(3); T.R.A.S.H., Ltd. v. DER, 1989 EHB 487.

The permit in question was issued pursuant to, inter alia, the Mine Subsidence Act, SMCRA, and the rules and regulations promulgated thereunder. Section 5(a) of the Mine Subsidence Act, 52 P.S. §1406.5(a), states that if the Department determines from the application that sufficient structural support will be provided and that the operation in question will comply with

the provisions of the Mine Subsidence Act and the rules and regulations, it shall cause a permit to be issued. In making this determination, DER must consider the criteria set forth in 25 Pa.Code §86.37.

Before turning to the thrust of Appellant's argument, we must first address the fact that certain issues raised by Appellant at varying points throughout the appeal are not before us for consideration, either because they are precluded or waived or because they are outside our scope of review. The first of such issues are those which were listed in Appellant's Notice of Appeal ("N.A."), but which were not raised at hearing or in her Post-Hearing or Answering Brief. These include the following: protection of "former agreements" (N.A., para. 3.2), concern over "aircraft disbursing rainclouds" and "little compliance to Federal Aviation Agency's prescribed approaches to the runways" (N.A. para. 3.3(b)), and objections to "financial ability and intent of [Rampside], including problems raised by potential bankruptcy, voluntary change or changes in ownership or the shifting of control..." (N.A., para. 3.4(a)). Since Appellant failed to address these issues in her Post-Hearing Brief, they are deemed to have been abandoned and are not before us for consideration. Lucky Strike, supra.

The second set of issues which are excluded from our review are those which Appellant has attempted to raise for the first time in her Pre-Hearing Memorandum, Post-Hearing Brief, and/or Answering Brief. Although it is difficult to decipher exactly what Appellant is trying to argue in her Memorandum and Briefs, she appears to be raising the following new matters: eminent domain (Pre-Hearing Memo., para. 3.C.7; Post-Hearing Brief, p. 8; Ans. Brief, para. 16); toxic fumes and black dust emitted by trucks (Pre-Hearing Memo., para. 3.C.14,16); traffic problems (Pre-Hearing Memo., para. 3.C.15;

Post-Hearing Brief, p. 8); cars in parking lot attracting thieves (Pre-Hearing Memo., para. 3.C.18); Rampside's alleged failure to obtain approval to cross a certain right-of-way held by Appellant (Ans. Brief, para. 5); flooding of mine parking area (Ans. Brief, para. 6); potential effect of mining on an old school building in the area (Ans. Brief, para. 15); and protection of wetlands (Ans. Brief, para. 17). With respect to a number of these issues, no testimony or other evidence even remotely related thereto was introduced at hearing. Moreover, since these matters were not raised by Appellant in her Notice of Appeal, and no good cause has been shown for allowing them to be raised at a later date, Appellant is precluded from asserting these arguments at this time. Commonwealth, Pennsylvania Game Commission v. Commonwealth, Department of Environmental Resources, 97 Pa.Cmwlth. 78, 509 A.2d 877 (1986), aff'd 521 Pa. 121, 555 A.2d 812 (1989).

Finally, the allegation of "double jeopardy" has been pursued by Appellant throughout this appeal. (N.T. 26-29; Pre-Hearing Memo., p. 2-4; Post-Hearing Brief, p. 7; Ans. Brief, p. 9). In her Pre-Hearing Memorandum, she explains this to mean that the mining operation will place her in "jeopardy of life and limb."[2] As Appellant correctly points out in her Memorandum, the double jeopardy clause contained in the Fifth Amendment to the United States Constitution protects a defendant in a criminal proceeding from multiple prosecution for the same offense. Commonwealth v. Meekins, 266 Pa.Super. 157, 403 A.2d 591 (1979). Although Appellant cites the Fifth

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[2]Although Appellant does not specifically make the claim of "double jeopardy" in her Notice of Appeal, she states that she objects to the mining of coal by Rampside in order "to protect life, limb and the habitat of humans, flora and fauna." (N.A., para. 3.1(a)) Since "jeopardy of life and limb" is the basis of her claim of "double jeopardy", we find that this issue was properly raised in her Notice of Appeal.

Amendment in her Pre-Hearing Memorandum and in her testimony at hearing, it is clear she is not referring to "double jeopardy" in that sense, but, rather, she is arguing that Rampside's mining operation poses to her a threat of serious harm, or "jeopardy of life and limb." However, other than simply making this general assertion, Appellant has failed to present the Board with any concrete evidence that the mining poses a threat of harm to her or other residents of the area.

The sole argument which remains to be addressed in this appeal is that the permit was improperly issued because the permit area is not feasible for mining and DER failed to consider the conditions of the area in approving the permit.

At the hearing on the merits, Appellant testified in her own behalf and entered into the record four exhibits (consisting of three photographs and a sworn statement from an area resident) as well as the testimony of two individuals who reside in the area. All three testified that they are concerned about loss of water caused by mining. (N.T. 12, 81, 83). In addition, Appellant testified as to the cracked ground in the area (N.T. 12, 45, 70) and the potential for subsidence (N.T. 56-57). She also testified that the mining poses a threat to endangered species (N.T. 72), that the cumulative impact of mining has destroyed the area (N.T. 70), that there were inaccuracies in the permit application (N.T. 70, 75), and that the bonding is insufficient. (N.T. 78)[3] However, Appellant failed to present any credible

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[3]Appellant also testified as to the following matters: bridges not being able to accommodate heavy truck traffic (N.T. 16), the danger of trucks not having a place to park (N.T. 16), local zoning regulations (N.T. 31-33), and the potential for rioting and striking by miners (N.T. 70). None of these footnote continued

evidence to support these claims.

In rebuttal to Appellant's claims, DER and Rampside presented the testimony of Thomas Callaghan, a Hydrogeologist II with DER and the lead reviewer at the time the permit in question was issued. Mr. Callaghan testified that DER conducted a review of the permit application and determined that the application met the requirements of 25 Pa.Code §86.37. Mr. Callaghan presented clear and convincing testimony on the following:

a. Mining activities can be feasibly accomplished in the permit area, as required by 25 Pa.Code §86.37(2). (N.T. 96)

b. There is no evidence of potential pollution of waters of the Commonwealth, as required by 25 Pa.Code §86.37(3). (N.T. 97)

c. An assessment of the probable cumulative impact of all coal mining in the area on the hydrologic balance was made by DER, and the activities proposed under the application have been designed to prevent damage to the hydrologic balance within and outside the permit area, as required by 25 Pa.Code §86.37(4). (N.T.97)

d. The permit area is not designated unsuitable for mining, nor at the time of application was it included in a petition to be designated as such, as per 25 Pa.Code §86.37(5). (N.T.97)

e. The mining activities will not adversely affect any publicly owned parks or places listed in the National Register of Historic Places, as per 25 Pa.Code §86.37(6). (N.T.99)

f. A right of entry has been obtained from the legal owner of the

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continued footnote
factors are relevant to DER's review of a permit application under the Mine Subsidence Act, SMCRA, or 25 Pa.Code §86.37. Furthermore, these matters were not raised in Appellant's Notice of Appeal. Therefore, they are not before us for review. Pennsylvania Game Commission, supra.

land, as required by 25 Pa.Code §86.37(7). (N.T. 99,100)

g. At the time the permit was approved, Rampside was not in violation of any act, rules, or regulations of the Department related to coal mining or any federal law, rule, or regulation pertaining to air or water protection, as per 25 Pa.Code §86.37(8), (10), and (11). (N.T. 100, 101)

h. Rampside has submitted to DER a mining and reclamation bond and a subsidence bond, as required by 25 Pa.Code §86.37(12). (N.T. 101)

i. The application satisfied the requirements of 25 Pa.Code §89.121 relating to prime farmland, as per 25 Pa.Code §86.37(13). (N.T. 101)

j. The proposed post-mining use of the land satisfied the requirements of 25 Pa.Code §89.88, as per 25 Pa.Code §86.37(14). (N.T. 101, 102)

k. There are no threatened or endangered species of wildlife on the site, as per 25 Pa.Code §86.37(15). (N.T. 102)

Sections 86.37(5)(iv), (v) and (vi) of the regulations, 25 Pa.Code §86.37(5)(iv), (v), and (vi), state that a proposed permit area shall not be within 100 feet of a stream or the outside right-of-way line of a public road, nor less than 300 feet from any occupied dwelling. Mr. Callaghan testified that the permit area in question is within 100 feet of a public road and stream and within 300 feet of a dwelling. However, §86.102 provides an exemption from these restrictions for any surface mining activity which existed on August 3, 1977. Mr. Callaghan testified that the mining facility in question was in existence prior to August 1977 (N.T. 98). Therefore,

pursuant to 25 Pa.Code §86.102, since the facility was in existence prior to August 1977, it is exempt from compliance with the aforesaid restrictions on distance.

In summary, Appellant failed to present any evidence showing that the permit in question was improperly issued or that DER failed to consider the conditions of the area in granting the permit. On the contrary, Mr. Callaghan's testimony clearly demonstrates that Rampside's application met the requirements of 25 Pa.Code §86.37 and that DER did not abuse its discretion or commit an error of law in issuing the permit to Rampside. Appellant has failed to meet her burden of proving otherwise.

Therefore, we conclude that the permit in question was properly issued by DER.

CONCLUSIONS OF LAW

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

2. Appellant has the burden of proving that DER abused its discretion or committed an error of law in issuing the permit in question. 25 Pa.Code §21.101(c)(3); T.R.A.S.H., supra.

3. Rampside's permit application satisfies the requirements of 25 Pa.Code §86.37.

4. Pursuant to 25 Pa.Code §86.102, since the mining facility was in existence prior to August 1977, it is exempt from the distance requirements of §86.37(5)(iv), (v), and (vi).

5. DER properly issued the permit pursuant to its authority under the Mine Subsidence Act, SMCRA and the rules and regulations thereunder.

6. Appellant presented no credible evidence showing that Rampside's mining permit application failed to meet the requirements of 25 Pa.Code §86.37, or that DER committed an abuse of discretion or error of law in issuing the permit to Rampside, and, therefore, Appellant failed to sustain her burden of proof in this appeal.

O R D E R

AND NOW, this 5th day of December, 1990, it is ordered that the appeal of J. C. Brush is dismissed and the Department of Environmental Resources' issuance of Mining Activity Permit No. 11861301 to Rampside Collieries, Inc. is sustained.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
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Member

DATED: December 5, 1990

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M. DIANE SMITH
SECRETARY TO THE BOAI

EMPIRE SANITARY LANDFILL, INC.	:	**EHB Docket No. 90-187-W**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 5, 1990

OPINION AND ORDER SUR
PETITION FOR SUPERSEDEAS OR STAY
OF BOARD ORDER DURING THE PENDENCY
OF PETITION FOR REVIEW

By Maxine Woelfling, Chairman

Synopsis

A petition for stay of a Board order pending review by the Commonwealth Court is denied. A stay is inappropriate where the petitioner fails to make a strong showing that it is likely to succeed on the merits.

OPINION

The procedural history of this matter is recounted in the Board's October 17, 1990, opinion denying Empire Sanitary Landfill's (Empire) motion to enforce an alleged settlement agreement between it and the Department for lack of jurisdiction.

On October 26, 1990, Empire filed a petition for review with the Commonwealth Court at No. 2288 C.D. 1990, seeking to overturn the Board's order of October 17, 1990. Three days later, on October 29, 1990, Empire filed a petition for stay of the Board's order of October 17, 1990, during the pendency of its petition for review.

Empire contends it is entitled to a stay of the Board's order because it is likely to prevail on the merits of its claim that the Board does have the authority to enforce the alleged settlement agreement. It argues that it will suffer irreparable harm if it is forced to abide by a permit limiting importation of out-of-state waste and that imposing a stay which would permit Empire to accept 3100 tons of out-of-state waste as a daily average would neither impede the administration of environmental harm nor adversely affect the public interest.

The Department countered Empire's petition by asserting, *inter alia*, that Empire was attempting to have the Board supersede the permit modification at issue in the appeal, and Empire replied to the Department's response on November 30, 1990.

This Board evaluates requests for stay pending review by the Commonwealth Court on the basis of four criteria: 1) the likelihood of success on the merits; 2) any irreparable harm threatening the petitioner if a stay is not granted; 3) the effect of the stay on other interested parties; and 4) the public interest. Pennsylvania Public Utility Commission v. Process Gas Consumers Group, 502 Pa. 545, 467 A.2d 805 (1983) (Process Gas), and Louis J. Novak, Sr., et al. v. DER, 1987 EHB 965. Considering these factors, a stay is inappropriate in the case at bar.

Tribunals are not to apply the standard of likelihood of success on the merits rigidly, for it is recognized that they would be reluctant to determine that a litigant has a likelihood of reversing the adverse determination of the tribunal. Rather, a petitioner for a stay must make a "strong showing" that it is likely to succeed on the merits of the appeal. See Process Gas, 467 A.2d 805, at 809. Applying this test, we must conclude that Empire has failed to make a strong showing of succeeding on the merits. We

will not repeat the discussion of our own caselaw and Commonwealth Court precedent which is set forth in the October 17, 1990, opinion. Suffice it to say that the Board's jurisdiction has been consistently interpreted to be limited to reviewing Department of Environmental Resources' actions for an abuse of discretion and has never been interpreted as bestowing the powers of a court of general jurisdiction.

Furthermore, even if Empire had made a strong showing that it is likely to succeed on the merits, a stay would be inappropriate, for Empire fails to identify how denial of a stay would cause it irreparable harm. Indeed, if we were to stay our October 17, 1990, opinion, Empire would be in no better position, for it would still be subject to the terms and conditions of its modified permits, since the October 17, 1990, Board order is purely a jurisdictional determination.

Since Empire has failed to satisfy the standards required for a stay, the Board must deny its petition. Rushton Mining Co. v. DER, EHB Docket No. 85-313-F (Opinion issued March 20, 1990).

O R D E R

AND NOW, this 5th day of December, 1990, it is ordered that Empire Sanitary Landfill's petition for supersedeas or stay of the Board's order of October 17, 1990, during the pendency of its petition for review before the Commonwealth Court is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: December 5, 1990

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M. DIANE SMITH
SECRETARY TO THE BOAF

KENNETH G. FRIEDRICH	:	
	:	
v.	:	**EHB Docket No. 88-493-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: December 6, 1990**

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

By Terrance J. Fitzpatrick, Member

Synopsis

A Department of Environmental Resources (DER) order suspending a blaster's license is affirmed. DER proved it had due cause to suspend the license by showing that the licensee had participated in a scheme to overcharge customers, which involved the licensee's falsifying blasting records. Suspension of the license until such time as the criminal charges against the licensee would be resolved satisfied the requirement that suspension be "for a stated length of time."

INTRODUCTION

This proceeding involves an appeal brought by Kenneth Friedrich (Friedrich), from the DER suspension of Friedrich's blaster's license. DER suspended the license based on criminal charges that, while Friedrich was employed at Harrison Explosives Company of East Allen Township in Northampton County, Frederich had participated in a scheme to defraud customers by

falsifying blasting reports and billing documents. DER ordered Friedrich's blaster's license suspended until resolution of the related criminal charges against Frederich, at which time DER would determine whether to reinstate, continue suspension of, or revoke the license.

A hearing was held in this proceeding on July 21, 1989. DER presented testimony from former HEC employees Priscilla Dougherty, Richard Tallini and Kenneth Friedrich; DER employee Michael Getto; and Joseph Fabey of the Pennsylvania Attorney General's Office. Friedrich presented testimony from Gregory Abeln of the Environmental Crimes Division of the Pennsylvania Attorney General's Office, Richard Tallini and Kenneth Friedrich. After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. The Appellant in this proceeding is Kenneth G. Friedrich (Friedrich), an individual.

2. The Appellee in this proceeding is the Commonwealth of Pennsylvania, Department of Environmental Resources (DER), an executive agency charged with the duty of administering and enforcing the Act of July 10, 1957, P.L. 685, as amended, 73 P.S. §§164-168; Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §§510-17; Section 1901-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-1, relating to DER powers and duties; and the rules and regulations promulgated under these acts.

3. Friedrich was employed as a blaster for Harrison Explosives Company from December of 1977 to April of 1987. (Transcript, 19)

4. During his employment at Harrison Explosives Company, Friedrich was licensed as a blaster by the Commonwealth of Pennsylvania. (T. 19)

5. While Friedrich was employed at Harrison Explosives Company, Friedrich participated in a scheme to defraud customers of Harrison Explosives Company, by overstating on the bills and the blasting reports the amount or quality of explosives used in the blasts. (T. 23, 24; App. Ex. 1, ¶2)

6. In overcharging customers of Harrison Explosives Company, Friedrich falsified blast reports. (App. Ex. 1, ¶2; T. 24)

7. DER uses blast reports to monitor compliance with its regulations and to ensure that explosives are not being sold or distributed to people unauthorized to use explosives. The reports are also used in damage claim investigations. (T. 66, 73)

8. Information as to the amount of explosives used that is recorded on blast reports is used to ensure the reliability of damage claim investigations. (T. 66, 67, 71)

9. Blast reports are the only standard mechanism DER uses to determine whether or not explosives have been distributed for unauthorized use. (T. 75)

10. DER requires the blaster to fill out a blast report for every blast he fires. (T. 24, 65, 66)

11. While Friedrich was employed at Harrison Explosives Company, Friedrich performed some blasting on his own time, using explosives from Harrison Explosives Company, and did not fill out a blast report for some of these blasts. (T. 12, 25, 26)

12. In 1979 or 1980, Friedrich saw other Harrison Explosives Company employees bury roughly one hundred pounds of Vibranite, a blasting agent, about one hundred feet from the Harrison Explosives Company office, located in East Allen Township, Northampton County. (T. 4, 26-27)

13. Friedrich left Harrison Explosives Company in April of 1987.

(T. 134)

14. In the summer of 1988, Friedrich and two other former Harrison Explosives Company blasters, Richard Tallini (Tallini) and Robert Gerald O'Neill (O'Neill), contacted the Pennsylvania Office of the Attorney General to report the 1979 or 1980 burial of the Vibranite. (T. 58-59)

15. On July 1, 1988, Friedrich gave a statement to Special Agent Joseph Fabey (Fabey) of the Pennsylvania Attorney General's Office regarding the unlawful disposal of explosives at the Harrison Explosives Company site but did not mention the overcharging scheme or falsification of blast reports. (T. 58-61)

16. Tallini stated on July 1, 1988 to Agent Fabey that the billing records may have been falsified to cover up the illegal disposal of the explosives. Tallini made no reference to the overcharging scheme or the related falsification of blasting records. (T. 59)

17. Through the Attorney General's investigation of the billing records on July 21, 1988, brought on by the July 1 statements by Friedrich, Tallini and O'Neill, Fabey and Gregory Abeln discovered the overcharging and record falsification scheme. (T. 60, 90-91)

18. Because of his participation in the overcharging scheme, Friedrich was arrested in October 1988 and charged with a number of criminal offenses. On January 27, 1989, Friedrich entered into a plea agreement with the Office of the Attorney General of Pennsylvania whereby, in exchange for Friedrich's continuing cooperation with the Attorney General's Office in the prosecution of this matter, the Attorney General would dismiss all charges except one misdemeanor against Friedrich, and would recommend to the Court of Common Pleas of Northampton County, that Friedrich be admitted into the Accelerated Rehabilitative Disposition (ARD) Program. (App. ex. 1; T. 20-21;

92-93)

19. Friedrich, Tallini and O'Neill were admitted to the ARD program. Under the terms of the program, Friedrich was to be on probation through May 1990. All charges against him would be dismissed if he continued to cooperate with the Attorney General and otherwise comply with the terms of his one year probation. (T. 21, 23, 33, 92, 139, 140)

DISCUSSION

In this case, DER suspended Friedrich's blasting license pursuant to the Act of July 10, 1957, P.L. 685, 73 P.S. 165, and the derivative regulation, 25 Pa. Code §210.2(f). Both the statute and the regulation provide that a blaster's license may be suspended for due cause, without hearing. DER had the burden to show that it did not abuse its discretion in suspending Friedrich's license. Fiore v. DER, 1984 EHB 643, 650.

DER contends that due cause existed for suspension of Friedrich's license because Friedrich violated the blasting regulations when he did not report certain blasts he detonated, and when he took part in the overcharging scheme. DER established at the hearing that Friedrich had detonated some blasts on his own account for which he did not fill out blast reports. (T. 13, 25, 26). DER urges that this was a violation of 25 Pa. Code §210.5(c) (requiring blasters licensed by DER to comply with the regulations in 25 Pa. Code Chapter 211) and of 25 Pa. Code §211.56 (3), (7) and (8) (requiring blasters to fill out a blast report on each blast for which they are responsible). DER also established at the hearing that the blasters (including Friedrich) falsified the blasting records and billing documents of quarry blasts by overstating on the documents the amount or the quality of the explosives actually used. (App. Ex. 1, ¶2; T. 7, 8,. 24.) DER charges that this was a violation of Sections 210.5(c) and 211.56 of 25 Pa. Code, and

reason enough for suspension of Friedrich's blaster's license.

Friedrich asserts that the chief legal question in this appeal is whether or not due cause existed for DER to suspend the blaster's license. (T.148) Friedrich argues that DER did not have due cause to suspend the license, because falsifying the records in this case did not endanger the public or the environment, as the amounts of explosives recorded on the documents were always higher than those actually used in the blasts. Friedrich adds that suspension in this case is inappropriate because the true environmental danger was in the burial of the Vibranite, which Friedrich reported to his own detriment. Friedrich urges that the good done by this report far outweighs the potential damage of his participation in the overcharge scheme. Finally, Friedrich argues that the suspension is not valid because DER did not set a specific date for its termination, but instead ordered the suspension to continue until the related criminal charges were resolved.

Considering the evidence, we find that DER did not err in suspending Friedrich's blaster's license. DER put on evidence at the hearing revealing that Friedrich falsified blasting records, thus, he violated 25 Pa. Code §§210.5(c) and 211.56. In a related case, a member of the Board has held that a blaster's participation in an overcharge scheme involving falsification of blasting documents creates due cause for suspension of the blaster's license. Sysak v. DER, 1989 EHB 126, 129. The testimony brought out at the hearing of this appeal leaves no doubt that Friedrich participated in the same activity as that ruled to create due cause in Sysak. We see no reason to deviate from that conclusion here. The fact that Mr. Friedrich came forward with the information regarding burial of the Vibranite, while laudable, does not require DER to ignore all the evidence of wrongdoing which grew from that

disclosure.

Having determined that DER established that it had due cause to suspend Friedrich's license because of Friedrich's participation in the overcharge scheme, we now consider whether DER erred because it did not set a specific date for termination of the suspension. We believe that DER did not err. The regulation in question, 25 Pa. Code §210.2(f), provides that a blaster's license may be suspended "for a stated length of time." This same section discusses the revocation of licenses, and it appears that the language quoted above was designed to convey the idea that suspensions, unlike revocations, are temporary. DER's suspension of Friedrich's license until the criminal charges filed against him are resolved does not run afoul of this regulation. This conclusion is buttressed by DER's post-hearing memorandum, which states at page 8 that the criminal charges against Friedrich will be resolved when he completes his one-year probation pursuant to the ARD program.

In summary, DER did not err in its suspension of Friedrich's blaster's license.

CONCLUSIONS OF LAW

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

2. DER bears the burden of proving that it met the statutory requirements of due cause for suspension of a blaster's license. Fiore v. DER, 1984 EHB 643, 650.

3. Due cause to suspend a blaster's license is established by evidence showing that the licensee has falsified blasting records Sysak v. DER, 1989 EHB 126.

4. Due cause existed for the suspension of Friedrich's blaster's license because DER established that Friedrich had participated in an

overcharging scheme which involved falsifying blasting records.

5. DER's suspension of Friedrich's blaster's license until criminal charges against him were resolved complies with the requirement that suspensions be "for a stated length of time." 25 Pa. Code §210.2(f)

O R D E R

AND NOW, this 6th day of December, 1990, it is ordered that the Department of Environmental Resources' suspension of Kenneth G. Friedrich's blaster's license is sustained, and the appeal of Kenneth G. Friedrich is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 6, 1990

cc: Bureau of Litigation
Library, Brenda Houck
For the Commonwealth, DER:
Kurt Weist, Esq.
Central Region
For Appellant:
Harold J. J. DeWalt, Jr., Esq.
Easton, PA

jm

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HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BO

RICHARD TALLINI	:	
	:	
v.	:	**EHB Docket No. 88-522-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: December 6, 1990**

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

By Terrance J. Fitzpatrick, Member

Synopsis

A Department of Environmental Resources (DER) order suspending a blaster's license is affirmed. DER established that it had due cause to suspend the license by showing that the licensee had participated in a scheme to defraud customers which involved the licensee's falsifying blasting records. Suspension of the license until such time as the criminal charges against the licensee would be resolved met the requirement that suspension be "for a stated length of time."

INTRODUCTION

This appeal was initiated by Richard Tallini (Tallini) on December 19, 1988, challenging DER's suspension of Tallini's blaster's license. DER suspended the license based on charges that, while Tallini was employed as a blaster at Harrison Explosives Company of East Allen Township in Northampton County, Tallini had participated in a scheme to defraud customers by

falsifying blasting reports and billing documents. DER suspended Tallini's blaster's license until resolution of the related criminal charges against Tallini, at which time DER would determine whether to reinstate, continue suspension of, or revoke the license.

A hearing was held in this matter on July 21, 1989. DER presented testimony from former Harrison Explosives Company employees Priscilla Dougherty, Richard Tallini and Kenneth Friedrich; DER employee Michael Getto; and Joseph Fabey of the Pennsylvania Attorney General's Office. Tallini presented testimony from Gregory Abeln of the Environmental Crimes Division of the Pennsylvania Attorney General's office, Richard Tallini and Kenneth Friedrich. After a complete review of the record, we make the following:

Findings of Fact

1. The Appellant in this proceeding is Richard Tallini (Tallini), an individual.

2. The Appellee in this proceeding is the Commonwealth of Pennsylvania, Department of Environmental Resources (DER), an executive agency charged with the duty of administering and enforcing the Act of July 10, 1957, P.L. 685, as amended, 73 P.S. §§164-168; §1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; §1901-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-1, relating to DER powers and duties; and the rules and regulations promulgated under these acts.

3. Tallini was employed by Harrison Explosives Company as a blaster and as the Vice President of Quarry Sales from 1976-1980, and again as a blaster in 1987. (Transcript, 33-34, 105)

4. During his employment at Harrison Explosives Company, Tallini was licensed as a blaster by the Commonwealth of Pennsylvania. (T. 105)

5. While employed by Harrison Explosives Company, Tallini regularly performed blasting services for Harrison Explosives Company customers. Most of the customers Tallini serviced were quarries, some of which were located in Pennsylvania. (T. 34, 37)

6. While employed at Harrison Explosives Company, Tallini participated in a scheme to defraud customers of Harrison Explosives Company by overstating on the bills and blasting reports the amount or quality of explosives used in the blasts. (T. 6-10, 36-38; Appellant's Exhibit 1, ¶2)

7. DER uses blast reports to ensure the reliability of damage claim investigations and to determine whether or not explosives have been distributed for unauthorized use. (T. 66-67, 71-75)

8. Tallini explained the overcharging scheme to other blasters employed at Harrison Explosives Company. (T. 38)

9. In 1979 or 1980, Tallini saw other Harrison Explosives Company employees bury approximately 2,000 pounds of nitroglycerine-based dynamite, as well as Vibranite S--a blasting agent--near the Harrison Explosives Company office in East Allen Township, Northampton County, Pennsylvania. (T. 4, 40-41)

10. Tallini was not employed by Harrison Explosives Company from 1980 through 1986. When Tallini returned to Harrison Explosives Company in 1987, Tallini saw Harrison Explosives employees dump or wash emulsion out of trucks almost daily at the Harrison Explosives facility. Tallini estimated he saw other employees dump over 50,000 pounds of emulsion, most of which was mixed with fuel oil, onto the ground at the Harrison Explosives facility in 1987. (T. 33, 43-44, 107)

11. Emulsion is a waterproof mixture of ammonium nitrate and materials that suspend the ammonium nitrate, which is often blended with fuel

oil before being used as an explosive. (T. 42-43)

12. In the summer of 1988, Tallini and two other former Harrison Explosives Company blasters, Kenneth Friedrich and Robert Gerard O'Neill, contacted the Pennsylvania Office of the Attorney General to report the burial of the explosives. (T. 45, 58-59, 61)

13. On July 1, 1988, Tallini gave a statement to Special Agent Joseph Fabey (Fabey) of the Pennsylvania Attorney General's Office regarding the unlawful disposal of explosives at the Harrison Explosive Company site. (T. 58-61)

14. Tallini stated on July 1, 1988 to Agent Fabey that the billing records may have been falsified to cover up the illegal disposal of the explosives. Tallini made no reference to the overcharging scheme or the related falsification of blasting records. (T. 59)

15. Through the Attorney General's investigation of the billing records on July 21, 1988, brought on by the July 1 statements by Friedrich, Tallini and O'Neill, Fabey and Gregory Abeln discovered the overcharging and record falsification scheme. (T. 60, 90-91)

16. Because of his participation in the overcharging scheme, Tallini was arrested in October 1988 and charged with a number of criminal offenses. On January 27, 1989, Tallini entered into a plea agreement with the Office of the Attorney General of Pennsylvania whereby, in exchange for Tallini's continuing cooperation with the Attorney General's Office in the prosecution of this matter, the Attorney General would dismiss all charges except one misdemeanor against Tallini and would recommend to the Court of Common Pleas of Northampton County that Tallini be admitted into the Accelerated Rehabilitative Disposition (ARD) Program. (App. Ex. 1; T. 35-36, 92-93, 97-98)

17. Friedrich, Tallini and O'Neill were admitted to the ARD program. Under the terms of the program, Tallini was to be on probation through April 1990. All charges against him would be dismissed if he continued to cooperate with the Attorney General and otherwise complied with the terms of his one-year probation. (T. 36, 92-93)

DISCUSSION

This case was consolidated for hearing with the case of Kenneth G. Friedrich v. Commonwealth of Pennsylvania, Department of Environmental Resources, Docket No. 88-493-F. In the adjudication issued this same date in Friedrich, the Board has ruled that due cause to suspend a blaster's license is established by evidence that the licensee has falsified blasting records, and that suspension for the period pending resolution of criminal charges meets the regulatory requirement of a "stated length of time." This appeal turns on those issues resolved in Friedrich; therefore, we incorporate the Discussion of that adjudication herein by reference. Accordingly, we find that DER did not err in suspending Tallini's blaster's license.

CONCLUSIONS OF LAW

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

2. DER bears the burden of proving that it met the statutory requirements of due cause for suspension of a blaster's license. Fiore v. DER, 1984 EHB 643, 650.

3. Due cause to suspend a blaster's license is established by evidence showing that the licensee has falsified blasting records. Sysak v. DER, 1989 EHB 126.

4. Due cause existed for the suspension of Tallini's blaster's license because DER established that Tallini had participated in an

overcharging scheme which involved falsifying blasting records.

5. DER's suspension of Tallini's blaster's license until criminal charges against Tallini were resolved complies with the requirement that suspensions be "for a stated length of time." 25 Pa. Code §210.2(f).

ORDER

AND NOW, this 6th day of December, 1990, it is ordered that the Department of Environmental Resources' suspension of Richard Tallini's blaster's license is sustained, and the appeal of Richard Tallini is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

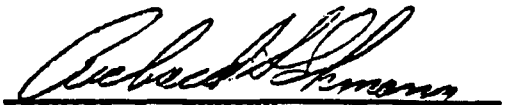
MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

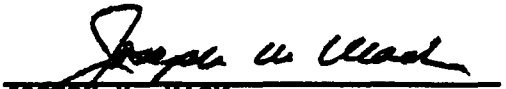
ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 6, 1990

cc: Bureau of Litigation
Library, Brenda Houck
For the Commonwealth, DER:
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Central Region
For Appellant:
Harold J. J. DeWalt, Jr., Esq.
Easton, PA
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M. DIANE SMITH
SECRETARY TO THE BOARD

MIDWAY SEWERAGE AUTHORITY	:	
	:	
v.	:	EHB Docket No. 90-231-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: December 6, 1990

OPINION AND ORDER
SUR DER'S
AMENDED SECOND MOTION FOR SANCTIONS

By: Richard S. Ehmann, Member

Synopsis

The sanction of barring a party from use of a particular expert witness may be imposed pursuant to 25 Pa. Code §21.124 when the expert witness is not identified in Appellant's Pre-Hearing Memorandum (with his testimony summarized), its answers to interrogatories, at a subsequent Pre-Trial Conference of counsel with the Board, or in the party's first Supplement to its Pre-Hearing memorandum, but is only so identified barely one month before trial, and then is so identified without provision of a summary of expert testimony (which is not filed until two weeks before trial). Conduct showing repeated non-compliance with the Board's Orders cannot be approved by denial of the Motion. No extenuating circumstances have been shown to justify Appellants' conduct, since Appellant had knowledge of this proposed witness and had used him for over a year before the date of the filing of its Pre-Hearing Memorandum, and appellant was provided many opportunities to disclose his existence in a timely fashion. Appellant's desire to not have to

retain this witness as an expert (and pay his expert witness fees), coupled with its hope of finding evidence to support its position in a less expensive manner, is not adequate reason to avoid disclosure of a witness whose testimony is in a field in which no prior expert testimony had been proposed.

OPINION

The instant appeal was filed by Midway Sewerage Authority ("Midway") on June 12, 1990. It is an appeal from the Department of Environmental Resources' ("DER") refusal to agree to revision of a "planning module component" specifying sewage disposal through construction of a regional sewage treatment plant, as opposed to the method now proposed by Midway. The issue now before us deals with discovery, expert witnesses, and sanctions; we center this discussion on these issues rather than the merits of the parties' contentions.

Our rules of procedure, our Orders issued thereunder, and the many cases interpreting same, all show a basic scheme wherein the parties and the Board work from broad appeals to narrow the issues which must be adjudicated through a hearing before us. Appeals state each and every objection of an Appellant. Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1989), affirmed, 521 Pa. 121, 555 A.2d 812 (1989), instructs that one cannot amend a timely Notice of Appeal to add new grounds for appeal absent a nunc pro tunc showing as to the proposed amendments. Virtually everything alleged in an appeal is subject to discovery and examination by Appellant and Appellee. This discovery is scheduled by Pre-Hearing Order No. 1 to be completed prior to the filing of each party's respective Pre-Hearing Memorandum. Our Pre-Hearing Order No. 1, requiring the filing of the Pre-Hearing Memoranda, further warns that a party may be deemed to have

abandoned legal and factual contentions not set forth in its pre-hearing memorandum. Pre-Hearing Order No. 2 then requires the parties to file a subsequent pre-trial stipulation of facts, documents, and remaining legal issues. We then conduct our hearing thereon. Further, Lucky Strike Coal Co. et al. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988), instructs that a party is deemed to have abandoned those legal contentions not covered by the party's post-hearing brief. This winnowing process must be kept in mind in this case because DER's amended second Motion For Sanctions is based on claims that Midway's conduct is contrary to our Orders implementing this procedure.

On June 21, 1990, we issued to both parties Pre-Hearing Order No. 1, Paragraph 2 of which directed completion of all discovery within seventy-five days of the Order's date. Paragraph No. 3 required that by September 4, 1990, Midway file with us a Pre-Hearing Memorandum "which shall contain the following:

...

C. Description of any scientific tests relied upon by any party and summary of testimony of experts.

D. Order of Witnesses." (emphasis supplied)

Paragraph 4 directed DER to file its responding Pre-Hearing Memorandum within fifteen days of receipt of that filed by Midway. Paragraph 5 of that Order warned the parties that we might enter sanctions against parties failing to observe the requirements of Paragraphs 3 and 4.

On September 5, 1990, we received a Pre-Hearing Memorandum from Midway, and, on September 19, 1990, DER filed its responding Pre-Hearing Memorandum. As becomes significant below, Victor K. Lynch, Esq., is not listed as a witness in either document.

Thereafter, on Motion from DER which was not opposed by counsel for Midway, a period for additional discovery was authorized by our Order of September 25, 1990. In the period between September 25, 1990 and October 31, 1990, our records reflect issuance of a subpoena for Midway to use to conduct a deposition of a third party, DER's Notice of Deposition of Midway's witnesses, and a copy of Midway's Request For Production (by DER) of documents; so, we know both parties utilized this extended discovery period.

On September 27, 1990, after a conference call with counsel for both parties, we issued our Pre-Hearing Order No. 2, which scheduled this appeal for hearings on December 12 and 13 of 1990. In Paragraph 6 of that Order, the parties were specifically advised that they could seek leave of the Board to amend their Pre-Hearing Memoranda to address issues raised during the conference call which were not adequately covered in their respective Pre-Hearing Memoranda. No general leave to amend same was authorized by Pre-Hearing Order No. 2, however.

Thereafter, on October 31, 1990, Midway sent us a Supplement to its Pre-Hearing Memorandum. Midway did not seek leave to file same with us either before or after delivering it to us. Midway's Supplement named twenty-four new fact witnesses, including Victor K. Lynch. No new expert witnesses were named therein.

In response, DER filed a Motion For Sanctions seeking to bar the testimony of these witnesses. DER argued that Midway had failed to identify these persons, as required, in answers to DER's interrogatories filed during the period set aside for discovery, and, prejudically, DER could no longer depose same because that period had ended. DER also argued that Midway's answers to DER's interrogatories directed DER to only the nine people

previously named as witnesses in Midway's initial Pre-Hearing Memorandum and to specified others, while reserving the right to amend this list of witnesses based upon on-going discovery, and that these twenty-four people were not in the groups of persons identified in Midway's Interrogatory Answers. Further, DER argued sanctions were appropriate because our prior Pre-Hearing Order No. 1 required disclosure of all such witnesses in Midway's Pre-Hearing Memorandum.

Since DER simultaneously filed a Motion For A Pre-Trial Conference, we held such a conference with counsel for Midway and DER on November 6, 1990, and, based on the discussions at the conference, we issued our Order of that same date. Our conference discussions revealed the twenty-four witnesses' testimony was cumulative with that of the first nine witnesses, was repetitive as to what each witness would tell us, and dealt exclusively with events at public meetings about the disputed sewage project. Midway's counsel also advised us he was only planning to call some of these people to testify but he was not sure which ones. Accordingly, we issued our Order of November 6, 1990, requiring Midway, by November 13, 1990, to select two of these persons to testify. The Order also required Midway to summarize their testimony and to amend its Pre-Hearing Memorandum as to them, and granted DER the right to depose both of them. In addition, our Order denied DER's first Motion For Sanctions. Importantly, our Order indicated the two witnesses would be limited to testifying in accordance with our understanding that their testimony would be cumulative to that of its previously identified witnesses, rather than dealing with new areas of testimony.

Midway filed both its second Supplement to its Pre-Hearing Memorandum and a Supplement to its Answers to DER's Interrogatories with us on November

13, 1990. In these documents, Victor K. Lynch, who had been listed in Midway's first Supplement as one of twenty-four fact witnesses, was listed not as a fact witness, but as an expert witness. Midway's action prompted DER to file its second Motion For Sanctions, which it amended on November 26, 1990. On December 3, 1990, Midway filed its timely response to DER's amended second Motion For Sanctions.

DER argues our Order of November 6, 1990 says that as agreed by the parties, Midway's two new witnesses will not be called except to give cumulative testimony, and use of Lynch as an expert is beyond what was agreed, as reflected in our Order. It is obvious from a reading of the Supplement, the five page summary of Lynch's proposed testimony, and Midway's response as to sanctions, that Lynch is being offered on a non-cumulative basis to address "municipal finance" issues. Midway is offering Lynch as an expert in a subject matter area in which it had not previously proposed expert testimony. DER also argues, correctly, that Midway failed to reveal Lynch's use as an expert in its initial Pre-Hearing Memorandum or at the Pre-Trial Conference. The motion also urges Midway has not given sufficient responses as to Lynch in its answer to DER's Interrogatories nor has it provided a summary of his expert testimony as required by Pre-Hearing Order No. 1, and with discovery closed and trial less than a month away, DER is prejudiced by Midway's misconduct to the point that Lynch should be barred from testifying as an expert.

In response, Midway asserts that it did not decide to use Lynch as an expert until its review of the documents produced by DER in response to Midway's Request For Production showed it could not prove its case in the manner it had initially chosen. Midway says it did not mention Attorney Lynch

in its earlier filings because it wanted to avoid using him as an expert (and paying him fees, for this service) if possible, but it now finds him necessary.

It is a universally endorsed concept that justice in our trial courts is not served where lawyers use tactics designed to for trial by ambush and unfair surprise. After stating the rules are intended to prevent unfair surprise, Goodrich-Amram 2d §4001(c):1, citing to Eisenberg v. Penn Traffic Co., 6 D&C.2d 364 (1955), states:

> The discovery rules are purely procedural and do not affect the substantive rights of the parties, but [a] party has no substantive right to keep the mouths of its witnesses closed up to the day of trial.

We cite this language because we believe that DER states a strong case for imposition of sanctions. When we issue our Pre-Hearing Order No. 1, it directs both parties to engage in their discovery, complete same, and then, but only then, file their respective Pre-Hearing Memoranda. The often technical nature of matters before us makes us require the disclosure of experts and their opinions at this point, together with the facts a party plans to prove and each legal contention advanced. With this information in our possession, and only then, we schedule the dates for hearing. Thus, compliance with Pre-Hearing Order No. 1 by both sides gives each party the opportunity to discover the strengths and weaknesses of his position and that of his opponent, a chance to abandon or reinforce contentions which have become weaker or stronger in discovery, and a vehicle (the Pre-Hearing Memorandum) with which to pull all trial preparation efforts together. Since

there are no pleadings in most matters before us, it also gives the Board its only real opportunity to study the "lay of the land" in each appeal and to think about the issues being raised.

Here, our Pre-Hearing Order No. 1 gave Midway seventy-five days to conduct discovery. Midway could have obtained production of DER's documents within that period, but it did not. Had it done so, it would have known before the August 31, 1990 filing of its Pre-Hearing Memorandum that DER's documents did not prove Midway's contentions and Midway could have listed Attorney Lynch as a witness at that time. Midway could have disclosed Attorney Lynch as an expert in its first Supplement to its Pre-Hearing Memorandum, also. Since discovery had closed by November 6, 1990, Midway must have seen DER's documents prior to our Pre-Trial Conference with counsel on November 6, 1990, so it could have disclosed in our face-to-face discussion Attorney Lynch's expertise and its desire to use him in that capacity. It did none of these and waited until the last possible day (November 13, 1990) to disclose his identity. Even then, Midway failed to simultaneously summarize his expert testimony, as required by our Pre-Hearing Order No. 1, which was issued nearly six months earlier. Instead, Midway failed to provide this Board and DER the summary until November 27, 1990.

In our conference with counsel on November 6, 1990, it was revealed that Attorney Lynch had been available to Midway on matters relating to "municipal financing" for over a year. This was reconfirmed in a conference telephone call between the Board and counsel for both parties on November 29, 1990. Thus, Attorney Lynch is not a newly uncovered expert. Since, according to his resume (filed as part of Midway's supplemental answer to DER's interrogatories), Mr. Lynch has worked as a lawyer in this field in the

Pittsburgh area since 1970, he is also not someone who, until recently, was undiscoverable by Midway's counsel. There thus can be no excuse for Midway's failure to comply with our prior orders or to seek leave to add this witness in a much more timely fashion. Had Midway timely disclosed Mr. Lynch, DER could have deposed Mr. Lynch in September or October, during the time which we extended for further discovery by both sides, or early in November, and we would not be faced with this Motion today.

If the procedures under which we function are to provide each party appearing before us in the hundreds of appeals filed each year a speedy determination of their controversy, then Midway's failure to disclose this witness until the last possible moment and failure to provide a summary of his testimony until November 27, 1990 cannot be condoned by denial of DER's Motion. Midway has not complied with our orders, nor can it be said to have forthrightly dealt with this expert witness's disclosure. Such dealings require the imposition of sanctions on Midway and the granting of DER's amended second Motion For Sanctions by entry of our Order of December 3, 1990.[1]

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

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[1]In a departure from our routine practice, we issued this Order prior to the typing and issuance of this opinion as a courtesy to counsel for both sides who are preparing this matter for hearings to commence on December 12, 1990.

DATED: December 6, 1990

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Theresa Grencik, Esq.
Western Region
For Appellant:
Peter K. Darragh, Esq.
Pittsburgh, PA

med

COMMONWEALTH OF PENNSYLVANIA
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M. DIANE SMITH
SECRETARY TO THE BOAF

BLAIRS VALLEY PROTECTION ASSOCIATION and MARIANNE MEIJER, DORIS HORNBAKER and SHARON DAYLEY	:	
v.	:	**EHB Docket No. 90-210-MR**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and WHITETAIL LAND COMPANY, Permittee	:	**Issued: December 7, 1990**

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Robert D. Myers, Member

Synopsis

In a third-party appeal from the issuance of a Water Quality Management Permit, where the Appellants seek summary judgment on the basis that the sewage disposal system approved by the Permit issuance does not conform to the system previously approved in the Planning Module that now constitutes a revision to the municipality's Official Plan, the Board denies the Motion. Holding that absolute conformity is not required, the Board rules that a factual dispute exists on the issue of the extent to which the two systems differ. The Board also refused to grant summary judgment, despite the factual dispute, on the basis of a DER memorandum stating that DER erred in processing the Permit application, in the absence of anything on the record establishing the truth of the contents of the memorandum.

OPINION

This appeal was begun on May 25, 1990 by Blairs Valley Protection Association, Marianne Meijer, Doris Hornbaker and Sharon Dayley (Appellants),

seeking review of the April 5, 1990 issuance by the Department of Environmental Resources (DER) of Water Quality Management Permit No. 2889426 (Permit) to Whitetail Resort (Permittee) pertaining to a facility in Montgomery Township (Township), Franklin County. Notice of the issuance of the Permit was published in the April 28, 1990 edition of the Pennsylvania Bulletin.

On July 13, 1990 Appellants filed a Motion for Summary Judgment accompanied by a Memorandum of Law and a Petition for Stay of Proceedings. Permittee responded on August 3, 1990 with a Reply to the Motion for Summary Judgment, a Memorandum in support thereof, and a Response to the Petition for Stay of Proceedings. DER filed a Response to the Motion for Summary Judgment on August 6, 1990, declining to take an active role in the case pursuant to its policy on third party appeals from permit issuances. Appellants filed a Reply Brief on August 14, 1990.[1]

Appellants claim to be entitled to summary judgment because the Permit approves a project which they allege does not conform to the approved Official Plan of the Township as required by 25 Pa. Code §91.31. From the documents attached to the Motion and the Reply it appears that Permittee intends to develop a ski resort consisting of ski trails, ski lifts, a base village and condominium units. On April 7, 1984 Permittee secured Township approval for its Planning Module for Land Development as a revision to the Township's Official Plan.

This Module revealed three stages of development. In the first stage, holding tanks would receive 30,000 gallons per day (gpd) of sewage effluent from the food service building and related facilities. In the second

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[1] The Petition for Stay of Proceedings was granted by an Order dated August 10, 1990.

stage, an aerated holding lagoon would receive 40,000 gpd of sewage effluent from the completed base village. The holding tanks and lagoon would provide 3 days storage capacity. The contents would be removed by a licensed hauler and transported to the Borough of Chambersburg Wastewater Treatment Facility. In the final stage, 92,500 gpd of sewage effluent from the entire development would flow to a circular extended aeration treatment plant with flow equalization, high-pressure sand filtration, chlorination and direct discharge to Blair Valley Creek, a tributary of Licking Creek.

The Planning Module was submitted to DER on or about April 7, 1984 and was approved as a revision to the Township's Official Plan on November 2, 1984. The approval was advertised in the Pennsylvania Bulletin on December 1, 1984. One of the conditions of DER's approval was the issuance of a Water Quality Permit for the lagoon, treatment plant, outfall and related facilities. Permittee applied for a National Pollution Discharge Elimination System (NPDES) Permit from DER for the design discharge of 100,000 gpd of treated sewage to an unnamed tributary of Licking Creek. Notice of the filing of this application was published in the Pennsylvania Bulletin on June 22, 1985. DER issued a draft NPDES Permit to Permittee on November 4, 1987 and published notice thereof in the Pennsylvania Bulletin on November 21, 1987. This notice contained the same rate of flow and same point of discharge as the June 22, 1985 notice but set forth different effluent limits.

For reasons not disclosed to us, the NPDES Permit was never issued. On October 4, 1989 representatives of Permittee met with DER officials and discussed a land treatment system for the sewage effluent in lieu of discharge to a stream. DER officials informed Permittee's representatives that, since the land treatment system was not a significant departure from the system approved in the 1984 Planning Module, it was not necessary to submit a new

Planning Module. On the basis of this information, Permittee prepared and submitted to DER on December 7, 1989 an application for Part II Water Quality Management Permit. This application covered the facilities necessary to collect sewage and convey it to a 3-cell deep lagoon where it would remain for 14 days and receive aerated treatment, mechanical sand filtering and disinfection. The treated effluent would then be pumped into a supply line where it would become a component (3.5% initially, 10% ultimately) of the water used in snow-making. Stormwater and snowmelt runoff would be collected and stored in an on-site reservoir and used for snow-making. During the off-season the sewage effluent would be stored in the lagoon. There would be no discharge to a stream.

On April 5, 1990 DER issued the Permit (from which the appeal was filed) based upon the application filed on December 7, 1989, authorizing the use of the land treatment system with respect to sewage flows of 35,000 gpd.

It is apparent that resolution of the issue before us turns on the determination of whether or not the sewage disposal system approved by DER in the issuance of the Permit adequately conforms to the system approved in the Planning Module which is now part of the Township's Official Plan. The necessity for conformity was clearly established in Lower Providence Township v. DER, 1986 EHB 832, but there are no precedents dealing with how close the conformity must be. A rule of absolute conformity does not appeal to us because of its rigidity;[2] but drawing the line short of that is a delicate task that we are loath to undertake on the basis of the record before us.

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[2] While engineering work goes into the preparation of a Planning Module, the detailed work required for issuance of a permit is not generally done until after the Planning Module has been approved. Consequently, some degree of variance must be permitted. This is apparent from the language of DER's letter approving Permittee's Planning Module (Exhibit B to Motion for Summary Judgment).

Appellants assert, with some apparent merit, that the Planning Module contains no hint of a land application system. Permittee alleges, however, that (1) the Planning Module contemplated an in-stream impoundment where the treated effluent would be mixed and used in snow-making, and (2) the system approved in the Permit only changes the place of mixing - a change not significant enough to require a new Planning Module. Permittee attaches an April 4, 1984 letter from DER to Permittee providing effluent limits both for a stream discharge and for a discharge to an impoundment for snow-making purposes, and argues that the effluent limits used in the Planning Module submitted to DER a few days later uses the latter effluent limits. Obviously, the facts are hotly disputed on this issue and we are unable to resolve it at this preliminary stage: Pa. R.C.P. 1035(b).

Summary judgment should be granted despite this factual dispute, according to Appellants, because DER acknowledges that it erred when it informed Permittee that a new Planning Module was unnecessary. They refer to a January 12, 1990 memorandum allegedly handwritten by Charles D. Ferree, Jr., a Water Quality Specialist Supervisor for DER, containing these comments. While there is an affidavit swearing that this memorandum is a true and correct copy of a document in DER's files, there is nothing in the record establishing the truth of the contents. Consequently, the document is hearsay evidence upon which we are unwilling to render summary judgment.

ORDER

AND NOW, this 7th day of December, 1990, it is ordered as follows:

1. The Motion for Summary Judgment, filed by Appellants on July 13, 1990, is denied.

2. On or before December 28, 1990, the parties shall submit to the Board a mutually agreeable schedule for discovery and the filing of pre-hearing memoranda.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: December 7, 1990

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R. Timothy Weston, Esq.
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M. DIANE SMITH
SECRETARY TO THE BOAR

NEW HANOVER TOWNSHIP, et al.	:	
	:	
V.	:	**EHB Docket No. 88-119-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	**Issued: December 10, 1990**
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and NEW HANOVER CORPORATION	:	

OPINION AND ORDER SUR
MOTION FOR JUDGMENT ON THE PLEADINGS
OR, IN THE ALTERNATIVE, SUMMARY JUDGMENT

Maxine Woelfling, Chairman

Syllabus

A motion for judgment on the pleadings or, in the alternative, summary judgment, will be denied where the moving party fails to establish that it merits judgment as a matter of law, either based on the pleadings alone, or in combination with any depositions, answers to interrogatories, admissions, and supporting affidavits. To establish that the environmental harm of a proposed action so clearly outweighs the benefits to be derived as to constitute an abuse of discretion by the Department, a party must do more than assert that the proposed activity would confer no benefit. The fact that new set-back requirements, effective after the date of issuance of the permit will not apply to a proposed landfill is not, in itself, evidence of environmental harm for purposes of Article I, §27 of the Pennsylvania Constitution.

OPINION

The New Hanover Corporation (NHC) municipal waste disposal site in New Hanover Township, Montgomery County, is the subject of three separate appeals by the Paradise Watch Dogs (Paradise). The appeal at Docket No. 88-126-W involves the Department of Environmental Resources' (DER) March 1, 1988, issuance of Solid Waste Permit No. 101385 to NHC; the appeal at Docket No. 88-127-W involves the Department's March 1, 1988 issuance of National Pollutant Discharge Elimination System Permit PA 0052345 to NHC; and the appeal at Docket No. 88-128-W involves the Department's March 1, 1988, issuance of a certification to NHC pursuant to §401 of the federal Clean Water Act, 33 U.S.C. §1341.[1] Paradise also appealed the Department's December 24, 1988, issuance of a §401 certification to NHC, and that appeal was docketed at 89-017-W.[2] Presently before us for disposition is Paradise's March 30, 1990, motion for judgment on the pleadings, or, in the alternative, motion for summary judgment. Although the caption of the motion indicates it relates to Paradise's appeal at Docket No. 89-017-W, the substance of the motion indicates it relates to Paradise's appeal of the solid waste permit at Docket No. 88-126-W, which was consolidated at Docket No. 88-119-W, and we will treat it as such.[3]

---

[1] On April 28, 1985, Paradise's three appeals were consolidated at Docket No. 88-119-W with New Hanover Township's appeal of the two permits and the certification at Docket No. 88-119-W and the Boyertown Area School District's appeal of the same Department approvals at Docket No. 88-129-W. Boyertown withdrew its appeal on December 5, 1988.

[2] New Hanover Township also appealed the certification at Docket No. 89-020-W and the two appeals were initially consolidated at Docket No. 89-017-W; they were consolidated with Docket No. 88-119-W on March 20, 1989.

[3] Our doing so is by no means an indication that we condone or excuse Paradise's imprecise motion practice.

In the motion, Paradise asserts that it deserves judgment in its favor as a matter of law because the environmental harm which will result from issuing the permit clearly outweighs the benefits, in violation of Article I, §27 of the Pennsylvania Constitution.

In its response to the Paradise motion, NHC argues that the motion for judgment on the pleadings should be denied for two reasons: (1) the motion is inappropriate, since no response is required to a notice of appeal, the only pleading filed in the case at bar; and (2) the main issue raised in the motion was not raised in the underlying pleading. In regard to the alternative motion for summary judgment, NHC asserts that summary judgment is not appropriate because: (1) Paradise has failed to produce any significantly probative evidence of its contention that the setback regulations pending on March 1, 1988, had to be applied to the NHC permit application; and, (2) Paradise doesn't show there will be any harm from the project, let alone harm which clearly outweighs the benefits of the project.

Even assuming that this is an appropriate case for disposition through judgment on the pleadings, Paradise has failed to establish that it is entitled to judgment as a matter of law, either based on the notice of appeal alone, or in combination with any depositions, answers to interrogatories, admissions, and supporting affidavits. Pa. R.C.P. Nos. 1034, 1035 and Upper Allegheny Joint Sanitary Authority v. Department of Environmental Resources, 567 A.2d 342, Pa. Cmwlth. (1989). Article I, §27 imposes a duty upon the Commonwealth and its various agencies to consider the environmental effects of its actions. Payne v. Kassab, 11 Pa. Cmwlth, 14, 312 A.2d 87 (1973). In determining whether Article I, §27 has been violated, the courts employ a three-part test: (1) has there been compliance with all the statutes and regulations relevant to protection of the Commonwealth's natural resources;

(2) does the record demonstrate a reasonable effort to reduce environmental incursion to a minimum; and (3) does the environmental harm which will result so clearly outweigh the benefits to be derived that to proceed further would be an abuse of discretion. Id. Paradise asserts that the Department did not comply with the third part of the test.

As the moving party, Paradise bears the burden of demonstrating that it is entitled to the relief requested. Under either of its arguments, however, Paradise fails to establish that the environmental harm so clearly outweighs the benefits to be derived as to constitute an abuse of discretion. First, Paradise maintains that the permit produces no benefit, since it does not allow the disposal of municipal waste. Even if Paradise is correct, it must do more than establish that a Departmental action confers no benefit: under the third element of the Payne standard, Paradise must demonstrate that the harm clearly outweighs the benefits. Paradise does not, however, point to any harm which will result from the Department granting a permit containing the restriction that NHC not dispose of municipal waste. The fact that new set-back requirements, effective after the date of issuance of the permit, will not apply is not, in itself, evidence of environmental harm for purposes of Article I, §27.

Paradise next asserts that if the permit did allow for waste disposal, the Department violated Article I, §27 because the Department "did not assess the environmental harm caused by the proposed project to the adjacent homes, streams, and drinking water sources as evidenced by the inability to meet the set-back requirements..." At best, this argument is speculative in the context of Paradise's appeal at Docket No. 88-126-W. And even if the argument weren't speculative, Paradise has failed to show that the harm clearly outweighs the benefits; the fact that new set-back

requirements, effective after the date of issuance of the permit, will not apply is not, in itself, evidence of environmental harm for purposes of Article I, §27. Paradise's blanket assertion that the Department did not assess the environmental harm which the proposed project would cause does not, in itself, constitute a demonstration that the environmental harm of the proposed landfill clearly outweighs the benefits.

ORDER

AND NOW, this 10th day of December, 1990, it is ordered that Paradise Watch Dogs' motion for judgment on the pleadings or, in the alternative, summary judgment is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: December 10, 1990

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Mary Young, Esq.
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Janet S. Kole, Esq.
Mark A. Stevens, Esq.
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M. DIANE SMITH
SECRETARY TO THE BOAF

BRIAN F. WALLACE	:	
	:	
V.	:	**EHB Docket No. 89-434-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: December 10, 1990**

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

By Robert D. Myers, Member

Syllabus:

The Board concludes that a $7,000 civil penalty assessed by DER against a landowner, who (1) disposed or authorized the disposal of solid waste upon the surface of the ground without a permit from DER, (2) burned or authorized the burning of solid waste in the open without a permit from DER, and (3) attempted to evade DER's order to remove the solid waste by burying it on the site, is mandated by the Solid Waste Management Act and is reasonable.

Procedural History:

Brian F. Wallace (Appellant) filed a Notice of Appeal on September 25, 1989 seeking review of a Civil Penalty Assessment made by the Department of Environmental Resources (DER) on August 31, 1989. The civil penalty, in the amount of $7,000, was assessed under section 605 of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.605, for unpermitted activities involving solid waste on a tract of land owned by Appellant in Lawrence Township, Clearfield County. In his Notice of

Appeal, Appellant claimed that he had cleaned up the site and that the civil penalty is too harsh.

After pre-hearing memoranda had been filed, the appeal was scheduled for a hearing in Harrisburg before Administrative Law Judge Robert D. Myers, a Member of the Board, beginning January 16, 1990. On December 21, 1989 Appellant's representative, Robert L. Thompson, Jr., requested that the hearing be postponed because Appellant, who had become a resident of Florida, would not be coming back to Pennsylvania until after the end of March 1990. The request was granted.

Efforts to reschedule the hearing during April 1990 through Thompson and Ferdin Wallace, Jr., Appellant's father who also was listed as his legal counsel on the Notice of Appeal, produced another request for delay to give Appellant the opportunity to explore settlement possibilities with DER. In response, the Board issued an Order on May 4, 1990 staying proceedings until June 29, 1990 but scheduling a hearing for July 17, 1990 in the event a settlement could not be reached. The parties were admonished that the hearing would not be cancelled for any other reason.

On July 9, 1990 DER filed a Motion for Partial Summary Judgment which was denied the following day because of the proximity of the hearing. When the hearing convened on July 17, 1990 DER was represented by legal counsel but neither Appellant nor any representative of Appellant was in attendance. Judge Myers stated for the record that the notice of hearing had gone out on May 4, 1990 and that no request for postponement had been received. Since DER had the burden of proof on the appeal, Judge Myers directed DER's legal counsel to proceed with the presentation of evidence. DER presented one witness and offered into evidence a transcript of proceedings in Commonwealth Court on November 9, 1989 in the case of Commonwealth of Pennsylvania,

Department of Environmental Resources v. Brian F. Wallace, No. 227 Misc. Dkt. 1989, to establish the violations underlying the civil penalty assessment. At the conclusion of DER's case in chief, it was observed that Appellant or his representative still were not in attendance. Accordingly, the hearing was adjourned and the record closed.

The record consists of the pleadings, a hearing transcript of 28 pages and the transcript of proceedings in Commonwealth Court.

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

FINDINGS OF FACT

1. Appellant is an individual who is currently a resident of Florida but who, at the time of issuance of the civil penalty assessment, was a resident of Clearfield County, Pennsylvania (Notice of Appeal, Trans. 30[1]).

2. DER is an administrative department of the Commonwealth of Pennsylvania and is authorized to administer the provisions of the SWMA, section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 and the rules and regulations adopted pursuant to said statutes.

3. Appellant is the owner of a tract of land (Site) in Lawrence Township, Clearfield County, having acquired it from his father, Ferdin Wallace, Jr., on or about November 21, 1988 (Trans. 29, N.T. 13).

4. Beginning in 1984 or earlier, Ferdin Wallace, Jr. had disposed, or had authorized others to dispose, of municipal solid waste on the Site in a pit approximately 40 feet long and 60 feet wide, without having obtained

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[1] "Trans." refers to the transcript of proceedings in Commonwealth Court. "N.T." refers to the transcript of the hearing before the Board on July 17, 1990.

permits from DER. Much of this waste had come from an apartment complex and a racetrack owned by Ferdin Wallace, Jr. (Trans. 30-31, 36, 53, N.T. 11-12).

5. DER had inspected the Site and had issued Notices of Violation (NOVs) in 1986 and 1988, informing Ferdin Wallace, Jr. that the burying or open burning of municipal solid waste without permits from DER constituted violations of the SWMA. The NOVs instructed Ferdin Wallace, Jr. to cease the unpermitted activities and remove the municipal solid waste to an approved disposal facility (Trans. 31, 37-38).

6. After becoming the owner of the Site, Appellant allowed the unpermitted disposal activities to continue. DER inspected the Site on February 2, 1989 and April 24, 1989 and issued an NOV to Appellant with respect to each inspection, containing the same information and instructions as those issued previously to Ferdin Wallace, Jr. (Trans. 31).

7. On May 25, 1989 DER issued to Appellant an Order directing him to cease the unpermitted disposal activities on the Site, to remove all municipal solid waste from the Site within 30 days and to furnish to DER written proof of the removal in the form of receipts from an approved disposal facility (Trans. 31; N.T. 13-14).

8. DER inspected the Site on August 2, 7 and 10, 1989. On the first date it was ascertained that the municipal solid waste had not been removed. On the two subsequent dates it was observed that waste was being burned in the open. NOVs were issued covering these violations (Trans. 32, 37-38; N.T. 16).

9. On August 14, 1989 DER inspected the Site and found that the pit had been filled to ground level with soil. On August 15, 1989 DER dug into the soil and found that municipal solid waste had been buried and not removed (Trans. 42-44).

10. On August 31, 1989 DER issued the civil penalty assessment forming the basis of the appeal.

11. In determining the amount of the civil penalty, DER assigned $3,000 for the inspections resulting in NOVs and $4,000 for the inspections to determine compliance with the May 25, 1989 Order, amounting to a total of $7,000 (N.T. 16-21, 23-24).

DISCUSSION

DER has the burden of proof in this appeal: 25 Pa. Code §21.101(a) and (b). To carry its burden DER must show by a preponderance of the evidence that (1) Appellant violated the SWMA and (2) the amount of the civil penalty assessed is authorized by law and is reasonable: Chrin Brothers v. DER, 1989 EHB 875.

The evidence clearly establishes that Appellant violated section 610(1) and (3) of the SWMA, 35 P.S. §6018.610(1) and (3), by depositing or permitting the depositing of solid waste onto the surface of the ground without a permit from DER and by burning solid waste without a permit from DER. It also is clear that Appellant violated section 603, 35 P.S. §6018.603, and section 610(9), 35 P.S. §6018.610(9), of the SWMA by his failure to comply with the May 25, 1989 Order from DER.

Under section 605 of the SWMA, 35 P.S. §6018.605, DER is authorized to issue a civil penalty up to a maximum amount of $25,000 for each violation of the SWMA with each day being considered a separate violation. A civil penalty must be assessed if the violation results in a cessation order. On the basis of this statutory provision, DER had to assess a civil penalty against Appellant and could have levied one in a staggering amount. The $7,000 actually assessed, in our judgment, is eminently reasonable. If DER had considered the willfulness of Appellant's disregard of the NOVs and the

guile with which he tried to conceal his failure to comply with the May 25, 1989 Order, the penalty would have been much greater.

CONCLUSIONS OF LAW

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

2. DER has the burden of showing by a preponderance of the evidence that (a) Appellant violated the SWMA and (b) the amount of the civil penalty assessed is authorized by law and is reasonable.

3. Appellant violated sections 603, 610(1), (3) and (9) of the SWMA, 35 P.S. §6018.603, §6018.610(1), (3) and (9).

4. Since the violations of the SWMA resulted in a cessation order, DER was required by section 605 of the SWMA, 35 P.S. §6018.605, to assess a civil penalty against Appellant.

5. The $7,000 civil penalty assessed against Appellant is reasonable.

ORDER

AND NOW, this 10th day of December, 1990, it is ordered that the appeal of Brian F. Wallace is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

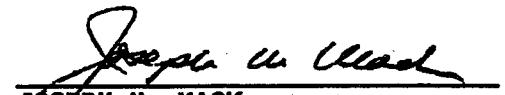
ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 10, 1990

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Robert Abdullah, Esq.
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For Appellant:
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M. DIANE SMITH
SECRETARY TO THE BOA

CHARLES BICHLER, BICHLER LANDFILL	:	
	:	
v.	:	**EHB Docket No. 89-608-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: December 10, 1990**

OPINION AND ORDER SUR CROSS-MOTIONS FOR SUMMARY JUDGMENT

By Maxine Woelfling, Chairman

Synopsis

The Department of Environmental Resources' (Department) motion for summary judgment is granted and appellant's is denied. The Department did not abuse its discretion in refusing to process a preliminary application under 25 Pa. Code §271.11(b) where the application was submitted nearly one year after the filing deadline in 25 Pa. Code §271.111(a). Appellant, who possessed a permit issued prior to April 9, 1988, could not operate his landfill after October 11, 1988, because of his failure to submit the preliminary application by that date. Pending litigation before the Board did not abnegate appellant's responsibility to comply with 25 Pa. Code §271.111.

OPINION

This matter was initiated on December 21, 1989, with the filing of a notice of appeal by Charles Bichler, Bichler Landfill c/o Richard Solomon, Solomon Industries (Bichler), contesting the Department of Environmental Resources' (Department) December 4, 1989, refusal to process Bichler's

preliminary application for a modification to Solid Waste Permit No. 100976 or to allow operations to commence at Bichler's demolition waste landfill in the Borough of Taylor, Lackawanna County. The Department's action, which was taken pursuant to the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. (the Solid Waste Management Act), and the rules and regulations adopted thereunder at 25 Pa. Code §§271.111 and 271.112, was challenged by Bichler as being contrary to law, arbitrary and capricious, and an abuse of discretion.

On March 29, 1990, the Department filed a motion for summary judgment, contending that since Bichler admittedly failed to comply with 25 Pa. Code §271.111, the Department had a duty to deny Bichler's application and the Department was, therefore, entitled to judgment as a matter of law.

Bichler filed an answer to the Department's motion on April 19, 1990, containing admissions and general denials and contending that because he was involved in litigation with the Department during the period that the new regulatory requirements became operative, he did not have to comply with them. Bichler also maintained that the Department's motion was untimely because the Department had not responded to certain of his discovery requests.[1]

On August 6, 1990, the Department filed its brief in support of its motion,[2] asserting, inter alia, that Bichler's involvement in litigation was no defense to his failure to comply with 25 Pa. Code §271.111. Noting that Bichler had failed to provide opposing affidavits in responding to the

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[1] On July 18, 1990, Bichler filed a petition for supersedeas, which the Board denied on July 20, 1990, as a result of Bichler's failure to conform to the requirements of 25 Pa. Code §21.77(a). Bichler refiled the petition on August 2, 1990, but the Board, by order dated August 28, 1990, postponed scheduling a hearing on the petition pending the disposition of the Department's motion for summary judgment.

[2] The brief should have been filed with the Department's motion.

Department's motion, the Department urged the Board to conclude that there were no genuine issues of material fact.

On September 10, 1990, Bichler filed his brief in opposition to the Department's motion and attached the affidavit of Richard Solomon, who has power of attorney for Charles Bichler. In the brief, Bichler reiterates that nothing in the regulations indicates that his permit expired or is automatically invalidated if a permit application was not submitted by October 11, 1988. Although Bichler admits having been notified by the Department of the requirements imposed by the 1988 municipal waste regulations, he disputes the necessity of filing a permit application.

Thereafter, on September 10, 1990, Bichler filed a cross-motion for summary judgment, incorporating the arguments he made in his response to the Department's motion for summary judgment. In addition, Bichler contended that the Commonwealth Court's unreported decision in FR&S, Inc. v. Comm., Department of Environmental Resources, Nos. 3044 C.D. 1986, 1667 C.D. 1987 (Pa. Cmwlth. Aug. 6, 1990) mandated the Board's granting the relief requested by Bichler.

Finally, on October 9, 1990, the Department filed its brief in opposition to Bichler's cross-motion for summary judgment, re-iterating the arguments made in its motion for summary judgment and asserting that even if FR&S were not distinguishable from the present appeal, the decision could not be cited as precedent.

The Board has the authority to grant summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Summerhill Borough v. Com., Department of Environmental

Resources, 34 Pa. Commonwealth Ct. 574, 383 A.2d 1320, 1322 (1978), County of Schuylkill et al. v. DER and City of Lebanon Authority, EHB Docket No. 90-124-W (Opinion issued November 6, 1990). Furthermore, since a motion for summary judgment may be filed at any time after the pleadings are closed so long as it does not delay hearing, outstanding discovery requests do not bar the filing of the motion. Upper Allegheny Joint Sanitary Authority v. DER, 1989 EHB 303, 306.

Here, in spite of the number of motions and briefs, the issue is relatively simple. The municipal waste management regulations adopted by the Environmental Quality Board on April 9, 1988 imposed more stringent permitting, design, and operational standards for municipal waste landfills.[3] Operators of landfills could choose either to not upgrade to the new standards and close their facilities or re-permit their facilities under the newer standards; these possibilities were set forth in 25 Pa. Code §271.111(a), which provides that:

> (a) A person or municipality possessing a permit for a municipal waste landfill or construction/demolition waste landfill under the act or a permit for an impoundment used for municipal waste disposal issued under The Clean Streams Law (35 P.S. §§691.1-691.1001), which was issued by the Department prior to April 9, 1988 shall file with the Department, by October 11, 1988 one of the following:
>
> (1) A preliminary application for permit modification under subsection (b).
>
> (2) A closure plan under §271.113 (relating to closure plan).

Recognizing practical and administrative difficulties in accomplishing the upgrading of landfills to the new requirements, the regulations allowed for a

---

[3] Including demolition waste.

transition scheme in 25 Pa. Code §271.112, which states, in pertinent part, that:

> (a) By October 11, 1988, no person or municipality that possesses a municipal waste landfill or demolition waste landfill permit under the act or a permit for an impoundment for municipal waste disposal under The Clean Streams Law (35 P.S. §§691.1-691.1001) which was issued prior to April 9, 1988, may dispose or process waste under the permit, unless a preliminary application for permit modification or a closure plan is filed under §271.111 (relating to permit application filing deadline).

This preliminary application primarily explains the differences between the design and operational parameters of the existing facility and the new design and operational requirements, 25 Pa. Code §271.111(c). And, finally, 25 Pa. Code §271.111(d) provides that one who filed a preliminary application with the Department must, within six months of receiving notice from the Department, file "a complete application to correct differences between the existing permit" and the requirement of the new regulations. Thus, anyone who possessed a demolition waste permit issued prior to April 9, 1988 who wished to continue operating after October 11, 1988, was mandated by the regulations to file a preliminary application on or before October 11, 1988.

The material facts here are undisputed. Bichler was issued Solid Waste Permit No. 100976 on June 20, 1974 (Solomon Affidavit, p. 1), and the permit was still in effect on April 9, 1988, the effective date of the municipal waste management regulations (Bichler's Answer to Motion for Summary Judgment, par. 3). Bichler did not file either a preliminary application or a closure plan by October 11, 1988 (McDonnell Affidavit, p. 3; Bichler Answer to Motion for Summary Judgment, par. 6). Bichler's counsel advised the Department in a June 29, 1989, letter that Bichler intended to re-open the landfill and would submit a preliminary application in the near future

(McDonnell Affidavit to Department's Motion for Summary Judgment, Ex. A). On September 19, 1989, Bichler submitted a preliminary application for a permit modification and a statement of his intent to resume operations (McDonnell Affidavit to Department's Motion for Summary Judgment, p. 3).

Applying the regulations to the undisputed facts leads to the conclusion that Bichler could not operate his landfill after October 11, 1988, because he failed to submit a preliminary application to the Department by that date. Furthermore, because Bichler did not submit the preliminary application to the Department until nearly a year after the deadline in the regulations, the Department did not abuse its discretion in refusing to process Bichler's preliminary application. Thus, the Department is entitled to judgment as a matter of law.

Before entering our order, we will address several issues raised by Bichler.

Bichler asserts that 25 Pa. Code §§271.111 and 271.112 were not applicable to him and has offered several reasons why he was not required to meet the October 11, 1988 filing deadline--namely that he was involved in litigation before the Board and that since the landfill was not in operation,[4] he would suffer economic hardship in preparing the application. The regulations do not provide any exceptions to the requirement to prepare the preliminary application or the closure plan.[5] They also do not distinguish between facilities which are permitted and operational and which

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[4] This argument mystifies us, for the Bichler Landfill apparently has not been operational since 1983, Ex. C to McDonnell Affidavit, Department Motion for Summary Judgment.

[5] Most likely because the requirement is not onerous and permittees were given more than sufficient time to prepare the submission.

are permitted and non-operational. Furthermore, the fact that litigation was pending before the Board[6] does not excuse Bichler from satisfying the relevant regulatory requirements.[7]

Bichler also maintains that this appeal is governed by the Commonwealth Court's decision in FR&S, supra. Because this decision was unreported, it cannot be cited as precedent. Section 414, Internal Operating Procedures for the Commonwealth Court. But, even if the FR&S decision could be cited for its precedential value, it is clearly distinguishable from Bichler's appeal. In the FR&S decision, the Commonwealth Court determined that, as a result of the Department's erroneous denial of FR&S' solid waste permit application and the Board's delay in rendering a decision on FR&S' appeal of the Department's permit denial, FR&S' permit was unlawfully withheld during the period that the new solid waste disposal regulations came into effect. Consequently, the Court directed the Department to reinstate the permit and allow FR&S to file a preliminary application for permit modification. Here, Bichler did possess a permit to operate the landfill on April 9, 1988. Bichler was not operating at this time because he chose not to file a petition for supersedeas or to comply with the permit conditions contested in his appeal at Docket No. 86-552-W.[8]

Since we are entering summary judgment in the Department's favor, we

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[6] See Bichler v. DER, 1989 EHB 1.

[7] If Bichler now wishes to operate the landfill, he must file a complete application in accordance with the requirements of the municipal waste regulations and receive a permit from the Department.

[8] Bichler's permit was also the subject of an appeal by Mr. and Mrs. John Korgeski at EHB Docket No. 86-562-W which is awaiting adjudication. Likewise, the existence of that appeal does not affect the conclusion that Bichler possessed a permit issued prior to April 9, 1988.

must deny Bichler's motion for summary judgment.[9]

[9] Consequently, it is unnecessary for the Board to dispose of the Department's pending motion to deny Bichler's petition for supersedeas without hearing.

ORDER

AND NOW, this 10th day of December, 1990, it is ordered that:

1) The Department 's motion for summary judgment is granted;

2) Bichler's cross-motion for summary judgment is denied; and

3) The appeal of Charles Bichler, Bichler Landfill is dismissed.

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JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 10, 1990

cc: **Bureau of Litigation**
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SECRETARY TO THE BOARD

PLUMSTEAD TOWNSHIP CIVIC ASSOCIATION	:	
	:	
v.	:	**EHB Docket No. 90-220-W**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: December 10, 1990**

OPINION AND ORDER SUR MOTION FOR SUMMARY JUDGMENT

By Maxine Woelfling, Chairman

Synopsis

Summary judgment in favor of the Department of Environmental Resources (DER) is appropriate where no dispute exists as to any material facts and the appellant takes issue only with DER's position that the areas unsuitable procedures under §315 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.315 (the Clean Streams Law), apply just to lands with identified coal reserves.

OPINION

This appeal was initiated by the Plumstead Township Civic Association (PTCA) on June 1, 1990, with the filing of a notice of appeal contesting DER's decision to deny PTCA's April 5, 1990, petition to designate an area of approximately 616 acres of land in Plumstead Township, Bucks County, as unsuitable for the surface mining of argillite. PTCA's petition was filed pursuant to §315(i) of the Clean Streams Law. DER rejected the petition, reasoning that, absent evidence of coal beneath the land at issue, it lacked

the authority to declare the area unsuitable for non-coal surface mining under the Clean Streams Law, the Noncoal Surface Mining Conservation and Reclamation Act, the Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. §3301 et seq. (the Noncoal Act), and the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. (the Surface Mining Act).

In its appeal, PTCA maintains that DER abused its discretion and committed errors of law by: (1) dismissing the petition on the basis that it failed to comply with the Noncoal Act when the petition was filed under the Clean Streams Law; (2) concluding that an identified coal resource within the petition area was required for DER to entertain an unsuitable for mining petition; (3) failing to conclude that the petition was brought pursuant to only the Clean Streams Law; and (4) concluding that the unsuitability for mining provisions of the Clean Streams Law require that there be an identified coal resource within the petition area for DER to entertain an unsuitable for mining petition.

On July 30, 1990, DER filed a motion for summary judgment, asserting that its authority to declare an area unsuitable for mining under §315 of the Clean Streams Law is limited to areas where identified coal resources exist. The definition of "surface mining operations" given in §315(h), DER argues, also applies to §315(i) - the subsection under which PTCA brought its petition. According to DER, the intent of the legislature to restrict the application of §315(i) to coal mining is apparent from: (1) the language of §4 of the Noncoal Act, (2) the wording of §§315(h) through 315(o) of the Clean Streams Law, and (3) the fact that the acts were passed as part of a comprehensive legislative program designed to obtain Pennsylvania primacy in coal mining regulation.

In its August 17, 1990, response to DER's motion, PTCA concedes that, since the passage of the Noncoal Act, the term "surface mining operations" in §315(h) of the Clean Streams Law refers only to coal mining. It contends, however, that the limitation in §315(h) does not apply to petitions to declare land unsuitable brought under §315(i). In support of its position, PTCA argues that: (1) the change in language between §§315(h) and 315(i) is evidence of a change in the legislative intent; (2) the references to coal in §§315(i) through 315(o) are not significant enough to draw any conclusions as to the intent of the legislature; and (3) if, indeed, the legislative history is relevant, it shows that the legislature intended §315(i) to apply to all types of mining.

The Board may grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Pa. R.C.P. No. 1035(b), Summerhill Borough v. DER, 34 Pa. Cmwlth 574, 383 A.2d 1320 (1978). No genuine issue as to a material fact is present here: PTCA's notice of appeal does not aver that coal is present in the area sought to be declared unsuitable. Instead, the issue on which the determination turns is whether, as a matter of law, DER can declare an area unsuitable for mining under §315(i) of the Clean Streams Law if no coal is present on the land.[1]

The statutory provision at issue here, §315(i), was added to the Clean Streams Law by Act 157 of 1980. It provides that an area may be designated

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[1] The Board in a recent adjudication, Palisades Residents in Defense of the Environment v. DER, EHB Docket No. 86-366-W (Adjudication issued September 5, 1990), held that an area could be designated as unsuitable for mining under §4(b) of the Noncoal Act only where there is coal above the non-coal mineral which will be removed incidental to the removal of the non-coal mineral. Section 315 of the Clean Streams Law was not an issue in that appeal.

"as unsuitable for certain types of mining operations" under four conditions.[2] The term "mining operations" is not defined in §315(i), but the subsection preceding subsection (i), which pertains to designating areas unsuitable for surface mining operations defines "surface mining operations" by reference to §3 of the Surface Mining Act,[3] which encompasses the surface mining of anthracite and bituminous coal. Thus, the question becomes whether the definition of "surface mining operations" in §315(h) of the Clean Streams Law applies to §315(i).

While the letter of the law is not to be disregarded under the pretext of pursuing its spirit, inquiry into the legislative intent and history is appropriate where the words of a statute are ambiguous. 1 Pa. C.S. §1921(b) and (c).

The General Assembly clearly expressed its intention to amend the statutes for regulating surface coal mining in Pennsylvania, including the Clean Streams Law, in order to secure primacy over surface coal mining under federal SMCRA. See, e.g. §6 of Act 157 of 1980, the primacy amendments to the

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[2] These conditions are where mining operations will:
(1) be incompatible with existing State or local land use plans or programs;
(2) affect fragile or historic lands in which such operations would result in significant damage to important historic, cultural, scientific and esthetic value and natural systems;
(3) affect renewable resource lands in which such operations could result in a substantial loss or reduction of long-range productivity of water supply or of food or fiber products, and such lands to include aquifers and aquifer recharge areas; or
(4) affect natural hazard lands in which such operations could substantially endanger life and property, such lands to include areas subject to frequent flooding and areas of unstable geology.

[3] The Surface Mining Act originally applied to all types of minerals; the Noncoal Act repealed the Surface Mining Act to the extent it applied to the surface mining of minerals other than anthracite and bituminous coal. See §27 of Act 219 of 1984.

Clean Streams Law. Section 503 of federal SMCRA, 30 USC §1253, required states to demonstrate that their programs for the regulation of surface coal mining had, inter alia, the ability to effectuate the purposes of federal SMCRA through the

* * * * *

> (5) establishment of a process for the designation of areas as unsuitable for surface coal mining in accordance with section 522 provided that the designation of federal lands unsuitable for mining shall be performed exclusively by the Secretary after consultation with the State; ....

* * * * *

Given the General Assembly's expressed intention of securing primacy, the amendments to §315 of the Clean Streams Law were enacted to secure primacy over surface coal mining.

This is also readily apparent from an examination of the language of §§315(h) through (o) of the Clean Streams Law and the language of §§522(a)(2) through (a)(6) and (c) through (e) of federal SMCRA. But for the numbering system used for the subsections and minor variations in wording, the state and federal provisions are identical.[4] Since §522 of the federal statute applies only to surface coal mining operations and the General Assembly was satisfying primacy obligations in amending the Clean Streams Law, then it follows that the General Assembly did not intend the areas unsuitable

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[4] The comparable state and federal provisions are:

Clean Streams Law	Federal SMCRA
§315(h)	§522(a)(2)
§315(i)	§522(a)(3)
§315(j)	§522(a)(4)
§315(k)	§522(a)(5)
§315(l)	§522(a)(6)
§315(m)	§522(d)
§315(n)	§522(d)
§315(o)	§522(e)

provisions in §315 of the Clean Streams Law to apply to all types of surface mining operations in Pennsylvania.

Even if the legislative intent in enacting §§315(h) through (o) were not indicative that the General Assembly intended §315(i) to apply only to coal-bearing lands, construing subsection (i) in pari materia with other subsections of §315 relating to designation of areas unsuitable for mining leads to this result. Parts of statutes are in pari materia where they relate to the same things or same classes of things, §1932 of the Statutory Construction Act, 1 Pa. C.S. §1932. Subsections (h) through (o) of the Clean Streams Law are in pari materia because they all relate to the same thing--designation of areas unsuitable for mining operations--and must be construed to apply to areas with coal.

Another principle of statutory construction supports this result. Under subsection (n) of §315, before the Department can designate any area as unsuitable for mining operations it must prepare a detailed statement on: "(1) the potential coal resources in the area, (2) the demand for coal resources, and (3) the impact of such designation on the environment, the economy, and the supply of coal. (emphasis added)." If §315(i) were to apply to designation of areas without coal resources as unsuitable for mining, the requirements of §315(n) would be mere surplusage, which is contrary to the tenet that the General Assembly intends an entire statute "to be effective and certain." §1922(2) of the Statutory Construction Act, 1 Pa. C.S. §1922(2), and Masland v. Bachman, 473 Pa. 280, 374 A.2d 517 (1977).

Considering the purpose of the 1980 amendments to §315 of the Clean Streams Law, the parallel provisions of the federal SMCRA, and the language of §§315(h) through (o), we must conclude that areas cannot be designated as unsuitable for mining operations under §315(i) of the Clean Streams Law unless

coal resources are present. Since the parties do not dispute that the lands subject to the petition contain no coal resources, the Department is entitled to judgment as a matter of law.

O R D E R

AND NOW, this 10th day of December, 1990, it is ordered that the Department of Environmental Resources' motion for summary judgment is granted and the appeal of the Plumstead Township Civic Association is dismissed.

ENVIRONMENTAL HEARING BOARD

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DATED: December 10, 1990

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M. DIANE SMITH
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ANDERSON W. DONAN, et al.	:	
	:	
v.	:	**EHB Docket No. 88-375-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and PENGROVE COAL CO., DIV. OF ADOBE	:	
MINING CO., Permittee	:	**Issued:** December 11, 1990

OPINION AND ORDER SUR
SUNDRY DISCOVERY MOTIONS

By Terrance J. Fitzpatrick, Member

Synopsis

The Appellant may not be excused from complying with discovery requests (interrogatories, requests for production of documents, and notices of depositions) based upon the contention that the information sought is contained in the record of another proceeding before the Board. However, sanctions will not normally be imposed unless there has been a refusal to obey a Board Order directing compliance with discovery procedures.

OPINION

This is an appeal by Anderson W. Donan, M.D. and Shirley M. Donan (together, Donan) from the Department of Environmental Resources' granting of a Surface Mining Permit to Magnum Minerals, Inc. The permit in question has since been transferred to Pengrove Coal Co. (Pengrove), a division of Adobe Mining Co., and Pengrove has assumed responsibility for defending DER's action.

This Opinion and Order addresses several motions which have been filed regarding discovery: Donan's motion for protective order, and Pengrove's motions to compel, for sanctions against Donan, and for contempt and for sanctions against non-party Mayes Forks Water Co., Inc. (Mayes Forks). We shall address these motions in the order in which they were filed.

1. Pengrove's Motion to Compel Answers to First Set of Interrogatories and First Request for Production of Documents, and for Sanctions.

The first motion filed was Pengrove's motion to compel filed on April 30, 1990. In this motion, Pengrove contends that Donan violated Rule 4006, Pennsylvania Rules of Civil Procedure (Pa. RCP), by failing to provide, within thirty days, answers to Pengrove's first set of interrogatories and first request for production of documents. In response, Donan contends that Pengrove should be required to first examine the record compiled in the proceeding of Anderson W. Donan, M.D., et al. v. DER, EHB Docket No. 85-308-F, before conducting discovery in this proceeding. Pengrove then filed a reply to Donan's response, arguing that the substance of Donan's response constitutes an untimely objection, that Pengrove was not a party to the proceeding at 85-308-F, and that the record compiled at 85-308-F is not a substitute for answers to Pengrove's discovery requests.

We will grant Pengrove's motion to compel. Pengrove is correct that Donan's argument is tantamount to an untimely objection. Moreover, we see no basis for requiring Pengrove to wade through the record in another proceeding as a precondition to conducting discovery. If Donan's position in this proceeding is identical to his position in the proceeding at 85-308-F,[1] then

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[1] The proceeding at 85-308-F involved Donan's petition to declare an area unsuitable for mining; the area involved in that petition was the same area footnote continued

he can use the record in the other proceeding to formulate responses to Pengrove's discovery requests. He may not, however, simply point to the record in the other proceeding as a basis for escaping reasonable discovery requests.

In summary, we will grant Pengrove's motion to compel.[2]

2. The Motions for Protective Orders filed by Donan and by Mayes Forks.

On August 13, 1990, both Donan and Mayes Forks filed a motion for protective order with the Board. Donan's motion seeks an order from the Board protecting him from being deposed and from a related request for production of documents. Donan argues that the documents requested duplicate information requested in Pengrove's interrogatories; therefore, both the depositions and the request for production of documents are unreasonably burdensome under Pa. RCP 4012. In addition, Donan repeats the argument that Pengrove should be required to review the record at EHB Docket No. 85-308-F prior to conducting discovery. The motion for protective order filed by Mayes Forks raises the same arguments as Donan's motion.[3]

We will deny the motions for protective orders filed by Donan and by Mayes Forks. Since Donan never responded to Pengrove's interrogatories and first request for production of documents, he cannot argue that the depositions would duplicate the information sought in the interrogatories and

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continued footnote
which Pengrove has now been given a permit to mine. On August 29, 1990, the Board issued an Adjudication at 85-308-F, upholding DER's decision to reject the petition as frivolous.

[2] In its motion to compel, Pengrove also sought sanctions in the form of expenses and attorney's fees. We will deny this request for sanctions for reasons set out in part 3 of this Opinion.

[3] Mayes Forks was formed by Donan to distribute water taken from a spring on his property. Shirley M. Donan is the President of Mayes Forks. (Mayes Forks' motion for protective order, para. 3)

the request for production. In addition, as stated above, we do not believe that Pengrove should be required to review the record at EHB Docket No. 85-308F before it may conduct discovery in this proceeding.

3. Pengrove's Motion for Sanctions against Appellant and Motion for Contempt and for Sanctions against Mayes Forks.

Pengrove filed these motions on September 24, 1990. Pengrove contends that Donan and Mayes Forks failed to honor a subpoena issued by the Board requiring their presence at depositions scheduled for September 13, 1990. Pengrove contends that the motions for protective orders filed by Mayes Forks and by Donan did not excuse them from appearing at the depositions because, under Pa. RCP 4013, the filing of a motion for protective order only stays a deposition if the court (or the board) so orders. Pengrove requests that the Board impose sanctions upon Donan in the form of an order which precludes Appellants from supporting any claims which relate to the questions asked at the abbreviated deposition, strikes pleadings regarding the questions asked at the deposition, stays the proceedings until Appellants obey further orders scheduling depositions, and requires Appellants to pay the fees Pengrove incurred as a result of Appellants' non-compliance. Pengrove also requests that the Board impose roughly the same sanctions against Mayes Forks as against Appellants.

Donan and Mayes Forks filed responses to the motions for sanctions. They admit that they did not appear for the scheduled depositions, but they allege that they attempted to postpone the depositions, and also that they did not have sufficient time to respond to Pengrove's offer to cancel the depositions in exchange for their agreement to answer Pengrove's interrogatories and request for production of documents. In a reply to these responses, Pengrove acknowledges that it made the settlement offer but

contends that the offer was only valid if it was accepted before the time scheduled for the depositions.

We will deny Pengrove's motions for sanctions. With regard to Pengrove's request for sanctions in the form of reimbursement of fees, this sanction may only be imposed if the offending party has failed to obey a Board order compelling discovery. See Pa. RCP 4019(a)(1). With regard to the other sanctions sought by Pengrove, while Pa. RCP 4019(a) would allow these sanctions, it is the general practice of courts not to impose these sanctions unless a party refuses to obey a court order directing compliance. Griffin v. Tedesco, 355 Pa. Superior Ct. 475, 513 A.2d 1020, 1024 (1986), Concerned Residents of the Yough, Inc. v. DER, EHB Docket No. 86-513-MJ (Opinion and Order issued September 18, 1990). Therefore, we will not impose sanctions upon Donan or Mayes Forks for failing to appear at the depositions, although we will compel them to comply with the discovery rules regarding depositions in the future. Any future failure by Donan or Mayes Forks to comply with discovery may warrant sanctions.

In summary, we will grant Pengrove's motion to compel, deny Donan's and Mayes Forks' motions for protective orders, and deny Pengrove's motion for sanctions against Donan and motion for contempt and sanctions against Mayes Forks.

ORDER

AND NOW, this 11th day of December, 1990, it is ordered that:

1) Pengrove's Motion to Compel Answers to its First Set of Interrogatories and First Request for Production of Documents and for Sanctions is granted, except that the motion is denied to the extent it seeks sanctions. Appellant shall provide such Answers by January 4, 1991.

2) The Motions for Protective Orders filed by Donan and by Mayes Forks are denied.

3) Pengrove's Motions for Sanctions against Donan and for Contempt and for Sanctions against Mayes Forks are both denied, except that Donan and Mayes Forks are hereby ordered to comply with the Rules of Civil Procedure regarding depositions.

ENVIRONMENTAL HEARING BOARD

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TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: December 11, 1990

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
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Joseph N. Mack

JOSEPH N. MACK
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M. DIANE SMITH
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JAMES E. CRAFT t/d/b/a SUSQUEHANNA LAND COMPANY	:	
V.	:	**EHB Docket No. 90-060-MR**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: December 11, 1990**

ADJUDICATION

By Robert D. Myers, Member

Syllabus:

DER, having determined that a planning module submitted as part of an Official Plan revision was incomplete with respect to the soils and slopes on the proposed development site, informed the Township and the developer (Appellant) that the planning module had to be resubmitted with the complete information before the 120-day review period would begin to run. Later, a DER soil scientist examined the site and obtained data on soils and slopes. Appellant's argument that (1) the site examination obviated the need for resubmitting the planning module and that (2) the Official Plan revision was deemed approved under 25 Pa. Code §71.54(e) when DER failed to act within 120 days after the site examination is rejected. The Board holds that the language of DER's letter made it clear to all parties that no further action would be required of DER until the planning module was resubmitted. If the Township or Appellant had any doubt about the continuing nature of that requirement after the site examination, they had a duty either to seek

clarification from DER or to inform DER that they would not resubmit the planning module and wanted the Official Plan revision to be judged on the basis of the material already in DER's hands.

Procedural History

James E. Craft, t/d/b/a Susquehanna Land Company (Appellant), filed this appeal on February 6, 1990, seeking review of a January 22, 1990 letter of the Department of Environmental Resources (DER) disapproving an Official Plan revision submitted by the Township of East Manchester, York County, pertaining to Appellant's proposed residential development. After the filing of pre-hearing memoranda, the appeal was scheduled for a hearing in Harrisburg before Administrative Law Judge Robert D. Myers, a Member of the Board, beginning on June 5, 1990. At the request of the parties, the hearing was cancelled and the appeal was set down for adjudication on the basis of a Stipulation of Facts ultimately filed on June 21, 1990 and briefs filed on the same date.

The record consists of the pleadings, a Stipulation of Facts and 6 exhibits. After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. Appellant is an individual residing at P.O. Box 8, 2780 York Haven Road, York Haven (York County), Pa. 17370 (Exhibit 2)

2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq.; the Pennsylvania Sewage Facilities Act (SFA), Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 et seq. and the rules and regulations promulgated pursuant to said statutes.

3. On October 11, 1988 the Board of Supervisors of the Township of East Manchester (Township), York County, approved, and on December 27, 1988 submitted to DER, the planning module for Phase III of the Griffith Lane Development, a subdivision being developed by Appellant at the intersection of Canal Road and Conewago Road in the Township (Stip. ¶ and Exhibit 2).

4. Phase III of Appellant's development involved 7 lots for single family residences intended to be served by individual on-site sewage disposal and water supply systems (Exhibit 2).

5. On February 9, 1989 DER issued a review letter to the Township, noting deficiencies and inconsistencies in the planning module and requiring the Township to take action consistent with the contents of the letter. The letter stated specifically that the 120-day review period will not begin to run until the submission is complete and that the planning module will be disapproved if the additional information is not submitted within 60 days (Stip. ¶2 and Exhibit 1).

6. On April 4, 1989 the Township responded to DER's February 9, 1989 letter by submitting comments provided by Appellant's consultant, two copies of the planning module and the required "certification statement" (Stip. ¶3 and Exhibit 2).

7. On June 22, 1989 DER issued another review letter to the Township concerning deficiencies in the planning module submitted on April 4, 1989 (said deficiencies having been noted initially in DER's February 9, 1989 letter), and requiring the Township to take certain action. This letter, like the February 9, 1989 letter, stated specifically that the 120-day review period will not begin to run until the submission is complete and that the planning module will be disapproved if the additional information is not submitted within 60 days (Stip. ¶4 and Exhibit 3).

8. On August 11, 1989 a site examination of Phase III of Appellant's development was conducted by DER Soil Scientist E. Lester Rothermel, along with other representatives of DER and a representative for Appellant's consultant. Rothermel examined the soils and measured the slopes at four probe pits located on proposed lots 16, 19, 23 and 21, respectively. Based on his findings, Rothermel recommended that the planning module be disapproved (Stip. ¶5 and Exhibit 4).

9. On January 22, 1990 DER issued a letter to the Township disapproving the planning module for Phase III of Appellant's development on the basis of Rothermel's findings (Stip. ¶6 and Exhibit 5).

10. Between June 22, 1989 and January 22, 1990 the Township did not resubmit the planning module for Phase III of Appellant's development (as instructed in DER's June 22, 1989 letter), and neither the Township nor the Appellant responded in writing in any way to DER's June 22, 1989 letter (Stip.¶7).

11. Between August 11, 1989 and January 22, 1990 DER did not communicate either to the Township or to Appellant the results of DER's site examination of August 11, 1989 and did not request any additional extension of time (Stip. ¶8).

DISCUSSION

Appellant has the burden of proof in this appeal: 25 Pa. Code §21.101(c)(1). To carry the burden Appellant must prove by a preponderance of the evidence that DER acted unlawfully or abused its discretion in disapproving the Official Plan revision for Phase III of Appellant's development: 25 Pa. Code §21.101(a). Appellant asserts that he has carried the burden of proof by showing that DER's disapproval came more than 120 days after the planning module was submitted, resulting in a "deemed approval" of

the Official Plan revision under 25 Pa. Code §71.54(e). DER argues that the 120-day review period never began to run because Appellant's submission was not "complete" as required by 25 Pa. Code §71.54(b) and (e).

The regulations cited by the parties went into effect on June 10, 1989 as part of a major revision to Chapter 71. Appellant's planning module was governed initially by the pre-revision version of Chapter 71. The parties agree that on June 10, 1989 it became subject to the revised version. Accordingly, we will dispose of this appeal on the basis of the revised regulations.

25 Pa. Code §71.54 provides, in relevant part, as follows:

> (a) No proposed plan revision for new land development will be approved by [DER] unless it contains the information and supporting documentation required by the act, the Clean Streams Law and regulations promulgated thereunder.
>
> (b) No proposed plan revision for new land development will be considered for approval unless accompanied by the information required in §71.53(d) (relating to municipal administration of new land development planning requirements for revisions).
>
> * * *
>
> (d) Within 120 days after receipt of a complete proposed plan revision and documentation, [DER] will approve or disapprove the proposed plan revision.
>
> (e) Upon [DER's] failure to act upon a proposed plan revision within 120 days of its submission, the proposed plan revision shall be deemed to have been approved, unless [DER] informs the municipality prior to the end of the 120-day period that an extension of time is necessary to complete review. The additional time will not exceed 60 days.
>
> (f) In approving or disapproving an official plan or revision, [DER] will consider the requirements of §71.32(d).

> (g) When an official plan revision for new land development is disapproved by [DER], written notice will be given to each municipality included in the plan revision, with a statement of reasons for the disapproval.

In order for the 120-day clock to start, a planning module must be complete; that is, it must contain all of the information required by §71.53(d). Where on-site sewage disposal systems are proposed, a planning module must include a statement from the local sewage enforcement officer commenting on the suitability of the site for such systems (§71.53(d)(5)). These comments are to be based upon "on-site verification of soil tests, general site conditions and other generally available soils information." This information was among the "incompletes" listed by DER in its first review letter (February 9, 1989) and was addressed by Appellant's consultant in the Township's response (April 4, 1989)[1]

In the second review letter (June 22, 1989), DER again found the planning module to be incomplete and raised questions about the suitability of the soils and the slopes for on-site sewage disposal systems. The letter advised the Township that the site must be re-tested and a complete planning module resubmitted. The letter admonished the Township that the 120-day review period would not begin to run until the submission was complete, and that the planning module would be disapproved if the additional information was not submitted within 60 days.

Appellant does not take issue with either review letter and, apparently, concedes that the planning module was incomplete. Appellant maintains, however, that the planning module became complete on August 11,

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[1] Even though pre-revision Chapter 71 did not spell out the specific information now required by §71.53(d)(5), it authorized DER to request further information to insure compliance with Chapters 71 and 73 (see §71.14(b)(3) of pre-revision Chapter 71). DER's request was made pursuant to this Authority.

1989 when DER's soil scientist performed his site examination, studying the soils and measuring the slopes at four probe pits. With a complete planning module in DER's hands on August 11, 1989, according to Appellant, the 120-day clock started on that date and stopped on December 9, 1989. Since DER did not act (either to disapprove or to extend the period) before the clock stopped, the Official Plan revision received deemed approval. DER argues to the contrary, emphasizing that the June 22, 1989 review letter required the Township to resubmit the planning module - something that was never done - and that the August 11, 1989 site examination did not provide the complete information described in the June 22, 1989 review letter.

We have no knowledge of the circumstances giving rise to the site examination. We assume that, if the parties had agreed beforehand that the site examination would serve as the method for completing the planning module, they would have stipulated to it or Appellant would have raised it in his arguments. In the absence of either of these, we find it reasonable to conclude that there was no such agreement. We also have incomplete information concerning the results of the site examination. While Appellant claims that the information gathered in that examination filled all the remaining gaps in the planning module, DER asserts that the soils information was obtained only from 4 of the 7 lots and that slope data was not obtained at all. DER's assertion appears to be contradicted by paragraph 5 of the Stipulation of Facts (see Finding of Fact No. 8), Rothermel's memorandum (Exhibit 4) and DER's disapproval letter (Exhibit 5). Nevertheless, in the absence of a stipulation or preponderating evidence, we cannot resolve this part of the controversy.

Despite this unsettled issue, we are of the opinion that deemed approval must be denied in this case. While the 120-day time limit

undoubtedly was established to "eliminate deliberate or negligent inaction"[2] on the part of DER, it was not intended to become a device whereby an applicant, by his silence, can secure approval by default. Here, DER acted in a timely manner on each submission. The February 9, 1989 review letter was issued 44 days after the planning module was first filed. The June 22, 1989 review letter was issued 79 days after the planning module was resubmitted. This second review letter, in addition to itemizing the incompleteness, specifically informed the Township that the planning module must be resubmitted in duplicate - "a complete module package" with a "copy of this letter" attached - and that the 120-day review period would not begin until the resubmission occurred.

In view of this language, we find that DER, the Township and Appellant all should have understood that further action would not be required of DER until a planning module was resubmitted containing the soil and slope information requested. If the Township or Appellant had any doubts about the continuing nature of that requirement after the site examination, they had a duty either to seek clarification from DER or to inform DER that they were not going to resubmit the planning module and wanted the Official Plan revision to be judged on the basis of the material already in DER's hands. See Crowley v. DER, 1989 EHB 44 at 52, citing decisions under the MPC in DePaul Realty Company v. Borough of Quakertown, 15 Pa. Cmwlth. 16, 324 A.2d 832 (1974) and Wiggs v. Northampton County Hanover Township Board of Supervisors, 65 Pa.

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[2] The phrase is borrowed from Morris v. Northampton County, Hanover Township Bd. of Supervisors, 39 Pa. Cmwlth. 466, 471, 395 A.2d 697, 699 (1978), dealing with a similar provision in section 508 of the Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §10508.

Cmwlth. 112, 441 A.2d 1361 (1982). The Township's and Appellant's silence in the face of this duty cannot give rise to a deemed approval.

Since Appellant raises no other objection to DER's action, the disapproval of the Official Plan revision must be sustained.

CONCLUSIONS OF LAW

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

2. Appellant has the burden of proving, by a preponderance of the evidence, that DER acted unlawfully or abused its discretion in disapproving the Official Plan revision for Phase III of Appellant's development.

3. In order for the 120-day review period to begin, the planning module had to be complete.

4. Appellant's planning module, as submitted and resubmitted, was not complete with respect to information on soils and slopes.

5. Since the review letter on the resubmission stated that a complete planning module package had to be resubmitted with the soil and slope information before the 120-day period would begin to run, all parties should have understood that no further action would be required of DER until such resubmission had taken place.

6. If Appellant or the Township had any doubts about the continuing nature of the resubmission requirement after the site examination, they had a duty either to request clarification from DER or to inform DER that they were not going to resubmit the planning module and wanted the Official Plan revision to be judged on the basis of the material already in DER's hands.

7. Appellant's silence in the face of this duty cannot give rise to a deemed approval.

ORDER

AND NOW, this 11th day of December, 1990, it is ordered that the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 11, 1990

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

CAROL RANNELS	:	
	:	
v.	:	**EHB Docket No. 90-110-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 11, 1990

OPINION AND ORDER SUR
MOTION FOR SUMMARY JUDGMENT

By Terrance J. Fitzpatrick, Member

Synopsis

A motion for summary judgment filed by the Department of Environmental Resources is denied. In order to prove that Appellant is a "bottled water system" under the regulations, DER must show that the Appellant regularly serves at least 25 year-round residents. 25 Pa.Code §109.1.

OPINION

This is an appeal by Carol Rannels, Brecknock Township, Berks County, from a compliance order issued by the Department of Environmental Resources (DER) on February 27, 1990. In this order, DER directed Rannels, who is the owner of Crystal Springs Water Co. (Crystal Springs), to conduct microbiological sampling on a weekly basis for each of Crystal Springs's wells. This order was based upon a finding that Crystal Springs constituted a "bottled water system" under the Pennsylvania Safe Drinking Water Act (SDWA), Act of May 1, 1984, P.L. 206, No. 43, 35 P.S. §721.1 et. seq., and under the regulations implementing the SDWA at 25 Pa.Code Chapter 109.

This Opinion and Order addresses DER's motion for summary judgment filed on July 9, 1990. In this motion, DER contends that there are no genuine issues of fact and that it is entitled to judgment as a matter of law. Specifically, DER asserts that Crystal Springs provides water from three wells for sale to the public through four vending machines. DER contends that Crystal Springs' water system constitutes a "bottled water system" as defined in 25 Pa.Code §109.1, and that Rannels is a "bottled water supplier" as that term is used in the SDWA and 25 Pa.Code Chapter 109. DER further asserts that bottled water suppliers are required to perform microbiological testing of each source of supply every week. 25 Pa.Code §109.301(6)(i). For bottled water systems where a container is not supplied by the supplier, samples must be taken at the point of delivery to the consumer and must include one representative sample for each source of water. 25 Pa.Code §109.303(a)(4). Since these were the requirements which DER imposed in its order, DER argues that it is entitled to judgment as a matter of law.

Rannels, who is not represented by counsel, filed a response objecting to DER's motion. Rannels' chief assertion is that Crystal Springs is not a "bottled water system" or a "community water system" as those terms are defined in 25 Pa.Code §109.1; she asserts that Crystal Springs is a "non-public, non-community" water system. As such, Rannels contends that the microbiological testing requirements do not apply to Crystal Springs. Rannels also asserts that DER recognized the status of Crystal Springs when it issued a "water supply permit" rather than a "public water supply permit" to Crystal Springs in 1986.

The Board has the authority to grant summary judgment only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to

any material fact and that the moving party is entitled to judgment as a matter of law." Summerhill Borough v. DER, 34 Pa. Commonwealth Ct. 574, 383 A.2d 1320, 1322 (1978), Ingram Coal Co. v. DER, EHB Docket No. 88-291-F (April 17, 1990).

Applying these principles here, we will deny DER's motion for summary judgment. DER's compliance order is based upon the conclusion that Crystal Springs is a "bottled water system" as that term is used in the SDWA and the regulations in Chapter 109. Although the term is not defined in the SDWA, the regulations define "bottled water system" as:

> A community water system which provides artificial or natural mineral, spring or other water for bottling as drinking water whether or not containers are provided by the water supplier. The term includes, but is not limited to, the sources of water, and treatment, storage, bottling, manufacturing or distribution facilities. The term excludes a public water system which provides only a source of water supply for a bottled water system and excludes an entity providing only transportation, distribution or sale of bottled water in sealed bottles or other sealed containers.

25 Pa.Code §109.1. Since a bottled water system is, by definition, a "community water system," we must also examine the definition of the latter term in the SDWA and the regulations:

> Community water system. A public water system which serves at least 15 service connections used by year-round residents or regularly serves at least 25 year-round residents.

35 P.S. §721.3, 25 Pa.Code §109.1.[1]

The focus of the dispute here is on the requirement that a community water system - and, thus, a bottled water system - serve at least 15 service

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[1] In the regulations, the definition of "bottled water system" is listed under the definition of "community water system." 25 Pa.Code §109.1

connections used by year-round residents or regularly serve at least 25 year-round residents. Clearly, Crystal Springs does not have service connections since it is not a fixed utility. Moreover, Rannels contends that Crystal Springs does not fit under the second part of the definition in that it does not regularly serve at least 25 year-round residents. This is the heart of Rannels' argument that Crystal Springs is not a community water system, and, hence, that it is not a bottled water system.

DER addresses this argument in its memorandum of law accompanying its motion. DER does not specifically assert that Crystal Springs regularly serves 25 year-round residents. Instead, DER relies upon the intent behind the Chapter 109 regulations. DER cites the following language contained in the Pennsylvania Bulletin at the time these regulations were adopted:

> Bottled water systems which were formerly regulated by the State under a separate law ... are defined as public water systems under the act and are treated as community water systems in these regulations. The definition of bottled water system includes only systems which provide water for bottling as drinking water. (§109.1) The Department interprets this definition as including any water bottled or marketed in a manner which provides a reasonable alternative to a tap water supply of drinking water.

14 Pennsylvania Bulletin 4479, 4480 (December 8, 1984). Relying upon this statement, as well as the language of 25 Pa.Code §109.4(b),[2] DER argues that the Environmental Quality Board (EQB) intended that all bottled water systems were to be regulated under Chapter 109 as community water systems. By "all bottled water systems," it seems clear that DER means even those which do not serve at least 25 year-round residents. DER goes on to argue that the public

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[2] 25 Pa.Code §109.4(b) states that bottled water and bulk water hauling systems, unless specifically exempted, shall comply with regulations applicable to community water systems, except requirements relating to water quantity and water pressure.

interest supports this conclusion because the customers of bottled water systems require the same degree of protection as customers of community water systems.

DER's argument asks us not so much to interpret the regulations as to ignore them. The definitions are not ambiguous. Under the regulations, a "bottled water system" is a form of "community water system," and the latter term is defined as a system which, among other things, "regularly serves at least 25 year-round residents." 25 Pa.Code §109.1 DER's argument regarding the EQB's intent (actually, the language in the Pennsylvania Bulletin refers to "the Department's" interpretation, not the EQB's) cannot justify this result. If the Department wishes to define a bottled water system "as including any water bottled or marketed in a manner which provides a reasonable alternative to a tap water supply of drinking water," then we suggest that DER attempt to have the EQB adopt this definition.[3] Clearly, we may not superimpose this "interpretation" on the existing definition in order to, in effect, strike from the definition the requirement that a bottled water system regularly serve at least 25 year-round residents.[4]

With regard to DER's argument that the public interest requires that Crystal Springs be subjected to the same requirements as a community water system, this argument, even if true, does not justify the result DER would have us reach. We may not ignore the regulations under the guise of pursuing

---

[3] We express no opinion as to whether such a definition would be consistent with the SDWA.

[4] With regard to DER's argument based upon 25 Pa.Code §109.4(b), although this argument does not justify ignoring the clear language in the definitions section, we admit that §109.4(b) is curiously worded. Since a bottled water system is a form of community water system, it seems strange to say that a bottled water system must comply with the same requirements as a community water system.

the public interest.

In summary, DER's argument that Crystal Springs is a "bottled water system," regardless of whether Crystal Springs regularly serves 25 year-round residents, must be rejected. Therefore, DER's motion for summary judgment will be denied. Since DER has not filed its pre-hearing memorandum, we do not know at this point whether DER will seek to prove at a hearing that Crystal Springs does regularly serve 25 year-round residents. If not, it may be appropriate for the parties to submit this case to the entire Board for an Adjudication based upon a stipulated record.

ORDER

AND NOW, this 11th day of December, 1990, it is ordered that:

1) DER's motion for summary judgment is denied.

2) DER shall file its pre-hearing memorandum on or before January 9, 1991.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: December 11, 1990

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

E. P. BENDER COAL COMPANY	:	
	:	
v.	:	EHB Docket No. 90-487-MJ
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	: :	Issued: December 11, 1990

OPINION AND ORDER SUR PETITION FOR SUPERSEDEAS

By Joseph N. Mack, Member

Synopsis

A petition for supersedeas is denied where the petition lacks supporting affidavits, as required by 25 Pa.Code §21.77(a), and fails to state grounds sufficient for the granting of a supersedeas, as per 25 Pa.Code §21.77(c)(4).

OPINION

This matter originated with the filing of a notice of appeal by E. P. Bender Coal Company (Bender) on November 16, 1990 from a Compliance Order issued by the Department of Environmental Resources (DER) on November 5, 1990. The Compliance Order charged Bender with degrading the water supply of the Elder Township Water Authority in violation of §4.2 of the Surface Mining Conservation and Reclamation Act (SMCRA), 52 P.S. §1396.4b; §5(c) of the Safe Drinking Water Act, 35 P.S. §721.5(c); and §§5, 316, 402, 501, 601, and 610 of

the Clean Streams Law, 35 P.S. §§691.5, 691.316, 691.402, 691.501, 691.601, and 691.610. The Order required Bender to provide to the Elder Township Water Authority, within 72 hours, a water supply of equal quality and quantity as the pre-mining supply.

Concurrent with the filing of the appeal, Bender also petitioned for supersedeas. In both its notice of appeal and petition, Bender argues that the Compliance Order is so vague as to preclude Bender from knowing the specific nature of the alleged degradation, and that its mining operation has in no way degraded the water supply.

In response to the Petition for Supersedeas, DER filed, on November 28, 1990, an Answer with New Matter, as well as a Brief in Support of Motion to Dismiss Supersedeas Petition. DER argues that Bender has failed to meet the requirements for supersedeas, as set forth in the Board's rules at 25 Pa.Code §§21.77 and 21.78(a). DER also asserts that Bender is prevented under the doctrine of administrative finality from attacking the findings of the Compliance Order since the company failed to appeal an August 8, 1990 Bond Release Denial which had made the same findings.

We first turn to the Board's rules at 25 Pa.Code §21.77, which discuss the required contents of a petition for supersedeas. Section 21.77(a) requires that a petition for supersedeas plead facts with particularity and that it be supported by affidavits setting forth facts upon which issuance of the supersedeas may depend, or an explanation of why no such affidavits accompany the petition. Bender's petition fails to meet this requirement, in that no supporting affidavits accompany the petition, nor is an explanation provided for the lack thereof. The petition does contain a verification signed by what appears to read "Martha A. Bender", and which simply states

that the signer has read the petition and that the statements contained therein are true and correct to the best of her knowledge. This clearly does not meet the criteria of §21.77(a)(1), which requires "[a]ffidavits...setting forth facts upon which issuance of the supersedeas may depend." (Emphasis added.) Bender has failed to provide us with any affidavits supporting the claims made in its petition. On this basis alone, the petition may be denied. 25 Pa.Code §21.77(c)(3); Brophy and Metz v. DER, EHB Docket No. 90-315-MJ (Opinion and Order issued October 9, 1990).

Moreover, Bender's petition fails to state grounds which would entitle it to the granting of a supersedeas. 25 Pa.Code §21.77(c)(4). Section 21.78(b) of our rules, 25 Pa.Code §21.78(b), states that a supersedeas may not be granted in cases where pollution or injury to the public health, safety, or welfare is threatened during the period in which the supersedeas is in effect. With respect to this issue, Bender simply makes the blanket assertion that there will be no injury to the public since the quality of the public water supply has not been degraded since 1981. It offers nothing in support of this general statement. In contrast, DER has provided us with affidavits to the effect that the Elder Township water supply has been degraded as a result of Bender's mining activities, that water samples taken by DER and Bender show an excess sulfate level, and that elevated sulfate levels in drinking water could cause health problems in infants and sensitive individuals. Bender has provided us with nothing to dispute DER's assertions of threatened harm to the public if the supersedeas is granted.

In light of the above-stated inadequacies in its petition, Bender's request for a supersedeas must be denied. As noted previously, DER also moved to dismiss the petition on the theory of collateral estoppel. DER

states that by letter dated August 8, 1990, DER advised Bender that it was denying the Company's Stage III bond release because of "Degradation of a Public Water Supply." DER asserts that since Bender did not challenge that finding, it may not now attack the Compliance Order citing Bender for degradation of the water supply. Because we are denying Bender's petition for supersedeas due to its failing to comply with 25 Pa.Code §21.77, it is not necessary at this point to address the question of estoppel. It should simply be noted that while DER asserts that Bender failed to appeal the August 8, 1990 bond release denial, and therefore should be estopped from challenging the finding thereof, DER provided no certification showing that an appeal was not taken from the August 8, 1990 denial. Therefore, we could not have entertained this argument had we reached it.

O R D E R

AND NOW, this 11th day of December 1990, for the reasons set forth herein, the Petition for Supersedeas filed on behalf of E. P. Bender Coal Company is denied.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 11, 1990

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M. DIANE SMITH
SECRETARY TO THE BOAF

WILLIAM FIORE d/b/a MUNICIPAL AND INDUSTRIAL DISPOSAL COMPANY	:	**EHB Docket No. 84-010-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 17, 1990

OPINION AND ORDER SUR MOTION TO DISMISS AS MOOT

By Maxine Woelfling, Chairman

Synopsis

A motion to dismiss as moot is denied where the factual allegations in the motion are not of record in the appeal and are not otherwise verified by affidavit.

OPINION

This matter was initiated with the filing of a January 10, 1984, notice of appeal by William Fiore (Fiore) challenging the National Pollutant Discharge Elimination System (NPDES) permit issued to Fiore by the Department of Environmental Resources (Department) on December 8, 1983. Fiore objected to the permit on the grounds that it was issued by a Department employee who had no authority to issue it and that the Department lacked regulatory authority to set the discharge parameters, specifically those established for coumarone.

The Board canceled scheduled hearings and granted a motion for continuance in this matter pending disposition of criminal charges in an appeal before the Allegheny Court of Common Pleas. During this period, the parties submitted several status reports to the Board. The Department reported that when Fiore was sentenced on the criminal conviction, the Department intended to revoke the NPDES permit and move to dismiss the appeal as moot. By Board order dated October 21, 1986, the Department was directed to file a motion to dismiss the appeal as moot within 30 days of Fiore's actual sentencing. Several more status reports were filed during the period in which an appeal of Fiore's conviction was pending. On April 13, 1990, the Supreme Court of Pennsylvania denied Fiore's petition for allowance of appeal, Com. v. Fiore, ___ Pa. ___, 575 A.2d 109 (1990).

By Board order dated July 10, 1990, the Department was directed, consistent with the Board's October 21, 1986, order, to file a motion to dismiss the appeal for mootness for the reasons stated in its previous status reports.

On July 31, 1990, the Department filed a motion to dismiss the appeal on the grounds of mootness, arguing that Fiore's conviction in the Supreme Court established that Fiore had significantly altered the discharge at Monitoring Points 711 and 810, those points with effluent limits for coumarone. The resulting "changed" discharges were not described in the permit application, and, therefore, were not authorized by the permit. Accordingly, the Department contends that the effluent limitations prescribed for the discharges which had been authorized by the NPDES permit are no longer applicable and Fiore's appeal is, therefore, moot. Secondly, the Department maintains that the permit, by its terms, expired on April 20, 1984, and has not been renewed since that date. As a result, the permit cannot be amended

or altered, thereby precluding the Board from granting the relief Fiore requested.[1]

On September 4, 1990, Fiore filed his objections to the motion to dismiss. The objections are generally unresponsive to the material contained in the motion in that they address the merits of Fiore's appeal.

We will first address the Department's argument that Fiore's appeal is moot because the permit expired and has not been renewed. In Paragraph 6 of its motion to dismiss, the Department states: "The permit, by its terms, expired on April 20, 1984, and it has not been renewed since that date." The Department, however, failed to attach a single piece of evidence to substantiate its claim that the permit had not been renewed. While there is no requirement in our own rules of practice and procedure or the Rules of Civil Procedure, in general, that motions containing factual allegations not of record be verified by affidavit, Pa.R.C.P. No. 206 does require that petitions and answers containing factual allegations not of record be verified by affidavit. Similarly, Pa.R.C.P. No. 1035(b), which pertains to motions for summary judgment, requires that a party seeking summary judgment in its favor establish that there are no disputed material facts through pleadings, depositions, answers to interrogatories, admissions, and affidavits. The word of counsel alone does not suffice to establish factual allegations.

Accordingly, while elements of mootness are alleged and appear present, without an affidavit or even a verification that the information contained in the motion is correct and true, we are unable to determine whether or not the permit expired by its own terms or expired as a result of

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[1] Interestingly, the Department's motion was not premised on the grounds that Fiore's appeal was moot because the permit had been revoked by the Department.

Fiore's application for renewal of the permit and the Department's denial of his application.[2] Since we must view the Department's motion in the light most favorable to Fiore, the non-moving party, Del-Aware Unlimited v. DER, 1988 EHB 158, 160, and the Department has failed to provide sufficient evidence to establish the requisite facts for the relief it seeks, the motion to dismiss on this grounds must be denied.

As for the Department's other grounds for grant of the motion, it contends that because Mr. Fiore was convicted in the Allegheny County Court of Common Pleas for altering Monitoring Points 711 and 810, the discharges from those points were not as described in Fiore's permit application and were, therefore, not authorized by Fiore's NPDES permit. This, the Department contends, renders the permit moot. Because the permit application is not of record here and the Department has provided us with nothing other than counsel's allegations in the motion, we can hardly conclude that the NPDES permit no longer authorizes the discharges. While the Department has provided us with no citations to legal authority in support of its position, it does appear that the appropriate remedy would be for the Department to revoke or suspend Fiore's permit, not argue to the Board that it is moot. See 25 Pa.Code §92.51(b).

Accordingly, the motion to dismiss must be denied.

O R D E R

AND NOW, this 17th day of December, 1990, it is ordered that:

1) The Department of Environmental Resources' motion to dismiss the appeal of William Fiore is denied.

---

[2] Establishment of this fact is essential to determining whether Fiore's appeal is moot because of the language of 25 Pa.Code §92.9.

2) The Department shall file a properly supported motion to dismiss as moot on or before January 11, 1991.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: December 14, 1990

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Dennis W. Strain, Esq.
Harrisburg, PA
For Appellant:
William Fiore
Pittsburgh, PA

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M. DIANE SMITH
SECRETARY TO THE BOAF

BRUCE E. NOTHSTEIN	:	
	:	
V.	:	**EHB Docket No. 89-510-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: December 17, 1990**
and MAHONING TOWNSHIP, Permittee	:	

OPINION AND ORDER SUR
MOTION FOR PROTECTIVE ORDER
AND MOTION TO COMPEL

By Terrance J. Fitzpatrick, Member

Synopsis

A motion for protective order and stay and a motion to compel are denied when both fail to state supporting factual or legal grounds as to why the motions should be granted, and where the party against whom discovery is sought appears willing to allow inspection by the requesting party.

OPINION

This proceeding involves an appeal brought by Bruce E. Nothstein (Nothstein) from the Department of Environmental Resources' (DER) approval of an update to the official sewage facilities plan of Mahoning Township, Carbon County, Pennsylvania. Nothstein filed a skeleton appeal on October 27,

1989.[1] On or about February 7, 1990, Mahoning Township Board of Supervisors (Mahoning) received Nothstein's First Set of Requests for Production of Documents and Things, pursuant to Pa. RCP 4009. On March 13, 1990, Mahoning filed a petition seeking a stay and protective order regarding documents requested in the First Set of Requests, pursuant to Pa. RCP 4012 and 4013. On March 20, 1990, Nothstein filed a response to the petition for stay and protective order, as well as a motion to compel discovery of the documents requested in the First Set of Requests. The motion to compel is incorporated by reference into Nothstein's response to the motion for stay and protective order, and addresses the same issues. Therefore, this opinion and order addresses both motions.

The motion for protective order summarily avers that certain documents requested in the First Set of Requests should be protected from discovery because providing the documents would involve copying hundreds of pages, because the information requested was privileged, or because the request was made in bad faith. Corresponding to the motion for protective order, Nothstein's motion to compel summarily states that Mahoning should be ordered to produce the documents, without explaining the significance of any of the documents sought.

We deny both the motion for protective order and stay and the motion to compel. Neither motion supports its conclusions with a factual or legal basis for granting the requests. Each moving party has the burden of demonstrating it is entitled to the relief requested. John Pozsgai v. DER, EHB Docket No. 90-063-W (Slip Opinion, October 10, 1990). Unsupported assertions alone are not sufficient for a party to resist discovery, or

---

[1] Apparently Nothstein is dependent on information held by Mahoning for the perfection of his appeal.

conversely, for a party to compel discovery. Pozsgai, Id.; Coalition of Religious & Civic Organizations, Inc., et al. v. DER and Pfizer Pigments, Inc., EHB Docket No. 90-128-W (Slip Opinion, November 7, 1990). Furthermore, it is apparent from the assertions in the motions that both parties agree that Nothstein may come discover documents at the Mahoning Township Building so long as Nothstein will bear the cost of copying the desired documents. We suggest that the parties so proceed. If, upon examination of Mahoning's files at the township building, Nothstein is not satisfied that his requests have been complied with, he is free to submit another motion to compel.

ORDER

AND NOW, this 17th day of December, 1990, it is ordered that:

1) The motion for protective order and stay filed by Mahoning Township Board of Supervisors is denied; and

2) The motion to compel filed by Bruce E. Nothstein is denied.

3) Discovery shall be completed and Appellant shall file his Pre-Hearing Memorandum by January 31, 1991.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: December 17, 1990

cc: **Bureau of Litigation**
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Central Region
For the Appellant:
Bruce E. Nothstein
Lehighton, PA
For the Permittee:
Holly A. Heintzelman, Esq.
Lehighton, PA

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SECRETARY TO THE BOAF

BARRY D. MUSSER	:	
	:	
V.	:	EHB Docket No. 90-085-MR
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: December 17, 1990
and TOWNSHIP OF SPRING, INTERVENOR	:	

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Robert D. Myers, Member

Synopsis

Where a developer seeking DER's approval of a Planning Module for a residential development, already approved by the municipality as a revision to its Official Plan, submits additional data requested by DER, the time period for DER action begins anew and the developer is not entitled to a "deemed approval."

OPINION

Barry D. Musser (Appellant) initiated this appeal on February 23, 1990, seeking review of a January 23, 1990 letter of the Department of Environmental Resources (DER) disapproving a revision to the Official Plan of Spring Township (Township), Centre County, involving Section 1 of the Musser Hills Subdivision. This proposed development, on a tract of land owned by Appellant, consists of 12 residential lots intended to be served by individual on-site water and sewage disposal systems. On July 13, 1990 Appellant filed a Motion for Summary Judgment and supporting brief. DER filed an Answer to the

Motion, accompanied by a memorandum of law, on August 14, 1990. Appellant filed a reply brief on August 24, 1990.[1]

The Motion relies on DER's Responses to Appellant's Requests for Admission (Pa. R.C.P. 4014). DER's Answer is supported by affidavits. Viewing the evidence in favor of DER, the non-moving party, as we are required to do, Ritmanich v. Jonnel Enterprises, Inc., 219 Pa. Super. Ct. 198, 280 A.2d 570 (1971), the following facts appear:

Appellant's Planning Module for Land Development was approved by the Township on July 5, 1988 as a revision to the Township's Official Plan. On July 29, 1988 the Planning Module was submitted to DER for its approval. The comments of the Centre County Planning Commission were received by DER on August 4, 1988, at which point the Planning Module was considered complete for the purpose of DER's review. On November 14, 1988 DER sent a letter to the Township reading, in part, as follows:

> [DER] has for some time been reviewing planning modules for the Musser Hills Subdivision I. [DER] will require an extension of the normal 120 day review period due to recent information concerning possible elevated levels of nitrate in the groundwater within this general geographical area. [DER] will be taking samples of some nearby wells to better assess the extent of this concern. [DER] hopes to complete our review by no later than December 15, 1988.

On January 31, 1989 DER sent a letter to Appellant's authorized representative, William Shuey, reporting the results of DER tests on water samples collected from three wells near the proposed subdivision. Because these tests revealed nitrate levels very close to or in excess of the maximum levels allowable for drinking water, DER informed Shuey that an in-depth

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[1] The Township intervened on August 2, 1990 but has not participated in the Motion for Summary Judgment.

groundwater impact assessment would have to be done by a hydrogeologist. With the letter, DER sent a new Planning Module component for preliminary hydrogeological data.

A DER hydrogeologist met with Appellant's hydrogeologist, Melina Bucek, on March 10, 1989 and specified the type of hydrogeological data that needed to be obtained and submitted. On April 29, 1989 DER sent a letter to Bucek (copy to Shuey) explaining further DER's policy with respect to proposed developments in high nitrate areas. Having received nothing further from Appellant, DER sent a letter to Shuey (copy to Bucek) on June 8, 1989 inquiring whether any additional information would be submitted. On November 20, 1989 Bucek delivered hydrogeological data to DER. On January 23, 1990 DER sent a letter to the Township (copy to Shuey) disapproving the Planning Module as a revision to the Township's Official Plan on the basis that it would cause nitrate levels to rise above drinking water standards.

In the midst of these events, amendments were made to the Pennsylvania Sewage Facilities Act (SFA), Act of January 24, 1966, P.L. (1965) 1535, 35 P.S. §750.1 et seq., and to Chapter 71 of the regulations. The regulatory change pertinent to this appeal dealt with the time allowed DER to approve or disapprove an Official Plan revision. 25 Pa. Code §71.16, which provided for 120 days, had specified that the revision "shall be deemed to have been approved" unless DER acted within that time period either to disapprove or to inform the municipality that additional time was necessary. The new regulation, which became effective on June 10, 1989 and is now set forth in 25 Pa. Code §71.54, makes only one change relevant to this appeal. Instead of the open-ended time extension implied by the prior regulation, §71.54(e) limits the extension to 60 days.

Three weeks after the effective date of the new regulations, Act No. 26 of 1989 became law. This Act amended the SFA, inter alia, by adding the following language to section 5(e), 35 P.S. §750.5(e):

> except that [DER] shall approve or disapprove revisions [to Official Plans] constituting residential subdivision plans within ninety days of the date of a complete submission, for the period of one year from the effective date of this amendatory act, and within sixty days of the date of a complete submission thereafter. [DER] shall determine if a submission is complete within ten working days of its receipt.

This provision became effective in 90 days - September 29, 1989.

Appellant argues that DER's disapproval on January 23, 1990 was too late, regardless of which of these statutory/regulatory provisions is applied. Consequently, the Planning Module must be deemed to have been approved as a revision to the Township's Official Plan. DER contends that neither provision affects matters already pending on the effective date.

We will leave the untangling of this dilemma to another occasion and dispose of Appellant's Motion on a different ground. Appellant's submission on November 20, 1989 of the hydrogeological data requested by DER constituted a waiver of the time limits: Crowley v. DER, 1989 EHB 44 at 52, and a resetting of the clock: DePaul Realty Company v. Borough of Quakertown, 15 Pa. Cmwlth. 16, 324 A.2d 832 (1974).[2] Whether the time limit is determined to be 90 days or 120 days, DER's disapproval 64 days after the submission was timely.

Appellant argues that the ruling in DePaul Realty, supra, was modified in Township of Plymouth v. County of Montgomery, 121 Pa. Cmwlth. 303,

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[2] This decision involved a similar "deemed approval" provision in section 508 of the Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §10508.

550 A.2d 1033 (1988), where it was held that the clock is not reset under section 508 of the MPC unless the additional material makes basic changes in the project. The hydrogeological data submitted here, in Appellant's view, only supplements the original filing and makes no significant change in the proposed development. In its latest pronouncement on the subject, Abarbanel v. Solebury Township, ____ Pa. Cmwlth. _____, 572 A.2d 862 (1990), Commonwealth Court cited DePaul Realty for the principal of resetting the clock and discussed Township of Plymouth only with respect to the issue of good faith. We are not bound, of course, by decisions under the MPC and have cited them in the past only as persuasive authority on the deemed approval subject. Nevertheless, we are not persuaded that Township of Plymouth vitiates DePaul Realty, and we are not prompted to abandon our ruling in Crowley.

We have observed recently (James E. Craft t/d/b/a Susquehanna Land Company v. DER, docket number 90-060-MR, Adjudication issued December 11, 1990) that the time limits for action on Official Plan revisions were established to eliminate deliberate or negligent inaction on the part of DER. That type of agency abuse has not occurred here. DER responded to Appellant's Planning Module 102 days after the complete Module was in DER's hands. Pointing out its concerns about high nitrate levels, DER stated that additional time was necessary to test several wells in the vicinity. 78 days later DER informed Appellant of the test results and of the need for Appellant to do an in-depth hydrogeological study. Appellant did not submit the data produced by that study until 293 days later. DER, as noted above, acted on the data 64 days after its submission. The "extraordinary delay" that Appellant complains about in his brief was his own doing and not the fault of DER. As we have said before, Appellant had the freedom at any time to inform

DER that he would not submit the additional data and wanted his Planning Module to be judged on the basis of the material already in DER's hands. Not having taken this approach and, instead, having submitted the additional data, Appellant waived the time limits and brought about a resetting of the clock.

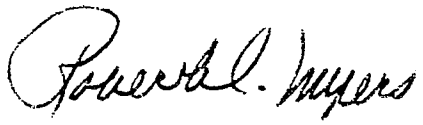
ORDER

AND NOW, this 17th day of December, 1990, it is ordered as follows:

1. The Motion for Summary Judgment, filed by Appellant on July 13, 1990, is denied.

2. The parties shall comply with the Order dated July 18, 1990.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: December 17, 1990

cc: **Bureau of Litigation**
Library: Brenda Houck
Harrisburg, PA
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Central Region
For Appellant:
Joel R. Burcat, Esq.
Ronald W. Chadwell, Esq.
Harrisburg, PA
For the Intervenor:
John R. Miller, Jr., Esq.
Bellefonte, PA

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M. DIANE SMITH
SECRETARY TO THE BOAF

ROGER WIRTH	:	**EHB Docket No. 88-527-W**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 18, 1990

OPINION AND ORDER SUR
MOTION TO DISMISS

By Maxine Woelfling, Chairman

Synopsis

A motion to dismiss for lack of standing is granted because the appellant failed to allege that he will suffer any direct and immediate injury as a result of the action which has been appealed.

OPINION

This proceeding involves a December 21, 1988, appeal by Roger Wirth (Wirth) of a November 21, 1988, letter from the Department of Environmental Resources (Department) to Wirth notifying him that snowmobiling would be prohibited on Pecks Pond consistent with the Department's policy regarding snowmobiling on other bodies of water within the State Parks system. Wirth owns and resides in Pecks Pond Store, adjacent to the southwest portion of Pecks Pond, which is within the Delaware State Forest. Wirth contends that the Department's action was invalid and contrary to law because the applicable regulations provide that snowmobiling shall be permitted in state forests and Pecks Pond is within a state forest; the Department has no authority to

rescind a designated snowmobile area; and, even if the Department had authority to do so, it had no procedures or process for rescinding a designation.

This opinion and order addresses the motion to dismiss filed by the Department on August 14, 1989.[1] In its motion, the Department contends the appeal should be dismissed for lack of standing since Wirth has not alleged that the Department's letter affected his personal rights, privileges or immunities; more specifically, the Department argues Wirth has not alleged that he owns or operates a snowmobile or that he has suffered any personal financial or economic harm as a result of the decision. As an alternative ground for dismissal, the Department argues its letter of November 21, 1988, was not an appealable action and the Board, therefore, lacks jurisdiction to hear the appeal.

Wirth filed an answer to the Department's motion on September 8, 1989, arguing that as an adjoining landowner and property owner on Pecks Pond, his rights have been affected by the Department's decision. He asserts that actual ownership or operation of a snowmobile is not a prerequisite for appeal.

In order to have standing to appeal, a person must have a substantial interest that is directly and immediately impacted by the agency action being challenged. William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269, 280-284 (1975) and Andrew Saul v. DER and Chester Solid Waste Associates, EHB Docket No. 88-436-F (Opinion issued March 21, 1990). A substantial interest is defined as one in which there is "some discernible

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[1] Wirth filed a petition for supersedeas which was denied by an April 17, 1989, order. A hearing on the merits in this matter is presently scheduled for December 11-12, 1990.

adverse effect, some interest other than the abstract interest of all citizens in having others comply with the law." William Penn, 464 Pa. at 195, 346 A.2d at 282. "Direct" means that the person claiming to be aggrieved must show causation of the harm to his interest by the matter of which he complains. Id. "Immediate" means something other than a remote consequence of the judgment, focusing on and in the nature of and proximity of the action and injury to the person challenging it. Id. at 197, 346 A.2d at 283. Skippack Com. Ambulance Ass'n v. Skippack Twp., 111 Pa.Cmwlth 515, 534 A.2d 563 (1987).

Analyzing Wirth's appeal in the context of the William Penn standing test, we believe that he has no standing to challenge the Department's decision to prohibit snowmobiling on Pecks Pond. Wirth's allegations regarding his standing are contained in the following statements. Wirth stated in Paragraphs 1 and 2 of his notice of appeal that he owned and resided in Pecks Pond Store which is adjacent to the southwestern portion of Pecks Pond. Paragraph 12 of the affidavit accompanying Wirth's petition for supersedeas asserts that:

> DER's prohibition against snowmobiling on Pecks Pond prevents me from exercising my property rights which extend into the pond and continues to cause a great loss of business to my establishment, Pecks Pond Store, the precise extent of which is impossible to determine.

Finally, Paragraph 8 under the Statement of Facts contained in Wirth's pre-hearing memorandum indicates that:

> Wirth has been aggrieved by DER's action in that he has lost the privilege of snowmobiling and has sustained a loss of business from persons who would otherwise snowmobile on Pecks Pond.

Wirth has nowhere alleged that he owns or operates a snowmobile (Paragraph 7, Wirth's Answer to Motion to Dismiss), much less snowmobiles on the portion of

Pecks Pond owned by the Commonwealth.[2] It appears then that Wirth's interest is his business which sells merchandise to snowmobilers in the vicinity.

But, Wirth has not alleged that he has suffered any direct or immediate harm as a result of the Department's action. Although he has asserted in Paragraph 12 of the affidavit accompanying his petition for supersedeas that the Department's prohibition "continues to cause a great loss of business to...Pecks Pond Store," he goes on to state that it is impossible to precisely quantify that loss. And, during the course of his testimony in the hearing on the petition for supersedeas, which was held on February 10, 1989, he stated that his business was down 60% from the preceding year, but that he couldn't ascertain whether it was from the lack of snow or the Department's prohibition (N.T. 39).[3] Thus, Mr. Wirth has not demonstrated that he will suffer direct or immediate harm as a result of the prohibition.[4] Since his allegations regarding the harm are, at most, speculative, we cannot hold that he has standing to challenge the Department's prohibition, Application of Family Style Restaurant, Inc., 503 Pa. 109, 468 A.2d 1088

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[2] Wirth owns a portion of Pecks Pond upon which he permits others to snowmobile (Exhibit A to Affidavit of Roger Wirth).

[3] Fred O. Hesse, the previous (1973-1986) owner of Pecks Pond Store, also testified during the supersedeas hearing that it was impossible to differentiate between the business generated by snowmobiling on Pecks Pond and snowmobiling on the trails (N.T. 29).

[4] Nor is he likely to, for by order dated August 3, 1989, Wirth was precluded from introducing any evidence regarding his financial or economic losses as a sanction for his failure to comply with the Board's June 30, 1989, order to produce documents relating to financial or economic loss. Accordingly, this opinion should not be construed as holding that economic loss does not constitute direct and immediate harm; it is so in this appeal because the sanctions imposed on Wirth precluded the introduction of any evidence on this issue.

(1983), and County of Lebanon and Pine Grove Township v. DER and Pine Grove Landfill, Inc., 1988 EHB 1, and must grant the Department's motion to dismiss for lack of standing.

Because this appeal is dismissed on the basis of lack of standing, it is not necessary to address the Department's alternative grounds for dismissal.

O R D E R

AND NOW, this 18th day of December, 1990, it is ordered that the Department of Environmental Resources' motion to dismiss for lack of standing is granted and the appeal of Roger Wirth is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

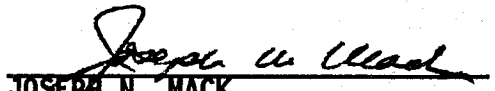
ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 18, 1990

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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Bureau of Legal Services
For Appellant:
Joseph R. Kameen, Esq.
BERGER AND KAMEEN
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M. DIANE SMITH
SECRETARY TO THE BOARD

PENNSYLVANIA-AMERICAN WATER COMPANY	:	
	:	
v.	:	**EHB Docket No. 90-122-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: December 18, 1990**

OPINION AND ORDER SUR
MOTION FOR SUMMARY JUDGMENT

By Joseph N. Mack, Member

Synopsis

The Appellant's Motion for Summary Judgment is denied where the Appellant has failed to show that the Department of Environmental Resources improperly calculated the minimum release rate in Appellant's Dam Safety & Encroachments Permit pursuant to 25 Pa.Code §105.113(c).

OPINION

This matter originated on March 22, 1990 with the filing of a notice of appeal by Pennsylvania-American Water Company ("PAWC") from the Department of Environmental Resources' ("DER") March 5, 1990 issuance of Dam Safety and Encroachments Permit D14-025A ("the permit") for operation and maintenance of the Philipsburg No. 3 (Upper) Dam ("the dam"), located in Rush Township, Centre County. Specifically, PAWC challenges a special condition of the permit requiring, inter alia, the following:

> A continuous flow of not less than 0.563 cubic feet per second, equivalent to 363,000 gallons

> per day, shall be maintained in the stream immediately below the dam unless the flow into the reservoir is less than that amount, in which case the lesser flow shall be maintained.

On November 21, 1990, PAWC moved for summary judgment, asserting that DER had incorrectly applied subsection (b) of 25 Pa.Code §105.113 in establishing the minimum release rate above, when in fact it should have relied on subsection (c). In support of its motion, PAWC relies on DER's answers to PAWC's First Set of Interrogatories. DER responded to the motion on December 6, 1990, contending that it had relied on subsection (c) of §105.113 in setting the rate schedule.

Section 105.113(a) of the regulations, 25 Pa.Code §105.113(a) provides that DER shall impose general and special conditions regarding release rates in permits for dams or reservoirs in order to maintain stream flows for the purposes set forth in that subsection. It further provides that the appropriate release rates shall be established in accordance with subsections (b) and (c).

Subsection (b) of §105.113 sets forth a specific formula ("the Q7-10 formula") for calculating release rates for dams and reservoirs constructed after August 28, 1978. This formula must be used when calculating release rates for all dams and reservoirs constructed after August 28, 1978, unless a modification is warranted pursuant to §105.113(b)(2).

Subsection (c) of §105.113 deals with dams and reservoirs constructed prior to August 28, 1978. This section simply requires that DER "determine a reasonable schedule for release rates" taking into consideration the following factors: the purposes listed in subsection (a) of §105.113 and the particular needs of instream and downstream water uses, the capacity of existing release works and feasibility of potential modification, and the yield of the

reservoir and its capacity to meet release requirements and satisfy the purposes and uses of the reservoir.

The dam involved in this appeal was constructed prior to August 28, 1978 and, therefore, falls under the scope of subsection (c) of §105.113. Therefore, in setting the release rate for the permit in question, DER was required to determine a "reasonable schedule" taking into consideration all the factors listed above.

DER states in its answers to PAWC's First Set of Interrogatories that in determining the release rate for the Philipsburg No. 3 Dam, it considered all the factors set forth in §105.113(c). (Ans. to Interrogatory No. 7) As to the actual calculation of the rate, DER used the Q7-10 formula set forth in §105.113(b). (Ans. to Interrogatory No. 8)

In its motion for summary judgment, PAWC argues that since the dam in question was constructed prior to August 28, 1978, DER erred in using the Q7-10 formula of subsection (b) in calculating the release rate in the permit. In response, DER contends that the release rate for the dam in question was calculated in accordance with subsection (c). DER argues that as to dams built before August 28, 1978, subsection (c) does not preclude DER from using the Q7-10 formula, or any other formula, if it is appropriate after consideration of the criteria listed in subsection (c). In this instance, DER determined the Q7-10 formula to be the appropriate methodology to determine a reasonable schedule for release rates for the Philipsburg No. 3 Dam.

We agree with DER and conclude that while it is true that subsection (b) requires that the Q7-10 formula be used in setting release rates for dams built after August 28, 1978, it is not true that DER is precluded from using this formula in setting release rates for dams built prior to August 28, 1978.

Subsection (c) simply requires that DER determine a "reasonable schedule for release rates," taking into consideration all the criteria listed in (c). In setting a reasonable schedule for release rates under (c), DER may utilize any formula which is appropriate under the criteria listed therein, including the Q7-10 formula.

Turning to PAWC's motion, under Rule 1035 of the Pa. Rules of Civil Procedure, summary judgment may be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Since genuine issues of fact still remain and since PAWC has not shown that it is entitled to judgment as a matter of law, its motion must be denied.

O R D E R

AND NOW, this 18th day of December 1990, the Motion for Summary Judgment filed on behalf of Pennsylvania-American Water Company is denied.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 18, 1990

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Julia Smith Zeller, Esq.
Central Region
For Appellant:
Michael D. Klein, Esq.
Harrisburg, PA

rm

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SECRETARY TO THE BOARD

RAYMARK INDUSTRIES, INC.	:	
RAYMARK CORPORATION	:	
RAYMARK FRICTION COMPANY, and	:	
RAYTECH CORPORATION	:	
	:	
v.	:	**EHB Docket No. 90-180-E**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: December 18, 1990**

OPINION AND ORDER
SUR
DER MOTION TO LIMIT ISSUES

By: Richard S. Ehmann, Member

Synopsis

The Department of Environmental Resources' ("DER") Motion To Limit Issues, which is based on its perception that the Notice of Appeal filed on behalf of three of the four Appellants fails to raise certain challenges to DER's Order, is denied. Contrary to the assertion of Raymark Industries, Inc. ("Industries"), Raymark Corporation ("Corporation"), and Raymark Friction Company ("Friction"), our Rules require that more must be stated in a Notice of Appeal than that DER has the burden of proof and that Appellants demand DER meet this burden. Nevertheless, their collective Notice of Appeal does contain enough specificity to overcome DER's Motion, however marginally this may occur.

OPINION

The procedural history of this consolidated appeal is set forth in our Opinions in Raymark Industries, Inc. et al. v. DER, Docket No. 89-294-E (Opinion issued September 20, 1990), and Raymark Industries, Inc. et al v. DER, Docket No. 89-294-E (Opinion issued September 24, 1990). Since the issuance of these opinions, we dismissed as moot the appeal of Industries, and others at Docket No. 89-294-E on September 27, 1990, but we retained the two appeals at Docket Nos. 90-180-E and 90-209-E consolidated at the instant docket number. Also, on October 1, 1990, we granted the written request of the parties for an extension of the discovery deadline and directed the filing of Appellants' Pre-Hearing Memoranda by November 9, 1990.

Apparently in anticipation of the filing of the Raymarks' Pre-Hearing Memorandum and on November 2, 1990, DER filed with this Board a Motion To Limit Issues. It seeks a ruling from us that the Raymarks'[1] Notice of Appeal did not raise any issue relating to DER's determination of the inadequacy of the 1987 Plan for closure of the Manheim Landfill ("Closure Plan") or the requirement that the Raymarks submit a revised Closure Plan, and thus, these issues are outside the scope of this appeal. In its Brief in Support thereof, DER asserts the Raymarks were well aware of the basis of their challenge to DER's 1990 Order when they filed this appeal. DER states that the 1990 Order was virtually identical to DER's 1989 Order to Industries and Corporation concerning this landfill. DER urges that just like its 1989 Order, the 1990 Order found the Closure Plan to be inadequate and

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[1]As in our prior opinions, this refers collectively to Raymark Industries, Inc., Raymark Corporation, and Raymark Friction Company, which entities filed a joint appeal.

directed its recipients to file an amended Closure Plan. It then says that in 1989, while the appeal of the 1989 Order was pending before us and DER had yet to issue its 1990 Order, the Appellants in the 1989 appeal specified each reason for their challenge of the 1989 Order in Responses to DER Interrogatories, where they stated that they challenged the 1987 Closure Plan and DER's requirement that a revised Closure Plan be submitted. DER then argues that the insufficiently specific objections contained in the Raymarks' Notice of Appeal of DER's 1990 Order do not include challenges of the DER finding that the 1987 Closure Plan was inadequate or DER's requirement that a revised plan be submitted. DER further argues that Paragraph 3 of the Raymarks' instant Notice of Appeal is so general as to be generic, and, by failing to specifically refer to the 1987 Closure Plan's rejection by DER or to the determination that a new plan must be submitted, the Raymarks' right to be heard on these issues in this appeal has expired.

In opposition to DER's Motion, the Raymarks raise three defenses thereto.[2] The Raymarks first argue that despite the generality of Paragraph 3 of their Notice of Appeal, it is sufficient, as an objection to DER's Order, to raise a challenge to the rejection of the 1987 Closure Plan for the Manheim Landfill, especially where, as here, DER bears the burden of proof. Secondly, the Raymarks argue that even if the Notice of Appeal is insufficient, we nevertheless retain jurisdiction over these issues because their Notice of Appeal was a skeleton appeal under 25 Pa. Code §21.52(c). The Raymarks argue

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[2]In addition, on November 9, 1990, the Board received the Raymarks' Petition To Amend their Notice of Appeal. Since DER's Motion was received first, we address it first. A separate Opinion and Order will be forthcoming as to the merits of the Raymarks' Petition (which is opposed by DER). The Petition is not addressed herein.

Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. Cmwlth. 73, 509 A.2d 877 (1986), affirmed on other grounds, 521 Pa. 121, 555 A.2d 812 (1989), is "inapposite" because in that matter, a party sought to amend to raise an entirely new ground for appeal whereas here, the Raymarks contend they do not seek to do so. Finally, the Raymarks argue DER's Motion is premature as the Raymarks are still engaged in discovery and they retain their right to assert grounds for appeal revealed by discovery.

Only two paragraphs in the Raymarks' Notice of Appeal specify objections. They are Paragraphs 3 and 4. Our opinion of September 24, 1990, cited above, dismissed the Raymarks' appeal as to the issues raised in Paragraph No. 4. Thus, the only remaining question is whether Paragraph 3 of their Notice of Appeal addresses these issues. Paragraph 3 states:

> 3. Appellants appeal for the reason that issuance of the 1990 Order constituted an arbitrary and capricious exercise of DER's functions and duties and was contrary to law insofar as the 1990 Order: (1) finds inaccurate facts; (2) makes conclusions of law contrary to the Pennsylvania Solid Waste Management Act ("SWMA"), Pa. Stat. Ann. tit. 35, §6018.1012-.1013 (Purdon Supp. 1989), the Pennsylvania Clean Streams Law ("CSL"), Pa. Stat. Ann. tit. 35, §§691.1 - .1001 (Purdon 1977 Ann. Supp. 1989, [sic] the Pennsylvania Hazardous Sites Cleanup Act ("HSCA"), Pa. Stat. Ann. tit. 35 §§6020.101 - .1305 (Purdon Supp. 1989), Article I, section 27 of the Pennsylvania Constitution, the Supremacy Clause, U.S. Const. art. VI, cl. 2, the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§6901-6992, and other applicable law; and (3) requires Appellants to take actions which are impossible, excessive or unwarranted in light of the facts and applicable requirements of law. Appellants reserve the right to state further grounds for appeal or further to specify these grounds for appeal should additional grounds come to Appellants' attention through discovery or otherwise.

Neither party suggests Paragraph 3 is a model of specificity. In part, DER compares this appeal with the appeal of DER's superseded 1989 Order, and argues that the Raymarks, knowing that they raised certain issues in the 1989 Order's appeal, eliminated those issues in their current appeal by not repeating them there. Our first problem with this argument is that the appellants in the 1989 Order's appeal are not identical to the parties before us in the current proceeding. As noted in our opinion of September 20, 1990 which was issued when the appeal of the 1989 Order and the instant appeal were still consolidated, Industries appealed the 1989 Order but Corporation apparently filed an untimely appeal. Friction was not an appellant in that matter at all. DER did not issue the 1989 Order to Friction. Accordingly, DER cannot advance this argument as to all of the Raymarks and the appeal of DER's 1989 Order. It can only argue to us about Industries' appeal of the 1989 Order. Thus, the force of this portion of DER's argument evaporates. Even if we were to hold that based on this argument, Industries could not raise these issues (and we were to include Corporation based on its attempt to bootstrap itself into Industries' 1989 appeal), we could not, on this basis, bar Friction from raising these issues.

Turning to Paragraph 3 itself, we must next consider if its language can be read to raise a challenge to either DER's decision that the 1987 Closure Plan was inadequate or to its command that a revision be submitted.[3] In so doing, we explicitly reject the Raymarks' contention that where, as

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[3]We make this decision based only on Paragraph 3 because our Opinion and Order of September 24, 1990 eliminated the Raymarks' objections to DER's 1990 Order as set forth in Paragraph 4 of their appeal. Paragraphs 3 and 4 were the only two paragraphs in their Notice of Appeal containing any objections to the Order.

here, DER has the burden of proof, all a party must do to properly appeal is demand DER meet its burden. This is so clearly not what our rules say as to deserve no further comment. The Raymarks' Paragraph 3 says the Order is arbitrary and capricious and contrary to law because it finds inaccurate facts and draws conclusion of law contrary to several enumerated state and federal statutes and select portions of the state and federal constitutions. Clearly, Paragraph 3 fails to specify which specific findings of fact and conclusions of law are disputed. It is also clear that Paragraph 3 is not as detailed as Paragraph 4 of the Notice of Appeal. However, this does not mean that this quoted language from Paragraph 3 does not include a challenge to DER's determination of the inadequacy of Industries' proposed 1987 Closure Plan or the need to submit a revision thereto. The fact that Paragraph 3 is facially general is not enough for us to find a violation of 25 Pa. Code §21.51(e) and grant DER's Motion. Under NGK Metals Corporation v. DER, EHB Docket No. 90-056-MR (Opinion issued April 5, 1990), some "elasticity" rather than rigidity is appropriate. Had DER filed interrogatories causing the Raymarks to specify what each of DER's errors or failures consisted of, as it did as with the 1989 Order, and had it included Raymarks' Answers thereto with its Motion, we might have been in a position to decide this matter differently. We sympathize with DER counsel's concern about the lack of specificity here; however, the solution thereto is a DER Motion seeking greater specificity from the Raymarks or interrogatories such as those referenced above rather than our granting this Motion. Accordingly, we enter the following Order.[4]

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[4]In denying this motion in this fashion, we have not passed on any alleged merit of either of the last two arguments advanced by the Raymarks.

ORDER

AND NOW, this 18th day of December, 1990, upon consideration of DER's Motion To Limit Issues and the objections thereto filed on behalf of the Raymarks, its is ordered that the Motion is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: December 18, 1990

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EMPIRE SANITARY LANDFILL, INC.	:	EHB Docket No. 90-187-W
	:	(Consolidated Docket)
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: December 18, 1990

OPINION AND ORDER SUR
REQUEST TO ADJUDICATE THE MERITS
BASED ON THE RECORD OF THE SUPERSEDEAS HEARING

By Maxine Woelfling, Chairman

Synopsis

A request by appellant to adjudicate the merits of a matter based upon the record of a hearing to enforce an alleged settlement agreement and the record of a supersedeas hearing is denied because of the differing nature of the issues, potentially differing burdens of proof, and different evidentiary showings on the merits.

OPINION

The procedural history of this matter to October 17, 1990, is described in the opinion and order of that date denying Empire Sanitary Landfill, Inc.'s (Empire) motion to enforce an alleged settlement agreement. Needless to say, the matter did not remain quiescent after the issuance of that opinion. Empire renewed its petition for supersedeas and the Board scheduled a hearing on the petition for November 1 and 2, 1990. In the meantime, the Department of Environmental Resources (Department) issued

another modification to Empire's solid waste permit on October 26, 1990; the Department requested that the supersedeas hearing be continued as a result of this action. Empire appealed the latest modification on October 31, 1990, and also filed a petition for supersedeas of the Department's October 26, 1990, action on that same date. Empire's newest appeal was assigned Docket No. 90-467-W and consolidated with its previous appeal at Docket No. 90-187-W at the earlier docket number on October 31, 1990. The Department's request for continuance was denied, and the supersedeas hearing was held, as scheduled.

In a letter filed with the Board on November 7, 1990, Empire requested the Board to adjudicate the merits of the consolidated appeals on the basis of the record made at the September 20, 1990, hearing on Empire's motion to enforce the alleged settlement agreement in Docket No. 90-187-W and the record made at the November 1 and 2, 1990, hearing on the petition for supersedeas in the consolidated appeals. Empire argued that the Board had the authority to do so in §21.90 of its rules of practice and procedure, that any additional evidence would be cumulative, and that the issues were legal issues.

The Department opposed Empire's request in a November 16, 1990, letter, citing the truncated nature of a supersedeas hearing and the burden of proof. The Department emphasized that Empire's appeal at Docket No. 90-467-W was filed only 24 hours before the supersedeas hearing and that the Department would require discovery to develop its case. The Department disputed Empire's interpretation of 25 Pa.Code §21.90 and suggested that the parties could designate relevant portions of the supersedeas hearing for incorporation into the record of a hearing on the merits.

Empire responded to the Department's letter on November 26, 1990, disputing the necessity for any further evidence.[1]

In a case directly on point, C&L Enterprises and Carol Rodgers v. DER, 1989 EHB 58, the Department's request to incorporate testimony and exhibits from a hearing on a petition for supersedeas, which request was opposed by the appellants, was denied for these reasons:

> First, the Board denied a C&L request for continuance of a supersedeas hearing, which effectively precluded it from using any expert testimony to address the merits of its petition for supersedeas. Since C&L has not retained an expert, the nature of its case on the merits may be entirely different and might require a different presentation by DER. Second, and most important, during the supersedeas hearing, C&L had the burden of showing, in part, that it had a strong likelihood of prevailing on the merits of its appeal, i.e., that DER abused its discretion in issuing the order. See 25 Pa.Code §21.78. However, in the hearing on the merits, DER will have to show that its order was a proper exercise of discretion, 25 Pa.Code §21.101(b)(3), and the nature of both parties' cases may be quite different.
>
> 1989 EHB at 59-60.

The situation here differs little from that in C&L Enterprises. The Department's request to continue the supersedeas hearing on the grounds of its issuance of the October 26, 1990, permit modification was denied. Empire, being the party requesting supersedeas relief, had the burden of proving it was entitled to a supersedeas by satisfying the criteria set forth in 25 Pa.Code §21.78. This is a different matter than proving the elements necessary to sustain an appeal on the merits. In particular, the likelihood of success on the merits for purposes of the grant of a supersedeas is not the

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[1] Empire also raised certain other objections to the course of the proceedings which are not germane to the disposition of this request.

same as proving by a preponderance of the evidence that the Department did/did not abuse its discretion in modifying Empire's solid waste permit.[2]

Finally, Empire's expansive interpretation of 25 Pa.Code §21.90 is rejected in this instance. While the Board, as Empire urges, may, under 25 Pa.Code §21.90(a), limit the number of witnesses on an issue, that situation is not presented here, for the Department was never given the opportunity to present its case on the merits. Empire may choose to make its case on the merits on the basis of the supersedeas hearing, but the Department cannot be penalized for electing not to rely upon Empire's framing of the issues in this matter.

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[2] It is not necessary to reach the issue of whether Empire or the Department has the ultimate burden of proof, since it is arguable that the Department's modification of Empire's permit is akin to the issuance of an order.

O R D E R

AND NOW, this 18th day of December, 1990, it is ordered that Empire Sanitary Landfill's request to adjudicate the merits on the basis of the record already made is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: December 18, 1990

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M. DIANE SMITH
SECRETARY TO THE BOARD

JAMES BUFFY AND HARRY K. LANDIS, JR.	:	
v.	:	**EHB Docket No. 90-284-E**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and PBS COALS, INC., Permittee	:	**Issued: December 18, 1990**

ADJUDICATION

By: Richard S. Ehmann, Member

Synopsis

A third party's appeal is not barred by the doctrine of administrative finality when he failed to appeal from issuance of a permit to a coal company but timely appealed from the issuance of the subsequent Bonding Increment authorizing mining of a portion of the mine site which is the recharge area for his water well. Since the previously issued mining permit had prohibited mining in the recharge area until the coal company could demonstrate an adequate water replacement supply, the permit's issuance had no impact on Harry K. Landis. Accordingly, he could timely appeal from the Bonding Increment to challenge the adequacy of the coal miner's proposed replacement water supply which was approved by the Department of Environmental Resources ("DER") at the time it issued the Bonding Increment.

In approving the water replacement proposal made by PBS Coals, Inc. ("PBS"), DER's staff was shown to have failed to follow DER's own written

policy on evaluating proposed replacement supplies as to issues of quantity of water and water supply replacement costs. When this showing was made at the hearing, while the burden of proof remained with Appellants, the burden of proceeding shifted jointly to PBS and DER.

Our examination of the DER decision to approve replacement of individual wells serving five private residences with a single well to jointly serve all five residences causes us to conclude DER's decision was unreasonable and capricious. PBS' single well community water system would cause Appellants to have less control over their proposed new water supply than they have over their existing wells.

The DER decision cannot be defended on the basis that PBS's proposal is the only way in which both the site can be mined and water provided. This is because another option exists and because the law envisions that there may be situations in which a permit or bonding increment must be rejected by DER because there is no sufficient showing that an adequate replacement supply exists.

Where the proposed alternative water supply would have greater operation and maintenance costs associated with its use, it cannot be deemed adequate absent suitable provisions by the applicant to compensate the water supply users for this cost. Here, the evidence showed inadequate operating and maintenance cost data available to DER or this Board to judge whether or not the proposed replacement water supply would be more costly to operate.

Background

On July 16, 1990, James Buffy ("Buffy") and Harry K. Landis Jr. ("Landis") filed their Notice of Appeal to this Board from DER's issuance of Bond Increment 1-00222-56890105-03 ("Increment 3") to PBS which authorized the

surface mining of a portion of a coal strip mine known as PBS' Job 9 located in Shade Township, Somerset County. The notice of appeal recites that DER issued Surface Mining Permit (SMP) 56890105 to PBS on January 11, 1990, but, in Special Condition 15, barred mining on the area covered by Increment 3 until a suitable replacement source of water was found. The Buffy and Landis appeal states that DER's approval of PBS' proposed replacement supply is arbitrary and capricious because the quantity of water in the proposed source is too little, the supply would be used without the required testing and permits, the water source does not meet the requirements of the Safe Drinking Water Act, and the mining will adversely affect the groundwater in the area around the homes of Buffy and Landis and much of the area's groundwater is already contaminated from sources other than PBS' operation. At the same time the Notice of Appeal was received, Appellants filed a Petition For Supersedeas seeking a Board order superseding DER's issuance of Increment 3.

On July 19, 1990, in a conference telephone call with counsel for all parties, it was agreed that the Petition For Supersedeas was withdrawn. At the same time, an agreement was reached on a schedule for expedited hearings on the merits. Both of these procedures were detailed in our Pre-Hearing Order No. 1 and our Pre-Hearing No. 2, each being dated July 20, 1990. Thereafter, the parties engaged in some limited discovery and filed their respective Pre-Hearing Memorandums.

Hearings on the merits of this appeal were held in Pittsburgh on August 13, and 14, 1990. Thereafter, the transcripts thereof were received and, in due course, the Post-Hearing Briefs of all three parties, together with Reply Briefs from all three parties, were filed. The last such filing was Appellants' Reply Brief, which we received on October 16, 1990.

After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. Appellants James Buffy ("Buffy") and Harry K. Landis ("Landis") are private individuals with mailing addresses of R.D. #1, Box 381, Central City, PA 15926 and R.D. #1, Box 378, Central City, PA 15926, respectively. (Exh. B-29)[1]

2. Appellee, Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), is the agency of the Commonwealth with the duty and authority to administer and enforce the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. Section 1396.1 et seq. ("Surface Mining Act"); The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. Section 691.1 et seq. ("Clean Streams Law"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. Section 510-17 ("Administrative Code"); and the rules and regulations promulgated thereunder. (Exh. B-29)

3. Appellee, PBS Coals, Inc. ("PBS"), is a Pennsylvania corporation with a mailing address of P.O. Box 260, Friedens, PA 15541. PBS is engaged in the business of mining coal by the surface method in Pennsylvania pursuant to License No. 1-00222. (Exh. B-29)

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[1]Exhibit B-29 is the Joint Stipulation of the parties containing the facts upon which they have agreed. The parties' joint exhibits are identified as "B-___." PBS' exhibits are designated as "P-___." The exhibits for Buffy and Landis appear as "A-___." References to the transcript of the hearing on August 13, 1990 appear as "T-___." Since the pages of the transcript of the hearing on August 14, 1990 are not numbered consecutively with those from the hearing on August 13, 1990, references to that transcript appear as "T2-___."

4. On January 11, 1990, the DER issued Surface Mining Permit (SMP) No. 56890105 for a surface mine located in Shade Township, Somerset County to PBS. (Exh. B-29)

5. SMP No. 56890105 is also known as Job 9 and authorizes PBS to mine the Lower and Middle Freeport Seams of Coal on 245 acres of land in Shade Township. (Exh. B-1, B-29)

6. Special Condition No. 15 of SMP 56890105 provides:

> During processing of surface mining permit no. 56890105, the applicant was unable to identify a suitable replacement water supply for the James Buffy Well (DW-39), and the Elmer Buffy Well (DW-40); for this reason there will be no authorizations to mine (bonding increments) issued which include bonding for coal removal or spoil storage within the area cross-hatched in red on the Module 9 (Operations Map) prepared by Earthtech on December 11, 1989 and received by the Department on December 14, 1989 until the applicant demonstrates to the satisfaction of the Department that suitable replacement supplies exist for SP-39 and SP-40.

(Exh. B-1)

7. No evidence was offered to show that when SMP 56890105 was issued, either PBS or Buffy challenged the permit in an appeal to this Board. Landis did not file such an appeal. (T-55-56)

8. When SMP 56890105 was issued to PBS, Landis did not file any appeal from the DER conclusion inherent in that permit that PBS' proposal to provide him a new 600-foot-deep well was an adequate replacement water supply. Landis did not appeal because DER inserted Special Condition 15 in PBS' permit denying it the right to mine the tract covered by Increment 3, which meant he would not lose his water. (T-55-56)

9. The area identified in Special Condition 15, on which PBS was not authorized to mine, lies immediately across a township road, identified as

T-799, from five residences, including those of Buffy and Landis (B-15(p)). This area is marked in green on Exhibit B-15(p). (T-117)

10. The five houses are those identified as belonging to Buffy, Landis, George Kohan, Elmer Buffy and D. Dneaster. (Exhibit B-15(p))

11. Buffy has lived in his home for 26 years. (T-13) He lives with his wife. (Exh. B-29; T-12) The water for their residence comes from a 96-foot-deep well located next to the house. (T-12)

12. The pump for Buffy's well is located in a 42-inch-deep pit next to his well. In the time he has lived at this location, Buffy has never had a problem with his well except for repairs to his pump's motor. (T-13, 15-16)

13. In addition to normal residential water uses, Buffy has a 12,000 gallon swimming pool which he fills periodically. (T-14)

14. Buffy is employed by the Area Agency on Aging as a meal transporter. This job necessitates that he wash his truck and his car at least twice each week unless the roads are so dirty that additional washing is needed. (T-14)

15. Buffy became concerned about the Job 9 mine in September of 1989 because he received a "paper" from DER's geologist saying that because of the mining, he would lose his water. (T-16-26)

16. Buffy's well has a higher yield than the Landis well. (T-119-120)

17. Landis lives one house away from Buffy. (Exh. B-15(p)) He lives with his wife and two teenage children and has resided there for 11 years. (T-45)

18. Landis' home is served by a well located next to the house. The well is eight years old. (T-45) Landis previously had a well in front of his house but he lost the water in it at the same time that PBS was drilling test holes right across the street on the Job 9 site. (T-45-46) Landis' new well is 137-feet-deep; he paid the cost of having it installed. (T-48) Landis has

had no trouble with the quantity of water it produces. (T-47) Landis and his family have only normal residential uses of this well's water. (T-47)

19. On July 9, 1990, DER issued Increment 3 to PBS, and Buffy and Landis appealed therefrom. (Exh. B-29 and Appellants' Notice of Appeal)

20. Appellants do not challenge DER's decision on Increment 3 based on issues related to concerns over water quality. (Exh. B-29; T-80)

21. Landis understands from seeing the Comprehensive Hydrological Impact Assessment ("CHIA"), which is Exhibit A-4[2] prepared by DER geologist Tim Kania, that PBS' mining of the area in Increment 3 will cause the loss of the water in his well. (T-48)

22. Tim Kania is lead geologist in the DER's Ebensburg mining office, which reviews applications for surface mining permits in Somerset County. (T-67)

23. Kania prepared all of the CHIA on the PBS site except the effluent discharges limitations. (T-69)

24. The CHIA states in part:

> Private water supplies will be lost if the entire area is mined. Permit special condition number 15 requires that a suitable replacement supply be found before the recharge for the wells is affected.

(Exh. A-4)

25. Kania believes Landis' well connects to water coming from the bottom of the Lower Freeport Coal Seam, while Buffy's water is from a shallower elevation identified as the "Upper Freeport" aquifer. (T-77)

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[2]Exhibit A-4 was admitted into evidence at page 126 of the transcript even though this is not indicated in the Transcript's Index to Exhibits. (T-2D)

26. The recharge area for the Buffy and Landis wells is located in the topographically higher area east of their homes, which is the area covered by Special Condition 15 in PBS' permit. (T-73-74)

27. If PBS mines the area covered by Special Condition 15, it will mine through the water tables used by both Buffy and Landis. (T-78-79)

28. Kania made no recommendations concerning issuance of Increment 3 and he reviewed none of the materials which concerned Increment 3 submitted by PBS to DER after the permit's issuance, but he did review and evaluate the PBS materials submitted prior to permit issuance. (T-69, 85)

29. Kania recommended acceptance of the community well water supply from PBS' proposal, referred to as the RW-60 system, as an adequate alternative **only** if DER could get agreement from all of the homeowners to accept it. (T-86)

30. As far as Kania knows, there was no such agreement to the RW-60 proposal by Buffy or Landis. (T-87)

31. DER did not solicit information from PBS on the RW-60 well's recharge area before issuing Increment 3. (T-88)

32. The mining to occur under PBS' permit and Increment 3 will not significantly impact the recharge capability of RW-60 because of the distance between RW-60 and the mine site, coupled with the fact that the mining operation is oblique from the direction of ground water flow in relation to where RW-60 is located. (T-110-111; T2-138)

33. According to Kania, DER's policy requires that the replaceability of a water source be demonstrated to DER's satisfaction prior to permit issuance. (T-111)

34. Kania believes that the "demonstration" of a suitable replacement supply mentioned in Special Condition 15 means PBS had to show DER that the five individual water supplies could be replaced if lost during mining, not that these new supplies had to be in existence at the time Increment 3 was issued. (T-107)

35. At some point prior to permit issuance, Kania determined a PBS proposal for a replacement well known as an RW-57 type well was an adequate water replacement proposal as to Landis. He orally told Landis this and he thought he had also done so in writing, but he could find no copy of such a writing in DER's file. (Exh. B-29; T-97-98)

36. PBS drilled the well actually identified as RW-57 to demonstrate a replacement, in response to DER's concerns, and DER feels this type well is an adequate replacement for the Kohan, Dneaster and Landis wells. (Exh. B-29; T-105, 147-148)

37. An RW-57 type well can be drilled on the lands of Kohan, Dneaster and Landis. (Exh. B-29) It gets its name from the fact that this is how PBS' demonstration well is designated on Exh. B-15(p).

38. In reaching the conclusion prior to the permit's issuance that a type RW-57 well would be a satisfactory water source replacement for Landis, Kania recognized that such a well would have a higher maintenance cost and would be more difficult to maintain than Landis' current well, but, despite these drawbacks, he concluded it was nevertheless suitable. (T-114-115)

39. As of the time that DER issued the surface mining permit to PBS, PBS had not proposed individual replacement wells located at sites off the

homeowners' individual lots and on PBS' property. PBS had also made no offers to escrow money for well construction costs or operation and maintenance, and had not submitted any design for the RW-60 well system. (T-107)

40. Mike Welch is DER's district mining manager in charge of DER's Ebensberg office and is ultimately responsible for both the issuance of PBS' SMP and Increment 3. (T-137-138)

41. Welch's formal education is in the forestry area, rather than hydrogeology or geology (T-140), though prior to being in his current position, DER assigned him to review permit applications in the same way it now assigns its hydrogeolgists to review them. (T-137-140)

42. Welch made the final decision concerning issuing this surface mining permit to PBS. Because he saw that the recharge area for the water supplies for the five homes was in the area to be mined, he directed deletion of the areas covered by Special Condition 15 until PBS could show a replacement supply which was adequate according to DER's standards. (T-146)

43. Welch told Kania to insert Special Condition 15 in PBS's permit until an adequate demonstration as to replacement supplies was made by PBS. (T-149-150)

44. PBS submitted enough information to DER after the SMP was issued to cause Welch, on behalf of DER, to approve Increment No. 3. (T-152-153)

45. PBS made proposals to DER in March of 1990 which developed the concept of the RW-60 community water supply system's pump house and water delivery system. (T-152-153)

46. All of the pieces of PBS' proposal concerning use of RW-60 as an adequate community replacement source were first put together in the document

called Undertaking of PBS Coals, Inc. ("Undertaking"), dated June 8, 1990. (Exh. B-19; T-156)

47. The Undertaking provides:

> 1. The DER requires that PBS demonstrate that it would be able to provide replacement domestic water supplies to the present structures located adjacent to the permit area in the event, which is not certain, that the proposed mining activities result in the degradation or otherwise affect the current domestic water supplies for the occupants of these structures, which are referred to herein as the "Affected Properties." PBS has asserted that its investigations, exploratory drilling and establishment of a test well has demonstrated that it can provide individual wells to the Affected Properties, but it has requested that, instead of individual wells, it be permitted to, and will, provide the replacement domestic water supplies for the Affected Properties through the development of a single community-type well, with the necessary fittings, pumps, tanks, pipelines, rights of way, connections, and other improvements, to be located on PBS property, and designated as R-60 on the permit application. This well, and the necessary fittings, pumps, tanks, pipelines, rights of way, connections, and other improvements shall be referred to herein as the "Water System."
>
> 2. PBS has proposed that, upon completion of the construction of the Water System, the Water System be dedicated for public use to the supervisors of Shade Township.
>
> 3. At this time, Shade Township has declined to accept dedication of the Water System, although such dedication was offered by PBS.
>
> 4. PBS undertakes to operate the Water System, at no cost to the owners or occupants of the Affected Properties.
>
> 5. Certain of the owners of the Affected Properties have requested that PBS provide written assurances, security and undertakings that the costs of maintaining the Water System, after the completion of mining operations be paid, for so long as any of the five occupied structures on the Affected Properties continue to exist and be occupied, by the current owners or any successors

and assigns thereof, as dwellings by any person (the "Term" hereof). PBS agrees that it will establish an escrow account (the "Account") in United States National Bank, Central City Office, in the initial principal amount of $30,000.00, which shall be deposited by the bank in an interest bearing account, and held for the purpose of securing to the Township and the owners of the Affected Properties that the Water System will be maintained and operated in good order and repair for the Term. So long as PBS is conducting mining operations, once the balance in the Account reaches $50,000.00, through either interest accruals or additional contributions by PBS, PBS shall be entitled to receive all interest earned on the Account. As the sum of $30,000.00 has been estimated to be the total system replacement cost, so long as the balance in the Account would not be reduced below $30,000.00, PBS may withdraw funds from the Account to pay or reimburse expenses actually incurred by PBS in the operation and maintenance of the Water System. The liability of PBS to expend funds to maintain or repair the Water System shall not be limited to expenditures that can be reimbursed from the Account and PBS shall be required to expend such other sums of money as are necessary to carry out its obligations hereunder. At the completion of mining, or at such time as the Water System is dedicated to the Township or transferred to any other municipal authority or similar entity which agrees to operate the Water System, if that occurs first, the Account shall be transferred to the Township or such other entity, to be held for the payment of all charges levied or accrued for the benefit of any of the Affected Properties. After such transfer, all interest shall be retained and added to the balance of the Account and held for the purpose of securing the payment of such charges. In the event the Township determines that such account is no longer necessary, it shall be permitted to transfer the balance in the account for its general fund in exchange for its undertaking to the owners of the Affected Properties that it will provide water service to the Affected Properties free of any charge, levy or assessment whatsoever for the duration of the Term. All maintenance obligations shall extend to and include the point where the individual dwelling connects to the Water System, and neither PBS nor its successor shall be responsible for normal maintenance of internal plumbing systems in said dwellings, unless such maintenance is caused by the quality or

characteristics of the water supplies through the Water System.

6. In the event the Water System has not been dedicated to the Township, the owner of any of the Affected Properties may present a written demand to the bank for the disbursing of the necessary funds from the Account to pay any expense or expenses that have been incurred and, in the opinion of the bank, are reasonably necessary for the operation and maintenance of the Water System during the Term hereof. The bank shall designate an independent consultant or agent knowledgeable in the operation of municipal water systems, which may be a municipality, municipal authority or private consultant or business, as necessary for the purpose of determining the necessary operating procedures for the Water System, the propriety of claimed expenditures, and to have access to all facilities associated therewith, in the event that the Township does not accept dedication of the Water System, and PBS fails or otherwise neglects to do so.

7. At the end of the Term, as defined above, when none of the structures on the Affected Premises are used for dwelling purposes, any money remaining in the Account, if it shall remain in existence, shall be returned to PBS, its successors or assigns.

(Exh. B-19)

48. This appeal's specific water replacement situation and the escrow are atypical from normal replacement issues confronting DER in mining permit reviews. (T-149, 160)

49. Because the RW-60 well is located on PBS property rather than the property of these five residences, is a community supply, and is more complex to operate and maintain than a shallow individual private well, DER did not want problems to crop up in the future, and so it insisted on the Undertaking and that a third-party-trustee control these funds. (T-157-158)

50. PBS had deposited with a Bank the $30,000 identified in its Undertaking and had signed an Escrow Agreement, dated June 15, 1990, with the bank in regard to its use related to the RW-60 system. (Exhs. B-20, B-20(a))

51. DER agreed to the $30,000 figure based on the estimate of the cost to drill and build a total RW-60 replacement system as prepared by Somerset Well Drilling for PBS. (T-159)

52. Shade Township has indicated that since its citizens do not want the RW-60 community water supply system, it will not assume responsibility therefor. (T2-190-191)

53. Welch reads the Undertaking as not going into effect until after PBS completes the mining of this site. (T-159)

54. After receiving a copy of the escrow agreement for these funds and PBS' execution of the Undertaking, DER also insisted the residents have the choice of which replacement water system they wish to serve their own homes. (T-161)

55. PBS' agreement on the issue of choice for the residents is reflected in Exhibit B-18 which provides:

> 1. Immediately upon notification by the Pennsylvania Department of Environmental Resources ("DER") of a degradation or diminution of a Water Supply, PBS will provide a temporary water supply consisting, if necessary, of bottled water and water supplied in tanks, trucks or other containers. Within 5 working days, PBS will provide the affected property owner and the DER with a choice among the following options:
>
> A. Connection to the water system to be installed and maintained in accordance with a separate undertaking of PBS to the DER which has been provided to the owners of the Water Supplies.
>
> B. Construction and installation of a new domestic water supply well, which is adequate in quality and quantity on property of the owner of

any affected Water Supply, including the necessary connections and fittings to insure that the well is connected to the owner's household plumbing system.

C. Construction and installation of a new domestic water supply well on nearest property adjacent to the property owner's premises owned by PBS or any affiliated company, including the necessary connections and fittings to insure that the well is connected to the property owner's household plumbing system and the necessary deeds or agreements to vest in the property owner and his, her or their successors legal title to the necessary easements, water rights, fee ownership in land and other rights necessary to insure perpetual access to the water well to the owner or owners of each affected property.

2. In order to secure the payment of the necessary costs to make or construct and maintain any of the wells or connections described herein, PBS will establish a trust fund or escrow account with United States National Bank in an amount deemed to be sufficient to provide the funds necessary to pay said costs of installation, construction and maintenance. This amount has been determined to be Four Thousand ($4,000.00) Dollars. PBS will also execute and deliver such other documents, papers or other undertakings reasonably required in order to provide adequate assurances that the undertaking contained herein will be completed in a timely fashion.

56. Items 1A and 1C in Exhibit B-18 were not proposed by PBS to DER prior to DER's issuance of SMP 56890105 to PBS. (Exh. B-29)

57. PBS' first option referred to in Exhibit B-18 is the RW-60 community system. The second and third options are an RW-57 type well with a $4,000 escrow of funds for each such well and $4,000 escrow servicing only one home. The second option locates this well within the property of the person suffering the water loss; the third option would offer an RW-57 type well on the nearest piece of PBS-owned property to the residence of the persons choosing that option. (T-162)

58. In the opinion of DER's staff, the options offered by PBS meet the DER standards for water replacement found in Section 4.2 of the Surface Mining Act and 25 Pa. Code §87.119. (T-169-170)

59. An RW-57 type well is an individual source of water for a single residence which is drilled to reach an aquifer located about 350-feet beneath the surface. Because PBS deepened this well to about 600-feet after it was initially drilled, it is referenced in the transcript as the 600-foot-deep well. The parties offered us no evidence as to the name of the aquifer to which it connects, but it produces a flow of 2 gpm and is located below the Lower Kittanning Coal Seam. (Exhs. B-26; P-26; T-26, 56, 96-97; T2-134, 162)

60. The RW-60 well takes water from the Upper Freeport aquifer, which also supplies the water for the existing Landis well and a portion of the water in the Buffy well. (Exh. B-26; T2-136) It is not drilled as deep as the RW-57 type well, since neither the Buffy nor the Landis well exceeds 150 feet in depth. (T-12, 48) The RW-60 well takes this name because that is how PBS identified it on Exh. B-15(p). RW-60 is located on a probable fracture shown on Exh. B-28. (T2-138-139)

61. Buffy understands that PBS has offered to drill him a replacement well on property PBS owns and to deed the well site to him, but he does not believe that PBS has offered a well on his residence property. (T-25)

62. Buffy objects to an RW-57 type of replacement well located on his property because he could not maintain a 600-foot well himself, whereas he can maintain his present well. He also objects that if this well's water is "bad", then he will need to treat it. (T-26)

63. If Buffy had a 600-foot well and the pump needed repair, he would have to have machinery brought in to pull it out of the well because it is 400 to

600 feet below the surface, whereas he can repair his own well's pump today without such equipment. (T-26)

64. Buffy has been offered a connection to the RW-60 water system. (T-26)

65. Buffy wants a water source of his own on his own property because he does not get along with two of his four neighbors and he believes that with his extra water uses for car washing and filling of the swimming pool, there will be more problems with his neighbors if water runs low. (T-27, 32)

66. Buffy anticipates problems in cooperation among his neighbors as to well maintenance. (T-31-32)

67. Insofar as PBS offers him a private well on land now owned by PBS, Buffy is concerned about maintenance of such a well which would be ¼ to ½ mile away from his home. This is because of the need for maintenance of a longer water line, pump failure, the possible increase in cost to operate a pump for such a well, and his added cost of ownership of the land on which such a well would be located. (T-25, 33)

68. Landis objects to a 600-foot well, too. This is because it is the last water available to him and if it were lost in the future, he would have no water at his home. He also objects to the well because he cannot maintain it himself as he does his current well. Landis believes that he would have to bring in machinery to pull the pump out of such a well if it ever broke. (T-49)

69. Landis objects to a community RW-60 water system because he is not sure it will produce enough water; he feels the cost to operate it is not clearly known and well maintenance obligations are not clearly spelled out. (T-50) Additionally, because it is not next to the houses, Landis feels that the well would be subject to possible vandalism. (T-50)

70. Landis does not want a single residence (RW-57 type) well located on PBS property because it could also be vandalized and he could not maintain such a well. (T-51)

71. Landis gets along with his neighbors (T-55) but he is not sure his neighbors can work together to operate and maintain a RW-60 well system. (T-57)

72. Landis agrees that connection to a municipal water supply could be an adequate well replacement for his home. (T-58)

73. DER did not consider a water supply system utilizing the RW-60 well to be part of the surface mining to be conducted by PBS on Job 9. (T2-16)

74. Elmer Buffy, Kohan, and Dneaster have agreed to accept water replacement for their individual wells through the well RW-60 system. (Exh. B-29)

75. Prior to issuance of Increment No. 3, Welch talked with David Plank, who works for the Bureau within DER which regulates public water supplies, and learned that no public water supply permits would be required for PBS's proposed RW-60 system. (T2-14-15)

76. PBS stipulates that the RW-60 system will have a chlorinator on it if the system is constructed. (T2-27)

77. Prior to approving the RW-60 proposal, Welch did not inspect the proposed well area and did not study the suitability of the soils in the area for laying water pipes. (T2-15)

78. Prior to approving Increment 3, DER considered requiring connection of these homes to a public water supply, but it says that the nearest such supply refused to provide the volume of water needed. (T2-29)

79. An RW-57 well is not an adequate replacement supply for James Buffy. (T2-34)

80. Of the three options offered by PBS, only the RW-60 option is adequate for Buffy's needs. (T2-34-37)

81. Another option as to a replacement supply for Buffy might be an RW-60 type well for his private use. (T2-35)

82. Prior to approving Increment 3, DER did not determine if there were other locations at which an RW-60 well could be installed to serve Buffy's home, but concluded that the RW-60 well is adequate as a joint supply to serve all five homes and that there are probably other locations at which an RW-60 type well could be drilled for Buffy's private use where sufficient water might be found for his needs. (T2-35) Welch's approval of Increment 3 for DER was thus based solely on the existing RW-60 well. (T2-36)

83. If Buffy wants to have a replacement private well located on his residence property to replace his current well, DER does not know any location where that well could be drilled, but relied on the existence of RW-60 to show a similar well could be drilled on nearby PBS properties. (T2-37-38)

84. DER relied on the fact of RW-60's existence to be sure Buffy's family would not be without water; it has not determined any other specific locations where another RW-60 well could be located. (T2-38)

85. Buffy has not been offered RW-60 for his exclusive use. (T2-41)

86. The Buffy and Landis homes are located approximately 2,710 feet above sea level, while the RW-60 well is located sixty feet lower, at an elevation of approximately 2,660 feet. (B-15(p); T2-47-48)

87. The RW-60 water supply system contains a pressure tank to force the water in the system's lines to the homes, but, when it approved Increment 3, DER did not know the exact amount of water available to the homes if the well's pump shut down. (T2-48-49)

88. DER understands that PBS will operate the RW-60 system until it is done with Job 9 (until bond release) and DER interprets the various documents so that at that time, the trustee will take over operation of the RW-60 system. (T2-50-52, 71)

89. DER interprets its statutes to say that PBS has responsibility for the water replacement for these five homes in perpetuity. (T2-54)

90. In setting the escrow amount, DER did not factor in maintenance costs except insofar as PBS was building the RW-60 system and then escrowing an amount equal to the cost of building the RW-60 system again. (T2-57-59)

91. DER had no maintenance and operations cost data available to it when it agreed with PBS to the escrow proposal, and it approved the RW-60 system independent of the escrow because it felt it lacked authority to require the escrow. (T2-58-62)

92. DER's district mining manager (Welch) did not consider the cost of operating and maintaining ("O&M") an RW-57 type well when he approved it as a replacement well. (T2-66)

93. DER knew neither how long it would take the $30,000 deposited in escrow to grow to the $50,000 referenced in PBS's Undertaking nor how the $4,000 figure was arrived at, but it believed the $4,000 figure was to have O&M costs factored into it. (T2-67-68)

94. Arthur Gusbar ("Gusbar") is one of the two principals of Franklin Associates, the civil consulting engineering firm which designed the RW-60

system for PBS. (T2-85, 104) Gusbar is not a registered professional engineer, nor does he have formal education in engineering. He is a Registered Landscape Architect and a Registered Engineering Technician who relies on representations of geologists in assisting in his firm's design of underground water supply systems. (T2-86-92)

95. Franklin Associates has experience in designing small water supply systems. (Exh. P-25; T-86-87, 90-91, 219)

96. An Equivalent Dwelling Unit ("EDU") is 350 gallons per day and this is the standard measurement water consumption used statewide by DER. (T2-105-106)

97. Based on 5 EDUs, the RW-60 well is adequate to supply water to these five homes (T2-105); however, use of EDUs does not take into account Buffy's non-standard water uses. Nevertheless, Gusbar states that the RW-60 well will produce 14,400 gallons of water per day, which should be adequate to handle these needs. (T2-105-106, 157-158, 182)

98. RW-60's yield is not equal to the combined yields of all five homes' current wells, but none of the homeowners has ever indicated he uses 100% of his well's yield. (T2-159-160)

99. PBS offered no testimony to the Board from its officers as to PBS' understanding of the scope and extent of all of its obligations concerning replacement water supplies.

100. Dennis Noll is a hydrogeologist hired by PBS to submit the hydrogeologic information on PBS's behalf regarding its application for the Job 9 permit; he studied the water replacement issue on PBS' behalf. (T-126, 131-132)

101. It is Noll's conclusion that by utilizing the water in an aquifer below the Lower Kittanning Seam, an RW-57 type well is an adequate replacement source for the Landis' well. (T2-134)

102. Noll concludes from his investigation that the RW-60 well is adequate in quantity to supply all five homes. (T2-135)

103. Noll believes that because the aquifer into which the RW-60 well taps is extensive in this area, another RW-60 well could be drilled somewhere and be made available for Buffy's use. (T2-136-137)

104. Noll believes that a well tapped into the same aquifer as RW-60 and located southwest of RW-60 would not be affected by mining but would be even further from Buffy's home than RW-60. If such a well were west of RW-60, it would be at an even lower elevation relative to Buffy's home. (B-15(p); T2-138)

105. Noll has made no proposals to DER on behalf of PBS regarding a site at which to drill an individual well to serve only Buffy's residence. (T2-144-145)

106. Noll submitted no designs for an RW-57 well to DER and furnished it no O&M cost information. (T2-152)

107. If two RW-60 wells were installed next to each other, they would each diminish the other's producible volume. (T2-161)

108. As far as Noll is aware, in situations where a coal company proposes to replace five wells with one group well, there is no set of standards available as to what is an adequate replacement because normally, replacement is a single replacement well for a single well; so, with a single replacement

source replacing multiple wells, issues arise as to water supply systems, quantity of water, water storage, and various aspects of system design. (T2-168-169)

109. The components of PBS' RW-60 system are the well itself, a 10 gpm pump, a 200 gallon pressure tank, a chlorinator, pressure switches and valves, the 6 inch PVC water lines, and a building to house the tank, chlorinator, switches, and valves. (Exh. B-15(o); T2-174, 177)

110. PBS' RW-60 system has storage capacity of approximately 4,000 gallons built into it. (T2-174)

111. If electric power failed, Gusbar estimates as much as 70-75% of the water in the portion of the RW-60 water supply system between the pressure tank and the homes (in the 6 inch water line) could be available for use at these residences, but less would be available at the house furthest from the well, and whatever water was coming into these houses in this situation would come in at basement level, not at the second floor. (T2-222-223)

112. According to Gusbar, the escrow account's $30,000 is to pay for electric power, chlorine solution (for the chlorinator), repairs, testing, and administration after PBS leaves the Job 9 site. (T2-184)

113. Gusbar has experience in estimating O&M costs for small municipal systems. Based on experience, he opines that the nominal O&M fund for such systems is usually 15% of the cost to install the system. It is set at this percentage on a new system because the system is new, so repairs are not anticipated. (T2-184-185)

114. Under Gusbar's formula, O&M costs for the RW-60 system is approximately $4,500 per year. (T2-204)

115. According to Gusbar, his firm calculated actual annual O&M cost for the RW-60 system to be between 10% and 12% of the $30,000, but this assumed only $400 per year for repairs. (T2-213-214)

116. Gusbar estimates that if this RW-60 escrow fund of $30,000 grows to $50,000, it would sustain this system for 30 years, even if there had to be one or two pump replacements in that period. (T2-204-206)

117. Gusbar opines that based on his experience, this escrow amount is adequate. (T2-184)

118. PBS provided no evidence showing it will not draw money from the escrow fund, as it is authorized to do, during the time it runs the RW-60 system.

119. PBS provided no evidence, other than Gusbar's opinion, that where fees or rates are not charged to system users, as is to be the case with the RW-60 well, the $30,000 proposed escrow is enough to cover in perpetuity a $4,500 O&M annual cost calculated by using Gusbar's 15% formula when added to the fees which the trustee may charge for its services under the escrow agreement.

120. The $4,000 escrow proposed for the individual wells is based on Gusbar's knowledge of current well replacement costs incurred by mining companies in replacing wells serving single dwelling units. (T2-187)

121. The current cost of drilling a new 600-foot-deep RW-57 type well is between $3,000 and $3,500, while the cost of drilling a 100-foot-deep well, like an RW-60 well, is $1,800. (T2-214, 221)

122. Gusbar, on behalf of PBS, evaluated connecting these homes to a municipally operated water system and prepared the cost figures for such an approach. (T2-210)

123. On behalf of PBS, Gusbar determined such a connection was not feasible, based in part on Gusbar's cost figures and in part on the municipal authority's inability to furnish the volume of water needed to serve both these five homes and the homes in the village of Gahagen, which abuts PBS's Job 9 mine site on its northern boundary. (Exh. B-15(p); T2-210-212)

124. The Municipal Authority could furnish sufficient water to supply these five homes alone but that was deemed unfeasible by Gusbar because it was too costly for PBS to run such a line only for five homes. (T2-211-212, 225-226)

DISCUSSION

In their Post-Hearing Brief, Buffy and Landis raise the following issues: (1) Does Landis have a right to maintain an appeal from DER's issuance of Increment 3 to PBS[3] and (2) Did PBS satisfactorily demonstrate the existence of an adequate and suitable replacement water supply prior to the issuance of Increment 3 authorizing the mining of the recharge area for Appellants' existing wells? Within this second issue, in turn, Buffy and Landis examine for merit each of the possible water supply options. Finally, and almost as an aside, on page 30 of their Brief, Buffy and Landis ask for the award to them by the Board of attorneys fees. We are limited to considering only these issues in this adjudication because, as we have held many times in the past, an appellant is deemed to have abandoned all contentions not raised in its post-hearing brief. Lucky Strike Coal Co. et al. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988). It is also appropriate to note before considering the first of these issues that it

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[3]Buffy and Landis raise this issue because, at the end of their case-in-chief, PBS moved to dismiss the Landis appeal as untimely (T-134) and the parties were directed to address this issue in their Post-Hearing Briefs. (T-136-137)

is Buffy and Landis who bear the burden of proof here under 25 Pa. Code §21.101(c)(3). Clearfield Municipal Authority v. DER et al., 1989 EHB 627.

The issue as to the timeliness of Landis' appeal arises because DER's Kania testified that prior to the issuance of SMP 56890105 to PBS, he determined that an RW-57 type well could be an adequate replacement water source for Landis in the event the PBS mining operation caused Landis to lose the water in the well next to his house. Both Landis and Kania think a letter was written communicating this decision by Kania to Landis, though neither can now find it, and, thus, we do not know its date in relation to issuance of the permit or Increment 3. Although DER normally leaves permit defense to the permit applicant, it contends that Landis failed to file an appeal from the issuance of SMP 56890105 within thirty days of that permit's issuance. Accordingly, DER argues that since he had knowledge of Kania's decision, he had to appeal in a timely fashion or be precluded from challenging DER on water replacement in the current appeal, which is only timely when measured from issuance of Increment 3. In support of the contention DER cites us to Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976), and its progeny.

Citing Commonwealth, DER v. Wheeling-Pittsburgh Steel Corporation, 22 Pa. Cmwlth. 280, 348 A.2d 765 (1975), affirmed, 473 Pa. 432, 375 A.2d 320 (1977), cert. denied, 434 U.S. 969 (1977) and its progeny, PBS argues that since Landis failed to challenge DER's decision to issue this permit, which included its decision as to his water replacement, the doctrine of administrative finality bars Landis from attacking the issuance of Increment No. 3.

PBS' challenge to this appeal lacks merit because this is not the type of proceeding envisioned in Wheeling-Pittsburgh Steel, supra. There, as in both

Dithridge House v. Commonwealth, DER, 116 Pa. Cmwlth. 24, 541 A.2d 827 (1988) and the other cases which PBS cites, the issue was DER's enforcement of its prior unappealed administrative decision. For example, in Dithridge House, supra, DER first denied an application for bathing place permit by the contractor who built this condominium. Dithridge did not appeal that denial. Thereafter, DER ordered closure of the swimming pool at the Dithridge House because it lacked a permit, and, again, no appeal was taken. When Dithridge's own application for a permit for the same pool was denied for the same reason as the prior permit, Dithridge challenged the denial and DER asserted it was too late to do so since Dithridge had not done so as to either the prior order or prior permit denial. The present case is akin to Nemacolin, Inc. v. Commonwealth, DER, 115 Pa. Cmwlth. 462, 541 A.2d 811 (1988), which was the companion case to Dithridge House, supra. Commonwealth Court determined in these two swimming pool cases that administrative finality applied in Dithridge House, supra, because DER's order to close the pool imposed an immediate, affirmative obligation on Dithridge, but did not apply in Nemacolin, supra, because no obligation was imposed on Nemacolin by virtue of DER's denial of its application for permit. The instant appeal is not analogous to Dithridge House, supra, or Wheeling-Pittsburgh Steel, supra, because no new obligation or burden was imposed on Landis by virtue of issuance of this permit. Here, no obligation is imposed on Landis by the permit's issuance to PBS; hence, preclusion by the doctrine of administrative finality is inapplicable.

DER's argument in support of PBS' Motion, rather than being based on issue preclusion, goes directly to the timeliness of Landis' appeal. It too must fail, but not on the law. Rather, DER's argument is tripped up by the facts

of this appeal. When DER concluded that an RW-57 type well was an adequate replacement supply for Landis, it issued the permit to PBS, but inserted in it the "infamous" Special Condition 15. This Condition expressly prohibits all mining by PBS on the portion of its proposed surface mine which includes the recharge area for each of the wells for the five homes (those of Landis, Elmer Buffy, Buffy, Dneaster and Kohan), identified by Kania as the ones which will lose their water. Thus, while DER issued this permit based on PBS data, its simultaneous insertion of this Condition stopped mining or any impact of the permit on Landis until DER rendered its decision, reflected by issuance of Increment 3. We would have no trouble sustaining DER's argument if Increment 3 had been issued jointly with SMP 56890105 because then PBS could have mined this tract. Because this did not occur, we are forced to examine when Landis' rights were impacted. This examination causes us to conclude that Landis would never have been impacted as to water replacement issues and the PBS mine if PBS had not sought to demonstrate an adequate replacement supply and to secure DER's issuance of Increment 3. The same lack of impact on Landis is true if DER had denied issuance of Increment 3 to PBS. In reviewing what constitutes an appealable action, we have consistently held there must be some impact on the appellant's rights and duties. See Perry Brothers Coal Company v. DER, 1982 EHB 501, and M. C. Arnoni Company v. DER, 1989 EHB 27. This test applies here as well. When it is applied, it shows that only upon issuance of Increment 3 can PBS mine the recharge area for these five wells. It is true that Landis is not expressly mentioned in Special Condition 15, as are Elmer Buffy and James Buffy, but the parties agree the recharge area for all the wells is the same. PBS could not have strip mined only the recharge area for the Landis, Kohan and Dneaster wells prior to issuance of Increment 3 while

leaving unaffected the recharge area for the two wells serving each of the Buffys. It is thus clear that Landis' "injury" occurred with Increment 3's issuance. Accordingly, we reject DER's argument that Landis' appeal must be dismissed as untimely.

Keeping in mind that the burden of proof remains on Appellants and that we review DER's decision to issue Increment 3 under the test in Warren Sand and Gravel Company v. Commonwealth, DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975), we turn to examine the merits of DER's decision and how it was determined. In so doing, we note that we have only issued one prior decision in a situation involving water replacement for many sources by a single multi-party well. That decision is Gioia Coal Company v. DER, 1986 EHB 82.

DER's duties as to water loss/water replacement issues in the permitting context are spelled out in 25 Pa. Code §§87.47 and 87.119. As to permit applicants, such as PBS, §87.47 states in part that the applicant shall identify the impacts of mining on any existing water supply and then states:

> The applicant shall identify the extent to which the proposed surface mining activities may result in contamination, diminution or interruption of an underground or surface source of water within the proposed permit or adjacent area for domestic, agricultural, industrial or other legitimate use. If contamination, pollution, diminution or interruption may result, then the description shall identify the means to restore or replace the affected water supply in accordance with §87.119 (relating to hydrologic balance: water rights and replacement).

25 Pa. Code §87.119 then provides:

> The operator of any mine which affects a water supply by contamination, diminution or interruption shall restore or replace the affected water supply with an alternate source, adequate in water quantity and water quality for the purposes served by the supply. For the purposes of this section, the term water supply shall include any

> existing or currently designated or currently planned source of water or facility or system for the supply of water for human consumption or for agricultural, commercial, industrial or other uses."

In drawing conclusions as to what is meant here, DER's staff is guided by DER's policy and guidance on water replacement, which is before us as PBS' Exhibit P-23. As to issues of water quantity, DER's policy provides in part:

> Pursuant to 87.119 and 88.107, the proposed alternate supply must be adequate in quantity for the purpose served by the supply. Unless the owner of the property utilizing the water supply specifically agrees to a lesser supply, the quantity of the proposed replacement supply must be the same as, or greater than, the quantity available with the existing supply. This will require pump tests for specific yield, from both the existing supply and the proposed replacement source. (emphasis added)

As to "Costs" it states:

> The installation costs, as well as any additional maintenance or treatment cost, must be borne by the applicant. In the case of maintenance costs, the applicant must show cost calculation for the existing supply, as well as the proposed replacement water supply. (emphasis added)
>
> One method of assuring the maintenance cost would be for the operator to calculate a sum, that if invested, would yield an amount equal to the additional annual maintenance and treatment cost. The operator would put this sum in an escrow where the water supply user can draw on it.

Although Gioia is distinguishable from the present appeal, the concepts of maintenance and control set forth therein provide guidance for assessing the adequacy of supplies. Specifically: (1) a replacement supply may be adequate even if more maintenance is required for it than the predecessor supply had required; (2) a replacement cannot be unreliable or require excessive maintenance; and (3) a replacement supply is not adequate where control over

it is not in the hands of the property owner it is to serve to approximately the same degree as the predecessor supply.

Importantly, Gioia Coal, supra, is distinguishable from the instant appeal because it deals with post-mining enforcement action by DER, rather than DER pre-mining permit review as is before us in the instant appeal. This distinction is significant because a proper pre-mining evaluation of the evidence submitted by the applicant can eliminate many of the post-mining enforcement actions such as that in Gioia Coal, supra. That there should be such a distinction is evidenced by 25 Pa. Code §87.115(b), which is a pre-mining sign post for miners advising them that as to any new mine site the recharge capacity of a mine site shall be restored after mining to a condition which both minimizes disturbances to the prevailing hydrologic balance on the site **and adjacent properties**, and provides a recharge rate approximating the pre-mining recharge rate. Obviously, DER's permit review must be aimed at compliance with these mandates. Any approval of Increment 3, thus, can only take place when this occurs or when a suitable replacement for the depleted water supply is proposed. Thus, permit review issues have a much greater scope than the issues in a Gioia Coal, supra, type enforcement proceeding.[4]

In Gioia Coal, supra, we specifically stated:

> [W]e do not believe the Legislature intended that a replacement water supply which might be cut off

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[4]DER's policy for determining suitability of a replacement supply in a permit review context (Exh. P-23) appears to be more stringent than the standards set out in Gioia Coal, supra. PBS has not questioned the validity of DER's policy; indeed it was PBS which placed it in evidence. We will thus apply it in judging DER's actions here. Importantly, we also believe "adequacy" should be interpreted more liberally than we did in Gioia Coal, supra. See Footnote 6.

> at any time by the acts of another person should be regarded as an "alternative source of water adequate in quantity" under §1396.4b(f).

Applying the concepts on control stated in Gioia Coal, supra, and DER's policy in this pre-mining permit appeal, we must conclude that DER's evaluation of the proposed Buffy and Landis replacement supplies did not comport with these guidelines.

As to quantity, we know an RW-57 well is adequate in quantity to replace Landis' well but not the Buffy well. We also know the RW-60 well produces more water than Buffy's existing well but it was not offered to Buffy exclusively. PBS offered it to Buffy, but only with at least Kohan, Dneaster and Elmer Buffy as joint users with Buffy. Further, pump tests of the well show that RW-60 maximum yield produces less water than the maximum yields of each of the four remaining wells (including Landis' well) when added together. (Exh. B-5) Clearly, since Buffy has not consented to a lesser supply, this RW-60 well as offered does not produce at least the same total quantity as the five existing sources, contrary to DER's policy. The fact that Elmer Buffy, Kohan and Dneaster have consented to this system does not change this conclusion since there was no evidence presented that they consented to a lesser supply and Buffy's right to a share of the water equal to the volume of water producible by his existing well.

DER's policy on costs requires PBS to show a maintenance costs calculation for the existing supply and for the proposed supply so that DER may compare them to establish that any increased O&M costs are borne by PBS. We have been provided no O&M costs for the existing Landis and Buffy wells. We have no evidence before us to suggest that DER had this information when it approved Increment 3. Further, we have no evidence of calculation of the proposed

system's O&M costs on behalf of PBS and there is no evidence that PBS gave DER the raw data needed to make such a calculation, either. Finally, the parties did not provide this Board with the data necessary for us to make this calculation and to substitute the resulting escrow figure for that agreed to by DER. We do have statements from various persons that they considered these O&M costs, but DER's Welch admitted that the only figures in front of him when he thought about this issue was the $30,000 in escrow offered by PBS, which is the estimated cost to replace a RW-60 well system and thus not the same thing as O&M cost calculations. (T2-58-59)

Gusbar, who was offered as an expert despite both his lack of a formal education in this field and the fact that he is not a registered professional engineer, opined that this was enough money to cover all costs because under the PBS proposal, it can grow to $50,000. While he may hold this opinion, we have not been shown how he reached it, and there is no evidence in the form of any hard data which was provided to DER on how he reached it. Thus, DER failed to follow its written policy, as set forth in Exhibit P-23, as to quantity and costs. We do not approve of DER's failure to follow its own written policy in this case for the reasons set forth above.

Turning to the question of control over these wells again, we deal only with the RW-60 well; this is because an RW-57 well for Landis on his own land is conceded by Landis to be in his control. An RW-57 well located on a tract owned by PBS with the necessary rights of way to convey water to Landis' home is also in Landis' exclusive control since he shares it with no one and PBS will deed him rights to it. His concerns that someone could tamper with it or vandalize it do not go to the question of his sharing control over it with some other party, but rather need to be addressed when looking at what are the

true well replacement costs and replacement well O&M costs for such a proposal.

PBS' RW-60 well proposal has a single well located on PBS property providing water to all five homes. PBS argues that it will operate the well as a community system free-of-charge to the residents as long as PBS is responsible for the Job 9 mine site, i.e., through the bond release period.[5] While freedom from cost is of importance, it is not of importance on the issue of control (except in terms of the possibility that the escrowed funds could get used up). If PBS will make the repairs it feels are necessary in this period, will it also repair the system as directed by Buffy or Landis even if that repair is unwarranted in PBS' view? Will PBS run the system as directed by Buffy and Landis if that method of operation is more costly than operation methods proposed by PBS? No such commitments are made by PBS. PBS is also not committing itself to repair or operation to suit one homeowner, if in doing so, this would be contrary to the wishes of the other sets of residents connected to this well. Thus, control as to RW-60 is less for Buffy or Landis than their control over their existing private wells and comes at a time when the evidence shows that Buffy does not get along with two of the other four proposed users of this well. Moreover, when PBS leaves the Job 9 site, the documents submitted to DER by PBS and approved by DER make the situation murkier. According to the various undertakings and escrow documents, if municipal ownership of the system is not arranged when PBS leaves; a homeowner may demand a repair of the system from the bank which holds the escrow, but

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[5]While PBS argues this, it is also authorized in its Undertakings to use the escrowed money for the RW-60 system's operation during this period. Of course, such use of the escrowed money may prevent it from ever growing to $50,000.

the bank would only be required to make those repairs using the escrow funds it feels are reasonably necessary for system operation and maintenance. The Escrow Agreement provides the bank will administer the escrowed funds in accordance with the PBS Undertakings, but that is all it is obligated to do. The question of who makes the repairs that the bank does not agree are needed or the ones that are opposed by some of the homeowners is not addressed at all. Under these circumstances, we cannot help but conclude that Buffy and Landis are required to give up a significant portion of their control over the water supply if an RW-60 well system is imposed on them.

In their Reply Brief, Buffy and Landis next argue that while they have the burden of proof, through the evidentiary showings they have met it, and (though said inarticulately) they apparently argue that the burden of proceeding thus shifts to PBS and DER. Even if they had not urged this argument, it would be true. Although the burden of proof remains with the appellants throughout this appeal, it is clear the burden of going forward can shift to PBS and DER. In Easton Area Joint Sewer Authority et al. v. DER, EHB Dkt No. 86-559-W (Adjudication issued October 29, 1990), we stated such a shift can occur when a *prima facie* case is made by appellants. Such a shift occurs in this case. This burden shifts to DER and PBS in this case to come forward with evidence that DER's decision to okay Increment No. 3 was reasonable despite Appellants' lack of control over the proposed community water system, the lack of O&M costs data, and the fact that RW-60's quantity does not equal the combined quantity of the five existing wells, as set forth in DER's own written policy.

Clearly, DER's decision cannot be defended on the basis that it was the only way in which PBS could mine the site and these homeowners could have any

water in their homes. Sections 87.47 and 87.119 envision circumstances where applications may have to be denied because no replacement is available. The same is true of DER's written policy; there is no logical reason to phrase these regulations and policies in this fashion if denial of a permit based thereon is not contemplated to be one of the options. It follows therefrom that justification of DER's decision on the theory that this is the only way to do both (unless of course all parties agreed thereto) must be found to be inadequate. Such a justification is also inadequate because at least one other option existed. These homes could have been connected to the public water supply serving Central City. The evidence at the hearing showed that Central City water supply could not supply enough water for these five homes and those in the village of Gahagen but there was enough water for these five homes alone. Gusbar testified that he rejected on PBS' behalf the option to serve only these five homes because in his opinion, it was too costly an option. Accordingly, DER's decision must be examined on its individual merit.

Turning first to the issue of costs, DER's policy provides that a proposed replacement water supply is not adequate where it costs more to operate and maintain than the existing supply.[6] How can a replacement supply be

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[6]We recognize that this statement is not in keeping with Gioia, which stated that increased costs rendered a replacement supply inadequate only if the costs could be characterized as "excessive." 1986 EHB at 92. However, as we stated above, Gioia was an enforcement proceeding, while this is a permit review proceeding. Moreover, to the extent that the standard governing the two situations may be the same - both 52 P.S. §1396.4b(f) (governing enforcement proceedings) and 25 Pa. Code §§87.47 and 87.119 (governing permit review) speak in terms of an "adequate" replacement supply - we believe that the grudging approach taken in Gioia to determining adequacy does not provide sufficient protection to the public. Gioia stated that individuals who were forced to incur additional expenses in connection with a replacement water supply would have to sue for damages in Common Pleas Court to recover their (footnote continues)

adequate in quantity and quality where costs may make its use too expensive for the homeowner? Such costs are properly costs to be borne by the miner or at least internalized by it when it decides whether to seek a permit to mine a particular tract. Along the line of our statement from Gioia, supra, we do not believe the legislature intended that a replacement water supply which costs more to operate and maintain should be regarded as an "alternative source of water adequate in quantity and quality" under Section 1396.4b(f). We now hold that for such a proposal to be adequate, it must contain an adequate companion proposal of compensation for this increased cost.

DER's decision to approve Increment No. 3 cannot be sustained on the basis of the evidence offered to us by PBS and DER. It is clear that the parties agree that water loss will most likely occur if PBS mines the recharge area. It is also clear that no adequate individual replacement supply is offered to Buffy.[7] While, with suitable cost data and financial arrangements, an RW-57 well drilled on Landis' land is a suitable replacement for Landis, no data was offered other than Gusbar's opinion which provided any basis for DER or this Board to conclude that the $4,000 escrow is an adequate O&M cost proposal as to Landis. No O&M cost proposal of any kind was made as to Buffy, except as

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(continued footnote)
expenses, so long as the expenses were not "excessive." Forcing injured parties to sue for damages defeats the very purpose for which regulation of coal mining was instituted.

[7]We will not accept expert testimony that another well of a depth similar to the RW-60 well might be drilled elsewhere on PBS' property for Buffy's use as proof sufficient for us to find in favor of PBS and DER. This offer was never made by PBS to DER or this Board. All we have is the expression by PBS' consultants to the effect that this is an option and that in the opinion of PBS' consultants, the aquifer can support it. We have neither costs data regarding it nor, importantly, any testimony from a PBS official that PBS is extending such an offer.

part of the community service by the RW-60 well. The data that either DER or this Board should review might consist of a breakdown of all O&M costs for the current source (electricity, disinfection costs-if appropriate, and a justifiable figure to amortize replacement of system components as they wear out and the labor therefor)[8] plus a breakdown of all O&M costs for the new source (which may include factors not in the existing source's O&M costs). With such information one could perform the mathematical computation to determine how much more (if anything) the new source's costs would be for which the miner would be responsible. In turn, with this figure, it would be possible to determine the amount which must be escrowed to produce and reproduce these additional costs *ad infinitum*.

When control over a replacement water source is adequately addressed, when quantity issues are resolved, and when such financial information is available, DER will be able to follow its written policy and adequately review such a proposal. Until this occurs, neither DER nor this Board can act without "picking numbers out of a hat". We will not substitute arbitrary action by this Board for arbitrary action by DER by, for example, randomly picking a new dollar figure for PBS to escrow. Accordingly, DER's decision to approve Increment 3 cannot be sustained and we enter the following Order.

CONCLUSIONS OF LAW

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

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[8]Any pump, motor, chlorinator, or pipe has an estimable useful life before it wears out. If a portion of the labor and equipment purchase price is set aside each year of that period then at the end of the period a fund exists from which to pay these replacement costs.

2. The doctrine of administrative finality based on Landis' failure to appeal from the prior issuance of the SMP does not apply to bar the appeal filed by Landis from DER's issuance of Increment No. 3. As was pointed out in Nemacolin, supra, the doctrine does not apply because DER's issuance of the SMP imposed no affirmative obligation on Landis.

3. Landis' appeal of Increment No. 3 is a timely appeal as to the issue of the adequacy of a replacement water supply even though he took no appeal from the SMP's issuance. This is because the SMP contained Special Condition 15 and thus had no impact on Landis' rights and duties until after Increment 3's issuance.

4. The burden of proof is on Buffy and Landis pursuant to 25 Pa. Code §21.101(c)(3).

5. Buffy and Landis make out a *prima facie* case by showing the projected destruction of their existing water supplies caused by PBS' mining of the Increment 3 tract coupled with DER's failure to follow its written policy for review of the adequacy of proposed replacement water supplies during review of Increment 3. Accordingly, the burden of going forward with the evidence to justify this increment's approval then shifts to DER and PBS.

6. According to Gioia, supra, when Buffy and Landis exclusively control their existing private sources of supply, the proposal for a community replacement source of water must demonstrate that Buffy and Landis retain substantially equal control over it or consent thereto, if it is to be judged an adequate replacement proposal.

7. A proposal for a replacement water supply cannot be considered as an alternative source of water adequate in quantity and quality unless it demonstrates that either the O&M costs for the proposed replacement source are

substantially the same as the existing system and the existing supply's users agree to shoulder these costs or that the miner has included in its proposal a satisfactory method for compensating the users of the existing supply for the replacement supply's increased costs.

8. DER unreasonably, arbitrarily, and capriciously approved PBS' mining on the Increment 3 tract where there was no showing by PBS that the PBS proposed community replacement water supply system would leave Buffy and Landis with the same degree of control over this proposed community system as they have over their existing private wells and where there was no evidence produced as to actual O&M costs for either the existing or the proposed replacement supplies from which to judge the adequacy of the amount escrowed by PBS.

9. Where the volume of water produced by the proposed community replacement water supply is less than the combined volumes of the five private wells serving the five homes which are projected to suffer a loss of water because of mining, the replacement supply may nevertheless be adequate where either it can be shown to produce a volume at least equal to all reasonable projected needs of these five homes or that the property owners consent to the proposed replacement.

ORDER

AND NOW, this 18th day of December, 1990, the appeal of James Buffy and Harry K. Landis from DER's issuance of Bond Increment 1-00222-56890105-03 to PBS is sustained.[9]

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
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ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

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[9]In entering this order, we have refrained from adjudicating the merits of the request for payment of attorneys fees contained in the conclusion of Appellants' Brief. If Appellants wish to pursue same, they must do so by filing a Petition with this Board which sets forth verified factual allegations supporting the amount sought therein. See Kwalwasser v. DER, 1988 EHB 1308; Jay Township et al. v. DER et al., 1987 EHB 36.

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 18, 1990

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M. DIANE SMITH
SECRETARY TO THE BOA

T.R.A.S.H., Ltd.	:	
	:	
v.	:	**EHB Docket No. 89-031-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: December 20, 1990**
and DRAVO ENERGY RESOURCES, Permittee	:	
and COUNTY OF MONTGOMERY, Intervenor	:	

OPINION AND ORDER SUR
CROSS-MOTIONS FOR SUMMARY JUDGMENT

By Maxine Woelfling, Chairman

Synopsis

Permittee and Host County's Motion for summary judgment to sustain the Department of Environmental Resources' (Department) extension of an air quality plan approval is granted where the only issue is whether the Department must apply Best Available Technology/Best Available Control Technology (BAT/BACT) guidance in effect at the time of the request for extension to the plan approval and the Board holds that the Department is not required to do so by the relevant regulations. Appellant's cross-motion for summary judgment is denied for the same reason.

OPINION

The facility involved in this appeal has previously been the subject of appeals to the Board; this involvement began with the Department of Environmental Resources' July 23, 1987, issuance of an air quality plan approval (No. 46-340-002), which also constituted an approval under federal

Prevention of Significant Deterioration (PSD) Requirements,[1] and a solid waste management permit authorizing the construction of a municipal and solid waste incinerator in Plymouth Township, Montgomery County. The plan approval was issued pursuant to the Air Pollution Control Act, the Act of January 8, 1960, P.L. 2119, as amended, 35 P.S. §4001 et seq. (the Air Pollution Control Act) and the rules and regulations adopted thereunder, and the solid waste management permit was issued pursuant to the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. and the rules and regulations adopted thereunder.

The Department's actions were appealed to the Board by Plymouth Township and a citizens' group, The Residents Against Solid Waste Hazards (TRASH), and the appeals were consolidated by the Board at Docket No. 87-352-W. On April 28, 1989, the Board issued an adjudication sustaining the Department's issuance of the plan approval and solid waste permit, TRASH, Ltd. and Plymouth Township v. DER et al., 1989 EHB 487 (TRASH I).[2] During the pendency of the appeal at Docket No. 87-352-W, Dravo and Montgomery County (County) jointly requested the Department to extend the term of the plan approval four months, since by virtue of Condition 4(A), the plan approval would expire on January 23, 1989. This request was granted by the Department on January 23, 1989.

On February 6, 1989, TRASH filed a notice of appeal seeking the Board's review of this plan approval extension, contending that neither Dravo

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[1] The relationship between the Pennsylvania regulations and the federal PSD requirements is explained more fully in Max Funk et al. v. DER and Erie Energy Recovery Company, Inc., EHB Docket No. 87-078-W (Opinion issued on March 1, 1990).

[2] The Board's adjudication was affirmed by the Commonwealth Court, TRASH Ltd. and Plymouth Township v. Department of Environmental Resources, ___Pa. Cmwlth___, 574 A.2d 721 (1990).

nor the Department notified TRASH that a plan approval extension had been requested or granted, despite the fact that the extension related to the appeal then pending at EHB Docket No. 87-352-W. TRASH also alleged that the Department failed to publish notice of its action in the Pennsylvania Bulletin and that, pursuant to Condition 4(A) of the plan approval, Dravo was required to demonstrate that its proposed facility would comply with the BAT criteria in effect at the time of its extension request. This appeal was docketed at No. 89-031-W.

The County filed a petition to intervene in the appeal on March 3, 1989, and the Board granted the petition by order of March 28, 1989.

The County and Dravo filed a joint motion for summary judgment on April 20, 1989, arguing that they were entitled to summary judgment because both the Department's regulations and policies authorized the grant of plan approval extensions. Furthermore, they alleged that such requests were to be evaluated in light of a "good cause" standard and that good cause existed in that the monies escrowed to finance the project could not be released until the Board adjudicated TRASH I.

TRASH opposed the joint motion in an answer filed May 10, 1989, contending that any plan approval extension would have to be evaluated, pursuant to the Department's regulations and condition 4(A) of the plan approval, in light of the then current requirements for BAT; that Dravo had not submitted documentation with its plan approval extension request demonstrating compliance with revised BAT criteria then in effect; and that, therefore, the Department's grant of the plan approval extension was improper.

The County replied to TRASH's answer on May 19, 1989, and Dravo joined in the County's reply on May 25, 1989. The County claimed, inter alia, that Condition 4(A) of the plan approval was amended by the extension and that

a Department PSD policy adopted on May 16, 1989, supported the County's position that it was not necessary for Dravo to submit a BAT analysis with its plan approval extension request.

The County and Dravo further supplemented their motion on June 19, 1989, maintaining that TRASH's appeal was barred by laches in that TRASH was aware of the May 23, 1989, closing on the financing arrangements for the facility, yet failed to seek a supersedeas. TRASH responded to this supplement on June 22, 1989, arguing that the County and Dravo took a risk in proceeding with construction prior to resolution of the litigation.

TRASH then filed its own motion for summary judgment on May 25, 1989, essentially raising the same issues that it did in its response to the motion for summary judgment filed by the County and Dravo.

On June 15, 1989, the County and Dravo filed a joint answer to TRASH's motion for summary judgment, alleging that the only relevant issue now before the Board is whether the Department had "good cause" to grant the extension in accordance with the Board's ruling in Del-AWARE v. DER, 1986 EHB 919. The joint answer averred that the Department had good cause and authority via 25 Pa. Code §127.13 for granting the extension and argued that there is a presumption of regularity when evaluating agency decisions.

The Department then entered the fray by filing a response to TRASH's motion on June 16, 1989. The Department generally supported the joint response of the County and Dravo but, in addition, argued that Condition 4(A) did not preclude it from granting the extension and that such extensions are contemplated and permitted by both Pennsylvania and federal regulations. Finally, the Department defended its finding that good cause existed for granting the extension by pointing out that Dravo and the County demonstrated the impact of continuing litigation on their construction efforts and that the

Department was, at that time, involved in on-going policy development on the extension question.

TRASH then filed a reply memorandum on June 22, 1989, noting an internal memorandum from a Department engineer containing the opinion that Condition 4(A) may have precluded the granting of an extension (TRASH Reply, Ex. A). TRASH argued that the Department's interpretation of Condition 4(A) strips it of meaning, since no permittee would voluntarily opt to re-apply under more stringent BAT guidelines when it may avail itself of the option to extend the plan approval. TRASH contended that 25 Pa. Code §127.13 does not relate to the situation contemplated by Condition 4(A) because Condition 4(A) deals with the situation where the permittee has not begun construction by the expiration date of the plan approval, whereas 25 Pa. Code §127.13 applies to the situation where construction has not been completed by the termination date of the plan approval. TRASH also asserted that the "good cause" standard enunciated in Del-AWARE, supra, was not relevant here and could never, in any case, allow the Department to ignore the conditions of the plan approval and the regulations.

Despite this mound of paper, the Board on March 20, 1990, after reviewing the issues raised in TRASH's motion for summary judgment, ordered the Department, Dravo, and the County to file supplemental briefs on the import of Condition 4(A) of the plan approval.

Dravo, in its April 5, 1990, brief, argued that the grant of the extension was completely consistent with the Department's authority under 25 Pa. Code §127.13 and with the Department's January 18, 1989, interim policy on plan approval extensions. Furthermore, Dravo asserted that Condition 4(A) of the plan approval never came into operation because the plan approval did not expire before the extension was granted. The County raised similar arguments

in its April 5, 1990, supplemental brief, but also asserted that an interpretation of Condition 4(A) requiring continual re-analysis of BAT guielines would be unworkable. The Department's April 13, 1990, supplemental brief essentially reiterates its position concerning its authority to extend plan approvals and then proffers several reasons to justify its decision that good cause existed to extend the plan approval.

As we have stated in Ingram Coal Company et al. v. DER, EHB Docket No. 88-291-F (Opinion issued April 17, 1990), we have the authority to enter summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Here the relevant material facts are not in dispute and we are called upon to determine whether either party is entitled to judgment as a matter of law.

The central issue to be addressed in disposing of the cross-motions is whether the Department could extend the expiration date of the Dravo plan approval without requiring Dravo to submit documentation that its facility met the then-applicable BAT guidelines.

TRASH asserts that the language of Condition 4(A) of the plan approval prohibits the Department from granting Dravo an extension of the plan approval without a demonstration that the facility complies with the then-applicable BAT/BACT guidance.[3] Condition 4(A) of the plan approval provides that:

> If construction of the facility does not commence within 18 months of the date of issuance of this Plan Approval, the approval will become invalid and the permittee shall be required to submit revised applications demonstrating that the proposed facility will comply with all

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[3] TRASH reads our adjudication in TRASH I to support this position. Obviously, the Board did not consider the issue of extensions in that appeal and only noted that, under appropriate circumstances, the facility may have to be re-evaluated in light of changing BAT/BACT guidance.

> requirements contained in any revised Department BAT Criteria Document in effect at the time of resubmission of the application.

While TRASH urges us that Condition 4(A) does not authorize any plan approval extension unless Dravo can demonstrate that the facility will comply with the BAT guidance in effect on January 23, 1989, its argument has merit only if one examines Condition 4(A) in a vacuum.

Indeed, the plan approval itself recognizes the possibility of extensions. Condition 4(B), which immediately follows Condition 4(A) in the plan approval, reads:

> Construction of any proposed facilities covered by this permit cannot occur until required Department approvals and/or permits for the sewerage facilities related to this project have been obtained. If such approvals have not been obtained on or before Jan 23, 1989, this permit if not previously revoked or specifically extended, shall cease and become null and void.
>
> (emphasis added)

Furthermore, Condition 4(A) neither recognizes nor prohibits the granting of an extension. Rather, it deals solely with the situation where the underlying plan approval expires without commencement of construction.

TRASH also contends that the language of 25 Pa. Code §127.13, in particular the last sentence, requires the BAT/BACT analyses before the Department may grant an extension of the plan approval. This regulation[4] provides that:

> Approval granted by the Department will be valid for a limited period of time. At the end of the time, if the construction, modification, reactivation or installation has not been

[4] The last sentence of 25 Pa. Code §127.13 was deleted in an amendment of the regulation published at 19 Pa. Bulletin 1171 (March 18, 1989).

> completed, a new plan approval application or an extension of the previous approval will be required. The Department will not grant any extension unless the application for and the conditions of the previous approval were such that any new approval would be essentially a duplication of the previous approval.

But we cannot interpret this last sentence of 25 Pa. Code §127.13 to require the BAT/BACT demonstration for several reasons.

This regulation applies to plan approvals, in general. However, because Dravo's plan approval also constituted approval under the federal PSD program, 25 Pa. Code §127.13 must be construed in pari materia with the federal regulations governing PSD, since the federal regulations are incorporated by reference into the Department regulations at 25 Pa. Code §127.83. The federal regulation applicable to PSD extensions, 40 CFR §52.21(r)(2), provides that:

> Approval to construct shall become invalid if construction is not commenced within 18 months after receipt of such approval, if construction is discontinued for a period of 18 months or more, or if construction is not completed within a reasonable time. The administrator may extend the 18 month period upon a satisfactory showing that an extension is justified. This provision does not apply to the time period between construction of the approved phases of a phased construction project; each phase must commence construction within 18 months of the projected and approved commencement date.
>
> (emphasis added)

Thus, the applicable federal regulation authorizes the grant of PSD extensions; it does not mandate a BAT/BACT demonstration, but rather leaves it to agency discretion to determine what constitutes justification.

Second, the interpretation suggested by TRASH would eliminate the concept of an extension, since the permittee would have to make the same demonstration to obtain an extension as it would to obtain a plan approval and

may be placed in the untenable position of having to re-design a project when it is substantially complete. This produces a result that is unreasonable and which vitiates the regulation, in contradiction of §1922 of the Statutory Construction Act, 1 Pa. C.S.A. §1922. Such a result also removes all flexibility from the regulatory system. While we have stated that BAT is a constantly evolving concept, Max Funk, supra, the regulatory system must not be so inflexible that it does not recognize the legal, financial, and practical difficulties in undertaking projects of this magnitude.[5] In the absence of such flexibility, no project sponsor, whether public or private, would be willing to undertake the risk of constantly changing parameters for design and construction of a project.

Finally, we are required to accord great deference to the Department's interpretation of 25 Pa. Code §127.13, unless that interpretation is clearly erroneous, County of Schuylkill et al. v. DER and City of Lebanon Water Authority, 1989 EHB 124. The Department interpreted both 25 Pa. Code §127.13 and 40 CFR §52.21(r)(2) in a draft guidance (Ex. C, Joint Motion) and utilized it in deciding Dravo's extension request. Pending the finalization of the draft guidance, the Department authorized short-term extensions of up to four months without a new BAT/BACT review if the permittee had made a good faith effort to start construction. Good faith would be evidenced by "reasonable efforts to resolve legal appeals and litigation related financing problems." (Ex. D, Joint Motion) Because of the reasons above, we cannot hold that the Department's interpretation of its regulations, as articulated

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[5] We do not suggest that numerous and lengthy extensions would be authorized in the absence of re-evaluation of a facility's control technology. Indeed, the Department's refusal to extend the plan approval in Max Funk, supra, where the permittee did not commence construction and was looking at other control technology in the meantime is an example of such a circumstance.

in this draft guidance is clearly erroneous, so we are required to accord it deference.

Having determined that an extension may be granted without requiring a BAT/BACT re-evaluation, we must next ascertain what standards are applicable to the grant of an extension. The County and Dravo argue that a simple "good cause" standard as articulated in Del-AWARE, supra, is applicable, while TRASH contends that the good cause standard is inapplicable here because the appellant in Del-AWARE was prohibited from initiating construction and its permit did not have a condition similar to Condition 4(A). It is not necessary to decide whether the Del-AWARE good cause standard is the proper standard, for the regulations contain the standards - whether the new approval is essentially a duplication of the existing approval (25 Pa. Code §127.13) and whether the extension is justified[6] (40 CFR §52.21(r)(2), as incorporated by 25 Pa. Code §127.83).

TRASH does not dispute the existence of ongoing litigation concerning the facility, although it assails the decision of Dravo not to proceed with construction during the pendency of the litigation. As to whether the conditions of the plan approval as extended are identical to those of the plan approval, TRASH's only contention is a legal argument that new BAT /BACT requirements should be applied. Since we have held that the Department was not required to apply revised BAT/BACT requirements and there is no other factual assertion that the application for and conditions of the extended plan approval, with the exception of the expiration date, are not identical to those for the original plan approval (Ex. H, TRASH Motion, Ex. D; Joint Answer

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[6] The difference between the "good cause" standard of Del-AWARE and the "justified" standard in 40 CFR §52.21(r)(2) is, we believe, purely semantic.

to TRASH Motion), there are no disputes concerning the material facts which formed the basis for the Department's conclusion that the extension of the plan approval was justified and that the conditions were essentially the same as proposed in the original approval.

Since the only dispute between the parties is whether the Dravo plan approval extension request should have been judged in light of the BAT/BACT requirements in effect at the time the extension was requested and we have decided that the Department had the authority to grant an extension without Dravo making a demonstration that its facility complied with the then applicable BAT/BACT requirements, Dravo and the County are entitled to judgment as a matter of law.[7]

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[7] In light of this ruling, we need not address the assertions of Dravo and the County that TRASH's appeal here is barred by laches.

ORDER

AND NOW, this 20th day of December, 1990, it is ordered that:

1) The motion for summary judgment of TRASH, Ltd. is denied;

2) The joint motion for summary judgment of the County and Dravo is granted; and

3) The appeal of TRASH, Ltd. is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

Member Terrance J. Fitzpatrick files a dissenting opinion.

DATED: December 20, 1990

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

T.R.A.S.H., Ltd.	:	
	:	
v.	:	**EHB Docket No. 89-031-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 20, 1990
and DRAVO ENERGY RESOURCES, Permittee	:	
and COUNTY OF MONTGOMERY, Intervenor	:	

DISSENTING OPINION OF BOARD MEMBER
TERRANCE J. FITZPATRICK

The Board's decision here, like the DER decision it affirms, may be sound from a policy perspective. I am compelled to dissent, however, because I do not believe either decision can be squared with the law.

This appeal involves a four-month extension of a plan approval granted on January 23, 1989 by DER to Dravo Energy Resources and Montgomery County. The plan approval was for construction of an incinerator in Plymouth Township, Montgomery County. At the time DER granted the extension, the relevant regulation provided:

> Approval granted by the Department will be valid for a limited period of time. At the end of the time, if the construction, modification, reactivation or installation has not been completed, a new plan approval application or an extension of the previous approval will be required. The Department will not grant any extension unless the application for and the conditions of the previous approval were such that any new approval would be essentially a duplication of the previous approval.

25 Pa. Code §127.13.[1] The key language here is the last sentence. It requires us to ask whether the conditions upon a new approval, at the time of the extension request, would be the same as those placed upon the previous approval. In this case, the conditions would not be the same, because as the Appellant points out, and the other parties do not refute, the emission limits under the BAT criteria became more stringent on November 9, 1987 (DER's original plan approval was issued on July 23, 1987). Thus, a new plan approval issued on January 23, 1989 would have applied the BAT criteria which became effective on November 9, 1987. None of the elegantly crafted arguments set forth by Dravo regarding EPA's regulations, deference to an agency's interpretations of its own regulations, or DER's reliance upon an internal policy document, should distract us from the clear language of 25 Pa. Code §127.13. Moreover, deference to an agency's interpretation of its regulations does not compel us to accept an interpretation which is clearly erroneous.[2]

I recognize the policy problem which the last sentence of §127.13 poses. No doubt, recognition of this problem is why the EQB has now deleted

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[1] The last sentence of this section was deleted on March 18, 1989, after the DER decision at issue here.

[2] DER argues that the last sentence of 25 Pa. Code §127.13 was satisfied here because the "conditions of the Plan Approval and the extension were essentially duplicative...." (DER Supplemental Brief filed April 16, 1990, ftnote 8). The answer to this assertion is that the last sentence of §127.13 does not ask whether the conditions of the extension duplicate those of the previous approval, the last sentence asks whether the conditions of "any new approval would be essentially a duplication of the previous approval." (emphasis supplied). It is obvious that this language required DER to treat the extension request like a request for new approval for purposes of determining whether the conditions were sufficient.

this language. But I cannot eviscerate the language in this case in order to reach a result which I might regard as just.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: December 20, 1990

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M. DIANE SMITH
SECRETARY TO THE BOAF

PLYMOUTH TOWNSHIP	:	**EHB Docket No. 89-040-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES,	:	
DRAVO ENERGY RESOURCES of MONTGOMERY	:	
COUNTY, Permittee	:	
and	:	**Issued:** December 20, 1990
COUNTY OF MONTGOMERY, Intervenor	:	

OPINION AND ORDER SUR
MOTION FOR SUMMARY JUDGMENT

By Maxine Woelfling, Chairman

Synopsis

The Board grants summary judgment and dismisses an appeal of the Department of Environmental Resources' (Department) extension of the expiration date of an air quality plan approval. Since the parties adopted the motions and responses filed in a companion case at Docket No. 89-031-W, the Board grants summary judgment here for the same reasons it is doing so this same date at Docket No. 89-031-W.

OPINION

This matter was initiated with the February 22, 1989, filing of a notice of appeal by Plymouth Township (Township), Montgomery County, seeking the Board's review of the Department's January 23, 1989, extension of the expiration date of a plan approval issued to Dravo Energy Resources of Montgomery County (Dravo). The plan approval, which was originally issued on July 23, 1987, authorized the construction of a 1200 ton per day municipal

waste incinerator in the Township.[1] The Township alleged the Department had committed an abuse of discretion in issuing the plan approval extension by not providing the Township with notice of and an opportunity to comment upon Dravo's request for the extension and by not requiring Dravo to assure that the incinerator would control air emissions in accordance with the current Best Available Technology/Best Available Control Technology guidance.

The County of Montgomery (County) petitioned to intervene in the matter on March 16, 1989, and the Board granted its petition by order dated May 2, 1989.

On June 14, 1989, the County filed a motion for summary judgment, incorporating by reference its motion for summary judgment in TRASH, Ltd. v. DER et al., EHB Docket No. 89-031-W, an appeal of the same plan approval extension by TRASH, Ltd. The Township responded to the County's motion on June 29, 1989, by adopting the response of TRASH, Ltd. to the County's motion for summary judgment at Docket No. 89-031-W. Dravo joined in the County's motion on July 12, 1989.

Since we are, in an opinion and order of this date, granting the motion for summary judgment of the County and Dravo at Docket No. 89-031-W, and both the motion and response at Docket No. 89-031-W are incorporated at this docket, we will grant the motion for summary judgment filed by the County

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[1] The Township previously appealed the issuance of the plan approval and a related solid waste management permit, and its appeal was dismissed by the Board in TRASH et al. v. DER et al., 1989 EHB 487. The Commonwealth Court sustained the Board's adjudication in TRASH, Ltd. and Plymouth v. Department of Environmental Resources, ___Pa.Cmwlth___, 574 A.2d 721 (1990).

and Dravo at this docket.[2]

O R D E R

AND NOW, this 20th day of December, 1990, it is ordered that the motion for summary judgment of the County of Montgomery and Dravo Energy Resources of Montgomery County is granted and the appeal of Plymouth Township is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

Member Terrance J. Fitzpatrick dissents for the reasons set forth in his dissenting opinion at Docket No. 89-031-W.

DATED: December 20, 1990

cc: See following page.

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[2] Since we are granting the motion for summary judgment and dismissing the Township's appeal, it is unnecessary for us to decide the motion to dismiss the Township's appeal for lack of prosecution which was filed by the County and Dravo.

EHB Docket No. 89-040-W

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

BOBBI L. FULLER et al.	:	**EHB Docket No. 89-142-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
PARADISE TOWNSHIP SEWER	:	
AUTHORITY, Permittee	:	**Issued:** December 20, 1990

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

By Maxine Woelfling, Chairman

Synopsis

Third party appeals of various water quality permits are dismissed where Appellants fail to sustain their burden of proving that the Department of Environmental Resources (Department) committed an abuse of discretion.

Where the Appellants challenge the transfer of a water quality management permit and a National Pollutant Discharge Elimination System (NPDES) permit and the only term or condition of the permits altered in the transfer is the identity of the permittee, Appellants cannot challenge the propriety of the underlying terms and conditions of the permits. Since Appellants failed to present any evidence why the Department abused its discretion in transferring the permits, their appeals must be dismissed.

Appellants' challenge to the Department's issuance of a water quality management permit to construct a sewage treatment plant must likewise be dismissed where they have not sustained their burden of proof. The permit is consistent with the applicable official sewage facilities plans and complies

with 25 Pa.Code §§91.24 and 91.31 where its capacity is sufficient to serve the residences and other buildings which will be connected to it over a five to ten year period. The capacity is still sufficient to serve present and future needs where an adjoining municipality proposes hooking into the system if an inter-municipal agreement can be reached.

Other issues raised by the Appellants are outside the scope of this appeal. Appellants cannot challenge the flooding impacts of the treatment facility where they did not appeal an encroachments permit issued simultaneously with the water quality management permit. Appellants may not contend that the Department committed an abuse of discretion in not considering alternative locations for the treatment facility, since that issue is appropriately addressed in the sewage facilities planning phase of the project. Appellants are also precluded from challenging the impact of the treatment plant on historic resources where they raised the issue for the first time in an amended pre-hearing memorandum filed six days before the hearing on the merits.

The Department's Sewerage Manual does not have the binding effect of a regulation, although it is to be regarded as an expression of good sanitary engineering practices. The treatment plant is consistent with the Sewerage Manual's recommendations concerning flood effects and noise, odor, and air quality impacts. Furthermore, the permittee has undertaken extensive efforts to minimize any of these effects. Finally, the treatment plant will have little impact on traffic.

INTRODUCTION[1]

This matter was initiated with the May 22, 1989, filing of a notice of appeal by Bobbi L. Fuller, Darryl Wilson, and the Paradise Township Citizens Association (Appellants) seeking review of the Department's April 28, 1989, issuance of an amendment to NPDES Permit No. PA 0083470 (NPDES permit). The amended NPDES permit was issued to the Paradise Township Sewer Authority (Authority) and approved a discharge to Pequea Creek from the Authority's proposed sewage treatment facility in Paradise Township, Lancaster County. This appeal was docketed at No. 89-142-W.

On the same date, Appellants also sought the Board's review of the Department's April 28, 1989, issuance of Water Quality Management Permit No. 3688468 (treatment plant permit) to the Authority; the permit authorized the construction and operation of the Authority's sewage treatment plant in Paradise Township. This appeal was docketed at No. 89-144-W. The Department's April 28, 1989, transfer of Water Quality Management Permit No. 3687424-T1 (sewer permit) from Paradise Township to the Authority was also challenged by the Appellants in a May 22, 1989, appeal docketed at No. 89-145-W. By order dated June 5, 1989, the three appeals were consolidated at Docket No. 89-142-W.

All three of the notices of appeal set forth the same objections to the Department's actions. Appellants alleged that the Department's approval was not in accordance with §41.2 of the Department's Sewerage Manual; that the Department failed to consider the possible emission of airborne pathogens from the proposed plant; that the Department failed to consider safety problems resulting from the closing of Singer Avenue; that the Department failed to

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[1] Because of the nature of several pre-hearing rulings in this matter, a more exhaustive recitation of the procedural history is provided.

consider the flooding impact of the plant; that the Department did not consider alternative locations for the plant; that the Department failed to adequately consider the transfer of the permit to the Authority from Paradise Township; and that the Department otherwise failed "to act in accordance with departmental rules, regulations, applicable statutes, and guidelines." All of these deficiencies, Appellants argued, constituted an abuse of discretion and a violation of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* (Clean Streams Law), the federal Clean Water Act, 33 U.S.C. §1251 *et seq.*, and Article I, §27 of the Pennsylvania Constitution.

The Authority moved to dismiss the appeal on November 1, 1989, as a sanction for Appellants' failure to comply with the Board's discovery orders and for failure to prosecute. In support of this request, the Authority asserted that Appellants had failed to pursue discovery after the Board had extended the discovery period in response to their requests. The Board denied the motion in an order dated November 28, 1989, pointing out that a party's failure to pursue discovery was not necessarily evidence of a lack of intention to prosecute its appeal.

By order dated May 2, 1990, a hearing on the merits was scheduled for June 11-13, 1990. On June 5, 1990, Appellants filed a motion for a view, along with an amendment to their pre-hearing memorandum. This amendment added four contentions: the Department failed to address the potential for adverse environmental impacts on wetlands as a result of the construction of the sewage treatment plant; the Department failed to consider and address the sewage treatment plant's adverse effect on nearby historic and architectural resources; the Department failed to balance the economic benefit of locating the plant against the adverse environmental impacts, in violation of Article

I, §27 of the Pennsylvania Constitution; and the location and design of the plant violated federal, state, and local rules, regulations, and ordinances regarding floodplain management. The amendment also listed additional expert and fact witnesses.

The Department moved to quash subpoenas requested by Appellants for Jack Ford, an employee of the Bureau of Dams and Waterways Management, and Timothy J. Finnegan, an employee of the Bureau of Water Quality Management, on the grounds that their testimony would be irrelevant and inadmissible. More specifically, the Department argued that neither was involved in the issuance of the three permits which were the subject of the appeals and that Appellants were, in essence, mounting an impermissible collateral attack on the Department's April 15, 1990, approval of the Paradise Township official sewage facilities plan (official plan) which Finnegan was involved in, and the Department's April 28, 1989, issuance of Water Obstructions and Encroachments Permit No. E36-296 (encroachments permit), with which Ford was involved.[2] The Department also sought to quash the subpoenas issued on Appellants' behalf to Edward J. Ruch, another employee of the Bureau of Water Quality Management, and Mr. Ford for the reason that Appellants had listed both individuals as expert witnesses in their amended pre-hearing memorandum and they could not be compelled to testify as expert witnesses.

On that same date, the Authority filed a motion to strike Appellants' amended pre-hearing memorandum on the basis that Appellants had failed to raise three of the additional four issues (wetlands impact, effect on historic and architectural resources, and failure to balance economic and social

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[2] Appellants had not sought the Board's review of either of these actions. The date of the Department's approval of the Paradise Township official plan appears to be incorrect, but we have taken the date from the Department's motion.

benefits against adverse environmental impacts) in either their notices of appeal or their initial pre-hearing memorandum. In addition, the Authority contended that the amendment, which was filed six days before the hearing, was unfair and prejudicial.

Appellants responded to the motion to quash on June 8, 1990, arguing that they were not seeking to collaterally attack the Department's approval of the Paradise Township official plan or its issuance of the encroachment permit and that, "What happened in other programs in this matter,...is relevant to this permit and Appellants have the right to elicit testimony from employees of the Department." Appellants also denied that they were seeking to compel Department employees to testify on their behalf as experts and that the testimony of Messrs. Ruch and Ford, of necessity, involved a mixture of fact and opinion testimony. Finally, they asserted that the listing at this time of the three Department employees as witnesses was not unfair.

Appellants also responded to the Authority's motion to strike on June 11, 1990, denying that, with the exception of wetlands, the issues raised in their amended pre-hearing memorandum were not within the scope of their notices of appeal.

The Board heard arguments on the motions to quash and to strike at the beginning of the June 11, 1990, hearing on the merits. The motion to quash was granted with respect to Messrs. Ford and Finnegan because their testimony would be, at the time, prejudicial and unfair and because the subject of their testimony was precluded by Appellants' failure to challenge the approval of the official plan or the issuance of the encroachments permit. The motion to strike was also granted on the grounds that the Appellants had failed to raise these issues in their notices of appeal, Pennsylvania Game Commission v. Department of Environmental Resources, 97 Pa.Cmwlth 78, 509 A.2d

877 (1986), rev'd on other grounds, ___Pa.___, 555 A.2d 812 (1989). These rulings were confirmed in a June 19, 1990, order, which is herewith adopted by the Board.[3]

Appellants filed their post-hearing brief on August 17, 1990, generally arguing that the Department did not comply with the requirements 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.* (Sewage Facilities Act), its regulations, and the Sewerage Manual. Appellants also raised five specific issues: failure to consider negative health impacts from noise, odor, and airborne pathogens in allowing the siting of a sewage treatment plant less than 250 feet away from residences; failure to consider whether the sewage treatment plant was compatible with the present and future land uses; failure to consider potential harm from siting the sewage treatment plant in an established floodway; the failure to consider alternative locations for the sewage treatment plant; and failure to consider impacts from increased traffic to and from the sewage treatment plant.

The Authority filed its post-hearing brief on September 19, 1990, contending generally that Appellants had failed to satisfy their burden of proof in demonstrating that the Department had abused its discretion and

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[3] The Board also issued a June 19, 1990, order granting Appellants' June 5, 1990, motion for view in part. Although the view was opposed by the Authority as being unnecessary, the parties stipulated at the hearing that Board Chairman Woelfling, in light of her familiarity with the area, could conduct a view of the area unaccompanied by the parties in order to spare time and expense. That view was conducted on August 25, 1990.

specifically addressing each of Appellants' contentions.[4]

The Department, consistent with its practice regarding third party appeals, advised the Board on August 27, 1990, that it would not file a post-hearing brief.

Finally, in response to the Authority's October 31, 1990, motion to expedite the Board's decision, the adjudication of this appeal is being expedited as a result of certain financing strictures faced by the Authority.[5]

Consistent with our precedent, we will deem all issues not raised in the parties' post-hearing briefs to be waived, John Percival v. DER, EHB Docket No. 83-094-W (Adjudication issued September 13, 1990).

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

FINDINGS OF FACT

1. Appellants are Bobbi L. Fuller, who resides at 3809 Lincoln Highway East, Paradise, Pennsylvania 17562; Darryl Wilson, who resides at 9

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[4] Thereafter, Appellants filed a reply brief on October 4, 1990, and the Authority, with the Board's permission, filed a sur-reply brief on November 8, 1990.

[5] The Authority, on that same date, filed a motion to supplement the record with final Federal Emergency Management Agency (FEMA) flood elevations and the approved Leacock Township official plan. This motion was opposed by the Appellants and it was denied in a November 23, 1990, opinion and order because the Authority had failed to satisfy the requirements of 25 Pa.Code §21.122 and it would be prejudicial to Appellants unless they were given an opportunity to cross-examine on the documents. The opinion noted that it would also be impossible to satisfy the Authority's request for an expedited decision if any further testimony were taken.

North Singer Avenue, Gordonville, Pennsylvania 17562; and the Paradise Township Citizens Association, which has a mailing address of 3809 Lincoln Highway East, Paradise, Pennsylvania 17562.

2. Members of the Paradise Township Citizens Association include 42 individuals who reside in the area to be sewered and 18 others concerned about siting a sewage treatment plant in a floodway; the members are both residents and non-residents of Paradise Township (N.T. 129, 156).[6]

3. Appellee is the Department, the agency of the Commonwealth with the authority to administer the Clean Streams Law, the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 *et seq.* (Dam Safety Act), the Flood Plain Management Act, the Act of October 4, 1978, P.L. 851, as amended, 32 P.S. §679.101 *et seq.* (Flood Plain Management Act), the Sewage Facilities Act, and the rules and regulations adopted thereunder.

4. Permittee is the Authority, which has a mailing address of 196 Blackhorse Road, P. O. Box 40, Paradise, Pennsylvania 17562.

5. On July 4, 1987, the Department issued the NPDES permit to Paradise Township; the permit authorized Paradise Township to discharge 0.12 million gallons per day (MGD) of effluent into Pequea Creek (Ex. P-13).

6. Appellants did not appeal the issuance of the NPDES permit to Paradise Township (N.T. 221).

7. On April 29, 1989, the Department issued an amendment to the NPDES permit authorizing the transfer of the permit from Paradise Township to

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[6] "N.T." refers to notes of testimony from the June, 1990 hearing; "Ex.B-" denotes Board exhibits; "Ex.A-" denotes Appellants' exhibits, and "Ex.P-" denotes the Authority's exhibits.

the Authority; there were no other changes to the terms and conditions of the permit (N.T. 213; Ex. A-27 and P-14).

8. Appellants filed a timely appeal of the issuance of the amended NPDES permit (Notice of Appeal).

9. On June 30, 1987, the Department issued the sewer permit to Paradise Township; it authorized the construction of sewers and appurtenances to serve Phases 1, 2, and 3 of the Paradise sewer project (N.T. 214).

10. Appellants did not appeal the issuance of the sewer permit.[7]

11. On April 28, 1989, the Department approved the transfer of the sewer permit from Paradise Township to the Authority; no other terms or conditions of the sewer permit were altered (N.T. 214; Ex. P-15).

12. Appellants filed a timely appeal of the transfer of the sewer permit (Notice of Appeal).

13. On April 28, 1989, the Department issued the encroachments permit to the Paradise Township Supervisors; the permit, which authorized the deposition of "fill for a sewage treatment plant within the 100-year floodway of Pequea Creek located at a point approximately 1000 feet upstream of U.S. Route 30," was issued pursuant to the Clean Streams Law, the Dam Safety and Encroachments Act, and the Flood Plain Management Act (Ex. B-1).

14. Appellants did not file an appeal from the issuance of the encroachments permit (N.T. 8).

15. On April 29, 1989, the Department issued the treatment plant permit to the Authority; it authorized the construction and operation of a 0.12 MGD extended aeration activated sludge sewage treatment plant in the Village of Paradise (N.T. 40; Notice of Appeal).

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[7] There is no record citation for this finding. The Authority states this at page two of its post-hearing brief and Appellants have not disputed it.

16. Appellants filed a timely appeal from the issuance of the treatment plant permit.

Transfers of the NPDES Permit and the Sewer Permit

17. In reviewing permit transfers the Department determines whether the transferor and the transferee properly completed and executed the application form for permit transfer (N.T. 213).

18. Paradise Township and the Authority properly completed and executed the application for permit transfer (N.T. 213).

19. Appellants presented no evidence concerning why the transfers of the NPDES permit and the sewer permit from Paradise Township to the Authority were an abuse of discretion.

Treatment Plant Permit

20. When a Bureau of the Department receives a permit application for a proposed project or activity, other Bureaus are advised of it through the circulation of what is known as a Form 1 (N.T. 32).

21. Where a project involves both an NPDES permit and a water quality management permit, the Department routinely issues the permits simultaneously; the NPDES permit was issued before the treatment plant permit in this case (N.T. 38-39).

22. The Form 1 is not circulated to the Bureau of Dams and Waterways Management; an applicant must obtain any necessary approvals under the Dam Safety and Encroachments Act or the Flood Plain Management Act directly from the Bureau of Dams and Waterways Management, as was the case here (N.T. 32-33).

23. The Bureau of Dams and Waterways Management has primary responsibility for reviewing applications involving obstructions in the floodplain (N.T. 46).

24. The Bureau of Water Quality Management and the Bureau of Dams and Waterways Management communicated throughout the course of their reviews of the treatment plant and encroachments permit applications (N.T. 33, 219).

25. The Department did not conduct a public hearing on the Authority's application for the treatment plant permit (N.T. 174, 230).

26. In the course of its review of the treatment plant permit application the Department was aware of a citizens group opposed to the construction of the sewage treatment plant (N.T. 208).

27. The Department received a petition containing the signatures of 265 individuals who were in favor of construction of the plant (N.T. 208).

28. The concerns of those opposed to the sewage treatment plant were forwarded to the appropriate agencies for response before the Department issued the treatment plant permit (N.T. 209).

29. The Department conducted an on-site inspection of the proposed site for the sewage treatment plant (N.T. 200).

30. When the Department reviews a water quality management permit application and its supporting plans, specifications, and documentation, the Department determines whether the application is in conformance with the applicable rules and regulations and is consistent with the Sewerage Manual (N.T. 32, 198, 210).

31. The purpose of the Sewerage Manual is to provide guidelines for the design and operation of sewage treatment facilities which reflect good sanitary engineering practices (N.T. 209-210).

32. The Sewerage Manual is an adaptation of the so-called Ten States Standards and is utilized in various forms in other states (N.T. 210).

33. The Department did not consider alternative locations for the sewage treatment plant in its review of the treatment plant permit application

because that issue is evaluated in the sewage facilities planning for the project (N.T. 229).

34. Several other locations for the plant were considered in the planning process (N.T. 140-141; Ex. A-6).

35. Although Edward Ruch, the reviewing engineer, did not review the Paradise Township official plan, he discussed the permit application's consistency with the Paradise Township official plan with the Planning Section of the Bureau of Water Quality Management's Harrisburg Regional Office (N.T. 40, 41, 73).

36. Mr. Ruch was advised that the permit application was consistent with the Paradise Township official plan (N.T. 41).

37. Mr. Ruch did not review the Leacock Township official plan during the course of his review of the water quality management permit application (N.T. 41).

38. The Leacock Township official plan sets forth as an alternative a proposal that sewage from the so-called Gordonville basin be treated at the Authority's treatment plant if an intermunicipal agreement could be negotiated between the Authority and Leacock Township (N.T. 287, 294).

39. Likewise, the Paradise Township official plan addresses the possibility of servicing part of the Gordonville basin, specifically a trailer park and a motel/restaurant (N.T. 287).

40. If no agreement regarding the Gordonville basin is reached, its sewage flows will be treated at a proposed treatment plant in Leacock Township (N.T. 287, 294).

41. At the time of the hearing on the merits, there was no agreement between Leacock Township and the Authority for the treatment of sewage from the Gordonville basin (N.T. 288).

42. The Sewerage Manual recommends that a treatment plant be designed to provide for an estimated population 15 to 25 years hence, except where the capacity of the treatment units can be readily increased (N.T. 99; Ex. A-30).

43. The treatment plant's service area includes the Village of Paradise and its extended areas, and is consistent with the ten year planning phase of Paradise Township's official plan (N.T. 284-285).

44. The Paradise Township official plan has eleven phases; Phases 1 through 8 will be connected to the treatment plant over the next five to ten years and, when completed, will serve 332 equivalent dwelling units (EDUs) (N.T. 284-285; Ex. A-6).

45. Although the design criteria is to assume 350 gallons per day per EDU, actual flow figures from sewage treatment plants in similar areas indicate that 210 gallons per day per EDU is a more realistic flow figure (N.T. 285-286).

46. When all 332 EDUs in the Village of Paradise are connected, the treatment plant will have 3800 gallons per day remaining capacity, using the 350 gallons per day per EDU design flow, and 50,280 gallons per day remaining capacity, utilizing the 210 gallons per day per EDU design flow.

47. When and if a portion of the Gordonville basin in Leacock Township is added to the plant's service area, 18,000 gallons per day of capacity would be needed for the area (N.T. 287).

48. The Department considered plant expansion in its review of the permit application (N.T. 201).

49. The proposed site for the plant is approximately two-thirds of an acre (N.T. 55).

50. While the area for plant expansion is somewhat limited and would be in the direction of the Garland Hoover residence, the modular design of the plant is such that it can be readily expanded (N.T. 140, 201).

51. The plans and specifications for the sewage treatment plant indicated areas for expansion through the addition of three treatment units (N.T. 286).

52. The three treatment units would add 30,000 gallons per day of capacity (N.T. 286).

53. Any expansion of the treatment plant would require another permit from the Department (N.T. 76).

54. The plant is to be located in the floodway of Pequea Creek (N.T. 45-46).

55. It is not unusual for a sewage treatment plant to be sited in a floodplain because floodplains are low-lying areas and treatment plants receive sewage through collection lines and interceptors which convey sewage by gravity (N.T. 46, 237).

56. Locating the treatment plant outside the floodplain would be costlier, since larger pumps, force mains, and additional construction would be required to convey the sewage to the treatment plant (N.T. 238).

57. The treatment plant's impact on the floodplain was considered by the Bureau of Dams and Waterways Management in its review of the encroachments permit application (N.T. 206).

58. The only flooding impacts considered by the Bureau of Water Quality Management in its review of the treatment plant permit application were whether the treatment works and electrical and mechanical equipment were

protected from physical damage during a 100-year flood event and whether the plant was fully operational and accessible during a 25-year flood event (Ex. A-30).

59. The Sewerage Manual recommends that the floor elevation of a sewage treatment facility be above the 100 year flood elevation (N.T. 34; Ex. A-30).

60. According to FEMA studies, the 100-year flood elevation at the site of the treatment plant is 349.1 feet (N.T. 281).

61. The design elevation for the first floor of the control room and the tops of the treatment tanks is 351 feet (N.T. 281).

62. With the addition of the fill required for construction of the plant, the 100-year flood elevation at the site will be increased by .1 to .15 feet, or to 349.2 to 349.25 feet (N.T. 282).

63. After adjusting for the fill, the elevations of the first floor of the control building and the tops of the treatment tanks will be at least 1.7 feet above the 100-year flood elevation (N.T. 282-283).

64. Although the flood studies performed by the Authority for FEMA for purposes of HUD financing and for the Department for purposes of the encroachments permit application were based upon different models, standards, and criteria, the results are not inconsistent (N.T. 264).

65. The Department and FEMA employ different scientific assumptions in analyzing floodplain impacts (N.T. 263, 264).

66. The Department will accept either the Waterflo-Plus or HEC-2 computer model for the hydrologic and hydraulics report which must be submitted with an encroachments permit application, while FEMA will not accept the Waterflo-Plus model (N.T. 237, 250-251, 257).

67. The Authority's flood studies accounted for the fill needed to elevate and relocate part of Singer Avenue (N.T. 261).

68. Flood studies utilizing the Waterflo-Plus computer model indicated a .1 foot rise in the 100-year flood elevation at the site as a result of the proposed fill (N.T. 249).

69. Flood studies performed with the HEC-2 computer model indicated a .1 to .15 foot rise in the 100-year flood elevation at the site due to the proposed fill (N.T. 261).

70. The conclusions from the Waterflo-Plus modeling and the HEC-2 modeling do not conflict (N.T. 248-249).

71. Based upon the design elevations submitted by the Authority, the treatment plant is not likely to flood in a 100-year flood event (N.T. 226).

72. The plant is capable of operating during a 100-year flood event because the tops of the treatment tanks are above the 100-year flood elevation, as are the pumps and the blowers (N.T. 228, 283).

73. An emergency generator is available in the event of a power outage during a flooding event (N.T. 283).

74. Sewage will not spill over the tanks in the event of a 100-year flood event (N.T. 283-284).

75. Concrete anti-flotation collars will be used to prevent the treatment tanks, equalization tanks, and sludge tanks from floating during a flood event (N.T. 283-284).

76. The Authority submitted documentation to the Department concerning evacuation procedures (motor boat and early warning system) at the plant site during a flooding event, and the Department concluded the procedures were acceptable (N.T. 69, 206-207, 234; Ex. A-30).

77. The design of the plant is such that it will allow the plant to remain operational and not sustain any permanent damage in a 100-year flood event (N.T. 207).

78. Expansion of the plant through the addition of modular units at grade will not require additional fill (N.T. 231-232, 287).

79. Appellants' expert witness, John G. Fuehrer, concurred that the plant would be built above the 100-year flood elevation, although he didn't know by how much, since he didn't have complete information on flood elevations and hadn't had sufficient time to review the information he was given (N.T. 120, 121-123).

80. Mr. Fuehrer concurred that expanding the plant to 150,000 gallons per day by the addition of three treatment tanks would not require additional fill (N.T. 101).

81. The Sewerage Manual recommends that sewage treatment facilities be located further than 250 feet from the nearest residence (N.T. 49-50; Ex. A-30).

82. Where a proposed sewage treatment facility is to be sited less than 250 feet from residential structures, the Sewerage Manual recommends that special consideration be given to odors, noise, and air quality (N.T. 49-50; Ex. A-30).

83. There are two residences within 250 feet of the proposed plant, one of which is unoccupied (N.T. 49, 53, 55, 102, 269).

84. The home of Garland Hoover is located 218 feet from the property line of the site of the proposed plant; the distance from the Hoover residence to the treatment plant itself is not known (N.T. 129).

85. Mr. Hoover's residence is located on the downside of the prevailing winds and is in a basin where smoke, odors, and air pollution may collect under certain weather conditions (N.T. 132).

86. The residence of Reynold A. Schenke is approximately 400 feet from the site of the proposed treatment plant and 260 feet from Pequea Creek (N.T. 156-157).

87. The residence of Bobbi L. Fuller is in an apartment building approximately 500 feet from the site of the proposed treatment plant (N.T. 182-183).

88. The residence of Darryl D. Wilson is approximately 250 feet from the site of the proposed plant (N.T. 189-190).

89. Messrs. Hoover, Schenke, and Wilson and Ms. Fuller are concerned about the negative esthetic impact of having a sewage treatment plant visible from their residences (N.T. 134, 160-161, 184, 190-191).

90. Mr. Hoover is particularly concerned about visual impacts because of the visibility of the control building, which is 20 feet high and will be built on a ten feet mound of earth (N.T. 134).

91. The Department does not directly consider visual impacts when it reviews applications for water quality management permits (N.T. 218).

92. The Authority has developed a landscape plan to reduce the visual impact of the treatment plant (N.T. 275).

93. Pine trees will be planted at the base and sides of the embankment, while arborvitae will be planted around the fence at the top of the embankment (N.T. 275).

94. In response to a request from the Pennsylvania Historic and Museum Commission (Historic and Museum Commission), the Authority will also

plant pine trees along the side of the facility facing Pequea Creek (N.T. 301).

95. The largest source of noise at the treatment plant will be the blowers, which blow air into the activated sludge biological treatment process (N.T. 269).

96. The blowers will run 24 hours a day (N.T. 300).

97. The design of the proposed treatment plant incorporates mufflers on the intake and exhaust of the blowers and vegetative screenings to reduce the noise levels (N.T. 202, 269).

98. The blowers will be enclosed in the insulated control building to further reduce noise; the location of this building was also shifted from one side of the site to the other so that it would be greater than 250 feet from the nearest residence (N.T. 269, 270).

99. At a distance of 50 feet from the control building, the sound level created by the blowers will be no more than a hum (N.T. 270).

100. Because the treatment plant uses the extended aeration biological treatment process, the risk of odors is minimized by the introduction of air into the system (N.T. 117, 271).

101. Chemical dosing facilities to inject odor-eliminating chemicals are also included in the plant's design (N.T. 271).

102. Because of the direction of the prevailing winds and the proximity of residences, the design of the plant incorporates screening and odor control facilities (N.T. 274-275).

103. Screening the plant site with vegetation and fences, as is provided for in the design, will block the wind, thereby containing odor incursions on the site (N.T. 272).

104. The plant's design also proposes that 40% of the surface area of the treatment tanks be covered; the tanks are designed so that they may be completely covered if odors prove to be a problem (N.T. 272).

105. Since sludge from the plant will not be processed at the plant, the potential for odors will be greatly reduced (N.T. 270-273).

106. While the water quality management permit indicates that septage would be accepted at the plant, no decision has been reached on whether to allow septage haulers to dump septage at the plant (N.T. 61, 274).

107. The plant site is surrounded by farmland (N.T. 273).

108. Odors from the wastewater treatment plant are less severe than odors from agricultural practices such as manure spreading (N.T. 273).

109. The Department was satisfied that the Authority had adequately addressed the issue of mitigating odors (N.T. 60).

110. Mr. Fuehrer, Appellants' expert, and Mr. Schenke acknowledged that if the plant were properly operated, there will be little risk of odors (N.T. 117, 162, 170).

111. During the course of its review of the treatment plant permit application, the Department considered air quality effects, including the emission of airborne pathogens (N.T. 203).

112. The Sewerage Manual contains no specific recommendations regarding airborne pathogens (N.T. 278).

113. Mr. Ruch, the Department's review engineer, raised the issue of airborne pathogens after attending a training course on the health risks associated with working at a sewage treatment plant; Mr. Ruch was concerned about possible effects on individuals residing within 250 feet of a sewage treatment plant (N.T. 62-62; Ex. A-3 and A-10).

114. After discussing the issue with his supervisor, Mr. Corriveau, Mr. Ruch requested the Authority to address how it would mitigate against the potential emission of airborne pathogens (N.T. 205).

115. The literature regarding health impacts of airborne pathogens from sewage treatment plants concerns effects on employees working within the plants and not off-site effects (N.T. 277-278).

116. Studies indicate that there are no proven health effects on treatment plant operators who come in contact with the sewage and who are on-site eight hours per day for 365 days a year (N.T. 278).

117. In response to the Department's request, the Authority incorporated vegetative screens and fencing and grating for the treatment tanks to minimize the possibility of creating aerosols in the treatment process (N.T. 205).

118. The aeration process for the plant involves the use of diffused air, rather than surface aerators, thereby minimizing spraying action (N.T. 276).

119. Air emissions will be further minimized by grating on the treatment tanks, the placement of dividers, perimeter lips and 40% cover on the treatment tanks (N.T. 40, 277).

120. The vegetative plantings along the cyclone fencing and the plastic strips in the cyclone fencing will minimize air emissions (N.T. 277).

121. The vegetative plantings will catch mists formed by the treatment process, mitigating the dissemination of airborne pathogens (N.T. 277).

122. Singer Avenue, the access road to the treatment plant, is a township road (N.T. 279, 296).

123. The permit application originally indicated that Singer Avenue would be closed (N.T. 53).

124. Whether Singer Avenue will be open or closed will have no effect on the operation of the treatment plant (N.T. 115).

125. The Department requested the Authority to reconsider the impact closing Singer Avenue would have on traffic (N.T. 235).

126. Singer Avenue will now remain open as a through street (N.T. 279).

127. Ms. Fuller and Mr. Wilson were concerned that Singer Avenue would be blocked off when sludge is being hauled away from the treatment plant by trucks, thereby preventing access by emergency vehicles and preventing use of the road by Amish buggies and other vehicular traffic (N.T. 185, 186, 191).

128. Sludge will be removed from the treatment plant by tank trucks on a weekly basis (N.T. 237, 279).

129. Approximately 3000-5000 gallons of sludge will be hauled from the treatment plant on a weekly basis (N.T. 297).

130. The sludge removal will take approximately an hour (N.T. 280).

131. There is adequate room at the treatment plant site for tank trucks to pull off the road during sludge loading, leaving both lanes of Singer Avenue open during loading (N.T. 279-280).

132. In the worst case where a tank truck is unable to pull off the road during loading, only one lane of Singer Avenue will be temporarily blocked (N.T. 280).

133. The Department did not consider the Environmental Master Plan when it reviewed the Authority's water quality management permit application (N.T. 71).

134. The Historic and Museum Commission raised concerns about the location of the treatment plant after the water quality management permit was

issued, and the concerns were relayed to the Authority (N.T. 70-71; Ex. A-15 and A-17).

135. Although the site of the proposed treatment plant is not ideal, it is acceptable in light of the mitigating measures incorporated into the design (N.T. 200, 216).

136. The Department's review of the Authority's water quality management permit application went beyond its normal requirements (N.T. 75).

DISCUSSION

When a third party appeals actions of the Department, it bears the burden of proving by a preponderance of the evidence that the Department committed an abuse of discretion, 25 Pa.Code §21.101(c)(3) and Robinson Township Board of Supervisors v. DER and Aloe Coal Company, EHB Docket No. 87-242-R (Adjudication issued January 26, 1990). Thus, Appellants must demonstrate that the Department's actions were arbitrary, capricious, in violation of the relevant law, or a manifest abuse of discretion, Anderson W. Donan, M.D. et al. v. DER, EHB Docket No. 85-308-F (Adjudication issued August 29, 1990). For the reasons which follow, we hold that Appellants have failed to sustain their burden.

TRANSFERS OF THE NPDES PERMIT AND THE SEWER PERMIT

Appellants have challenged the transfer of these two permits from Paradise Township to the Authority. The only evidence adduced at the hearing was that the permit transfers conformed to the Department's procedures (N.T. 213)[8] and, as a result, we must hold that Appellants failed to prove that the transfer of the two permits was an abuse of discretion.

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[8] There are no regulations in either 25 Pa.Code, Ch.91, or 25 Pa.Code, Ch.92, which relate to transfers of water quality management permits, in general, or of NPDES permits, in particular.

Furthermore, Appellants cannot use their challenge to the transfers of these two permits as a vehicle to challenge their underlying terms and conditions, for the only change was the name of the permittee (N.T. 213). The underlying terms and conditions of these permits are final, and cannot now be collaterally attacked by Appellants, Antrim Mining, Inc. v. DER, 1988 EHB 105.

ISSUANCE OF THE TREATMENT PLANT PERMIT

Appellants have raised six categories of objections to the issuance of the treatment plant permit and we will address each separately.

Consistency with Sewage Facilities Planning Requirements and Capacity

Appellants assert that the approval of the treatment plant permit was an abuse of discretion because it was not consistent with the official plans for Leacock and Paradise Townships[9] and, therefore, in violation of 25 Pa.Code §91.31. As a corollary to this argument, Appellants also contend that because the treatment facility was not consistent with the official plans, it was not adequately sized to account for expected flows from the two municipalities, and, consequently, violative of 25 Pa.Code §91.24. The evidence simply does not support these contentions.

Before the Department may issue a permit under §207 of the Clean Streams Law, it must be satisfied that the proposed treatment facility conforms to the official plan for the municipality in which it is located, 25

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[9] It must be noted that the notice of appeal filed by Appellants made no reference to either the Sewage Facilities Act or lack of consistency with official plans. However, Appellants did contend that the issuance of the permit was in violation of the Clean Streams Law and Department regulations. Since Department regulations require permits issued under the Clean Streams Law to be consistent with official plans, these arguments were within the ambit of Appellants' objections. But, this does not alter the result of the interlocutory decision to quash the subpoena issued to Timothy Finnegan, the Department's Sewage Facilities Consultant, on grounds of prejudice and unfairness to the Department and the Authority and on the grounds that his testimony would lead to a prohibited collateral attack on the substance of the Paradise Township Official Plan.

Pa.Code §91.31 and Lower Providence Township v. DER and the County of Montgomery, 1986 EHB 395. Appellants make a great deal out of Mr. Ruch's testimony that rather than directly examining the Paradise Township official sewage facilities plan, he relied upon his consultations with the Planning Section, which was directly responsible for review of the plans (N.T. 40-41, 73). We cannot hold that in doing so the Department committed an abuse of discretion, for we recognize that the decision whether to issue a permit is not one individual's decision; it is a collegial decision wherein the expertise and judgment of various individuals are drawn upon to reach a final determination. Even if this were not the case, our examination of the Paradise Township official plan, in the context of our *de novo* review, convinces us that the permit is consistent with the plan. As for Appellants' emphasis on the Department's failure to consider the Leacock Township official plan in reviewing the permit application (N.T. 41), we do not find it to be a fatal flaw, for we have considered testimony relating to that plan in the course of our *de novo* review.

In asserting that the sewage treatment plant does not have adequate capacity to meet the present and future needs set forth in the Leacock and Paradise Township official plans, Appellants ignore two very critical facts. The first is that the Paradise Township official plan contemplates sewering the area to be served by the treatment plant in eight phases over the next five to ten years (N.T. 38; Ex. A-6) and only three of the phases have been sewered.[10] The second is that neither the Leacock Township nor Paradise Township official plans commit to the Gordonville basin being served by the

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[10] The three phases comprise 171 EDUs (Ex. A-6).

treatment plant (Ex. A-5, A-6). Even if they did, only a small portion of the Gordonville basin would be involved (N.T. 28).[11]

As we noted previously, the planning argument advanced by Appellants is interrelated with the capacity argument, for capacity is determined based upon the present and future needs identified in the official plan. See 25 Pa.Code §71.14(a)(4), (7), and (8).[12] The Department also recognizes the practical necessity of sizing a sewage treatment facility to provide capacity for present and future needs in 25 Pa.Code §91.24, which provides that: "Plans shall provide ample capacities for present needs and for a reasonable time in the future. Conservative and accepted factors of design shall be used." Again, based on the evidence produced, we must conclude that the treatment plant complied with this regulation.

Appellants again rely upon their erroneous assumption that all 332 EDUs in the Paradise Village area, as well as the entire Gordonville basin, will connect to the treatment plant as soon as construction of the plant is completed. As we have pointed out previously, the reality is that connection of the Paradise Village area will occur over a five to ten year period and there is no commitment for the Authority to service part of, much less, the

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[11] In reaching our findings regarding the capacity of the treatment plant we have placed more weight on the testimony of George Wagner, the consulting engineer who designed the plant for the Authority and who is also project manager for Leacock Township (N.T. 267-268, 287), than on the testimony of Garland Hoover, a lay witness. While we have respect for the sincerity of Mr. Hoover's convictions, we must rely upon the testimony of one with more demonstrated experience in this area, Joseph D. Hill et al. v. DER and Horsham Township, 1988 EHB 228, 233. Furthermore, just as in Hill, Appellants here did not introduce into evidence the adopted and approved Leacock Township official plan. It was the Authority which later sought to reopen the record over Appellants' objections, to incorporate the final plan.

[12] 25 Pa.Code §71.14 was amended and renumbered as 25 Pa.Code §71.21 at 19 Pa.Bulletin 2435 (June 10, 1989).

entire Gordonville basin area of Leacock Township. As recommended by §43.411 of the Department's Sewerage Manual (Ex. A-30),[13] the Authority also used a conservative design flow of 350 gpd sewage per EDU, which would equate with 116,200 gpd of capacity for the 332 EDU Paradise Village service area; the treatment plant, which has a capacity of 120,000 gpd, will have sufficient capacity to accommodate the 332 EDUs when they are all connected.[14]

Finally, Appellants argue that the capacity of the sewage treatment plant is inconsistent with §41.1 of the Sewerage Manual which requires treatment plants to be designed to accommodate population in the next 15 to 25 years. Appellants conveniently disregard the last portion of the recommendation, which provides an exception where the capacity of the treatment units can be readily increased (Ex. A-30). That is the case here, for an additional 30,000 gpd of capacity may be readily added to the treatment plant (N.T. 140, 201, 286).

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[13] The Sewerage Manual does not have the binding effect of a regulation, but the Board has recognized it as an expression of good sanitary engineering practices which the Department should not depart from without valid reasons. See Pennsbury Village Condominium v. DER et al, 1977 EHB 225, 232-233.

[14] In their reply brief, Appellants suggest that the design flow requirements of 25 Pa.Code §73.17(a) are applicable to this treatment plant. However, those requirements are only applicable to subsurface disposal systems regulated under the Sewage Facilities Act, 25 Pa.Code §§73.1, 73.2, 73.11(c), and use of the design flow figure of 75 gpd per person x 3.5 persons per EDU would produce less flow than the design flow of 100 gpd per person utilized by the Authority. Furthermore, this design flow of 262.5 gpd per EDU suggested by Appellants is more in line with the actual flow figures of 210 gpd per EDU in similar areas (N.T. 285-286).

Failure to Adhere to the Applicable Regulations and the Sewerage Manual and Failure to Consider Adverse Impacts, Minimize Them and Balance Them Against Social and Economic Benefits

Under this broad umbrella, Appellants have raised five contentions relating to noise, odor, visual, and air quality effects; historic resource protection, flooding, alternative locations, and traffic. We will address them seriatim.

Noise, Odor, Visual, and Air Quality Effects

Appellants' arguments stem from the Sewerage Manual's (Ex. A-30) recommendation in §41.2 to locate treatment facilities at least 250 feet from occupied dwellings or recreational areas. If that is not possible, the manual recommends that "appropriate measures... be taken to minimize adverse impacts" from noise, odors, air emissions, and sludge disposal and processing. The evidence establishes that the Authority has undertaken extensive design measures to minimize any adverse effects from noise, odors, air emissions, and sludge disposal.

Initially, it must be noted that there is only one occupied residence within 250 feet of the treatment plant (N.T. 49, 53, 55, 102, 269) and that residence is 218 feet from the property line of the two-thirds acre plant site (N.T. 129). Other residences are 250-500 feet from the site (N.T. 156-157, 182-183, and 189-190). Because of the planning considerations in selecting this site, it was the most suitable and, therefore, in accordance with the recommendations of the Sewerage Manual, efforts had to be undertaken to minimize impacts.

As for visual and noise concerns, the control building is only one-story (N.T. 134). Although the plant is to be constructed on a ten feet embankment (N.T. 134), the Authority has developed a landscape plan to reduce the visual impact (N.T. 275). By muffling intake and exhaust on blower

exhaust, enclosing the blowers in an insulated control building, and moving that building to the area of facility furthest away from residences, the sound level 50 feet from the control building will be no more than a hum (N.T. 269, 270).

Regarding odors, the nature of the treatment process - extended aeration - minimizes this risk (N.T. 117, 271). Additional measures to reduce odor impacts, such as chemical dosing, screening with vegetation and fences, and covering the treatment tanks (N.T. 271, 172, 274-275) will be utilized. Appellants' expert even agreed that there will be little risk of odors from the plant (N.T. 117). Sludge processing, a primary source of odors from sewage treatment plants, will not take place at the site (N.T. 270-273), so the risk of odors will be greatly reduced.

Lastly, Appellants have raised the spectre of the plant's emitting airborne pathogens. There is no evidence whatsoever to substantiate their claims that emission of off-site air pathogens is a problem at sewage treatment plants (N.T. 277-278); the studies they refer to relate to workers at the treatment plants who come in contact with the sewage (N.T. 278). Moreover, even if pathogens were a problem, the Authority has incorporated design features such as plantings, screenings, covers and grating over the treatment tanks, and use of diffused air in the treatment process to prevent aerosol formation in order to avoid potential risks from air emissions (N.T. 40, 205, 276, and 277).

Failure to Account for Adverse Impacts on Historic Resources

Appellants contend that the Department violated Article I, §27 of the Pennsylvania Constitution by not requiring the Authority to minimize the effect of the treatment plant on historic resources in the area and by failing to coordinate its review of the treatment plant permit application with the

Historic and Museum Commission. This particular argument was raised for the first time in Appellants' amended pre-hearing memorandum, which was filed six days before the hearing on the merits,[15] and the Authority's motion to strike it was granted at the hearing on the merits. Appellants have requested in their post-hearing brief that the ruling be reconsidered.

We will not reconsider the ruling. A request to reconsider must be filed within 20 days of the ruling, 25 Pa.Code §21.122 and Miller's Disposal and Truck Service v. DER, EHB Docket No. 89-576-E (Opinion issued November 28, 1990), and, in the case of an interlocutory order, present exceptional reasons, Salford Township Board of Supervisors et al. v. DER and Mignatti Construction Company, 1988 EHB 676. Appellants' request is both untimely and fails to state any exceptional circumstances justifying reconsideration.[16]

Failure to Consider Adverse Effects and Potential Environmental Harm from Siting a Sewage Treatment Plant in a Floodway

Appellants are concerned that the siting of the sewage treatment plant in the floodway will raise the elevation of the 100-year flood, thereby exacerbating the impact of flooding occurrences on surrounding residences and properties. They contend that the Department abused its discretion in issuing the permit by not properly assessing the potential flooding impacts of the

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[15] We note that the mere mention of Article I, §27 in a notice of appeal does not entitle an appellant to raise any issue remotely relating to Article I, §27.

[16] Even if we had granted reconsideration, it would not have altered our conclusions. Although the Historic and Museum Commission did not become involved until after the issuance of the water quality management permit (Ex. A-15, A-16), it determined that the treatment plant would have no adverse effect on historic resources in the area (Ex. A-17). Furthermore, the Authority, in response to a request from the Historic and Museum Commission, agreed to plant trees to screen Pequea Creek from the treatment plant.

treatment plant. This argument, although quite logical, is disingenuous, for it fails to account for the fact that the flooding impacts of the treatment plant are regulated by the Department pursuant to the Flood Plain Management Act and the rules and regulations adopted thereunder at 25 Pa.Code §106.1 *et seq.* and the Dam Safety and Encroachments Act, and the rules and regulations adopted thereunder at 25 Pa.Code §105.1 *et seq.*

These two comprehensive regulatory schemes were enacted to address flooding impacts and this purpose is set forth in the statement of purpose in each statute. Section 103 of the Flood Plain Management Act states that its purpose is to:

> (1) Encourage planning and development in flood plains which are consistent with sound land use practices.
>
> (2) Protect people and property in flood plains from the dangers and damage of floodwaters and from materials carried by such floodwaters.
>
> (3) Prevent and eliminate urban and rural blight which results from the damages of flooding.
>
> * * * * *
>
> (7) Minimize the expenditure of public and private funds for flood control projects and for relief, rescue and recovery efforts.

Similarly, §2 of the Dam Safety and Encroachments Act articulates its purposes as to:

> (1) Provide for the regulation of dams and reservoirs, water obstructions and encroachments in the Commonwealth, in order to protect the health, safety and welfare of the people and property.
>
> * * * * *
>
> (3) Protect the natural resources, environmental rights and values secured by the Pennsyl-

> vania Constitution and conserve the water quality, natural regime and carrying capacity of watercourses.
>
> (4) Assure proper planning, design, construction, maintenance and monitoring of water obstructions and encroachments, in order to prevent unreasonable interference with waterflow and to protect navigation.

The purposes of the statutes are implemented through a permitting program. Section 6(a) of the Dam Safety and Encroachments Act requires a permit to construct a water obstruction or encroachment. An "encroachment" is defined in §3 of the statute to include "Any structure or activity which in any manner changes, expands or diminishes the course, current or cross-section of any watercourse, floodway or body of water (emphasis added)," while a "water obstruction" is defined as "...any fill...or other structure located in, along, across or projecting into any watercourse, floodway or body of water (emphasis added)." Section 302 of the Flood Plain Management Act requires that obstructions owned by a person engaged in rendering a public utility service be permitted by the Department if the obstruction is in the 100-year flood plain. "Person" is defined to include a governmental unit, while sewage treatment and disposal is within the definition of public utility service. Thus, it is clear that the construction of the sewage treatment plant in the floodway, which is within the 100-year flood plain, is subject to the permitting program under the two statutes.

The regulations implementing the permitting programs under both the Dam Safety and Encroachments Act and the Flood Plain Management Act require detailed analyses of potential flooding impacts. Applications for permits for the placement of fill under the Dam Safety and Encroachments Act are required by 25 Pa.Code §105.261 to include:

> (1) A plan detailing the location of all structures and properties 1000 feet upstream and

downstream of the proposed fill, levee, or similar structure and within the flood plain of the flood of record on both sides of the stream or body of water.

(2) Basement and first floor elevations of structures indicated on the plan required by paragraph (1) of this section.

(3) A complete hydraulic and hydrologic report on the proposed project, including, if the Department so requires, a backwater analysis of the project.

(4) Complete cross sections of the stream and floodway of the flood of record.

(5) Stream profiles showing the bed slope and the normal and flood water elevations for points sufficiently upstream and downstream in effect on the project.

* * * * *

(8) The design flood for the fill, levee, or similar structure.

(9) A copy of the local flood plain management regulations or ordinances.

* * * * *

Similarly, applications for permits to place obstructions in the floodplain under the Flood Plain Management Act are required by 25 Pa.Code §106.12 to include:

(1) Floodplain maps prepared by FEMA and copies of municipal floodplain management regulations adopted under the act.

(2) Plans showing the location, size, and height of the proposed highway obstruction or obstruction and detailing the topographic features, elevations, and nearby structures so as to enable an appraisal of the hazard potential of the obstruction.

(3) A description of the floodplain within the municipality or area which may be affected by the project and a plan showing drainage patterns and flood elevations within the floodplain.

(4) A hydrologic and hydraulic report which shall include:

(i) Data on size, shape, and characteristics of the watershed.

(ii) The 100-year flood elevation.

(iii) An hydraulic analysis to show the effect of the highway obstruction or obstruction on the floodplain including a backwater analysis and an assessment of flood damage.

And, in reaching a decision on the permit application to place fill in the floodway, the Department is prohibited by 25 Pa.Code §105.271(a), one of the regulations implementing the Dam Safety and Encroachments Act, from approving the fill if:

(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; or

(3) it will increase flood damages downstream through a loss of flood plain storage.

Finally, in reaching a decision on an application pursuant to the Flood Plain Management Act, the Department is required by 25 Pa.Code §106.13(a) to consider these factors:

(1) Potential threats to life or property created by the highway obstruction or obstruction.

(2) Potential threats to safe navigation created by the highway obstruction or obstruction.

(3) The effect of the proposed highway obstruction or obstruction on the property or riparian rights of owners upstream, downstream, or adjacent to the highway obstruction or obstruction.

(4) The effect of the proposed highway obstruction or obstruction on the regimen of the watercourse or other body of water and on the prevention of pollution or other hazards to health, safety, and welfare.

(5) The need for the proposed highway obstruction or obstruction to be located in the floodplain and alternatives in location, design, and construction which are available to minimize the adverse impact of the project.

(6) Present conditions and the effects of reasonably foreseeable future development within the affected watershed upstream and downstream of the highway obstruction or obstruction. In assessing the impact of future development, the Department may require the applicant to submit data regarding estimated development potentials based on municipal, county, and regional planning related to the affected watershed.

(7) Consistency with State and local floodplain and storm water management plans and programs, ...

The flooding impacts and considerations raised by Appellants are precisely those which the Department considers in the permitting program under the Dam Safety and Encroachments Act and the Flood Plain Management Act.[17]

Because the General Assembly established a separate regulatory program for the flooding impacts of obstructions, the Department was not required to evaluate these effects in the course of the review of the water quality management permit application for the construction of the treatment plant. The Bureau of Water Quality Management consulted with the Bureau of Dams and Waterways Management during the course of its review because it was, of course, mandated to satisfy itself that all relevant statutes had been complied with in accordance with the test enunciated in Payne v. Kassab, 11

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[17] The two permitting programs are coordinated. See 25 Pa.Code §§105.24 and 106.24.

Pa.Cmwlth 14, 312 A.2d 86 (1973). In doing so, it was entitled to rely upon the expertise and judgment of its own personnel in the Bureau of Dams and Waterways Management.

Moreover, we must also rely upon the judgment of the Bureau of Dams and Waterways Management and presume that the Department acted in accordance with the Dam Safety and Encroachments Act, the Flood Plain Management Act, and the applicable regulations when it issued the encroachment permit, Anthony J. Agosta et al. v. DER and the City of Easton, 1977 EHB 81. This is particularly so, since Appellants failed to seek the Board's review of the permit issued under the Dam Safety and Encroachments Act and the Flood Plain Management Act to place the fill in the floodway despite the fact that the permit was issued on the same day as the three approvals which are the subject of this proceeding (N.T. 8; Ex. B-1) and, as a result, cannot now collaterally attack that permit, Antrim Mining, Inc., *supra*.[18]

Since Appellants cannot raise the issue of flooding impacts, flood elevations, and related considerations, the only aspect of the flooding issue which may be challenged is whether the sewage treatment plant is designed in accordance with the engineering practices reflected in the Sewerage Manual, namely whether the treatment works structures and electrical and mechanical

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[18] Appellants believe that a challenge to the assumptions and considerations regarding the flood impacts may be mounted here because their failure to appeal was due to an oversight of prior counsel and because the encroachments permit is so closely linked to the water quality management permit. Appellants ignore a fundamental legal principle - jurisdiction - in making this bootstrap argument. Unless a timely appeal of a Department action is filed with the Board, we have no jurisdiction to review that action, even where it is raised in the guise of an Article I, §27 challenge. They also argue in their reply brief that our decision in David D. Beitman v. DER et al., 1974 EHB 297, opens this inquiry. Beitman, however, was decided long before the passage of the Dam Safety and Encroachments Act and the Flood Plain Management Act.

equipment are protected from damage by the 100-year flood and whether the facility will be accessible and fully operational during a 25-year flood event (Ex. A-30). The evidence establishes that the Authority satisfied these requirements.

The facility will be built above the 100-year flood elevation (N.T. 57, 59); the first floor of the control room and the tops of the treatment tanks will be above the 100-year flood elevation, even adjusting for fill (N.T. 280-283). As a result, sewage will not flow over the tops of the treatment tanks in the event of a 100-year flood event. Similarly, the pumps and blowers will be above the 100-year flood elevation and will not be subject to power outages during a flood event. Finally, additional design features in the form of anti-flotation measures have been incorporated into the design of the treatment tanks, pump station, equalization tanks, and sludge holding tanks (N.T. 283-284). These design elements establish that the plant can either remain operational during a 100-year flood event or quickly resume operation. As for the issue of evacuation and accessibility during a flood event, the plant can be reached by motorboat, which albeit simple, is a satisfactory procedure (N.T. 69, 206-207, 234). All in all, we must conclude that the Department properly evaluated flooding effects and that the treatment plant design more than met the recommendations in the Sewerage Manual.

Alternative Sites for the Treatment Plant

Appellants contend that §5(a)(1) of the Clean Streams Law and the planning requirements of the Sewage Facilities Act require the Department to examine alternative sites for a treatment plant when the Department is reviewing the application for a permit to construct the treatment plant. We do not agree with their characterization of the Department's responsibilities.

Section 5(a)(1) of the Clean Streams Law requires the Department, "where applicable," to consider water quality management and pollution control in the watershed in issuing permits. Nowhere in that language is a duty to undertake evaluation of alternatives. Evaluation of alternatives is a requirement under the regulations adopted pursuant to the Sewage Facilities Act, but that requirement attaches at the planning, rather than the permitting, phase of a project, 25 Pa.Code §71.14(a)(7) and (8)[19] and Dwight L. Moyer et al. v. DER and Horsham Township, 1989 EHB 928. Quite simply put, this is not the planning phase of this project and it is not permissible for Appellants to challenge siting alternatives.[20]

Failure to Consider Traffic Impacts

Under the umbrella of their argument that the Department, as part of its obligation under Article I, §27, failed to consider the adverse impacts of the treatment plant, minimize them, and balance them against the social and economic benefits of the project, Appellants suggest that the Department failed to consider the impact of increased traffic as a result of the

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[19] The regulation was amended and renumbered as 25 Pa.Code §71.21 at 19 Pa.Bulletin 2419 (June 10, 1989).

[20] We recognize that the consideration of alternatives may be compelled under the Payne test where there is likelihood of significant environmental harm, Frances Skolnick, et al. v. DER and GPU Nuclear Corporation, EHB Docket No. 89290-F (Opinion issued June 11, 1990). However, it is not required here because we have found no likelihood of significant environmental harm and because the consideration occurred under the Sewage Facilities Act and Appellants did not challenge it.

treatment plant.[21] In particular, they emphasize that the closing of Singer Avenue will interfere with access by emergency vehicles and that trucks removing sludge from the facility will create safety problems. We do not agree with the Appellants' contentions.

There are no requirements under the Clean Streams Law or the regulations adopted thereunder to consider traffic impacts of sewage treatment plants. There are also no recommendations in the Sewerage Manual regarding the traffic safety implications of treatment plant design. However, as Appellants rightly point out, such considerations are relevant in light of the Department's duties under Article I, §27 of the Pennsylvania Constitution, Pa. Env. Mgt. Services v. Dept. of Env. Resources, 94 Pa.Cmwlth 182, 503 A.2d 477, 480, n.9 (1986). Although Appellants' view of the law is correct, their view of what the Department considered in its review does not establish that the Department committed an abuse of discretion.

Appellants operate under the erroneous assumption that Singer Avenue will be permanently closed as a result of the treatment plant's construction, which is not the case, since the Authority re-evaluated that decision in light of the Department's concerns (N.T. 279). Furthermore, they have made outlandish assertions concerning the frequency and duration of sludge removal and septage disposal at the plant. There was no evidence presented to substantiate any of their claims concerning the frequency or amount of septage disposal at the treatment plant. As for sludge disposal, it can hardly be concluded that sludge removal will have a serious adverse effect on traffic safety when it will only be removed, on the average, once a week (N.T. 237,

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[21] The issue of traffic safety was, unlike that of historic resources, specifically raised in the notice of appeal.

279), will take approximately one hour (N.T. 280), will involve 3000-5000 gallons (N.T. 297), and will provide adequate room for other vehicular traffic to pass (N.T. 279-280). Under such circumstances, the traffic impacts of the treatment plant are minimal and the Department did not abuse its discretion in this regard.

In short, the Appellants have presented us with no credible evidence, beyond their belief that the treatment plant should be located elsewhere, to satisfy their burden of demonstrating that any adverse effects from the treatment plant would not be minimized. Because of this, they have failed to satisfy their burden of proof regarding the Department's alleged abuse of discretion in issuing the treatment plant permit and their appeal of the issuance of this permit must be dismissed.

CONCLUSIONS OF LAW

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

2. Appellants bear the burden of proving by a preponderance of the evidence that the Department abused its discretion in transferring the NPDES permit and the sewer permit and in issuing the treatment plant permit, 25 Pa.Code §21.101(c)(3).

3. Appellants are precluded from challenging any of the underlying conditions of the NPDES permit and the sewer permit where the only change in the transfers was removing Paradise Township as the named permittee and substituting the Authority, Antrim Mining, Inc. v. DER, 1988 EHB 105.

4. The transfer of the NPDES permit and the sewer permit from Paradise Township to the Authority was in accordance with the Department's procedures for permit transfers.

5. Appellants failed to sustain their burden of proving that the transfer of the two permits from Paradise Township to the Authority was an abuse of discretion.

6. Water quality management permits issued pursuant to §207 of the Clean Streams Law must be consistent with the applicable sewage facilities planning, 25 Pa.Code §91.31.

7. The treatment plant permit was consistent with the Paradise and Leacock Township official plans.

8. The capacity of the Authority's treatment plant is in accordance with 25 Pa.Code §91.24.

9. The Sewerage Manual is an expression of good sanitary engineering practices.

10. The Department did not abuse its discretion in approving a sewage treatment plant in close proximity to occupied dwellings where any adverse effects from noise, odor, visual appearance, and air emissions were minimized.

11. Appellants are precluded from challenging the impact of the treatment plant on historic resources by their failure to properly raise the issue in their notice of appeal.

12. The flooding impacts of siting a sewage treatment plant in a floodway are appropriately considered in the Department's evaluation of applications for permits under the Dam Safety and Encroachments Act and the Flood Plain Management Act.

13. Appellants are precluded from collaterally attacking conclusions concerning the flooding impacts of the Authority's treatment plant where they failed to appeal the encroachments permit for the facility which was issued by the Department pursuant to the Dam Safety and Encroachments Act and the Flood Plain Management Act.

14. The Department properly concluded that the Authority's treatment plant would be able to maintain operation and would be accessible during a flood event.

15. In evaluating an application for a water quality management permit, the Department is not required to evaluate alternate locations for a sewage treatment facility project; alternatives are properly addressed in the sewage facilities planning for the project.

16. The Department is required by Article I, §27 to consider traffic impacts in reviewing water quality management permit applications.

17. The Authority's treatment plant will have a minimal impact on traffic in the area.

O R D E R

AND NOW, this 20th day of December, 1990, it is ordered that:

1) The appeal of Bobbi L. Fuller et al. of the amendment to NPDES Permit No. PA 0083470 at Docket No. 89-142-W is dismissed;

2) The appeal of Bobbi L. Fuller et al. of the issuance of Water Quality Management Permit No. 3688468 at Docket No. 89-144-W is dismissed; and

3) The appeal of Bobbi L. Fuller et al. of the transfer of Water Quality Management Permit No. 3687424-T1 at Docket No. 89-145-W is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

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Administrative Law Judge
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DATED: December 20, 1990

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FRANK COLOMBO, d/b/a COLOMBO TRANSPORTATION SERVICES and NORTHEAST TRUCK CENTER, INC. et al.	:	
V.	:	**EHB Docket No. 88-420-M (consolidated)**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES AND CITY OF SCRANTON, et al., Intervenors	:	**Issued: December 21, 1990**

OPINION AND ORDER
SUR
MOTION FOR RECONSIDERATION
AND MOTION FOR SUMMARY JUDGMENT

Robert D. Myers, Member

Synopsis

Where DER's enforcement action involves two independent segments - one relating to obtaining a permit and the other relating to abating a common law nuisance - the entry of summary judgment on the permitting segment is final and appealable. Consequently, DER's request for reconsideration and for the entry of summary judgment in its favor, filed about 8 months later, cannot be granted. The Board's power to modify or reverse the action expired 30 days after its entry.

OPINION

These consolidated appeals involve a solid waste operation conducted by Appellants on Keyser Avenue in the City of Scranton, Lackawanna County. On December 7, 1989 the Board issued an Opinion and Order (1989 EHB 1315) which details the activities engaged in by Appellants. In that Opinion and Order

the Board denied Appellants' request for a supersedeas but granted Appellants' Motion for Partial Summary Judgment, sustaining the appeal "with respect to those portions of DER's Order and Amended Order directing [Appellants] to apply for a permit for a transfer station."

On August 6, 1990 the Department of Enviromental Resources (DER) filed a Motion for Reconsideration and Motion for Summary Judgment, relying on amendments to the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq., incorporated in Act 109 of 1990 which became law on July 11, 1990, effective immediately. Appellants filed an Answer on August 29, 1990. On August 31, 1990 the City of Scranton, Intervenor, advised the Board by letter that it had no objection to the Motions[1] filed by DER. The other Intervenors, primarily business owners and residents of the Keyser Avenue area, filed no response.

In our December 7, 1989 Opinion and Order we considered the provisions of the SWMA and of the underlying regulations beginning at 25 Pa. Code Chapter 271 and concluded that Appellants' operation is not a "transfer facility," as defined in 25 Pa. Code §271.1, requiring a permit. DER now contends that it is a "transfer facility," as defined in Act 109, requiring a permit. Consequently, we should reconsider this issue and grant summary judgment to DER. Appellants argue that DER's request is untimely and cannot be entertained.

Under our rules of procedure, a request for reconsideration must be made within 20 days after the date on which a decision has been rendered: 25 Pa. Code §21.122. DER's request, coming 8 months after our Opinion and Order of December 7, 1989, is untimely and cannot be considered. DER also asks us

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[1] In addition to the Motions named, DER filed a Motion for Expedited Decision which was denied by a Board Order issued September 24, 1990.

to grant summary judgment in its favor now that Act 109 has broadened the scope of the SWMA. To accede to DER's request, we would have to undo our December 7, 1989 Order sustaining Appellants' appeal with respect to those portions of DER's Order directing Appellants to apply for a permit for a transfer station. Appellants maintain that we no longer have the power to do this.

Praisner v. Stocker, 313 Pa. Super. Ct. 332, 459 A.2d 1255 (1983), is a comprehensive dissertation on the effect of partial summary judgment. Acknowledging the general rule that an order granting partial summary judgment is interlocutory, the Superior Court observed that an exception to the general rule comes into play when the summary judgment removes from the litigation an issue that is severable and independent from the others. Thus, where one litigant asserts separate and distinct causes of action against another, an order granting partial summary judgment as to some but not all of the causes of action is final and appealable. If the exception applies to the present case, our power to reverse our December 7, 1989 Order and to grant summary judgment to DER expired 30 days after its entry:[2] 42 Pa. C.S.A. §5505; Vanleer v. Lerner, 384 Pa. Super. Ct. 558, 559 A.2d 577 (1989).

After a thorough review, we conclude that our December 7, 1989 Order was final and appealable with respect to the permitting issue and is no longer subject to our modification or reversal. We are led to this conclusion by the fact that the two prongs of DER's enforcement action against Appellants are severable and independent. The one prong charges Appellants with operating without a permit; the other charges them with creating and maintaining a

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[2] Our power to change a final order beyond this period, e.g. for obvious error or fraud, is not applicable here.

public nuisance.[3] These prongs are not interdependent, but are capable of standing alone (as evidenced by the fact that the public nuisance aspect of the case continues despite the summary judgment on the permitting issue).

The severable nature of these two types of enforcement proceedings is even more apparent from the manner in which DER approached the situation. The original DER Order, issued October 5, 1988, simply directed Appellants to file an application for a permit. The Amended Order, issued August 18, 1989 (over 10 months later), while reiterating the permit requirement, focused on the public nuisance created by Appellants' operations. The Amended Order directs Appellants to cease all operations and to file a nuisance abatement plan. The distinction is manifest. DER did not order the shutdown initially because the operations were not being conducted in an objectionable manner. DER's concern was to bring Appellants into compliance with the SWMA by having them obtain a permit. When DER learned that the operations were creating a public nuisance in the Keyser Avenue area, it then turned its attention to that aspect of the problem. DER's thrust at that point was to bring Appellants into compliance with the SWMA by having them cease operations and submit an abatement plan.

Having concluded that the permitting issue was severable and independent, we must rule that our December 7, 1989 Order granting summary judgment to Appellants on that issue was final and appealable. Not having taken an appeal and not having filed a timely request for reconsideration, DER is bound by that Order. We are powerless to change it.

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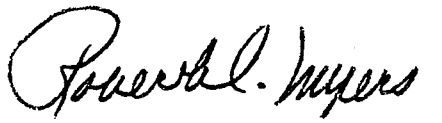
[3] This refers to a common law nuisance, not merely the statutory nuisance created by §601 of the SWMA, 35 P.S. §6018.601, for operating without a permit.

ORDER

AND NOW, this 21st day of December, 1990, it is ordered that the Motion for Reconsideration and Motion for Summary Judgment, filed by DER on August 6, 1990, are denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: December 21, 1990

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M. DIANE SMITH
SECRETARY TO THE BOARD

RAYMARK INDUSTRIES, INC., et al.	:	
	:	
v.	:	EHB Docket No. 90-180-E
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: December 28, 1990

OPINION AND ORDER SUR
SUR
PETITION FOR LEAVE TO AMEND NOTICE OF APPEAL

By Richard S. Ehmann, Member

Synopsis

A petition for leave to amend a notice of appeal to "restate with more specificity" the grounds purportedly set forth in the original notice is denied. Appellants have not alleged that discovery was necessary to formulate the issues sought to be amended. Rather, they allege that they have raised the issues they seek to amend since the time of the filing of initial notice of appeal and that through amendment, they would clarify grounds already raised in the notice. Additionally, the reservation of right to amend clause which is contained in their notice of appeal does not operate to reserve any right to amend other than that recognized by NGK Metals Corp. v. DER, EHB Docket No. 90-056(MR) (Opinion issued August 21, 1990), and Commonwealth, Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa.Cmwlth. 78, 509 A.2d 877 (1986), aff'd, ___ Pa. ___, 555 A.2d 812 (1989). Further,

appellants have not shown good cause for us to permit them to amend their notice of appeal.

OPINION

On November 9, 1990, Raymark Industries, Inc. ("Industries"), Raymark Corporation ("Corporation"), and Raymark Friction ("Friction") (collectively "the Raymarks"), filed a petition with us seeking to amend their notice of appeal filed on May 7, 1990. The Raymarks' petition was accompanied by a supporting memorandum. Subsequently, by a letter received on November 19, 1990, DER informed us it was opting to rely upon its previously filed Motion to Limit Issues and supporting brief as a response to the Raymarks' petition. DER's letter stated that the Motion to Limit Issues addressed the same issue asserted by the Raymarks' petition (i.e., the failure of the notice of appeal to specify the Raymarks' objections to DER's order.)

In their petition, the Raymarks state they set forth their grounds for appeal in Paragraph 3 of the notice of appeal, and "over the course of these proceedings, the Raymark parties have informed and refined their grounds for appeal." The petition further states, "the Raymark parties now seek to amend the Notice to restate with more specificity the grounds set forth in paragraph 3 of the Notice."[1] Additionally, the Raymarks' petition claims that neither DER nor Raytech will be prejudiced by the proposed amendments and alleges the Raymarks have "raised the issues for which amendment is sought on numerous occasions throughout this proceeding and in the United States Bankruptcy Court since filing the Notice." It adds, "the issue of

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[1]At Paragraph 3 of their petition, the Raymarks state: "[g]iven the vagueness of the 1990 [DER] Order, the Raymark parties were compelled to state their grounds for appeal in broad terms." The transparent self-serving nature of this statement is obvious.

Corporation's vicarious liability has been fully briefed by the parties on Corporation's Motion for Summary Adjudication."

In opposition, DER contends the Raymarks' assertion that DER either knew or would have been able to discover the Raymarks' specific grounds for appeal is irrelevant because the requirement that issues be raised in the notice of appeal is a jurisdictional requirement, rather than a notice requirement. (DER's Brief in Support of its Motion to Limit Issues at p. 6, citing NGK Metals Corp. v. DER, EHB Docket No. 90-056-MR (Opinion issued August 21, 1990)).[2]

In their supporting memorandum, the Raymarks quote the statement in the Board's decision in Commonwealth, Pennsylvania Game Commission v. DER, 1983 EHB 377, "the Board customarily permits appellants to litigate issues not expressly raised in the notice of appeal but set forth in appellants' pre-hearing memorandum," to buttress its argument.

As DER argues, we observed in NGK Metals, supra, that specifying grounds for appeal is a jurisdictional prerequisite. We said:

> Aware that discovery frequently is necessary to frame specific objections to DER's actions in areas that are highly technical in nature, the Board traditionally has taken a liberal approach in allowing issues to be raised in the pre-hearing memorandum that were not included in the Notice of Appeal. Commonwealth Court's decision in Commonwealth, Pennsylvania Game

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[2]On December 5, 1990, we received a document in the form of a letter from the Raymarks' counsel which set forth several arguments and requested that we grant their petition "as unopposed" because DER's Brief in Support of its Motion to Limit issues "does not state a single ground for denying a petition to amend [the] notice of appeal to plead the same objections with additional specificity." The letter continues, "[f]or this reason, the Department has failed adequately to object even to the amendment of the Raymark parties' notice of appeal...." We not only disagree with this contention but we also marvel at the logic of arguing a failure to "adequately object" amounts to an unopposed motion.

> Commission v. Commonwealth, Department of Environmental Resources, 97 Pa.Cmwlth. 78, 509 A.2d 877 (1986), cast a cloud over this liberality by holding (1) that specifying the grounds for appeal is a jurisdictional prerequisite, and (2) that amendments to the grounds for appeal, beyond the 30-day appeal period, can be allowed only in limited circumstances. This holding remained somewhat in limbo until March 6, 1989 when the Pennsylvania Supreme Court affirmed the Commonwealth Court decision (on other grounds without discussing the amendment issue), ____ Pa. ____, 555 A.2d 812 (1989). Since that date, the Board has considered itself bound by the Commonwealth Court holding, allowing amendments where discovery was necessary to formulate an issue and where the right to amend was reserved in the Notice of Appeal. See, for example, Kacer v. DER, 1989 EHB 914.
>
> NGK had reserved the right to amend in its Notice of Appeal "to introduce additional objections in this proceeding based upon subsequent discovery"; but the amendments NGK subsequently offered presented issues for which discovery was unnecessary--issues that could have been raised initially in the Notice of Appeal.

NGK, supra, at pp. 3-4.

We have acknowledged that where it is alleged that discovery was necessary to formulate an issue and the right to amend was reserved in the notice of appeal, an opportunity to amend the notice of appeal is proper (though limited to add the grounds shown to have been "discovered"). See, e.g., NGK Metals, supra, and Philadelphia Electric Company, et al. (PECO) v. DER, et al., EHB Docket No. 88-309-M (Opinion issued August 31, 1990). Clearly, since the Raymarks are arguing that the amendments would clarify grounds already stated in the notice to "state [them] with more specificity," they are not contending that discovery was necessary for formulation of the issues they seek to amend. In fact, the Raymarks state in their petition that they "have raised the issues for which amendment is sought on numerous

occasions throughout this proceeding and in the United States Bankruptcy Court since filing the Notice."

The Raymarks further urge that through a reservation of right to amend clause in paragraph 3 of their notice of appeal, they have reserved the right to clarify the grounds in their notice.[3] We will address this argument to correct the Raymarks' misperception of what rights they can reserve through inclusion of such a clause in their notice of appeal.

Contrary to the Raymarks' belief that they can reserve a right to clarify their notice of appeal, their ability to reserve a right to amend is circumscribed by the decisions of this Board and the Commonwealth and Supreme Courts. See Commonwealth, Pennsylvania Game Commission, supra; NGK, supra; and ROBBI v. DER, 1988 EHB 500. Accordingly, under the instant circumstances, the Raymarks' reservation clause could not reserve for them the right to "clarify" their grounds for appeal.

Additionally, the Raymarks have not shown us "good cause" why the amendments they seek should be permitted.

The petition indicates the amended notice would make the following changes to the notice of appeal:

> a. Paragraph 4 of the Notice is deleted[,]
> b. Paragraphs 4 through 8 of the Amended Notice have been added[,]

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[3]The reservation in the notice of appeal reads:

> Appellants reserve the right to state further grounds for appeal or further to specify these grounds for appeal should additional grounds come to Appellants' attention through discovery or otherwise.

The Raymarks' memorandum declares that they have "reserved the right to amend the Notice to add additional grounds for appeal or to clarify the grounds for appeal stated in the Notice." (Emphasis added.)

c. Paragraphs 5 and 6 of the Notice have been renumbered[,]

d. The Amended Notice has been served on counsel for DER and Raytech[,]

e. The Amended Notice corrects several typographical errors in the Notice.

Our Opinion and Order in this matter dated September 24, 1990 granted judgment on the pleadings to DER as to paragraph 4 of the notice; thus, deletion of that issue from the notice of appeal can no longer occur. A final judgment on it has been entered. Consequently, good cause for renumbering of paragraphs 5 and 6 of the notice also has not been shown. Additionally, the Raymarks have not demonstrated good cause for permitting amendment of the alleged typographical errors.

As to amendment adding paragraphs 4 through 7[4] to the notice of appeal, since the Raymarks allege these paragraphs only state with "more specificity" issues which are already contained in the notice of appeal, we see no good cause for amending the notice.

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[4]In view of our Order dated December 10, 1990 which granted the plea of Corporation's counsel for oral argument as to whether the issue of Corporation's liability based solely on its corporate parenthood was timely raised in the notice of appeal and as to whether our order of September 20, 1990 is a final order on this issue, we do not address paragraph 8 of the proposed amendments. We reserve our ruling until after oral argument has been heard.

O R D E R

AND NOW, this 28th day of December 1990, it is ordered that the Petition for Leave to Amend Notice of Appeal, filed by the Raymarks on November 9, 1990, is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: December 28, 1990

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

KIRILA CONTRACTORS, INC.	:	
	:	
v.	:	**EHB Docket No. 90-488-E**
	:	**7/19/90 Assessment of Civil**
COMMONWEALTH OF PENNSYLVANIA	:	**Penalty**
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: December 28, 1990**

OPINION AND ORDER
SUR PETITION TO FILE APPEAL
NUNC PRO TUNC

By: Richard S. Ehmann, Member

Synopsis

Where Appellant's Petition To File Appeal Nunc Pro Tunc fails to set forth any ground for Appellant's failure to timely appeal from a civil penalty assessment other than Appellant's belief, based on a settlement of another assessment, that its conduct was not a violation, Appellant fails to state grounds on which its Petition can be granted.

OPINION

A Petition To File Appeal Nunc Pro Tunc was filed with this Board on November 1, 1990, on behalf of Kirila Contractors, Inc. ("Kirila"). It alleges that on July 20, 1990, the Department of Environmental Resources ("DER") issued a civil penalty assessment in the amount of $6,000 against Kirila under the Non-Coal Surface Mining Conservation and Reclamation Act, the

Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. §3301 et seq., and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq.

Kirila's Petition states that on June 18, 1987, DER had issued an assessment against Kirila in the amount of $3,500. Kirila timely appealed that assessment to us and we assigned its appeal EHB Docket No. 87-282. On February 12, 1990, DER and Kirila settled this appeal via a Consent Order and Adjudication which we approved.[1] The only action of substance which Kirila's Petition alleges to have occurred between June 18, 1987 and our receipt, on November 1, 1990, of Kirila's Petition for leave to appeal nunc pro tunc is this settlement.

As has been said repeatedly in the past, a failure to file an appeal in a timely fashion deprives this Board of the jurisdiction to hear same. Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). Our jurisdiction to hear an untimely appeal does not exist unless we grant a Petition such as that which is now before us in the instant case. For us to grant the Petition, it must meet the requirements of 25 Pa. Code §21.53. While this Petition is in writing, as required by Section 21.53, it fails to aver good cause. Good cause is fraud or the breakdown in Board procedures which contributed to the tardy filing. JEK Construction Co. v. DER, 1987 EHB

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[1]DER's Response to the Petition does not dispute any of this, and the settlement is confirmed by 20 Pa. Bull. 1758 and by our review of the Board's file at Docket No. 87-282-MJ.

643, Mario L. Marcon v. DER and National Waste and Energy Corp., EHB Docket No. 90-078-E (Opinion issued May 8, 1990). No allegation of fraud or breakdown in this Board's procedure exists in the Petition.[2]

The Petition states "[i]n light of Kirila's settlement with the Department at Docket No. 87-282-MJ, Kirila did not believe that its conduct was a violation." It then asserts that Kirila has a good defense to the assessment, that DER's case would not be prejudiced by allowance of an appeal, and that it would be manifestly unfair to deny the appeal because the appeal time has expired.

Even if all of these allegations are true, and we do not suggest they are not, they are not sufficient basis for us to grant the Petition. JEK, supra. Unlike what may be the situation with other forums, our jurisdiction is so time-related that, as a matter of law, we are not permitted to overlook untimeliness unless there has been fraud or a breakdown in this Board's procedure which caused the untimely filing of the appeal. Nothing in the Petition alleges that Kirila's belief that its conduct was not in violation was induced by fraud or by a breakdown in our procedure. Accordingly, we are compelled to deny the Petition.[3]

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[2]Kirila's Petition contains two counts seeking leave to appeal nunc pro tunc from two separate DER civil penalty assessments. One occurred in 1988 and the instant assessment was made in 1990. We assigned the two requests separate docket numbers. The Petition for leave to appeal nunc pro tunc as to the 1988 assessment is found at Docket No. 90-471-E. By Opinion and Order dated December , 1990, we denied the Petition as to the 1988 assessment. It is not addressed herein.

[3]Even if Kirila's belief that its conduct was not violational had an apparently sound basis in February of 1990, clearly that belief's soundness must have been questioned when this $6,000 assessment was levied by DER in (footnote continues)

ORDER

AND NOW, this 28th day of December, 1990, the Petition To File Appeal Nunc Pro Tunc filed on behalf of Kirila Contractors, Inc. is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

(continued footnote)
July of 1990. Inquiry by Kirila at that time as to this belief was appropriate. The delay from July to November 1, 1990 for the filing of this appeal reinforces the question as to whether Kirila's belief could have remained sound for this entire period. Our ruling above, however, does not require us to address this question.

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 28, 1990

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
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Joseph P. Valentino, Esq.
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M. DIANE SMITH
SECRETARY TO THE BOA

GRAND CENTRAL SANITATION, INC.	:	
	:	
v.	:	**EHB Docket No. 89-506-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: December 31, 1990**

OPINION AND ORDER SUR
MOTION FOR SUMMARY JUDGMENT

By Terrance J. Fitzpatrick, Member

Synopsis

The Board dismisses part of an appeal for lack of jurisdiction. Failure to prepay a civil penalty assessed under the Municipal Waste Planning, Recycling and Waste Reduction Act, the Act of July 28, 1988, P.L. 556 No. 101, 53 P.S. §4000.101 et seq. (Act 101) deprives the Board of jurisdiction over the matter. When an appellant submits a check with an appeal, but orders payment on the check stopped before the check can clear, prepayment is not accomplished under Act 101. Thus, that portion of the appeal brought under Act 101 is dismissed for lack of jurisdiction.

OPINION

This case involves an appeal brought by Grand Central Sanitation, Inc. (Grand Central) from a one-hundred dollar ($100) civil penalty assessed by the Department of Environmental Resources (DER) on October 13, 1989. DER assessed the penalty as follows: Fifty dollars ($50) for Grand Central's failure to have proper signage on trucks transporting solid waste in

connection with Grand Central's municipal waste landfill, as required by §1101(e) of Act 101; and fifty dollars ($50) for failure to properly cover or enclose municipal waste during transport, as required by the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, 35 P.S. §6018.605 (SWMA) and 25 Pa. Code §286.211(a).

Grand Central filed its appeal of the assessment on October 26, 1989, accompanying it with a check for $100 as prepayment of the penalty. Before the check could clear, however, Grand Central ordered payment on the check stopped, and the check was returned as uncollectible.

On March 29, 1990 DER filed a motion for summary judgment as to that part of the appeal addressing the Act 101 penalty. DER maintains in its motion that Grand Central waived its right to appeal the Act 101 assessment because it did not prepay the penalty, as required for perfecting an appeal under §1704(b) of Act 101. DER argues that, because Grand Central cancelled the check it had sent with the appeal, the appeal was never perfected as to the Act 101 penalty assessment, and the Board has no jurisdiction to review the matter.

Grand Central responded to the motion for summary judgment, stating that it did not fail to perfect the appeal because it sought to comply with the prepayment requirement when it issued the original check, and that the stop payment order was merely an oversight. Grand Central added that it is not unusual for appeals to be filed in courts of law with the filing fees or other payments to follow.

Because DER's grounds for summary judgment are jurisdictional, we will treat the motion as a motion to dismiss, rather than as one for summary judgment. See, Grand Central Sanitation, Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources, EHB Docket No. 89-615-F

(Opinion issued June 28, 1990).

We agree that Grand Central failed to perfect its appeal when it cancelled the check it had sent for that purpose. Section 1704(b) of Act 101 states, in pertinent part:

> The person charged with the penalty shall then have 30 days to pay the penalty in full or if the person wishes to contest either the amount of the penalty or the fact of the violation, either to forward the proposed amount to the department for placement in an escrow account with the State Treasurer or with a bank in this Commonwealth or to post an appeal bond in the amount of the penalty... Failure to forward the money or the appeal bond to the department within 30 days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

Act 101, §1704(b) (emphasis supplied).

Grand Central remarks that Grand Central's issuing a stop order on the check "does nothing to detract from the fact that Grand Central had essentially sought to comply with the mandate of the rules at that point." We disagree. Cancellation of the check prevented its placement in escrow, and, thus, the check did not constitute prepayment as required by §1704(b). Just as we held in Grand Central Sanitation, Inc., supra, we state here that Grand Central's failure to prepay the penalty assessment within the 30-day period prescribed in §1704(b) is a failure to perfect the appeal, and deprives the Board of jurisdiction over the matter. Therefore, we dismiss that portion of the appeal objecting to the civil penalty assessed under Act 101.

ORDER

AND NOW, this 31st day of December, 1990, it is ordered that the portion of Grand Central Sanitation, Inc.'s appeal objecting to the Civil penalty assessment under Act 101 is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers
ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick
TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann
RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack
JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 31, 1990

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

F.A.W. ASSOCIATES	:	
	:	
v.	:	**EHB Docket No. 90-228-B**
	:	**(Consolidated Docket)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 31, 1990

OPINION AND ORDER
SUR
PETITION FOR SUPERSEDEAS

By Thomas M. Ballaron, Hearing Examiner

Synopsis

A Petition for Supersedeas is denied for failure to demonstrate the likelihood of prevailing on the merits of the underlying appeals. Compliance Orders were issued by the Department of Environmental Resources (DER) alleging that the Petitioner's unlicensed excavation activities constituted surface mining and were, therefore, in violation of the Noncoal Surface Mining and Reclamation Act, the Act of December 19, 1984, P.L. 1093, No. 219, as amended, 52 P.S. §3301 *et seq.* (Noncoal Act) and the Noncoal Mining Regulations, 25 Pa.Code §77.1 *et seq.* The Petitioner failed to challenge the validity of the Noncoal Mining Regulations or preserve this issue in any manner in its Notice of Appeal. As a result, this argument will not be considered or reviewed. Petitioner's argument that DER should be estopped from enforcing the Noncoal Mining Regulations must also fail, since it was asserted against an agency performing its statutory duties. As measured against the record, the Petitioner's excavation activity does not qualify for the "construction excavation exception" set forth in the Noncoal Mining Regulations.

OPINION

This action arises from a consolidated appeal filed by F.A.W. Associates (FAW) to a series of Compliance Orders issued by DER between May and August 1990.[1]

At the root of this controversy was FAW's excavation activity at a site which it allegedly intended to develop as an office park (Exh. A-5, A-6, N.T. 44-51), and DER's interpretation of the excavation as "surface mining" as defined in the Noncoal Act.

FAW's Petition for Supersedeas was filed with the Board on September 19, 1990; hearings on the Petition were scheduled and held October 9-10, 1990. As set forth below, FAW has failed to satisfy its burden of proof and, therefore, is not entitled to a supersedeas of DER's compliance orders.

A supersedeas is an extraordinary remedy analogous in many respects to the injunctive relief provided by our state and federal courts, Reading Anthracite and Coal v. Rich, ___ Pa. ___, 577 A.2d 881 (1990). It is not a remedy afforded to a litigant absent a clear demonstration of appropriate need, as defined by the specific standards set forth in the Board's rules of practice and procedure, 25 Pa. Code §21.78:

> (a) The Board, in granting or denying a supersedeas, will be guided by relevant judicial precedent and the Board's own precedent. Among the factors to be considered are:
>
> (1) Irreparable harm to the petitioner.

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[1] Compliance Order No. 90-5-058N was received by FAW May 7, 1990; Compliance Order No. 90-5-069-N was received by FAW May 31, 1990. FAW filed an appeal to both on June 7, 1990 (Docket No. 90-228-MR). The third Compliance Order No. 90-5-112-N was received by FAW August 7, 1990; FAW filed an appeal to this order on August 21, 1990 (Docket No. 90-355-B). Upon motion of FAW, the appeals were consolidated by order dated September 24, 1990 at Docket No. 90-228-B.

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

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

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

The party seeking this extraordinary remedy must satisfy all of the criteria of §21.78(a), Al Hamilton Contracting Co. v. DER, EHB Docket No. 90-268-W (Opinion issued August 9, 1990); Carroll Township Authority v. DER, 1983 EHB 239.

This opinion will evaluate FAW's assertion that it has satisfied the second element of §21.78(a)--that it is likely to prevail on the merits of its underlying appeal. To sustain this burden FAW must demonstrate more than a speculative chance of prevailing, yet is not required to prove its case absolutely. Rather, FAW must "garner a case (of) showing a reasonable probability of success," Bethayres Reclamation Corporation v. DER and Lower Moreland Township, EHB Docket No. 83-227-W (Opinion issued May 29, 1990), citing Mourat v. C. P. Ct of Lehigh Co., 515 F. Supp 1074 (E.D. Pa. 1981).

In support of its position, FAW vigorously argued three alternative theories: (A) DER should be estopped from enforcing the Noncoal Mining Regulations; (B) the Noncoal Mining Regulations are invalid since they exceed the authority granted to DER in the Noncoal Act; (C) if legal, FAW's conduct demonstrates compliance with the regulations. Common to each theory, is FAW's

contention that its excavation activities do not constitute "surface mining" since they were being conducted "incidental to the construction" taking place at the site.[2]

A. Estoppel

In this argument FAW suggests that DER should be estopped from reviewing the issue of FAW's compliance with the "construction excavation exception" based upon DER's determination on January 30, 1990, (Exh A-13), that the "...area in question was being developed for commerical use...."[3]

The basic elements of estoppel are outlined in Heckert v. Commonwealth of Pennsylvania Department of State, 82 Pa.Cmwlth.Ct. 636, 476 A.2d 481 (1984): (1) misrepresentation of a material fact; (2) with knowledge (or with reason to know) that another would justifiably rely upon the misrepresentation; (3) resulting in subsequent harm or detriment. Also, see Divine Providence Hospital v. Commonwealth of Pennsylvania, Department of

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[2] The "construction excavation exception" is set forth as part of the definition of surface mining under the Noncoal Act:

> Surface mining does not include any of the following:
> * * * * *
> (5) The extraction, handling, processing or storing of minerals from any building construction excavation of the site of the construction where the minerals removed are incidental to the building construction excavation, regardless of the commercial value of the minerals. (emphasis added).

Also see the Noncoal Mining Regulations at 25 Pa.Code §77.1, which elaborate upon this exception. (footnote 4, *infra*).

[3] In December, 1989, DER issued a Compliance Order based upon its evaluation that FAW was engaged in surface mining. It subsequently vacated the order on January 30, 1990, following assurances that the excavation was nearly complete and that construction would begin at the site in the Spring of 1990 (N.T. 269).

Public Welfare, 76 Pa. Cmwlth. Ct. 188, 463 A.2d 118 (1983); and Hauptman v. Commonwealth of Pennsylvania Department of Transportation, 59 Pa. Cmwlth. Ct. 277 429 A.2d 1207 (1981) and cases cited therein.

In asserting that it is entitled to relief based upon this doctrine, FAW has incorrectly measured the facts in evidence against the standards enumerated above.

DER's review of the FAW parcel and its subsequent lifting of the initial Compliance Order in January, 1990 was not misleading in any respect. DER vacated the Compliance Order based on its reasonable expectation that FAW would continue to develop the parcel in accordance with the proposed plan and representations. As a result, DER expected FAW to complete its excavation activity and initiate construction by the spring of 1990. Upon reinspection in May, the DER inspector noted that the excavation work had continued and that construction had not begun. Having determined that FAW had failed to obtain any building or sewage permits, he was fully justified in re-evaluating the FAW site to determine whether it should remain exempt from the definition of surface mining.

Similarly, FAW has failed to demonstrate that it justifiably relied to its detriment upon DER's action. In the wake of DER's January determination, FAW resumed the identical excavation activity in which it was engaged prior to its receipt of the compliance order. The record is devoid of evidence that FAW changed its position, altered its plans or undertook any substantial forbearance based on DER's decision. In fact the record reveals that FAW continued to benefit from the unfettered excavation of sand and gravel from the site (N.T. 81).

More fundamentally, FAW has failed to recognize that an estoppel argument will not prevail when asserted against an agency performing its

statutory duties and responsibilities. DER is charged with both the administration and enforcement of the Noncoal Act. Even if its agents had been lax or negligent in their initial review of the FAW parcel, DER cannot be prevented from enforcing the law. See Commonwealth v. Western Maryland Railroad Company 377 Pa. 312, 105 A.2d 336 (1954); Lackawanna Refuse Removal Inc. v. Com. Dept. of Environ. Resources 65 Pa. Cmwlth. 372, 442 A.2d 423 (1982); Com. Dept. of Environ. Resources v. Philadelphia Suburban Water Co., ___ Pa.Cmwlth ___, 581 A.2d 984 (1990). As a result, FAW's estoppel argument must fail.

B. The Noncoal Mining Regulations

FAW's second argument essentially involves a multi-faceted attack upon the Noncoal Mining Regulations promulgated at 25 Pa. Code §77.1. FAW's basic contention is that the Environmental Quality Board (EQB) exceeded its authority by expanding the definition of the "construction excavation exception" by adding two material elements: (A) the requirement as set forth in a DER draft policy document that a building permit be obtained in order to qualify for the exception; (B) a time constraint requiring the excavation to take place concurrently with the construction, (FAW's brief p. 14 and 19).

These legal arguments must also fail. The Board's Rules of Practice state at 25 Pa. Code §21.51(e) that:

> ...any objection not raised by the appeal shall be deemed waived, provided that upon good cause shown the Board may agree to hear such objection or objections. For the purpose of this section, good cause shall include the necessity for determining through discovery the basis of the action from which the appeal is taken.

FAW failed to raise or preserve these issues in its Notice of Appeal; nor did it reserve its right to amend its appeal following discovery, precluding review of these issues in the instant case. It is a well accepted

principle that issues not raised by an appeal are waived. See NGK Metals Corporation v. DER, EHB Docket No. 90-056-MR (Opinion issued April 5, 1990), in which the Board refused to allow NGK to contest the validity of certain regulations, when the issue was not raised in the Notice of Appeal. Also see Pennsylvania Game Commission v. DER, 97 Pa. Cmwlth. 78, 509 A.2d 812 (1989); Raymark Industries v. DER, 89-294-E (Opinion issued September 20, 1990); Western Hickory Coal Company v. DER, 90-057-E (Opinion issued July 20, 1990).

C. FAW's Compliance Within the Noncoal Regulations

FAW's final argument is posed in the alternative. Assuming that the Noncoal Mining Regulations are legal, FAW asserts that it is not engaging in surface mining activities. Instead, FAW suggests that it has plans to develop the parcel commercially and is simply preparing its land for construction. Therefore, FAW argues that its excavation activities are clearly within the scope of the "construction excavation exception."[4]

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[4] The definition of the "construction excavation exception" set forth in the Noncoal Act (footnote 2, *supra*) was refined in the Noncoal Mining Regulations 25 Pa. Code §77.1:

> For purposes of this section, the minerals removed are incidental to construction if the excavator demonstrates that:
>
> A. Extraction, handling, processing or storing are conducted concurrently with construction.
> B. The area mined is limited to the area necessary to construction.
> C. The construction site is reasonably related to the use proposed for the site.

It is apparent that the exception is based upon a recognition that the primary goal of the developer is to earn a return on his investment through the sale or lease of the developed parcel, not by mining the site. Consequently, the exception relieves the developer from the obligation of obtaining a mining permit or license, since it is expected that he will move as quickly as possible through the planning, permitting and site-preparation phases in order to proceed with construction.

Viewed in the context of the exception, the record does not support FAW's assertions. FAW admitted that it proceeded more slowly with its excavation than it might have due to the weak financial market which made development funds "very uncertain," the research costs of developing an appropriate sewage treatment plant compatible with the effluent standards associated with an exceptional value stream, and the overall development potential of the FAW parcel (N.T. 77). Moreover, FAW also conceded that the excavation of the site was scheduled according to how easily it could sell the sand and gravel (N.T. 78) rather then in accord with a construction schedule (N.T. 81). In addition, FAW acknowledged that it did not have any contracts or leases with any prospective tenants for its office park. As a result, neither the final design specifications nor the construction date of the office park had been determined. Of equal note, FAW indicated it might not begin construction at the site until 1992 or 1993. In view of the rationale and express language of the exception, it is patently unreasonable to expect excavation to take 3-4 years.

FAW's failure to pursue its development plan in the manner envisioned by the exception is more deeply underscored by its awkward proposal to build a warehouse on the parcel. Eschewing its proposal to build an office park, FAW indicated at the supersedeas hearing that it would could begin construction of a warehouse on the excavated site as early as the spring of 1991. FAW's decision was motivated by its need to satisfy the criteria of the exception (see footnote 4, *supra*), rather than an interest in advancing the development of the parcel.[5] The development plan (Exh. A-5 and A-6) and the "use

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[5] On the first day of the supersedeas hearing, FAW proposed to build the warehouse on a portion of the site which had not been excavated (N.T. 157). footnote continued

proposed for the site" called for the construction of an office park. The subsequent excavation activities, including a determination of the amount of material to be removed and the dimensions of the site, were tailored to that proposal, not the construction of warehouse facilities. The warehouse facilities were never part of the FAW development plan; the facilities consisted of relatively simple, pre-engineered structures which could be built quickly and which FAW would consider removing if it were able to interest a prospective tenant in an office building (N.T. 363). Clearly, the warehouse plan does not bear a reasonable relationship to the "proposed use of the site." Similarly, it is evident that FAW selected the dimensions of the warehouse to fit the excavation, as opposed to "limiting the excavation site" to accommodate the construction.

As measured against the record, FAW has failed to demonstrate compliance with the specified elements of the exception, and, therefore, is not removing minerals "incidental to construction" as this phrase is defined in the regulation.[6]

FAW may intend to eventually develop the parcel according to the proposed plans. At the present, it would appear that FAW has chosen to pace

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continued footnote
Reversing itself on the second day of the hearing, FAW indicated that it had reconsidered the location and now intended to build on the area that had been cleared and excavated (N.T. 361-362). By altering the location, FAW could argue that construction could begin very soon. In fact, this simply casts more doubt on the credibility of the proposal.

[6] In structuring its argument, FAW asserted that DER improperly interpreted the definitions of incidental (to construction excavation) and concurrent (with construction) (FAW brief, p. 17). FAW correctly recites that for "mineral removal" to be "incidental to the construction excavation," it must be secondary in importance to the construction excavation. However, FAW failed to perceive that the term focused solely upon the purpose of the activity at the site, not the sequence or timing of the activities. In contrast, "concurrent with construction" relates to when other construction must occur in relation to the rest of the project.

its development according to the general economic climate, its resources and business objectives. FAW's slow and measured excavation of the parcel provides it with the maximum flexibility, as it awaits a resurgence in demand for office space. It also allows FAW to prepare the site as inexpensively as possible and perhaps generate some revenue from the sale of the minerals.

While these are certainly commendable business objectives, future potential development of a parcel does not constitute an exception to the definition of surface mining.

CONCLUSION

FAW's activities do not come within the scope of the "construction excavation exception" of the Noncoal Act; as a result, FAW is not likely to prevail on the merits of the underlying appeals of the subject Compliance Orders.

Having found that FAW has failed to sustain its burden of proof in this respect, it is unnecessary to explore its additional arguments for a supersedeas.[7]

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[7] While not determinative of the within opinion, FAW's claim that it will suffer irreparable injury through potential exposure to civil and criminal liability is without merit. If DER pursues civil and criminal sanctions against FAW, it will do so in the appropriate venue. While there may be some similarities in the facts, it must be noted that the remedies will be different, the elements of the charged offenses will be different, and the burdens of proof will be different. FAW will be afforded its day in Court with all of the attendant substantive and procedural safeguards, before any finding of civil or criminal misconduct can be entered.

O R D E R

AND NOW, this 31st day of December, 1900, it is ordered that FAW's Petition for Supersedeas is denied.

ENVIRONMENTAL HEARING BOARD

THOMAS M. BALLARON
Hearing Examiner

DATED: December 31, 1990

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F.A.W. ASSOCIATES	:	
	:	
v.	:	EHB Docket No. 90-228-B
	:	(Consolidated Docket)
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: December 31, 1990

OPINION AND ORDER SUR MOTION TO COMPEL DISCOVERY

By Thomas M. Ballaron, Hearing Examiner

Synopsis

A Motion to Compel Discovery filed by F.A.W. Associates (FAW) seeking a "draft policy document" on noncoal surface mining will be granted over the objection of the Department of Environmental Resources (DER), which claimed that the "draft policy" was shielded from discovery by the deliberative process privilege.

The deliberative process privilege is not recognized as a bar to discovery; nor are the policy arguments propounded in support of the privilege adequate to sustain the burden of proof necessary for the issuance of a protective order pursuant to 25 Pa. Code §21.111(e) and Pa.R.C.P. No. 4012.

OPINION

In the underlying action, DER asserted that FAW had engaged in noncoal surface mining without a license or permit. DER subsequently issued

and served a series of Compliance Orders upon FAW.[1]

Having filed timely appeals to the orders, FAW countered that its excavation activity was "incidental to construction" and therefore qualified for an enumerated exception to the definition of surface mining found in the Noncoal Surface Mining Conservation and Reclamation Act, the Act of December 19, 1989, P.L. 1093, No. 219, as amended, 52 P.S. §3301 et seq.

FAW also alleged that its excavation activity was not evaluated against the standards of the law, but rather against the criteria of an unpublished "draft policy document" assembled by DER which allegedly required developers to obtain building permits before qualifying for the exception.

During the course of depositions held on October 2 and 5, 1990, DER witnesses were asked about the "draft policy document." In both situations they were instructed by their counsel not to answer the questions or provide any information regarding the subject. FAW's Motion to Compel Discovery was subsequently filed with the Board.[2]

It is well accepted that discovery is available to any party regarding any matter, not privileged, which is relevant to the subject matter of the action. Pa.R.C.P. No. 4003.1(a)

Our discovery rules are designed to provide generous access to all relevant information. CORCO v. DER, EHB Docket No. 90-128-W (Opinion issued Nov. 7, 1990). To this end, relevance is construed broadly and liberally to

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[1] The background of this controversy has been detailed in the parallel opinion dismissing FAW's Petition for Supersedeas, F.A.W. Associates v. DER, EHB Docket No. 90-228-B (Opinion issued December 31, 1990)

[2] These allegations were specified in FAW's Motion to Compel Discovery presented to the Hearing Examiner at the beginning of the supersedeas hearing on October 9, 1990. DER subsequently filed a Response to the Motion, and both parties have submitted briefs in support of their respective positions.

allow discovery if there is any conceivable basis of relevancy. Save Our Lehigh Valley Environment v. DER and Chrin Brothers, 1988 EHB 147, at 150. Also see 8 Standard Pa. Practice 2d §34.16, and the cases collected therein. Under these standards FAW's inquiry is certainly relevant.[3]

DER wishes to bar access to the "draft policy" by asserting that the withheld documents are part of an ongoing effort to develop a policy guidance manual for use in implementing the noncoal surface mining exceptions. It suggests that premature disclosure of the "draft policy" would seriously "chill" the free exchange of ideas and views necessary for the formation of a meaningful policy. For these reasons DER contends that the "draft policy" is shielded absolutely by the deliberative process privilege.

This argument is not persuasive; the Board has repeatedly held that it does not recognize the deliberative process privilege.[4]

The Board's view on this issue has not changed since the respective merits of the privilege were discussed in Kocher Coal Co. v. DER, 1986 EHB 945 in which DER raised a similar argument. Arrayed against DER's contention were the more compelling public policy objectives of the Pennsylvania discovery rules. The Board explained that without the guidance of statutory or appellate authority it must find in favor of the party seeking relevant discovery, ".... to ensure that every litigant is able to present its best

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[3] FAW's legal argument regarding DER's alleged implementation of the "draft policy," as woven into its general assertion that the Noncoal Mining Regulations, (25 Pa. Code §77.1 et seq.) were illegal, was dismissed since FAW failed to raise or preserve the issue in its Notice of Appeal. F.A.W. Associates v. DER, EHB Docket No. 90-228-B (Opinion issued December 31, 1990). Nevertheless, the discovery issue is not moot since a review of the "draft policy" could lead to the development of admissible evidence. Pa.R.C.P. No. 4003.1(b).

[4] Kocher Coal Co. v. DER, 1986 EHB 945; DER v. Texas Eastern Pipeline Co., 1989 EHB 186; City of Harrisburg v. DER & The Pa. Fish Com., EHB Docket No. 88-120-F (Opinion issued April 30, 1990).

possible case to the finder of fact."[5]

The rationale of this case remains firm and unyielding; as a result, absent statutory action by the legislature or an express directive of an appellate court, the deliberative process privilege will not be recognized as a bar to discovery.

In the alternative, DER asserts that a protective order should be issued to prevent the release of the "draft policy" to third parties.

The Board's authority in this regard is specified in 25 Pa. Code §21.111(e) which empowers the Board to issue protective orders according to the standards enumerated in Pa.R.C.P. No. 4012. The pertinent section of the rule requires the party requesting this relief to demonstrate "good cause" that the order is necessary to protect it from "unreasonable annoyance, embarrassment, oppression, burden or expense." Pa.R.C.P. No. 4012(a).

Relying solely upon the identical policy arguments submitted in support of the deliberative process privilege, it is apparent that DER has not met its burden of proof. Any annoyance and/or embarrassment caused by the release of the "draft policy" is certainly reasonable in light of the public policy objectives noted above. This is underscored and made more obvious by the fact that DER had already released the substance of the "draft policy" to industry representatives in April, 1990 during a series of "noncoal roundtable

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[5] Kocher Coal Co. v. DER, 1986 EHB 945, 952-953. Also see DER v. Texas Eastern Transmission Corp., 130 Pa. Cmwlth. 655, 569 A.2d 382 (1990), in which the Court specifically held that "no present authority supporting the deliberative process privilege can be found in Pennsylvania" and "the appropriate course may be to defer the development of a deliberative process privilege to the General Assembly...."

meetings."[6] Similarly, DER has failed to produce any affidavits or evidence, and has failed to propound any arguments or theories demonstrating that the production of a single policy document would cause it unreasonable burden, expense or oppression. In summary, DER has not offered any reason, much less shown good cause, for the issuance of a protective order to deny or otherwise limit FAW's discovery request in any manner.

ORDER

AND NOW, this 31st day of December, 1990, it is ordered that:

1. FAW's Motion to Compel is granted.

2. DER's Motion for a Protective Order is denied.

3. DER shall produce a copy of its draft policy document on noncoal surface mining and provide the same to FAW for inspection and copying within 15 days of this Order.

ENVIRONMENTAL HEARING BOARD

THOMAS M. BALLARON
Hearing Examiner

DATED: December 31, 1990

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[6] Roger J. Hornberger from DER testified at the supersedeas hearing that the information was made available to noncoal mine operators, consultants, surveyors and "anyone who showed up at the meetings." (Notes of Testimony pp. 215-216)