Environmental Hearing Board

Adjudications and Opinions

2007
VOLUME II

COMMONWEALTH OF PENNSYLVANIA
Thomas W. Renwand, Acting Chairman

JUDGES

OF THE

ENVIRONMENTAL HEARING BOARD

2007

Chief Judge and Chairman (Resigned April 6, 2007)	Michael L. Krancer
Acting Chairman and Chief Judge (Effective April 7, 2007)	Thomas W. Renwand
Judge	George J. Miller
Judge	Michelle A. Coleman
Judge	Bernard A. Labuskes, Jr.
Secretary	William T. Phillipy [IV]

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 2007.

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

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2007

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SECRETARY TO THE BOARD

VEOLIA ES GREENTREE LANDFILL, LLC	:	
	:	
v.	:	**EHB Docket No. 2006-073-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 5, 2007**

OPINION AND ORDER ON DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT FOLLOWING EVIDENTIARY HEARING

By Thomas W. Renwand, Acting Chairman and Chief Judge

Synopsis:

This opinion is issued following an evidentiary hearing to determine whether a letter from the Department which accompanied a refund check for disposal fees collected under Act 90 was a final action of the Department on a refund petition filed by a landfill. The testimony of Department officials was that the petition had no bearing on the amount of the refund or the contents of the letter that accompanied the refund check, and, therefore, we cannot conclude as a matter of law that the letter was a final decision on the refund petition.

OPINION

This matter involves an appeal by Veolia ES Greentree Landfill, LLC (Veolia), formerly known as Onyx Greentree Landfill, LLC, challenging the Department of Environmental Protection's (Department) procedure of refunding disposal fees found to be improperly collected under Act 90 of 2002, Act of June 29, 2002, P.L. 596, *as amended*, 27 Pa.C.S.A. §§ 6201 – 6305

(Act 90). This opinion is issued following an evidentiary hearing on the question of whether Veolia's appeal is untimely or barred by administrative finality.

Procedural Background

The Board has consolidated a number of appeals by other landfills challenging the disposal fee refunds at EHB Docket No. 2006-012-R. Veolia was granted intervention in that matter and has also maintained the present appeal.

This matter was originally assigned to former Chief Judge Michael L. Krancer and was reassigned to Acting Chief Judge Thomas Renwand on February 5, 2007. A comprehensive history of this litigation is set forth in an earlier opinion by Chief Judge Krancer ruling on a motion to dismiss filed by the Department, *see Onyx Greentree Landfill, LLC v. DEP*, EHB Docket No. 2006-073-K (Opinion and Order Denying Motion to Dismiss issued June 30, 2006) and an earlier opinion by Acting Chief Judge Renwand ruling on a motion for summary judgment filed by the Department, *see Veolia ES Greentree Landfill, LLC v. DEP*, EHB Docket No. 2006-073-R (Opinion and Order on Department's Motion for Summary Judgment issued February 27, 2007).

As noted in the earlier opinions, this matter and a number of other similar appeals came about after the Commonwealth Court's decision in *Brunner v. DEP*, 2004 EHB 684, *rev'd,* 869 A.2d 1172 (Pa. Cmwlth. 2005), *petition for allowance of appeal denied*, 885 A.2d 44 (Pa. 2005), which addressed the application of paragraph (b)(1) of Section 6301 of Act 90. Section 6301 of Act 90 deals with the collection of disposal fees for municipal waste landfills. Subsection (a) imposes a disposal fee of $4.00 per ton for all solid waste disposed at a municipal waste landfill. Subsection (b) provides two exceptions. The exception addressed in *Brunner* reads as follows:

> (b) Exceptions. – The fee established under this section [6301] shall not apply to the following:

> (1) Process residue and nonprocessible waste that is permitted for beneficial use or for use as alternate daily cover at a municipal waste landfill.
>
> * * * * *

27 Pa.C.S.A. § 6301(b)(1).

Prior to *Brunner*, the Department had interpreted this exception to apply only to process residue and nonprocessible waste generated by a resource recovery facility. In 2002, Joseph J. Brunner, Inc., a municipal waste landfill, challenged the Department's interpretation of Section 6301(b)(1), after receiving a notice of deficiency for failure to pay the fee. In a split decision, the Environmental Hearing Board ruled in favor of the Department. On appeal, the Commonwealth Court reversed, holding that the limited reading of the statute applied by the Department was incorrect and that non-resource recovery material was also eligible for the fee exception. *See Brunner, supra.*

While the *Brunner* case was being litigated, the appellant in that case continued to withhold the payment of the $4.00 per ton disposal fee for non-resource recovery material used as alternate daily cover, while other landfills took the route of continuing to pay it while the case was pending. After the holding in *Brunner*, a number of those landfills filed petitions or letters with the Department seeking a refund of the fees they had paid on non-resource recovery material used as alternate daily cover since the inception of the fee in 2002. Included in these petitions was one from Onyx Greentree Landfill, now Veolia, which was filed on November 21, 2005.

The Department granted refunds to the landfills but only as far back as March 14, 2005, the date of the *Brunner* Commonwealth Court decision, *or* six months prior to the date of a landfill's communication which the Department considered to be a refund petition, whichever

was earlier. The refunds were sent to landfills, including Veolia, accompanied by a letter from the Department dated December 16, 2005. At issue in both this appeal and the appeals consolidated at EHB Docket No. 2006-012-R is the question of the point in time from which the Department is required to calculate the refunds. That question is the subject of summary judgment motions before the Board and was addressed in an oral argument on March 1, 2007. At the request of the parties in this matter, a decision on those motions was stayed pending a decision on the timeliness of Veolia's appeal.

As to the timeliness question, Chief Judge Renwand had denied the Department's motion for summary judgment on this issue on the grounds that further evidence was needed. An evidentiary hearing was held April 13, 2007 to address the question of whether Veolia's appeal is untimely or barred by the doctrine of administrative finality. At issue is the Department's December 16, 2005 letter that accompanied the refund check issued to Veolia and the question of whether that letter was a final action on Veolia's refund petition. Based on the evidence presented at trial, the Joint Stipulation of the parties and previous findings of the Board, we make the following findings of fact:

Factual Findings

Following the Commonwealth Court's decision in *Brunner* and beginning in April 2005, the Department began receiving letters from various landfills asking for a refund of the disposal fees they had paid on alternate daily cover since the inception of the fee in 2002. (T. 24-25; App. Ex. 1A—1G) Beginning on June 10, 2005, the Department responded by letter and advised the landfills to continue paying the fee since an appeal had been taken to the Pennsylvania Supreme Court; the Department further advised the landfills that the money would be placed in an escrow account. (App. Ex. 2A—2H) The Department's letters were addressed to specific individuals at

the landfills. Additional letters requesting refunds were sent to the Department in September 2005. (App. Ex. 3A—3F) The Department considered these letters and the earlier letters to be petitions for a refund. (T. 29)

On September 8, 2005, the Supreme Court denied allocatur and put to rest the question of whether the landfills had to pay a disposal fee for non-resource recovery material used as alternate daily cover. On September 23, 2005, Jeffrey Beatty, Chief of the Department's Division of Reporting and Fee Collection, sent an email to two representatives of the waste industry – Mary Webber at the Pennsylvania Waste Industries Association and Mark McClellan at Evergreen Environmental – asking them to notify landfills not to pay the $4.00 per ton disposal fee on any solid waste used as alternate daily cover. (T. 75-78; App. Ex. 8 and 9) The Department did not directly notify the landfills. (T. 79)

Thereafter, the Department began the process of determining how it would address the refunds due the landfills for the fees they had paid on alternate daily cover. This task was primarily handled by Mr. Beatty and his superior, Mr. Kenneth Reisinger, Director of the Bureau of Waste Management. Landfills were divided into categories: petitioners who were due a refund, petitioners who were not due a refund, non-petitioners who were due a refund, and Joseph J. Brunner, Inc. Joseph J. Brunner, Inc. was treated differently because it had challenged the Department's interpretation of the fee exception and had withheld payment of the disposal fee for the third quarter of 2002. (T. 57-58, 164)[1] Petitioners who were not due a refund were landfills who had not paid fees during the time period in question but had simply filed a protective appeal. (T. 180) Of the remaining categories, "petitioners due a refund" were considered to be those who had filed either a petition or a letter requesting a refund, while "non-

[1] *See Brunner, supra.*

petitioners due a refund" were those who had not filed a letter or petition but were still entitled to a refund. (T. 164-79)

The Department made a decision to refund everyone, both petitioners and non-petitioners, at least as far back as the Commonwealth Court's decision in *Brunner*, March 14, 2005. Additionally, to calculate the refund due petitioners, the Department turned to the refund procedure set forth in Section 702(e) of Act 101, Act of July 28, 1988, P.L. 556, *as amended*, 53 P.S. §§ 4000.101 – 4000.1904, which states that "the department shall refund to the operator the amount due him, together with interest...from the date of the overpayment. No refund...shall be made unless the petition for the refund is filed with the department within six months of the date of the overpayment." 53 P.S. § 4000.702(e). Accordingly, the Department refunded the petitioners either six months back from the date of their petition or back to March 14, 2005, whichever was earlier. (T. 164-79)

Following this approach, and taking into consideration the fact that disposal fee payments were due by the 20th day of the month following the end of each quarter, the Department determined that any petitions received on or before October 20, 2005 would be refunded an amount six months prior to the date of their petition. Any petitions coming in after October 20, 2005 would be refunded back to March 14, 2005. (T. 87) Since Veolia filed its petition on November 21, 2005, after the October 20th cutoff date, it was treated as a non-petitioner. (T. 86-87, 173, 184, 189-90)

The petition filed by Veolia was submitted to the Department by Veolia's counsel in this matter, Howard J. Wein, Esq. (T. 85) It was prepared by Attorney Wein with assistance from Veolia's area manager/general manager, Donald Henrichs, and was accompanied by a cover letter signed by Attorney Wein on his law firm's letterhead. (App. Ex. 5; J.S. 10; T. 85) The

petition requested $600,979.16, which Veolia claimed represented the amount of disposal fees it had paid for solid waste used as alternate daily cover plus interest since the third quarter of 2002, the inception of the disposal fee. (J.S. 11) This amount was subsequently corrected to $513,258.90 after discovering an error in the calculation. (T. 8-10)

The Department prepared a series of letters to be sent to the landfills along with refund checks where a refund was due. The letters were signed by the Director of the Department's Bureau of Waste Management, Kenneth Reisinger, and were prepared with the assistance of Department regulatory counsel. (T. 249) The letters and checks were sent to the landfills on December 16, 2005. (J.S. 14, 15; T. 188) The letters were not addressed to any specific individual at the landfills but simply to the corporate entity. The letter sent to Veolia was not addressed to general manager/area manager Mr. Henrichs, nor was Veolia's counsel Attorney Wein copied on the letter. (J.S. 16, 17)

The form of letter that a landfill received was determined by which category they fell into – petitioner due a refund, petitioner not due a refund, non-petitioner due a refund and Brunner. (T. 225-29) Veolia was the only petitioner who fell into the non-petitioner category due to the lateness of its petition. (T. 173, 184, 189-90, 193) All other petitioners received a letter referring to their petition. The December 16 letter received by Veolia did not refer to its petition. (App. Ex. 5) In fact, the calculations performed by the Department for Veolia's refund were already underway by the time the petition was received by the Department. (Comm. Ex. 1; T. 165-167, 173) When Veolia's petition was received by the Department in November 2005, it was either not discussed or was discussed only briefly because it was considered to have no bearing on the amount to be refunded to Veolia. (T. 49-50, 86-87)

The check that accompanied the Department's December 16 letter to Veolia was in the

amount of $94,798.94, representing what the Department calculated Veolia had paid in disposal fees for alternate daily cover since the Commonwealth Court's decision in *Brunner* on March 14, 2005. (J.S. 13) The letter and refund check were received by Heidi Trichey, an employee of Veolia, who signed the certified mail receipt on December 19, 2005 and forwarded the documents to Trisha Boni, Veolia's office manager. (J.S. 18, 19, 21) Trisha Boni informed Mr. Henrichs of the receipt of the check for fees paid on alternate daily cover. (J.S. 20, 22) Mr. Henrichs did not ask to see the check at the time, nor did he ask if a letter accompanied it. (T. 140) It was his testimony that he thought it was part of the money the company had petitioned for. (T. 126) Mr. Henrichs contacted Shari Onoratti, Veolia's staff accountant, to determine what should be done with the check. (J.S. 26) She told him to have the check deposited which was done on January 15, 2006 by Ms. Boni. (J.S. 26, 27).

Mr. Henrichs did not see the December 16 letter that accompanied the refund check and was not aware of its existence until he spoke to Attorney Wein at the end of January 2006 inquiring about the status of the refund petition. (J.S. 29-31) On January 31, 2006, Attorney Wein sent an electronic mail (e-mail) to Bureau Director Kenneth Reisinger inquiring about Veolia's petition. (App. Ex. 14) Attorney Wein was informed by Mr. Reisinger by email that day that the Department had sent a letter to Veolia on December 16, 2005 addressing refunds of the $4.00 disposal fee. (App. Ex. 15) Attorney Wein contacted Mr. Henrichs, who then obtained a copy of the December 16 letter from Ms. Boni. (J.S. 33-35)

Attorney Wein then sent another email to Mr. Reisinger that same day noting that the December 16 letter did not reference the November 21, 2005 petition filed by Veolia. In that email, Attorney Wein asked for a response to the November 21, 2005 petition. (Comm. Ex. 10) Mr. Reisinger followed up with a letter to Attorney Wein on February 3, 2006 stating that the

Department considered its December 16, 2005 letter to be a final action on Veolia's petition. (App. Ex. 16) Veolia filed an appeal of Mr. Reisinger's January 31, 2006 email and February 3, 2006 letter.

The Department argues that to the extent the appeal is intended to be an appeal of the Department's December 16 letter, it is untimely. To the extent the appeal is from Mr. Reisinger's January 31 email and February 3 letter, it is the Department's argument that the appeal is barred by administrative finality. The Department contends that the final action in this matter, and the action that should have been appealed, is the December 16, 2005 letter that accompanied the refund check.

That letter states in relevant part as follows:

> The Department is refunding all fees collected on solid wastes used as alternate daily cover since March 14, 2005. The quarterly reports that you submitted to us since March 14, 2005, indicate that you paid disposal fees on solid waste that was used as alternate daily cover in the total amount of $93,552.48. These fees are being returned to you with interest at a rate that has been set by the Secretary of the US Treasury for each calendar year, less 2%, for a total of $94,798.94.
>
> In view of the Court's decision, please do not continue to include payment of the $4 disposal fee on solid waste that is used as alternate daily cover with your quarterly reports.
>
> Any person aggrieved by this action may appeal. . .Appeals must be filed with the Environmental Hearing Board within 30 days of receipt of written notice of this action unless the appropriate statute provides a different time period. . .This paragraph does not, in and itself, create any right of appeal beyond that permitted by applicable statutes and decisional law.

(App. Ex. 7)

Veolia asserts that because the December 16, 2005 letter does not reference the

November 21, 2005 petition it could not have been interpreted as being a final action as to the petition. The Department counters that the letter's failure to specifically reference the November 21, 2005 petition has no bearing on the matter since Mr. Henrichs did not read the letter when it was received by Veolia, nor did he read the letters received by other landfills who filed petitions and whose letters did refer to their petitions. The Department asserts that the wording of the letter along with its practical impact and appeal language indicates an intent that it was the Department's final action on Veolia's petition and similar requests for refund.

Discussion: Is the December 16, 2005 letter a final action on Veolia's November 21, 2005 petition?

Both the Bureau of Waste Management Director, Kenneth Reisinger, and the Department's Chief of the Reporting and Fee Collection Division, Jeffrey Beatty, stated that they considered the December 16 letter to be a final action with regard to the issue of the disposal fee refund (T. 216, 243). However, while the Department's intent may have been to take a final action with regard to refunds it considered to be due as a result of the *Brunner* decision, *we cannot conclude that the December 16 letter was a final action on Veolia's petition.* It is apparent from the testimony of both Mr. Reisinger and Mr. Beatty that the petition itself had no bearing on the contents of the December 16 letter. When the Veolia petition was received, there was either little or no discussion of it between Mr. Reisinger and Mr. Beatty because it was considered to have no bearing on the refund due Veolia. (T. 86) Mr. Beatty testified that the petition was put aside when received since it was considered to have no impact on the final decision. (T. 190) When asked whether the December 16 letter had anything to do with the November 21 petition, Mr. Beatty said the petition had no effect on the calculations. (T. 216) When asked if he considered the December 16 letter to be a response to the November 21

petition, Mr. Reisinger simply stated that he was aware the Department had received the petition but did not believe it was timely or relevant. (T. 243)

That the December 16 letter had no connection to the November 21 petition is further evidenced by the fact that when the Department calculated the refund amounts, Veolia was treated as a *non*-petitioner (T. 173, 184, 189-90) The Department began the process of calculating the refund it considered to be due Veolia before it received Veolia's petition. (Comm. Ex. 1; T. 165-73) Veolia would have received the same refund regardless of whether it filed a petition.

As noted earlier, the December 16 letter sent to Veolia does not reference its petition. While the Department stated in earlier documents filed in this matter that this was an administrative oversight, it contends that the letter's "substance, meaning and purpose, its practical impact, its regulatory and statutory context and its apparent finality" demonstrate that the letter is a final action. (Comm. Post Hearing Brief, p. 2) However, nowhere in the letter does it state that all outstanding issues regarding the $4.00 per ton disposal fee are being resolved. (T. 247-48) The letter merely refers to fees collected after the Commonwealth Court's decision in *Brunner*.

The Department argues that Veolia's *post hoc* subjective reading of the letter cannot justify its failure to file a timely appeal. The Department argues that this is simply an attempt by Veolia to make up for what the Department terms a "monumental inattention to detail." However, it is clear that the Department's own actions with regard to mailing the refund letters may have contributed to the letter "falling through the cracks." Although the Department took pains to ensure that the letters were sent by certified mail because the Department felt that appeals were likely to be filed (T. 194, 197), they made no effort to address the letters to specific

individuals at the landfills or to copy the landfills' counsel on the letters when it was clear that counsel had been involved in filing the petitions. (T. 194) Rather, the letters were simply addressed to the corporate entity itself (T. 196), even though the Department has this information readily available to it on forms that landfills are required to file with the Department. (T. 99) In the case of Veolia, the Department could have easily determined that Mr. Henrichs was the contact person at Veolia since he is listed as such on the General Information Forms filed with the Department. (App. Ex. 10, 11; T. 99) Additionally, the person who submitted Veolia's petition was its counsel, Attorney Wein; yet he was not copied on the December 16 letter. When asked why the letters were not addressed to specific individuals at the landfills or to their counsel, the Department stated that there was no conscious decision not to do so and that the landfills were addressed since they were the ones who paid the fees and had the interest in the matter. (T. 194-95, 252) However, the Departmental letters sent earlier in the year, in June 2005 and subsequent thereto, which advised landfills to continue paying the $4.00 per ton disposal fee on non-resource recovery alternate daily cover, were addressed to specific individuals. (App. Ex. 2; T. 199-200) The Department could easily have done the same in the present case.

Based on the evidence received at the hearing on this matter, we cannot conclude as a matter of law that the December 16 letter was a final action on the November 21, 2005 refund petition filed by Veolia. Therefore, we find that Veolia's appeal of the Department's January 31, 2006 email and February 3, 2006 letter is timely and is not barred by administrative finality. This appeal will be permitted to proceed.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

VEOLIA ES GREENTREE LANDFILL	:	
	:	
v.	:	**EHB Docket No. 2006-073-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 5th day of July 2007, following an evidentiary hearing on the Department's motion for summary judgment on the question of whether the appeal of Veolia ES Greentree Landfill is untimely or barred by administrative finality, we find that the appeal is timely and not barred by administrative finality. The Department's motion is *denied*, and Veolia's appeal shall be permitted to proceed.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

DATED: July 5, 2007

c: **DEP Bureau of Litigation**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

NANCY PARKS and WILLEM van den BERG (husband and wife) and MARCIA CASE	:	
v.	:	**EHB Docket No. 2006-199-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CON-STONE, INC., Permittee	:	**Issued: July 16, 2007**

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board finds that there are no facts and no law to support third-party appellants' objection in an appeal from a noncoal mining permit that the permit was obtained far in advance of the permittee's need for the mine in order to circumvent proposed zoning changes in the host municipality. The Board also dismisses the appellants' objection that the Department must install its own monitoring devices around the mine.

DISCUSSION

Nancy Parks, Willem van den Berg, and Marcia Case (hereinafter collectively referred to as "Parks") appeal from the Department of Environmental Protection's (the "Department's") issuance of a noncoal surface mining permit to Con-Stone, Inc. for a limestone quarry in Haines Township, Centre County, known as Aaronsburg West. All of the parties have submitted

motions for summary judgment along with voluminous memoranda in support of and opposed to the motions. The parties have essentially ignored our recent admonition in *CAUSE et al. v. DEP*, EHB Docket No. 2006-005-L, slip op. at 6 (Opinion February 6, 2007), that summary judgment generally only makes sense in Board proceedings when a small number of material facts are truly undisputed and the appeal presents a clear question of law. With only a couple of minor exceptions, the parties' summary motions raise disputed issues of fact and/or complex and possibly important issues of mixed fact and law that we would prefer not to resolve until after a hearing on the merits. We will limit our discussion to the two instances where we find summary judgment to be appropriate.

First, one of Parks's objections to Con-Stone's permit is that the "real purpose" of the permit application "appears to be" to secure mining rights before the host municipality adopts a zoning ordinance, stormwater management plan, and a subdivision and land development ordinance. She asserts that this is not a "legitimate basis" for permit issuance, and that the Department has effectively "blocked a municipal action under the Municipalities Planning Code." Parks says that Con-Stone's effort to secure mining rights prior to zoning regulations being promulgated is "the only logical explanation" for permitting a new quarry before mineral reserves in an existing quarry are exhausted. She points to a statement by Con-Stone's supervisor that Con-Stone may be ten years away from mining in the new quarry.

The Department and Con-Stone are entitled to summary judgment on this objection. First, Parks cites to no record evidence to support her allegation. Her claim constitutes nothing more than conjecture. In fact, the objection itself merely describes what Con-Stone's purpose "appears to be." Putting aside the lack of any record evidence of a connection between the permit application and possible zoning changes, there is no record evidence regarding what

ordinances are supposedly being considered, or the extent to which any such ordinances are being seriously contemplated. Not only does the objection lack any factual support, Parks cites no law to support the objection other than a vague reference to the section of the Noncoal Surface Mining and Conservation Act that outlines the legislature's purpose in enacting the statute (52 P.S. § 3302). In truth, there is no statute, regulation, or case law to support Park's novel theory. We will decline her invitation to fashion a wholly new standard for reviewing the Department's permitting decisions based upon an applicant's "real purpose." Finally, it is worth mentioning that if Con-Stone does not commence mining within three years, as opposed to the ten years attributed to Con-Stone's supervisor, it will lose its permit. 25 Pa. Code § 77.128. Parks's speculation that the site may sit dormant for a decade is not warranted given this regulatory deadline.

Secondly, we find that the Department and Con-Stone are also entitled to summary judgment on Parks's claim that the Department is required to install all manner of monitoring devices at and near the site. A ruling in support of this theory would constitute a radical departure from Pennsylvania environmental law and practice. Instead of referring us to some specific support in the law for the theory, Parks once again falls back upon nebulous arguments regarding the Department's general duty and authority to protect the environment (citing, e.g., Section 17 of the Administrative Code, 71 P.S. § 510.17). These citations provide inadequate legal support for her radical new proposal. It is entirely unrealistic to expect that the Department would be required to install and operate monitoring devices at even a small percentage of the quarries in the state. There is no such statutory or regulatory requirement for good reason.

Finally, we note for the record that Parks concedes in her response that she lacks evidence that any water supplies have been drained or diminished as a result of Con-Stone's

mining at the Aaronsburg Quarry. In addition, she has withdrawn her objections that the permit application does not contain a blast plan, that missing borehole data rendered the Department's hydrogeologic analysis incomplete, and the Department did not require adequate hydrologic testing to determine that mining activities would not harm private water supplies.

The motions are in all other respects denied. Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NANCY PARKS and WILLEM van den BERG (husband and wife) and MARCIA CASE	:	
v.	:	**EHB Docket No. 2006-199-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CON-STONE, INC., Permittee	:	

ORDER

AND NOW, this 16th day of July, 2007, it is hereby ordered as follows:

1. The appellants' motion for summary judgment is denied.
2. The Department and Con-Stone's joint motion for summary judgment is granted in part. The following objections are dismissed: 1(a)("real purpose" of permit application); 1(c)(DEP monitoring devices); 5(a)(as it relates to blasting damage to water supplies); 5(d)(lack of a blasting plan); 7(h)(missing borehole data), and 7(j)(hydrologic testing regarding private water supplies). The joint motion in all other respects is denied.

ENVIRONMENTAL HEARING BOARD

Thomas W. Renwand

THOMAS W. RENWAND
Acting Chairman and Chief Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: July 16, 2007

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

EUREKA STONE QUARRY, INC.	:	
	:	
v.	:	**EHB Docket No. 2006-044-MG**
	:	**(consolidated with 2006-174-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**August 6, 2007**
	:	

ADJUDICATION

By George J. Miller, Judge

Synopsis:

The Board reduces two civil penalty assessments for air pollution violations against a quarry operation from $175,300 to $93,350. The Board reduces most of the penalties assessed for failing to adequately control fugitive dust emissions where the Department improperly doubled a base penalty for a facility simply because it holds a state permit. The Board also reduces other penalties for failing to maintain records because the amount of the penalty was not a reasonable fit for the violations. The Board reduces a civil penalty assessed for installing and operating a wet suppression system without a plan approval, which the operator agreed to install as part of a consent agreement between the operator and the Department as a major solution to fugitive dust problems.

The Board also finds that excavating overburden to bedrock is not exempted "clearing of land" under the Department's fugitive air contaminants regulations at 25 Pa. Code § 123.1(c)(1), and therefore the operator is liable for a civil penalty for failing to control fugitive dust.

The Board further holds that the Department did not abuse its discretion by placing the quarry operator on the Compliance Docket because the operator did not exhibit an intention or ability to comply with the regulations. Although the operator made some attempts to abate violations cited by the Department, the operator expended no real effort in proactively preventing violations which occurred frequently in its operations, over the course of several years prior to its agreement to install a wet suppression system satisfactory to the Department.

BACKGROUND

Before the Board are appeals filed by the Eureka Stone Quarry, Inc. objecting to a series of enforcement actions taken by the Department in connection with the operation of three of Eureka's quarries and stonecrushing operations. Specifically, Eureka challenges two substantial civil penalty assessments dated January 3, 2006 and June 29, 2006, and also the Department's placement of Eureka on the Compliance Docket on January 3, 2006. The Compliance Docket is a tool authorized by the Air Pollution Control Act[1] and may serve as a permit bar where the Department determines that a permittee lacks the intention or ability to comply with the Air Act and its regulations.

Although Eureka was charged with some recordkeeping and equipment maintenance violations, the majority of the Department's enforcement actions were

[1] Act of January 8, 1960, P.L. 2119, *as amended*, 35 P.S. §§ 4001-4015 (Air Act).

directed to fugitive emissions violations related to dust generated by the operations of the three quarries. For the most part, the facts related to these violations have been stipulated to by Eureka. Therefore the challenge is generally directed to the reasonableness of the $149,500 penalty for fugitive emission violations. Eureka does challenge its liability related to a broken monitor and for excavation activities which caused dust emissions, and argues that its placement on the Compliance Docket and certain other penalties were unreasonable and constitute an abuse of discretion by the Department.

The Department argues that its enforcement actions are reasonable and justified by the facts as established by two years of inspections and attempts by the Department to bring Eureka into compliance with current air pollution requirements. The Department also takes the position that Eureka's placement on the Compliance Docket is a moot question inasmuch as Eureka has been removed from the Compliance Docket during the pendancy of the appeal and there is no further remedy that the Board can offer.

A hearing was held for four days from March 20, 2007 through March 22, 2007 and on March 29, 2007, before the Honorable George J. Miller. That hearing generated a transcript of 832 pages and 95 exhibits. The parties also executed a substantial stipulation of facts which was admitted into evidence as Board Exhibit 1. The parties have filed post-hearing briefs which include proposed findings of fact, conclusions of law and legal argument. After full review of these materials we make the following:

FINDINGS OF FACT[2]

1. The Department of Environmental Protection is the agency with the duty and authority to administer and enforce the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, *as amended,* 35 P.S. §§ 4001-4015 (Air Act); Section 1917-A of the Administrative Code of 1929, P.L. 177, *as amended,* 71 P.S. § 510-17 ("Administrative Code); and the rules and regulations promulgated under these statutes. (Stip. ¶ 1)

2. The Appellant, Eureka Stone Quarry, Inc., is a corporation registered to do business in the Commonwealth of Pennsylvania and is the owner and operator of several stone quarries, stone crushing facilities, and asphalt plants within the Commonwealth. It has a business address of 800 Lower State Road, Chalfont, PA 18914 and a registered corporate address of Pickertown Road and Lower State Road, Eureka, PA 19454. (Stip. ¶ 2)

3. Eureka owns and operates a facility located at 911 Swamp Road, Wrightstown Township, Bucks County and referred to as Rush Valley Eureka facility, which contains a stone crushing plant and three asphalt plants and is subject to State Only Operating Permit No. 09-00031. The facility manufactures a variety of crushed stone and asphalt. (Stip. ¶ 3)

4. Eureka owns and operates a facility located at State and Pickertown Roads, Warrington Township, Bucks County and referred to as the Chalfont Eureka facility, which contains a stone crushing plant and a batch asphalt plant and is subject to State

[2] Board Exhibit 1 is cited as "Stip. ¶ __"; the Department's exhibits are designated as "Ex. C-__"; Eureka's exhibits are cited as "Ex. A-__"; and the notes of testimony are cited as "N.T. __."

Only Operating Permit No. 09-00032. This facility manufactures a variety of crushed stone and asphalt. (Stip. ¶ 4)

5. Eureka owns and operates a facility located at Rt. 611 & Bristol Pike, Warrington Township, Bucks County and referred to as Warrington Eureka facility which contains a stone crushing plant. This facility does not have a Department-issued Air Quality State Only Operating Permit. (Stip. ¶ 5)

6. On June 14, 2004, the Department and Eureka entered into the June 14, 2004 Consent Assessment of Civil Penalties (June 14, 2004 CACP) and paid a civil penalty of $41,100.00. This CACP resolved Eureka's civil penalty liability for conduct at the Rush Valley Eureka facility and the Chalfont Eureka facility from October 26, 2000 through September 9, 2003, which the Department had determined to be violations of the Air Pollution Control Act. Eureka agreed to the truth and accuracy of most of the Findings set forth in that June 14, 2004 CACP and agreed not to challenge the Findings in any other proceedings. (Stip. ¶ 20)

7. The majority of the inspections which give rise to the penalties in these appeals were performed by Robert Guzek, now an air quality specialist in the Department's Southeast Regional Office. He has held the position for two years. Prior to his role as an air quality specialist, Mr. Guzek was an environmental trainee for one year. He holds a B.S. degree in Environmental Science from the University of Maine. (N.T. 12-13)

JANUARY 3, 2006 CIVIL PENALTY ASSESSMENT

Fugitive Emissions Violations

8. On September 17, 2004, Department Inspector Robert Guzek and Compliance Specialist Christian Vlot inspected the Rush Valley Eureka facility and observed fugitive dust coming from the transfer point from the primary crusher and from the transfer point from the secondary crusher. (Stip. ¶ 32; Ex. C-37)

9. Some water suppression devices were in use, but were ineffective in controlling the dust. (Guzek, N.T. 120-26; Ex. C-37)

10. On September 20, 2004, Department Inspector Robert Guzek and Compliance Specialist Christian Vlot inspected the Chalfont Eureka facility and observed fugitive dust coming from the belt scraper being used on the conveyor to the final screen house at the stone crushing plant. (Stip. ¶ 21)

11. Mr. Guzek characterized the emissions at Chalfont as "significant" and those at Rush Valley as "very significant." (N.T. 26-28; 116)

12. On October 29, 2004, he issued a notice of violation to Eureka requesting an abatement plan for the observed violations at Chalfont. On November 8, 2004, he issued a notice of violation for Rush Valley. Both notices required that Eureka submit an abatement plan. (Exs. C-9; C-39)

13. By letter dated November 22, 2004, Eureka provided abatement plans in response to the notices of violation. Specifically the plans included the installation of a water spray at Chalfont and a conveyor cover and dust flaps on the underside of the crusher at Rush Valley to address the fugitive dust observed at each facility. Eureka

represented that this work be completed by December 23, 2004. (Exs. C-10; C-40; Guzek, N.T. 59-60)

14. Although Eureka did add a water spray at Chalfont, it was not added at the location directed by the Department. (Guzek, N.T. 60; Furey, N.T. 610)

15. The flaps were installed at the Rush Valley crusher during the facility's winter shutdown. Although the conveyor cover may have been fabricated, it had not yet been installed as of Mr. Guzek's next inspection in April. (Furey, N.T. 607; Guzek, N.T. 132; Ex. C-41)

16. On April 22, 2005, Department Inspector Robert Guzek and District Supervisor Shawn Mountain performed an inspection of the Chalfont Eureka facility during the inspection of the asphalt plant operations. They observed fugitive dust coming from three locations: the tertiary crusher and screen house, from a window and transfer point at the secondary crusher, and from an opening in the conveyor cover between the primary and secondary crusher house. (Stip. ¶ 24; Guzek 62-63; Mountain, N.T. 321-22; Ex. C-11)

17. Mr. Guzek issued a notice of violation on April 26, 2005, and requested an abatement plan. By letter dated June 3, 2005, Eureka submitted an abatement plan which provided that the doors and windows were closed during the inspection to control dust from under the screen house, and the water spray was adjusted on the conveyer. Also, a rubber flap was installed to cover the opening in the conveyor cover. (Guzek, N.T. 64-65; Ex. C-14)

18. Mr. Furey was surprised to receive a notice of violation from the April inspection, because he was told that he would have 14 days to come into compliance. (Ex. C-14; Guzek, N.T. 269-70; Furey, N.T. 680)

19. Even though the violations noted in the April notice of violation were corrected, Mr. Guzek still recommended further enforcement action against Eureka. (Guzek, N.T. 228; Ex. C-13)

20. On June 22, 2005, Mr. Guzek was in the vicinity of the Rush Valley facility and saw dust clouds which appeared to be coming from the Eureka facility. He therefore inspected the Rush Valley Eureka facility and observed fugitive particulate matter being emitted to the atmosphere from excavation activities on site. (Stip. ¶ 34; Guzek, N.T. 144-45).

21. Specifically, Mr. Guzek testified that he saw a large earthmover removing "overburden from above bedrock" on a portion of the property. Dust was being generated not only from the activities of the earthmover, but also from the large trucks which were being loaded and driven down a dirt road. (Guzek, N.T. 144)

22. No water was being applied to suppress dust. (Guzek, N.T. 144-45)

23. The Department's air quality regulations exempt emissions created from the "clearing of land." 25 Pa. Code § 123.1(a).

24. In Mr. Guzek's view, "clearing of land" in the Department's air quality regulation is only removing trees and stumps. Removing the entire "column of soil" to bedrock is not clearing land. (Guzek, N.T. 249)

25. Mr. Guzek believed that Eureka was removing overburden to begin blasting in a new area of quarry activity. As of the date of hearing no blasting had yet taken place

because Eureka was in the process of building a new entrance road. (Guzek, N.T. 247-48)

26. James Furey, Eureka's safety director, testified that soil was being removed to create berms around the perimeter of the property. (Furey, N.T. 665)

27. On June 23, 2005, Department Inspector Robert Guzek inspected the Chalfont Eureka facility and observed fugitive dust coming from the primary crusher dump hopper when trucks were unloaded. Although there was water spray in the area, it was ineffective at controlling the dust generated from the dumping of aggregate into the trucks. (Stip. ¶ 25; Guzek, N.T. 68-70; Ex. C-15)

28. Although the violations that he noted in his April inspection had been resolved, the fugitive emissions that he observed in June were a new source of dust, which he characterized as "significant." (Guzek, N.T. 68-70; Ex. C-15)

29. Mr. Furey conceded that dust emanating from the unloading of trucks has been an ongoing problem. (Furey, N.T. 615-17)

30. On June 28, 2005, Department Inspector Robert Guzek performed a follow-up inspection of the Rush Valley Eureka facility and observed fugitive dust coming from the primary crusher point to the conveyor and from underneath the conveyor cover at the primary crusher. Eureka continued to generate dust from the excavation activities that Mr. Guzek had observed on June 22. (Stip. ¶ 35; Ex. C-45; Guzek, N.T. 149)

31. Mr. Guzek issued a notice of violation on July 6, 2005, based on his June 22 and June 28 inspections of Rush Valley and requested an abatement plan. By letter dated July 22, 2007, Eureka submitted a plan wherein Eureka stated that it would install a

misting spray to address the dust at the primary crusher and use a water truck at the excavation site. (N.T. 146-49; Exs. C-46, C-48)

32. However, the misting spray was not installed until September. (Guzek, N.T. 150)

33. Mr. Guzek, also issued a notice of violation on July 6, 2005, for the June 23 violations he observed at Chalfont and requested an abatement plan. By letter dated July 22, 2005, Eureka submitted an abatement plan. Eureka represented that it had installed a misting spray to address the dust from the dump hopper. (Ex. C-18; Guzek, N.T. 70)

34. Eureka did not, in fact, install the misting spray until long after the July 22 letter was written. (Guzek, N.T. 75)

35. Mr. Furey testified that it was a challenge to find a spray nozzle that would be effective to control dust emitted from the truck loading area. First, Eureka utilized a "deluge" nozzle, which proved to be ineffective. Next, they attempted a misting or atomizing spray and fog-it nozzles which were not effective. Finally, Eureka installed fire sprinkler nozzles to control dust. This progression of nozzles took place between July 2005 and January 2006. (Furey, N.T. 617-20)

36. On August 12, 2005, Department Inspector Robert Guzek inspected the Chalfont Eureka facility and again observed "significant" fugitive dust coming from the primary crusher dump hopper when trucks were unloaded. (Stip. ¶ 26; Guzek, N.T. 79-81)

37. Also, on August 12, 2005, Department Inspector Robert Guzek inspected the Rush Valley Eureka facility and observed fugitive particulate matter was being emitted to the atmosphere from excavation activities onsite which were done without any

fugitive emission control. Mr. Guzek also observed fugitive dust coming from the primary crusher transfer point to the conveyor and from underneath the conveyor cover at the primary crusher. (Stip. ¶¶ 37, 38-49; N.T. 152-53)

38. Mr. Guzek again issued notices of violation requesting an abatement plan for the violations that he observed at Chalfont and Rush Valley. (Exs. C-20; C-50)

39. By letter dated September 6, 2005, Eureka submitted an abatement plan for Chalfont and represented that it had installed misting sprayers at the dump site to address the fugitive dust at that location. (N.T. 83; Ex. C-21)

40. Eureka also submitted an abatement plan for Rush Valley by letter dated September 6, 2005, stating that it would install more misting sprays and use a water truck to control emissions from the excavation activities. Eureka, in fact, completed this work by Mr. Guzek's next inspection in September. (Ex. C-51; Guzek, N.T. 154-55)

41. By operating water trucks in the area of excavation activities and installing and operating water sprays at the primary crusher transfer points, Eureka could sufficiently control fugitive emissions from those sources, as evidenced by the Department's inspection of the Rush Valley Eureka facility on September 9, 2005. (Ex. C-49; Guzek. N.T. 155-56)

42. On September 9, 2005, Robert Guzek inspected the Rush Valley facility. He found that the violations which had been cited in his earlier inspections had been rectified and that the facility was in compliance with air quality laws and regulations. (Guzek. N.T. 155; 254-55; Ex. C-49)

43. On September 9, 2005, Department Inspector Robert Guzek also inspected the Chalfont Eureka facility and again observed fugitive dust coming from the primary

crusher dump hopper when trucks were unloaded. He also observed emissions from the conveyor from the primary crusher near the belt tensioner, from an opening in the cover for the conveyor leading from the primary crusher, and from underneath the screening bin house where excess screenings were being dropped into a wheelbarrow. (Stip. ¶ 27; Guzek, N.T. 86-87)

44. This is the third time that Mr. Guzek observed dust from the dump hopper and the second time he observed dust from an opening in the conveyor cover. (Guzek, N.T. 86-87)

45. On September 13, 2005, Mr. Guzek issued a notice of violation but does not recall receiving an abatement plan or any other response from Eureka. (N.T. 88-90; Ex. C-23)

46. Mr. Furey testified that the wheelbarrow was removed that day to resolve the last violation caused by screenings falling from the screening bin house to the wheelbarrow. (Furey, N.T. 627)

47. He also testified that he resolved the dust from under the conveyor by closing a flap and also closed the opening on the conveyor cover to prevent dust. (Furey, N.T. 621-25)

48. Mr. Furey also testified that his failure to submit an abatement plan was an oversight. He had submitted inaccurate information in some earlier abatement letters because he received inaccurate information from his foremen at the site. He had been told by the Department to make sure data in the abatement letters was complete and accurate before submitting them. In this particular instance, he was waiting to receive

new nozzles for dust suppression and simply forgot to respond to the NOV. (Furey, N.T. 628-29)

49. On November 7, 2005, Department Inspector Robert Guzek inspected the Chalfont Eureka facility and observed fugitive dust coming from an opening in the screening houses and also from a belt scraper on the conveyor belt leading to the final screening house. (Stip. ¶ 28)

50. The opening in the screening house was caused by wind blowing a panel off the side of the building. Mr. Guzek characterized this as a "major" source of fugitive emissions. (Guzek, N.T. 91-92; 223; Furey, N.T. 629-32)

51. After the inspection, Eureka placed a tarp over the opening until the missing panel could be permanently replaced. (Furey, N.T. 629-31)

52. On November 9, 2005 Mr. Guzek issued a notice of violation to Eureka for the violations observed during his inspection two days before. He also requested an abatement plan, but does not recall receiving one from Eureka. (N.T. 103; Ex. C-27)

53. However, Mr. Furey testified that the conditions observed by Mr. Guzek were abated. The opening in the screen house was covered with a tarp, and the condition from the belt scraper was abated by making sure the water spray was on. (Furey, N.T. 634-36)

54. On November 21, 2005, Department Inspector Robert Guzek inspected the Warrington Eureka facility and observed fugitive dust coming from three locations: the primary crusher dump hopper when trucks were unloaded, from the transfer point from the primary crusher to the conveyor, and from the secondary crusher house. There was little water suppression operating at the facility during his inspection. (Stip. ¶ 40; Ex. C-55; Guzek, N.T. 164-66; 169-75)

55. Mr. Guzek issued a notice of violation dated November 23, 2005 for the violations that he observed at the Warrington facility. (Ex. C-57)

Penalty Calculation

56. Christian Vlot serves as an environmental protection compliance specialist with the Department's Southeast Regional Office. He has held that position for approximately three and a half years. Before that he was an air quality specialist and had occasion to inspect Eureka's Rush Valley and Chalfont facilities in that role. (N.T. 348-51)

57. He calculated the civil penalties assessed against Eureka in January and June 2006. Generally, he receives a packet from his supervisor, William Stroble, which includes the enforcement memo and associated documents, such as the notices of violation, abatement letters, and inspections reports. Thereafter he consults the Department's civil penalty policy and the Air Pollution Control Act in order to calculate a civil penalty. (Vlot, N.T. 356; *see* Ex. C-69)

58. Ms. Carlini reviewed the civil penalty calculation with the Notices of Violations and consultation with her staff and made the final decision to include the penalty amount calculated by Mr. Vlot in the January 3, 2006 Air Pollution Abatement Order and Assessment of Civil Penalties. (Carlini, N.T. 493-509; Vlot, N.T. 388-410)

59. On January 3, 2006, the Department issued an Air Pollution Abatement Order and Assessment of Civil Penalties totaling $136,300 to Eureka which is subject to this appeal. (Stip. ¶ 43)[3]

[3] Eureka was also placed on the Compliance Docket on January 3, 2006. See Findings of Fact below.

60. For each fugitive emission violation at each of Eureka's three facilities he applied the Department's policy and the statutory factors for calculating civil penalties in the Air Pollution Control Act in the same manner. Accordingly, for each fugitive dust violation, he charged Eureka with a series of $6,500 penalties. (Vlot, N.T. 371-72)

61. Specifically, the factors he considered were environmental impact, degree of willfulness and compliance history:

a. He determined that each violation was of "moderate" environmental impact because the facility is an "ongoing violator."

b. Each violation was "willful" which is defined by the policy as "intentional" or "reckless." He chose this level of knowledge because the company was very aware of the requirements of the Department's regulations and what is needed to comply with them.

c. Using a penalty matrix, this established a base penalty of $2,500 for each violation, which is the maximum penalty in the range. Mr. Vlot chose the maximum to take deterrence into account. He also took into account that the lower penalty assessed in 2004 was ineffective in deterring future violations by Eureka.

d. That number was doubled for Rush Valley and Chalfont, because those facilities hold a permit, therefore Eureka should be aware of the regulatory requirements.[4]

[4] Although Mr. Vlot initially believed that Warrington was also a permitted facility when he first calculated the penalty, the Department corrected that error and amended the penalty charged to the violation at Warrington. (Stip. ¶ 45)

e. Mr. Vlot then applied a 30% multiplier to the penalty because of Eureka's compliance history and because he considered Eureka to be a recalcitrant violator.

(N.T. 365 – 69)

62. In Mr. Vlot's view, the willful category was appropriate because Eureka was aware of the regulatory requirements relative to fugitive emissions, but plainly disregarded those requirements. (Vlot, N.T. 375)

63. Eureka's conduct related to the fugitive emissions violations was reckless. (See generally testimony of Robert Guzek and Francine Carlini and discussion below).

64. The Department's guidance document for the assessment of civil penalties for fugitive emissions requires that the base penalty is to be doubled if the facility holds a permit. Mr. Vlot initially testified that he believed that the rationale for the doubling of the penalty was that a permitted facility would have a heightened knowledge of what the regulations require as compared to the general public. (Vlot, N.T. 364, 367, 417-18; Ex. C-69)

65. There was no difference in the conduct which gave rise to the violations at Rush Valley and Chalfont and the conduct which gave rise to the violations at Warrington, which does not hold a permit. (Vlot, N.T. 418)

66. However, the doubling policy only applies to visible emissions violations and not to violations of permit conditions. Mr. Vlot did not know why the policy treated these two classes of violations differently relative to doubling the base penalty. (Vlot, N.T. 378 , 435)

67. Francine Carlini testified that the "doubling" policy was probably developed as a means to take the size of the facility into account. (Carlini, N.T. 511-12)

68. Although Eureka's employees were generally considered polite and did respond to at least some of the notices of violation, no adjustment was made to the penalty assessment for a "degree of cooperation" because each violation was discovered by the Department and not reported by Eureka. Mr. Vlot also considered that many of the abatement measures took a long time to install. (Vlot, N.T. 390-91)

69. Although there were at least some occasions when the inspection reports noted that fugitive dust left the Eureka property, there was no direct evidence of a specific harm to the welfare or the safety to the public or harm to plant or animal life caused by these specific fugitive dust emissions. (Vlot, N.T. 410-12; 437)

70. Although there had not been previous violations at the Warrington facility, Mr. Vlot considered Eureka as a whole in concluding that they had a poor compliance history. (Vlot, N.T. 433-35)

71. The total penalty for fugitive emissions charged for six violations at Rush Valley on September 17, 2004, June 22, 2005, June 28, 2005 and August 12, 2005, is $39,000 (6 x $6,500). (Ex. C-70)

72. The total penalty for fugitive emissions charged for 11 violations at Chalfont on September 20, 2004, April 22, 2005, June 23, 2005, August 12, 2005, September 9, 2005 and November 7, 2005, is $71,500 (11 x $6,500). (Ex. C-70)

73. The total amended penalty for three fugitive emission violations at the Warrington facility on November 21, 2005, is $9,750 (3 x $3,250). (Ex. C-70; Stip ¶ 45)

Failure to Maintain Records

74. Eureka's operating permits for Chalfont and Rush Valley require Eureka to monitor NO_x and VOC emissions on a rolling basis and also maintain certain pressure drop and maintenance and inspection records. (Stip ¶¶ 65, 66; Exs. C-4, C-5)

75. On September 17, 2004, Department Inspector Robert Guzek and Compliance Specialist Christian Vlot inspected the Rush Valley facility and observed that Eureka was failing to keep VOC and NO_x emissions records for the Rush Valley facility in the manner required by the operating permit, records of daily facility monitoring for malodors, visible emissions, and fugitive emissions, and was not keeping any maintenance log for the of the tertiary crusher. (Stip. ¶ 31; Guzek, N.T. 117)

76. On September 20, 2004, Department Inspector Robert Guzek and Compliance Specialist Christian Vlot inspected the Chalfont facility, and Mr. Guzek requested that Eureka provide the Department with required VOC and NO_x emission rolling records. Eureka did not provide those records to the Department upon its request. (Stip. ¶ 22)

77. Based on Eureka's inability to provide the Department with the VOC and NO_x emissions records on September 20, 2004, the Department determined that Eureka was not calculating the VOC and NO_x emissions records for the Chalfont Eureka facility in the manner required by its operating permit. (Stip. ¶ 23)

78. The Department received the first properly completed rolling records for Rush Valley and Chalfont in April 2005. (Guzek, N.T. 133)

79. The purpose of a rolling record is to ensure that at no time is a facility violating 12-month VOC or NO_x limits. It is calculated by tracking monthly emissions,

adding the monthly total to the previous eleven monthly totals, dropping the oldest month from the total. This creates a twelve-month rolling window. (Guzek, N.T. 29-30)

80. Chalfont's operating permit requires that total emissions of VOC and NO_x remain less than 24.9 tons per year on a twelve-month rolling basis. (Ex. C-5; Guzek, N.T. 29)

81. In 2003, Chalfont emitted 3.6 tons of NO_x and 4.2 tons of VOCs. (Guzek, N.T. 214; Ex. A-20)

82. However, although he was aware of annual emissions reporting for the facilities, Mr. Furey did not know how to create a rolling record for NO_x or VOCs. (Guzek, N.T. 222-23; Furey, N.T. 598-602, 719; Ex. C-10)

83. The rolling record requirement was probably not a permit condition before 2003. (Carlini, N.T. 506-507)

84. Eventually, Mr. Furey was able to acquire a software program that would generate rolling emission records and created a report that was acceptable to the Department. (Furey, N.T. 598-602)

85. Mr. Furey also testified that the daily maintenance records are kept by the site supervisors; although he might check to see if they are available, he does not read them. (Furey, N.T. 705-06; 717-18)

86. These records do not require calculation and Eureka began maintaining them some time after receiving the NOV. (Furey, N.T. 603)

Penalty Calculation

87. Mr. Vlot also calculated the civil penalty for the failure to maintain rolling records for NO_x and VOCs at Rush Valley and Chalfont, and failure to maintain daily site monitoring records at Rush Valley. (Vlot, N.T. 376; Ex. C-70)

88. These violations are classified as permit violations. For the base penalty he chose the middle of the range of $500 because Eureka has had recordkeeeping violations in the past. But he only charged for one day of violation. He made a 40% upward adjustment of the penalty for compliance history and environmental impact because he considered Eureka an ongoing and recurring violator. (Vlot, N.T. 377)

89. The amount of time it took Eureka to produce the records and degree of willfulness were accounted for by placing the violations in the middle of the penalty range. (Vlot, N.T. 379)

90. Accordingly, Mr. Vlot calculated a $700 penalty for each of three recordkeeping violations at Rush Valley on September 17, 2004 and $700 for each of two recordkeeping violations at Chalfont on September 20, 2004. The total penalty for failing to maintain rolling records of VOCs, rolling records of NO_x and daily site monitoring records was $3,500. (Ex. C-70)

91. Mr. Vlot also calculated a civil penalty because proper maintenance records were not being maintained at Rush Valley on September 17, 2004. He chose $1,000 as the base penalty which is in the upper end of the penalty range because Eureka had been penalized for a similar violation in the 2004 consent agreement. He adjusted the penalty by 40% for compliance history and moderate environmental impact, for a total penalty of $1,400. (Vlot, N.T. 380-81)

Broken Manometer

92. On April 22, 2005, Department Inspector Guzek and District Supervisor Shawn Mountain inspected the Rush Valley facility and observed that the manometer on the facility's tertiary crusher was cracked, disconnected and inoperable.(Stip. ¶ 33)

93. The baghouse, an air pollution control device, acts as a "large vacuum cleaner" to filter particulate matter. Pressure drop records, as measured by a manometer, provide data concerning the operation of the bags in the baghouse and indicate when they need to be cleaned or replaced. (Guzek, N.T. 135-37)

94. It probably broke sometime during the winter, but Mr. Guzek testified that without proper records, it is not possible to know for sure. (Guzek, N.T. 137-38; Furey, N.T. 708-09)

95. Condition 004 for the tertiary crusher at Rush Valley, requires Eureka to "maintain pressure drop monitors in operable condition on all fabric collectors which are associated with air contamination sources for this source." (Ex. C-4 at 27)

96. After receiving a notice of violation dated May 16, 2005, by letter dated June 28, 2005, Eureka represented that a new manometer had been installed. (Ex. C-44)

97. However, when Mr. Guzek inspected Rush Valley on June 22, 2005, and June 28, 2005, the manometer was mounted but was not completely installed or running. His report does not note that the tertiary crusher was operating. (Guzek, N.T. 145-46; Ex. C-45)

98. On July 7, 2005, Department Inspector Robert Guzek inspected the Rush Valley Eureka facility and observed that Eureka had connected and installed an operable

manometer for the tertiary. Eureka states that it installed the new manometer for the tertiary crusher at the Rush Valley Eureka facility on July 7, 2005. (Stip. ¶ 36)

99. Mr. Furey testified that the tertiary crusher was not operating until the new manometer was installed. (Furey, N.T. 659)

100. However, the primary crusher was operating beginning in March 2005, after the winter shutdown. The primary crusher, which crushes coarse rock from the surge pile, is not attached to the baghouse on the tertiary crusher. (Furey, N.T. 712; Ex. C-45)

Penalty Calculation

101. Mr. Vlot calculated the civil penalty for the inoperable manometer. As with the failure to maintain the records, Mr. Vlot chose $1,000 for the base penalty which is on the high end of the range for violations of permits or plan approvals. (Vlot, N.T. 382)

102. Although the manometer was out of operation at least from April 2005 until July 2005, he only charged Eureka with one day of violation. But he adjusted the penalty upward by 40% for moderate impact and because Eureka is an ongoing violator. (Vlot, N.T 382)

103. The total penalty for failing to have an operable manometer on the tertiary crusher at Rush Valley was $1,400. (Vlot, N.T. 382; Ex. C-70)

COMPLIANCE DOCKET AND JUNE 29, 2006 CIVIL PENALTY ASSESSMENT

104. On January 3, 2006, the Department placed Eureka on the Air Quality Compliance Docket and notified Eureka of such action and its consequences. (Stip. ¶ 44; C-73)

105. That decision was made primarily by Francine Carlini, the Regional Program Manager for Air Quality. She was aware of the history of the Eureka facilities based on her past enforcement actions. In making her decision she consulted her staff as well as the Department's internal guidance and policy documents. (Carlini, N.T. 493-94; Strobel, N.T. 452)

106. She expressed her frustration that after negotiating the 2004 Consent Assessment of Civil Penalty, Eureka continued to commit the same types of violations. She was also aware that Eureka was not always submitting abatement plans as requested by notices of violation. (Carlini, N.T. 492, 495)

107. After she learned of the fugitive dust situation relative to the earthmoving activities at Rush Valley in June and August 2005, she decided to move forward to place Eureka on the Compliance Docket. (Carlini, N.T. 492; 530)

108. Her decision was based upon her conclusion that Eureka lacked the ability and intention to comply with the Department's regulations. (Carlini, N.T. 530-31)

109. A significant factor in determining that Eureka lacked the ability or intention to comply with the regulations was its failure to respond to three of the notices of violation. (Carlini, N.T. 537; Strobel, N.T. 469; Ex. C-73)

110. Although as of January 2006, Rush Valley was deemed "in compliance" and Warrington only had one violation in five years, Ms. Carlini took a more global view of the Eureka facilities in her conclusion that Eureka lacked the intent to comply with the law. She considered the compliance history of the three Eureka facilities as a totality, and the number of years that the Department had invested in Eureka which had failed to achieve a commitment to compliance on the part of Eureka. (Carlini, N.T. 537-38)

111. Ms. Carlini also believed that Eureka should have been aware that it might be placed on the Compliance Docket based on past meetings between Eureka and the Department leading up to the 2004 CACP. Additionally, in her view the Department had been "on a campaign to try and get Eureka into compliance over a number of years." (Carlini, N.T. 495; *see also*, Carlini, NT 551-53; *see also,* Guzek, N.T. 272)

112. Although the Department had no meeting prior to the January 2006 letter, specifically discussing compliance, Ms. Carlini felt that there had been so many interactions between the Department and Eureka from numerous inspections that Eureka should have been aware that their lack of compliance was a serious issue. (Carlini, N.T. 539-43; *see also*, Stroble, N.T. 466-69)

113. Shortly before placement on the Compliance Docket, on December 12, 2005, the Department received Plan Approval Application No. 09-0031 to install a replacement asphalt plant at the Rush Valley Eureka facility. The Department notified Eureka by letter dated December 21, 2005 that it had determined that plan approval application to be complete. (Stip. ¶ 42)

114. On January 23, 2006, the Department notified Eureka by letter that it had stopped review of its Plan Approval Application No. 09-0031 to install a replacement asphalt plant at the Rush Valley Eureka facility because of its placement on the Compliance Docket and informed Eureka that it would not resume its review until Eureka complied with the order requirements of the January 3, 2006 Air Pollution Abatement Order and Assessment of Civil Penalties. (Stip. ¶ 46)

115. On January 31, 2006 Eureka's counsel sent the Department a letter in response to the January 3, 2006 Air Pollution Abatement Order and Assessment of Civil

Penalties which required Eureka to submit by February 1, 2006 short-term compliance plans for all three Eureka facilities. (Stip. ¶ 47)

116. On February 3, 2006, representatives of the Department and Eureka met to discuss compliance generally, and, specifically, the January 3, 2006 civil penalty assessment and the significance of the Compliance Docket for Eureka, achieve long-term compliance and for submission of plans to the Department. (Stip. ¶ 49; Mountain, N.T. 331)

117. Specifically, Eureka discussed its efforts to acquire and install a more effective wet suppression system for the quarries. (Morrissey, N.T. 757-59; Mountain, N.T. 333)

118. The Department suggested that Eureka consider a NESCO system. This system apparently was in use at another quarry facility and was considered effective at controlling dust emission. (Morrissey, N.T. 759; Mountain, N.T. 333-34; Strobel, N.T. 462)

119. James Morrissey, the president and owner of Eureka, participated in the meeting. He testified that he agreed to investigate both a Johnson March system that Eureka was already looking into, and also the NESCO system suggested by the Department. (Morrissey, N.T. 747, 756; *see also* Strobel, N.T. 458)

120. One week after the Compliance Docket meeting, on February 10, 2006, District Supervisor Shawn Mountain and former Inspector Rebecca Schremp inspected the Chalfont Eureka facility and observed fugitive dust coming from the primary crusher during dumping of trucks and from the crusher itself during operation, the loading of bin trucks from the bottom of the Creek Screen House, the use of the haul road in the pit by

truck traffic, and from the Creek Screen House in the area where the upper conveyor enters the building. (Stip. ¶ 29; Mountain, N.T. 305-309, 339; Ex. C-28)

121. The purpose of this inspection was to determine the status of the ongoing violations at Eureka for the purpose of negotiating a consent order after the February 3rd meeting. (Mountain, N.T. 306)

122. Eureka continued to have problems with dust generated at the primary crusher and dump hopper. Further, the fire sprinkler water sprays which had been installed had very low water pressure and were not effective in controlling dust. (Mountain, N.T. 307)

123. Although Eureka was not using water on the haul road, the rest of the facility was wet and they were using water trucks elsewhere. (Mountain, N.T. 309)

124. Mr. Furey testified that in his view it was unsafe to put water on the haul road because the steep portion going into the quarry pit would get icy and create a hazard for the trucks. (Furey, N.T. 642-43)

125. Although Mr. Furey conceded that the water nozzles at the primary crusher were not completely satisfactory, he testified that Eureka was in the process of investigating the new wet suppression system at that time. (Furey, N.T. 638)

126. Additionally, when the water truck is being filled, the water spray is affected because the two use the same water pump. (Furey, N.T. 638)

127. Other areas of dust were corrected with the installation of rubber curtains and flaps. (Furey, N.T. 638-39)

128. Mr. Mountain also inspected Warrington on February 10, 2005, but noted no violations. The plant was not operating because they were doing some maintenance activities. (Mountain, N.T. 328-30; Ex. C-59)

129. On March 1, 2006, Eureka submitted to the Department a letter setting forth its plans to achieve long-term compliance with the violations contained within the January 3, 2006 Air Pollution Abatement Order and Assessment of Civil Penalties. In that letter, Eureka detailed how it evaluated control systems proposed by Johnson March Systems, Inc. and NESCO and ultimately selected NESCO to install new wet suppression control device systems at the three Bucks County facilities subject to this appeal. With the plan, Eureka provided the Department with NESCO's proposals to install these systems. (Stip. ¶ 50; Morrissey, N.T. 760; Ex. C-76)

130. Mr. Morrissey testified that he put pressure on Mr. Furey to get the systems installed as soon as possible. (Morrissey, N.T. 761)

131. On or about April 14, 2006, the Department received an application from Eureka for a plan approval for a wet dust suppression air-cleaning device for its existing stone crushing plant at the Rush Valley, Chalfont and Warrington facilities. (Stip.¶¶ 51, 53, 54; Exs. C-83, C-84, C-85)

132. However, these applications could not be approved as long as Eureka remained on the Compliance Docket. (Ex. C-73; Furey, N.T. 694; Ex. A- 86)

133. On May 1, 2006, the Department and Eureka entered into a Consent Order and Agreement. The terms and conditions to which the parties agreed are contained in the May 1, 2006 COA. The Department also removed Eureka from the Compliance Docket. (Stip. ¶¶ 54, 55; Carlini, N.T. 510-11, 515)

134. Ms. Carlini viewed the placement of Eureka on the Compliance Docket as successful, because Eureka sought a meeting and met with the Department within one month and committed to installing the wet suppression system and putting an environmental management program into practice. (Carlini, N.T. 495-96)

135. After meeting with Mr. Morrissey and the issuance of the May 1 consent agreement, Ms. Carlini had instructed her group that if Eureka was operating the existing wet suppression system "as well as they could," they could exercise discretion and not penalize Eureka for dust violations. (Carlini, N.T. 515, 554-55; *see also*, Guzek, N.T. 292; Strobel, N.T. 462-63)

136. On May 23, 2006, Department Inspector Robert Guzek and former Inspector Andrea Kalup inspected the Chalfont Eureka facility and observed that Eureka had begun installation of two NESCO wet suppression control device systems at the Chalfont facility's stone crushing plant without first obtaining a plan approval from the Department. (Stip. ¶ 30; Guzek, N.T. 105-06; Ex. C-33)

137. On May 23, 2006, Department Inspector Robert Guzek and former Inspector Andrea Kalup inspected the Warrington Eureka facility and observed that Eureka installed and operated a NESCO wet suppression control device system at the Warrington Eureka facility's stone crushing without first obtaining a plan approval and an operating permit from the Department. (Stip. ¶ 41; Guzek, N.T. 177-78)

138. At Warrington, the system was in operation and was successfully controlling fugitive dust at the primary crusher and dump hopper. (Guzek, N.T. 180)

139. After the inspections the NESCO systems were taken off-line and locked out by May 24, 2006. (Guzek, N.T. 108, 184; Furey, N.T. 649; Exs. C-36; C-65)

140. Mr. Morrissey immediately contacted Ms. Carlini to arrange to meet with her. He did not believe that he had to wait for a plan approval before installing the wet suppression systems. Ms. Carlini explained the legal requirements for installing the NESCO system and assured Mr. Morrissey that if he operated the systems that he had in place the best that he could, Eureka would not receive further penalties. (Morrissey, N.T. 763-64; Carlini, N.T. 554; *see also* Furey, N.T. 645)

141. Mr. Guzek inspected Warrington on June 12, 2006. He stopped because he saw fugitive dust at the facility as he was driving by. (Guzek, N.T. 186)

142. He observed dust from the final two screen houses. (Guzek, N.T. 186; Ex. C-63)

143. Mr. Furey testified that the water suppression was not working at the screen house because a valve was broken. The system was shut off so that it could be replaced. (Furey, N.T. 678-79)

144. The water nozzle was turned back on within a half hour of his arrival. (Guzek, N.T. 185-87; 210-12)

145. Although Eureka was removed from the Compliance Docket on May 1, 2006, on June 29, 2006, the Department issued an Assessment of Civil Penalties to Eureka, totaling, as amended, $48,750. (Stip. ¶ 56)

146. Mr. Vlot calculated two civil penalties for Eureka's installation of the NESCO system at Chalfont and Warrington without a plan approval, and also a penalty for operating the NESCO system without a plan approval at Warrington. (Vlot, N.T. 402; Ex. C-77)

147. In Mr. Vlot's view, the installation of the system without a plan approval was intentional because Eureka was well aware of the requirement for a plan approval from meetings and other communications from the Department. However, the violation had a low environmental impact. Therefore he assessed a base penalty of $5,000 for each violation. He then applied a 30 % multiplier for Eureka's compliance history of a total penalty of $6,500 for each of the three violations. (Vlot, N.T. 403-08; Ex. C-77)

148. Mr. Vlot calculated civil penalties of the June 12 fugitive dust violation at Warrington, and the four dust violations at Chalfont on February 10, in the same manner as he calculated the penalties for the January assessment, and assessed $6,500 for each fugitive dust violation. The penalty for Warrington was later reduced to $3,250 because it does not hold a permit. (Vlot, N.T. 399; Stip. ¶ 57)

149. Although these violations were addressed by Eureka within a short period of time, Mr. Vlot did not lower the penalty calculation to take into account a degree of cooperation. (Vlot, N.T. 421-23)

150. Mr. Furey received draft permits for at least one of the NESCO units sometime during the summer of 2006. At some point after that the permit reviewer at the Department left and was replaced with another reviewer, who had additional comments on the applications. The permits for the NESCO systems were issued by the Department in November of 2006. (Furey, N.T. 650-52; Guzek, N.T. 196; Stip. ¶¶ 60-62)

DISCUSSION

Standard of review

In an appeal from a civil penalty assessment, it is the Department which bears the burden of proof.[5] Specifically the Department must prove by a preponderance of the evidence that there is a factual basis for the violations charged and that the civil penalties assessed are a reasonable fit given the circumstances of the violation.[6]

Our review is *de novo.* Where we find that a penalty is not a reasonable fit for a violation, we may adjust the penalty accordingly.[7] While the penalty matrix utilized by the Department to calculate penalties is a useful tool, we are not bound by it. Rather, we are guided by the factors provided for in the Air Pollution Control Act.[8]

THE JANUARY 2006 CIVIL PENALTY ASSESSMENT

Fugitive emissions violations

Except for the civil penalties relating to Eureka's "excavation" activities at Rush Valley on June 22, 2005 and August 12, 2005, Eureka does not challenge its liability for the fugitive dust violations in the January 2006 assessment. However, Eureka argues that the amount of those penalties, $6,500 for each violation at Rush Valley and Chalfont and $3,250 for each violation at Warrington, is unreasonably high. We agree only in part.

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[5] 25 Pa. Code § 1021.122(b)(1).
[6] *Keinath v. DEP*, 2003 EHB 43.
[7] *Keinath.*
[8] *E.g., Sunoco, Inc.(R&M) v. DEP*, 2004 EHB 467; *Keinath,* 2003 EHB at 52.

Our review of a civil penalty assessment under the Air Pollution Control Act is guided by Section 9.1:

> In determining the amount of the penalty, the department shall consider the willfulness of the violation; damage to air, soil, water or other natural resources of the Commonwealth or their uses; financial benefit to the person in consequence of the violation; deterrence of future violations; cost to the department, the size of the source or facility; the compliance history of the source; the severity and duration of the violation; degree of cooperation in resolving the violation; the speed with which compliance is ultimately achieved; whether the violation was voluntarily reported; other factors unique to the owners or operator of the source or facility; and other relevant factors.[9]

The Department, utilizing a penalty matrix from a guidance document for the assessment of civil penalties under the Air Pollution Control Act, considered most of these factors to develop a penalty amount for the fugitive dust violations at the Eureka facilities. Specifically, Christian Vlot testified that he began with a base penalty in the range of $1,500 to $2,500, which the matrix sets for a willful violation of moderate environmental impact for fugitive emissions. He chose the highest base penalty in the range, to create a deterrent effect because the lower penalty assessed in 2004 was ineffective at deterring future violations. The guidance document calls for doubling the penalty for permitted facilities. Mr. Vlot additionally applied a 30% multiplier because of Eureka's compliance history and because he considered Eureka to be a recalcitrant violator. Based on these calculations, each fugitive dust violation at Rush Valley and Chalfont, permitted facilities, was assessed a penalty of $6,500. Each dust violation at Warrington, which is not permitted, was assessed a penalty of $3,250 for each violation.

[9] 35 P.S. § 4009.1.

Eureka argues that these penalties are unreasonably high. Specifically, it argues that it is not reasonable to double the penalty simply because a facility holds a permit; the Department had no specific evidence of environmental damage caused by the fugitive emissions; that the violations were at most negligent and not willful; and that Eureka's compliance history formed the basis for multiple and overlapping enhancements to the penalty. We will deal with each of these arguments in order.

We agree that doubling the penalty for two facilities was not reasonable. No witness from the Department had a clear reason for doubling a fugitive emission penalty when a facility holds a permit. Mr. Vlot testified that he doubled the base penalty because it was directed by the guidance document. Francine Carlini also testified that the guidance was drafted by the policy office and it was her "belief" that the doubling was directed to address the size of the facility.

However, there was no specific evidence that the Rush Valley and Chalfont operations were significantly different from the Warrington operation or that the emissions violations were significantly worse at the permitted facilities than those observed at Warrington. The Department introduced no evidence of the size of the Eureka quarries as compared to any other facility. Accordingly, there is no reasonable basis for doubling a penalty simply because a facility holds a permit. An operator's level of knowledge is already accounted for by establishing a degree of willfulness. The size and impact of the particular violation are also accounted for by the base penalty assigned to a particular violation.[10]

[10] See *American Auto Wash, Inc. v. Department of Environmental Protection*, 729 A.2d 175 (Pa. Cmwlth.), *petition for allowance of appeal denied,* 743 A.2d 923 (Pa.

Eureka argues that the penalty should be reduced because its conduct was "negligent" and not "willful." We disagree and conclude that Eureka's conduct was at least "reckless."

We have defined the various levels of culpability applicable to assigning a value to a civil penalty many times:

> An intentional or deliberate violation of law constitutes the highest degree of willfulness and is characterized by a conscious choice on the part of the violator to engage in certain conduct with knowledge that a violation will result. Recklessness is demonstrated by a conscious disregard of the fact that one's conduct may result in a violation of the law. Negligent conduct is conduct which results in a violation which reasonably could have been foreseen and prevented through the exercise of reasonable care.[11]

Eureka clearly had issues with fugitive dust violations in the past, and in fact paid a civil penalty as a result of those violations. It engaged in settlement discussions with the Department, including Francine Carlini, where Ms. Carlini expressed her concern about the continuing violations at Eureka facilities. Yet Eureka continued to operate in such a manner that fugitive emissions continued to occur. Many of the abatement measures that were put into place were as simple as closing windows and doors, which could easily have been achieved with a simple self-inspection[12] without the involvement of the Department.

1999)(where the base penalty is established based on throughput, it was unreasonable to apply a ten percent multiplier based on the same factor.)

[11] *202 Island Car Wash, L.P. v. DEP*, 2000 EHB 679, 694 (*quoting Phillips v. DER*, 1994 EHB 1266, *aff'd*, 2651 C.D. 1994 (filed June 16, 1995 Pa. Cmwlth.)).

[12] In fact, the Eureka permits require these inspections. Exs. C-4; C-5. No doubt Eureka's efforts to remain compliant were hampered by their failure to routinely keep fugitive emission monitoring and inspection records. *See* Guzek, N.T. 135.

It is true that Mr. Furey attempted to obtain various sorts of water nozzles at various locations and installed flaps and covers in problem areas. However, he waited for the Department to issue a notice of violation for problem areas rather than proactively working to bring the operations at the Eureka plants into compliance. He then failed to follow up adequately with the site foremen to make sure the abatement measures were both installed and consistently in use.

A quarry operator has an affirmative duty to provide an adequate dust suppression system when and where it is necessary.[13] A commitment to compliance must be communicated to those working in facilities which are regulated by the Department. Eureka does not appear to have done this effectively even after the 2004 civil penalty assessment. Therefore, while we may not classify their conduct as "willful" in the sense that they deliberately violated the Department's regulations, Eureka's conduct was clearly reckless. Eureka knew that the Department was concerned about fugitive dust emissions from the facility and knew that it was an ongoing problem, but they chose not to develop an effective program to control dust emissions.

We therefore approve a total penalty for these fugitive dust violations of $58,500.[14] A penalty of $3,250 for each fugitive dust violation in the operations portion of the quarries is a reasonable fit for each violation in view of the reckless nature of Eureka's violations. However, we reject the doubling of the penalty solely on the basis that the facility is permitted.

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[13] *Eureka Stone Quarry, Inc. v. Commonwealth,* 544 A.2d 1129 (Pa. Cmwlth. 1988).

[14] 18 violations x $3,250 = $58,500.

Eureka does challenge its liability for civil penalties assessed at Rush Valley for fugitive dust related to its excavation operations on June 22, 2005 and August 12, 2005. Specifically, Eureka argues that the activities observed by Mr. Guzek fall within the exception to fugitive dust emissions for "clearing of land" in the Department's regulations. We disagree.

Section 123.1 of the Department's regulations, prohibits the emission of a fugitive air contaminant, except for those from the following sources:

> (1) Construction or demolition of buildings or structures.
> (2) Grading, paving and maintenance of roads and streets.
> (3) Use of roads and streets. Emissions from material in or on trucks, railroad cars and other vehicular equipment are not considered as emissions from use of roads and streets.
> (4) Clearing of land.[15]
>
> . . . .

The Department argues that clearing the surface of the land down to bedrock is not "clearing of land" and therefore Eureka's excavation activities do not fall within the exception of Section 123.1(a) (4). The Department concedes that "clearing of land" is not defined by the air quality regulations, but that its interpretation is reasonable and the Board must defer to its reasonable interpretation pursuant to the *NARCO*[16] decision.

We agree with the Department's interpretation of the regulation language, "clearing of land" means only the removal of trees, stumps and scrub from the surface of the land, but not the removal of "overburden" down to bedrock. Although that phrase is

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[15] 25 Pa. Code § 123.1(a).

[16] *Department of Environmental Protection v. North American Refractories Co.*, 791 A.2d 461 (Pa. Cmwlth. 2002).

not explicitly defined in the regulations there is a significant body of case law which supports the Department's position that there is a common understanding of the meaning of the word. Our experience with land clearing is based primarily on cases involving the proper management and disposition of waste as a result of land clearing. In each one of these cases, the "land clearing" that developed the waste was initiated by the removal of trees, shrub and their stumps presumably for further processing. In *Stine Farms and Recycling, Inc.*, we approved penalties for violation of a Department's order requiring Stine to cease the open burning/or disposal of waste in violation of a consent decree that required the cessation of open burning and disposal of waste, including stumps and "land clearing debris" on the property.[17] In *Fifer* we denied a petition for supersedeas that contended that forest material derived from "land clearing operations," including stump and tree grinding used to produce mulch, a marketable material, was product rather than waste.[18] More recently, in *Banfe Soil and Mulch, Inc.*, we rejected a motion for summary judgment concerning the Department's order requiring the appellant to remove all land clearing, grubbing and excavation waste, including, but not limited to trees, brush, stumps and vegetative material.[19] While tree and stump removal will require the excavation of some soil in order to fully remove the stump, none of these cases involved any other excavation activities. We see no reason to apply a different understanding of "land clearing" to Eureka's activities here.

Indeed, it appears to us that the removal of soil to bedrock to provide material for a berm around the perimeter of the property, as testified to by Mr. Furey, is part of

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[17] *Stine Farms and Recycling, Inc. v. DEP,* 2001 EHB 796.
[18] *Fifer v. DEP,* 2000 EHB 1234.
[19] *Banfe Soil and Mulch, Inc. v. DEP,* 2006 EHB 672.

Eureka's mining activity rather than mere clearing of land. This activity not only exposes more rock for mining but also provides soil for a protective berm that Eureka found desirable for its continuation of mining.

Two penalties of $6,500 for these excavation activities were assessed for two days on June 22, 2005 and August 12, 2005. Mr. Guzek testified that on these dates Eureka was removing topsoil and overburden down to bedrock in preparation for blasting activities but was not taking any precautions to reduce the dust and that the activity was producing significant dust.[20] Mr. Vlot, as in other fugitive dust penalty assessments, doubled the penalty to a total of $13,000. We conclude that a penalty of only $3,250 for each day of violation, or a total penalty of $6,500, is a reasonable fit for these violations as a result of our holding that doubling the penalty on the sole basis that the facility holds a permit is unreasonable.

Recordkeeping Violations

The Department assessed a civil penalty against Eureka for failing to maintain rolling records for VOCs and NO_x at Rush Valley and Chalfont, and for failing to maintain site monitoring and baghouse records at Rush Valley. Eureka does not challenge the violations themselves, but argues that the penalties assessed are unreasonable, because the violations were not willful and caused no environmental damage. Eureka also takes the position that the NO_x and VOC record violations were not repeat violations and that it was inappropriate for the Department to use deterrence as a factor in setting the penalty amount because such a long period of time elapsed between the violations and the penalty assessment.

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[20] Stip. ¶¶ 34, 37, 38-49; Guzek, N.T. 144-45; 152-53.

The Department assessed a penalty of $700 for each violation relating to failing to maintain rolling records. We agree with Eureka that the enhancements to the base penalty for failing to maintain rolling records for compliance history and recalcitrance are not reasonable given the scope of this particular penalty. There is no evidence that Eureka failed to keep appropriate emissions records in the past, nor is there any evidence that this violation had the potential to cause environmental damage related to an exceedance of an air pollution limit for either of those pollutants. Annual emissions for VOCs and NO_x at both facilities were well below the 25 tons per year approved in the operating permits. Further it is unlikely that the rolling requirement was in Eureka's permits before 2003. These types of records require a particular sort of calculation that Mr. Furey was not familiar with, and it took him some time to acquire a methodology that would translate annual emissions records into monthly rolling totals. Accordingly, we find that $500 for each of the four record violations is reasonable for a total of $2,000.

However, we disagree with Eureka that it was not appropriate to take deterrence into consideration. This Board has often noted that deterrence is a relevant consideration in assessing civil penalties, and it has value not only against the violator at hand, but may also serve to deter similar violations by other regulated entities.[21]

As for the daily site monitoring and maintenance logs, we find that the Department's penalty is reasonable. These records appear to be fairly simple daily records and we can see no reasonable explanation for Eureka's failure to maintain them. Certainly had they done so, some of the fugitive dust problems could likely have been remedied without enforcement action by the Department. Moreover, three months earlier

[21] *Westinghouse Electric v. Department of Environmental Protection*, 745 A.2d 1277 (Pa. Cmwlth. 2000).

in June 2004, Eureka entered into a consent assessment of civil penalty with the Department, which was based, in part, on Eureka's failure to maintain similar records. Therefore, we find the $700 penalty for not conducting daily site monitoring and $1,400 for not maintaining the maintenance logs reasonable and we affirm that amount of penalty.

Broken Manometer

The Department charged Eureka with a $1,400 civil penalty for failing to maintain a manometer on the tertiary crusher at Rush Valley in operable condition. In the Department's view, this is a clear violation of Condition 004 of Eureka's Rush Valley permit. Eureka counters that it was inappropriate to charge a violation for the broken manometer because the tertiary crusher which it monitored was not operated during the time that the manometer was broken. In Eureka's view it makes no sense to assess a penalty for a broken piece of equipment that was not in operation until it was properly repaired.

While we might agree that the Department's choice to assess a penalty for violating Condition 004 seems somewhat overzealous, we can not say as a matter of law that there is no violation. Condition 004 explicitly requires Eureka "to maintain pressure drop monitors in operable condition . . . ." There is no provision that would release a permittee from this requirement if the manometer monitor is not in operation. Rather the requirement is that the monitor remain "operable", whether the baghouse monitor is operating or not. While it may be that the permit should make provisions to allow a permittee to take equipment out of service for six months to allow the replacement of a

broken control device, that is a subject for a permit challenge, but not for the enforcement challenge facing us here.

However, given the circumstances surrounding the violation, we find that $1,400 is not a reasonable fit for the gravity of the violation, particularly when there is no evidence that the tertiary crusher and baghouse were in operation during the period of time the manometer was broken. The entire plant was closed during the winter. It was the testimony of Mr. Furey that only the primary crusher was operated from March through July, when the manometer was replaced. The primary crusher operates independently of the tertiary crusher. Further there is no evidence that Eureka had failed to properly maintain manometers in the past or that any emission exceedence or threat of emission exceedance occurred as a result of the broken manometer.

Yet the fact remains that Eureka was not proactive about reporting the broken device to the Department, did not keep an adequate record that would reflect when the manometer was broken, and took at least three months to repair it.[22] With these facts in mind, a reasonable penalty for this violation is $500.

COMPLIANCE DOCKET AND JUNE 2006 CIVIL PENALTY ASSESSMENT

Section 7.1 of the Air Pollution Control Act[23] provides the Department with the authority to place a permittee on the so-called Compliance Docket, which serves, among other things, as a permit bar until the permittee achieves compliance with the Department's regulations:

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[22] We are also mindful that Condition 8 of the general permit conditions provides that it "shall not be a defense for the permittee in an enforcement action that it was necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit." Ex. C-4 at p. 8.

[23] Act of January 8, 1960, P.L. (1959) 2119, *as amended,* 35 P.S. § 4007.1(b).

> (b) The department may refuse to issue any plan approval or permit pursuant to this act if it finds that the applicant or permittee or a partner, parent or subsidiary corporation of the applicant or permittee has shown a lack of intention or ability to comply with this act or the regulations promulgated under this act or any plan approval, permit or order of the department, as indicated by past or present violations, unless the lack of intention or ability to comply is being or has been corrected to the satisfaction of the department.
>
> ....

By letter dated January 3, 2006, the Department informed Eureka that it was placing Eureka on the Compliance Docket because it had concluded that Eureka lacked the intention or ability to comply with the Air Act and regulations. Thereafter, Eureka entered into a consent agreement with the Department and was removed from the Compliance Docket on May 1, 2006.

The Department argues that we should not consider Eureka's appeal of its placement on the Compliance Docket since that action is now moot because Eureka has been removed from the docket and the NESCO permits have been approved. The Department further argues that even if the question is not moot, the Department was fully justified in placing Eureka on the docket. Further, the decision to place Eureka on the Compliance Docket had nothing to do with the decision to assess civil penalties on June 29, 2006, or to force Eureka to pay the January 2006 civil penalties.

Conversely Eureka contends that if the Board does not consider the placement of Eureka on the Compliance Docket, the issue will evade review. Moreover, Eureka contends that the Board can provide effective relief by abating the June penalty assessment.

The law which guides our analysis of mootness doctrine has been repeated many times:

> It is axiomatic that if an event occurs during the appeal process which deprives the Board of the ability to provide effective relief or deprives an appellant of an actual stake in the outcome of a controversy, the appeal should be dismissed as moot. Generally speaking where the Department rescinds or supplants a permit condition or approval, the Board has found the appeal objecting to that condition moot. However, courts have established some narrow exceptions to the mootness doctrine, which include situations where the conduct complained of is capable of repetition but will evade review; where the case involves issues of great public importance; or where one party will suffer a detriment without the court's decision.[24]

The Department argues that Eureka's removal from the Compliance Docket is analogous to the Department's withdrawal of an order, therefore there is no further relief which can be granted. We believe that a more apt analogy is that the removal of Eureka from the Compliance Docket is akin to the satisfaction of a compliance order by a permittee. In those cases we have held that although the matter may be technically moot, the permittee has a continuing stake in the controversy either because the compliance order imposes continuing obligations or because the order, although complied with, may have other continuing effects.[25] Although the evidence is that the Department did not use the Compliance Docket when assessing the June 29 civil penalties, the record does demonstrate that the Department does consider past compliance history in assessing penalties. For example, Mr. Vlot testified that he took the 2004 CACP and violations leading up to that agreement into consideration when generating his civil penalty

[24] *Morris Township v. DEP*, 2006 EHB 55, 56-57.
[25] *E.g., Eighty-Four Mining Co. v. DEP*, 2004 EHB 141.

assessments at issue here. Therefore we do not believe that the Department's removal of Eureka from the docket renders the placement of Eureka moot.

We are also persuaded that we should consider this issue because otherwise whether or not the Department properly placed Eureka on the Compliance Docket would evade review. The only way that Eureka could challenge its placement on the docket would be to complete the litigation and further delay the plan approval for the asphalt plant and potentially plan approvals for any modernized wet suppression system. Rather, Eureka opted to negotiate a settlement with the Department. Placement on the Compliance Docket should be by its very nature of short duration. Given this short duration, challenges to placement on the docket will almost always be moot before the Board has an opportunity to review the matter.[26] Accordingly, because Eureka's placement on the Compliance Docket may have a future impact on Eureka and because it is otherwise likely to evade review, we hold that we have jurisdiction to review the Department's action.

We turn, then, to our consideration of the Department's action. As Eureka correctly points out, the propriety of placement on the Compliance Docket is one of first impression. Eureka argues that it was an abuse of discretion to place Eureka on the Compliance Docket, because at the time the decision was made, Eureka was "in compliance" at two of its three facilities, and working to resolve the outstanding violations at the third. Eureka also states that it has always abated the violations noted in the Department's notices of violation, even if it inadvertently neglected to submit

[26] *Cf. Lower Milford Township v. DEP*, 2006 EHB 387 (declining to dismiss an appeal from a Department waiver letter because the questions raised are capable of repetition and will evade review).

abatement plans. Finally, Eureka takes the position that the placement of Eureka on the docket was procedurally defective because the Department did not "informally" attempt to resolve the violations at the Eureka facilities by at least writing a warning letter as provided in the Department's guidance document.

Viewing the record as a whole, most particularly the emphatic testimony of Francine Carlini, we find that the Department did not abuse its discretion by placing Eureka on the Compliance Docket. It is abundantly clear that the negotiation and settlement of the civil penalties from 2000 to 2004, culminating in the June 2004 Consent Agreement for Civil Penalties (CACP), did little to impress upon Eureka the need to change its operations to become proactive about reducing fugitive emissions of dust at its facilities. Eureka has been in business for a very long time and should have enough sophistication at this point to understand that in the Department's view civil penalties are not to be considered merely a cost of doing business. Rather, operators are expected to be proactive about compliance and willing to do what is necessary to achieve compliance, not just react when they are cited with a violation. Eureka waited for the Department to catch a violation and only then did it seem willing to rectify the problem. Although Eureka did abate many of the violations observed by the Department, it never did more than the minimum which was necessary. There is very little evidence in this record that Eureka had any intention of developing a long-term solution to the succession of fugitive emission problems prior to its placement on the docket. We conclude that there is ample evidence upon which to base a conclusion that Eureka lacked the intent to comply with the law and was properly placed on the Compliance Docket.

We are also unpersuaded by Eureka's argument that its placement on the docket was procedurally defective because the Department did not issue a warning letter as it did in 2003.[27]

Section 127.412(g) provides that

> If the Department finds that the applicant or related party has an existing or continuing violation or lacks the intention or ability to comply with the act, or the rules or regulations promulgated under the act, or a plan approval operating permit or order of the Department, as indicated by past or present violations, the Department will attempt to resolve the violations or lack of intention or ability to comply informally.[28]

"Informally" is not defined. We can not say that the Department's view that the numerous inspections and communications generated by those inspections are not a reasonable interpretation of an "informal" attempt to resolve the ongoing violations at the Eureka facilities. Further, Eureka was at least aware of the Compliance Docket from Ms. Carlini's 2003 letter which threatened Eureka with placement on the docket at that time. She also testified that she warned Eureka that they may face placement on the Compliance Docket in meetings leading up to the 2004 CACP.[29]

Both William Stroble and Francine Carlini testified that in their view there was a tremendous amount of communication between Eureka and the Department indicating that the Department was becoming increasingly intolerant of the violations that continued

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[27] Ex. C-111.

[28] 25 Pa. Code § 127.412(g).

[29] There was a sharp dispute as to whether or not this warning was given in connection with the 2006 placement on the Compliance Docket. Mr. Morrissey denied that he had been so advised. Although general counsel for Eureka, Alice Meehan, Esq., said that she did not recall Ms. Carlini making that statement, she also testified that she was not generally aware of the Compliance Docket, nor was she responsible for the day-to-day operations and compliance at Eureka's quarries. N.T. 744-45. In any event, we hold that such a warning is not required prior to a placement on the Compliance Docket.

to occur between June 2004 and January 2006. Indeed, Eureka facilities were inspected at least 14 times in that 18 month period. Each inspection generated a written report and frequently a notice of violation. Ms. Carlini characterized this period as a "campaign" to bring Eureka into compliance.

Eureka also argues that the Department's guidance document concerning the Compliance Docket provides a form of a letter that is to be sent to an operator who is in danger of placement on the docket. There is no question that this letter was not sent to Eureka. However, a guidance document does not bear the force of a regulation and the Department is free to deviate from the procedures in a guidance document.[30] Accordingly, we hold that the Department's placement of Eureka on the Compliance Docket was not procedurally defective.

We next turn our consideration to the civil penalties assessed by the Department on June 29, 2006. That assessment charged a series of penalties for fugitive dust violations at Chalfont in February 2006, and a fugitive dust violation at Warrington in June. The Department also assessed a civil penalty for the premature installation of the NESCO system at Chalfont and the premature installation and operation of the NESCO system at Warrington.

Eureka generally argues that the entire June 29 civil penalty should be abated because it suffered a financial hardship by being placed on the Compliance Docket which delayed review of its plan approval for a new asphalt plant at Rush Valley. That is, Eureka had been "punished enough" therefore assessing further penalties was unreasonable.

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[30] *E.g., Upper Gwynedd Township v. DEP*, EHB Docket No. 2005-358-MG (Opinion issued January 30, 2007).

However, we cannot conclude as a matter of law that the Department should have considered the financial hardship to Eureka by placing it on the Compliance Docket in its civil penalty calculations for the subsequent violations. In other contexts this Board has consistently held that the Department need not consider the private financial constraints of a person when it designs enforcement schemes.[31] The Department's mission is to secure compliance with environmental laws and regulations and it utilizes the enforcement tools at its disposal to achieve those goals. That an individual may not be able to afford remediation to repair environmental damage or pay a civil penalty is not a factor that the Department is required to consider. Similarly, there is no legal requirement that the Department take the alleged financial impact of one enforcement action into consideration when imposing another.

Eureka suggests that it was bad faith to inspect Chalfont on February 10, a week after meeting with the Department to negotiate a resolution of the placement of Eureka on the Compliance Docket. Shawn Mountain of the Department, testified that the purpose of the inspection was to gauge the status of fugitive dust control for the purpose of negotiating an order that would remove Eureka from the docket. We disagree that inspecting Chalfont on February 10 was an abuse of discretion.

Mr. Vlot testified that he used the same factors to calculate the civil penalties for fugitive dust violations in the June 29 penalty assessment that he used for the January 3 assessment. We too, employ the same analysis from our previous discussion and hold that it was not reasonable to double the base penalty because Chalfont holds a permit where the degree of the violation and the knowledge of the violator are already taken into

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[31] *Ramey Borough v. Commonwealth of Pennsylvania, Department of Environmental Resources*, 351 A.2d 613 (Pa. 1976).

account in assessing the penalty. But we find the penalty otherwise reasonable. Therefore, a civil penalty of $3,250 for each fugitive dust violation at Chalfont on February 10, 2006 is an appropriate penalty.

Similarly we find the amended civil penalty of $3,250 for a fugitive dust violation at Warrington is also reasonable. Although Mr. Furey testified that the violation was of short duration because a valve needed to be repaired, the fact remains that Eureka continued to operate a portion of the plant without adequate dust controls. At this point, it decided to do so at its peril and Eureka should have been aware of the consequences of that choice.

Finally we turn our consideration to the $19,500 in civil penalties which were assessed for the installation and operation of the NESCO systems at Chalfont and Warrington without plan approvals. Given the circumstances, these penalties are not a reasonable fit for the violations.

Although the Department was concerned generally with Eureka's compliance with all provisions of its permits and air quality regulations, it is abundantly clear that a long-term solution to the fugitive dust violations at the Eureka facilities was the primary goal for placing Eureka on the Compliance Docket. Accordingly, a modernized wet suppression system was a primary topic of conversation at the February 3, 2006 meeting with the Department, which was attended by not only the senior staff in the Department's air quality section, but also by the owner of Eureka, James Morrissey. At that meeting, the Department suggested that Eureka consider the NESCO system, which Eureka promptly did. By March 1 Eureka had acquired a proposal for installation of NESCO systems at the three quarries, and submitted plan approval applications to the Department

by April 14, 2006. The commitment to install the NESCO systems was a major component of the May 1, 2006, consent agreement which resulted in the removal of Eureka from the Compliance Docket.

Shortly thereafter Eureka "jumped the gun" and installed the systems without a plan approval from the Department. On May 23, 2006, Mr. Guzek inspected Chalfont and Warrington and noted that the systems had been installed. He also witnessed that the system which was installed at Warrington was operating and was successfully controlling the generation of dust. Immediately upon being notified that it was improper for Eureka to operate the systems before receiving approval from the Department, Eureka shut down and locked the NESCO systems until they received their plan approvals several months later in November, 2006. Nevertheless the Department assessed a $6,500 civil penalty for the installation of the NESCO system at Chalfont, and assessed $6,500 for the installation at Warrington, and an additional $6,500 for operating the system at Warrington.

We simply do not find that the circumstances here warrant such a substantial penalty. At long last Eureka was addressing its fugitive dust problem with a water suppression system recommended by the Department. Eureka promptly purchased the system and filed the proper paperwork with the Department in a timely fashion. Although Mr. Furey clearly knew that Eureka should not install and operate these systems without plan approval, Mr. Morrissey wanted the system installed right away so there would be no further fugitive emission violations. Accordingly, we do not believe that it is reasonable to punish Eureka's one significant attempt at addressing the fugitive dust problem with such a large penalty.

At the same time, we are impressed by Ms. Carlini's testimony on the importance the Department properly places on requiring a plan approval before construction begins.[32] Consistency in enforcement reasonably calls for some penalty.

The Department calculated a total penalty of $19,500, representing a penalty of $6,500 for the two days of installation and one day of operation of the system. This was assessed by selecting $5,000 as the high range of the base penalty set forth in the Department's guidance with the addition of 30% due to Eureka's history of compliance. We conclude that such a high penalty is inappropriate in view of Eureka's new found desire to come into compliance as promptly as possible as a result of having been placed on the Compliance Docket. Accordingly, we approve a penalty of only $7,500 for these three violations.

CONCLUSIONS OF LAW

1. It is not reasonable to double a base civil penalty assessment for fugitive dust violations on the basis that a facility holds a permit.

2. A civil penalty of $3,250 is a reasonable penalty for each of 23 fugitive dust violations observed at:

   a. Rush Valley on September 17, 2004, and for emissions from the primary crusher conveyor on August 12, 2005;

   b. at Chalfont on September 20, 2004, April 22, 2005, June 23, 2005, August 12, 2005, September 9, 2005, November 7, 2005, February 10, 2006; and

   c. at Warrington on November 21, 2005 and June 12, 2006.

3. Eureka's conduct related to the fugitive emissions violations was reckless.

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[32] N.T. 828-29.

4. Eureka violated Section 123.1(a) of the Department's regulations by removal of soil to bedrock at Rush Valley without proper emission control. A penalty of $6,500 is a reasonable fit for these violations.

5. A civil penalty of $500 is reasonable for each violation related to Eureka's failure to maintain rolling records for VOCs and NO_x at Chalfont and Rush Valley on September 17 and September 20, 2004.

6. It is a violation of the Rush Valley air quality permit to fail to maintain a manometer in operable condition regardless of whether or not the air pollution control device is actually in operation or not. A civil penalty of $500 is reasonable for this violation.

7. A penalty of $7,500 is a reasonable fit for the installation and operation of the wet suppression system without a plan approval.

8. Eureka's challenge to its placement on the Compliance Docket by the Department is not moot.

9. The Department did not abuse its discretion by placing Eureka on the Compliance Docket.

We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EUREKA STONE QUARRY, INC.	:	
	:	
v.	:	**EHB Docket No. 2006-044-MG**
	:	**(consolidated with 2006-174-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

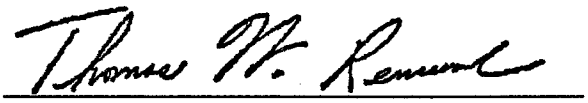
AND NOW, this 6th day of August, 2007, the appeal of Eureka Stone Quarry , Inc. in the above-captioned matter is hereby sustained in part and dismissed in part as follows:

1. The January 3, 2006 civil penalty assessment is reduced from $126,550 to $69,600.

2. The June 29, 2006 civil penalty assessment is reduced from $48,750 to $23,750.

3. The appeal from the Department's January 3, 2006 placement of the appellant on the Compliance Docket is dismissed.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Acting Chairman and Chief Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: August 6, 2007

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BUCKS COUNTY WATER AND SEWER AUTHORITY	:	
v.	:	**EHB Docket No. 2006-225-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PLUMSTEAD TOWNSHIP, Permittee	:	
BUCKS COUNTY WATER AND SEWER AUTHORITY	:	
v.	:	**EHB Docket No. 2007-078-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, PLUMSTEAD TOWNSHIP and HIGHLAND HILL, L.P., Permittees	:	
BUCKS COUNTY WATER AND SEWER AUTHORITY	:	
v.	:	**EHB Docket No. 2007-145-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, PLUMSTEAD TOWNSHIP and PLUMSTEAD CHASE, c/o TOLL BROTHERS, INC., Permittees	:	**Issued: August 8, 2007**

OPINION AND ORDER
ON PETITIONS TO INTERVENE

By George J. Miller, Judge

Synopsis

The Board denies a petition to intervene in a series of appeals relating to sewage planning in a municipality. The petitioner failed to adduce sufficient factual averments which would support his contention that he is an interested party in the subject matter of the appeals. It appears that the petitioner's real interest is in the subject of alleged settlement discussions related to a court of common pleas proceeding which may or may not affect him, but which are nevertheless, beyond the scope of the current appeals.

OPINION

Thomas Alvare, an individual, petitions the Board to allow his intervention in three appeals currently pending before the Board. These appeals involve different sewage facilities actions by the Department in Plumstead Township, Bucks County from which the Bucks County Water and Sewer Authority has appealed. The parties to the appeals, which include the Authority, the Department, the Township, and the developer of a subdivision known as Plumstead Chase, all oppose the intervention of Mr. Alvare (Petitioner). As we explain below, we will deny his petition to intervene.

The Appeals

The first appeal is a challenge by the Authority of the Department's September 15, 2006 approval of an Act 537 Plan Update for Plumstead Township. The Authority objected to the approval, generally speaking, because the Plan Update called for the Township to own and operate all community wastewater disposal systems, which, in the Authority's view, ran afoul of a 1978 agreement between the Township and the Authority. That agreement, according to the notice of appeal, conveyed ownership rights of certain sewage facilities in the Township to the

Authority. Further, the Township and the Authority are involved in litigation before the Court of Common Pleas of Buck County involving the 1978 Agreement. Accordingly, it is the Authority's position that the Department abused its discretion by approving the Township's Plan Update without properly considering the impact of that Plan Update on the Authority's interests. The Authority's appeal was docketed by the Board at 2006-225.

Later, on February 9, 2007, the Department approved a planning module for the Carriage Hill Subdivision, which provides, among other things, for the construction of a municipally-owned wastewater treatment plant and construction of a new sewage collection and conveyance system and two new pump stations. The Authority filed a similar notice of appeal again objecting to the approval on the basis that it affected its rights under the 1978 Agreement and that the Department erred in approving the planning module without adequately considering the other litigation already pending. This appeal was docketed at 2007-078.

On May 4, 2007, the Department also approved another planning module for a subdivision known as Plumstead Chase. This approval also provided for service to Plumstead Chase by the new wastewater treatment plant, and provided for the construction of other sewage facilities within the Township to serve the subdivision and five existing properties. The Authority challenged this approval on the same basis and the previous appeals. This appeal was docketed at 2007-145 on June 5, 2007.

The Petition to Intervene

On July 19, 2007, Thomas Alvare filed a petition to intervene in each of the three appeals. In his petition he alleges that the Authority seeks to "establish a right to provide sewers throughout Plumstead Township, which will by their nature deplete the groundwater throughout the Township . . . ." He expresses his concern that a settlement is imminent which will result in

new interceptors which will deplete groundwater resources within the Township. He argues that he is affected by the outcome of the appeal because he is a resident and property owner in the Township and relies on groundwater to serve his well. He further alleges that groundwater resources in the Township are very limited due to the underlying geology. In his view, the Township supervisors will not protect his interests because they are willing to agree to a settlement without appropriate groundwater studies.

Each of the parties to the appeals object to the intervention of the Petitioner on the basis that he has failed to identify an interest that is relevant to the subject-matter of any of the appeals. Further, neither the Department nor Plumstead Chase have been party to any settlement discussions with the Authority or the Township. The Township and the Authority admit that they have discussed settlement, but that their talks have centered around the dispute before the court of common pleas, and not specifically the actions pending before the Board. The Authority also opposes the petition because it is late in the proceedings.

DISCUSSION

Intervention before the Board is governed by Section 7514(e) of the Environmental Hearing Board Act, which provides that "[a]ny interested party may intervene in any matter pending before the board."[1] The Board's regulations provide the required contents of a petition to intervene, which include sufficient factual averments and legal assertions to establish the petitioner's reason for intervention, and basis for asserting an identified individualized interest.[2] The petitioner must also establish the manner in which the identified interest will be affected by

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[1] 35 P.S. 7514(e).
[2] 25 Pa. Code § 1021.81(b)(1) and (2).

the Board's adjudication and the specific issues upon which the petitioner will offer evidence or legal argument.[3]

First, the Petitioner has failed to identify any objection to the Department's approval of Plumstead Township's Plan Update or the planning modules for Plumstead Chase and Carriage Hill, which are the actions under appeal. Our reading of the notices of appeal does not suggest that the Authority "seeks to provide sewers throughout the Township." The Authority appears to be arguing that the Department failed to adequately consider what rights it may have under the 1978 Agreement that should have been accounted for in the Department approvals. The Petitioner does not mention the position of the Authority or the Township with respect to which has the right to provide sewer service or the Department's actions. At most, the petition might be generously read to suggest an argument that a central sewer system may discharge treated effluent to a stream rather than to the ground, and there may be some diminishment of groundwater. However, the petition makes no claim as to where the Authority or the Township might discharge treated effluent from a treatment facility. If either of them apply for an NPDES permit, the Petitioner might then be able to show that he has an interest.

Rather, the Petitioner describes his concern about the impact of an unidentified settlement agreement, which may, in an unspecified way, have an impact on groundwater in the Township. Although the Township and the Authority do admit that they have been having discussions, those talks are apparently directed to the litigation in the court of common pleas. No agreement has been reached. Therefore, those talks have had no effect on the appeals before the Board.

Further, the petition sheds very little light on the Petitioner's connection with any of the actions under appeal, because he merely identifies himself as a resident and property owner of

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[3] 25 Pa. Code § 1021.81(b)(3) and (4).

the Township. We can form no opinion about whether his residence is even located in or near any of the areas affected by the Plan Update, or the planning modules for the subdivisions. Although he makes general, unsupported statements concerning the Township as a whole, he draws no connection, hydrogeological or otherwise, between his well and the properties affected by the Department's approvals.

We will deny the Petitioner's request to intervene because his petition has failed to meet any of the requirements for intervention before the Board. Any interest a petitioner may have must be identified with some specificity;[4] property ownership by itself is insufficient to create a properly identified individual interest in the appeals.[5] Further, that interest must be sufficiently related in some way to the subject-matter of the Department actions being appealed.[6] Any concerns that the Petitioner may have related to a future settlement of the court of common pleas litigation between the Township and the Authority are far too removed from the current Board appeals to create an interest in those appeals sufficient to permit him to intervene.

Accordingly, we enter the following:

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[4] *TJS Mining, Inc. v. DEP*, 2003 EHB 507.
[5] *P.A.S.S., Inc. v. DEP*, 1995 EHB 940.
[6] *Brunner v. DEP*, 2003 EHB 186.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BUCKS COUNTY WATER AND SEWER AUTHORITY	:	
v.	:	**EHB Docket No. 2006-225-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PLUMSTEAD TOWNSHIP, Permittee	:	
BUCKS COUNTY WATER AND SEWER AUTHORITY	:	
v.	:	**EHB Docket No. 2007-078-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, PLUMSTEAD TOWNSHIP and HIGHLAND HILL, L.P., Permittees	:	
BUCKS COUNTY WATER AND SEWER AUTHORITY	:	
v.	:	**EHB Docket No. 2007-145-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, PLUMSTEAD TOWNSHIP and PLUMSTEAD CHASE, c/o TOLL BROTHERS, INC., Permittees	:	

ORDER

AND NOW, this 8th day of August, 2007, the petitions to intervene of Thomas Alvare in the above-captioned appeals are hereby **DENIED.**

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Judge

DATED: August 8, 2007

c: **DEP, Department of Litigation:**
Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

WILLIAM A. STOUT, d/b/a ATLAS RAILROAD CONSTRUCTION COMPANY	:	
v.	:	**EHB Docket No. 2007-052-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MAPLE CREEK MINING, INC., Permittee	:	**Issued: August 17, 2007**

OPINION AND ORDER ON MOTION TO STAY PROCEEDINGS

By: Thomas W. Renwand, Acting Chairman and Chief Judge

Synopsis:

The Pennsylvania Environmental Hearing Board is granted exclusive jurisdiction to hear appeals from actions of the Department of Environmental Protection. The Pennsylvania Mine Subsidence and Land Conservation Act further provides that appeals of Department actions under the Act lie with the Pennsylvania Environmental Hearing Board. The doctrine of exhaustion of administrative remedies provides that where the General Assembly has mandated an administrative process the process must first be pursued before a party can appeal to the judiciary. The Pennsylvania Environmental Hearing Board may find it necessary to decide whether an oral contract was entered into between the property owner and the mining company in deciding whether the Pennsylvania Department of Environmental

Protection acted correctly in denying the property owner's claims for incidental damages. This is especially so when such agreements are contemplated by the Mine Subsidence Act and implementing regulations. The Pennsylvania Environmental Hearing Board has exclusive jurisdiction to decide whether the costs claimed by a property owner are incidental costs under the Mine Subsidence Act and implementing regulations.

OPINION

This Appeal was filed on January 26, 2007 by William A. Stout, doing business as Atlas Railroad Construction Company (Atlas Railroad Construction Company), as a result of the Pennsylvania Department of Environmental Protection's (Department or DEP) denial of Atlas Railroad Construction Company's claims for incidental costs pursuant to the Bituminous Mine Subsidence and Land Conservation Act (Mine Subsidence Act), 52 P.S. Section 1406.1 and specifically Section 1406.5e (d) and its regulatory counterpart, 25 Pa. Code Section 89.142a(f)(2) (ii). These claims are for alleged costs associated with the interruption of Atlas Railroad Construction Company's business while it was undermined by Maple Creek Mining, Inc.'s (Maple Creek Mining) longwall mine. The costs Appellant seeks to recover include lost direct shop costs, lost indirect shop costs, lost interest costs, lost field costs, lost opportunity costs, loss of market value, expert fees, attorney fees, insurance premiums, and other costs. The Department concluded that these are not recoverable costs under the Mine Subsidence Act and the implementing regulations. Maple Creek Mining agrees with the Department's conclusion.

Presently before the Pennsylvania Environmental Hearing Board (Board) is the Appellant's Motion to Stay Proceedings (Motion to Stay). In addition to filing an Appeal with the Environmental Hearing Board of the Department action denying its claim for incidental costs, Appellant has filed a Writ in the Court of Common Pleas of Washington County at docket number 2007-2071. Appellant, in its Motion to Stay, contends that in addition to its statutory and regulatory claims, it is also entitled to recover these incidental costs based on an alleged oral contract between Appellant and Maple Creek Mining that the coal company "would take care of the expenses incurred." (Paragraph 5 of Appellant's Motion to Stay.) Maple Creek Mining denies entering into any oral contract to pay such costs. In addition to its breach of contract action, Atlas Railroad Construction Company also intends to pursue "alternatively, in the [Washington County] Court of Common Pleas, a citizen's suit under the provisions of the Mine Subsidence Act."

The Pennsylvania Department of Environmental Protection is evidently content to put this Appeal on hold pending resolution of the Washington County Common Pleas action (as long as its outstanding discovery is answered).[1] Maple Creek Mining argues we should deny the Motion to Stay but instead allow both actions to proceed.

We begin our discussion of this important issue by turning first to the Environmental Hearing Board Act. The Environmental Hearing Board Act grants the Pennsylvania Environmental Hearing Board ***exclusive jurisdiction*** to hear appeals from actions of the

1 "The Department therefore requests that the Board grant Appellant's Motion for Stay ..." as long as Appellant files responses to the Department's outstanding discovery requests. (Paragraph 14 of the Department's Response to

Department of Environmental Protection:

> The Board has the power and duty to hold hearings and issue adjudications ... on orders, permits, licenses or decisions of the Department.

35 P.S. Section 7514(a).

Furthermore, "no action of the Department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the Board." 35 P.S. Section 7514(c).

The Mine Subsidence Act provides that the Department has broad duties, responsibilities and powers to permit and regulate the mining of coal. The Mine Subsidence Act further provides that appeals of Department actions under the Act lie with the Environmental Hearing Board. "If either the landowner or the mine operator is aggrieved by an order issued by the Department .... Such person shall have the right to appeal the order to the Environmental Hearing Board within thirty days of receipt of the order." 52 P.S. Section 1406.5e(e). "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...." 52 P.S. Section 1406.5(g). The provision entitled "Right to Hearing and Appeal" in Section 1406.16 provides that any party "aggrieved or affected by any administrative rule, regulation or order of the Department issued pursuant to the provisions of this Act" shall have the right to file an appeal with the Environmental Hearing

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Appellant's Motion to Stay).

Board.

Appellant is seeking to reverse the Department's denial of its claims for incidental costs on two grounds: first that the incidental costs are recoverable under the Mine Subsidence Act and implementing regulations and second, that Maple Creek Mining orally agreed to pay these costs to Appellant.

In a case that counsel in this case are well aware, the Commonwealth Court dismissed a claim for declaratory relief originally filed in the Court of Common Pleas for Washington County and then transferred it to the appellate court allegedly pursuant to the Mine Subsidence Act, holding that "the [Mine Subsidence] Act provides an administrative remedy where, initially, the Department of Environmental Protection and the Environmental Hearing Board have *exclusive jurisdiction* to determine the extent and manner of repairs and/or compensation and how they are to be awarded, including the interpretation sought here: who controls repairs and whether relocation costs are reasonable costs.." *Faldowski v. Eighty-Four Mining Co. et al.*, 725 A.2d 843, 846 (Pa. Cmwlth. 1998) (*emphasis added*). As the Commonwealth Court emphasized, if the parties are unable to agree on damages for repairs or compensation as a result of underground mining, then "the property owners can file a claim before the DEP, and if dissatisfied with that determination, can appeal to the EHB." 725 A.2d at 845.

The recent Pennsylvania Commonwealth Court decision announced in *Texas Keystone, Inc. v. Pennsylvania Department of Conservation and Natural Resources*, 851

A.2d 228 (Pa. Cmwlth. 2004) is also very instructive in our analysis. The Court reiterated that the doctrine of exhaustion of administrative remedies is still viable in Pennsylvania. This judicially created doctrine is intended to prevent premature judicial intervention into the administrative process. 851 A.2d at 234 (quoting *Empire Sanitation Landfill v. Pennsylvania Department of Environmental Resources*, 684 A.2d 1047, 1053 (Pa. 1996)).

Judge Leavitt explained that the doctrine of exhaustion of administrative remedies is founded on judicial recognition of the mandate of the General Assembly that statutorily prescribed remedies are to be strictly pursued. *See* 1Pa.C.S. Section 1504 ("Statutory remedy preferred over common law"). Most importantly, it is recognition that an unjustified failure to follow the administrative scheme undercuts the rationale upon which the administrative process is founded; that the technical nature of the subject and the ability of a statutorily created administrative tribunal expert in environmental litigation matters is sufficient to displace preliminary court action. 851 A.2d at 234-235, 239 n. 16.

We are also mindful of our duty and responsibility, to conduct a hearing *de novo*. *Warren Sand and Gravel Co., Inc. v. Department of Environmental Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975). As Commonwealth Court recently reminded us in affirming our decision in *Pennsylvania Trout v. Department of Environmental Protection and Orix-Woodmont Deer Creek Venture*, 863 A.2d 93, (Pa. Cmwlth. 2004), "The Environmental Hearing Board is not an appellate body with a limited scope of review attempting to determine if the DEP's action can be supported by the evidence received at DEP's fact-

finding hearing. Rather the Environmental Hearing Board's duty is to determine if DEP's action can be sustained or supported by the evidence taken by the Environmental Hearing Board." 863 A.2d at 106.

First and foremost, Appellant's request for a stay seems to be premised on the fundamental assumption that the Pennsylvania Environmental Hearing Board does not have jurisdiction to decide whether the parties entered into an oral agreement regarding incidental costs even though such agreements are contemplated by the regulations. "The operator shall also compensate the occupants ***for other actual, reasonable incidental costs agreed to by the parties or approved by the Department.***" 25 Pa. Code Section 89.142a(f)(2)(ii) (*emphasis added*). Although Maple Creek Mining implores us to deny the Motion to Stay, it agrees with Appellant and the Department that the Court of Common Pleas is the proper forum to litigate the parties' oral contract issue.

We are not as quick as the parties, especially after review of the controlling appellate cases, to simply *assume* that the Board is powerless to decide this issue. If the Board's jurisdiction is at issue, the Board deserves the opportunity to address that question in the first instance. We believe that it would be irresponsible for us to essentially relinquish our jurisdiction in an ongoing appeal without some clear showing that it is necessary or appropriate to do so. *Pequea Township v. Herr*, 716 A.2d 678, 686-687 (Pa. Cmwlth. 1998); *Pennsylvania Trout v. Department of Environmental Protection and Orix-Woodmont Deer Creek Venture*, 863 A.2d 93 (Pa. Cmwlth. 2004)

Moreover, the issue is not whether Courts of Common Pleas have jurisdiction over breach of contract claims. They certainly do. The question is whether Common Pleas Courts have ***exclusive jurisdiction*** over an issue raised in a Board proceeding. None of the parties have answered or even addressed this question.

We decide discovery issues, issues involving attorney/client privilege, and other similar issues that Common Pleas judges also decide. These issues are raised in our cases on a regular basis. It is a mistake to focus merely on the issue raised in a Board proceeding and try to place that into some "legal box" which would result in a Balkanized practice of administrative law resulting in costly piecemeal litigation. Rather the process is much more fluid and is based on the jurisdictional power of the Board to decide the issues before it. *See Pequea Township v. Herr*, 716 A.2d 678, 687 (Pa. Cmwlth. 1998). It seems to us that the focus of the inquiry should be not so much on the issue but whether the relief requested may be granted by the Board. We can certainly grant the relief requested here if we find that the Department abused its discretion by ignoring a valid agreement entered into by the parties.

In *Berks County v. DEP*, 2005 EHB 233, the Board engaged in an analysis of a contract – the Host Agreement – to determine whether the Department's reliance upon the Host Agreement in issuing a permit was an appropriate exercise of the Department's discretion. The Commonwealth Court affirmed the Board in *Berks County v. Department of Environmental Protection,* 894 A.2d 183 (Pa. Cmwlth. 2006), and held that the Department properly conducted the harms/benefits analysis required by the solid waste regulations and

concluded that the environmental harms of the project were outweighed by environmental, social and economic benefits provided by the permittee. The court also concluded that the land use consistency review, and other procedural and technical aspects of the Department's review, were proper.

Conversely, it seems that it is entirely appropriate, and might even be required, for us to analyze the evidence presented to us regarding the alleged oral contract, to determine whether the Department acted correctly in denying Appellant's claims for incidental damages. Our determination may or may not be binding on any other tribunal that may consider the issue regarding whether there is a valid oral contract.[2]

Piecemeal litigation is generally to be avoided. *Sechan Limestone Industries v. DEP*, 2004 EHB 185, 187; *Ziviello v. State Conservation Commission*, 1998 EHB 1138, 1139. As we stated earlier, we see the issue of whether an oral contract took place here as part and parcel of the parties' overall dispute. There is little to be said for carving out one collateral aspect of the dispute and having that resolved in a separate action in a separate forum. The same underlying facts and witnesses are involved. We do not anticipate that incorporating this oral contract issue into our case will dramatically expand the proceeding. This is especially true when both the Act and the regulations, contemplate such agreements. The Court of Common Pleas is probably not in a position to rule on anything other than the oral contract issue.[3] We may be in a position to rule on everything.

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2 Whether our decision would be binding would be based on principles of *res judicata* and/or collateral estoppel.

3 We also question what Appellant means by pursuing a citizen's suit in the Court of Common Pleas under the

We have sometimes held that the Environmental Hearing Board will be receptive to staying our proceedings in deference to related civil litigation where it is clear that the related litigation will effectively resolve our *case one way or the other*. *Lower Paxton Township Authority v. DER*, 1995 EHB 290, 295. This is certainly not the case here if the Court of Common Pleas finds there is no oral contract. In that case, the parties would be right back before the Environmental Hearing Board for us to decide the first issue. A lot of time and money will have been wasted.

Moreover, in conformance with the doctrine of the exhaustion of administrative remedies it seems clear to us that we should first determine whether the Department's action under the Mine Subsidence Act and the implementing regulations can be upheld or if the Department erred, and then whether "we should substitute our discretion for that of the Department and order the relief requested." *Pequea Township v. Herr*, 716 A.2d 678, 687 (Pa. Cmwlth. 1998).[4] We are very hesitant to declare, at this point in the litigation, that we simply do not have jurisdiction over assertions that an oral contract was entered into as part of the statutorily mandated scheme.

Ultimately, it is within our discretion to decide whether to stay proceedings. It might

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provisions of the Mine Subsidence Act. We suspect that Appellant merely intends to replace the statutorily mandated administrative practice before this Board with an action in Common Pleas Court where Appellant seeks to raise not only the oral contract issue but whether the costs claimed are incidental costs pursuant to the Mine Subsidence Act and the regulations. With all due respect, if this is what Appellant plans to do, such action would be in direct contravention of the legislative mandate set forth in both the Environmental Hearing Board Act and specifically in the Mine Subsidence Act.

4 We are also very mindful of the Commonwealth Court's admonition to this Board in *Pequea Township* when it held that "[A]lthough the Board stated it was "acting in equity," we find this to be harmless error as the Board was acting within the scope of its authority in modifying the Department's action and directing the Department as to the

make sense to postpone a case to allow for productive, meaningful, and timely settlement talks to take place. It does not make sense to postpone a case for a he said/she said exercise in another forum.

We also have an interest independent of the parties in not unnecessarily relinquishing our own jurisdiction, managing our docket in the most efficient and fair manner possible, and encouraging settlement discussion. We see no reason to carelessly stand by while the parties debate our jurisdiction in Common Pleas Court, and we see nothing efficient or fair in allowing our proceeding to stall out pending litigation collateral to the matter at hand. Our jurisdiction, which is exclusive (or ***primary***) under the Mine Subsidence Act, should not be relinquished simply because an oral contract issue, collateral to the main issue in the Appeal, is raised. To do so would circumvent the will of the General Assembly "and could be used to short-circuit the administrative process and have the law determined without the benefit" of the Environmental Hearing Board's expertise. *Faldowski*, 725 A.2d at 846. It is for these reasons that we resoundingly deny the Motion to Stay Proceedings.

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proper action to be taken." 716 A.2d at 687.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WILLIAM A. STOUT, d/b/a ATLAS RAILROAD CONSTRUCTION COMPANY	:	
v.	:	**EHB Docket No. 2007-052-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MAPLE CREEK MINING, INC., Permittee	:	

ORDER

AND NOW, this 17th day of August, 2007, the Appellant's Motion to Stay Proceedings is ***denied***.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

DATED: August 17, 2007

EHB Docket No. 2007-052-R

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CUMBERLAND COAL RESOURCES, L.P.	:	
	:	
v.	:	**EHB Docket No. 2006-234-R**
	:	
COMMONWEALTH OF PENNSYLVANIA: DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 23, 2007**

OPINION AND ORDER ON DEPARTMENT'S MOTION REGARDING THE PRESUMPTION OF LIABILITY

By Thomas W. Renwand, Acting Chairman and Chief Judge

Synopsis:

The presumption of liability set forth in 52 P.S. Section 1396.4b(f)(2) and 25 Pa. Code Section 87.119(b) applies where diminution of a water supply is allegedly caused by construction and operation of an access road authorized by the Pennsylvania Department of Environmental Protection pursuant to the regulations contained in Subchapter E. The word "permitted" in the regulation refers to a coal mining permit.

OPINION

This is an appeal from an order of the Pennsylvania Department of Environmental Protection (Department) dated September 28, 2006. The Department found that

Cumberland Coal Resources, L.P. (Cumberland Coal), as a result of its coal exploration activities, was responsible for replacing or restoring a domestic water supply on the property of George and Ruth Ann Flenniken. Cumberland Coal timely appealed this Order.

Pursuant to a request by the parties, the Board agreed to first decide the issue of which party bears the burden of proof on whether or not the coal exploration activities of Cumberland Coal damaged the Flennikens' domestic water supply. The parties engaged in discovery on the burden of proof issue. Following the filing of the Department's Motion raising this issue and Cumberland Coal's answering papers, the Board held oral argument in Pittsburgh on the following issue. Does the presumption of liability established under 52 P.S. Section 1396.4b(f)(2) and 25 Pa. Code Section 87.119(b) apply where diminution of a water supply is allegedly caused by construction and operation of an access road authorized by the Department pursuant to Subchapter E?

The coal exploration activities performed by Cumberland Coal included the construction of an access road and the drilling of a core exploration borehole. No coal mining permit issued by the Department is required to conduct these types of coal exploration activities. However, pursuant to 25 Pa. Code Chapter 86 Subchapter E entitled "Coal Exploration" a coal company is required to notify the Department of its coal exploration and comply not only with the terms of the Coal Exploration Notice of Intent to Explore or Request for Permit Waiver (a Department form) but also the regulations contained in Subchapter E.

It is undisputed that Cumberland Coal properly submitted its Coal Exploration

Notice of Intent to Explore or Request for Permit Waiver. This form also included a detailed narrative by Cumberland Coal complete with maps setting forth exactly what it planned to do. Six days after the submission of the Coal Exploration Notice of Intent to Explore the Department acknowledged receipt of the form and discussed the applicable regulations.

Cumberland Coal's exploration activities on the Flennikens' property fall within the definition of "surface mining activities" set forth in the Surface Mining Conservation and Reclamation Act (SMCRA), *as amended*, 52 P.S. Section 1396.1 *et. seq.* The definition in SMCRA includes "all surface activities connected with surface or underground mining, including, but not limited to, exploration ... and construction and activities related thereto..." 52 P.S. Section 1396.3.

The key statutory provision in this case is the rebuttable presumption found in SMCRA. Under SMCRA, a surface mine owner or operator is presumed liable for affecting a water supply, if the water supply is within 1,000 feet of mining activities, subject to the surface mine owner or operator's opportunity to rebut the presumption. 52 P.S. § 1396.4b(f)(2). Section 4.2(f) of SMCRA states as follows:

> It shall be presumed, as a matter of law, that a surface mine operator or owner is responsible without proof of fault, negligence or causation for all pollution, except bacteriological contamination, or diminution of public or private water supplies within one thousand (1,000) linear feet of the boundaries of the areas bonded and affected by coal mining operations, areas of overburden removal and storage and support areas except for haul and access roads. **If surface mining activities are conducted on areas which are not permitted and bonded, this presumption applies to all water supplies within one thousand (1,000) linear feet**

of the land affected by such operations.

52 P.S. § 1396.4b(f)(2) (*emphasis added*).

Similarly, the regulations implementing Section 4.2(f) of SMCRA state:

> (1) It shall be presumed, as a matter of law, that a surface mine operator or mine owner is responsible without proof of fault, negligence or causation for all pollution, except bacteriological contamination, and diminution of public or private water supplies within 1,000 linear feet (304.80 meters) of the boundaries of the areas bonded and affected by coal mining operations, areas of overburden removal and storage and support areas except for haul and access roads.
>
> (2) **If surface mining activities are conducted on areas which are not permitted or bonded,** it shall be presumed, as a matter of law, that the surface mine operator or mine owner is responsible without proof of fault, negligence or causation for all pollution, except bacteriological contamination, and diminution of public or private water supplies within 1,000 linear feet (304.80 meters) of the land affected by the surface mining activities.

25 Pa. Code § 87.119(b) (*emphasis added*).

Cumberland Coal contends that it had the Department's permission to conduct coal exploration activities when the Department granted them permission to proceed pursuant to Cumberland Coal's completed Coal Exploration Notice of Intent to Explore Form. Cumberland Coal argues that since their surface mining operations were done in an area with the Department's permission the presumption should not apply.

We disagree. Where the word "permitted" is used in this regulation we believe it is used as a noun rather than as a verb and refers to an actual permit to mine coal. We believe it is a "word of art" when used in this context and means an actual permit to mine coal.

We believe the Department's interpretation of its own regulation is both reasonable and correct. *North American Refractories, Inc. v. DEP*, 791 A.2d 461 (Pa. Cmwlth. 2002).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CUMBERLAND COAL RESOURCES, L.P.	:	
	:	
v.	:	**EHB Docket No. 2006-234-R**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 23rd day of August, 2007, the Department's Motion is ***granted*** to the extent that the rebuttable presumption set forth at 52 P.S. Section 1396.4b(f)(2) and 25 Pa. Code Section 87.119(b) is applicable to Cumberland Coal.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

DATE: August 23, 2007

See following page for service list

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CITIZENS FOR PENNSYLVANIA'S FUTURE (PENN FUTURE)	:	
v.	:	**EHB Docket No. 2006-100-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARINA COMMONS AT HARVEYS LAKE, LLC, Permittee	:	**Issued: September 4, 2007**

OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Judge

Synopsis

The Board grants a motion for summary judgment and sustains an appeal from the Department's issuance of a water obstruction and encroachment permit issued to a marina. The Department issued the permit without requiring the permittee to ensure the protection of an endangered plant which is present at the site. The Department improperly relied on an e-mail from the Department of Conservation and Natural Resources which stated that it was not treating the plant as an endangered species in that location, rather than upon the published regulation which lists the plant as endangered without restriction.

OPINION

Before the Board is a motion for summary judgment filed by the Appellant, Citizens for Pennsylvania's Future. The motion argues that the Department improperly granted a water obstruction and encroachment permit to the Permittee, Marina Commons at Harveys Lake, LLC, because it failed to provide for the protection of an endangered plant located at the site, as required by the antidegradation regulations which require the protection of endangered species and critical habitat. The Department opposes the motion[1], arguing that a hearing is required to determine whether its reliance on an e-mail from the Department of Conservation and Natural Resources stating that the incidence of the endangered plant should not be protected rather than upon the regulation which lists the plant as endangered, was reasonable. We find that as a matter of law, the Department must rely upon the endangered species list promulgated as a regulation when carrying out its duty to implement the antidegradation requirements.

Many of the facts listed in the Appellant's concise Statement of Material Facts which accompany the motion are uncontested by the Department.[2] The Department issued Water Obstruction and Encroachment Permit No. E40-631 (Permit) to the Permittee on February 10, 2006.[3] The Permit authorizes the Permittee to remove sediment, through dredging, from an area totaling 1.38 acres in Harveys Lake, Luzerne County. Because the activity proposed involved a surface water, the Department was required to evaluate the project pursuant to the antidegradation regulations at Section 93.4c.[4] Subsection (a)(2) provides that "[if] the

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[1] By letter dated August 8, 2007, the Permittee joins the Department's response to the Appellant's motion.

[2] The Appellant's motion exhibits, consisting of affidavits, excerpts from depositions and the accompanying exhibits are organized as individually labeled pages as "App. __."

[3] Permit, Appellant's Appendix of Exhibits at App. 29.

[4] 25 Pa. Code § 93.4c.

Department has confirmed the presence, critical habitat, or critical dependence of endangered or threatened Federal or Pennsylvania species in or on a surface water, the Department will ensure protection of the species and critical habitat." [5]

The February 2004 Permit application included a Pennsylvania Natural Diversity Index (PNDI) screening report that resulted in a "potential conflict" for a Pennsylvania endangered species, the Broad-leaved Water-milfoil, *Myriophyllum Heterophyllum*.[6] This Broad-leaved Water-milfoil is listed as an endangered species in DCNR's Native Wild Plant regulations.[7] However, the Department did not require any further investigation of the presence of the Broad-leaved Water-milfoil in the project area, nor did it make any determination about whether the permit area contained critical habitat for the Broad-leaved Water-milfoil.[8] Rather, the Department relied upon an e-mail from a DCNR employee dated August 12, 2003, which stated that in the opinion of DCNR, the Broad-leaved Water-milfoil at Harveys Lake is an "introduced invasive species."[9] Further, the e-mail stated that DCNR is "currently in an effort to remove the occurance [sic] from the PNDI system."[10] Therefore, the Department informed the Permittee that

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[5] 25 Pa. Code § 93.4c(a)(2).

[6] See PNDI Internet Database Search Results, Appellant's Appendix of Exhibits at App. 70.

[7] 25 Pa. Code § 45.12.

[8] Deposition of Eugene Trowbridge, a Department Water Pollution Biologist, Appellant's Appendix of Exhibits at App. 57-58; Department Response to Appellant's Motion for Summary Judgment, ¶ 6.

[9] Deposition of Trowbridge, Appellant's Appendix of Exhibits at App. 57-58; Department Response, ¶ 7.

[10] In its entirety, the August 12, 2003 email reads:

> After further consoltation [sic] with Autumn and also with Ann Rhoads. [sic] We are willing to make a determination that this population of Broadleaved Milfoil is infact [sic] an introduced invasive species. The natural habitat for this species tends to be in coastal plan regions, such as Philadelphia and Erie. It is our determination that the botanical survey for this species is therefore unnecessary,

it was not considering the Broad-leaved Water-milfoil an endangered species, and did not require any further action by the Permittee related to the Broad-leaved Water-milfoil.[11]

Any Broad-leaved Water-milfoil located within the project area would be destroyed by the dredging authorized by the permit.[12] After the permit was issued in February 2006, in July, 2006, a consultant retained by the Permittee identified the presence of the Broad-leaved Water-milfoil in the project area, although he did not label it as a "species of concern." [13] The Broad-leaved Water-milfoil has also been observed by an advisor to DCNR.[14]

The Appellant argues that the Department committed a fundamental error of law when it concluded that the Broad-leaved Water-milfoil was not an endangered species for the purpose of applying the anti-degradation requirements in 25 Pa. Code § 93.4c. More specifically, the Department should have relied upon the classification of the Broad-leaved Water-milfoil in DCNR's regulations rather than upon an e-mail message. The Department takes the position that it was appropriate to rely upon the information from DCNR and that DCNR intends to amend its endangered species regulation. The Department also states that the Broad-leaved Water-milfoil has been removed from the PNDI at Harveys Lake.

We find that the Department acted unlawfully as a matter of law. Regardless of whether or not DCNR intends to change the status of the Broad-leaved Water-milfoil at some point in the

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> since the species was introduced to the lake. We are currently in an effort to remove the occurance [sic] from the PNDI system. If you have any further questions or would like to discuss this further, please don't hesitate to call.

Appellant's Appendix of Exhibits at App. 83.

[11] Motion and Response ¶ 8.

[12] Trowbridge Deposition, Appellant's Appendix of Exhibits at App. 66.

[13] Appellant's Appendix of Exhibits at App. 17. *See also* Appellant's Reply Brief, Attachment A.

[14] Affidavit of Dr. Ann F. Rhoads, Department's Response to Appellant's Motion for Summary Judgment, Exhibit B.

future, at all relevant times, the plant was listed in a promulgated regulation as an endangered species. Accordingly, when the permit application included a notification that the plant may be present at the project site, it was incumbent upon the Department to investigate further and make an independent determination whether an endangered species was present and whether accommodations needed to be made to "ensure protection of the species and critical habitat" as required by the Department's regulation at Section 93.4c(a)(2).[15] Since the Department did not properly carry out this duty, we must grant the Appellant's motion for summary judgment.

It is a fundamental principle of law, that administrative regulations carry the force of law and are as binding upon administrative agencies as they are on the general public.[16] Therefore, where the Department fails to review an application in accordance with statutes and regulations, it acts contrary to law and its action can not stand.[17]

The Department admits that it relied upon the 2003 DCNR e-mail rather than 17 Pa. Code § 45.12, when it decided not to require further inquiry into the presence of the Broad-leaved Water-milfoil at the proposed project site. In response to the allegations in the Appellant's motion, the Department explains that DCNR is in the process of amending the endangered plant species regulation and that the technical committee that advises DCNR, has recommended the reclassification of the Broad-leaved Water-milfoil. However, the Department does not cite one case or one legal principle which would provide any authority for its reliance upon an allegedly anticipated regulation. Nor does the Department cite any authority to rely on an e-mail from one

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[15] 25 Pa. Code § 93.4c(a)(2).

[16] *E.g., Commonwealth v. State Conference of State Police*, 520 A.2d 25, 28 (Pa. 1987); *Teledyne v. Unemployment Board of Review*, 634 A.2d 665 (Pa. Cmwlth. 1993); *Harriman Coal v. DEP*, 2000 EHB 1008, 1012, n.1.

[17] *E.g., Blue Mountain Preservation Ass'n v. DEP*, 2006 EHB 589; *Oley Township v. DEP*, 1996 EHB 1098.

agency employee to another which contradicts the plain language of a promulgated regulation defining the Broad-leaved Water-milfoil as "Pennsylvania Endangered" without limitation. The cases consistently hold that while the Department may consult other agencies in carrying out its duties, it may not blindly defer to those agencies in abdication of its own duties.[18] This is especially true where it appears that the consulted agency is not complying with its own regulations. Our research has certainly not revealed any such authority. The regulation which is currently the law of the Commonwealth defines the Broad-leaved Water-milfoil as "Pennsylvania Endangered." Unless and until that definition changes, the Department is required to treat it as such.

In order to properly carry out its duty to protect endangered species and critical habitat under the anti-degradation regulations, the Department clearly had a duty to engage in further investigation once the permit application revealed the potential presence of the Broad-leaved Water-milfoil at the project site, regardless of DCNR's view that the plant was "invasive." Even if the plant has since been removed from the PNDI,[19] the Permittee's own expert, and affidavits relied upon by the Department in its response clearly point to the existence of Broad-leaved Water-milfoil at Harveys Lake. The Department can not now argue that it has no further duty under Section 94.3c because its presence has not been "confirmed." Clearly the Department has sufficient information – both officially and unofficially – to merit further scrutiny. As we held in

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[18] *Kleissler v. DEP*, 2002 EHB 737; *Eagle Environmental, L.P. v. DEP*, 1998 EHB 896, *affirmed,* No. 2704 C.D. 1998 (Pa. Cmwlth. filed October 19, 2001). *See also Heritage Building Group v. DEP,* EHB Docket No. 2006-072-MG (Adjudication issued May 16, 2007).

[19] In *Kleissler* the Board observed that in performing the Department's duty to evaluate the effect of proposed oil or gas wells on critical forest habitat, the PNDI may provide incomplete information. This view was informed, in part, by testimony in a related supersedeas hearing. See 2002 EHB at 744-45.

Oley Township v. DEP,[20] the Department may not avoid its legal obligations by ignoring or deliberately relying upon incomplete information.

It may be that the Broad-leaved Water-milfoil is "invasive" at Harveys Lake. That view can certainly be debated in the context of proper rulemaking proceedings to reclassify the milfoil before the EQB.[21] It may also be that DCNR permitting regulations may permit the removal or relocation of the Broad-leaved Water-milfoil from the project area, if in fact, the plant is problematic to the ecology of the lake.[22] However, we can find little justification for ignoring the administrative process and conducting regulatory duties via e-mails from one employee to another. Process and procedural safeguards are essential to the administrative process generally, and to environmental protection in particular.[23] That those processes may seem pointless or cumbersome from time to time is not a reason to simply ignore them.[24]

We therefore enter the following:

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[20] 1996 EHB 1098.

[21] Wild Resource Conservation Act, Act of June 23, 1982, P.L. 592, *as amended*, 32 P.S. § 5307.

[22] See 45 Pa. Code §§ 45.41-45.50.

[23] *Zlomsowitch v. DEP*, 2004 EHB 756.

[24] *Blue Mountain Preservation Ass'n* (an appellant sustains his burden of proof in a challenge under the anti-degradation regulations if he can show that the Department did not require a proper analysis and issued a permit anyway.)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CITIZENS FOR PENNSYLVANIA'S FUTURE (PENN FUTURE)	:	
v.	:	**EHB Docket No. 2006-100-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARINA COMMONS AT HARVEYS LAKE, LLC, Permittee	:	

ORDER

AND NOW, this 4th day of September, 2007, the motion for summary judgment of Citizens for Pennsylvania's Future in the above-captioned matter is hereby **GRANTED**. The appeal is **SUSTAINED** and Water Obstruction and Encroachment Permit No. E40-631 (Permit) to Marina Commons at Harveys Lake, LLC on February 10, 2006 is **REVOKED**.

ENVIRONMENTAL HEARING BOARD

Thomas W. Renwand

THOMAS W. RENWAND
Acting Chairman and Chief Judge

George J. Miller

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: September 4, 2007

c: **DEP, Department of Litigation:**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

VICTOR G. KENNEDY	:	
	:	
v.	:	**EHB Docket No. 2007-177-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 12, 2007**

OPINION AND ORDER ON MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Department's motion to dismiss is granted where the appellant challenges a proposed settlement offer. A proposed offer is not an appealable action.

DISCUSSION

Victor Kennedy filed this appeal from a settlement offer he received from the Department of Environmental Protection (the "Department") on June 15, 2007. The settlement proposal was in the form of a draft consent decree relating to violations at a sewage treatment plant operated by Kennedy. The parties did not execute or enter into the consent decree. The Department has filed a motion to dismiss Kennedy's appeal, which we grant.

Motions to dismiss should only be granted when the matter is free from doubt. *Concerned Citizens of Ligonier v. DEP*, EHB Docket No. 2005-314-L, slip op. at 2 (Opinion, February 13, 2007); *Rakoci v. DEP*, 2002 EHB 590, 591. This matter is free from doubt. The

Board only has jurisdiction to review final actions of the Department. 35 P.S. § 7514(a); 25 Pa. Code § 1021.2; *PEACE v. DEP*, 2000 EHB 1, 2. To be appealable, an action must affect personal or property rights, privileges, immunities, duties, liabilities, or obligations of a person. 25 Pa. Code § 1021.2; *DER v. New Enterprise Stone and Lime Co.*, 359 A.2d 845, 847 (Pa. Cmwlth. 1976); *Langeloth Metallurgical Co. v. DEP*, EHB Docket No. 2006-272-L, slip op. at 3 (Opinion, July 5, 2007); *PEACE v. DEP*, 2000 EHB 1, 2.

The Department correctly argues that a settlement offer is not an appealable action. Here, the Department has not done anything to trigger our jurisdiction. The Department simply sent a settlement offer to Kennedy for his consideration. The Department did not require Kennedy to sign the consent decree, and Kennedy was free to reject it, which he ultimately did. The offer, by itself, does not bind Kennedy or the Department to do anything. It is not a final action of the Department in that it does not, by itself, affect Kennedy's rights. *Amerikohl Mining, Inc. v. DER*, 1986 EHB 1, 2.

Kennedy argues that the Department's refusal to negotiate the terms of the proposed consent decree made it a final action. A final offer is no different than any other settlement offer when it comes to evaluating our jurisdiction. Unless the offer is accepted, there is no consent decree and no final action. If the Department chooses to proceed, it will need to follow up with some formal action, which Kennedy will have the right to appeal. At this point, the Department has taken no such action.

Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

VICTOR G. KENNEDY	:	
	:	
v.	:	**EHB Docket No. 2007-177-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 12th day of September, 2007, it is hereby ordered that the Department's motion to dismiss is granted. The docket shall be marked closed and discontinued.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: September 12, 2007

c: **DEP, Department of Litigation:**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

WEBCRAFT, LLC	:	
	:	
v.	:	**EHB Docket No. 2007-200-R**
	:	
COMMONWEALTH OF PENNSYLVANIA: DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 13, 2007**

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

By Thomas W. Renwand, Judge

Synopsis:

The Pennsylvania Environmental Hearing Board denies without prejudice the Department's Motion to Dismiss. The Motion requested as a sanction the dismissal of Appellant's Appeal for the failure to follow a Board Order. However that Order was returned to the Board by the United States Postal Service and not served on the Appellant.

OPINION

Presently before the Pennsylvania Environmental Hearing Board is the Pennsylvania Department of Environmental Protection's Motion to Dismiss. The Department's Motion to Dismiss is denied without prejudice at this time as the Board's

original Pre-Hearing Order No.1 and Order to Perfect were returned to the Board unopened, with the words "Return to Sender" "Not Here" written on the envelope.[1] In light of the fact that Appellant was neither served with our Pre-Hearing Order No. 1 nor our Order to Perfect, we issued an Amended Order to Perfect on September 10, 2007 ordering that Webcraft shall file a copy of the Department action being appealed on or before September 28, 2007.

The Department raises an excellent point in its Motion to Dismiss regarding Appellant's failure to set forth its objections in separate numbered paragraphs in its Notice of Appeal. 25 Pa. Code Section 1021.51(e) specifically provides that the notice of "appeal shall set forth in separate numbered paragraphs the specific objections to the action of the Department. The objections may be factual or legal." In light of this requirement, we will issue an order requiring the Appellant to list its objections accordingly.

[1] The Order was addressed to the attorney listed by Appellant in its Notice of Appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WEBCRAFT, LLC	:	
	:	
v.	:	**EHB Docket No. 2007-200-R**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 13th day of September, 2007, following review of the Pennsylvania Department of Environmental Protection's Motion to Dismiss the Appellant's Notice of Appeal as a sanction for failure to follow a Board Order, it is ordered as follows:

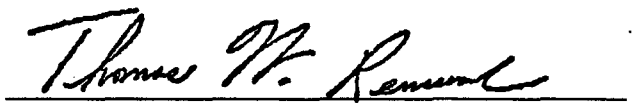
1) The Department's Motion to Dismiss is **denied without prejudice** because the Board's Order was returned to the Board by the United States Postal Service and was not served on Appellant.
2) On or before **September 28, 2007** Appellant, Webcraft, LLC, shall perfect its Appeal pursuant to our Amended Order of September 10, 2007 by filing a copy of the Department action being appealed.
3) Appellant Webcraft, LLC, shall on or before **September 28, 2007** file an *Amended Notice of Appeal* in compliance with 25 Pa. Code Section 1021.51(e) by setting forth in separate numbered paragraphs its specific objections to the action of the Department. These specific objections may be factual or legal.
4) One copy of all documents submitted to the Board shall be served on the Department of Environmental Protection by serving a copy on its

counsel. 25 Pa. Code Section 1021.37(b).

5) Failure to supply the missing information as ordered may result in an appropriate sanction which may include the dismissal of the Appeal. 25 Pa. Code Section 1021.161.

6) The Board is providing the Appellant with a copy of the Pennsylvania Environmental Hearing Board Rules of Practice and Procedure.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Acting Chairman and Chief Judge

DATE: September 13, 2007

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

HANSON AGGREGATES PMA, INC., GLACIAL SAND AND GRAVEL COMPANY and TRI-STATE RIVER PRODUCTS	:	
v.	:	**EHB Docket No. 2006-175-R (Consolidated with 2006-176-R and 2006-177-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA FISH AND BOAT COMMISSION, Intervenor	:	**Issued: September 17, 2007**

OPINION AND ORDER ON
MOTION FOR PARTIAL SUMMARY JUDGMENT

By Thomas W. Renwand, Acting Chairman and Chief Judge

Synopsis:

The Environmental Hearing Board's jurisdiction extends to reviewing a challenge to permit conditions that were developed by the Department of Environmental Protection in reliance upon regulations adopted by the Pennsylvania Fish and Boat Commission designating certain species of fish as threatened or endangered.

OPINION

Procedural Background

This matter involves dredging permits issued by the Department of Environmental Protection (Department) to Hanson Aggregates PMA, Inc., Glacial Sand and Gravel Company and Tri-State River Products, Inc. (collectively referred to as Appellants). The permits authorize

the Appellants to dredge in the Allegheny and Ohio Rivers. The Appellants have challenged, *inter alia*, Condition F and Appendix B of the permits, which require them to perform a fish survey in accordance with a prescribed protocol prior to dredging. The Appellants also challenge Table 2 of Appendix B of the permit which contains a list of fish species which, if encountered during sampling, may result in the imposition of additional criteria or the preclusion of dredging in certain areas. The fish listed in Table 2 of the permit (the Table 2 list) were derived from a more comprehensive list of threatened and endangered species developed and promulgated as regulations by the Pennsylvania Fish and Boat Commission (hereinafter the Fish and Boat Commission, or the Commission). The Fish and Boat Commission was granted leave to intervene in these consolidated appeals.

Presently before the Board is a motion for partial summary judgment filed by the Fish and Boat Commission. The motion asks the Board to strike those portions of the Appellants' amended notices of appeal challenging the validity of the Table 2 list of threatened or endangered fish.[1] The notices of appeal contend that the Table 2 list is not based on competent

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[1] The Fish and Boat Commission asks the Board to strike all of paragraphs 3(v) – 3(vi) of the Appellants' amended notices of appeal and the portion of 3(vii) indicated below:

> v. The Fish Survey Condition incorporates as an approval criteria a list of fish which, if "found" prior to dredging can preclude dredging or impose a more stringent and costly survey requirements because said "fish" are allegedly "threatened" or "endangered." This "list," with limited exception, is not based on competent scientific data and was not developed using a valid scientific methodology, has never been peer reviewed and is grossly over inclusive and thus invalid, contrary to law, an abuse of discretion and is manifestly arbitrary and capricious.
>
> vi. It is an abuse of discretion and arbitrary and capricious for the Department to rely upon the Pennsylvania Fish and Boat Commission's "list" of "threatened," "endangered" or "candidate" fish species to preclude or otherwise regulate dredging activities

scientific data or a valid scientific methodology and question whether most of the fish included in the list are either threatened or endangered. It is the Fish and Boat Commission's contention that any challenge to the list of threatened and endangered fish is not within the Board's jurisdiction since the Fish and Boat Commission holds the authority to create and maintain lists of threatened and endangered species pursuant to the Fish and Boat Code.

The Fish and Boat Code, Act of October 16, 1980, P.L. 996, *as amended*, 30 Pa. C.S. §§ 101 – 7314, provides the Fish and Boat Commission with the authority to establish a Pennsylvania Threatened Species List and a Pennsylvania Endangered Species List, which are published in the Pennsylvania Bulletin. *Id.* at § 2305(a). Pursuant to this provision, the Fish and Boat Commission has promulgated regulations establishing lists of threatened and endangered species at 58 Pa. Code §§ 75.1- 75.2 (the threatened or endangered list).[2]

The permits in question in this appeal were issued pursuant to the Dam Safety and Encroachments Act (Dam Safety Act), Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1 – 693.27. Section 9 of the act provides the Department of Environmental Protection with the power to grant an encroachment permit if it determines that a proposed project complies with all applicable laws administered by, *inter alia*, the Fish and Boat

---

> because this "list" was not based on competent scientific data, was not developed using a valid scientific methodology, and is grossly over inclusive.
>
> vii. The "categories" of species which trigger adverse consequences is not based on competent scientific evidence *and the fish listed therein are, with limited exception neither "threatened" nor "endangered"* and, in any event, will not be "taken" as a result of dredging and their "habitat" (which has never been defined) will not be adversely affected by dredging to any degree (if at all) sufficient to warrant imposing this condition.

[2] The Fish and Boat Commission has also promulgated regulations establishing a candidate species list at 58 Pa. Code § 75.3.

Commission. *Id.* at § 693.9(a). It further authorizes the Department to impose such permit terms and conditions as may be necessary to ensure compliance with those laws. *Id.* at § 693.9(b). The Dam Safety regulations at 25 Pa. Code, Chapter 105 require consideration of the following: An encroachment application may not be approved for a project located within an area that serves as a habitat of a threatened or endangered species, as designated by the Fish and Boat Commission (or the Pennsylvania Game Commission), unless the Department finds it will not have an adverse impact on the public natural resources. 25 Pa. Code § 105.16(c). In reviewing a permit application, the Department must examine the effect of the encroachment on various factors including fish and wildlife and aquatic habitat. 25 Pa. Code § 105.14(b)(4). According to the deposition testimony of Christopher Kriley, the Department's Chief of Permitting and Technical Support, Watershed Management, the Department's regulations at 25 Pa. Code § 105.14 and 105.16 were the basis for including the fish survey conditions and Table 2 in the Appellants' permits. (Ex. A to Motion; Ex. F to Response)

According to the Fish and Boat Commission, the list contained in Table 2 of the permits contains a specific species of fish, referred to as benthic lithophilic, which are included in the Fish and Boat Commission's list of threatened or endangered species set forth in its regulations. Because the Table 2 list in the permit was derived from the Fish and Boat Commission's list of threatened or endangered species, the Commission characterizes the Appellants' objections as a challenge to its designation of threatened or endangered species and to its regulations at 58 Pa. Code §§ 75.1-2. The Fish and Boat Commission asserts such a challenge is not within the jurisdiction of the Board since the Board is limited to reviewing actions of the Department of Environmental Protection. Any challenge to its regulations, argues the Fish and Boat Commission, should be brought before it, and not the Environmental Hearing Board.

The Appellants raise several arguments in response.[3] First, they assert they are not launching an attack on the Fish and Boat Commission's threatened or endangered list or the regulations where the list is codified. Rather, they argue, their dispute is with the list contained in Table 2 of their permit. Second, the Appellants argue that it is within the Board's jurisdiction to determine whether the Department acted reasonably in relying on the Fish and Boat Commission's threatened or endangered list in developing Table 2 and the fish survey conditions of the permit. Third, the Appellants assert that the Fish and Boat Commission has been involved in this process at many levels, first, by working with the Department to develop the information leading to the permit conditions and, second, by intervening in this appeal, and has waived its right to object to the Board's jurisdiction over this matter.

Discussion

We begin our analysis with a discussion of the Pennsylvania Environmental Hearing Board's jurisdiction. The scope of the Board's jurisdiction is set forth in Section 4 of the Environmental Hearing Board Act as follows: "The [B]oard has the power and duty to hold hearings and issue adjudications...on orders, permits, licenses or decisions of the [D]epartment [of Environmental Protection]." 35 P.S. § 7514. *Redbank Valley Municipal Authority v. DEP*, 2006 EHB 813, 818-19; *Neville Chemical Co. v. DEP*, 2003 EHB 530, 533 (citing *Felix Dam Preservation Assn. v. DEP*, 2000 EHB 409, 421-22). Thus, the Fish and Boat Commission is correct that the Environmental Hearing Board reviews actions of the Department of Environmental Protection, not the Fish and Boat Commission. Where we respectfully disagree with the Fish and Boat Commission, however, is whether our review of the Appellants' objections to Table 2 and the fish survey conditions constitutes a review of an action of the Fish

[3] The Department did not file a response to the motion.

and Boat Commission. We conclude that it does not. The action under review here is the Department's placement of conditions in the Appellants' permits requiring that a fish survey be conducted prior to dredging and imposing additional criteria on the Appellants should the fish in Table 2 of the permits be encountered during the survey. The fact that the Department relied on the Fish and Boat Commission's list of threatened or endangered fish in developing the list in Table 2 of the permit does not deprive us of jurisdiction. It is the role of the Environmental Hearing Board to review challenges to permits issued under the Dam Safety Act and regulations, and no such permitting action may be final as to any person adversely affected by it until such person has had the opportunity to appeal such action to the Environmental Hearing Board. 35 P.S. § 7514(c); *Redbank, supra.* Whenever the Department action under review incorporates or relies upon information or data provided by another agency, it must fall within the scope of the Board's review to determine if the Department has acted reasonably in relying upon that information. We agree with the Appellants that "just as an appellant can challenge the Department's reliance on some other 'data set' or 'source' as unreasonable because the 'data' or 'source' was scientifically flawed, the Appellants in this case are entitled to question the reasonableness of the Department's reliance on the [Fish and Boat Commission's threatened or endangered] List when developing Table 2 and the Fish Condition." (Appellants' Response, p. 19)

This matter is very similar to *Eagle Environmental, L.P. v. DEP*, 1997 EHB 733, in which the Department revoked, suspended and modified several permits, including an encroachment permit held by the appellant Eagle Environmental (Eagle) in connection with its operation of a landfill. The Department modified the encroachment permit because it allowed Eagle to affect wetlands within the floodplains of what the Fish and Boat Commission had

designated as "wild trout streams." Eagle challenged the permit modification on the basis that the Department had erred in relying on the Fish and Boat Commission's classification of wild trout streams, asserting that the Commission had failed to properly promulgate the designation as a regulation and, second, because it constituted an impermissible delegation of authority to the Commission.

In response to Eagle's objections, the Department argued that because it had deferred completely to the Fish and Boat Commission's classification of the streams as wild trout streams, any challenges to that classification should be raised by filing an appeal with the Commission, not the Board. It did, however, concede that the Board was the proper forum to determine whether the Department had abused its discretion by relying on the Commission's classification.

In an opinion by former Chairman and Chief Judge Miller, the Board noted that the regulations of federal and state agencies often refer to determinations made by sister agencies. In that case, like the present one, Section 9 of the Dam Safety Act required the Department to ensure compliance with the laws of the Fish and Boat Commission. Judge Miller went on to explain the structure of environmental regulation in Pennsylvania, which involves the promulgation of regulations by the Environmental Quality Board (EQB) "for the guidance of the Department in administering the various environmental statutes enacted by the General Assembly." He noted:

> The Department's exercise of discretion in administering those statutes is controlled by both the standards set forth in the regulations by the EQB and this Board's determination of whether the Department has properly applied the standard set forth by the EQB. While the Board normally limits its review to whether or not the Department has abused its discretion, where the Department's action is discretionary, this Board may substitute its own discretion for that of the Department based on the evidence presented at the hearing before it. *Warren Sand and Gravel Co., Inc. v. Commonwealth of Pennsylvania, DER*, 341 A.2d 556 (Pa. Cmwlth. 1975); *City of Harrisburg v. DEP*, 1996 EHB 1518.

1997 EHB at 741-42.

Tying this into the Department's reliance on the Fish and Boat Commission's wild trout stream designation, he held:

> Given this overall regulatory structure, together with the definition of "wild trout stream" at 25 Pa. Code § 105.1, *we believe the Department cannot blindly defer to the Commission's classification of streams as wild trout streams. Instead, the Department has a duty to ascertain that the Commission's determination is correct.* Such a determination may require the Department to evaluate whether the standard the Commission applies accurately indicates whether a stream supports naturally reproducing trout populations. It may also require the Department to assure itself that the Commission has considered all available evidence relevant to its determination. It is the duty of this Board to determine whether the Department properly exercised its discretionary powers based on the evidence before it. If the Board so chooses, it may determine based on the evidence before it whether the Department's action was proper.

1997 EHB at 742 (emphasis added).

As in *Eagle Environmental*, we are here faced with the Department taking a permitting action – in this case, the inclusion of certain permit conditions – based on a designation made by the Fish and Boat Commission. As in *Eagle Environmental*, it is the duty of this Board to determine whether the Department properly exercised its discretionary power based on the evidence before it. This includes an examination of whether the Department's reliance on the Fish and Boat Commission's threatened or endangered list in the Department's development of the Table 2 list in the permit was a proper exercise of its discretion.

In its reply brief, the Fish and Boat Commission argues that *Eagle Environmental* is factually and legally distinguishable from the present case since the threatened or endangered fish classification has been promulgated as a regulation, whereas the trout stream classification at issue in *Eagle* had been neither promulgated as a regulation nor advertised in the Pennsylvania

Bulletin. Indeed, one of the objections raised by Eagle in that case was whether the wild trout stream designation should have been promulgated as a regulation in accordance with the proper procedures. In dismissing Eagle's argument, Judge Miller concluded that the standard for designating what constituted a wild trout stream and the Fish and Boat Commission's list of such streams were "not regulations but only criteria for a determination which finally may be made only by the Department or this Board." *Eagle Environmental*, 1997 EHB at 743.

In the present case, the Fish and Boat Commission's designated list of threatened or endangered species has been promulgated as a regulation at 58 Pa. Code §§ 75.1-2. We recognize the distinction pointed out by the Fish and Boat Commission, but find the underlying principles set forth in *Eagle Environmental* to be just as applicable in this situation. We do not see the issue in this case being as broad as the Fish and Boat Commission asserts. The challenge here is not to the Commission's regulations but to the *Department's decision to include certain conditions in the Appellants' permits* based on the information contained in those regulations. We agree that an examination of that issue necessarily involves a review of the information contained within the Fish and Boat Commission's regulations. If those regulations are based on sound science, then the Fish and Boat Commission should welcome and invite our inquiry. However, we agree with the Commission that we do not have the power to overturn their regulations. Our decision is limited to reviewing the Department's reliance on those regulations and their application to the permits at issue in this appeal. If we find that there is no scientific basis for the permit conditions protecting the fish listed in Table 2, this would not result in an overturning of the Commission's regulations, but simply the overturning of the permit conditions in this case. In that case, the regulation may still stand; the permit conditions may not.[4] Moreover, according to the

[4] Of course, we are speaking hypothetically. Our determination will be based on the evidence

Department's Chief of Permitting and Technical Support, Watershed Management, Christopher Kriley, the fish survey conditions and Table 2 list were included in the permit based on *Department* regulations, 25 Pa. Code §§ 105.14 and 105.16, which are certainly within the scope of our review.

The Fish and Boat Commission argues that any challenge to the validity of the threatened or endangered species list, or the Table 2 list derived therefrom, should be brought by way of an appeal to the Commission rather than to the Board. This is impractical and likely to lead to piecemeal litigation, which is to be avoided. *Stout d/b/a Atlas Railroad Construction Co. v. DEP* (herein referred to as *Atlas Railroad),* EHB Docket No. 2007-052-R (Opinion and Order on Motion to Stay Proceedings issued August 17, 2007), p. 9; *Sechan Limestone Industries v. DEP*, 2004 EHB 185, 187; *Ziviello v. State Conservation Commission*, 1998 EHB 1138, 1139. The Fish and Boat Commission's approach would require that the Appellants file two appeals: one with the Fish and Boat Commission with respect to the Table 2 list, and a second appeal with the Board for the remaining challenges to the permit. If the Appellants' permits also contained conditions related to an endangered wildlife list designated by the Game Commission or a protected wetlands list designated by the Department of the Interior, then under the Commission's argument, the Appellants would be required to appeal some permit conditions to the Board, some to the Fish and Boat Commission, others to the Department of the Interior and yet others to the Game Commission, and possibly other agencies that we have not contemplated. As we held in *Atlas Railroad*, "There is little to be said for carving out one collateral aspect of the dispute and having that resolved in a separate action in a separate forum." *Slip op.* at 9. We noted this was particularly true where the same underlying facts and witnesses are involved. *Id.*

---

presented to us.

Many of the decisions of the Department necessarily rely on determinations made by sister agencies. *Eagle Environmental,* 1997 EHB at 740. Those determinations may come in the form of studies, recommendations or regulations. With regard to permitting decisions, this inter-agency cooperation may not occur until the permit application review process and may result, as it did in this case, in the insertion of certain conditions in the permit. The appropriate timeframe for reviewing the reasonableness of the basis for those conditions is during an appeal of the permit.

In reviewing actions of the Department, we are often called upon to consider matters extending beyond the Department's regulations. *See, e.g., Atlas Railroad, supra.* (holding that the Board has jurisdiction to decide whether parties entered into an oral agreement regarding costs incidental to mining where such agreements are contemplated by the regulations); *Coolspring Stone Supply, Inc. v. DEP*, 1998 EHB 209, and *Pond Reclamation, Inc. v. DEP*, 1997 EHB 468 (holding it is well within the scope of the Department's and the Board's authority and duty to evaluate property-related issues and contracts for the purpose of determining compliance with regulations and statutes). As we further held in *Atlas Railroad,*

> It is a mistake to focus merely on the issue raised in a Board proceeding and try to place that into some 'legal box' which would result in a Balkanized practice of administrative law resulting in costly piecemeal litigation. Rather the process is much more fluid and is based on the jurisdictional power of the Board to decide the issues before it. *See Pequea Township v. Herr*, 716 A.2d 678, 687 (Pa. Cmwlth. 1998).

Slip op. at 8.

The Appellants' right to due process is the lodestar that guides us and requires that they be afforded an opportunity to challenge the conditions of their permits, including those based on information that the Department has obtained from another agency's regulations. Where the

Department takes an action based on information contained in another agency's regulations, the Department's action and the basis for it are subject to our review.

In conclusion, we enter the following order:

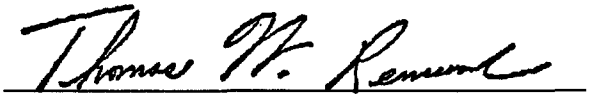
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HANSON AGGREGATES PMA, INC., GLACIAL SAND AND GRAVEL COMPANY and TRI-STATE RIVER PRODUCTS	:	
v.	:	**EHB Docket No. 2006-175-R (Consolidated with 2006-176-R and 2006-177-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA FISH AND BOAT COMMISSION, Intervenor	:	

ORDER

AND NOW, this 17th day of September 2007, the Fish and Boat Commission's motion for partial summary judgment is *denied*.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Acting Chairman and Chief Judge

DATE: September 17, 2007

c: **DEP Bureau of Litigation:**
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2007-125-CP-L**
JOHN P. PECORA, JAMES D. PECORA, ANN PECORA GREGO, ELIZABETH PECORA, JAY J. PECORA AND PHILIP A. PECORA, Defendants	:	**Issued: September 28, 2007**

OPINION AND ORDER ON
MOTION FOR DEFAULT JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board grants the Department's unopposed motion for default judgment where the defendants failed to answer a complaint for civil penalties or file a response to the Department's motion. A hearing will be scheduled to determine the amount of the penalty to be assessed.

OPINION

On May 11, 2007, the Department of Environmental Protection (the "Department") filed and served a complaint for $46,500 in civil penalties against the Defendants for alleged violations of the Clean Streams Law, 35 P.S. § 691.1 *et seq.*, and the Dam Safety and Encroachments Act, 32 P. S. § 693.1 *et seq*. The Defendants never answered the complaint. On July 11, 2007, the Department moved for entry of a default adjudication. The Defendants have

not responded to that motion.[1]

Our rules provide as follows:

> A defendant failing to file an answer within the prescribed time shall be deemed in default and, upon motion made, all relevant facts in the complaint may be deemed admitted. Further, the Board may impose any other sanctions for failure to file an answer in accordance with § 1021.161 (relating to sanctions).

25 Pa. Code § 1021.74. Section 1021.161 provides that the Board may impose sanctions upon a party for failure to abide by a Board order or rule of practice and procedure. The sanctions may include entering an adjudication against the offending party. 25 Pa. Code § 1021.161.

Our existing rules arguably would permit us to enter a default adjudication in this case against the Defendants for the amount of civil penalties requested by the Department in its complaint.[2] Such an adjudication would have been appropriate because the Defendants have shown that they have no intention of defending against the Department's complaints, and it appears certain that a hearing to address the amount of civil penalties will be a *pro forma* exercise. By addressing the Department's complaint on the merits, this Board, as well as the Department, will be required to devote time and resources to a matter about which the Defendants themselves have shown they do not care. We will be required to generate a precedential ruling as a result of empty-chair litigation.

It would not be appropriate, however, to enter a default adjudication in this case for the amount of civil penalties requested in the complaint because the Department, consistent with past

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[1] The Defendants' nonfeasance in this case is consistent with their conduct in a related proceeding pending before the Board at Docket No. 2006-114-CP-L. Although the Defendants filed an answer in that case, they did not respond to the Department's motion for summary judgment on liability, they failed to comply with the Board's pre-hearing orders, and they did not appear at the hearing on the merits.

[2] Any doubt regarding our authority in this regard will be eliminated if a proposed rule currently making its way through the Board's regulatory review process is finalized. That rule, if promulgated, will provide us with express authority to enter a default adjudication for the amount of penalties requested in the complaint. 25 Pa. Code § 1021.74(d)(proposed).

practice, has not asked that such relief be granted in its motion. Accordingly, we will limit our Order to the relief requested. We deem all relevant facts admitted pursuant to 25 Pa. Code § 1021.74, and we will preclude the Defendants from contesting liability pursuant to 25 Pa. Code § 1021.161. We will hold a hearing to receive evidence regarding the amount of civil penalties to be assessed.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2007-125-CP-L**
JOHN P. PECORA, JAMES D. PECORA, ANN PECORA GREGO, ELIZABETH PECORA, JAY J. PECORA AND PHILIP A. PECORA, Defendants	:	

ORDER

AND NOW, this 28th day of September, 2007, it is hereby ordered that the Department's unopposed motion for default judgment is granted. The relevant facts in the complaint are deemed admitted and liability is established. A hearing will be scheduled to receive evidence limited to the amount of civil penalties to be assessed.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: September 28, 2007

c: **For the Commonwealth, DEP:**
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Dana M. Adipietro, Esquire
Northwest Regional Counsel

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CHARLES C. PERRIN	:	
	:	
v.	:	**EHB Docket No. 2007-118-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PITTSFIELD TOWNSHIP and BROKENSTRAW VALLEY AREA AUTHORITY, Appellees	:	**Issued: September 28, 2007**

OPINION AND ORDER ON
APPELLANT'S MOTION TO DISQUALITY
OR RECUSE COUNSEL

By: Thomas W. Renwand, Acting Chairman and Chief Judge

Synopsis:

The Pennsylvania Environmental Hearing Board denies a Motion to disqualify counsel for Appellees where Appellant met with another member of Appellees' law firm on a matter unrelated to Appellant's Appeal. The decision of the Pennsylvania Department of Environmental Protection which Appellant appealed to the Pennsylvania Environmental Hearing Board was based on an updated Act 537 Plan submitted to the Department more than six months after the consultation and approved by the Department more than eight months after the consultation. As such there are no grounds set forth in

Appellant's Motion warranting the removal of counsel.

OPINION

This is a *pro se* hand written appeal filed by Appellant Charles C. Perrin to the Department's approval of the updated Act 537 Plan for Pittsfield Township, Pennsylvania. The Pittsfield Township's Act 537 Plan Update dated February 22, 2007 was approved by the Pennsylvania Department of Environmental Protection on April 6, 2007. Appellant evidently believes that the Act 537 Plan is flawed and that he should not have to connect to the centralized sewage collection system recommended by Pittsfield Township and operated by Brokenstraw Valley Area Authority.[1]

Presently before the Board is an undated handwritten request from Appellant (quoted exactly as written by Appellant) docketed on September 4, 2007 stating, in part:

> I am writing you for a Request that the Quinn Law Firm (Recuse) from Counsel for the Pittsfield Township and Brokenstraw Valley Area Authority. My reasons for this is that back in 8-1-06 I had went to the Quinn Law Firm for consultation on my property about many wrongful acts that were done to me. I talk to Rick Blakely of the Quinn Law Firm and he sead that he would talk to Paul Burroughs who is there Civil Attorney on these matter's at hand and being that the Warren County Planning and Zoning Commission is involved in bouth of those matter's at hand. I thank it would be a Ethical Conflict of Interest.
> Respectfully submitted
> Citizen
> Charles C. Perrin

[1] We say "evidently" because although Appellant has filed loads of documents with the Board he has not filed a legally coherent Notice of Appeal pursuant to 25 Pa. Code Section 1021.51(e) setting forth "in separate numbered paragraphs the specific objections to the action of the Department." Such objections may be factual or legal.

Attached to Mr. Perrin's request was a receipt dated August 1, 2007 from the Quinn Law Firm evidencing the fact that Mr. Perrin evidently paid the law firm fifty dollars in cash for the consultation.

Attorney Paul Burroughs and the Quinn Law Firm represent Pittsfield Township and Brokenstraw Valley Area Authority in this appeal. Pittsfield Township and Brokenstraw Valley Area Authority vigorously oppose Appellants' "Motion" to disqualify Attorney Burroughs and the Quinn Law Firm from representing them in this Appeal. Appellees contend that the limited consultation between Mr. Perrin and Attorney Blakely "about many wrongful acts that were done to me" is wholly unrelated to Mr. Perrin's Appeal of Pittsfield Township's Updated 537 Plan which is dated more than six months after Mr. Perrin's consultation with Attorney Blakely. Moreover, Attorney Burroughs has set forth a verification indicating that Attorney Blakely never consulted him at the time concerning his meeting with Mr. Perrin. In fact, according to the Quinn Law Firm no further communication or representation of Mr. Perrin took place.

Rule 1.9 of the Rules of Professional Conduct provides as follows:

Rule 1.9 Duties to Former Clients

a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are material adverse to the interests of the former client unless the former client gives informed consent.

b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

c) whose interests are materially adverse to that person; and

1) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent.

d) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
   1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
   2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

A lawyer at the Quinn firm met with Mr. Perrin several months before the Department of Environmental Protection approved the updated 537 Plan of Pittsfield Township. Closely reviewing Appellant's unverified request we find no basis in the law to grant his request to disqualify counsel representing Brokenstraw Valley Area Authority and Pittsfield Township.

As we noted in *Hartstown Oil and Gas Exploration Company v. DEP*, 2005 EHB 959, 961, the Pennsylvania Rules of Professional Conduct are designed to provide guidance to attorneys and a structure for regulating conduct through disciplinary agencies. As pointed out in the preamble to the Rules of Professional Conduct, the Rules are not designed as a basis for civil liability.

Looking at the limited facts alleged by Appellant, we see no basis for disqualifying Attorney Burroughs or the Quinn Law Firm from representing Appellees in this case. Mr. Perrin simply does not set forth any facts which would trigger the above provisions. We share the concern of Judge Labuskes as set forth in *DEP v. Whitemarsh*

Disposal Corporation, 1999 EHB 588, 590, as we are also "loathe to interfere with a party's choice of counsel" especially in the absence of any prejudice to Appellant. Although Mr. Perrin has not clearly articulated his objections to the Department's action, we believe his case is based on simply not wanting to hook up to the municipal sewer system. Therefore, we find no merit in Mr. Perrin's request to disqualify Attorney Burroughs and the Quinn Law Firm.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CHARLES C. PERRIN	:	
	:	
v.	:	**EHB Docket No. 2007-118-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and PITTSFIELD	:	
TOWNSHIP and BROKENSTRAW	:	
VALLEY AREA AUTHORITY, Appellees	:	

ORDER

AND NOW, this 28th day of September, 2007, Appellant's Motion to Disqualify or Recuse Counsel is ***denied***.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

DATE: September 28, 2007

c: **DEP Bureau of Litigation:**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2006-114-CP-L**
JOHN P. PECORA, JAMES D. PECORA, ANN PECORA GREGO, ELIZABETH PECORA, JAY J. PECORA AND PHILIP A. PECORA, Defendants	:	**Issued: October 4, 2007**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board assesses a civil penalty in the amount of $18,500 for the Defendants' failure to comply with an order issued pursuant to the Clean Streams Law and Dam Safety and Encroachment Act. The defendants failed to timely comply with a Department order requiring them to stabilize and restore their property. The civil penalty is based largely on the defendants' delay in compliance with the Department's order and the resulting sediment pollution to an adjacent exceptional value wild trout stream.

Background

The Department of Environmental Protection (the "Department") issued an order to Phillip A. Pecora, John P. Pecora, James D. Pecora, Ann Pecora Grego, Elizabeth Pecora, and Jay J. Pecora (the "Pecoras") on February 3, 2005 for violations of the Clean Streams Law and

Dam Safety and Encroachments Act (the "Order"). The Order cited the Pecoras for performing extensive excavation and grading work on a site in Bradford Township, McKean County (the "Site"). The work encroached into Minard Run, an exceptional value, designated wild trout stream. The work resulted in severe damage to the stream, including disfigurement of the stream channel itself. The work was done without the necessary permits. The Order required the Pecoras to restore the Site. The Pecoras did not appeal the Order.

When the Pecoras did not comply with the Order, the Department filed a petition to enforce it in Commonwealth Court. The action was settled with a consent decree between Philip Pecora and the Department on June 29, 2005 (the "Consent Decree"). Pecora complied with the Consent Decree, and in the process the Order, by September 29, 2005.

The Department reserved the right in the Consent Decree to seek civil penalties from the Pecoras "for non-compliance with the Department's Order and the violations set forth in the Department's Order." (Commonwealth Exhibit ("C. Ex.") 7, paragraph 4.) The Department filed a complaint for civil penalties with us on April 10, 2006 requesting a civil penalty of $75,500 for the Pecoras' noncompliance with the Order. For reasons that have not been explained, the Department has only pursued penalties for the Pecoras' noncompliance with the Order, not the violations giving rise to the Order in the first place. The Pecoras filed an answer on May 1, 2006.

On November 29, 2006, the Department filed a motion for partial summary judgment against the Pecoras on the issue of liability. The Department contended that the Pecoras were not in a position to contest liability because they admitted to it in the Consent Decree. Although represented by counsel, the Pecoras did not file a response to the Department's motion. On January 22, 2007, we granted the Department's motion, finding the Pecoras liable for the

violations set forth in the Department's complaint. On February 5, 2007, the Pecoras filed a motion for reconsideration of the Board's opinion and order, which the Department opposed. We denied the motion. We thereafter scheduled a hearing for June 18, 2007 to take evidence regarding the amount of the civil penalty to be assessed. On April 26, 2007, the Pecoras filed a motion to set aside the Department's complaint, which the Department opposed and we denied. The Department filed its pre-hearing memorandum on May 2, 2007. When the Pecoras did not file an answering pre-hearing memorandum as required, we issued a rule for them to show cause why sanctions should not be imposed for failure to file a pre-hearing memorandum. The Pecoras did not respond to the rule. We issued an Order on June 12, 2007 precluding the Pecoras from presenting a case-in-chief.

We held the pre-hearing conference that we had previously scheduled by Order on February 2, 2006 by telephone conference on June 14, 2007. The Pecoras' attorney did not call in. The Board's staff was eventually able to track down the Pecoras' attorney who complained that he was not aware of the conference and would be late for another engagement if required to participate. He nevertheless joined the call and informed the Board and the Department that the Pecoras would not attend the hearing. We held a one day hearing on June 18, 2007 at the Pittsburgh office of the Board. Neither the Pecoras nor their attorney appeared at the hearing.

FINDINGS OF FACT[1]

1. The Department is the agency with the duty and authority to administer and enforce the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 – 691.1001 ("Clean Streams Law"); the Dam Safety and Encroachments Act, Act of November 26,

[1] Unless otherwise noted, the facts are taken from the unappealed Order (Commonwealth Exhibit ("C. Ex.") 1) and the Consent Decree (C. Ex. 7).

1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1-693.27 ("Dam Safety Act"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17; and the rules and regulations promulgated thereunder.

2. Philip Pecora occupies the Site. The other Pecoras own it.

3. Minard Run, an exceptional value stream, flows through the Site.

4. The Pennsylvania Fish and Boat Commission has designated Minard Run as a wild trout stream. (Notes of Transcript page ("T.") 12.)

5. Beginning in 1998 and continuing through February 2005 when the Order was issued, Department inspections revealed extensive earth disturbance activity on the Site. The unpermitted activity included excavation and grading of Minard Run itself. The site activities resulted in severe sedimentation of the stream. (C. Ex. 1-4, 7.)

6. The site work changed what had been a well-defined, narrow, deep stream channel, into one with wide, shallow, ill-defined side banks and in-stream gravel bars. By increasing the temperature of the water and adding a significant sediment load to the stream, the work destroyed habitat and otherwise compromised the ability of the stream to function as a wild trout stream of exceptional value. (T. 13-18; C. Ex. 2, 3.)

7. The damage to the stream was severe. (T. 17; C. Ex. 2, 3.)

8. The Department issued the Order on February 3, 2005. The Order required the Pecoras to within 15 days hire a trained professional to design a plan to stabilize and restore the Site. Within 30 days, the Pecoras were required to submit all applicable plans and permit applications for the activities necessary to restore the Site. Upon the Department's approval, the Pecoras were required to restore the Site in accordance with the approved plans. (C.Ex. 1.)

9. The Pecoras did not appeal or comply with the Order.

10. On May 18, 2005, the Department filed a petition with the Commonwealth Court to enforce the Order.

11. On June 29, 2005, the Department and Philip Pecora entered into the Consent Decree. (T. 23; C. Ex. 7.) Philip Pecora made the following admissions in the Consent Decree:

> G. On February 3, 2005, the Department issued an administrative order ("Department's Order") to the Owners and Phillip A. Pecora directing them to, among other things, immediately cease all earth disturbance activity at the Property and restore disturbed areas at the Property....
>
> H. Philip A. Pecora received the Department's Order.
>
> J. Neither the Owners nor Philip A. Pecora appealed the Department's Order and the findings contained in the Department's Order are administratively final.
>
> K. To date, the Owners and Philip A. Pecora have not complied with the Department's Order.
>
> L. The Owners' and Philip A. Pecora's failure to comply with the Department's Order constitutes unlawful conduct under Section 18 of the Dam Safety Act, 32 P.S. §693.18, and Section 611 of the Clean Streams Law, 35 P.S. §691.611; and subjects the Owners and Philip A. Pecora to civil penalty liability under Section 21 of the Dam Safety Act, 32 P.S. §693.21, and Section 605 of the Clean Streams Law, 35 P.S. §691.605.

(C. Ex. 7.)

12. Philip Pecora agreed in the settlement to stabilize and restore the Site.

13. Philip Pecora complied with the Consent Decree (and the Order) by September 29, 2005.

14. Philip Pecora's failure to comply with the Order up until the Consent Decree was executed was intentional.

15. The Pecoras' delay in compliance with the Order resulted in continuing damage to the stream. (T. 18.) Photographs from a June 2005 inspection revealed a large area of denuded landscape that would have continued to cause excess sedimentation of Minard Run, which itself remained in its improperly altered condition. (C. Ex. 2, 3.)

DISCUSSION

Given the Defendants' admissions, their failure to appeal the Order, their failure to defend this action, and our ruling granting the Department's partial summary judgment motion on the issue of liability, the only remaining issue that we need to address at this point is the amount of the civil penalty to be assessed. The Dam Safety and Encroachments Act (the "Dam Safety Act") provides for a maximum $10,000 penalty, plus $500 for each day of continued violations. 32 P.S. § 693.21(a)(3); *DEP v. Carbro Construction Corporation*, 1997 EHB 1204, 1228. In the case of the Clean Streams Law, the Board may assess a maximum civil penalty of $10,000 per day for each violation. 35 P.S. § 691.605; *DEP v. Angino*, EHB Docket No. 2003-004-L, slip op. at 27 (Adjudication, March 13, 2007). We consider similar factors in determining a penalty amount under both laws. Under the Dam Safety Act, the Board is to consider the willfulness of the violation, damage or injury to the stream regimen and downstream areas of the Commonwealth, cost of restoration, the cost to the Commonwealth of enforcing the provisions of the act against such person, and other relevant factors. 32 P.S. § 693.21(a)(3). We recently had this to say regarding the assessment of civil penalties under the Clean Streams Law:

> In determining the penalty amount, the Board is to consider the willfulness of the violations, damage or injury to the waters of the Commonwealth or their uses, costs of restoration, and other relevant factors. *DEP v. Strubinger*, EHB Docket No. 2004-120-

> CP-C, slip op. at 15-16 (Adjudication October 4, 2006). The deterrent value of the penalty is also a relevant factor. *Westinghouse v. DEP*, 745 A.2d 1277, 1280-81 (Pa. Cmwlth. 2000); *Leeward*, 2001 EHB at 886; *DEP v. Whitemarsh Disposal Corporation*, 2000 EHB 300, 346.

DEP v. Angino, EHB Docket No. 2003-004-L, slip op. at 27.

The Board's role in a complaint for civil penalties is to make an independent determination of the appropriate penalty amount. The Department may suggest an amount in the complaint, but the suggestion is purely advisory. *DEP v. Angino*, EHB Docket No. 2003-004-L, slip op. at 28 (Adjudication, March 13, 2007); *DEP v. Leeward Construction, Inc.*, 2001 EHB 870, 885. The guidance the Department uses in determining a suggested civil penalty is not binding on the Board. *United Refining Company v. DEP*, 2006 EHB 846, 849-50; *Dauphin Meadows v. DEP*, 2001 EHB 521. In fact,

> this Board must be wary of placing too much emphasis on the Department's internal guidance documents. We do not view it as our responsibility to evaluate whether the Department has followed its own guidance document in calculating a *suggested* penalty in a complaint action. Rather, our responsibility is to assess a penalty based upon applicable statutory maxima and criteria, regulatory criteria (if any), and Board precedent. *DEP v. Hostetler*, EHB Docket No. 2005-011-CP-K. (Adjudication June 8, 2006); *Leeward*, 2001 EHB at 908, 913.

DEP v. Kennedy, EHB Docket No. 2005-299-L, slip op. at 11 (Adjudication, January 22, 2007).

We have often stated that deterrence is a major factor in determining an appropriate civil penalty. We discussed the value of deterrence in *DEP v. Leeward Construction*, 2001 EHB 870:

> We consider the deterrence value of the penalty to be very important in this matter. Leeward continues to be engaged in large earthmoving projects, but more generally, all such contractors must understand the importance of not only installing but maintaining adequate controls. It is only natural to discount the importance of controls. They seem collateral to the primary mission of a project, which is to prepare a site for new buildings,

> roads, or other development. They do not advance the primary objective, and in fact, can be something of a distraction. Owners will be quick to complain if a building pad is not ready on time, but perhaps not so concerned if a settling basin does not work. A construction project is necessarily a muddy affair. The effects of the construction activity itself appear to be relatively short-lived. Despite these considerations, E&S controls are not a nuisance item to be installed as an appeasement to the regulators and then forgotten. They are critically important in preventing pollution of the waters of the Commonwealth. They must command the utmost attention and care for the life of the project or the streams of the Commonwealth are bound to continue to suffer where there is development. The penalty assessed must be large enough to counteract the natural tendency to minimize their importance, and it must be reflective of the economics of large projects.

2001 EHB at 870, 890. *See also Angino*, slip op. at 34 (deterrence appropriate where defendant has extensive plans for property); *DEP v. Hostetler*, 2006 EHB 359, 365 (Board assessing civil penalty to deter defendant from acting in the same manner again in the future); *DEP v. Breslin,* 2006 EHB 130 (deterrence appropriate in light of defendant's checkered compliance history).

It is important to understand that the Department is not seeking a civil penalty for the Pecoras' unauthorized site work. The Department for unexplained reasons is only seeking a penalty for the Pecoras' subsequent failure to comply with the Order. The Department seeks a penalty for each day of noncompliance starting on February 18, 2005, which was the day by which the Pecoras were to have hired a trained professional to prepare a restoration plan, and ending on June 29, 2005, the date of the Consent Decree. (This is a period of 130 days.)

The Department's complaint narrows our focus considerably. For example, when we consider harm to the environment, we must keep in mind that the Department has not asked us to assess any penalties for the initial damage done to the stream. Instead, our focus must be on the damage to the stream that resulted from the Pecoras' delay in compliance. Of course, the extent of damage initially done to the stream is relevant in assessing the continuing damage caused by

the delay in remediation, but the penalty itself may only relate to the noncompliance with the Order.

There are a few factors that weigh in the Pecoras' favor. Of course, the Department's piecemeal approach to enforcement in this case fundamentally constrains our analysis. Beyond that, as to the period of noncompliance between February and June 2005, it is important to remember that the Pecoras ultimately did comply with the Department's Order. Admittedly, it took a Commonwealth Court action to achieve cooperation, but in the end the work was performed. There is a limited record as to the harm to the stream from the failure to comply, and no record of any permanent damage as a result of the delayed compliance. It would have been helpful, for example, to know the condition of the stream both at the time of the Department's Order and the time of the Consent Decree to see if conditions deteriorated during that period. This deterioration could have been directly tied to the failure to comply. The Department, somewhat counterintuitively, states that the Pecoras enjoyed no cost savings as a result of the period of noncompliance. The Department has not asked for any of what appear to be its considerable costs of enforcement, which means that the Commonwealth's taxpayers must bear those costs. We have no record of any activity or any interaction between the Department and the Pecoras during the period of noncompliance.

There are also several factors that weigh against the Pecoras. It does not appear that the Pecoras made any attempt whatsoever to comply with the Order. Photographs from a June 2005 inspection (the Order was issued in February 2005) show a severely impacted stream as it comes in contact with the Site and large denuded areas with no erosion controls that would do continuing damage to the stream. (C. Ex. 2, 3.)

When we assess a civil penalty for water pollution, we consider such factors as the actual and potential harm to the stream and its inhabitants, the size of the disturbed area, the magnitude and duration of the discharge, the classification and condition of the stream, and the degree to which the discharge exceeded permit limits. *Angino*, slip op. at 18. The Department presented credible, albeit limited, expert testimony of ongoing harm to the stream as a result of the failure to comply. There were approximately five acres of disturbed land, as well as the length of the stream itself. (T. 18; C. Ex. 1-3.) The stream in question is not only of exceptional value, it has been designated as a wild trout stream.

With respect to Philip Pecora, there is no doubt that he intentionally failed to comply with the Order. We have defined the various levels of culpability as follows:

> An intentional or deliberate violation of law constitutes the highest degree of willfulness and is characterized by a conscious choice on the part of the violator to engage in certain conduct with knowledge that a violation will result. Recklessness is demonstrated by a conscious disregard of the fact that one's conduct may result in a violation of the law. Negligent conduct is conduct which results in a violation which reasonably could have been foreseen and prevented through the exercise of reasonable care.

Angino, slip op. at 18 (*quoting DEP v. Whitemarsh Disposal Corporation*, 2000 EHB 300, 349). Pecora received the Order (C. Ex. 7), and yet did nothing to comply with it until he was dragged into court. Pecora's previous history of site inspections and notices of violation shows that he knew what his legal obligations were and the record illustrates that he made a conscious choice to disregard them.

Somehow Mr. Pecora needs to be deterred from continuing to violate the law on the Site. It should not take a Commonwealth Court action to achieve compliance with an unappealed Departmental Order. A civil penalty will not only add incentive to comply on this site, it sends

the message that Departmental orders must be complied with in a timely manner. *See Leeward*, 2001 EHB at 886 (unexcused refusal to comply with order results in $10,000 per day penalty).

The Department has asked for a civil penalty of $75,500. Although the Pecoras have done nothing to help themselves in this case, in our independent judgment that amount strikes us as too high. We suspect that the amount reflects undue consideration of facts and circumstances that go beyond the sole count in the Department's complaint. While the Department has asked for a civil penalty of $500 a day here, it agreed to stipulated penalties of $200 per day in the Consent Decree. We also note that the Department asked for the same daily penalty for each of the 130 days beginning on the day the Pecoras should have hired a trained professional to design a restoration plan. Under the Order, however, the Pecoras had 30 days to submit a plan and another 30 days after the Department approved a plan to restore the Site. Damage to the stream would have continued during some of those days even if the Pecoras complied fully with the Order as written.

In our recent adjudication in *DEP v. Strubinger*, 2006 EHB 740, we assessed the amount of the penalty requested by the Department, $9,110, for conduct somewhat akin to the Pecoras'. Strubinger, among other things, relocated a stream section. That stream, however, was of a much lower quality than Minard Run. Strubinger was also being penalized for the underlying violative conduct, not the failure to comply with an order. In *Leeward*, we assessed a penalty of $10,000 per day for failure to comply with the Department order, but that case involved a huge development project that resulted in near worst-case damage to multiple streams. In *DEP v. Hostelter*, 2006 EHB 359, we assessed a $20,500 civil penalty for Hostetler's failure to implement erosion and sediment controls while harvesting timber, which resulted in damage to a high quality stream and the springs leading to it. Although the conduct in *Hostetler* was similar

to that of Pecora, the Department's complaint in that case included counts for Hostetler's failure to implement the proper erosion and sediment controls. In *DEP v. Kennedy*, EHB Docket No. 2005-299-CP-L (Adjudication, January 22, 2007) and *DEP v. Breslin*, 2006 EHB 130, we assessed civil penalties of $35,500 and $25,000 respectively for the defendants' failures to submit discharge monitoring reports for their sewage treatment plants. Although these penalties were for reporting violations, they reflected the length of the violations and the defendants' willfulness and intent to violate the law.

After considering applicable statutory maxima (which would allow a penalty of hundreds of thousands of dollars at $10,000 per day), the statutory criteria for setting penalties, and Board precedent, we conclude that a civil penalty of $18,500 is appropriate. We arrive at this by assessing a $100 per day penalty starting on the 15th day after the Order was issued, which was the day the Pecoras were to have hired a consultant, and continuing through the next 75 days (90 days after the Order was issued), which is the approximate date that the restoration was to have been completed. (We are allowing for 30 days for the Department's review of the Pecoras' plan.) During this period the stream damage would have continued even if the Pecoras had complied with the Order. We then assess a $200 per day penalty thereafter for the remaining 55 days of noncompliance for the Pecoras' failure to completely restore and stabilize the Site as required by the Order. During this latter period, damage to the stream would have stopped if the Pecoras had complied with the timeframes in the Order.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and subject matter of this complaint. 32 P.S. § 693.18; 35 P.S. § 691.610; 35 P.S. § 7514.

2. Failure to comply with an order of the Department constitutes unlawful conduct and a nuisance. 32 P.S. § 693.20; 35 P.S. § 691.611.

3. Pursuant to Section 21(a)(2) of the Dam Safety and Encroachments Act, 32 P.S. § 693.21, the Pecoras' failure to comply with the Order subjects them to the assessment of a maximum civil penalty of $10,000, plus $500 for each day of continued violation.

4. When assessing civil penalties under the Dam Safety and Encroachments Act, the Board is to consider the willfulness of the violation, damage or injury to the stream regimen and downstream areas of the Commonwealth, cost of restoration, the cost to the Commonwealth of enforcing the provisions of the act against such person, and other relevant factors. 32 P.S. § 693.21.

5. Pursuant to Section 605 of the Clean Streams Law, 35 P.S. § 691.605, the Pecoras' failure to comply with the Order subjects them to the assessment of a civil penalty of $10,000 per day for every day of a continuing violation.

6. When assessing civil penalties under the Clean Streams Law, the Board is to consider the willfulness of the violation, damage or injury to the waters of the Commonwealth and their uses, the cost to the Department of enforcing the provisions of the Act, the costs of restoration, deterrence, and other relevant factors. 35 P.S. § 691.605.

7. The Board assesses a civil penalty in the amount of $18,500 against the Pecoras for their violation of the Dam Safety and Encroachment Act and the Clean Streams Law by reason of their failure to comply with the Department's Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2006-114-CP-L**
JOHN P. PECORA, JAMES D. PECORA, ANN PECORA GREGO, ELIZABETH PECORA, JAY J. PECORA AND PHILIP A. PECORA, Defendants	:	

ORDER

AND NOW, this 4th day of October, 2007, it is ordered that civil penalties are assessed jointly and severally against John P. Pecora, James D. Pecora, Ann Pecora Grego, Elizabeth Pecora, Jay J. Pecora, and Philip A. Pecora in the total amount of $18,500 for violations of the Clean Streams Law and Dam Safety and Encroachments Act by reason of their failure to comply with the Department's Order.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: October 4, 2007

c: **DEP Bureau of Litigation:**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ANGELA CRES TRUST OF JUNE 25, 1998	:	
	:	
v.	:	**EHB Docket No. 2006-086-R**
	:	**(Consolidated with 2006-006-R)**
COMMONWEALTH OF PENNSYLVANIA: DEPARTMENT OF ENVIRONMENTAL PROTECTION and MILLCREEK TOWNSHIP, Permittee	:	**Issued: October 9, 2007**

OPINION AND ORDER ON JOINT MOTION TO HOLD HEARING IN ERIE, PENNSYLVANIA

By Thomas W. Renwand, Acting Chairman and Chief Judge

Synopsis:

The Pennsylvania Environmental Hearing Board grants in part and denies in part a motion from two of the parties which requested that the Board hold the merits hearing in Erie, Pennsylvania. The Board is amenable to holding two of the seven days of the scheduled hearing in Erie.

OPINION

Presently before the Pennsylvania Environmental Hearing Board is the Joint Motion of Millcreek Township and the Pennsylvania Department of Environmental Protection to hold the merits hearing in this matter in Erie, Pennsylvania in Room 104 of

the Manufacturers' Association of Northwest Pennsylvania, 2171 West 38th Street.

On May 14, 2007 the Board issued Pre-Hearing Order No. 2 scheduling the case for hearing in the Board's Courtroom located on the top floor of the Pittsburgh State Office building overlooking the Point in beautiful downtown Pittsburgh, Pennsylvania. The Board has allotted seven days for the hearing.

Prior to turning to the merits of the Joint Motion, we note that the Pennsylvania Environmental Hearing Board is the quasi-judicial agency established by law to hear appeals of final actions of the Pennsylvania Department of Environmental Protection. *Smedley v. DEP*, 2001 EHB 131. The Board conducts hearings *de novo* to determine whether the Departmental action in dispute is supported by the evidence presented to it, and a proper exercise of authority. *Pennsylvania Trout v. Department of Environmental Protection*, 863 A.2d 93 (Pa. Cmwlth. 2004). Upon appeal of discretionary Departmental actions, the Board may substitute its own discretion for that of the Department. *Pequea Township v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998). The Board's power to substitute its discretion for that of the Department includes the power to modify the Department's action and to direct the Department in what is the proper action to be taken. *Pequea Township v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998); *Environmental & Recycling Services, Inc. v. DEP*, 2002 EHB 461.

In order to carry out its statutory mandated duty and responsibility to conduct such hearings the Environmental Hearing Board maintains and operates four modern courtrooms throughout the state. The Board's newest courtroom is in Norristown, while the Board has long maintained two courtrooms at its headquarters in the Rachel Carson

State Office Building in Harrisburg. The Board's Western Pennsylvania hearing room is in Pittsburgh.

All of the Board's courtrooms are conducive to holding hearings for the convenience and comfort of parties, counsel, witnesses, members of the public and the Board. The courtrooms function as courtrooms do in locations throughout the state with a bench, podium, counsel tables, microphones, and ample seating for both witnesses and the public. Security is provided by the Pennsylvania State Capitol Police.

The Board, at the request of counsel, has conducted hearings in court houses throughout the Commonwealth, including Erie County. The Board held two days of a five day hearing at the Erie County Courthouse in the recent case of *Greenfield Good Neighbors Group, Inc. v. DEP and Lake Erie Promotions, Inc.* , 2003 EHB 555.

The Joint Motion indicates that a vast majority of the witnesses are from Erie County with several from nearby Crawford County. "Counsel for Millcreek and counsel for the Department reside in Erie, Pennsylvania and the surrounding areas." Joint Motion, Paragraph 9. The Joint Motion also points out that the subject of the appeal is located in Millcreek, Township, Erie County, Pennsylvania.

Appellees propose to hold "the hearing at Room 104 of the Manufacturers' Association of Northwest Pennsylvania, 2171 West 38th Street, Erie, Pennsylvania." Joint Motion, Paragraph 12. After reviewing its website, the location appears to be a modern conference facility and is a room "approximately 31′ x 21′ and can be arranged with tables in any fashion desired by the Board." Joint Motion, Paragraph 15.

Millcreek Township and the Department's counsel indicate that having the hearing

in Erie would be much more convenient and cost effective for them. According to the last paragraph in the Motion, Appellant does not have a position on where the hearing should be held.

Board Rule 25 Pa. Code Section 1021.114 provides as follows:

> At the discretion of the Board, hearings will be held at the Commonwealth facility nearest the location sought to be remedied by the Department with consideration for the convenience of witnesses, the public and the parties in attending the hearings.

We have held parts of some hearings in other Commonwealth facilities for the convenience of counsel, witnesses, the public, and the parties. Nevertheless, holding hearings in locations not operated and controlled by the Environmental Hearing Board has sometimes resulted in problems for all involved. We have found that when we do not have control over the facility we sometimes run into scheduling difficulties. Sometimes we have been limited in the hours available to complete the testimony at a remote facility. In one instance, the Commonwealth court facility was not aware that we needed their courtroom for another day of hearing and had scheduled another hearing for the same day.

In addition to our obligations and responsibilities to the parties in this case, we also have duties and obligations concerning our other cases. We have found that even with the advantages afforded by electronic communication, it is still more difficult to timely address from the road the many issues raised by counsel in our other cases. It is not unusual to receive telephone calls from counsel requesting an immediate telephone conference to address an issue in their case. Moreover, we have found it much more

difficult to address administrative matters and review circulating opinions while away from the office presiding over a case.

On July 25, 2007 the Board conducted a comprehensive site view with counsel and the parties in Millcreek Township, Erie County. Therefore, the Board is quite familiar with the site and there is thus no need to hold another site view in Erie County.

However, we certainly sympathize with counsel and the parties. We believe a fair compromise to the relief requested in the Joint Motion would be to schedule two days of hearing in Erie. We suggest that counsel identify and arrange for fact witnesses to testify those days. These witnesses could be taken out of order so that all of the parties could benefit from having two days of the hearing in Erie.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ANGELA CRES TRUST OF JUNE 25, 1988	:	
	:	
v.	:	**EHB Docket No. 2006-086-R**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and MILLCREEK TOWNSHIP, Permittee	:	

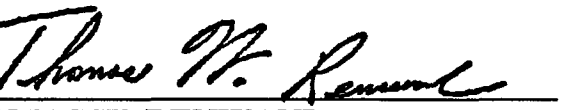
ORDER

AND NOW, this 9th day of October, 2007, following careful review of the Joint Motion to Hold The Hearing in Erie, Pennsylvania, it is ordered as follows:

1) The Joint Motion is ***granted in part*** and ***denied in part.***
2) The Board ***denies*** the Joint Motion to the extent it requests the Board to transfer the entire seven day hearing from Pittsburgh to Erie.
3) The Board ***grants*** the Joint Motion to the extent that it will hold two of the seven days of hearing in Erie.
4) The Board adjusts the hearing schedule as follows:

October 23, 2007	Pittsburgh	9:30 a.m. – 4:30 p.m.
October 24, 2007	Erie	12:00 p.m. – 6:00 p.m.
October 25, 2007	Erie	8:30 a.m. – 6:00 p.m.
October 26, 2007	Pittsburgh	10:30 a.m. – 5:30 p.m.
October 30, 2007	Pittsburgh	9:30 a.m. – 5:00 p.m.
October 31, 2007	Pittsburgh	9:30 a.m. – 5:00 p.m.
November 1, 2007	Pittsburgh	9:30 a.m. – 5:00 p.m.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Acting Chairman and Chief Judge

DATE: October 9, 2007

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ENVIRONMENTAL & RECYCLING SERVICES, INC.	:	
v.	:	**EHB Docket No. 2006-061-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** October 9, 2007

ADJUDICATION

By Michelle A. Coleman, Judge

Synopsis:

The Board finds that there is insufficient evidence to support the Department's denial of an application for a landfill expansion where the Appellant has shown that there is minimal potential for mine subsidence, settlement or groundwater contamination. The application proposes a 60 acre construction and demolition landfill to be placed overtop of 50 acres of a closed municipal waste landfill and 10 acres of a construction and demolition landfill. At the hearing the Appellant has shown that the Department erred when it denied the application based on concerns of mine subsidence, settlement and groundwater contamination. The Department was unable to substantiate its concerns, and ultimately at the hearing unable to rebut the Appellant's case.

INTRODUCTION

The Appellant, Environmental & Recycling Services, Inc. (ERSI or Appellant) challenges the Department of Environmental Protection's (DEP or Department) denial of its Phase IV Expansion Application. The Phase IV Expansion Application proposes a 60 acre construction and demolition (C&D) landfill, 10 acres to overlap Phases I-III and 50 acres to overlap the closed municipal solid waste landfill, Amity Landfill. The Department denied the application based on concerns of potential mine subsidence of coal seams found under the Phase IV footprint, as well as concerns of potential settlement of Amity Landfill's waste mass potentially causing groundwater contamination. The Board, however, finds these concerns to be unsubstantiated by the Department. The Appellant has met its burden of proof by a preponderance of the evidence to show that the Department improperly denied the Phase IV Expansion Application.

FINDINGS OF FACT

1. The Department of Environmental Protection (DEP or Department) is the agency with the duty and authority to administer and enforce the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. § 6018.101, et seq. (Solid Waste Management Act); the Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, P.L. 556, No. 101, *as amended*, 53 P.S. § 4000.101, et seq. (Act 101); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17 (Administrative Code); and the rules and regulations including 25 Pa. Code, Chapters 271-285 (Municipal Waste Regulations).

2. The Appellant is Environmental & Recycling Services, Inc. (ERSI or Appellant) a Pennsylvania corporation located in Taylor Borough, Lackawanna County,

Pennsylvania.

3. The Department issued a Solid Waste Permit to ERSI for Phases I-III in October of 1995 for the operation of a construction and demolition (C&D) landfill. Phases I-III began operating in November, 1996. Tr. 128-29.[1]

4. Also, located at the ERSI Landfill site is the Amity Landfill which is a closed municipal waste landfill. ERSI Exhibit (ERSI Ex.) 89, p. 3.

5. The Amity Landfill was a permitted municipal waste landfill that began operating in 1974. Tr. 139, 967-71.

6. As required by the waste regulations during Amity's operating years, Amity was required to have an attenuating soil subbase, as well as natural renovation soil equal to the depth of the waste, a 1:1 ratio of waste to soil. Tr. 139,148, 969-76.

7. Engineers placed grade stakes at Amity Landfill to ensure that the 1:1 ratio was being maintained at the landfill. DEP inspected the Amity Landfill during this time. Tr. 138, 145.

8. The 1972 design of Amity Landfill did not comply with newly adopted regulations of 1988 and could not be "retrofitted" to meet these requirements. The Amity Landfill was required to be closed by the Department in 1990. Commonwealth Exhibit (Cmwlth. Ex.) 173.

9. ERSI Phases I-III is a landfill approximately 30 acres, with 12 acres of Phases I-III overlying the closed Amity Landfill. ERSI Ex. 89, p. 3; ERSI Ex. 5, p. 4.

10. ERSI submitted a Phase IV Expansion Application that was received by DEP's Northeast Regional Office on December 9, 1999. ERSI Ex. 2; Tr. 19-20.

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[1] References to hearing testimony shall be cited as "Tr." followed by the page cite from the transcript.

11. The Phase IV Expansion Application proposes a 60 foot footprint of a C&D waste disposal area wherein 50 acres will overlie the Amity Landfill and 10 acres will overlie Phases I-III. ERSI Ex. 1, Vol. I; Tr. 371-72; 378-79.

12. Gannett Fleming, Inc. (Gannett Fleming), consultant of ERSI for Phase IV, proposes in the Application to place a natural renovation soil layer on top of Amity prior to Phase IV receiving waste. The Expansion Application also proposes to build Phase IV in four stages of about 15 acres. Approximately one year prior to an area receiving waste a layer of attenuating soil will be placed to allow settlement at Amity Landfill. ERSI Ex. 1, Tr. 377-79.

13. On June 21, 2000 DEP participated in a Local Municipality Involvement Process meeting in Taylor Borough regarding the Expansion Application. ERSI Ex. 23; Tr. 53.

14. In December, 2000, regulatory changes occurred and DEP forms were changed to reflect the newly adopted regulations. Tr. 35-37, 191, 1278.

15. A memorandum from George Barstar of Gannett Fleming, engineer in charge of Phase IV Expansion Application, was sent to Scot Haan. The memorandum indicated that the new regulations affected the ERSI Expansion Application. Cmwlth. Ex. 28. ERSI authorized Gannett Fleming to revise the Phase IV Expansion Application in accordance with the new regulations. Tr. 1286-87.

16. A February 15, 2001 letter from Gannett Fleming was sent to DEP to inform DEP that the Phase IV Expansion Application was being revised in accordance with the newly adopted regulations. Tr. 114; 1289; Cmwlth. Ex. 33.

17. ERSI sent a revised application on November 30, 2001 using the forms that were published in accordance with the newly adopted regulations. ERSI Ex. 1; ERSI Ex. 23; Tr. 35-36, 1286-87.

18. The revised Phase IV Expansion Application was deemed administratively complete by a letter on April 30, 2002 signed by William Tomayko, Chief of the Waste Program in the DEP's Northeast Regional Office. ERSI Ex. 7; Tr. 14-17.

19. The April 30, 2002 letter also included an alternative project review timeline that provided an additional 90 days to address the two "critical issues" of potential groundwater contamination and mine subsidence. ERSI Ex. 7;Tr. 14-17, 118-120.

20. Once an application is deemed administratively complete it is sent to an engineer to be reviewed. The administratively complete ERSI application was sent to Joseph Buczynski of the Northeast Regional Office. Tr. 56-57.

21. A meeting was held on July 16, 2002 between ERSI and DEP to discuss the Expansion Application. ERSI Ex. 23; Tr. 1303-06.

22. On July 26, 2002 DEP sent a letter to ERSI noting two issues of concern: (1) the potential for mine subsidence and its impact to the site; and (2) the potential for groundwater contamination and the ability for anyone to locate the source of any groundwater contamination due to the expansion over an existing landfill. ERSI Ex. 14; Cmwlth. Ex. 52.

23. On November 19, 2002 a meeting was held between Gannett Fleming representatives and DEP regarding the Expansion Application and the two issues of mine subsidence and groundwater contamination. Tr. 1307-28; Cmwlth. Ex. 61; ERSI Ex. 23.

24. On December 10, 2002, George Barstar sent a letter to DEP providing the minutes of the November 19, 2002 meeting. ERSI Ex. 16; Cmwlth. 62.

25. DEP sent a letter dated January 8, 2003 disagreeing with the characterizations in the December 10, 2002 letter, specifically the use of pan lysimeters to collect leachate and the soil recharge test to analyze settlement. Cmwlth. Ex. 69; Tr. 287.

26. George Barstar provided in the December 10, 2002 letter that Gannett Fleming would prepare and submit a work plan and location plan for the surcharge test to DEP. Cmwlth. Ex. 62, p. 5.

27. George Barstar prepared and submitted to Scot Haan an outline of the surcharge test and attached a detailed work plan. Cmwlth. Ex. 149; Cmwlth. Ex. 150.

28. On May 30, 2003 representatives of Gannett Fleming and ERSI met with DEP to discuss issues of mine subsidence. ERSI Ex. 23; Tr. 1329.

29. DEP received a mine subsidence report in December, 2003 from Gannett Fleming dated November, 2003 relating to the ERSI site. ERSI Ex. 3, Cmwlth. Ex 89.

30. On October 21, 2004, William Tomayko requested Gannett Fleming to send a "road map" of the information ERSI and its representatives had sent to DEP in support of its Expansion Application. ERSI Ex. 20; Tr. 122-23.

31. ERSI sent a letter on June 30, 2005 to DEP stating that ERSI would file a complaint in mandamus with Commonwealth Court on July 6, 2005 to compel DEP to complete its review of the Phase IV Expansion Application . Cmwlth. Ex. 110.

32. ERSI filed a complaint with the Commonwealth Court on July 6, 2005 seeking a Writ of Mandamus to compel DEP to take action on the Expansion Application and seeking an award for damages as a result of delay. Tr. 156-57.

33. DEP issued a pre-denial letter on July 26, 2005. ERSI Ex. 4.

34. A response by ERSI to the Department's pre-denial letter was sent on September 26, 2005. ERSI Ex. 6; Tr. 158-60.

35. DEP denied the Phase IV Expansion Application via letter dated February 1, 2006 because of concerns with the two "critical issues" of mine subsidence and groundwater

contamination. ERSI Ex. 5. Tr. 41-42, 47, 1916.

Mine Subsidence

36. Underlying Amity and Phases I-III are the following coal seams: Rock, Big, New County, Clark and Dunmore Nos. 1, 2, and 3. ERSI Ex. 86, p. 3; Tr. 559, 750

37. According to mine maps, both surface mining and deep anthracite coal mining have occurred in those coal seams. Tr. 751, 767, 138-39, 967, 1488.

38. Under the ERSI Site and Amity Landfill, the method of surface mining used was strip mining and the method of deep mining was "room and pillar". ERSI Ex. 86, p. 3; Tr. 751-54.

39. The mine maps indicate that the Rock vein was strip mined and 100% was removed. ERSI Ex. 86, p. 3; Tr. 751, 1500.

40. The Big vein was both strip mined and deep mined with second mining. Ex. ERSI 86, p. 3; Tr. 751, 754, 1501.

41. An area referred to as the "Big Vein Island" is a seven acre area that was partially deep mined, but not stripped (as of the date of the map). ERSI 86, p. 3; Tr. 757.

42. New County is 100 feet below the bottom of the Big Vein and 170 feet below the ground surface; this vein was deep mined with second mining. ERSI Ex. 86, p. 3; Tr. 751, 773, 1501-02.

43. The Clark vein had first mining, but no second mining occurred. However, the Clark vein collapsed due to water and pressure on the pillars for many years. Tr. 776; 1502.

44. Dunmore No. 1 has collapsed because of second mining and water. Tr. 777.

45. There are two types of mine subsidence. Pothole subsidence is a smaller, more localized depression created by shallow mine workings, such as a sinkhole. Tr. 756. The other

is trough subsidence which is a long surface depression that occurs when a large area of a deep mine collapses and resembles the shape of a bathtub. ERSI Ex. 86, p. 7, 10; Tr. 589, 772-773.

46. The shallow seams are the Rock and Big which are the only seams susceptible to pothole subsidence; the other seams are too deep for pothole subsidence. Tr. 757.

47. The Rock vein and Big vein are not a concern for pothole subsidence because they both have been completely stripped. Tr. 757.

48. The Big Vein Island is also susceptible to pothole subsidence, but a review of the mine maps and topographic map of Amity Landfill indicate that there is no risk of pothole subsidence at the Big Vein Island because it has been fully removed. ERSI Ex. 87, p. 8, 10; Tr. 573-76.

49. The stipulated testimony of DEP's Tim Altares of the Department's Bureau of Abandoned Mine Reclamation concludes that there is a low risk of pothole subsidence in Phase IV. Tr. 1822-23.

50. Trough subsidence has potential to occur when the mines have not been collapsed. ERSI Ex. 86, p. 7. Tim Altares' INTEX calculation found that maximum potential for trough subsidence would be 3.2 feet at the Big Vein Island and less than 3.2 feet in the remaining area of Phase IV. Tr. 1822.

51. Dr. Christopher Bise, an expert in mining, mine subsidence and mine engineering, found the maximum subsidence potential to be less than 1 foot using an INTEX calculation. ERSI Ex. 86, p. 7-10.

Groundwater Impacts

52. Under the ERSI Phases I-III and Amity Landfill is contaminated water found in fractured bedrock and coal seams, this is referred to as a "mine pool". The mine pool is 150

feet below Amity and is acidic, consisting of total dissolved solids, iron, sulfate and other dissolved metals. The mine pool is so contaminated that it can never be restored to a useable capacity. ERSI Ex. 85, p. 2; Tr. 562-63, 594, 599.

53. Groundwater under the ERSI Phases I-III and the Amity Landfill fluctuates between 590 and 610 feet above sea level. ERSI Ex. 85, p. 2-3; Tr. 593. There is a southwest slope that causes groundwater to flow toward a borehole drilled into the side of the mine pool and thirty million gallons a day discharges into the Lackawanna River. Tr. 594; ERSI Ex. 85, p. 3.

54. There are five monitoring wells located at ERSI Phase I-III and Amity Landfill. Two wells are located up gradient and three are located down gradient. Monitoring Wells MW-2R, MW-3 and MW-5 are down gradient and MW-1 and MW-4 are up gradient. MW-2 was used prior to Phases I-III and was replaced by MW-2R in 1995. Tr. 1089; ERSI Ex. 85, p. 3, 8.

55. The acquifer system at the ERSI Site and the Amity Landfill has a high permeability and the mine pool water is flat. Tr. 563, 598. The coal seams are on a downward angle to the southwest which causes some of the monitoring wells not to encounter the coal seams. Tr. 562-63. The upper part of the Site is the most sensitive of the mine pool because of the slope of the coal seams. Tr. 600-02; ERSI Ex. 85, p. 8.

56. Sampling is done from the wells both quarterly and annually. Tr. 1093-94. There are separate reporting forms required by DEP for municipal waste and for C&D waste leachate. Tr. 1091-92. Municipal waste disposal sites, like Amity Landfill, are sampled quarterly for a list of analytes, including volatile organic compounds (VOC). Municipal waste sites are also tested on an annual basis for an expanded list of constituents and the sample is usually split

so DEP can conduct its own testing on the annual sample. Tr. 1091-92, 610; ERSI Ex. 85, p. 9-10.

57. C&D waste sites are only sampled quarterly for a list of nine analytes and do not need to be tested annually, like municipal waste landfills, for the expanded list. Tr. 607-10. ERSI conducts its own C&D sampling and submits it to DEP. ERSI Ex. 85, p. 9-10.

58. Leachate from municipal waste landfills and C&D waste landfills can be differentiated because VOCs are contained in municipal waste leachate and not in C&D leachate. Tr. 610, 1646-47; ERSI Ex. 85, p. 8-9.

59. There has not been an adverse impact to groundwater from the ERSI Site or Amity Landfill. Tr. 2025-2027.

60. The Phase IV Expansion Application proposes the use of an attenuating soil base rather than a liner. Tr. 406-07; 982-84. The design will be natural attenuating soil on top of a natural attenuation landfill, which can accommodate differential settlement. Tr. 983.

61. Leachate from a landfill is produced by precipitation passing through the waste. Tr. 384, 627.

62. Amity Landfill is currently producing leachate. Tr. 612, 2017-18.

63. HELP modeling is a commonly used method in the solid waste industry for estimating leachate generation. Tr. 363.

64. The HELP model indicates that 716 gallons per acre per day of leachate or 13 million gallons per year is generated through the bottom of the 50 acre portion of the Amity Landfill that does not underlie Phases I-III. Tr. 386-87; ERSI Ex. 89, p. 9.

65. The HELP model shows that construction of Phase IV and having the attenuating soil base placed on Amity Landfill one year in advance of receiving waste will allow

for runoff and 83% reduction in leachate generation. Tr. 385; ERSI 89, 9-10.

66. During the open operation of Phase IV, there will still be a reduction of leachate generation, but it will be a 37% reduction since there will be infiltration into the waste. Tr. 389-90; ERSI Ex. 89, p. 8-9.

67. ERSI proposes to use a polyethylene geomembrane cap which will prevent precipitation from getting into Amity Landfill's waste, soil subbase and groundwater, and the HELP model indicates that zero infiltration will occur with this cap. Tr. 391-92; 1003-04.

68. There has been no indication of a "squeeze" of Amity as a result of Phases I-III loading because there are no VOCs present in the leachate. Tr. 615.

69. William Tomayko testified that a likely remedy would be to place a geomembrane cap on the site if leachate were detected in the groundwater. Tr. 2012-19.

70. ERSI proposes to install a geomembrane cap covering all of the Phase IV expansion area, regardless of the detection of leachate. Tr. 981-82, 991.

DISCUSSION

Standard of Review & Burden of Proof

The Pennsylvania Environmental Hearing Board (EHB or Board) reviews all DEP final actions *de novo*. *Warren Sand & Gravel Co. v. DEP*, 341 A.2d 556, 565 (Pa. Cmwlth. 1978); *Smedley v. DEP*, 2001 EHB 131, 156; *Pennsylvania Trout v. DEP*, 863 A.2d 93, 106 (Pa. Cmwlth. 2004). The Commonwealth Court has opined that "*de novo* review involves full consideration of the case anew." *O'Reilly v. DEP*, 2001 EHB 19, *citing Young v. DER*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991). In *Robert K. Swinehart v. DEP*, Judge Labuskes stated that "[the Board] may consider not only evidence that was before the [Department of Environmental Protection] at the time it denied [the appellant's] renewal application, but additional relevant

evidence as well." EHB Docket No. 2006-056-L, slip op. at 4 (Adjudication issued May 18, 2007); citing *Leatherwood v. DEP*, 819 A.2d 604 (Pa. Cmwlth. 2003) and *Gordon v. DEP,* EHB Docket No. 2005-323-R, slip op. at 8 (Adjudication issued April 26, 2007). The Board's duty is to determine whether the Department's action is supported by the evidence presented to the Board, not whether the action can be supported by the evidence presented at the DEP's fact finding hearing. *DEP v. N. Am. Refractories*, 791 A.2d 461 (Pa. Cmwlth. 2002). Thus "[w]e make our own findings of fact based solely on the record developed before us." *Smedley*, 2001 EHB at 156.

The Practice and Procedure Rules of the Environmental Hearing Board place the burden of proof on the appellant "when the Department denies a license, permit, approval or certification." 25 Pa. Code § 122(c). The party with the burden of proof must establish its case by a preponderance of the evidence. 25 Pa. Code § 1021.122(a).

The Department's denial of ERSI's Phase IV Expansion Application for a C&D landfill is a final action by the Department appealed by ERSI for which the Board conducted a *de novo* hearing. ERSI must establish by a preponderance of the evidence that the Department erred when it denied the Phase IV Expansion Application. Through the Board's *de novo* power we find, as will be discussed below, that the Appellant has sustained its burden of proof with credible evidence that the Department erred or otherwise acted contrary to the law when it denied the Phase IV Expansion Application.

Phase IV Application

The Department received the Phase IV Expansion Application in December 1999 requesting a 60 acre C&D waste disposal site to be constructed over 10 acres of Phases I-III and 50 acres over the closed Amity Landfill. ERSI Ex. 2; 23; Tr. 19-20, 378-79. A revised

application was sent to DEP in November of 2001 using DEP forms that were developed in accordance with the newly adopted regulations. Tr. 114, 197.

The Phase IV Landfill proposes to place a natural renovation soil layer on top of the closed Amity Landfill, to construct the landfill in stages of approximately 15 acres each, after placing the attenuating soil layer one year prior to that area receiving waste. Tr. 377-79. By letter DEP deemed the Phase IV Expansion Application was administratively complete and established a review timeline of 90 days to discuss the Department's two "critical issues" of mine subsidence and potential groundwater contamination at the ERSI site. ERSI Ex. 7; Tr. 14-17, 118-120.

Meetings were held July 16, 2002, November 19, 2002 and May 30, 2003 to discuss the two issues of concern. Tr. 1306-29. ERSI submitted a mine subsidence report in December 2003 prepared by Gannett Fleming regarding Phase IV. ERSI EX. 3; Cmwlth. Ex. 89. For the groundwater issues, the use of pan lysimeters was suggested by Gannett Fleming on behalf of ERSI to differentiate the leachate coming from Amity and leachate from ERSI, Phases I-III soil recharge test was also discussed. Tr. 287; 2017. The Department's position was that pan lysimeters were not going to work. Tr. 1978-80; 2016-18. Also, the DEP stated that it was concerned with the impact of conducting a surcharge test. No further discussions were held. Tr. 1985. On October 21, 2004, William Tomayko requested that a road map be prepared to show all the information submitted by ERSI with respect to Phase IV. Tr. 122-23.

ERSI informed the DEP on June 30, 2005 that it would file a complaint in mandamus to the Commonwealth Court to compel the Department to complete the review of the Phase IV Expansion Application. Cmwlth. Ex. 110. ERSI did file the complaint and DEP issued a pre-denial letter on July 26, 2005. ERSI Ex. 4, 6; Tr. 158-60. On February 1, 2006, DEP denied the

Phase IV Expansion Application citing the two concerns of mine subsidence and potential groundwater contamination. An appeal was filed with the Environmental Hearing Board on February 23, 2006 and a ten day hearing was held before the Honorable Michelle A. Coleman the last week of February 2007 and the first week of March 2007.

Mine Subsidence

The Department's concern of mine subsidence beneath the Phase IV footprint stems from the fact that extensive surface and deep mining took place under both the Amity and ERSI landfills. Tr. 767. ERSI's calculations of the potential mine subsidence were based on available data and information, such as mine maps, topographic maps and borings from Amity Landfill. Alexander Zdzinski of DEP's Northeast Regional Office reviewed the Phase IV Expansion Application and decided that a determination of the maximum potential mine subsidence should be done first, followed by an investigation by an engineer to see that the landfill is able to withstand the potential subsidence. Tr. 1420-24.

With respect to the calculation of maximum potential for mine subsidence, Zdzinski, DEP's expert, testified that he was concerned with ERSI's calculation because the application did not contain adequate site specific data. Tr. 1190-97. He argued that ERSI's use of mine maps to calculate the potential mine subsidence allows for uncertainties and assumptions of the mining conditions underlying Phase IV. Tr. 1190-97. However, Zdzinski's arguments are inconsistent with the Department's regulation governing C&D landfill applications which specifically provides for the use of mine maps:

> (a) If the proposed permit area and adjacent area overlie existing workings of an underground mine, the appellant shall submit sufficient information to evaluate the potential for mine subsidence damage to the facility, including the following:

> (1) Maps and plans showing previous mining operations underlying the proposed facility.
>
> (2) An investigation, with supporting documentation, by a registered professional engineer with geotechnical expertise addressing the probability and potential impacts of future subsidence. The investigation shall address the potential for additional mining beneath the permit and adjacent area, the stability of final underground workings, the maximum subsidence likely to occur in the future and the effect of that subsidence on the integrity of the facility, and any measures which have been or will be taken to stabilize the surface.

25 Pa. Code § 277.120 (emphasis added). In spite of ERSI's use of these requirements specified by the statute, the Department insists that there needs to be site specific data, such as soil borings[2] within the Phase IV footprint. Tr. 1190-97.

Zdzinski testified, and the regulation above provides, that once a calculation of mine subsidence is determined, an engineer must investigate whether the integrity of the facility would be compromised by the calculated maximum potential mine subsidence. Tr. 1420-24; *see also* 25 Pa. Code § 277.120(a)(2).

There are two types of subsidence, pothole and trough subsidence. Specifically with respect to pothole subsidence, ERSI asserts that the areas that would be a concern for pothole subsidence have been fully removed and pose no threat of potential subsidence. ERSI Ex. 87, p. 8, 10; Tr. 150, 153-55, 574-76. DEP's own expert, Tim Altares, agrees that there is a low risk of pothole subsidence at Phase IV. Tr. 1822-23.

Trough subsidence is only a concern with the deep mine seams, such as Rock, Big, New County, Clark and Dunmore No. 1. ERSI Ex. 86, p. 7. ERSI's expert in mining, mine subsidence and mining engineering, Dr. Christopher Bise, opined that according to borings

[2] It is worth noting that the Phase I-III application utilized the same data as the Phase IV application. The mine subsidence report for Phase I-III was done by Blazosky & Associates and Dr. Christopher Bise. Phase I-III was permitted without any borings directly into the Phase I-III footprint, as DEP suggests needed to be done with Phase IV. Tr. 1404-07, 1416.

around Phase IV, the lower coal seams have completely collapsed due to the deep mining, second mining and degradation over the years. Tr.752, 773-77. Dr. Bise also concluded that according to the monitoring wells around Phase IV, the Clark and Dunmore seams are filled with water. Tr.776. Assuming a worse case scenario, Dr. Bise calculated maximum trough subsidence to be 0.91 feet. ERSI Ex. 86, p. 7.

At the hearing in this matter, the Department's stipulated testimony of its expert Tim Altares of the Bureau of Abandoned Mine Reclamation, provided that to a reasonable degree of scientific certainty he *was* able to calculate the potential mine subsidence using the mine maps and borings from the Amity Landfill. Tr. 1822-23. This testimony completely contradicts the Department's concern that maximum potential mine subsidence could not be calculated. The Department's expert Tim Altares' intex calculation found that the maximum trough subsidence in the area of the Big Vein Island to be 3.2 feet and the remainder of Phase IV would be less. Tr. 1822-23. ERSI offered expert testimony that Phase IV could withstand DEP's predicted maximum subsidence without affecting its integrity. Tr. 938-88. ERSI's expert in geology, hydrogeology, mining geology and landfill hydrology, Dr. Thomas Earl, testified that a three foot trough subsidence event would not compromise the integrity of the design because Amity Landfill's soil subbase allows for the soil to adjust downward staying in its sedimentary configuration without any cracks in the base. Tr. 590-92. Richard Bodner, also an ERSI expert, testified that in a natural attenuation design the soil is free to flex and will not impact the integrity of the design. Tr. 989-90. ERSI provided DEP with a mine subsidence report prepared by Gannett Fleming which concluded that all the coal seams were either stripped or fully collapsed posing no risk of subsidence. ERSI Ex. 1, Vol. III, Form 11, Attachment 11-2.

Considering the language of the above cited regulation which states the "applicant shall

submit *sufficient information* to evaluate the potential for mine subsidence . . . ." 25 Pa. Code § 277.120(a) (emphasis added), the Board finds that ERSI provided sufficient information to DEP regarding the maximum potential for mine subsidence and sufficient information that it would not effect the integrity of the facility. Both ERSI and DEP experts were able to calculate potential mine subsidence. Additionally, ERSI's experts agree that subsidence is not an issue with Phase IV. Even assuming that a subsidence event of 3.2 feet would occur, there would be no effect on the integrity of the design. The Department never offered any evidence to rebut ERSI's expert testimony that there would be no impact to the integrity of the landfill design. *See* Cmwlth. Brief, p. 9-10. The Board finds that ERSI has sustained its burden in establishing that the Department's denial of the Phase IV Expansion Application based on the issue of mine subsidence was inappropriate.

Settlement & Potential Groundwater Contamination

The second issue of concern for the Department when denying the Phase IV Expansion Application is the settlement of Amity Landfill and potential for groundwater contamination. The DEP alleges that settlement will occur consolidating Amity Landfill's waste mass, resulting in the expulsion of leachate into the groundwater, referred to as a "squeeze". DEP further alleges that since there is no attenuating soil subbase at Amity Landfill, there are no means to treat the leachate.

ERSI argues that Amity Landfill complied with the solid waste regulations during its operating years from 1973 through 1990, specifically complying with the requirement of having an eight foot soil subbase and a 1:1 ratio of soil to waste. Tr. 139, 968-70, 976-77. Scot Haan was an employee at Amity Landfill and testified that the 1:1 ratio was maintained and that an engineer placed grade stakes to mark where and how much soil to place at Amity Landfill. Tr.

138-39, 143-38. Scot Haan also testified that DEP inspectors and engineers routinely checked the disposal area and certified that Amity Landfill met the permit requirements. Tr. 148, 967-68, 970. The Department's only counterargument to this testimony is that Haan did not work at Amity Landfill the first six years of its operation. Cmwlth. Brf., p. 18. ERSI, however, is quick to point out that 90% of Phase IV is to be placed over the area of Amity Landfill where Haan had worked. Cmwlth. Brf, p. 18; ERSI Reply Brf., p. 7.

Richard Bodner, ERSI expert in landfill engineering, landfill design, and landfill construction, reviewed drawings and plans that showed cross sections, soil cut lines, rock depth, existing grade, placement of soils, required thickness of attenuating soils, the allowable thickness of trash and the final grades. Tr. 976-78. Bodner testified that according to drawings and plans of Amity Landfill's design it is a natural permitted attenuation landfill that had the required 1:1 ratio of natural attenuation soil to waste. Tr. 967-76. The Department attempted to show that ERSI's Exhibit 74, which is an engineering map of Amity's sanitary landfill topography, shows no subbase and that waste is directly on top of bedrock. Cmwlth. Brf., p. 19. ERSI countered by stating that Richard Bodner's testimony at Tr. 976-78 explained that Exhibit 74 is part of a multi-sheet set of designs[3] of Amity Landfill and that the particular sheet, Exhibit 74, was chosen to show a cross section of how waste would be compacted and layered, it was not a cross section of the soil subbase. Tr. 976-78; *see also* ERSI Reply Brf., p. 10, n. 7, stating that "Mr. Bodner's testimony is consistent with the regulations at that time, which required a series of plans be submitted . . . and the first plan is the 'compaction of solid waste.' 25 Pa. Code § 75.24(c)(1)(i)." ERSI Reply Brf., Attachment 1 (code section).

[3] Mr. Bodner testified that this drawing, Exhibit 74, was labeled S-1 and this cross section "isn't the whole picture." Tr. 978. There are other sheets in Exhibit 74, "approximately eight or nine cross sections . . . [that] showed very specifically each cut line; the rock depth; the existing grade; where soils had to be placed to get the one-to-one ratio; what the thickness of trash could then be or was permitted to then be atop that attenuating soil; [and] the final grades." Tr. 977-78

Other than the Department's attempt to discredit Exhibit 74, it does not present any testimony or other evidence to properly rebut ERSI's evidence of a soil subbase being present under Amity Landfill, as well as the 1:1 ratio. The Department merely states that it is unclear what is under the Amity Landfill, and did not put on any witnesses of its own to indicate whether or not there is a soil subbase under Amity Landfill. Tr. 1961. ERSI provided expert and fact testimony regarding the natural attenuation soil present at Amity Landfill. For that reason, the Board finds that a natural attenuation soil subbase is under the Amity Landfill in compliance with the regulatory requirement during Amity Landfill's operating years.

The Department also argues that ERSI has inadequately calculated settlement because of the lack of site specific information, particularly with respect to the depth of the waste at Amity Landfill. ERSI experts, John Gardner and Richard Bodner, both testified that settlement is not critical in the design of Phase IV because Amity Landfill has a soil subbase, rather than a liner system. Tr. 406-07, 982-84. A liner does not have the flexibility of a soil subbase which can flex with any settlement of Amity Landfill. Tr. 408, 983.

There are two types of settlement, primary and secondary. Primary settlement is settlement that occurs due to weight and pressure, whereas secondary settlement is settlement that occurs due to time. Tr. 402-03. John Gardner did a settlement analysis in order to calculate any potential squeeze. Starting with primary settlement, Gardner based his analysis on the landfill design, unit weight for C&D waste (based on receipts from ERSI C&D Landfill) and literature value for the primary coefficient, which is an accepted practice for determining the primary coefficient. Tr. 412. Gardner's secondary settlement analysis used 1990 and 2003 topographic maps of the site, and reviewed the 22 landfill gas wells which provide waste thickness at each well. ERSI Ex. 88. The topographic maps provide a look into 13 years of

settlement at Amity Landfill, which Gardner opined is beneficial information you normally do not have when conducting a settlement analysis. Tr. 410, 415-16. He then compared the settlement over 13 years with the waste thickness values from the gas wells Gannett Fleming used in the Phase IV Expansion Application. ERSI Ex. 88, p. 10, Tr. 413-16, 421, 425. Using the maps and gas well data, he chose the thickest value represented since more settlement will occur in areas of thicker waste, which in turn has a greater potential for squeeze. Tr. 430-34. He chose the thickest value in order to have a conservative calculation of settlement. ERSI Ex. 88, p. 10; Tr. 430-34.

The Department's expert, Dr. Thomas Pease, did not do his own settlement analysis, but opined that the information used by ERSI in its Phase IV Expansion Application would not answer the question of whether settlement would occur under Phase IV. DEP Brf., p. 26. Dr. Pease testified about settlement and potential for squeeze. He claims in his expert report that Gannet Fleming used inappropriate values when calculating settlement and potential squeeze; however, at the hearing he testified that the values were in the middle of his expected range of capacity. Tr. 1808-11. He also did not like Gannet Fleming's use of literature values, but testified that Amity Landfill is reacting consistently with those literature values. Tr. 1807-08. Dr. Pease did not provide his own settlement and squeeze analysis in his expert report, rather all he provided was a statement on cross that he did a "back of the envelope" calculation for settlement. Tr. 1800-02. The Board would have liked to have seen these calculations to better understand Dr. Pease's testimony and expert opinion on settlement.

Dr. Pease also disputes Gannet Fleming's squeeze estimates, but did not provide any of his own estimates in his report. *Id.* In addition, Dr. Pease never reviewed Gardner's expert report with respect to settlement and squeeze. Tr. 1799-1800. ERSI experts testified that a

settlement calculation did not need to be performed because the soil liner under Amity Landfill is able to accommodate settlement. However, John Gardener did do a primary and secondary settlement analysis using the thickest values of waste (a worst case scenario) and determined that the Phase IV landfill design can accommodate the predicted settlement. *See* ERSI, Ex. 88, p 12-13; Tr. 983-88.

ERSI's Dr. Earl has been involved in many landfill excavations from the ground surface to the bottom of the waste mass. He noted that some of these landfills were older than Amity Landfill. Tr. 621-27. He explained that moisture within the landfill will only leach out if the landfill mass is saturated or at field capacity.[4] Tr. 634. If a waste mass is at field capacity and is under any additional pressure the moisture will disperse in various directions. Tr. 636. He testified that municipal solid waste, like that at Amity Landfill, is typically dry and has a higher water holding capacity because of the amount of paper products found within the mass. Tr. 621-26. Richard Bodner who also has taken part in exhumations of municipal solid waste masses, opined that his observations of municipal solid waste landfills indicate that usually the waste mass is not saturated, instead is quite dry. Tr. 994.

Dr. Earl determined that the leachate now found at Amity Landfill is mostly contained in paper and other absorbent materials. ERSI Ex. 85, p. 5-7. He suggests that placing Phase IV on top of Amity Landfill over a period of time will not cause a squeeze because Amity Landfill is not completely saturated, rather it will result in more compacting of the damp waste mass. *Id.* Bodner agrees that a substantial leachate squeeze will not occur from Amity Landfill when Phase IV is placed on top of Amity Landfill. Tr. 994. This is much like Phases I-III that were placed on top of Amity Landfill without any squeeze of the waste mass causing an adverse effect on

[4] Field capacity is complete saturation, when one drop more will cause one drop to discharge. Tr. 632-33.

groundwater. Tr. 2025-26.

The Department presented insufficient evidence on settlement and squeeze. Again, Dr. Pease's testimony would have been given more weight had he shown us his calculations of settlement and squeeze rather than just making bald assertions that ERSI's calculations were inadequate. As stated above, he did a back of the envelope calculation, but never provided it in his expert report.

With respect to groundwater contamination, ERSI's expert John Gardner preformed a Hydrologic Evaluation of Landfill Performance model (HELP) which is commonly used in the solid waste industry to simulate water movement into and within landfills. Tr. 361-63, ERSI Ex. 89. Gardner used the HELP model to look at the 50 acre portion of Amity Landfill that Phase IV would overlap. He sought to determine leachate being produced at Amity Landfill currently and leachate production once the Phase IV expansion was permitted. The model indicated that Amity Landfill is currently producing millions of gallons of leachate per year, without adverse impacts to groundwater suggesting that the soil subbase under Amity Landfill is doing its job. Tr. 1005, 2018. Gardner's HELP model indicates that placing the attenuating soil base over the portion of Amity Landfill not now covered with such a base will cause the leachate production to decrease by 83%. Tr. 388, 430. This is due to improvement in runoff from the surface and less infiltration into Amity's waste mass. Tr. 388, 480. The open and active Phase IV landfill area while loading of C&D waste will result in a 37% reduction of leachate production and as waste thickness increases leachate production will decrease slightly. ERSI Ex. 89, p. 10. Once the proposed geosynthetic cap is placed on top of the Phase IV landfill the leachate production will eventually go to zero. Tr. 393. Dr. Pease, DEP's expert, did not review Garnder's HELP model, nor did DEP have any evidence to rebut the HELP model.

The Department was also concerned with the ability to differentiate leachate, alleging that the Phase IV Expansion Application never provided for a means to differentiate leachate from municipal solid waste and C&D waste. ERSI Ex. 4, p. 14-15. Dr. Earl opined that leachate from municipal solid waste and C&D waste contain different components, specifically VOCs. Tr. 604-12; ERSI Ex. 85, p. 9-10. VOCs are found in municipal solid waste and not C&D waste leachate. *Id.* Even the Department's Alex Zdzinski testified that municipal solid waste contained VOCs, whereas C&D does not. Tr. 997-98. The Board does not see any reason why differentiating leachate should be a problem with Phase IV. In fact, William Tomayko testified that if there is a leachate problem at Amity Landfill a possible remedial action would be to cap the site. Tr. 2018. ERSI, as explained above, has proposed to place a cap over Phase IV which would cover a significant portion of the Amity Landfill.

Overall, ERSI's credible evidence that there would be no problems of settlement, potential squeeze and groundwater contamination was essentially unchallenged by DEP. ERSI has sufficiently established above that DEP's concerns did not support denial of the Phase IV Expansion Application. At the hearing there was no analysis done by any of the DEP experts, nor any testimony provided to contradict ERSI's settlement and squeeze analysis. In fact, DEP's witness remarked that in all the years he worked for DEP there was never a requirement for a squeeze analysis in a landfill over landfill design. Tr. 1938-39, 1941. The monitoring system around ERSI and Amity Landfills shows no adverse impact on groundwater even with a 12 acre portion of Phase I-III over top of the Amity Landfill, as confirmed by the Department. Tr. 2025-2026. DEP claims that the lack of evidence of contamination may be attributable to inadequate groundwater monitoring, however, the Department never substantiates that allegation. Cmwlth Brf., p. 15-16. ERSI presented sufficient evidence at the hearing to meet its burden of proof in

establishing that the Department's denial of Phase IV on the issues of settlement, squeeze and potential groundwater contamination was unsupported.

Based on the forgoing the Board finds that ERSI has sustained its burden of showing that DEP erred when it denied the Phase IV Expansion Application because of concerns of mine subsidence, settlement and groundwater contamination. If these were valid DEP concerns, evidence to support its position and rebut ERSI's evidence would have been provided at the hearing. The DEP continually remarked that ERSI did not provide sufficient evidence to support its Phase IV Expansion Application. In reality DEP, itself, did not provide evidence to adequately rebut the case presented. The Board's *de novo* review finds that ERSI has sufficient credible evidence to meet its burden of proof. The Department did not substantiate any of its reasons for denying the Phase IV Expansion Application and furthermore lacked the evidence necessary to rebut ERSI's burden of proof.

The Board remands this matter to the Department for reconsideration and full review of the application. ERSI requests, and the Board agrees, that the Board shall retain jurisdiction over the matter to ensure a timely review of the application. ERSI Brf., p. 66-67. Since the Phase IV Expansion Application has only undergone a preliminarily review by the DEP, the Board determines, consistent with its decision in *Dauphin Meadows, Inc. v. DEP*, that the Board should retain jurisdiction until a full review has occurred on the Phase IV Expansion Application. 2001 EHB 116. In *Dauphin Meadows*, the Board provided that "[a] retention of jurisdiction suggests that the reviewing body intends to postpone making a decision that will fully and finally end the entire matter until further work is performed and the matter is returned for additional review that will be dependent upon that additional work." 2001 EHB at 118. Accordingly, the Board shall retain jurisdiction of this matter until a timely and full review of the Phase IV Expansion

Application has occurred, which is consistent with the Board's findings herein.

CONCLUSIONS OF LAW

1. ERSI has carried its burden of proof in this matter to show that the Department erred in denying the Phase IV Expansion Application with respect to the maximum potential for mine subsidence.

2. ERSI has carried its burden in this matter to show that the Department erred when in denying the Phase IV Expansion Application with respect to settlement and groundwater contamination.

3. That Department erred with respect to mine subsidence in its finding that Phase IV will impact the integrity of the landfill design.

4. A natural attenuation soil subbase is under Amity Landfill and met the regulatory requirements during Amity Landfill's operating years.

Therefore, in consideration of the above findings we issue the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ENVIRONMENTAL & RECYCLING SERVICES, INC.	:	
v.	:	**EHB Docket No. 2006-061-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 9th day of October 2007, the Board rules in favor of the Appellant, Environmental & Recycling Services, Inc., and this matter is remanded to the Department for reconsideration consistent with the Board's findings stated herein. The Board shall retain jurisdiction of this matter to ensure a timely review of the application.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

Judge Bernard A. Labuskes, Jr. did not participate in this Adjudication.

DATED: **October 9, 2007**

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ANGELA CRES TRUST OF JUNE 25, 1998	:	
	:	
v.	:	**EHB Docket No. 2006-086-R**
	:	**(Consolidated with 2006-006-R)**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MILLCREEK TOWNSHIP, Permittee	:	**Issued: October 11, 2007**

OPINION AND ORDER ON MOTION IN LIMINE AND MOTION TO AMEND

By Thomas W. Renwand, Acting Chairman and Chief Judge

Synopsis:

The permittee's motion to limit issues is denied. The Board finds that the matters sought to be excluded were sufficiently raised in the notices of appeal filed in this matter and are not barred by administrative finality.

OPINION

Background

This matter involves consolidated appeals by Angela Cres Trust of June 25, 1998 (Cres Trust) from extensions of a water obstruction and encroachment permit granted by the Department of Environmental Protection (Department) to Millcreek Township, Erie County (Millcreek Township). The permit relates to what is known as the Heidler Road Drainage

Improvement Project, which Millcreek Township describes as the realignment of a stream channel and replacement of two culverts. Cres Trust describes the work as a storm drainage project. The trial in this case is scheduled to begin October 23, 2007.

The matter presently before the Board is a motion in limine filed by Millcreek Township and joined in by the Department. In addition to Cres Trust filing a response to the motion, the parties were also granted leave to file a reply and sur-reply. It is Millcreek Township's contention that certain statements of legal issues set forth in Cres Trust's prehearing memorandum were not raised in the notices of appeal and, therefore, all evidence relating thereto should be excluded from the trial. Millcreek Township also asserts that some of the issues relate to the original permit issuance, which it contends is outside the scope of this appeal. In response, Cres Trust argues that the issues are encompassed in the notices of appeal but, to the extent that the Board may find certain issues not raised, Cres Trust seeks to amend its notices of appeal. Cres Trust also disputes Millcreek Township's argument that it is attempting to challenge the original permit as opposed to the permit extensions.

Motion in Limine

In *Dauphin Meadows, Inc. v. DEP*, 2002 EHB 235, 237, Judge Labuskes explained the purpose of a motion in limine as follows:

> A motion in limine is a procedure for obtaining a ruling on the admissibility of evidence before it is offered at the hearing. *Delpopolo v. Nemetz*, 710 A.2d 92, 94 (Pa. Super. 1998). . . .Thus, a motion in limine generally should only be used to challenge whether certain evidence relative to a given point is admissible, not whether the point itself is a valid one. Of course, this principle can be easier to state than to apply. One clue to determining whether a motion is properly limited is whether it cites to specific pieces of evidence and asks that they be excluded.

Millcreek Township moves that evidence relating to the following issues be excluded as

being outside the scope of the appeal:

1) whether the issuance of the permit violates "common law rights of property owners to be free of stormwater being placed on their property;"
2) whether the project violates the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended,* 35 P.S. §§ 691.1-691.1001, because it "will cause and allow the discharge of pollutants into the waters of the Commonwealth;"
3) whether the Department could lawfully extend the permit because the project "violates Millcreek's Stormwater Management Ordinance and/or the Pennsylvania Clean Streams [Law];" and
4) whether the project "violates Millcreek's Stormwater Management Ordinance, Section 405, in that it is not designed to handle a 25-year storm event."

(Motion, p. 5) (citing Cres Trust Pre Hearing Memorandum)

Millcreek Township argues that the above-stated issues were not set forth in the notices of appeal and/or relate to the original permit rather than the permit extensions that are the subject of this appeal.

In response, Cres Trust asserts that all of the issues fall within the scope of the issues raised in the notices of appeal and all of the parties have been aware of these issues for over a year. It is the Trust's contention that the notices of appeal, which discussed the alleged insufficiency of the Department's permit review and approval, put Millcreek Township and the Department on notice of the aforesaid issues. Cres Trust points out that the issue of the Millcreek Township stormwater ordinance is addressed in Millcreek Township's own prehearing memorandum and the report of its expert. Cres Trust also asserts that some of the issues did not come fully to light until discovery. Finally, Cres Trust argues that Millcreek Township is

seeking not to exclude evidence but, rather, the legal theories being advanced by the Trust.

As to Millcreek Township's argument that some of the issues relate to the original permit issuance which is outside the scope of the appeal, Cres Trust cites the Board's decisions in *Wheatland Tube Co. v. DEP*, 2004 EHB 131, and *Tinicum Township v. DEP*, 2002 EHB 822, as holding that the doctrine of administrative finality does not shield a permit from review for all of time whenever changes to the permit are made. Cres Trust asserts that because the permit extension in this case required a re-evaluation by the Department and a change in the subject of the original project, it opens the door to certain aspects of the original project being evaluated.

Administrative Finality

In an earlier opinion in this matter denying a motion for summary judgment filed by Cres Trust, the Board addressed the question of administrative finality as follows:

> While the limited facts laid out before us lead us to believe that the appeals are not barred by administrative finality, particularly if the permit was opened for public comment in 2006, we are reluctant to make a final ruling on this issue based on the very limited record before us. We will allow this matter to proceed to trial where the parties may introduce evidence in support of their respective positions.

Angela Cres Trust of June 25, 1998 v. DEP, EHB Docket No. 2006-086-R (Consolidated) (Opinion and Order on Motion for Summary Judgment issued February 8, 2007), *slip op.* at 3.

It is Millcreek Township's contention that any issues relating to the underlying permit are beyond the scope of the Cres Trust's appeals. Though Millcreek Township does not use the term administrative finality in its motion, we believe its argument raises issues of administrative finality as to whether the original permit can be attacked in these appeals of the permit's extensions.

In *Solebury Township v. DEP*, 2004 EHB 95, Judge Miller, writing for the Board,

explained the concept of administrative finality as follows:

> The purpose of administrative finality is to give administrative actions some level of uncontestability which is critical to the "orderly operations of administrative law." Therefore, "one who fails to exhaust his statutory remedies may not thereafter raise an issue which could have and should have been raised in the proceeding afforded by his statutory remedy." For example, an appeal from the modification of a permit may not include objections that could have been raised in an appeal of the original permit. In the case of permit renewals or reissuances, we have noted that an appellant may challenge only those issues which have arisen between the time the permit was first issued and the time it was reissued or renewed. [citations omitted]

Id. at 112-13. That case dealt with the renewal of an NPDES permit held by a quarry. The permittee had argued that the appeal of the permit renewal was barred by administrative finality because the discharge rate had not changed, nor had the quarry's operation changed. In dismissing the permittee's argument, the Board noted that those conditions of the permit were not the only changes that could support a challenge to the propriety of continuing the permit for another set of years. In that case, the appellant had alleged that hydrogeological conditions had changed that could affect the continuation of the permit.

The Board reached a similar conclusion in *Tinicum Township*, 2002 EHB 822, which held:

> An application for a renewal does not compel the Department to reexamine whether the original permit should have been issued in the first place. It does, however, require the Department to ensure that a *continuation* of the permitted activity is appropriate based upon up-to-date information. Similarly, our review focuses upon the *continuation*, not the historical initiation, of the activity in question. 'The doctrine of administrative finality has no application where the issues raised in a different proceeding in which new facts are relevant to the propriety of the Department's action.'

Id. at 835-36 (emphasis in original) (quoting *Riddle v. DEP*, 2002 EHB 321, 327).

As noted in *Wheatland Tube, supra* at 133-34, permits issued by the Department may need to be renewed, modified or updated over time, and "[w]hen those changes, renewals or updates are made, the question often arises as to what can and cannot be challenged in an appeal from the change, renewal or update." The Board explained:

> The appellant is limited to challenging whether the current change is appropriate. That challenge will turn on the factors relevant to the current change, which may or may not resemble factors that were considered when the original action was taken.

Id. at 134.

In the present case, Cres Trust has alleged that certain essential information required for the original permit review was not provided until the time of the 2005 permit extension. It also argues that changes to the project and site conditions subsequent to the permit's original issuance required the Department to re-evaluate or consider new evidence relevant to the permit at the time of its extension. It is Cres Trust's position that the subject of the project has changed dramatically since the original issuance of the permit. For these reasons, Cres Trust argues that it should be permitted to present issues relating to the validity of the permit.

In these consolidated appeals, the issue is whether the Department should have extended the permit. As stated in *Tinicum Township*, this naturally includes an examination of whether the continuation or extension of the permitted activity is appropriate based upon up-to-date information.

Issues Set Forth in Notice of Appeal

Millcreek Township also seeks to exclude evidence relating to issues they assert were not set forth in the notices of appeal. After a review of the notices of appeal, we believe that the issues which Millcreek seeks to exclude were sufficiently raised. One of the arguments that Millcreek Township makes is that certain statutory provisions were not cited in the notices of

appeal. However, we find that the issues were generally raised. *See Croner, Inc. v. Department of Environmental Resources*, 589 A.2d 1183, 1187 (Pa. Cmwlth. 1991) (Objection raised in general terms is sufficient.) As former Chief Judge Krancer stated in *Ainjar Trust v. DEP*, 2001 EHB 59, 66, *aff'd*, 806 A.2d 402 (Pa. Cmwlth. 2002):

> While it may be true that the Notice of Appeal does not contain the recitation of the issue in exactly the same words as set forth in the Motion for Summary Judgment, we think that this genre of issue was fairly raised in the Notice. The Board has jurisdiction over issues not specifically recited in a notice of appeal if the issue falls within the scope of a broadly-worded objection found in the notice of appeal. *See Croner, Inc. v. DER*, 598 A.2d 1183, 1187 (Pa. Cmwlth. 1991); *Thomas v. DEP*, 1998EHB 93, 106 ("We must broadly construe objections raised in notices of appeal."); *Weiss v. DER*, 1996 EHB 1565, 1570 ("[T]he Commonwealth Court . . . held [in *Croner*] that a broadly[-]worded objection in a notice of appeal is sufficient to preserve a more specific basis of objection."); *Bradford Coal Company v. DEP*, 1996 EHB 888, 891 ("In determining whether a party has raised an issue in its notice of appeal, we must broadly construe the party's grounds for appeal.")

However, to the extent that any of the issues are seen as not being encompassed by the notices of appeal, we grant Cres Trust's motion to amend its appeal to include those issues pursuant to 25 Pa. Code § 1021.53(b). Board Rule 1021.53(b) was revised in 2006 to allow a more liberal standard for amendment of appeals where the Board finds no undue prejudice to the opposing party. *Groce v. DEP and Wellington Development*, 2006 EHB 289, 291-92. We find that the inclusion of the legal theories set forth in Cres Trust's prehearing memorandum can clearly be inferred from the notices of appeal and will provide no undue surprise to Millcreek Township or the Department.

However, to the extent that Millcreek Township or the Department determines that additional discovery is necessary, the Board will entertain a motion to reopen discovery if sufficient cause is shown.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ANGELA CRES TRUST OF JUNE 25, 1998	:	
v.	:	**EHB Docket No. 2006-086-R**
	:	**(Consolidated with 2006-006-R)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and MILLCREEK	:	
TOWNSHIP, Permittee	:	

ORDER

AND NOW, this 11th day of October 2007, Millcreek Township's Motion in Limine is *denied* and Angela Cres Trust's motion to amend is *granted.*

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

DATE: October 11, 2007

c: **DEP Bureau of Litigation:**
Attention: Brenda K. Morris, Library

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EHB Docket No. 2006-086-R (Consolidated)

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CONSTANTINE N. POLITES	:	
	:	
v.	:	**EHB Docket No. 2007-196-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 11, 2007**

OPINION AND ORDER ON MOTION TO DISMISS

By George J. Miller, Judge

Synopsis

The Board dismisses an appeal filed by an individual who objects to a letter written by the Department which describes the Department's regulatory treatment of back flow devices in the drinking water regulations. The letter merely describes the Department's regulation on this topic, but does not require the appellant to do anything, nor does it impose any obligation upon the appellant. Accordingly, the Board finds that the letter does not create an appealable action.

OPINION

Before the Board is a motion to dismiss filed by the Department of Environmental Protection, which seeks to dismiss the appeal of Mr. Constantine Polites (Appellant), who objects to a letter written by the Department to the Appellant concerning backflow devices required by customers of public water supplies. As we explain more fully below, we will grant

the Department's motion and dismiss the appeal because the Department's letter does not constitute an appealable action of the Department.

The Appellant has admitted most of the facts salient to the resolution of the Department's motion. The Appellant filed a timely appeal from a letter dated July 10, 2007, from Dana Aunkst, a director in the Department's Water Standards and Facility Regulation section. Mr. Aunkst's letter responds to a June 18, 2007 letter from the Appellant in which he requested the Department to exempt all commercial firms from annual testing of backflow values if their use is similar to residential users; and to allow commercial users whose usage requires testing the option of testing the valve themselves without any special training or credentials.[1] The Department's letter explains that backflow devices are addressed at 25 Pa. Code § 109.709 and directs the Appellant to a guidance manual for direction concerning the implementation of the Department's cross-connection control program, including the annual testing of backflow prevention devices. The letter closes by informing the Appellant that the Department is in the process of updating and revising its drinking water regulations and that "as a result of your letter, the Department program staff has already begun a review of the regulation and guidance manual at issue."[2]

The Appellant, in his notice of appeal, lodges three grounds of objection to the Department's letter: 1) the Department's policy is restrictive and unreasonable and improperly requires a threat to public health before changing its testing procedures; 2) the Department's testing requirements are unnecessarily restrictive, and providing an alternate means of self-testing would provide savings to the consumer and pose no public health threat; and 3)

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[1] See Appellant's Notice of Appeal, Ex. 1.
[2] Department Motion, Ex. A; Notice of Appeal Ex. 2.

commercial firms whose usage is similar to residential users should be treated as residential users and should be exempt from mandatory testing of backflow valves. The Appellant's response to the Department's motion to dismiss appears to take the position that the Department erred by not expressing an "unconditional willingness to consider amendments to its regulations and allow Appellant's request."[3] His memorandum of law disagrees with the Department's characterization of its letter and states that the Department's motion should be denied, but offers no legal argument in opposition to the Department's motion.[4]

The Board will only grant a motion to dismiss where the right to judgment is clear and free of doubt.[5] Neither the Appellant's notice of appeal nor his response to the motion for summary judgment suggest any specific impact or effect generated by the Department's letter upon the Appellant. Therefore it does not constitute a final action of the Department over which we have jurisdiction

This Board only has the power to consider final actions of the Department which have an adverse effect upon personal or property rights, privileges, immunities, duties, liabilities or obligations of a person.[6] The letter which forms the basis of the Appellant's appeal does not constitute an action by the Department which triggers our jurisdiction. There is no allegation in the Appellant's letter, his notice of appeal or his response to the motion to dismiss which states

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[3] Appellant's Response, ¶ 4.

[4] The Appellant has opted to proceed with his appeal *pro se*. We have repeatedly held that appellants who choose to pursue appeals without representation do so at their own risk. *See Kleissler v. DEP*, 2002 EHB 737; *Goetz v. DEP*, 2002 EHB 976; and *Van Tassel v. DEP,* 2002 EHB 625. *See also, Barber v. Tax Review Board*, 850 A.2d 866, 868 (Pa. Cmwlth. 2004)(a layperson who represents himself in legal matters assumes the risk that his lack of expertise in legal training will prove his undoing.)

[5] *Kennedy v. DEP*, EHB Docket No. 2007-177-L (Opinion issued September 12, 2007).

[6] The Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. § 7514(a); 25 Pa. Code § 1021.2; *Kennedy*, slip op. at 2.

that the Department has applied the backflow requirements to the Appellant or a business owned by the Appellant in an order, permit or other determination. There is no allegation that the Department has taken an enforcement action against the Appellant or issued any notice of violation or order against the Appellant. There is no language in the Department's letter which directs the Appellant to take any action or imposes any obligation upon the Appellant to take a particular action. Rather, the letter simply explains the Department's regulatory program and offers to consider the Appellant's suggestions when it undertakes a review of its regulation and guidance procedures. The Board has long held that a letter from the Department which merely describes the Department's regulatory program or informs the recipient of the agency's interpretation of the law, but imposes no obligations nor requires any action of the recipient does not constitute an appealable action which invokes our jurisdiction.[7] It may well be that the Department's regulatory scheme should be updated or changed in the manner suggested by the Appellant. But that role falls squarely within the legislative and policy-making role of the Department and the Environmental Quality Board. It is not within the purview of the judicial role of the Board as defined by the Environmental Hearing Board Act.

It may well be that under the Department's regulatory program the Appellant is effectively required by his drinking water supplier to comply with the Department's guidance at some expense to him.[8] Under the Department's regulation at 25 Pa. Code Section 109.709, adopted in 1984, the Appellant's water supplier was required to submit a program for the

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[7] *Borough of Kutztown v. DEP*, 2001 EHB 1115; *Beaver v. DEP*, 2002 EHB 666 (drawing the distinction between "prescriptive" communications and "descriptive" communications).

[8] The Appellant provides no factual statements in either his notice of appeal or his response to the Department's motion which state the manner in which he came to be aware of any back flow valve requirement which may have prompted his letter to the Department.

Department's approval for the elimination of contamination from cross-connections that would provide, among other things, for the discontinuance of water service for failure to comply with the water supplier's requirements. As observed by the Department's letter to the Appellant: "When establishing testing requirements with their customers, most public water suppliers use this guidance manual." However, we have no information as to when the Appellant learned of the Department's approval of the water supplier's program or of the water supplier's application of its program to Appellant based on the Department's guidance. In any event, if the Appellant learned of the application of the water supplier's requirements to him based on the Department's guidance more than 30 days before the filing of the appeal, we would be without jurisdiction over such an untimely appeal.

In short, we have no authority to offer any relief to the Appellant. Unless the Department moves to enforce the regulation against the Appellant, or the regulation is applied to the Appellant in the form of a permitting action, we can not provide the relief the Appellant appears to be seeking. Accordingly, we are constrained to dismiss his appeal.

We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONSTANTINE N. POLITES	:	
	:	
v.	:	**EHB Docket No. 2007-196-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 11th day of October, 2007, the motion to dismiss by the Department of Environmental Protection in the above-captioned matter is hereby **GRANTED**. The appeal of Constantine N. Polites is **DISMISSED**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: October 11, 2007

c: **DEP Bureau of Litigation:**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

EMERALD MINE RESOURCES, LP	:	
	:	
v.	:	
	:	**EHB Docket No. 2006-165-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SAMUEL R. BARCLAY, Recipient	:	**Issued: October 22, 2007**

OPINION AND ORDER ON MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Department's motion to dismiss an appeal as untimely is denied because it is unclear when the Department took what the parties have characterized as an appealable action, and it is not clear when the appellant received unequivocal notice of that action.

OPINION

On November 3, 2003, the Department of Environmental Protection (the "Department") registered a gas well to Samuel Barclay. The gas well passes through the Pittsburgh coal seam, which Emerald Mine Resources, L.P. ("Emerald") owns or leases. Approximately two and a half years later, on July 3, 2006, Emerald filed this appeal contesting the registration. The Department filed a motion to dismiss Emerald's appeal as untimely.

Emerald does not deny that it had actual notice of the registration of the Barclay Well a long time ago. Emerald's position, however, is that the notice of well registration that it received was not sufficient to trigger the appeal period because Emerald did not have notice that the well was registered *as an active well.* The appeal period in Emerald's view only began to run when it received actual notice that the well was not only registered, it was registered as active by the Department.

For purposes of the motion, the Department concedes that Emerald was entitled to notice that the well was registered as active. This concession ultimately proves to be fatal to the Department's motion. As proof of actual notice of the well's active status, the Department primarily relies upon a hand-written note delivered in the context of Emerald's application for a pillar permit that reads as follows:

> The Department's information indicates that [the Barclay Well] is active. Please call Mr. Trout at [his phone number] to verify if needed.

This language is too imprecise and informal to satisfy the Board's "general insistence on precision in the context of providing notice of Department final actions." *Barra v. DEP,* 2004 EHB 276, 284. The Department also argues that Emerald was aware for years that the Barclay Well was in fact active, but that is beside the point of when the Department made the *designation,* and when Emerald received actual notice of that designation. The Department has not pointed to anything else in the record showing that Emerald received clear notice of the Department's so-called designation of active status outside of the appeal period.

Motions to dismiss will only be granted when a matter is free from doubt. *Concerned Citizens of Ligonier v. DEP,* EHB Docket No. 2005-314-L (February 13, 2007). The Department's concessions and our uncertainty as to when Emerald received notice prevent us from granting the

Department's motion. As this appeal moves forward, however, the parties need to be aware that we are far from confident that the Board's jurisdiction has properly attached in this matter. The Department's motion and Emerald's response raise more questions than they answer. For example, is registration of a grandfathered well, which appears to be somewhat of a ministerial action, an appealable action? Does registration require designation as active or inactive? To use Emerald's phrase, does the Department make a "formal determination" of active status? If so, is that action separate and distinct from the registration itself? If it is separate, when did it occur in this case?

Why do the parties believe (or concede) that Emerald was entitled to receive "notice of the factual background relative to a Department's action" before Emerald was required to appeal? *See Veolia ES Greentree Landfill v DEP*, EHB Docket No. 2006-073-R, slip op. at 7 (February 27, 2007) (appellant's failure to read Department's letter embodying final action would not provide a basis for filing appeal outside of 30-day period); *Township of Robinson v. DEP*, EHB Docket No. 2006-250-K, slip op. at 6 (February 12, 2007) (appeal period not tolled because appellant did not have an opportunity to research basis for final action). If the "formal determination" of active status is separate from the registration, is it also separate from the review of the pillar permit? *See United Refining Company v. DEP*, 2000 EHB 132, 133; *Phoenix Resources v. DER*, 1991 EHB 1681, 1684. We also cannot help but notice from our review of the motion papers that the Barclay Well has now been plugged. Why is this appeal not moot? *See Brumage v. DEP*, 2002 EHB 496. What practical relief beyond the rendering of an advisory opinion can the Board order in this case?

In light of the foregoing, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EMERALD MINE RESOURCES, LP	:	
	:	
v.	:	
	:	**EHB Docket No. 2006-165-L**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and SAMUEL R. BARCLAY,	:	
Recipient	:	

ORDER

AND NOW, this 22nd day of October, 2007, the Department's motion to dismiss is denied.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: October 22, 2007

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ANGELA CRES TRUST OF JUNE 25, 1998	:	
	:	
v.	:	**EHB Docket No. 2006-086-R**
	:	**(Consolidated with 2006-006-R)**
COMMONWEALTH OF PENNSYLVANIA: DEPARTMENT OF ENVIRONMENTAL PROTECTION and MILLCREEK TOWNSHIP, Permittee	:	**Issued: October 23, 2007**

OPINION AND ORDER ON
APPELLANT'S MOTION TO EXCUSE
ESTHER POMEROY FROM TESTIFYING LIVE

By Thomas W. Renwand, Acting Chairman and Chief Judge

Synopsis:

The Pennsylvania Environmental Hearing Board grants in part and denies in part Appellant's Motion to excuse an elderly witness and admit her deposition transcript into evidence at the hearing. The age of the witness, 89, together with a letter from her medical doctor indicating that testifying in the case could detrimentally affect her health is sufficient reason for the Board to exercise its discretion and excuse her from testifying. However, the Board denies the Motion to admit her deposition transcript into evidence at the hearing because it cannot determine the probative value of her testimony and thus its relevance under Pennsylvania Rule of Evidence 401 based on the frequent unsolicited

comments from the son of the witness during her deposition.

DISCUSSION

This matter involves consolidated appeals by the Angela Cres Trust of June 25, 1998 ("Cres Trust") from extensions of a water obstruction and encroachment permit granted by the Pennsylvania Department of Environmental Protection ("Department") to Millcreek Township, Erie County, Pennsylvania ("Millcreek Township"). The Cres Trust contends that because of significant changes to the Heidler Road Drainage Improvement Project since the issuance of the original permit, the Department should have required Millcreek Township to apply for, and secure, a new permit.

The hearing in this case began on October 23, 2007. At the request of the parties, the Pennsylvania Environmental Hearing Board agreed to conduct two of the seven days of scheduled hearings in Erie, with the remaining days being in Pittsburgh.

Presently before the Board is the Cres Trust's Motion to Excuse Esther Pomeroy from Testifying Live ("Motion") which was filed on October 17, 2007. The following day, October 18, 2007, Millcreek Township filed its Response in Opposition to the Motion. Interestingly, the Cres Trust contends that the Department does not oppose a stipulation allowing the parties to present Mrs. Pomeroy's testimony at the hearing by submitting her deposition into evidence (Motion, Paragraph 8) while Millcreek Township contends that the Department agrees with it that "her testimony should be obtained [live] during those days on which testimony will be received in Erie." (Response, Paragraph 6)

Appellant states that Mrs. Pomeroy was deposed on September 1, 2006 and

attached a complete copy of her deposition transcript as Exhibit A to its Motion. Mrs. Pomeroy was deposed at her home and trial counsel for all parties attended the deposition. Mrs. Pomeroy is 89 years old and has lived in the area in question her entire life. Mrs. Pomeroy testified that the only flooding the area ever experienced was during a big storm in 1996.

Attached as an Exhibit to the Motion is a letter dated October 17, 2007 from Warren J. Beaver, M.D. to Appellant's co-counsel James D. McDonald. It reads in its entirety as follows:

> Dear Attorney McDonald:
>
> Mrs. Pomeroy is 89 years old and currently under my care. In my professional opinion, it is not advisable for her to be required to testify at trial. The stress associated with making her testify could, in fact, be detrimental to her health.
>
> Sincerely,
>
> Warren J. Beaver, M.D.

Appellant points out that all counsel were present at the deposition and had the opportunity to cross-examine the witness. Appellant further argues that "in view of the limited scope of Mrs. Pomeroy's testimony, her 89 years and ill health," she should be excused from testifying in-person at the hearing in Erie and her deposition transcript should be instead entered into evidence.

Millcreek Township cries foul. It points out that its counsel was never advised at any time prior to the conclusion of Mrs. Pomeroy's deposition that it would be used for trial purposes. More importantly, Millcreek Township contends that Mrs. Pomeroy's

son, Mr. Lee Pomeroy, who evidently was seated next to his mother during her deposition, made numerous unsolicited comments during the deposition. In addition, Millcreek Township argues that Attorney Hinerman, although not wearing a cap and whistle, nevertheless attempted to coach Mrs. Pomeroy during her deposition. Permittee further points out that Dr. Beaver never specifically states that Mrs. Pomeroy is in ill health but "speaks only to her age." (Response, Paragraph 8) In conclusion, Millcreek Township asks us to require Mrs. Pomeroy to testify live at the hearing in Erie or otherwise not allow her deposition transcript to be introduced into evidence because of the "inappropriate involvement and influence by her son and efforts by the [Cres] Trust's counsel to limit and influence her responses, all of which bear on the credibility of the witness and the probative value of her testimony which the Board must determine." (Response, Paragraph 9)

We begin our discussion of this issue by reviewing Rule 4020 of the Pennsylvania Rules of Civil Procedure. Specifically, Rule 4020(a)(3)(c) states:

> (a) At the trial, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had notice thereof if required, in accordance with any of the following provisions:
>
> (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds
>
> (c) that the witness is unable to attend or testify because of age, sickness, infirmity or imprisonment, ...

A simple reading of the Rule would seem to lead us to the conclusion that we

should grant Appellant's Motion. All parties were present and the witness was cross-examined by Millcreek Township's trial counsel. Although Dr. Weaver may not specifically say she is ill he does note her age and that she is "currently under my care." Most importantly, he is concerned that the stress of testifying "could, in fact, be detrimental to her health." This statement is sufficient to draw a strong inference that her health could be affected. The Rule is also quite clear that age alone can justify the admission of her deposition.

Unfortunately, hearings by their very nature can be stressful. No matter what efforts we employ to make the process as stress free and friendly as possible, undergoing cross-examination under oath is certainly not comparable to a day at Presque Isle. Therefore, Dr. Weaver's letter is certainly sufficient to afford us reason to excuse Mrs. Pomeroy from testifying. We will gladly excuse Mrs. Pomeroy from testifying with our best wishes for continued long life.

Turning to the second part of Appellant's Motion we have reviewed the complete deposition transcript several times. We empathize with counsel for all parties in these situations. We see no indication that any counsel did anything wrong. Nevertheless, Mrs. Pomeroy's son did take an active role in the deposition. Although we certainly view this as a son trying to help his mother, such action compromises the depositive process. We can not determine even after several readings of the deposition what probative value to give to Mrs. Pomeroy's testimony because we can not determine her credibility. Consequently, we can not say that her testimony constitutes relevant evidence pursuant to Rule 401 of the Pennsylvania Rules of Evidence. Therefore, for these reasons alone we

will exercise our discretion and in the interests of justice excuse Mrs. Pomeroy from testifying live before the Board yet at the same time deny the motion to admit her deposition transcript into evidence.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ANGELA CRES TRUST OF JUNE 25, 1998	:	
	:	
v.	:	**EHB Docket No. 2006-086-R**
	:	**(Consolidated with 2006-066-R)**
COMMONWEALTH OF PENNSYLVANIA:		
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and MILLCREEK	:	
TOWNSHIP, Permittee	:	

ORDER

AND NOW, this 23rd day of October, 2007, it is ordered as follows:

1) Appellant's Motion to Excuse Esther Pomeroy From Testifying Live is ***granted in part*** and ***denied in part.***
2) Mrs. Pomeroy is excused from testifying at the hearing in this appeal.
3) Mrs. Pomeroy's deposition transcript will ***not be admitted into evidence*** because we can not determine that it has probative value and is thus not relevant evidence pursuant to Rule 401 of the Pennsylvania Rules of Evidence.

ENVIRONMENTAL HEARING BOARD

Thomas W. Renwand

THOMAS W. RENWAND
Acting Chairman and Chief Judge

DATE: October 23, 2007
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

STONEY CREEK TECHNOLOGIES, LLC :
:
v. : **EHB Docket No. 2007-155-MG**
:
COMMONWEALTH OF PENNSYLVANIA, DEPARTMEMT OF ENVIRONMENTAL PROTECTION : **Issued: October 30, 2007**
:

OPINION AND ORDER ON MOTION TO DISMISS AND COUNTERMOTION FOR LEAVE TO FILE APPEAL *NUNC PRO TUNC* OR AMEND THE NOTICE OF APPEAL

By George J. Miller, Judge

Synopsis

The Board grants a motion to dismiss filed by the Department of Environmental Protection because the appellant failed to file an appeal from an order of the Department within the thirty-day appeal period. The Board also denies the appellant's motion to appeal *nunc pro tunc*. The appellant's excuse that employees of the company were under a great deal of stress due to the dire financial condition of the company and failed to understand the appeal period does not establish a non-negligent failure to file a timely notice of appeal.

BACKGROUND

This appeal is from the Department's order suspending Stoney Creek Technologies' (Appellant) air quality and storage tank permits. The order suspended the

permit-by-rule for the Appellant's storage tanks, required Appellant to cease operation of its permitted air pollution sources, to empty its storage tanks and take other remedial actions. The Appellant contends that the order was an abuse of discretion because, among other things, the Department's claim that it violated its air permits is erroneous and that its storage tanks are in good working order.

The Department contends that the Board has no jurisdiction over the appeal because the notice of appeal was not timely filed. The notice of appeal acknowledged receipt of the order on April 27, 2007. The notice of appeal was sent by facsimile to the Board on June 15, 2007 and a hard copy was filed with the Board on June 20, 2007. Accordingly, both notices were filed more than 30 days after Appellant received the order. The Department's order gave Appellant adequate notice that any appeal to the Board had to be filed within 30 days.

In response the Appellant contends that its officers thought in good faith that the time requirement was 30 business days, rather than calendar days, and that the appeal was not filed on June 4, 2007 because "its personnel were subject to considerable distress and distraction due to extreme financial difficulties which culminated in federal bankruptcy proceedings and an ongoing legal battle with Soltex, Inc. in State Court." This response includes a motion for leave to amend the appeal or to file the appeal *nunc pro tunc* in part because the Appellant will be required to close and liquidate its business by its inability to have its air permits reinstated by the Department by the end of October under the terms of a pending financial offer that is necessary for its survival. The Appellant argues that a permanent shut down of the plant will result in significant losses to the private owners of the company, the loss of employment of up to 60 local employees and plant closure

related to remediation costs of over $5 million. The proposed amendment or appeal *nunc pro tunc* objects to many of the findings in the order and to the major requirements of the order on the ground that they are erroneous or not in accordance with law.

DISCUSSION

We grant the motion to dismiss because the appeal is untimely and deny the motion to amend or file the appeal *nunc pro tunc* because the circumstances presented by the Appellant do not amount to either a non-negligent failure to file a timely appeal or a breakdown in the Board's operation. Neither the belief of Appellant's employees that only business days need be counted, the stress they were under, nor the failure to retain environmental counsel constitutes a non-negligent failure to file a timely appeal.[1]

The right to appeal in this case is created by the Storage Tank Act[2] and the Air Pollution Control Act.[3] Both of these statutes limit that right to filing a notice of appeal with the Board within 30 days of notice of the Department's action. This limited right of appeal is jurisdictional in nature, and can not be extended as a matter of grace.[4] Following the principles established by courts,[5] the Board will grant leave to file an

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[1] *Borough of Bellfonte v. Department of Environmental Resources,* 570 A.2d 129 (emotional distress); *Martz v. DEP*, 2005 EHB 349 (misunderstanding of time requirements); *Pedler v. DEP*, 2004 EHB 852 (started new job and was out of state serving as a birth partner for her sister).

[2] 35 P.S. § 6021.1314.

[3] 35 P.S. §§ 4010.2 and 4010.3.

[4] *See Rostoksy v. Department of Environmental Resources*, 364 A.2d 761 (Pa. Cmwlth. 1976); *Ziccardi v. DEP*, 1997 EHB 1.

[5] 25 Pa. Code § 1021.53a.

appeal *nunc pro tunc* only where fraud or breakdown in the Board's operation or unique and compelling circumstances establish a non-negligent failure to appeal.[6]

The Appellant does not dispute that its notice of appeal was filed beyond the 30-day appeal period. However it contends that the Board "has never had occasion to consider a request for appeal *nunc pro tunc* of an order when denial would mean inability to protest permanent operational closure of the sole operating facility of a company."

The Appellant argues, in part, that the right to an appeal is protected by the Pennsylvania Constitution in Article V, Section 9. This provision protects the right to appeal to a court of record, the selection of the court to be as provided by law.[7] This provision also states "and there shall also be such other rights of appeal as may be provided by law." The Appellant, however, has not been deprived of a right to appeal. Rather it has failed to exercise its right of appeal to the Board by neglecting to file its appeal within the time established by the Air Pollution Control Act and the Storage Tank Act.

Even if we were to assume that this provision of the constitution grants a constitutional right to appeal to the Board, we hold that the circumstances described by the Appellant do not constitute sufficiently unusual circumstances to justify granting leave to file an appeal after the required 30-day period. The Appellant points to the

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[6] *Grimaud v. Department of Environmental Resources*, 638 A.2d 299 (Pa. Cmwlth. 1994); *Falcon Oil Co. v. Department of Environmental Resources*, 609 A.2d 876, 878 (Pa. Cmwlth. 1992); *Glantz v. DEP*, 2006 EHB 841, 842.

[7] The Board, an administrative agency, is not a "court of record." *See Empire Sanitary Landfill v. Department of Environmental Protection*, 684 A.2d 1047 (Pa. 1996). Of course, the Appellant is free to file a petition for review from our decision here to the Commonwealth Court, which is a "court of record." *See* 42 Pa. C.S. § 763. *See also Durkee Lumber Co., Inc. v. Department of Conservation and Natural Resources*, 903 A.2d 593, 597 n.10 (noting that the Pa. Constitution provides a right of appeal from an administrative agency to a court).

criminal case of *Commonwealth v. Stock*[8] in which the Pennsylvania Supreme Court said: "Furthermore, it would be entirely unfair in the criminal context to permit Appellant's state constitutional right of an appeal to be extinguished solely on the basis of his counsel's failure to timely file the appeal where Appellant had requested that an appeal be filed."[9] However, in that case, the appellant had directed his attorney to file an appeal on his behalf from his conviction by a district justice well within the statutory appeal period, but the attorney failed to do so, due to no fault of the appellant. Here, the argument is that the extreme stress and distraction that the Appellant's employees were under as a result of financial pressure and the catastrophic consequences of the failure to grant an appeal should be sufficient to enable the Board to waive the late filing of the appeal. Yet both the courts and the Board have repeatedly held that stress or mistakes on the part of an appellant is insufficient to establish a non-negligent failure to file a timely appeal.[10] Business employees are frequently under stress to meet legal and financial requirements and we have no tool to measure how much stress and difficulty might justify a late appeal. If we were to excuse the late filing of an appeal on this ground, there might be no end to the grant of appeals *nunc pro tunc*. Emotional stress clearly is not a basis for the grant of a *nunc pro tunc* appeal, and these circumstances do not otherwise constitute sufficiently unusual circumstances to justify granting the Appellant's motion to accept its appeal..

Nor do we believe that the possible closing of the Appellant's chemical plant justifies the filing of a late appeal. To begin with, this is irrelevant to the question of

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[8] 679 A.2d 760 (Pa. 1996).

[9] *Id.* at 764.

[10] *See* cases cited in footnote 2.

whether the failure to file a timely appeal was non-negligent. As we observed in our decision in *Ziccardi*, "potential injustice or hardship which may result from dismissal of an untimely appeal does not provide adequate grounds to allow the appeal *nunc pro tunc.*"[11] If compliance with environmental requirements is not possible in time to meet future financing requirements, that circumstance is the Appellant's fault and not a ground for permitting an untimely appeal to proceed.

Accordingly, we enter the following

[11] *Ziccardi v. DEP*, 1997 EHB 1, 8.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STONEY CREEK TECHNOLOGIES, LLC	:	
	:	
v.	:	**EHB Docket No. 2007-155-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMEMT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 30th day of October, 2007 the Motion of the Department is granted and the motion of the Appellant is denied. The appeal is **dismissed.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

Dated: October 30, 2007

c: **DEP, Bureau of Litigation:**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CITIZEN ADVOCATES UNITED TO SAFEGUARD THE ENVIRONMENT, INC.	:	
v.	:	
	:	**EHB Docket No. 2006-005-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HAZLETON REDEVELOPMENT AUTHORITY, and HAZLETON CREEK PROPERTIES, LLC, Permittees	:	**(Consolidated with 2005-329-L)**
	:	**Issued: November 2, 2007**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Department approved a Determination of Applicability for the beneficial use of mixed residual waste for reclamation of an abandoned mine site in Hazleton. The Board upholds the Department's action in all respects except the Department's approval of the applicant's groundwater monitoring plan, which the Board finds to be inadequate. The Department erred in approving the monitoring plan because it has not been shown to be capable of detecting the off-site migration of contaminants. The Board remands the matter to the Department for development of an improved plan.

FINDINGS OF FACT

Parties

CAUSE

1. The Appellant, Citizen Advocates United to Safeguard the Environment, Inc. ("CAUSE"), is an environmental advocacy organization consisting of concerned citizens in Luzerne County. (Notes of Transcript page ("T.") 22, 24, 66-67, 459, 799, 809-810.)

2. CAUSE's officers and directors include Carolyn and Charles Martienssen and Francis and Thomas Yurick. (T. 24, 67, 459, 810.)

3. Carolyn and Charles Martienssen live less than one-half a mile from the site that is at issue in this appeal. (T. 47-48.)

4. Francis and Thomas Yurick live less than one mile from the site that is at issue in this appeal. (T. 454.)

5. CAUSE's members had an objectively reasonable apprehension that the project in question could adversely affect their right to live in and enjoy their property and the immediate environment in which they live, work, and recreate. If the project does not perform as planned, CAUSE's members could be among those who would be adversely affected. (T. 21-67, 64-83, 454-60, 792-94, 802-08, 1819-24; Hazleton Creek Properties Exhibit No. ("HCP Ex.") 131.)

HCP

6. The Permittee, Hazleton Creek Properties, LLC ("HCP"), is a Pennsylvania Limited Liability Company. (Department of Environmental Protection Exhibit No. ("DEP Ex.") 12, 42.)

7. HCP did not exist at the time the site in question was contaminated, and it did not cause or contribute to any preexisting conditions on the site. (DEP Ex. 12, 41.)

DEP

8. The Department of Environmental Protection (the "Department") is the agency of the Commonwealth with the duty and authority to implement environmental statutes in Pennsylvania including but not limited to the Solid Waste Management Act, 35 P.S. § 6018.101 *et seq.*, the Air Pollution Control Act, 35 P.S. § 4001 *et seq.*, the Clean Streams Law, 35 P.S. § 691.1 *et seq.*, and the Land Recycling and Environmental Standards Act ("Act 2") 35 P.S. § 6026.101 *et seq.*

HRA

9. The Redevelopment Authority of the City of Hazleton, also known as the Hazleton Redevelopment Authority ("HRA"), is a Pennsylvania municipal authority formed by the City of Hazleton under the Urban Redevelopment Authority Law, 35 P.S. § 1701 *et seq.* (DEP Ex. 42.)

10. HRA was formed to conduct redevelopment activities, and it is an "Economic Development Agency" as that term is used in the Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act ("Act 3"), 35 P.S. § 6027.3.

11. HRA is the owner of the site in question. (T. 1849-50.)

12. HRA did not cause or contribute to contamination on the site.

13. HRA is an entity separate and distinct from the City of Hazleton (the "City").

14. The City operated one or more unpermitted landfills on the site. The City caused and contributed to contamination on the site. *City of Hazleton v. DER*, 1976 EHB 316. (T. 584, 1322; DEP Ex. 27, 41.)

15. Although HRA is closely affiliated with the City, it functions independently. (T. 649-56, 812-16, 1289-92, 1308, 1326-89, 1400-12, 1812-28, 2166, 2280; CAUSE Exhibit No.

("C. Ex.") 71-74, 173, 175-78.)[1]

The Site

16. The site that is the subject of this appeal consists of about 277 acres bounded by Route 924, Route 309, and Broad Street in the City of Hazleton (the "Site"). (DEP Ex. 1, 12, 27, 41, 42.)

17. The Board conducted a site view on June 30, 2006.

18. Virtually the entire Site has been severely impacted by surface mining, deep mining, and waste disposal activities. (DEP Ex. 42.)

19. The Site is underlain by the Hazleton coal basin. (T. 2305, 2349-53.) There are no less than nine levels of mined coal veins on the Site. (T. 752, 1539-41, 2011; C. Ex. 166.)

20. Extensive surface mining on the Site has left behind a moonscape of spoil piles, dangerous highwalls, and open pits. (C. Ex. 185; DEP Ex. 15, 42.)

21. Between 1955 and as late as the early 1980s the City used the Site as a town dump. Hundreds or perhaps thousands of barrels, some of which likely contained hazardous waste, were disposed of at the Site, sometimes under cover of night. (T. 469-81, 625-27, 875, 1479-80; DEP Ex. 27; C. Ex. 160.)

22. The Department issued an order against the City directing it to close the landfills. The order was upheld on appeal but never fully enforced. *City of Hazleton v. DER*, 1976 EHB 316.

23. A waste area known as the "Hazleton Landfill" covers approximately 55 acres. (T. 1850; DEP Ex. 41.)

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[1] HCP and HRA are aligned in this matter. Unless the context requires otherwise, they shall hereinafter be collectively referred to as "HCP."

24. A waste area known as the "Crystal Ridge Landfill" has been closed with a two-foot cap. (DEP Ex. 42.)

25. A waste area known as the "Old Municipal Landfill" is being partially reclaimed and remediated by the Department. (DEP Ex. 42.)

26. There were landfill fires on the Site. (T. 623-25; DEP Ex. 27.)

27. The landfills are unlined. (T. 750-51.)

28. Leachate from the landfills is entering the environment. (T. 2068; DEP Ex. 12, 27.)

29. PCB-containing electrical components have been dumped at the Site, some of which have been removed. (T. 28-30, 585, 818, 1487-89, 1916-40; DEP Ex. 42; C. Ex. 74.)

30. The Site narrowly missed being placed on the National Priority List under the Federal Superfund program. (T. 681-90, 966; DEP Ex. 27; C. Ex. 159.)

31. The effects of surface mining at the Site are being partially ameliorated pursuant to work being performed under the supervision of the Bureau of Abandoned Mine Reclamation using approximately 3,000,000 cubic yards of native spoils and overburden. (T. 1932; DEP Ex. 42; C. Ex. 2.)

32. The Site in its current condition is contaminated, hazardous, and virtually useless. (DEP Ex. 15, 42.)

33. The City's public drinking water is not drawn from any source that has been shown to interact with the Site. (T. 2777.)

34. The Site is located in very close proximity to densely populated residential and commercial areas. (HCP Ex. 86.)

Determination of Applicability

35. In March 2004, the Department issued a general permit for the processing and beneficial use of residual waste, General Permit No. WMGRO85 (the "General Permit") on a statewide basis. (DEP Ex. 15.) *See Army for a Clean Environment, Inc. v. DEP*, 2005 EHB 628 and 2006 EHB 698.

36. The initial General Permit was issued to Lehigh Coal & Navigation for its intended use of dredge material, cement kiln dust, lime kiln dust, coal ash, and cogeneration ash (the "residual waste mixture") for mine reclamation at its Springdale Pit located in Schuylkill and Carbon Counties. *ACE v. DEP*, 2006 EHB at 698-99.

37. The General Permit grants statewide approval for the processing and beneficial use in mine reclamation of freshwater, brackish and marine dredge material, cement kiln dust, lime kiln dust, coal ash, and cogeneration ash by screening, mechanical blending, and compaction. (DEP Ex. 15.)

38. The General Permit prescribes handling procedures and establishes physical and chemical characteristics that the residual waste mixture must meet before it may be used. (DEP Ex. 15.)

39. The General Permit represents the Department's determination that the use of the residual waste mixture in accordance with the terms of the permit will not harm the environment or the public health, safety, or welfare, subject to proper monitoring to verify the lack of harm. (DEP Ex. 15.)

40. CAUSE did not file an appeal from the issuance of the General Permit. Therefore, CAUSE is limited to showing that there is something unique to the Site and the Hazleton project that renders unsafe what would ordinarily be a permitted and safe use of the

residual waste mixture. (T. 552-67.)[2]

41. A person who wishes to obtain coverage under the General Permit must apply for a Determination of Applicability ("DOA"). 25 Pa. Code § 287.642.

42. HCP filed an application for a DOA for the Site on June 21, 2005. (DEP Ex. 12.) HCP proposes to use an estimated 10,000,000 cubic yards of the residual waste mixture on the Site. (T. 1847-50, 1932; C. Ex. 89; DEP Ex. 15, 42.)

43. Notice of receipt of HCP's application was published in the *Pennsylvania Bulletin* on July 9, 2005. (HCP Ex. 34.)

44. HCP's DOA application was reviewed by Departmental personnel in its Northeast, Pottsville, and Central Offices. (T. 156-220, 492-605, 676-783, 1240-89, 2938-70; C. Ex. 39, 91.)

45. After a lengthy series of internal and external meetings, discussions, and correspondence including technical review letters and responses thereto, the Department issued a DOA with contingencies to HCP on October 5, 2005. (DEP Ex. 15.)

46. Notice of the issuance of the DOA was published in the *Pennsylvania Bulletin* on October 22, 2005. (HCP Ex. 39.)

47. CAUSE filed a timely appeal from the DOA on November 21, 2005. (EHB Docket No. 2005-329-L.)

48. The Department determined in accordance with 25 Pa. Code § 287.642(e) that HCP had demonstrated that the use of the residual waste mixture to reclaim the Site is consistent with the terms and conditions of the General Permit and the use does not have the potential to

[2] The General Permit has not been reviewed by this Board and it is not at issue in this appeal. Nothing contained in this Adjudication shall be construed as an endorsement or criticism of the General Permit.

harm or present a threat of harm to the health, safety or welfare of the people or the environment of this Commonwealth. (DEP Ex. 15.)

49. There are several conditions precedent to the acceptance of the residual waste mixture at the Site under the General Permit and DOA. (T. 2899; DEP Ex. 15, 16, 20; HCP Ex. 42, 79, 81.)

50. Special Condition 13 of the General Permit, as incorporated into the DOA, provides that "[p]rior to acceptance of any waste by the permittee, the permittee shall submit a sampling and analysis plan for monitoring groundwater and surface water at the proposed site(s) to the Department...." Special Condition 14 prohibits any discharges from the Site into waters of the Commonwealth. (D. Ex. 15.)

51. On December 1, 2006, the Department approved HCP's sampling and analysis plan for monitoring groundwater and surface water at the Site. (T. 177, 755-56, 2946-70; DEP Ex. 20.)

The Consent Order and Agreement

52. The Department, HRA, and HCP entered into a consent order and agreement (the "COA") on December 6, 2005. (C. Ex. 6.) CAUSE filed a timely appeal from the COA. (EHB Docket No. 2006-005-L.)

53. Special Condition 2 of the DOA reads "[p]rior to acceptance of any waste by the permittee, the permittee shall have coverage for the processing and beneficial use operations under a surface mining permit or a signed contractual agreement with the Department for reclamation of an abandoned mine." (T. 217; DEP Ex. 15.)

54. The COA satisfies Special Condition 2 of the DOA, and it also functions as a Special Industrial Area Agreement under Act 2. (The Site is contained within a designated

Special Industrial Area.) (C. Ex. 6.)

55. The COA authorizes the in-place closure of the Hazleton Landfill on the Site. HCP will not relocate the existing waste in the Hazleton Landfill. Instead, HCP will cover the area with at least two feet of approved on-site material in accordance with the COA. (T. 1929-30; C. Ex. 6; DEP Ex. 42; HCP Ex. 79.)

56. The landfill closure is designed to meet Statewide Health Standards and approved Site-Specific Standards under Act 2. (T. 2123-24; C. Ex. 6.)

57. The cap-in-place closure aspect of the project is an appropriate remedy for the landfills on the Site. (T. 2123-24; DEP Ex. 12; C. Ex. 6.)

The Project

58. The beneficial use of the residual waste mixture and the landfill closures (hereinafter the "Project") will restore the Site to its approximate original contours. No residual waste mixture will be placed outside of mine pits. (T. 1848.) Returning the Site to its approximate original contours would not be possible using only on-site materials, or practical using other off-site materials. (T. 1253, 1279, 1854-55; DEP Ex. 41, 42.)

59. The Project will make development and reuse of the Site possible. (DEP Ex. 41-42.)

60. The primary purpose of the Project is to find a place to beneficially use the residual waste mixture. In the process, mines will be reclaimed and waste disposal areas will be remediated. (T. 1847-53; C. Ex. 151, 172; DEP Ex. 15, 39-42; HCP Ex. 79.)

61. The residual waste mixture will supplement on-site materials available for reclamation, not replace them or substitute for them. (T. 1854-55; DEP Ex. 12; C. Ex. 2, 67.)

Surface Water

62. Cranberry Creek flows toward the Site but quickly disappears below the ground surface once it reaches the vicinity of the Site. (T. 2296-97, 2301, 2415-16.) One of the goals of the Project and mine reclamation activity on the Site is to restore that stream. (T. 2172, 2296; DEP Ex. 12.) HCP will have surface water monitoring points along the restored channel. (T. 2296; HCP Ex. 37.)

63. There is another small stream that crosses the Site that will be sampled as part of the Project as an upstream sampling location. (T. 2295-96.)

64. There are other wetlands, ponds, and seeps on and near the Site. (D. Ex. 29.) There is also a large sewage plant overflow that results after wet weather because the collection and treatment system cannot handle all the flow. This so-called "Locust Street pump station overflow" presumably contains raw sewage. (T. 2296-97.) The Project will not address this problem. This stagnant pond will continue to recharge groundwater on the Site.

65. CAUSE presented no credible evidence of harm or potential harm to any surface waters on the Site as a result of the Project.

66. The sampling and monitoring plan for the Project is adequate as it relates to surface waters. (T. 2301.)

Air Issues

67. Activity on the Site will result in the generation of dust. (T. 921-24, 1951-52; DEP Ex. 12.) If not adequately controlled, the dust could potentially blow off of the Site and settle in residential areas, including areas inhabited by CAUSE's members. (T. 923-24.)

68. HCP is required by its permit to prevent fugitive dust emissions from leaving the Site. (T. 1957; DEP Ex. 12; HCP Ex. 86.) Failure to comply can result in enforcement action.

(DEP Ex. 12.) There is no evidence in the record that HCP's dust control plans are inadequate, or that there is anything unique to HCP's plans or operations that will prevent it from complying with the dust control measures in its plans and the DOA.

69. There is no indication that HCP's activities, if properly performed, will cause air pollution as a result of dust or particulate matter emissions that have the potential to harm or present a threat of harm to public health, safety, or welfare or the environment. (T. 1900-01, 1951-52, 1956-57, 2776-77; DEP Ex. 12; H.Ex. 86.)

Mine and Landfill Gas

70. The landfills on the Site are producing relatively little in the way of landfill gases. (T. 873-74, 2149-53, 2795-97, 2091-92, 2098-2100, 2840-41.)

71. It has not been shown that there will be any significant lateral migration of mine or landfill gases from the Site. (T. 2153.) It has not been shown that any gases that might be present will penetrate, combine with, or react with the residual waste mixture in a detrimental way. (T. 2840-41, 2883-84.)

72. The expert opinions of HCP's experts, Lawrence Roach (site characterization), Laura Green (public health), and Barry Scheetz (residual waste characteristics), that landfill or mine gases have been adequately investigated at the Site and that no mine or landfill gases either by themselves or in combination with the residual waste mixture pose a threat of harm to the public or the environment are substantially uncontradicted, they are well supported by applicable science and pertinent facts, and they are credible. (T. 1011, 2149-53, 2795-97, 2840-41, 2883-84.)

Site Characterization – Issues other than Groundwater

73. On October 6, 2004, HRA delivered copies of Notices of Intent to Remediate

under Act 2 ("NIRs") for the Site to the City and the Department. (C. Ex. 172; DEP Ex. 41, 42.)

74. On November 6, 2004, the Department published notice of its receipt of the NIRs in the *Pennsylvania Bulletin.* (C. Ex. 172.)

75. The Department next approved HCP's Workplan detailing the investigative work to be performed at the Site. Notice of its approval of the workplan for the Site is in the January 15, 2005 *Pennsylvania Bulletin.* (DEP Ex. 39.)

76. The Baseline Environmental Report ("BER") dated December 10, 2004 was thereafter submitted to the Department as part of the Act 2 process. (DEP Ex. 40-42.)

77. On February 19, 2005, the Department published notice of its approval of the BER in the *Pennsylvania Bulletin.* (T. 1847-1848; DEP Ex. 40.)

78. The Act 2 Final Report will not be submitted until work is completed. (T. 1916.)

79. Lawrence Roach is HCP's highly qualified expert in the fields of geology, geophysics, and site characterization. (T. 1970-79.) His opinions regarding the site characterization are marked by a high degree of competence and credibility. (HCP Ex. 87.)

80. Existing wastes and contaminants at the Site, including barrels and PCBs, have been adequately investigated and documented. (T. 634-42, 1989-91, 2006-24, 2026-87, 2140-44, 2162-97, 2213-16, 2234-35, 2254-55; DEP Ex. 41-42.)

81. Test pits were one of the many methods properly and successfully used to characterize the Site. (T. 2255-61; HCP Ex. 87, 134-140; DEP Ex. 41-42, 158.)

82. The use of flux chambers at the Site to measure volatile compounds was adequate and appropriate. (T. 1743-49, 2256; DEP Ex. 179; HCP Ex. 87.)

83. The voluminous and numerous site studies and characterizations, including but not limited to the Baseline Environmental Report prepared under Roach's supervision, are in all

respects other than the off-site movement of groundwater, exhaustive, meticulous, well designed, and complete. The nongroundwater portions of the site characterization meet all applicable and generally accepted standards and practices and provide a comprehensive understanding of the existing condition of the Site. (T. 2925-26.) No further characterization in support of anything other than the off-site flow of groundwater is necessary or warranted. (T. 1979-2264; HCP Ex. 26, 70, 87, 97, 142; DEP Ex. 27, 34, 40-42, 159, 160.)

84. The work of Roach *et al.* adequately characterized the behavior of on-site groundwater above the mine workings on the Site in its current condition, given the purpose of the BER. No further characterization of on-site shallow groundwater flow on the Site in its current condition except as it may relate to off-site flow is necessary or warranted. (T. 1543, 2043-45, 2063-68, 2116, 2327, 2915, 2927; HCP Ex. 87.)

Whether the Project will Contaminate the Environment or Endanger Public Health

85. CAUSE presented the expert testimony of Charles Norris in support of its theory that contaminants may leach into the environment from the residual waste mixture at potentially harmful levels at the Site. (T. 1107, 1144.)

86. Much of what Norris might have testified about related to the unappealed limits and practices prescribed by the General Permit and it is, therefore, beyond the scope of this appeal. Norris conceded at one point that the Site is not *uniquely* unsuitable for application of the General Permit. (T. 1112-13.)

87. To the extent that Norris opined that there is a potential for contaminants to leach into the environment at harmful levels due to peculiar conditions at the Site, the opinion is not credible because it conflicts with the credible testimony of HCP's witnesses, and it is based on an extremely limited investigation, a flawed understanding of the Project in general and

monitoring activities used in the Project in particular, and an inaccurate presentation of data. (T. 1018-19, 1102, 1148-57, 1175-84, 1209-11, 2690-99, 2704-10, 2733-54; HCP. Ex. 103, 157-159; C. Ex. 167.)

88. Norris relied heavily but improperly on the Bark Camp Project to support his opinion. (T. 1128-33, 2690-99.) The Bark Camp Demonstration Project is located in Clearfield County, Pennsylvania in the Moshannon State Forest along Bark Camp Run, which flows approximately two miles south to north through the demonstration project site. The area was severely impacted by historical coal mining activity. (T. 2680-81, 2737; HCP Ex. 157-158.)

89. The Bark Camp Project was designed to test the possible impact of using various fill materials for reclaiming abandoned mine areas. (T. 2680-93, 2737-38; Ex. H-157, H-158.)

90. The Bark Camp Project was a multiyear study that yielded more than 100,000 pieces of data. (T. 2704.)

91. The Department did not rely upon the Bark Camp study when it decided to approve the DOA for the Project. (T. 2905.)

92. No expert witness credibly opined that the Bark Camp Demonstration Project shows that there will be contamination at the Hazleton Site. There are too many differences between the two sites. (T. 1208.)

93. Norris did little or no site-specific investigation. He never visited the Site. (T. 1157, 1162-63, 1166.)

94. Norris's opinion is also not credible because he relied without factual basis on the presence and interaction of landfill gases (T. 1067-84), which have not been shown to be present, and even if present, it has not been shown that they would penetrate the residual waste mixture. (T. 2841.)

95. Norris speculated that water flowing through the residual waste mixture will create an environment in which harmful chemical reactions might occur when, in fact, based upon the credible testimony of Barry Scheetz, one of HCP's experts, the permeability of the mixture is likely to be very low due to pozzolanic reactions rendering the mixture cementitious. (T. 2814-50, 2857-58.)

96. Norris was unable to point to any credible evidence that acid mine drainage on the Site would create an increased potential for harmful leaching of contaminants from the residual waste mixture in excess of that accounted for in the General Permit. (T. 1106, 1128-33, 2690-99.)

97. Laura Green, who testified on behalf of HCP, is a highly qualified expert in the fields of toxicology and health risk assessment. (T. 2757-70.)

98. Green opined that the Hazleton Project poses no significant or envisionable risk of harm to human health. (T. 2776-78.) CAUSE did not present any testimony from experts qualified in toxicology or health risk assessment to contradict Green's opinion. (T. 1058, 2779, 2788.)

99. Green is not a hydrogeologist. Her opinions are based on the assumption that either all or the vast majority of water from the Site will flow to the Little Nescopeck Creek via the Jeddo Tunnel. (T. 2799-2800.)

100. Green's essentially uncontradicted opinion regarding the lack of demonstrated harm to human health from the Project is credible. (T. 2770-72, 2776-80, 2785-91.)

101. Green credibly opined that there is nothing specific to the Hazleton Site, such as the presence of the closed landfills and the presence of large amounts of acid mine drainage, that would render the application of the General Permit or the limits contained therein at the Site

unsafe from a public health perspective. (T. 2795-98.)

102. Green's opinions regarding risk to human health were based in part on the beneficial effects of dilution in the environment. (T. 2777-78, 2800.) To the extent Green testified that the Project does not pose a threat to "the environment" (T. 2780), the opinion goes beyond her area of unique expertise and it was not qualified or explained.

103. There is no evidence to support CAUSE's contention that HCP will be unable to comply with Special Condition 9 of the Permit, which prohibits unauthorized mixing of the residual waste mixture with other on-site wastes.

The Groundwater Monitoring Plan

a. Description of the Plan and the Department's Review

104. Special Condition 13 of the DOA (incorporating the General Permit) requires HCP to submit a surface water and groundwater monitoring plan before accepting any waste at the Site. (T. 160, 2903-04; DEP Ex. 15.)[3] Approval of the DOA for the Project is conditioned upon design and implementation of an adequate monitoring plan. Special Conditions 13 and 14 read as follows:

> 13. Prior to beneficial use under this permit of any waste at any site, the permittee shall submit a sampling and analysis plan for monitoring groundwater and surface water at the proposed site(s) to the Department at the address in Condition 21, the Waste Management Program at the appropriate Regional Office, and the appropriate District Mining Office for approval by the District Mining Office. At a minimum, the plan shall include provisions for at least six (6) months of monitoring prior to beneficial use of waste under this permit and quarterly monitoring after beneficial use begins. In addition to constituents required by the mining program, the permittee shall monitor groundwater and surface water samples for all constituents in Condition 4c that have been detected in the processed waste that was beneficially used at the

[3] HCP's plan is adequate with respect to *surface* water and that aspect of the plan will not be discussed any further in this Adjudication.

> site. The permittee shall also add and sample for any constituent(s) of concern that are not already being analyzed for, should they be detected and/or found to be present in any of the waste beneficially used at the site. The permittee shall increase the monitoring frequency from quarterly to monthly and immediately notify the Department at the address in Condition 21, the Waste Management Program at the appropriate Regional Office, and the appropriate District Mining Office if the concentration of any constituent being analyzed for by the requirements of this condition increases in concentration for two consecutive quarters, in any groundwater or surface water sample obtained from a monitoring point at the site.
>
> 14. This permit does not authorize and shall not be construed as an approval to discharge any waste, wastewater or runoff from the site of processing to the land or waters of the Commonwealth.

(DEP Ex. 15.)

105. The Department's Northeast Regional Office originally took the lead in reviewing HCP's proposed groundwater monitoring plan. Officials in the Department's Northeast Regional Office expressed numerous concerns regarding the proposed groundwater monitoring plan during the course of their review. (C. Ex. 35, 37, 39, 91.) Responsibility for review and approval of the groundwater monitoring plan was ultimately reassigned to Keith Laslow, a highly respected, now retired hydrogeologist and Technical Chief in the Department's Pottsville District Mining Office. (T. 180, 194, 2903-04.)

106. HCP first described its proposed monitoring plan in its original DOA application submitted on June 20, 2005. In that application, HCP acknowledged the need to have a monitoring system:

> As part of an Act 2 remedial investigation of the property, the Hazleton Redevelopment Authority as the remediator has performed a series of extensive environmental investigations and site characterization of existing conditions and potential threats to public health and safety and the environment, including surface water and ground water sampling activities (See Baseline Environmental Report (BER) for the site (Appendix C of the application)). As part of the mine reclamation project, Hazleton

> Creek Properties, LLC will perform monthly sampling for six months prior to placement of any material and routine quarterly monitoring and sampling thereafter at various surface water and groundwater monitoring locations throughout the project area in conformance with the General Permit. *The purpose of the monitoring program is to establish baseline water quality prior to filling and then evaluate water quality conditions over time as they relate to the reclamation activities and the placement of processed dredged material and compare these results with recent and historical background data.* Surface water and groundwater sampling procedures will be conducted in accordance with the procedures set forth in this document as well as PADEP-accepted procedures and guidelines.

(DEP Ex. 12 (emphasis added).)

107. HCP accurately observed that a properly designed monitoring system for the Project must: (a) establish a baseline against which to measure future performance, and (b) allow for a meaningful comparison to the baseline during and after the Project is implemented to ensure that the Project is performing safely, as expected. (T. 1062-63; DEP Ex. 12.)

108. HCP's proposed plan never changed from the DOA application. HCP described its proposed plan as follows:

> **2.4 SURFACE WATER AND GROUND WATER SAMPLING PROGRAM**
>
> Surface water and groundwater on the site will be monitored at the monitoring locations approved by DEP as identified in the enclosed map (See Form 5 Attachment). These include a series of on-site groundwater wells, the Hazleton shaft off-site and one surface water location, which is the only existing location where surface water leaves the property.
>
> * * *
>
> A groundwater sampling program for the Hazleton Mine Reclamation Project ... includes wells in soil/coal wash/fill, wells in the underlying bedrock, wells that penetrate deep mine voids beneath the Placement Area and a sampling location at the Hazleton Shaft, which accesses the deep mine pool down gradient from the Placement Area.

> Groundwater monitoring will be performed at seven monitoring wells and the Hazleton Shaft.... The seven monitoring wells include five well locations originally used in the site characterization activities documented in the BER. These are: GW-B2S, GW-B3S, GW-C2S, GW-5D and GW-6D. The other two well locations (GW-7D and GW-8D) are newly installed wells constructed specifically for the purposes of this monitoring program. Wells GW-C2S and GW-6D have been vandalized since they were originally installed and are being replaced. In the case of well GW-6D, the replacement well will be within 200 feet of the former location due to access limitations for drilling equipment.
>
> Groundwater quality up gradient from the Placement Area will be monitored by well GW-C2S, which is screened in soil at and just below the water table. Within the Placement Area, wells GW-B2S and GW-B3S will monitor groundwater quality in soil/coal wash/fill beneath the former landfill. As such, these wells are essentially monitoring perched leachate from the former landfill. Wells GW-5D and GW-7D will monitor the first deep mine void encountered beneath the Placement Area, while GW-6D and GW-8D will monitor shallower bedrock above the deep mine voids (nominally 70 feet below ground surface).
>
> The Hazleton Shaft provides access to monitor the water quality in the mine pool at a location down gradient from the Placement Area (Figure 1). This sampling must be accomplished by lowering a bailer into the shaft to a depth of approximately 600 feet. Previous experience in sampling at this location indicates that there is active flow of mine water through the shaft, which will obviate any concerns regarding the representativeness of samples from this location.

(DEP Ex. 12.)[4]

109. HCP subsequently responded on August 29, 2005 to a technical review letter from the Department as follows:

> 16. **[DEP comment]** The proposed groundwater monitoring system may not be adequate to detect contamination from all of the proposed placement areas.

[4] It should be noted here that HCP's expert now asserts that the Hazleton Shaft does *not* "access the deep mine pool downgradient from the Placement Area," instead opining that the Shaft measures water in the gravity drainage system, which intercepts most of the groundwater before it reaches the deep mine pool. (HCP Ex. 86.)

Response [of HCP]:

The applicant disagrees with this statement. It believes the Department through the Act 2 program has already confirmed that the Act 2 site investigations have fully characterized the site including the site geology and hydrology as documented by the Department's approval of the Baseline Environmental Report on January 7, 2005. DEP concurred that "all groundwater on the site drains into the underlying miner [sic] pool". Further, the Department's selected expert geologist who approved the BER report personally approved the proposed number and locations of the required groundwater and surface water monitoring points for the project on April 19, 2005 and subsequently field approved the location of the required two new wells on May 12, 2005.

The BER report also documented and DEP concurred that all groundwater flow from this site is directly downward until it reaches the mine pool at 600 feet below the surface and flows to the Hazleton shaft. Therefore, with DEP's approval, in April 2005, the Hazleton shaft was selected as the only necessary down gradient groundwater monitoring point since all groundwater from the placement area will flow to this shaft.

***

The applicant believes there is no information available to the Department that contradicts the groundwater findings of the BER report previously approved by DEP or that challenges the April 19, 2005 DEP decision of its expert geologist that the seven on-site groundwater monitoring locations and the off-site Hazleton shaft are adequate to detect any potential contamination in all the placement areas.

(HCP Ex. 36.)

110. On February 17, 2006, HCP submitted a report by Craig Robertson, HCP's expert hydrogeologist, in further support of the proposed monitoring plan. The report states that "groundwater flow appears to be intercepted by the mine workings and percolates downward into the underlying mine pool." It says that "groundwater entering the mine pool passes through the Jeddo Tunnel." It notes that it is "reasonable to conclude" that samples taken at the Hazleton Shaft "would include integrated drainage from the mine workings beneath the Site as well as flow from the remainder of the basin to the west of the Site." There was no detailed analysis by

Robertson of flow in the mine workings, or any distinction between "the mine pool" and the subsequently described gravity drainage system that Robertson now opines is perched above the mine pool. The report includes a "schematic drainage map" showing 4,000 acres (plus or minus) draining toward the Hazleton Shaft. (C. Ex. 17.)

111. HCP submitted a "mine drainage analysis report" on November 8, 2006. (C. Ex. 19.) The report consisted of a detailed report by Robertson consistent with the opinions he expressed on the record in this case. (C. Ex. 19.) For the first time, the report describes Robertson's view of the mine drainage system in detail. The report includes several conclusions of note:

a. The Site is located within the Cranberry Creek Subbasin of the Jeddo Tunnel drainage basin, while the Hazleton Shaft is located in the adjacent Hazleton Creek Subbasin (also within the Jeddo Tunnel basin). Although in separate basins, flow observed in the Shaft comes from the Cranberry Creek Subbasin.

b. The Cranberry Creek Subbasin occupies an area of 8.53 square miles. The Project encompasses only about 277 acres of that area.

c. Virtually all drainage from the Cranberry Creek Subbasin flows through the 277-acre Project area.

d. Sampling at the Hazleton Shaft is preferable to sampling at the Jeddo Tunnel, which drains 32.24 square miles.

e. Groundwater flowing onto the Site discharges into a rock drainage gangway as well as into the deep mine voids.

f. Mine drainage originating from deep mine workings west of the Site passes through the deep mine workings beneath the Site.

g. The mine drainage system was designed to collect and convey water infiltrating into the mine workings.

h. "[T]he monitoring program required under the general permit must be one that monitors potential impacts of material placed on the surface of the property through which surface water may infiltrate and pass into the deep mine environment." (P. 17.)

112. By letter dated December 1, 2006, Laslow approved HCP's monitoring plan. (DEP Ex. 20.)

113. From the time of its initial submission onward, HCP relied heavily upon the groundwater investigation that was conducted as part of the Act 2 process that led up to the Baseline Environmental Report (BER). (DEP Ex. 12.) Yet, the site characterization work expertly performed by Lawrence Roach and others was not designed to and did not in fact set up a comprehensive, long-term monitoring program for the Project as a whole. (T. 734, 745, 871-73, 894, 963-64, 999, 1062-63, 2043-45, 2063-68, 2105-08, 2116-23, 2246-51; C. Ex. 35, 41.)

114. The BER's analysis of groundwater was attenuated due to the report's selection of Site-Specific Clean-up Standards for groundwater based upon the precedent conclusion that there are no complete groundwater exposure pathways from the landfills to potential receptors. (DEP Ex. 41.) Site Specific Standards relate to Act 2 cleanups, not the General Permit or the DOA. (DEP Ex. 15.)

115. The BER refers to only one sample taken from the Hazleton Shaft, the only downgradient monitoring point subsequently proposed for the Project. (T. 2119-20, 2246-47; DEP Ex. 27 (Vol. I, Table 2-13), 41 p. 2.) The sample was taken in 1993. (T. 2246; DEP Ex. 26, 41.)

116. Roach assumed that there would be no complete exposure pathway to

groundwater in designing the landfill closure remedy. (T. 2108, 2123-24, 2155-57; DEP Ex. 41.)

117. Roach assumed that the private wells along Route 309 would not be affected because they are topographically upgradient and structurally (geologically) updip, which means there may be no complete exposure pathway. (T. 2156.)

118. Eugene Pine, a Department hydrogeologist, expressed the purpose and importance of groundwater monitoring, and appropriately distinguished between a groundwater investigation for an Act 2 closure and an adequate monitoring plan for a beneficial use project, as follows:

> [The DOA application] states "**It is important to note that any potential impact to groundwater both from the individual components and the beneficial use material will be monitored through compliance with the site specific Groundwater and Monitoring Plan for the site contained within this DOA application".** This wording obligates the consultant to do what they have stated they will do ... have a groundwater monitoring system that will be reasonably able to detect any release of contamination into groundwater or surface water, from the individual components and/or the beneficial use (BU) material, at the site. One may argue that since it is not an engineered waste disposal facility like a landfill, the normal criteria DEP would employ for a groundwater monitoring plan review in those cases should not necessarily mean the beneficial use project should be subject to an equally-rigorous review. However, one may also argue that some basic common components should be inherent to both, for example wells that will not be affected by the operation for the project, and upgradient and downgradient monitoring points. These factors, in this case, are important for the operators of this project not only to effectively monitor the groundwater to detect any release from the beneficial use material, but also to document any contamination that might exist that may be incorrectly attributed to the BU material/project, when in fact the contamination originates from another source.
>
> DEP approval of the Baseline Environmental Report (on January 6, 2005), does not convey and/or imply subsequent approval of a groundwater and surface water monitoring plan for a future project that has the potential to impact groundwater, due to the size (253 acres), estimated volume of material (approximately 10 million cubic yards) and multi-tiered testing afforded to the dredge and dredge-mix beneficial use material. This does not mean that

> groundwater-related work done in the past has no value, nor does it mean that some of parts of that work cannot be incorporated into a groundwater monitoring plan for the GP/Beneficial Use project.

(C. Ex. 35 (emphasis in original). *See also* C. Ex. 91.)

119. Thus, the monitoring plan approved by the Department consists of monitoring of several on-site wells, most of which are dry and have nothing to sample, and a single downgradient off-site monitoring point: the Hazleton Shaft. (Findings of Fact ("FOF") 115; T. 743; DEP Ex. 27.)

120. The on-site wells, although usually dry, are not without value. They show that there is no continuous zone of saturation on the Site itself at or above the depth of the wells. (T. 2082-83, 2147.)

121. The existing well network cannot be used to detect future off-site effects from the Project. (T. 915, 926, 1030, 1083, 1115-16, 1543, 2147, 2251.)

122. Waste will be used as fill beyond where the on-site wells are located. (C. Ex. 185.)

123. It is not a generally accepted practice to have all monitoring wells in the midst of active project areas, as many of the existing wells on the Site appear to be. (T. 175-76; C. Ex. 153, 185.)

124. HCP made no attempt to drill any off-site wells or sample in any off-site mine workings other than the Hazleton Shaft and the Jeddo Tunnel.

125. Although the Site presents unique challenges, it is not uncommon to drill monitoring wells into a mine pool in the anthracite fields of Northeast Pennsylvania. (T. 1545, 2997-98.)

126. There has been almost no field investigation of groundwater conditions outside of

the area of future waste placement. (T. 743, 1028, 1032, 1610, 1755, 2257, 2635.)

127. Not a single downgradient, property-line, or off-site monitoring well is proposed for the Project. (T. 718-19, 1028, 2251; DEP Ex. 12; HCP Ex. 36; C. Ex. 185.)

128. No *existing* off-site water-supply wells have been included in the monitoring plan although such wells exist in virtually every direction. (T. 1607, 1678, 1755, 2468-71, 2635; HCP Ex. 86, 152.)

129. Water at the surface of the Site in its currently highly disturbed condition is immediately absorbed into the ground and becomes groundwater. (T. 1544, 2318, 2405.) Even Cranberry Creek disappears. (FOF 62.) It is not expected, however, that such rapid infiltration will persist after the Project is completed and the Site is returned to approximate original contour. (T. 2814-89.) Residual waste will be very deep in places. No hydrogeologist specifically opined on what effect these dramatic changes in site conditions will have on groundwater flow.

130. At least three downgradient wells are considered the norm for a permitted disposal facility. (T. 179, 195, 748-49.)

131. Having only one downgradient monitoring point for a project of this nature and size is highly unusual and inconsistent with standard and accepted practices as well as a Departmental guidance manual, but it is not *necessarily* unlawful or inappropriate. (T. 165, 178, 195, 498, 748-49.)

132. In other cases where waste has been placed on the ground in anthracite areas that have been undermined, thereby making groundwater sampling problematic, a greater emphasis has sometimes been placed on ensuring adequate detection within a double-liner system. (T. 750.) The Project does not include a liner. (T. 750-51.)

b. The use of the Hazleton Shaft as the only point for monitoring groundwater captured by the gravity drainage system

133. Robertson was the only expert to testify in support of the Hazleton Shaft as the sole off-site monitoring point. (T. 2292.) Roach deferred to Robertson on this issue. (HCP Ex. 87.) The Department's only expert witness, Gerald Olenick, did not offer testimony on this precise point.

134. Robertson is a highly qualified and respected hydrogeologist. (T. 2264-78.)

135. The Department only presented the *factual* testimony of Keith Laslow. Laslow testified as a factual matter that the Department found Robertson's plan to be acceptable. (T. 2951-58.)

136. CAUSE presented the expert testimony of Christopher Duffy and Robert Gadinski, both of whom are also highly qualified experts in hydrogeology. (T. 225-54, 847-69.)

137. Gadinski's expert opinion that the use of the Hazleton Shaft as the sole off-site groundwater monitoring point is insufficient is credible. Robertson's opinion that it is appropriate, at least without further field work, is *not* credible. (T. 915-16, 1031-33, 1719, 2987, 3005.)

138. The Site is underlain by extensive abandoned deep mine workings. (T. 177; C. Ex. 166; HCP Ex. 153, 155-56.)

139. The mine workings include a gravity drainage system, built as much as a century ago, that was designed to intercept groundwater entering the mine workings and rechannel that water away from deeper mine workings, thereby reducing pumping costs. (T. 177, 1702-06, 2317-20, 2349-53, 2377-80; C. Ex. 166; HCP Ex. 153, 155-56.)

140. The gravity drainage system is composed of the mine workings themselves, as well as a complex series of gangways, rock tunnels, bore holes, and shafts, all of which funnel

water to a massive discharge point known as the Jeddo Tunnel. (T. 177; C. Ex. 166; HCP Ex. 86, 155-56.)

141. The Jeddo Tunnel discharges to Little Nescopeck Creek. (HCP Ex. 97.)

142. The Hazleton Shaft is a preexisting vertical mine shaft extending 600 feet down from the surface that provides open-air access to the gravity drainage system. (T. 759, 2953-54.)

143. Downgradient monitoring wells generally should be within 200 feet of the perimeter of a disposal area to function as viable detection points. (T. 178, 735.)

144. The Hazleton Shaft is one and one-half miles away from the Site. (T. 748, 901, 1031.)

145. Robertson has credibly opined that much of the groundwater from the Site will find its way into the abandoned mine workings, including the gravity drainage system. (T. 2339-77, 2502-03; C. Ex. 166.)

146. Using a desktop analysis of mine maps, Robertson has explained in great detail how groundwater passing from or through the Site will travel *after* it is captured by the abandoned mine workings, including the gravity drainage system, in the vicinity of the Site to the extent the workings are open and intact. Much of the water from the Site that infiltrates the workings will travel to the Hazleton Shaft. (T. 1702-06, 2306-87, 2502-05, 2609, 2668-69, 2950-58, 3005; HCP Ex. 86, 97, 155-56; C. Ex. 166.)

147. The mine maps that Robertson used were generated in the first half of the last century and last updated in 1959. They were admitted into evidence over objection under the ancient-documents exception to the hearsay rule. (T. 2986; C. Ex. 166.)

148. It is appropriate, and indeed essential, to rely as Robertson has on mine maps in assessing groundwater flow and designing a monitoring system in an area that is heavily

disturbed by abandoned deep mine workings. (T. 1531-37, 2607, 2945-52, 3009, 3020; C. Ex. 163-66; DEP Ex. 42; HCP Ex. 86, 141.) Mine maps are a reliable and generally accepted source of information. (T. 1702-06, 2317-20, 2335-56, 2377-78, 2609, 3009.)

149. Mine maps, however, do not reveal how much groundwater is actually captured and retained by the system. Gadinski credibly opined that it was not sufficient in this case to unquestioningly and blindly rely on mine maps generated decades ago to draw conclusions regarding groundwater behavior without some independent field verification. (T. 1553-58, 1607, 1681-82, 1706, 1770, 2987, 2990-91, 3005, 3010-11.)

150. Over the course of decades that have passed since the mine maps were drawn it is reasonable to expect that some of the passages will have become blocked as a result of rockfalls and subsidence. (T. 933-34, 941, 2604-15, 2956-58, 2987.) It is not known to what extent such blockages have occurred on and near the Site. (T. 2615.)

151. Robertson in rendering his opinion that the gravity drainage system is functioning relied upon hearsay statements by one individual who did not testify and Roach's testimony to the effect that both individuals felt a "pull" when they lowered a sampling bailer on a rope down into the Hazleton Shaft, which is indicative of flowing water, and hearsay statements of other persons who did not testify regarding water level measurements in the shaft taken in 1997 through 1999 which were admittedly inaccurate in some respects. (T. 2120, 2377-80, 2383-87, 2525-28, 2606, 2665; HCP Ex. 143 (limited purpose exhibit).)

152. HCP did not measure the amount of water flowing at the Hazleton Shaft monitoring point. (T. 2513, 2587-88, 2593.)

153. Robertson also supported his opinions by stating that he grew up around coal mines, that he stuck his ear near the shaft, and he did not hear any water cascading down the

shaft. (T. 2519-20, 2523-29.)

154. A video inspection could easily have been performed and would have provided helpful information regarding, among other things, whether water is cascading into the shaft and the extent to which water is flowing in the shaft. (T. 1544, 1694, 1700, 2528, 3001.)

155. Other alternatives may exist for verifying Robertson's theories regarding the functionality of the mine workings but they were not considered or explored. (T. 1033, 3001, 3005.)

156. Gadinski credibly opined that further investigation would be necessary to ascertain to what extent groundwater from the Site is actually picked up by the Hazleton Shaft. (T. 1607, 3019.)

157. In operating a meaningful monitoring system it is important to compare results from a downgradient sampling point to baseline (preconstruction) results for that point as well as an upgradient source measuring the same regime. (T. 3006; C. Ex. 35, 91.)

158. No sampling is proposed in mine workings upgradient of the Hazleton Shaft to provide a standard of comparison for results obtained at the Hazleton Shaft. (T. 1687; C. Ex. 12, 86.) The only upgradient sampling is of *shallow* groundwater at monitoring well GW-C2. (DEP Ex. 12.)

b. The Problem of Dilution

159. Even if it is shown that the Hazleton Shaft is functioning as theorized, it has not been shown that it is appropriate to use it as the sole location for observing any future changes in the quality of groundwater resulting from the Project. Water in the Shaft comes from such a large area that it has not been shown that sampling that water will provide meaningful data regarding Project performance. (T. 1119-20.)

160. Robertson concedes that the shaft drains an area of 7.62 square miles, of which only 277 acres make up the Site. (T. 2359-70, 2591-93; HCP Ex. 97, 142; C. Ex. 164.)

161. There is no indication that upgradient water will actually flow through the residual waste mixture. (T. 2591-93.)

162. The Phase II Environmental Assessment (DEP Ex. 27) contains the following findings:

a. "[V]irtually all of the leachate and shallow perched groundwater percolates downward from the base of the landfill through natural and artificial voids in the underlying soils and bedrock. This leachate eventually reaches the mine pool which lies several hundred feet beneath the surface, *where it is greatly diluted.*" (P. 50 (emphasis added).)

b. "[G]roundwater quality at the Hazleton Shaft (7,000 feet northeast of the Site) can *reasonably be assumed* to be representative of the *integrated groundwater quality within the Hazleton Coal Basin.*" (P. 51 (Emphasis added).)

c. The entire Hazleton Coal Basin contributes to the mine pool. The contribution from the Unit B landfill [the Hazleton Landfill] is conservatively estimated at 2 percent or less. (P. 50.) (The Hazleton Landfill consists of approximately 55 acres or one-fifth of the Site.)

163. One of the Department's hydrogeologists involved in review of the Project, Alexander Zdzinski, testified that the Hazleton Shaft is draining an area much larger than the Site and may even include water downgradient of the Site. There will be a significantly greater volume of water in the Shaft than simply that which has infiltrated the Site. (T. 755-56.)

164. Zdzinski testified quite credibly as a fact witness as follows:

A. I think the Hazleton shaft is going to intercept water, is essentially going to intercept water, all the water that's going to be passing through the landfill. But it's also going to be picking up lots of other water from other areas of that basin. There is going to be a certain amount of dilution by the time it reaches the Hazleton shaft.

Q. By Mr. Fiorentino: A certain amount?

A. Yes, a significant amount of dilution. But constituents that are released by the landfill should ultimately end up at the Hazleton shaft. Whether they percolate directly downward, whether they flow through--for a certain amount of length through the unconsolidated veins, but ultimately should end up at the mine pool and would end up at the Hazleton shaft. So --

Q. Okay, but under your scenario, under your view, if you have a very large area draining to the shaft, much larger than the area just at the site, at some point you'll agree that an ability to detect a constituent could be lost because the dilution is so great, is it not true?

A. I don't know if you lose the ability. You lose the sensitivity of the system. In other words, you have to have a much greater release to be able to see a marked difference at the detection point.

You lose--again, if it were physically possible to have--well, let me put it this way: In like a down mine pool situation where you're able to locate wells relatively close to the site, you wouldn't have anywhere near the dilution of what you would have in a case where water is entering the mine pool. The system would be relatively sensitive to small releases.

Here, both from the dilution in the mine pool and also from the fact you're taking in water from a much greater area than the site, I don't know if I would say that you would lose all ability to detect things, but you would have to have a much larger release at the site to be able to see it above the background level at the Hazleton shaft, what the normal background level was of the mine pool.

(T. 756-58.) There is no explanation anywhere in the record for how these concerns regarding the utility of sampling results at the remote Hazleton Shaft were alleviated.

165. Gadinski's view, which we find to be credible, is that the Shaft will intercept water from the Site, but it will also pick up significant amounts of water from other areas of the

basin. This will result in a tremendous amount of dilution which will materially compromise the value and significance of sampling results. (T. 756-58, 901-06, 1031, 1698, 1771-72.)

166. Because groundwater from the Site making its way to the Hazleton Shaft is diluted, sampling is unlikely to detect anything less than dramatic contamination at the Site, and even if release is suspected, it will not be possible to show that it originated at the Site. Therefore, the Shaft appears to be useless as a meaningful monitoring point, even assuming it is functioning as theorized. (T. 757-58, 915-16, 1031, 1771-72.)

167. Robertson did not quantify what percentage of the water seen at the shaft comes distinctly from the Site itself. (T. 2591-93.) However, the Phase II Environmental Assessment calculated that less than two percent of the groundwater in the basin comes from the Hazleton Landfill, which consists of about 55 acres. (DEP Ex. 27.)

168. Laslow provided no testimony regarding whether sampling at the Hazleton Shaft would be effective in detecting contaminants released from the Project.

169. Robertson offered no opinion on the sensitivity of sampling at the Hazleton Shaft.

170. There is *no* record evidence that contradicts Zdzinski's credible point that monitoring at the Hazleton Shaft will at best only detect "a much larger release" from the Site.

c. Monitoring of groundwater not captured by the Hazleton Shaft

171. Any groundwater not captured and retained by the gravity drainage system cannot be analyzed at the Hazleton Shaft and will not otherwise be monitored because there are no other off-site monitoring points in HCP's plan.

172. Laslow accepted Robertson's recommendation of a single, distant monitoring point because, although drilling wells in other locations would be "preferable," it would likely

end up resulting in dry wells. (T. 2950-51, 2954-58.)

173. Robertson's opinion that no off-site sampling other than the shaft is warranted is based upon his conclusion that all but an inconsequential amount of water infiltrating the Site from above and from all directions (not already in mine workings) will move directly downward until it is captured by the gravity drainage system in the old mine workings. *No* appreciable water will move off-site laterally or bypass the drainage system or enter but then exit the drainage system at any time in Robertson's view. (T. 2279-2675.) The gravity drainage system acts as a perfect "sink" pulling in all groundwater above it from every direction. (T. 2663-64.)

174. We credit the expert opinion of CAUSE's expert, Christopher Duffy that Robertson's vision of a perfect, functioning system that captures all of the water from the Site is implausible (T. 303-31; C. Ex. 189), and Gadinski's opinion that at the very least it is not supported by adequate investigation (T. 1544-45, 1558, 1607, 1684-85, 1694, 2987, 3002-12, 3019).

175. Duffy's opinion that the abandoned mine workings capture some, but not all, of the groundwater flowing from or through the Site is not derived from a computer model, but rather, his general understanding of hydrogeologic principles and of the Site. This opinion is credible. (T. 303, 308-11, 359-60, 3050-56, 3066-68; C. Ex. 1C.)

176. Duffy acknowledges that a computer model such as the one that he used is a tool that attempts to *predict* generalized flow paths in a watershed. (T. 282, 319, 3029.) The model's predictions, particularly to the extent they are to be applied to a localized area, should not be accepted at face value, but instead need to be verified by field testing. (T. 332, 3029.) This opinion of Duffy is credible and consistent with Gadinski's credible opinions.

177. Gadinski does not adopt Duffy's reliance upon a computer's interpretation of

remote data input or Robertson's heavy and nearly exclusive reliance upon ancient mine maps. Instead, he credibly opines that models and mine maps must be supported and verified by meaningful field measurements, both on and off-site. There was virtually no off-site work for this Project. (T. 1607, 1610-11, 2987, 3005-12.)

178. Although it is reasonably certain that the gravity drainage system does not capture 100 percent of the groundwater from the Site, there is insufficient evidence of record to assess where that groundwater flows, which in turn determines where it should be monitored. (FOF 120, 183, 187.)

179. Robertson offered no definitive opinion of groundwater flow direction outside of the gravity drainage system because of his belief that the gravity drainage system functions as a perfect sink. He did suggest, however, that it is unlikely to move north or south due to "reported levels" in nearby water wells and the strike and dip of geologic strata, which will tend to funnel flow from the west, north, and south in an eastward direction. (T. 2389-90, 2471, 2477; HCP Ex. 150.) No monitoring wells have been proposed for east of the Site.

180. The Environmental Site Assessment for Unit C contains the following statement:

> These groundwater monitoring wells [GW-C1S, GW-C2S, GW-C3S] indicate that saturated conditions exist in the soil beneath the western portion of the site in the vicinity of the surface water features discussed above. The relative elevation of groundwater found in each well also indicates that the water table is shallow and roughly conforms to surface topography in the area west and northwest of the OML (Old Municipal Landfill). The relative water table elevations indicate that groundwater flow is to the northwest coincident with the direction of surface water flow.
>
> It should be noted that the groundwater encountered in monitoring well GW-C1S is likely perched since this well was installed at a location under which the Buck Mountain, Gamma and Warton Veins have been deep mined.

(DEP Ex. 29.)

181. *In situ* groundwater tends to flow in fractures and voids (T. 3002-03), and water flowing in fractures tends to mimic topography (T. 3053). The Site is highly fractured. Duffy's opinion that this flow can in some cases overcome bedding planes is credible. (T. 353-54, 3048-53, 3060-61.) It should not be *assumed* that all flow will be along bedding planes. (T. 354.)

182. Roach opined that "the main component" of shallow groundwater flow on the Site is downward rather than lateral. (T. 2251.)

183. There are no property-line or monitoring off-site wells and no water supply wells were tested to verify any of the expert's theories. (T. 1607, 1719.)

184. Duffy's opinion that the majority of the groundwater influenced by the Site (including any contaminants that find their way into that groundwater) will bypass the Jeddo Tunnel System and flow generally to the north and will reach as far as the Nescopeck (as opposed to the Little Nescopeck) Creek after passing through areas with approximately 30 private wells is not based on substantial evidence and it is not credible. (T. 303-06, 309, 311, 315-18, 331.)

185. Duffy based his opinions regarding the direction and quantity of flow almost exclusively upon a groundwater computer model. Duffy reviewed the digital information on groundwater in the area of the Site (T. 253-58, 262-66, 274-78, 291-95), and created a watershed model for the region (T. 266-67, 279-82). His model is a steady-state simulation that sometimes, but not in all cases, uses average characteristics for the region. (T. 270-71, 352-53.)

186. The model divides groundwater flow at the Site into three layers. (T. 283; C. Ex. 1.) Each layer has groundwater contours and flow vectors. (T. 302; C. Ex. 1.)

187. Robertson's criticisms of Duffy's use and interpretation of the computer model for this setting are credible and well-taken. Duffy's application of the computer model to this

Site was inappropriate and lacked credibility for numerous reasons, including the following:

a. Duffy repeatedly revised his exhibits in response to questioning from the parties and the Board, admitting that his original key exhibit was inaccurate. (T. 3038.)

b. Duffy's exhibits showed adjacent contour lines that depicted the same elevations. Duffy actually rejected Robertson's sympathetic effort to explain those lines. The only explanation provided was that "the computer" was trying to sort out jumbled information.

c. More importantly, Duffy's model admittedly does not have a good algorithm for underground drains. (T. 230.) There is no basis for Duffy's decision to arbitrarily increase the hydraulic conductance rate of the Jeddo Tunnel system by 10,000. Duffy tried many different values, and any value over a hundred or even a thousand gives essentially the same answer, "so there's very little sensitivity to that after the number gets so large." (T. 281-82.) This suggests the value chosen has no particular relation to reality.

d. Duffy used a "presumed" hydraulic conductivity for all of his inputs. (T. 279.)

e. Use of the model for a site riddled with old mine workings was not appropriate. The model is best suited for an ideal acquifer situation. As a site departs more from a homogenious setting to increasingly complex settings, the model becomes less valuable. Furthermore, Duffy did not consider individual mine features but instead simply increased hydraulic conductivity generally in areas with mine workings. (T. 361.) The presumably overpowering influence of topography in this setting is improperly exaggerated by the model (which is not to say that topography exerts no influence). (T. 438, 851-52, 866-68.)

f. The application of the model is inaccurate because it does not extend the areas of very high hydraulic conductivity under the Site into areas with known abandoned mine

workings. (T. 279-80, 2418-30; C. Ex. 1B; HCP Ex. 146.)

g. The model's use of three layers is completely artificial and in several cases misleading. For example, Layer 2 contains all of the underground mine workings. (T. 284, 308-310, 415, 2420; C. Ex. 1B.) There are actually more than 500 feet of underground mine workings. (C. Ex. 166.) Layer 2 was an imprint of Layer 1. (T. 2478-79.) However, Layer 2 contains the underground mine workings. (T. 286, 2478.). If Layer 2 gave due consideration to the mine workings, there should have been significant departures from Layer 1. (T. 2484-86.)

h. The model covers a water basin of about 338 square miles. (T. 263-64.) The drainage area of the Jeddo Tunnel is 32 square miles. (T. 275, 1269, 2394; C. Ex. 68.) Thus, the area covered by the model is greater than ten times the size of the drainage area of the Jeddo Tunnel. (T. 2394.) The Site consists of about 277 acres. (T. 2393.) Thus, the model is more than 800 times the size of the Site. (T. 2393.) The model is simply not site-specific enough to be of much value.

i. If the modeled predictions were accurate, one would see saturated conditions near the surface of the Site. (T. 2574-75; HCP Ex. 122; C. Ex. 1B, 181.) One would see lakes on the Site if the predictions in Duffy's model were accurate. (T. 2332-33, 2406-14; HCP Ex. 144-45.)

j. There are too many obstacles for the groundwater to reach Duffy's predicted destination of six miles north of the Site. (T. 449, 455-56, 460-61, 1660, 2490-91.) Groundwater would need to bypass Black Creek and the Black Creek Valley, which are underlain by deep mine workings. (T. 449, 455-56, 460.) It would need to cross three divides and a high ridge. (T. 461.) If the model were truly controlled by topographic drive, then such features would either block or impede most or all flow to the predicted destination. (T. 2451-54;

HCP Ex. 151.)

k. Duffy calibrated the model over the entire 337.84 square miles of the model. (T. 263, 3025-27; C. Ex. 1.) Robertson attempted to determine if the model was calibrated for wells similar to the wells at the Site. (T. 2442-46, 2595-2600; HCP Ex. 149.) The model shows a good calibration with wells in the valley. (T. 2446, 2595-2600.) It does not, however, show that it is well calibrated with wells on the plateau. (T. 2446-47, 2595-2600.) When the wells located within two miles of the Site are compared to the model, the correlation coefficient is 0.05. (T. 2466-69; HCP Ex. 152.) When wells above 450 meters (or 1475 feet) are compared to the model, the correlation coefficient is a very low 0.11. (T. 2446.) These low correlation coefficients indicate that there is a poor correlation between the model and actual well data. (T. 2469.)

l. Although the model is supposed to be a steady-state simulation that uses average characteristics for the region (T. 270-71, 352-53), the model is not calibrated to average flow from the Jeddo Tunnel. (T. 2431-32.) Instead, the model uses a base flow from the Jeddo Tunnel. (T. 266-67, 2431-32, 2439-40, 3030-33.)

188. Duffy opined that water wells along the Little Nescopeck Creek could be affected by water quality concerns manifesting at the Jeddo Tunnel discharge due to, *inter alia*, seasonal reversals of flows in groundwater along the creek. (T. 317-18, 3032-37; C. Ex. 1.) The opinion is speculative, theoretical, not based on any actual data, and not credible. (T. 3032-37.)

189. Thus, there is no credible expert testimony from Robertson or Duffy on *where* groundwater that escapes the gravity drainage system will flow.

190. There are two deep mine pools below the Site: the Buck Mountain mine pool and the deeper, more extensive mine pool in the Hazleton syncline. (T. 895, 907, 1553-55; HCP Ex.

86.)

191. Robertson agrees that the Hazleton Shaft will not measure the water quality of deep mine pools below the Site. (T. 898-900, 2315-20.)

192. It is unlikely that the Buck Mine Pool is in communication with private water wells along Route 309 because of the difference in the respective elevations, but no field work has been done to prove or disprove this conclusion. (T. 896, 908, 927, 1612, 1755, 2471, 2985.)

193. No attempt was made to advance a well to either of the two mine pools on the Site. (T. 743, 894-96, 908, 2083-86, 2985.)

194. No well was drilled to the deep mine pools because it would be very difficult and expensive ($50,000) to do so given the number and pitch of mined coal seams, and because despite the extraordinary effort that would be necessary, there is no way to tell whether sampling obtained would be representative. (T. 754-55, 2083-86.)

195. The actual depth of mine pools under the Site has been surmised from mine maps but not verified with any actual measurements or field data. (T. 897, 908, 927, 1553-56, 2985-86.)

196. The deepest mine pool appears to consist of standing, slow-moving saturated conditions, 300 feet of which is lower than and not continuously drained by the Jeddo Tunnel system. (T. 898, 930.)

197. The dominant flow path in the deep mine pools is probably to the east, but that has not been verified. (T. 3010.)

198. The water quality of the deep mine pools beneath the Site is unknown. (T. 903, 908, 1687.)

199. The Department's groundwater guidance manual recommends that at least one

well be advanced to the mine pool. (T. 917, 919; D.Ex. 126.)

200. It is not clear whether any water from the Site is likely to find its way into the deep mine pools partly due to the ever-changing definition of the "mine pool." (*See* DEP Ex. 12; HCP Ex. 36, 86.)

201. There is no evidence that any receptors have, can, or ever would use or be exposed to water from the deep mine pools. (T. 872, 894, 908, 2155-57, 2777.)

d. What Should Be Done Now?

202. It is undisputed among the many experts and Department employees who testified that it will be difficult to develop a *meaningful* program capable of monitoring the effect of the Project on groundwater at this complicated site. (T. 769-70.)

203. Gadinski has not personally performed a detailed investigation to determine the design of an adequate monitoring system. He has criticized the existing system but offered no alternatives with any degree of specificity. (T. 1033, 1512, 1531-36, 1703, 2990-91, 3005-12, 3020-21.)

204. Duffy recommends that, although very difficult to do, several monitoring wells should be completed to multiple depths off-site in order to resolve whether predicted flow directions are in fact accurate. (T. 332, 361-62.) The wells should not be limited to mine workings or coal measures in Duffy's opinion. (T. 361-62.)

205. The Department has not evaluated alternatives to the existing monitoring plan. HCP never presented any alternatives.

206. The Department's approval of the DOA without an effective groundwater sampling plan was inconsistent with its regulatory obligation to ensure and verify that the Project will not discharge contaminants or harm the public health, safety or welfare or the environment.

207. The Department acted unlawfully and unreasonably by approving the Project with a deficient groundwater monitoring plan.

208. The Department acted lawfully and reasonably in approving all aspects of the Project other than the groundwater monitoring plan.

209. The Department acted lawfully and reasonably in entering into the COA with HRA.

DISCUSSION

I. The Determination of Applicability (DOA)

CAUSE lodges the following four objections to the Department's approval of the DOA:

- General Permit WMGR085D001 is inapplicable to the Site and therefore DEP's approval of the DOA application was unreasonable and contrary to law.
- HCP does not demonstrate that dredge mixture will not pose greater harm or threat of harm than site spoils and overburden and therefore DEP's approval of the DOA application was unreasonable and contrary to law.
- HCP failed to demonstrate that there is no presumptive evidence of potential pollution of waters of the Commonwealth.
- HCP did not demonstrate there is no potential for harm or threat of harm resulting from its activities under General Permit WMGR085D001 and therefore DEP's approval of the DOA application was unreasonable and contrary to law.

In additional to defending against these objections, HCP raises the following additional defenses:

- CAUSE lacks standing.
- CAUSE has waived some of its challenges.

We will deal with HCP's defenses before turning to the merits of CAUSE's objections.

A. Defenses

1. Standing

Persons who are "adversely affected" by a Departmental action have a statutory right to file an appeal before this Board. 35 P.S. § 7514(c); Section 307 of the Clean Streams Law, 35 P.S. § 691.307 (persons who are or may be adversely affected may appeal); Section 108 of the Solid Waste Management Act, 35 P.S. § 6018.108; 25 Pa. Code § 1021.2 (an appealable "action" is an order, decree, decision, determination or ruling by the Department "affecting" personal or property rights, privileges, immunities, duties, liabilities, or obligations of a person). To suffer an adverse effect means that the would-be appellant is threatened with harm that is greater than that faced by the public at large (i.e. substantial) and there is a direct and immediate link (i.e. causation in fact and proximate cause) between the Department's action and that threat of harm. *Giordano v. DEP*, 2000 EHB 1184, 1185; *see generally William Penn Parking Garage v. City of Pittsburgh,* 346 A.2d 269 (Pa. 1975); *Delaware Riverkeeper v. DEP*, 2004 EHB 599, 630, *aff'd* 879 A.2d 351 (Pa. Cmwlth 2005). In the context of third-party appeals from the issuance of permits, we have held that third parties are adversely affected if they use the area potentially affected by the permitted activity and there is an objectively reasonable threat that the permitted activity may affect that use. *Pennsylvania Trout v. DEP,* 2004 EHB 310, 355-56, *aff'd*, 863 A.2d 93 (Pa. Cmwlth. 2004); *Giordano v. DEP*, 2000 EHB at 1187. A realistic potential of harm to a person's aesthetic appreciation of an environmental resource is enough to establish a right to appeal. *Orix-Woodmont Creek I Venture L.P. v. DEP,* 2001 EHB 82, 86; *Ziviello v. DEP*, 2000 EHB 999, 1004 n.9. The would-be appellants are not required to prove their case on the merits in order to have the right to appeal, but they must show that they have more than subjective apprehensions. *Greenfield Good Neighbors v. DEP,* 2003 EHB 555, 566; *Giordano*, 2000 EHB

at 1186. An organization such as CAUSE may appeal if at least one of its members has standing to appeal. *Groce v. DEP*, 2006 EHB 856, 895, *aff'd*, 921 A.2d 567 (Pa. Cmwlth. 2007); *Pennsylvania Trout*, 2004 EHB at 355.

Thus, when a person's right to file an appeal is challenged, we consider three things: (1) the Department's action, (2) the person's interests, and (3) the potential causal link between the two.[5] We do not consider *why* the person objects to the Department's action. We do not consider whether the Department's action was proper. An analysis of the merits has no place in the inquiry regarding standing beyond the requirement that the threat of harm must amount to more than pure speculation. "In determining whether a party has standing, a court is concerned only with the question of who is entitled to make a legal challenge and not the merits of that challenge." *Unified Sportsmen v. Pa. Game Commission*, 903 A.2d 117, 122 (Pa. Cmwlth. 2006). *See also In re T.J.*, 739 A.2d 478, 482 (Pa. 1999). Whether a party can ultimately prove its case is one thing; whether it is entitled to try is quite another.

The confusion between the standing inquiry and the merits inquiry has resulted in a great deal of unfortunate and unnecessary confusion in litigation before the Board. Because we do not delve into a person's specific objections in the standing inquiry, it necessarily follows that standing cannot be "issue-specific." Standing is specific to each Departmental action, not whatever objections there may be to the action. *Borough of Roaring Spring v. DEP*, 2004 EHB 889, 904 (J. Coleman) ("The agency action is the subject of an appeal, not the individual objections raised."). To possess standing to pursue a legal challenge to a controversy, a party must have an interest in the controversy, *Unified Sportsmen*, 903 A.2d at 122, not each and every

[5] The person's interests must be within the zone of interests protected by a statute, *Florence Township v. DER*, 1996 EHB 282, 289, but that will rarely be a concern in Board cases. CAUSE's members' interests in a safe environment, for example, are obviously protected by the Solid Waste Management Act and the

issue that makes up the controversy.

In a related context, the Commonwealth Court has admonished us not to erect incremental barriers to participation in Board proceedings that are not found in our statute. *BFI v. DER*, 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991). There is nothing in our jurisdictional statutes to suggest that a person must have standing with respect to specific issues. Some administrative agencies are limited to the review of a preexisting record. In such cases, a person's challenge is necessarily limited to the objections preserved in that preexisting record. In contrast, this Board's review is *de novo*. *Warren Sand & Gravel Co. v. DER,* 341 A.2d 556, 565 (Pa. Cmwlth. 1978). The objections that may be raised and pursued are constrained by our rules of practice and procedure (*e.g.*, specific objections must be listed in the notice of appeal), the Board's narrowly defined subject matter jurisdiction, and the rules of evidence (*e.g.*, objections must be relevant to the action appealed), not by principles of standing.

Standing jurisprudence is designed to ensure that persons whose rights are affected receive that process which is due, that the Board does not imprudently overstep its boundaries as a quasi-judicial agency, and that our precedential decisions are derived from the vigorous litigation that can be expected from a truly interested party. *Wurth v. DEP*, 2000 EHB 155, 170. None of those considerations are countervailed by allowing an interested party to raise whatever relevant objections it chooses in order to protect its interests. HCP has not cited and we have not independently uncovered a single court case that holds that standing must be established with respect to each and every specific allegation in a complaint.

In summary, a person's right to appeal turns on our assessment of the objective threat to the person's interests from the Department's action, not the merits of the Department's action.

Clean Streams Law.

There is nothing relating to the applicable statutory language, our administrative process, or considerations of prudential restraint that suggests that the standing inquiry should be convoluted with the merits inquiry or that standing must be established on an objection-by-objection basis. Any suggestion to the contrary in our case law is hereby overruled. *See, e.g., Borough of Glendon v. DER*, 1990 EHB 1501. *See generally Prizm Asset Management Company. v. DEP*, 2005 EHB 819, 839.

Thus, HCP's contention that CAUSE must have standing specific to both the Determination of Applicability (DOA) and the Consent Order and Agreement (COA) is entirely correct. The fact that we have consolidated CAUSE's appeals from those separate actions does not diminish CAUSE's obligation to prove its right to appeal each separate action. HCP's contention that CAUSE must prove standing with respect to each issue related to each environmental medium ("standing on air issues," "standing on water issues," etc.), however, is incorrect.

None of this is to say, however, that standing need not be proven as a factual matter. *See Florence Township v. DEP*, 1997 EHB 616, 626; *Township of Florence*, 1997 EHB 763, 774. Here, we have no hesitation in concluding that CAUSE's members, and therefore CAUSE, have a statutory right to appeal both the DOA and the COA. The Project cannot go forward without the DOA *and* the COA. For example, the Hazleton Landfill must be capped pursuant to the COA before residual waste can be used pursuant to the DOA. (DEP Ex. 42.)

The CAUSE members have a far more substantial interest in the Project than the common interest of all citizens in seeking compliance with the law. They not only use and enjoy the area potentially affected by the Project, they live there. All four testifying members live within one mile of the Site. *Compare Groce v. DEP*, 2006 EHB at 895 (citizen who lived 10 miles away

from proposed plan had standing). They all expressed what we conclude were objectively reasonable concerns that the Project would have an adverse effect on their property, daily life, and health. Among other things, Mr. Yurick testified that groundwater emerges as springs and seeps on and near his property. (T. 804-07). The groundwater on or near Yurick's property may or may not be associated with the Site, but the concern is justified. And to repeat, whether CAUSE was ultimately able to prove that any one of its members' concerns was meritorious is beside the point of the standing inquiry. There is a direct and proximate link between the Project as authorized by the COA and the DOA and the CAUSE members' legitimate interest in enjoying their property free from contamination, and that is enough to establish CAUSE's right to appeal under the EHB Act, the Clean Streams Law, and the Solid Waste Management Act. *Pennsylvania Trout*, 2004 EHB 358-59 (loss of enjoyment of one's property is an adverse effect); *Drummond v. DEP*, 2004 EHB 413, 424 (same).

2. Waivers

HCP includes a long and detailed list in its post-hearing brief of issues that CAUSE may have waived during the course of this litigation. For the most part we agree with HCP. Thus, for example, issues not raised in CAUSE's pre-hearing memorandum or post-hearing brief are waived. 25 Pa. Code §§ 1021.104 (pre-hearing memorandum) and 1021.131 (post-hearing brief). Two issues regarding waiver raised by HCP, however, require additional discussion.

a. Act 2 Reports

HCP notes that CAUSE did not appeal from the Department's approval of various notices and reports required under Act 2 that preceded execution of the final Consent Order and Agreement (COA). The COA is the Special Industrial Area Agreement required under Section 305(e) of the Act, 35 P.S. § 6026.305(e), for Act 2 to apply. HCP argues that CAUSE's failure

to appeal those earlier actions precludes CAUSE from raising "issues related to the scope and performance of the investigations contained in the Baseline Environmental Report (BER) in these consolidated appeals." (Brief at 146.)

HCP is incorrect. The Department's decisions involving preliminary Act 2 reports and evaluations are undeniably actions that could have been appealed *by HCP*. 35 P.S. § 6026.308; *Neville Chemical Company v. DEP*, 2003 EHB 503, 508; *Olympic Foundry v. DEP*, 1998 EHB 1046, 1049. It is not clear to us, however, that *CAUSE* could have appealed them. *Compare Neville Chemical*, 2003 EHB at 512 ("[T]he intent of the legislature, as evidenced by Section 308 of Act 2, was to allow *participants in the Act 2 process* to appeal decisions of the Department throughout each phase of the process...." (emphasis added).)

As discussed at length earlier in our Adjudication, a person must be "adversely affected" to appeal. 35 P.S. § 7514. Section 308 of Act 2 does not supersede or contradict this requirement. The person submitting an Act 2 report obviously is adversely affected if the Department disapproves its plan or approves it with conditions. Without an appeal option, the recipient could face a Hobson's choice between revising its plan even though it disagrees with the Department, or dropping out of the Act 2 process altogether and possibly bringing other enforcement action upon itself. *See Neville*, 2003 EHB at 513.[6]

No such considerations apply to third parties. The BER by itself did not authorize HCP to take any action that would affect third parties. The approval did not actually authorize HCP to do anything. HCP could not close the landfill as a result of the BER. An agreement was statutorily

[6] *Neville, supra* (DEP letter rejecting conceptual work plan was appealable by the recipient of the letter; Board rejects argument that Section 308 creates an exclusive list of Act 2 appealable actions, and goes on to note that the letter not only disapproved the plan, it found the recipient to be in violation of a related order and essentially directed it to take immediate action).

required before HCP could take any action, 35 P.S. § 6026.305(e), and it is that agreement that adversely affected CAUSE, not all of the preliminary steps leading up to that action. In fact, the Department's letter approving the BER specifically acknowledged that the remediation could not go forward absent a COA. (C. Ex. 89.) Thus, the COA was clearly appealable by CAUSE; the BER approval almost certainly was not. Administrative finality should only be applied where it is clear that a party was adversely affected by an earlier action. The doctrine should not be applied where a person *arguably* could have appealed the earlier action. *ACE v. DEP*, 2006 EHB 698, 703.

HCP's argument is still weaker with respect to CAUSE's appeal rights vis-à-vis the DOA. A BER is certainly not a defined, contemplated, or perhaps even authorized step leading up to the determination of applicability of a beneficial use general permit. The fact that the Department allowed HCP to incorporate the work that went into preparing the BER into the application for the DOA does not change the fact that the DOA review process was separate and distinct from the Act 2 cleanup authorized pursuant to the COA. *Cf. Olympic Foundry*, 1998 EHB at 1055 (Hazardous Sites Cleanup Act is a completely different process than Act 2 and does not involve submitting a Notice of Intent to remediate). In other words, even if CAUSE were precluded from challenging the adequacy of the investigation as an objection to the COA, it would not have been precluded from challenging the Department's extension of that work to the DOA. The BER did not provide a vehicle for challenging the investigation as it related to the DOA. The DOA involved "a completely different process." *Olympic Foundry, supra.*

The doctrine of administrative finality is a prudential measure that should be applied judiciously. Each time it is applied a Departmental action is effectively insulated from review and a party is deprived of appeal rights. If we were to apply it in the manner suggested by HCP,

third parties would be required to insert themselves into the Act 2 process at every step of the way. This would not be good for anyone. Furthermore, in order for us to make informed decisions, it is important that we be able to analyze facts and issues that are relevant to the action under appeal. *Wheatland Tube Co. v. DEP*, 2004 EHB 131, 134-35; *Winegardner v. DEP*, 2002 EHB 790, 792-93. HCP's approach would prevent us from considering virtually all issues related to the investigation supporting the Department's action. The Department's investigation leading up to the DOA is obviously highly relevant to the propriety of the DOA. The Department considered the information in the BER in reviewing the DOA, and so should we. We reject HCP's argument that CAUSE is precluded from challenging issues related to site investigations precedent to the DOA simply because they also formed the basis of the BER.

b. Groundwater Monitoring Plan

HCP in passing notes very briefly that CAUSE failed to file a separate appeal from the Department's letter approving HCP's sampling and analysis plan for monitoring groundwater and surface water. (Brief at 147, Surreply at 15.) The monitoring plan was approved in December 2006, well after the first DOA letter of October 5, 2005. HCP does not articulate what it believes the consequences of CAUSE's failure to file a separate appeal from the sampling plan approval should be in this appeal. It is not obvious to us why CAUSE's failure to appeal the groundwater plan would operate as a waiver of any of CAUSE's objections in this appeal. Administrative finality does not apply because that doctrine prevents a party from using a later Department action to challenge an earlier Department action. *Grimaud v. DEP*, 638 A.2d 299, 303 (Pa. Cmwlth. 1994). Here, it is actually the earlier Department action that CAUSE challenged. We are not aware of any other theory to suggest that CAUSE waived any rights in this appeal. We are not disposed to find that there has been a waiver unless the matter is free

from doubt, *Anjar Trust v. DEP*, 2001 EHB 59, 67-68, *aff'd*, 806 A.2d 482 (Pa. Cmwlth. 2002), and there is nothing but doubt regarding HCP's claim.

The monitoring plan is an integral part of the DOA. Without an approved plan there was no complete Determination of Applicability. The October letter expressly stated that Special Condition 13 of the General Permit "contains requirements that must be met or information that must be submitted and approved prior to Hazleton Creek Properties, LLC operating under this general permit." (DEP Ex. 15.)

It is not clear why the Department issued the October 5, 2005 letter without having first approved such an integral part of the Project, and the propriety of that particular approach has not been challenged. HCP may have needed the letter to obtain financing or deal with other third parties. (*See* C. Ex. 90 (permit needed to get contracts)). The Department often issues permits with conditions, but rarely do such contingencies go to the heart of the determination. A sampling plan is sometimes thought of as a relatively routine recitation of sample collection and laboratory protocols, but the plan in this case goes well beyond such prosaic detail. We also wonder whether the fact that the DOA had already been conditionally approved colored the subsequent review of the monitoring plan. Interestingly, the Department told HCP that it would withhold comments on the monitoring plan during the DOA review "since we do not want to delay making a decision on your application." (C. Ex. 88.) In any event, we are not willing to conclude that the Department's decision to issue a piecemeal approval requires piecemeal appeals. We will not perpetuate the Department's segmented approach. As an integral part of the DOA itself, the groundwater plan did not require a separate appeal. We have continually said that piecemeal litigation is to be avoided. *Hanson Aggregates PMA, Inc. v. DEP,* EHB Docket No. 2006-175-R, slip op. at 10 (Opinion, September 17, 2007); *Stout v. DEP,* EHB Docket No.

2007-052-R, slip op. at 9 (Opinion, August 17, 2007); *Sechan Limestone Industries v. DEP*, 2004 EHB 185, 187; *Ziviello v. State Conservation Commission,* 1998 EHB 1138, 1139.

The Department's approval of the sampling plan certainly was not substantively separate from its review of the DOA itself. HCP first presented its monitoring plan in its original application, and the plan never materially changed. (DEP Ex. 12, Section 5.2 of the Site Operations Plan.) The Department's extended consideration of groundwater issues beginning with the initial application, continuing through multiple review letters, and culminating in the approval of the sampling protocol was all part of one Department review process and one substantive decision. The review began before the DOA was partially approved, and the final approval of the sampling plan did not change anything in the DOA.

Finally, if anyone has waived an issue here, it is HCP. CAUSE has adequately raised, preserved, and argued its groundwater contentions. As previously mentioned, HCP did not develop or support its waiver argument in its post-hearing brief. HCP never previously raised it. Groundwater issues consumed a very large percentage of the thirteen days of hearings in this appeal. No less than nine experts and DEP hydrogeologists testified about groundwater with no objection from HCP. It is too late now to off-handedly intimate without any legal authority that CAUSE's groundwater objections were somehow waived by virtue of the Department's letter regarding HCP's sampling plan. In short, HCP has waived its waiver argument.[7]

[7] It is worth mentioning that the DOA is not final as to CAUSE because CAUSE appealed it. 35 P.S. § 7514(c) (no action of the Department adversely affecting a person shall be final as to that person until that person has had an opportunity to appeal). It is not clear how a letter stating that a contingency has been satisfied in an action that is not final can itself be considered final. It is also worth noting that no notice of the plan approval was published or otherwise given to any third parties.

B. CAUSE's Objections to the DOA

1. The Use of a General Permit at the Site

CAUSE's first objection is that the Site is an unsuitable location for application of the General Permit because the General Permit is designed to cover the beneficial use of residual waste "as fill in mine reclamation," but here the waste is being used for landfill capping: "The particular site history and proposed project does not match the standard for the thousands of acres of un-reclaimed abandoned mines in the Commonwealth for which the general permit was intended." (Brief p. 70.) CAUSE argues that the Department should have required HCP to apply for an individual, site-specific permit.

CAUSE raises a valid concern. The general permit is a valuable device that allows the Department to quickly and efficiently review multiple projects of a similar nature. 25 Pa. Code § 287.611; *Army for a Clean Environment, Inc. v. DEP*, 2006 EHB 698, 700 (general permits are a regulatory device designed to streamline the permitting of classes of facilities or activities sufficiently similar in design or operation to warrant general requirements and conditions); *see Attawheed Foundation, Inc. v. DEP*, 2004 EHB 858, 881 (general permitting allows Department to authorize many registrations in a timely and efficient manner). We have difficulty, however, accepting the notion that there is no limit to the use of general permits. *See RJM Manufacturing, Inc. v. DEP*, 1998 EHB 742, 749 n.4. (general permits are limited to activities that are similar in nature and can be adequately regulated by standard specifications); *Belitskus v. DEP*, 1997 EHB 939. We agree with CAUSE that the Department has certainly pushed the envelope by applying the general permitting process to this complex site.

The Department apparently felt itself under pressure to complete its review of the Project because DOAs, which are normally intended for relatively generic situations, are supposed to be

issued quickly. 25 Pa. Code § 287.642. (C. Ex. 90 ("Being a DOA, we have a short time frame.").) Yet, the Project at hand involves the deposition of millions of cubic yards of a residual waste mixture from remote locations and the closure of a municipal landfill that narrowly missed a Superfund National Priority List ranking, on a site that is very close to densely populated areas and that has a problematic hydrogeologic regime. If a general permit is appropriate in this setting, it is difficult to imagine a setting where it would not be appropriate. The Department should be wary of carrying a good thing too far.

That said, CAUSE's legitimate concern regarding the use of a general permit for this Project is not enough to compel us to remand the matter for consideration of an individual permit. First, there is nothing technically unlawful about the Department's use of the General Permit at the Site. Contrary to CAUSE's suggestion, the General Permit was not issued only for the original site where it was to be used, the Springfield Pit, or sites "like" the Springfield Pit, and it was not issued only for "standard" or "traditional" abandoned mines. CAUSE also has not persuaded us that there is anything necessarily unlawful about using a general permit directed at mine reclamation at an abandoned mine that also happened to be historically used for waste disposal. CAUSE asserts in its rhetoric that the General Permit was not intended for use at such a site, but it offers no proof or citations to support that contention. Landfill capping and mine reclamation are not mutually exclusive activities. HCP accurately observes that there is obviously a great deal of mine reclamation to be performed as part of the Project.

CAUSE argues that the Department had the *authority* to require an individual permit. We do not disagree. 25 Pa. Code § 287.612(c). The authority to require an individual permit, however, does not equate to a mandatory duty to require an individual permit.

CAUSE has fallen shy of meeting its burden of proving that the use of a General Permit

was unreasonable. In this case we must assume that the residual waste mixture is safe if it is handled correctly. Since the Department has determined that the particular material is safe, there is arguably no reason to require permit applicants to reinvent the wheel at every site. The requirement of a determination of applicability helps ensure that there is nothing unique to a particular site that would render the use of what is generally safe fill unsafe for a particular application.

CAUSE has not shown that its proposed remedy--individual permitting--would have made any difference. This Site and this Project have been subjected to rigorous study and careful review. We have no proof that an issue has slipped through the cracks *because* the general permitting process was used. In short, a remand for consideration of an individual permit application would serve no purpose.

Finally, CAUSE adds that the use of the General Permit at the Site is improper because Special Condition 13 provides that the General Permit may not be applied in the absence of an adequate groundwater plan, and HCP's plan is inadequate and it cannot be fixed. We agree that Special Condition 13 requires an adequate monitoring plan and HCP's current plan is inadequate. We are not prepared at this point to agree that it cannot be improved. Furthermore, if an adequate monitoring plan cannot be designed for the Site, an individual permit will not solve the problem.

2. Whether Dredge Mixture Will Pose Greater Harm Than On-Site Materials

CAUSE's next objection is that HCP failed to demonstrate that the beneficial use of the residual waste mixture will "not present a greater harm or threat of harm than the use of the product or ingredient which the waste is replacing." CAUSE's argument is based upon 25 Pa. Code § 287.631(a)(4)(iii), which reads as follows:

> *Each general permit issued by the Department* will include, at a minimum .... (4) A set of terms and conditions governing the beneficial use or processing of residual waste covered by the general permit as are necessary to assure compliance with the act, this article and the environmental protection acts, including provisions for the protection of groundwater. At a minimum, the conditions shall include ... (iii) A requirement that the activities authorized by the general permit will not harm or present a threat of harm to the health, safety or welfare of the people or environment of this Commonwealth. At a minimum, for beneficial use of residual waste, *the use of the waste as an ingredient in an industrial process or as a substitute for a commercial product may not present a greater harm or threat of harm than the use of the product or ingredient which the waste is replacing.*

(Emphasis added.)

CAUSE suggests that a demonstration called for in Section 287.631(a)(4)(iii) must be made on every site after comparing the relative threat of harm from the beneficial use material with the threat from either "commercially available standard mine reclamation materials or the available on-site spoils and overburden."

There are any number of problems with CAUSE's argument. First, the regulation upon which CAUSE relies describes the terms and conditions that must be included in *general permits* ("Each general permit issued by the Department ..."). CAUSE chose not to appeal the General Permit that was used for the Project. CAUSE may not use the DOA decision as a vehicle for challenging the terms and conditions of the General Permit.

There is nothing to support CAUSE's argument that the Section 287.631(a)(4)(iii) requirement applies to the DOA review process at issue in this appeal. Any comparisons that needed to be made would only be made in the process of drafting the General Permit, not the DOA. Not only is the express language of the regulation limited to general permits, there is one set of regulations that governs general permits, which includes Section 287.631(a)(4)(iii), *see* 25 Pa. Code §§ 287.621-.632, and a separate set of regulations that governs DOAs, *see* 25 Pa. Code

§§ 287.641-.642.

Even if Section 287.631 applied to the DOA process, CAUSE has not shown that the residual waste mixture is "replacing" anything. The residual waste mixture is supplementing on-site spoils, it is not replacing them. All of the on-site materials will be used. The on-site materials fall far short of what is necessary to reclaim the Site. The on-site materials are not available for some other use due to their purported "replacement."

CAUSE is posing theories with no proof to back them up. CAUSE has produced no proof that there are other "commercially available standard mine reclamation materials." We have no record upon which to conclude that the mixture is replacing either an "ingredient" "in an industrial process" or a "commercial product." Furthermore, CAUSE has failed to include any legal argument in its post-hearing brief on these points. An industrial process would seem to involve production of a product, and it is difficult to think of mining spoils as a commercial product. *Compare Tire Jockey Services v. DEP*, 2002 EHB 989, *aff'd*, 915 A.2d 1163 (Pa. 2007) (waste tires).

Finally, CAUSE has not shown that the residual waste mixture is in fact more dangerous than what it is allegedly replacing.[8] CAUSE has failed to show that the residual waste mixture presents any known threat of harm, let alone a greater threat of harm than that posed by on-site materials.[9]

3. Presumptive Evidence of Pollution

CAUSE's next argument is that HCP failed to demonstrate that there is no presumptive evidence of potential pollution of waters of the Commonwealth. CAUSE's argument is derived

[8] CAUSE at one point asserts that there must be a showing of *need* to beneficially use the residual waste. No such showing is required.

[9] CAUSE refers us back to arguments contained in one of its earlier filings in the appeal. This practice is

from a regulation that applies to coal mining; namely, 25 Pa. Code § 86.37(a)(3), which requires the Department to find that an applicant for a coal mining permit has demonstrated that pollution from its mining activities will not occur. CAUSE believes that a mining permitting regulation applies because the COA "is akin to a mining permit" at this Site.

CAUSE's argument has no merit. Chapter 86 only applies to coal mining activities. 25 Pa. Code § 86.2. The Project does not constitute a coal mining activity. *See Keck v. DEP*, EHB Docket No. 2005-280-L (Adjudication, June 26, 2007). The COA is not akin to a mining permit. It does not substitute for a mining permit. No mining permit is required for the Project. If Section 86.37(a)(3) applied, then all of Chapter 86 regarding the operation of a coal mine would apply, and that is obviously not the case with the Project. In any event, HCP has demonstrated that there is no presumptive evidence of pollution from the Project. All that is missing is a monitoring program that will ensure that reality conforms to predictions.

4. Potential for Harm

CAUSE's primary objection to the DOA is that the Department has not accurately determined that there is no potential for harm from the Project. CAUSE's objection is built upon 25 Pa. Code § 287.642(e), which reads as follows:

> The Department will determine that the general permit does not apply to the proposed beneficial use or processing activity and will deny coverage under the general permit if the applicant fails to demonstrate to the Department's satisfaction that the proposed activity *is consistent with the terms and conditions of the general permit, and does not have the potential to harm or present a threat of harm to the health, safety, or welfare of the people or environment of this Commonwealth.*

25 Pa. Code § 287.642(e) (emphasis added).

CAUSE has listed numerous reasons why it believes that the Project is inconsistent with

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unacceptable and constitutes a waiver of the issues involved. 25 Pa. Code § 1021.131.

the conditions of the General Permit and poses a threat of harm. We have dispatched most of CAUSE's concerns in our Findings of Fact, and there is no need to make a long Adjudication longer by repeating those findings here. By way of brief summary, we disagree that the site characterization was inadequate in respect to anything other than off-site groundwater flow. The groundwater investigation was sufficient to justify the COA remedy and supports the use of the Site for the beneficial use of the residual waste mixture (assuming an adequate monitoring plan can be developed). CAUSE has failed to carry its burden of proving that the Project will result in leaching of harmful levels of contaminants, that the Project poses a threat to surface waters, that the Project will result in unacceptable air pollution, that the Project will exacerbate any danger posed at the Site by landfill or mine gases, or that the Project will entail unpermitted mixing of wastes. CAUSE has, however, raised meritorious concerns regarding the groundwater monitoring plan for the Site as the Project goes forward.

Special Condition 14 of the General Permit prohibits the discharge of any waste to waters of the Commonwealth. (DEP Ex. 15.) This condition is consistent with the regulatory requirement that the General Permit must include provisions for the protection of groundwater. 25 Pa. Code § 287.631(a)(4)(iii). Of course, both the Clean Streams Law and the Solid Waste Management Act prohibit unpermitted discharges to the waters of the Commonwealth, which include groundwater. 35 P.S. § 691.401 and 35 P.S. § 6018.610; *Concerned Citizens of the Yough v. DER*, 639 A.2d 1265, 1268, 1270 n.4 (Pa. Cmwlth. 1994); *Gordon v. DEP*, EHB Docket No. 2005-323-R, slip op. at 8 (Adjudication, April 26, 2007); *Brandywine Recyclers, Inc. v. DER*, 1993 EHB 625, 639-40. The COA only releases HCP from liability for past discharges; it does not authorize any new contamination. (C. Ex. 6.)

Thus, the residual waste mixture may not contaminate the groundwater. Neither the

DOA nor applicable statutes and regulations authorize or excuse contamination of water because it is already impacted by acid mine drainage. *Commonwealth v. Harmar Coal Company*, 306 A.2d 308, 315, 321 (Pa. 1973); *DER v. Rushton Mining Company*, 1976 EHB 117, 136-37; *see Swinehart v. DEP*, EHB Docket No. 2006-056-L, slip op. at 5 (Opinion, May 18, 2007).[10] They do not authorize contamination because of an alleged absence of groundwater receptors. *Harmar Coal*, 306 A.2d at 320. They do not authorize additional contamination of the deep mine pool or the Little Nescopeck Creek. *Id.* They do not authorize contamination so long as there is no proven adverse health impact. Consideration of these factors may be appropriate in designing a remedy under Act 2, s*ee Defense Personnel Support Center v. DEP*, 1998 EHB 512, 531-34 (presence of benzene in groundwater plume acceptable under Act 2 remediation plan where it does not create an unacceptable health or environmental risk), but it is not appropriate when reviewing the beneficial use of residual waste. In short, a critical prerequisite to the beneficial use is that it will not result in *any* unpermitted surface water or groundwater pollution.

There is only one way to verify HCP's compliance with its duty to avoid any unauthorized discharges and that is to install a monitoring system capable of detecting such discharges. *See Heasley v. DER*, 1994 EHB 624, 678 (monitoring necessary for determining when groundwater degradation or pollution has occurred). There has never been any dispute in this case that adequate monitoring must be in place for the Project to go forward. HCP acknowledged as much in its DOA application. (FOF 106.) An approved monitoring system is specifically required by Special Condition 13. Adequate monitoring capable of detecting off-site contamination coming from the residual waste is necessary to ensure compliance with Special

[10] Although somewhat beside the point, it is worth noting that acid mine drainage is characterized by low pH, high acidity, and a short list of heavy metals. HCP is required to monitor the residual waste mixture for a long list of other contaminants, including volatile and semivolatile components.

Condition 14, and more fundamentally, to ensure that the Project does not harm the public or the environment. 25 Pa. Code § 287.642(e).

Just as HCP is not excused from its duty to prevent discharges simply because the receiving water is already polluted, HCP is not excused from implementing a meaningful monitoring system because some receiving waters may already be polluted. *Cf. Concerned Citizens of Earl Township v. DER*, 1994 EHB 1525, 1607-08. Furthermore, effective monitoring cannot be waived because a project presents no *known* risk of harmful contamination. *See Novak v. DER*, 1987 EHB 680, 698-99. If a project presented a known risk, it presumably would not have been permitted in the first place. The purpose of a monitoring system is to ensure that optimistic expectations are realized. The best laid plans of mice and men often go awry. A monitoring system must be installed to ensure that, if things go awry, something can be done about it before the damage becomes extensive and/or irreversible. *See Blose v. DEP*, 2000 EHB 189, 216 n.13 (purpose of monitoring); *People United to Save Homes v. DEP*, 1999 EHB 457, 566, *aff'd*, 789 A.2d 319 (Pa. Cmwlth. 2001) (monitoring allows Department to readily observe any changes in surface or groundwater flow).

Effective monitoring is all the more important in this case. The Project is a very large experiment. It is a well-planned, well-designed, noble experiment, but it is still an experiment. It will be the first time that the General Permit is actually used. It will involve the unprecedented placement of 10 million cubic yards of a residual waste mixture in unlined, abandoned mine workings that are partially filled with unpermitted landfills known to have been used for midnight dumping of hazardous waste. It would have been one thing if the Department approved a small beneficial use project at a site without complications located in an isolated area. Here, the Project will be carried out on a massive scale on a complicated site in very close proximity to

densely populated residential and commercial areas. If the people of Hazleton are to have this project in their midst, they deserve some assurance that the Project will perform as expected and not harm them or their environment.

HCP correctly points out that there are no regulatory specifications for the design of a monitoring system for a General Permit operation. Regulatory requirements that apply to groundwater monitoring at municipal or residual waste landfills, for example, do not directly apply in this situation. Therefore, best professional judgment must be brought to bear. At a minimum, however, there can be no serious debate that a monitoring system must be capable of detecting the off-site migration of significant levels of contaminants.

A groundwater investigation suitable for one purpose may not be adequate for another. HCP's groundwater investigation was adequate for designing an Act 2 remedy based in part on site-specific standards for the landfills on the site. The level of understanding necessary to satisfy that need, however, was not sufficient to support bringing 10 million cubic yards of *new* waste mixtures onto the Site.

HCP's proposed monitoring plan for the Project as it moves forward is inadequate. The system is simply not capable of detecting contaminants that leave the site. If the Project results in groundwater pollution, no one will know it. The monitoring plan merely creates the illusion of protection, which is arguably worse than no monitoring at all. This is truly unacceptable, and the Department acted unreasonably and in violation of the law in concluding otherwise.

a. Water in the old mine workings

Our resolution of this case turns in significant part on our assessment of competing expert testimony. Before turning to the competing opinions and theories of CAUSE and HCP, it is worth noting that the Department did not present any expert testimony directly in support of the

monitoring plan. It only presented the expert opinion of Gerald Olenick, a Department hydrogeologist, that the characterization of existing groundwater conditions was adequate.[11] Inexplicably, the Department only called another of its hydrogeologists, Keith Laslow, to explain as a factual matter why the Department approved the plan. The absence of clear support from a Departmental expert is noteworthy given the numerous concerns expressed by other Department witnesses on the stand and in the exhibits of record regarding monitoring at the Site.

Only one downgradient monitoring point is included in HCP's plan: the Hazleton Shaft. The Shaft is a remnant of underground mining from generations ago. It is a vertical mine shaft extending 600 feet down from the surface that provides open-air access to the mine workings.

Generally speaking, it is unusual, albeit not necessarily unlawful, to provide for only one downgradient monitoring point in a monitoring system for a project of this size. Monitoring points are also typically placed downgradient but within a few hundred feet of the potential source of contamination. The Hazleton Shaft is a mile and a half away from the Site. Again, such a remote sentinel is not necessarily unreasonable, but it certainly raises a red flag.

The problem with the Hazleton Shaft that overwhelms all other considerations, however, is that the water in the shaft is so diluted that a monitoring point there will be all but useless in detecting any contamination that emerges from the Site. One of the Department's hydrogeologists, Alexander Zdzinski, raised this concern. CAUSE's expert, Robert Gadinski, parroted it. Yet glaringly absent is any testimony from Robertson or Laslow that sampling at the Shaft will be sufficiently sensitive to detect any releases from the Site. In other words, while Robertson testified that the shaft is hydrogeologically connected to the Site, he never testified

[11] Olenick's initial opinion on direct examination was limited to concluding that the site characterization and remedy selection were appropriate. (T. 2912-26.) On redirect, Olenick was asked if the placement of dredge at the Site changed his opinion regarding the accuracy of the site characterization or delineation of

that sampling in the shaft would or could detect contamination from the Site. Neither did Iaslow. We do not view these omissions as inadvertent in light of the concerns expressed by several others regarding the dilution question.

According to Robertson's own calculations, the Hazleton Shaft drains roughly eight square *miles*. The Site is roughly 277 *acres*. Robertson artfully dodged questions about the proportional contribution of the Site during cross examination (T. 2591-93), but the Phase II Environmental Assessment for the Site very conservatively (on the high end) calculated that less than two percent of the groundwater in the basin draining to the Shaft comes from the 55-acre Hazleton Landfill on the Site. That would presumably equate to much less than ten percent of the flow for the entire 277-acre Site.

In response to Gadinski's credible opinion that the open shaft is likely to pick up substantial amounts of water from other areas of the basin including water flowing through higher and closer strata, Robertson's response is that he grew up around coal mines, that he stuck his ear near the shaft opening, and he did not hear cascading water. This testimony is emblematic of the lack of field verification performed in support of HCP's plan. Instead of the simple and commonly used technique of lowering a video camera down the shaft, for example, we have a person sticking his ear near the shaft to listen for cascading water. Instead of flow measurements in the shaft that conceivably could have been compared to a budget of water passing through the Site itself, Robertson referred to the impressions of others that they felt a "tug" on the rope used to lower a bailer down the shaft.

There are two reasons why the massive dilution factor at the Shaft presents a problem. First, as explained by Zdzinski, "you have to have a much greater release to see a marked

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exposure pathways. Without any explanation, he answered that it did not. (T. 2931.)

difference at the detection point." (T. 758.) Second, in the highly unlikely event a release could be detected, there is no way to show that it is originating from the Site. The release could be coming from anywhere within the eight square miles.

The problem of pinpointing the source of any contamination that is discovered is compounded by the fact that there is nothing to compare the Hazleton Shaft results to. Typically, one compares downgradient monitoring results not only with historical results at that point, but upgradient points as well. This allows for an identification of the source. There is no upgradient point proposed for this Project other than one relatively shallow monitoring well drilled outside of mine workings. No one has suggested that a comparison of results from the Hazleton Shaft with results from this point would have any significance.

In short, Gadinski credibly and convincingly opined that the Hazleton Shaft is essentially useless, or worse, it gives a false sense of comfort. A monitoring plan that uses that point as the exclusive downgradient monitoring point, based on information developed to date, should not have been approved.

b. Water outside of the gravity drainage system

Robertson's theory is based upon the fact that the mine workings contain a gravity drainage system. That system was designed to redirect water that found its way into the mine away from deeper workings, thereby reducing pumping costs. In Robertson's current view,[12] the pertinent parts of the gravity drainage system are perched above the deeper mine pools. The system, in his view, acts as a perfect sink drawing in every drop of groundwater from the Site, and transports all of that water directly to the Hazleton Shaft, and thence ultimately to the Jeddo Tunnel, which discharges a massive amount of acid mine drainage to the Little Nescopeck

[12] Robertson's early submittals referred only to a generic "mine pool." (FOF 111.)

Creek. Since 100 percent of the water finds its way to the Shaft, there is no reason to sample anywhere else off the site in Robertson's view, which the Department seems to have somewhat reluctantly accepted.[13]

The Department's reluctance was justified. Christopher Duffy, one of CAUSE's experts, testified that Robertson's perfect-sink theory violates basic principles of hydrogeology and is implausible. Gadinski opined that the theory is speculative and, at a minimum, would require some field work to back it up. We find ourselves in agreement with the credible opinions of Duffy and Gadinski. We find it inconceivable that the system could be functioning as perfectly as theorized by Robertson. Duffy and Gadinski convincingly opined that groundwater to a reasonable degree of scientific certainty exists and flows outside of the gravity drainage system and off the Site.

Robertson's perfect-sink theory is almost entirely based upon his desktop analysis of ancient mine maps. He also opined that the gravity drainage system was very important to the mine operators, and that it was built to last. Finally, he referenced the fact that other people have felt a tug on the bailer rope, which suggests that a significant amount of water is flowing through the Hazleton Shaft. There were no flow measurements, no dye tests, no video inspection, or any other modern investigatory techniques. Obviously, no other sampling points were drilled into the system.

Robertson has done an excellent job of explaining how water will flow once it is in the drainage system, assuming the system is intact. Mine maps are an indispensable tool in this setting and Robertson was correct to rely on them in defining the flow path of water in the

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[13] For example, Laslow testified that off-site wells would have been preferable, but they "probably" would have been dry. Olenick testified that the groundwater characterization for the Act 2 remediation was "what's the right work I'm looking for--I determined that their approach was a reasonably scientific

workings. Maps, however, last updated in the 1950s of a system built well before that, do not reveal whether the system is still functioning. More importantly, they do not in themselves show that the gravity drainage system as a distinct component of the vast mine workings will not only capture but hold and transport 100 percent of the groundwater in their vicinity.

If Gadinski and Duffy are correct in opining that some groundwater will escape the drainage system's embrace,[14] and we accept that they are, the question then becomes: where does it go? It is important to understand where the groundwater flows because that is where contaminants could potentially be carried off the site. Therefore, that is where some of the monitoring should take place (not necessarily, however, to the exclusion of that component of groundwater within the gravity drainage system).

Robertson and Duffy vehemently disagreed on this point. Robertson, of course, does not believe that *any* water will flow outside of the gravity drainage system, but when asked to opine on where else it could go, he said he did not know. (T. 2665.) He did opine that it would not flow north or south. No expert has suggested that a significant portion would flow west.[15] Robertson did not specifically rule out flow to the east, although to be fair, he consistently maintained that the gravity system would capture all flow. Robertson even went so far as to opine that absolutely no groundwater will get past the system and enter into the deeper mine pools, another aspect of Robertson's theory credibly attacked by the other experts.

Duffy's opinion that a gravity system cannot capture all flow is credible, and his opinion that field verification is needed to determine where escaped flow goes is also credible. His opinion, however, that large amounts of groundwater will flow north is not credible because it

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approach for the complex site." (FOF 86.)

[14] Lawrence Roach testified that the "main component" of groundwater at the site flows vertically down into the mine workings.

was based largely on his application of a computer model wholly unsuited to this location.[16]

We find that Gadinski gave the most credible opinions on this subject. Gadinski's bottom line is that, given the current level of investigation of off-site flow, opining where groundwater will flow from the site both within and without the mine workings is little more than speculation at this point. Gadinski believes that mine maps are an essential tool, but it is improper to blindly rely upon them. Gadinski also did not rely upon a computer model best suited for large-scale evaluation of homogenous conditions at areas unlike this Site, which has been torn apart by mining. Instead, Gadinski opined that one needs to obtain field verification of *theories* developed based upon computer models and mine maps for this Project.

Furthermore, we have been left to wonder how the Project itself will influence groundwater flow. The Site in its current condition acts as a veritable sponge, sending the main component of groundwater straight downward. The fill, however, will be much less permeable, and the Site will be returned to approximate original contour. The monitoring plan in its current form was designed in the context of investigating the Hazleton Landfill for an Act 2 closure. Very little attention, other than drilling two additional dry, on-site wells and increased elaboration of mine maps, was paid to a monitoring system for the beneficial use component of the Project.

HCP did not sample or measure any existing water supply wells proximate to the Site, and its monitoring plan does not require it to do so in the future. HCP has not drilled any of its own wells at a property line or off-site and its plan does not require it to do so. HCP made no attempt to drill into any mine workings or the deep mine pools, and it is not required to do so. In

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[15] But see the Environmental Site Assessment for Unit C, which indicates that some groundwater flow is to the northwest coincident with the direction of surface water flow. (FOF 201.)

[16] *See Prizm Asset Management Company v. DEP*, 2005 EHB 819, 831-32 (expert's opinion must have

short, as the plan now stands, there will be no meaningful off-site monitoring of groundwater moving off the site in any direction at any depth.

It is difficult to say *why* the Department approved such minimal monitoring for a first of its kind, 10 million cubic yard project within city limits. The Department clearly felt pressured to act quickly. (*See, e.g.*, C. Ex. 90.) It might be that there is an overwhelming and perfectly understandable desire to rehabilitate the surface of a devastated site. It might be that the groundwater in the area is so polluted by acid mine drainage that it is tempting to write off any concerns about adding new contaminants to the mix. It might be that the Site is an extremely complex site, and it could be very difficult and expensive to devise a meaningful monitoring program. But whatever the explanation, the fact remains that the Project needs more than a wink and a prayer to go forward. Unless, a meaningful warning system can be devised to verify that the Project is performing as hoped and is doing no harm, we cannot conclude that the Determination of Applicability should have been issued for this particular location. If the Department believed that no monitoring was necessary for projects of this scope and size, it would not have included Special Condition 13 in the General Permit.

This matter stands in contrast to the landfill application that was the subject of our recent Adjudication in *Environmental & Recycling Services v. DEP*, EHB Docket No. 2006-061-C (October 9, 2007). Of course, that case involved an individual permit for a construction and demolition waste landfill whereas the instant case involves a DOA of a general permit for beneficial use of residual waste.[17] The Department had two concerns in *ERSI*: mine subsidence

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proper basis); *Gleeson v. State Board of Medicine*, 900 A.2d 430, 436 (Pa. Cmwlth. 2006) (administrative board may accept or reject the testimony of any witness in whole or in part).

[17] It is interesting to note that the Department reviewed the application in *ERSI* from December 1999 through February 2006, a six-year span. The Department took final action only after ERSI filed a mandamus action against it in Commonwealth Court. HCP applied for a DOA in June 2005 and it was approved conditionally in October 2005.

and groundwater contamination. With respect to the first concern, we endorsed a heavy reliance on mine maps to assess the potential for mine subsidence and the effects thereof on the overlying landfill. If the only issue in this case were the potential for subsidence below the fill, we doubt that we would have had any trouble with the exclusive use of mine maps. In this case, however, mine maps are being relied upon to design a groundwater monitoring plan that proposes one downgradient monitoring point one and a half miles away from the Site that drains roughly eight square miles of territory. We repeat that a heavy reliance on mine maps is entirely appropriate in the coal fields, but under these circumstances, something more is required to inspire confidence in the use of the Hazleton Shaft and/or justify the complete lack of any other monitoring points. We would also note that actual borings were in fact relied upon by the experts in *ERSI*. (*ERSI* at 16.) The mine maps and borings provided "sufficient information" to evaluate the potential for mine subsidence in *ERSI*; they do not provide sufficient information without more to justify HCP's groundwater monitoring plan here.

The Department's second concern in *ERSI* was groundwater contamination. There, as here, we found that no actual threat had been shown to exist. There, unlike here, we found that there was an adequate monitoring system in place that would allay any concerns during operations. We noted that the Department never substantiated an allegation that the lack of demonstrated contamination might be attributed to inadequate monitoring in that case. (*ERSI* at 23.)

Although we feel quite confident in saying that the groundwater monitoring plan for the Project is inadequate, we do not have enough to go on based upon the existing record to mandate a specific fix. The experts who were critical of the plan were rather vague on how to fix it. But as one of the experts noted with some merit, it is not the appellant's responsibility to design a

monitoring plan for another party; it is HCP's responsibility, and the Department should not feel rushed or pressured to approve a plan that is inconsistent with its duty to protect the public welfare and the environment. We are not suggesting that any one gap in the plan is necessarily fatal. All aspects of the plan are undoubtedly interrelated. We also understand that the parties are unquestionably dealing with a difficult location. But part of the reason we believe the Department erred in this case is that these efforts were not even tried. As Gadinski testified,

> You have to realize twenty years ago, okay, all the consultants said you can't monitor landfills in the anthracite. That's hogwash and it has been disproven over the years.

(T. 2996-98.) Finally, we understand that the Project does not necessarily need the same level of monitoring as a landfill. We cannot agree, however, that the Project can go forward with *no* meaningful monitoring if Special Conditions 13 and 14 are to be accorded something other than lip service.

II. The Consent Order and Agreement (COA)

CAUSE's sole objection specific to the COA is that the Hazleton Redevelopment Authority (HRA) should not have been allowed to participate. It relies on Section 305 of Act 2, 35 P.S. § 6026.305, for the accurate proposition that persons who caused or contributed to the preexisting contamination on a brownfields site may not perform an Act 2 cleanup or obtain a release from liability pursuant to Act 2. CAUSE argues that HRA is not "functionally independent" from the City of Hazleton, and that the City is using its "surrogate," HRA, to "shield itself from liability and procure access to [Act 2's] review procedures," and "accomplish an Act 2 remediation with much less restrictive terms." (Brief, 81-82.)

CAUSE correctly points out that the City of Hazleton as the former operator of landfills on the Site undeniably caused or contributed to contamination on the Site. *City of Hazleton v.*

DER, 1976 EHB 316. Therefore, the City is not entitled to the procedures and protections of Act 2. The fundamental and fatal flaw in CAUSE's attack on the COA is that CAUSE seems to assume that the COA confers the benefits and protections of Act 2 upon the City. In fact, it does not. The City is not a party to the COA. There is nothing in the language of the COA to suggest explicitly or implicitly that its terms apply to the City. There is no evidence that HRA was signing as an agent of or otherwise on behalf of the City. And it does not somehow automatically follow from HRA's alleged functional dependence on the City that its entry into the COA binds, inures to the benefit of, or pertains in any respect to the City.

To the contrary, we read the COA to provide HRA, and HRA alone, with the benefits of Act 2. The COA does not entitle the City to the review procedures or liability protections of Act 2. Actually, the City is not gaining anything from the COA. The COA does not shield the City from liability. The liability protection afforded to HRA by the COA simply does not extend to the City. The City has the same liability now as it did before the COA was executed. The COA does not diminish whatever rights or causes of action governmental entities or private parties have vis-à-vis the City.

Although CAUSE's overriding concern seems to be that the City should not enjoy liability protection, it also complains that the City will benefit from a "remediation with much less restrictive terms." Much less restrictive than what? Even if we quite unrealistically assume that the Hazleton Landfill would have ever been closed pursuant to some other environmental program,[18] there is no factual basis for CAUSE's supposition that closure under some other program would have been more "restrictive" than the closure authorized by the COA.

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[18] It should be remembered that the Site was considered for and rejected as a National Priority List site under the federal Superfund program.

CAUSE objects that the City has enjoyed the benefits of Act 2 "review procedures." Again, the City is not a party to the COA and it is not enjoying anything as a result of the COA. Putting that aside, CAUSE fails to explain what was so beneficial about the "review procedures" employed in this case. The record reveals that an enormous amount of effort has been put into the study of the Site. In the absence of any explanation, we fail to see how the comprehensive and meticulous analysis that went into the landfill remediation would have been handled any differently under some other undefined environmental program with somehow different, undefined "review procedures."

We also do not assume that the City is obtaining any practical advantage as a result of the COA. If CAUSE's worst fears are realized and contamination at the Site worsens, the City's practical exposure arguably would go up, not down. More importantly, if liable parties indirectly benefit from a voluntary cleanup performed by others, it is the inevitable result of all successful brownfields projects, and that hardly serves as a basis for invalidating a remediation effort. To hold otherwise would stand Act 2 on its head. A key qualification in Act 2 is that liable parties remain liable regardless of the clean-up efforts of the nonliable parties, and that is exactly what will happen here.

To the extent CAUSE is arguing that HRA's affiliation with the City precludes HRA as a separate entity from enjoying the benefits of Act 2. CAUSE has failed to provide us with any legal support for its proposed "functional dependence" test. In other words, it fails to articulate why it believes that the Department should be legally precluded from entering into an Act 2 Special Industrial Area agreement with a party that is "functionally dependent" upon a party that contaminated a site. CAUSE's "functional dependence" test seems to be pulled out of thin air. CAUSE does not refer us to any precedent, either direct or analogous. CAUSE does not

advocate the use of the familiar "alter ego," "sham," or "participation" theories for disregarding the separate legal nature of related entities. Indeed, it has argued against the use of principles regarding piercing the corporate veil or defining a real party in interest. If CAUSE would have us fashion entirely new law, it needs to give us a thoughtful, well reasoned basis for doing so grounded firmly in statutory language or case law. CAUSE's off-handed suggestion of a "functional dependence" test falls well short. Otherwise, the "legislature in no uncertain terms has made it clear that a redevelopment authority is a completely separate entity from the city." *Herrimam v. Carducci*, 380 A.2d 761, 764-65 (Pa. 1977).

Finally, we would add that CAUSE has failed to carry its burden of proving as a factual matter that HRA should be treated under *any* conceivable legal standard as indistinct from the City for purposes of this appeal. There is no denying that HRA is closely associated with the City. However, HRA is a separate legal entity properly created pursuant to the Urban Redevelopment Authority Law, 35 P.S. §§ 1702, 1704, 1709. HRA itself did not cause or contribute to any contamination at the Site. CAUSE does not cite to any improper commingling of affairs. CAUSE has failed to prove as a factual matter that HRA functions as anything other than a legitimate entity that functions in legitimate cooperation with, but separately and apart from, the City. (T. 1291-1412.)[19]

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this appeal. 35 P.S. § 691.605, 35 P.S. § 7514; 35 P.S. § 6018.108.

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[19] CAUSE directs our attention to a letter from the Environmental Protection Agency stating that HRA was not eligible for a Brownfields Clean-Up Grant provided for under Section 104(k)(6) of the Small Business Liability Relief and Brownfields Revitalization Act, 42 U.S.C. § 9604(k)(6). (C. Ex. 29.) EPA made a "preliminary decision" that HRA was an "arm or department" of the City. Putting aside whether the unexplained hearsay letter is properly a matter of record, EPA's "preliminary" determination has no binding or even persuasive force whatsoever with this Board.

2. A party may prosecute an appeal if it is adversely affected by an action of the Department. 35 P.S. § 7514; 35 P.S. § 691.307; 35 P.S. § 6018.108; 25 Pa. Code § 1021.2.

3. CAUSE has the statutory right to prosecute this appeal. *Pennsylvania Trout v. DEP*, 2004 EHB 310. Standing need not be established with respect to individual environmental media or individual objections to the Department's action.

4. CAUSE's failure to appeal the notices and reports required under Act 2 that preceded execution of the final Consent Order and Agreement (COA) does not administratively preclude CAUSE from appealing the COA. 35 P.S. § 6026.305(e); 35 P.S. § 6026.308.

5. CAUSE has not waived its objection to HCP's groundwater monitoring plan.

6. The Board's review is *de novo*. *Warren Sand & Gravel Co. v. DEP*, 341 A.2d 556, 565 (1978).

7. A Special Industrial Area Agreement is required under Section 305 of Act 2, 35 P.S. § 6026.305, to confer the benefits of Act 2.

8. CAUSE bears the burden of proving that the Department's approval of the DOA and its entry into the COA were unreasonable or contrary to law. 25 Pa. Code § 1021.122(c)(4); *Lang v. DEP and Maple Creek Mining, Inc.*, 2006 EHB 7; *O'Reilly v. DEP,* 1999 EHB 896.

9. In the course of reviewing an application for a determination of applicability under a general permit, the Department determines whether a general permit is applicable to the activity to be done at a new location, 25Pa. Code §§ 287.641(f)(7), and 287.642(d), (f), whether the activity can be performed in accordance with the general permit's terms and conditions, and whether the proposed activity will be protective of people and the environment at the new location, 25 Pa. Code §§ 287.641(d), 287.642(e), (g). These site-specific issues are resolved in case-by-case determinations, and can be raised at the time they are applied to a site.

10. The Department must determine that the general permit does not apply to the proposed beneficial use or processing activity and will deny coverage under a general permit if the applicant fails to demonstrate that the proposed activity is consistent with the terms and conditions of the general permit and does not have the potential to harm or present a threat of harm to the health, safety or welfare of the people or environment of this Commonwealth. 25 Pa. Code § 287.643(e).

11. The Department's entry into the COA was reasonable and in accordance with the law in all respects.

12. The Department's approval of the DOA was reasonable and in accordance with the law in all respects except for the Department's determination that the Project is consistent with the terms of the General Permit and will not pose a threat of harm as a result of groundwater contamination.

13. In order to show that a Project is consistent with the terms of the General Permit and will not present a threat of groundwater contamination, the Project must include a groundwater monitoring system that is capable of detecting contamination if it migrates off the site of the Project.

14. The Project does not include a monitoring program that has been shown to be capable of detecting off-site groundwater contamination.

15. CAUSE carried its burden of proving by a preponderance of the evidence that the Department acted unreasonably and contrary to law by failing to require an adequate groundwater monitoring plan.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CITIZEN ADVOCATES UNITED TO SAFEGUARD THE ENVIRONMENT, INC.	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HAZLETON REDEVELOPMENT AUTHORITY, and HAZLETON CREEK PROPERTIES, LLC, Permittees	:	**EHB Docket No. 2006-005-L (Consolidated with 2005-329-L)**

ORDER

AND NOW, this 2nd day of November, 2007, it is hereby ordered that HCP's groundwater monitoring plan is disapproved without prejudice to its right to submit a revised plan for the Department's consideration consistent with this Adjudication and Order. HCP may not operate under the General Permit until a revised monitoring plan is approved. Jurisdiction is retained.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: November 2, 2007

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CITIZEN ADVOCATES UNITED TO SAFEGUARD THE ENVIRONMENT, INC.	:	
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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HAZLETON REDEVELOPMENT AUTHORITY, and HAZLETON CREEK PROPERTIES, LLC, Permittees	:	**(Consolidated with 2005-329-L)**

CONCURRING OPINION OF JUDGE MILLER

I concur with this extremely well written adjudication. I write separately only to object to the Board's willingness to decide in this case to reject in all future cases the "issue-by-issue" standing requirement that Pennsylvania courts and this Board have said is a required element of proof of standing.

First, I think this holding is unnecessary. I believe that appellants have standing on the issue of the absence of an adequate monitoring plan. The fact that they may use public water does not mean that contamination of the subsurface of their properties would not harm them. The record suggests to me that they have standing on other objections contained in their notice of appeal such as air contamination and the effects of increased traffic.

Second, I think as an academic matter it is contrary to the law on standing as interpreted by the Courts[20] and by dicta in our previous decisions.[21]

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[20] *See William Penn Parking Inc. v. City of Pittsburgh,* 346 A.2d 269, 280 (Pa. 1975)(party must have a direct interest in the "particular question litigated"); *see also e.g. Odette's Inc. v. Department of Conservation and Natural Resources*, 699 A.2d 775 (Pa. Cmwlth. 1982)(considering the issue of standing under the Dam Safety and Encroachments Act for various counts of a petition for review); *National Solid Waste Management v. Casey*, 580 A.2d 893 (Pa. Cmwlth. 1990)(finding that in a challenge to an executive order an appellant had standing on a declaratory judgment claim, but lacked standing with respect to a mandamus claim.)

[21] *PRIZM Asset Management v. DEP*, 2005 EHB 819; *see Riddle v. DEP*, 2001 EHB 355.

Third, the decision may rob us of a tool to deny appeals from parties who have no real interest in the issue litigated. I assume that the issue-by-issue standing requirement is simply a subset of the real party in interest requirement to insure that we do not entertain attacks on major issues of environmental protection which have no effect on the appellants simply because the project approved by the Department may have some other minor, adverse effect on them.

I acknowledge that we may simply be tilting at windmills on this aspect of the decision. At least over the past decade, I can recall no instance in which it would have been appropriate to deny standing on the ground that the party had no real interest in the issue being litigated. Despite many briefs from learned counsel claiming that an appellant has no interest in a particular issue in the notice of appeal, we have granted standing to persons who are likely to be adversely affected by the Department's action without reference to any particular issue raised by the appellant. In the case of municipal parties, we have upheld standing where the Department has permitted a project within its borders that might have an adverse effect on its citizens.[22] By contrast we have denied standing to members of the legislature as representatives of their constituents.[23] As a practical matter, that is the Board's entire law on standing.

Nevertheless, I can see no reason in this case to do away with the apparent requirement of issue-by-issue standing that has been said by the courts to be the law as an academic matter and which might be a useful tool to us in some unusual future proceeding.

George J. Miller

GEORGE J. MILLER
Judge

DATED: November 2, 2007

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[22] *Tinicum Township v. DEP*, 2002 EHB 822.
[23] *Levdansky v. DEP*, 1998 EHB 571.

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CITIZEN ADVOCATES UNITED TO SAFEGUARD THE ENVIRONMENT, INC.	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HAZLETON REDEVELOPMENT AUTHORITY, and HAZLETON CREEK PROPERTIES, LLC, Permittees	:	**EHB Docket No. 2006-005-L (Consolidated with 2005-329-L)**

AMENDED ORDER

AND NOW, this 7th day of November, 2007, our Order of November 2, 2007 is hereby amended to add the following sentence: CAUSE's appeal from the COA is dismissed.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: November 7, 2007

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SOLEBURY TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-183-MG**
	:	**(consolidated with 2006-116-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW HOPE CRUSHED STONE & LIME COMPANY, Permittee	:	**Issued: November 2, 2007**

OPINION AND ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

By George J. Miller, Judge

Synopsis

The Board grants in part and denies in part a motion for partial summary judgment by a quarry operator-permittee in appeals by a municipality which challenge a Department compliance order and permit renewal. The Department's action followed a Board order that required the Department to conduct an in-depth hydrogeologic study of the permittee's quarry operation. The appeals also challenge the issuance of the renewed permit following the completion of the hydrogeologic study by the permittee. The permittee's motion is granted on certain claims for relief in the municipality's notice of appeal which seek equitable or declaratory relief, seek the appointment of a special master and seek attorney's fees. The permittee's motion is granted with respect to its discharges between the time of the Board's order requiring the hydrogeologic study and the issuance of the renewed permit in 2006.

The permittee's motion is denied as to the other claims because the Board finds that the claims are neither moot nor citizen's suits. Rather the appeals raise issues related to the Department's compliance with the Board's prior order, which are relevant in assessing the propriety of the Department's actions under appeal. The Board also finds that there are genuine issues of material fact relating to whether or not two years is a reasonable amount of time to complete the study ordered by the Board and whether the municipality was improperly excluded from the permitting process. Therefore the permittee's motion is denied on this basis as well.

Background

Before the Board is a motion for partial summary judgment by New Hope Crushed Stone (Permittee) in these consolidated appeals by Solebury Township from the Department's May 19, 2005 administrative order and the March 16, 2006 NPDES permit renewal.

The action by the Department followed the Board's adjudication that vacated and remanded a previously renewed NPDES permit held by the Permittee in connection with a quarry operation located in Solebury Township. Our remand order directed the Department to perform a more detailed examination of the effect of the pumping from the quarry on the hydrogeologic balance of the Primrose Creek Basin.[1]

The Permittee commenced work on developing a work plan and some data collection. On May 19, 2005, the Department issued an administrative order directing the Permittee to complete its data collection and file the Primrose Creek Basin Study by July 31, 2005. On June 10, 2005, the Township filed an appeal from this order. The Township's appeal complained, among other things, that the Department had been dilatory in complying with the Board's order and that as a

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[1] *Solebury Township v. DEP*, 2004 EHB 95.

result water supplies in the Township were being adversely affected. The Department issued a renewed NPDES permit to the Permittee on March 16, 2006, which the Township also appealed.

The Permittee moved to dismiss the appeal from the administrative order arguing that its subsequent compliance with the Department's order rendered the Township's appeal moot. We disagreed with the Permittee's characterization and denied the motion. In our view the Township's appeal raised broader issues relating to the Department's conduct in complying with our 2004 order.[2]

The Permittee also sought dismissal of the Township's 2005 appeal on the basis of mootness and lack of jurisdiction. By order dated May 10, 2006, we again denied the Permittee's motion and reiterated our view that the issuance of the new permit did not necessarily resolve our concern that the Department's conduct during the period of time from our 2004 order until the issuance of the new permit in 2006 may have been inappropriate or unreasonable.[3] But recognizing that there was some overlapping of issues and in the interest of judicial economy, we consolidated the 2005 appeal from the administrative order and the 2006 permit appeal for review.

Later, the Permittee moved to strike several contentions in the 2006 appeal on the basis that the Board lacked jurisdiction to review many of the claims made by the Township in its notice of appeal. By order dated July 19, 2006, we denied the motion finding that while many of the statements made by the Township appeared to be inartfully drawn, they appeared to relate to the relief that the Board might provide. We concluded that the issue of remedy was premature and declined to dismiss the claims at that time.

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[2] *Solebury Township v. DEP*, 2005 EHB 898.
[3] *Solebury Township v. DEP*, 2006 EHB 256.

Thereafter the parties continued to engage in discovery, which has now concluded.[4] The Township filed a motion for summary judgment which we have decided by a separate opinion issued today. This opinion considers the Permittee's motion for partial summary judgment which seeks to revisit many of the issues raised by its previous motions to dismiss now that discovery is complete. We will address the Permittee's claims in turn.

OPINION

Summary judgment may only be granted where the evidentiary materials which support the motion demonstrate that the moving party is entitled to judgment as a matter of law.[5] In considering the merits of a motion for summary judgment, we view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.[6]

The first paragraph of the Permittee's motion seeks to dismiss certain enumerated claims made by the Township in the 2006 appeal on the grounds that the Board does not have jurisdiction to review these claims. Specifically the Permittee argues that objections raised by the Township attempt to relitigate a 1995 permit correction authorizing the Permittee to remove a stretch of the Primrose Creek between two of its quarry pits; assert a "citizen's suit" not authorized by the Environmental Hearing Board Act; seek to compel the Department to initiate enforcement proceedings; assert equity claims seeking the appointment of a special master and permanent injunction; and to collect attorney's fees for actions not pending before the Board.

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[4] We have issued two other opinions relating to discovery disputes in this matter on March 29, 2007 and May 16, 2007, which are not necessary to discuss for our purposes here.

[5] *E.g. Global Ecological Services, Inc. v. Department of Environmental Protection*, 789 A.2d 789 (Pa. Cmwlth. 2001); *Barra v. DEP*, 2006 EHB 198.

[6] *Scalice v. Pennsylvania Benefits Trust Fund,* 883 A.2d 429 (Pa. 2005); *Jones v. SEPTA*, 772 A.2d 435 (Pa. 2001).

The Township opposes the Permittee's motion and argues that judgment in the Permittee's favor is not warranted as a matter of law. As we explain more fully below, we agree with the Permittee that the Board has no authority to appoint a special master or grant attorney's fees for matters not currently before the Board. We also agree that the Township may not revisit the Department's authorization to the Permittee to remove the stretch of Primrose Creek between the two quarry pits. However, as we explain below, the Permittee's motion set forth in Paragraph 1 is otherwise denied.

Compliance with the Board's March 2004 Order

Many of the claims that the Permittee seeks to dismiss rest upon the notion that the Township's appeals are in the nature of a citizen's suit and are an attempt to compel the Department to take enforcement action against the Permittee. The Permittee suggests that the only proper inquiries are the validity of the 2006 NPDES permit renewal and whether the Department's 2005 administrative order was appropriate. Other claims attacking the conduct of the Department and the Permittee and the development of the Primrose Creek Basin Study raised by the Township are merely "collateral" and beyond the Board's authority. Accordingly, in the Permittee's view, the Board has no jurisdiction over these claims and they must be dismissed.

Yet as we have explained in our earlier opinions, our view of this matter is quite different. The Township's challenge to the Department's conduct from the time of our March 5, 2004 remand order to the time of the issuance of the 2006 NPDES permit is relevant to the propriety of the Department's 2005 order and permit renewal. We review the Department's actions to determine whether they comply with the law and are reasonable and appropriate. The "law" of course includes more than simply the statutes and regulations that the Department is mandated to apply, but also the law created by orders of the Board. Our interest is not one of

equity, but is the preservation of our ability to review actions of the Department. Our order directed the Department to undertake the hydrogeologic study or direct the Permittee to do so, and to issue a renewed permit based on that study. Accordingly, the Department was required to do as we required, and whether the requirements of our direction were adequately met is relevant to our determination.[7]

Specifically, the Permittee moves to dismiss Paragraphs 37 and 46 of the Township's 2006 appeal which complain that the Department and the Permittee have failed to comply with the Board's order to complete an in-depth hydrogeologic study of the Primrose Creek Basin. According to the Permittee this ground for objection is in the nature of a citizen's suit "calculated to usurp the Department's enforcement authority." We disagree with the Permittee's characterization of the Township's objections. Paragraphs 37 and 46 complain that neither the Department nor the Permittee have complied with the Board's order requiring an in-depth study, and asks the Board to find the Department and the Permittee in violation of our order. We rejected the Permittee's same contentions in our prior orders and see no reason to change our view now.

The Permittee also moves for summary judgment on claims concerning the adequacy of the hydrogeologic study which formed the basis for the 2006 NPDES permit renewal, whether the Permittee discharged water in excess of what we ordered in 2004, whether it was reasonable for the Department to take two years to reissue the NPDES permit renewal and whether the Township was improperly excluded from the process, both as a matter of the Board's jurisdiction and also on a factual basis. We explained our view on the scope of our jurisdiction above: these

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[7] *Pequea Township v. Herr*, 716 A.2d 678, 687 (Pa. Cmwlth. 1998).

claims all go to whether or not the Department acted reasonably and lawfully in taking its actions following our remand.

As a matter of substance, we will also deny the Permittee's motion because the Permittee has not demonstrated that there are no outstanding issues of material fact and that it is entitled to judgment as a matter of law. In support of its position that two years was a reasonable amount of time to complete the study and issue the permit renewal, the Permittee has submitted a timeline of activities taken by its experts in their preparation of the hydrogeologic study. This timeline is very comprehensive and detailed. It certainly informs the Board what activities the experts undertook in gathering data and assembling that information into a report to be submitted to the Department. However, while it tells us what the experts did, it does not as a matter of law answer the question whether or not those actions were taken in a reasonable amount of time. Such a determination requires a balancing of expert and lay testimony and is inappropriate for resolution by summary judgment.

Similarly, the evidence adduced by the Permittee in support of its position that the Township was not improperly excluded from the permitting process does not demonstrate that there is no genuine issue of material fact. The Township vigorously disputes the notion that the Township did not request involvement and that it was reasonable for the Department to conclude that it did not wish to participate. Whether the Township voluntarily chose not to participate or was deliberately excluded from participation clearly must be resolved with the development testimony and evaluation of the credibility of witnesses. Therefore this issue, too, can not be resolved by summary judgment.

Claims in Equity and Declaratory Judgment and Other Requests for Relief

The Permittee also seeks judgment on Paragraphs 40, 43, 45 and 49 of the 2006 appeal, based on the theory that the Township's appeal is in the nature of a citizen's suit, and these objections are seeking enforcement with the Clean Streams Law and Federal Water Pollution Control Act in the form of declaratory relief. The Township argues that its prayer for relief, although admittedly framed in the language of seeking declaratory judgment, is really seeking specific findings by the Board which would support revocation of the permit or a specific remand for further action by the Department. As we explained above, we do not see the Township's appeal as a citizen's suit. We accept the appeal as a request that we direct the Department to undertake an extensive hydrologic study and reconsider its permit renewal in light of that study. We clearly have the authority to do that.[8] However, we will grant the Permittee's motion to the extent the statements in the notice of appeal may be construed as seeking relief in the form of declaratory judgment,[9] but will deny the motion in all other respects.

Paragraph 40 states that "The EHB has jurisdiction over claims arising under the Pennsylvania Clean Streams Law . . . ." The Permittee argues that the Board does not have jurisdiction over all claims under the Clean Streams Law, but only with respect to claims related to an "action of the Department." In the interest of precision, we will grant the Permittee' motion to the extent that Paragraph 40 might be read to include citizen's suits. Similarly, we will grant the Permittee's motion to the extent that Paragraphs 43 and 45 appear to seek a declaratory judgment that the Permittee is in violation of the federal Clean Water Act or Clean Streams Law.

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[8] *Pequea Township v. Herr,* 716 2d 678, 687 (Pa. Cmwlth. 1998).

[9] *Empire Sanitary Landfill, Inc. v. Department of Environmental Resources,* 684 A.2d 1047 (Pa. 1996); *Costanza v. Department of Environmental Resources,* 606 A.2d 645 (Pa. Cmwlth. 1992); *Varos v. DER,* 1985 EHB 892.

We note however, it is certainly within our purview to make factual and legal findings on these topics to the extent they are necessary to our final disposition of the Township's appeals.

Similarly, Paragraph 47 of the appeal seeks relief in "law or equity" to restrain the "public nuisance" that may be created as a result of the conditions of the quarry's operation. We agree with the Permittee that we have no general jurisdiction in equity. However, the Commonwealth Court has stated that we may "direct the department in what is the proper action to be taken."[10] Therefore, after reviewing the evidence at the hearing if we find that the conditions created by the NPDES permit may cause a nuisance, we may direct the Department to change the permit in a way that will be reasonable and appropriate under the circumstances. Accordingly, the Permittee's motion is granted in part and denied in part.

Paragraphs 49 and 50 are related to attorney's fees and expenses. We held in our July 2006 opinions, that any review of attorney's fees that may be due is premature and any claims for such fees must be made in a properly filed petition after our adjudication on these appeals.[11] However, outside the context of a fee petition related to these appeals, we have no authority to grant relief to the Township in the form of all expenses incurred restraining or preventing a nuisance or expenses that are exclusively related to other proceedings. Therefore, to the extent that Paragraphs 49 and 50 may be read to include a request for fees and expenses wholly unrelated to the current appeals or based on the authority of the Federal Water Pollution Control Act, the Permittee's motion is granted.

Paragraph 44 asks the Board to appoint a special master to independently review all current and prospective submissions by the Permittee. The Permittee argues that this claim must

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[10] *Pequea Township v. Herr*, 716 A.2d 678, 687 (Pa. Cmwlth. 1998).
[11] *Solebury Township v. DEP,* 2006 EHB 455.

be dismissed because the Board has no jurisdiction to appoint a special master. The Township contends that its request for a special master is simply a request that the Board retain jurisdiction and some control over compliance with whatever order it may issue in resolution of the Township's appeal. We will grant the Permittee's motion and dismiss the Township's request for a special master. It is our role to oversee and evaluate the work product of the Department. The Environmental Hearing Board Act does not otherwise give us authority to suspend the executive powers granted to the Department by the legislature to regulate surface mining. However, the Board will retain its jurisdiction to review any final action taken by the Department with respect to the renewal permit.

The Nature of the Primrose Creek

Paragraphs 29, 30, 31 and 33 (l) of the Township's 2006 appeal relate to a stretch of the Primrose Creek which previously ran through the Permittee's quarry. In 1995, the Department made the determination that the Primrose Creek was "ephemeral" and authorized the Permittee to connect its two quarry pits by removing the streambed. Although the Township doesn't directly challenge the Department's authorization, it argues that the Department's conclusion that the Primrose Creek as ephemeral rather than perennial in 1995 was in error. Therefore, according to the Township, the premise of the Permittee's 2006 hydrogeologic study that the creek is not perennial is also flawed.

We can not agree with the Township that the entire history of the Primrose Creek Basin is relevant to the challenge to the current NPDES permit renewal. The scope of inquiry in an appeal of an NPDES renewal appeal is whether or not it is reasonable to renew the NPDES permit and discharge at a certain level going forward, not whether the permit which it replaces was

appropriate.[12] Therefore our concern is whether the conditions in the current permit will preserve the hydrogeologic balance of the basin during the term of the permit renewal.[13] The Township has directed us to no requirement which would require the permit to provide for remediation of alleged environmental damage which occurred in the past. While some understanding of the historical condition of the basin may be useful in understanding the current balance, we see no purpose to be served by revisiting an unappealed decision of the Department which occurred in another permit action over ten years ago. Even if the Department's decision were scientifically incorrect, for the purposes of evaluating the renewal of the NPDES permit, the stretch of the Primrose Creek that ran through the quarry no longer exists. Accordingly, we will grant the Permittee's motion and dismiss Paragraphs 29, 30, 31 and 33 (l) of the Township's 2006 appeal.

Mootness of the 2005 Appeal

The Permittee argues that the Township's 2005 appeal arising from the Department's administrative order was rendered moot by its compliance with the administrative order and the issuance of the 2006 NPDES appeal. We rejected that contention in our prior opinions and orders, and see no reason now to change our opinion.

We further reject the Permittee's argument that the Township's failure to appeal the October 11, 2005 letter which purports to "lift" the administrative order and finds the Permittee "in compliance" has an effect on the Township's 2005 appeal. This letter does not answer the question of whether or not the hydrogeologic study complied with the Board's 2004 order. Nor does it put to rest the issues raised in the 2005 appeal concerning the Department's timely compliance with the Board's 2004 order. Accordingly, we deny the Permittee's motion to

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[12] *Tinicum Township v. DEP*, 2002 EHB 822. *See also Wheatland Tube Co. v. DEP,* 2004 EHB 131.

[13] *Solebury Township v. DEP*, 2004 EHB 95, 114; *Tinicum.*

dismiss the Township's appeals on the basis of mootness or the Township's failure to appeal the October 2005 letter.

The Permittee's Right to Discharge after the Board's 2004 Order

The Permittee seeks summary judgment in Paragraph 5(c) of its motion on whether or not it had the right to discharge water on an interim basis pending the issuance of the 2006 NPDES permit renewal. We agree with the Permittee and grant judgment on this issue.

Although we vacated the 2002 permit renewal in our 2004 Order, we also required the Department to issue an interim authorization to the Permittee so that it could continue to operate while it was conducting the hydrogeological study:

> The Department shall amend the permit to authorize the Permittee to discharge no more than necessary to keep its pit dry enough to meet its production needs, but in no event shall the Permittee discharge more than 4 mgd on a monthly average until the Department completes its review pursuant to Paragraphs 1 and 2 of this order.[14]

It was not our intent to require the Permittee to shut down its operations during the time the study was being conducted. The Township concedes that our order authorizes a discharge by the Permittee but argues that it was improper for the Board to allow the Permittee to discharge at any level without sufficient factual findings concerning the hydrogeologic balance of the Primrose Creek Basin. We disagree. Our order was based upon the hydrogeologic evidence which was adduced at the hearing, by both the Township and the Permittee. Although we found the data insufficient to demonstrate that the discharge rate would preserve the hydrogeologic balance during the entire permit term, especially in times of drought, we had no reason at the time to believe that discharge by the Permittee at the rate we established was harmful per se or would be

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[14] 2004 EHB at 123-24.

unduly disruptive to the basin during a reasonable period during which the new permit renewal would be under consideration. We therefore grant the Permittee's motion for summary judgment on this issue.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SOLEBURY TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-183-MG**
	:	**(consolidated with 2006-116-MG)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and NEW HOPE CRUSHED	:	
STONE & LIME COMPANY	:	

ORDER

AND NOW, this 2nd day of November, 2007, the motion for partial summary judgment by New Hope Crushed Stone & Lime Company is granted in part and denied in part as described below.

1. Paragraph 1 of the Permittee's motion for partial summary judgment is granted in part and denied in part:

   a. Judgment on Paragraphs 43, 45, 47 and 49 of Solebury Township's notice of appeal at Docket No. 2006-116-MG is granted to the extent those paragraphs seek equitable or declaratory relief under the Clean Streams Law or Federal Water Pollution Control Act.

   b. Judgment on Paragraph 40 of the Township's notice of appeal is granted to the extent it claims that the Board has jurisdiction over citizen's suits under the Clean Streams Law.

   c. Judgment on Paragraphs 49 and 50 is also granted to the extent those claims seek attorney's fees and expenses wholly related to actions other than the appeals currently

before the Board, but summary judgment on these claims is denied in all other respects.

2. Paragraph 1 of the Permittee's motion for partial summary judgment on Paragraphs 29, 30, 31 and 33(l) of Solebury Township's notice of appeal at Docket No. 2006-116-MG is granted.

3. Paragraph 1 of the Permittee's motion for partial summary judgment on Paragraph 44 of Solebury Township's notice of appeal at Docket No. 2006-116-MG is granted to the extent it seeks the appointment of a special mater. However, in accordance with the request made in the Permittee's Brief the Board will retain jurisdiction over the Department's action in connection with the renewal permit.

4. Paragraph 1 of the Permittee's motion for partial summary judgment on Paragraph 37 and 46 of Solebury Township's notice of appeal at Docket No. 2006-116-MG, is denied.

5. The Permittee's motion for partial summary judgment Paragraphs 2, 3, 4 and 5 (a) and (b) are denied.

6. The Permittee's motion for partial summary judgment Paragraph 5(c) is granted.

7. The Board will contact the parties to schedule a hearing on the merits of these appeals.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: November 2, 2007

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SOLEBURY TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-183-MG**
	:	**(consolidated with 2006-116-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW HOPE CRUSHED STONE & LIME COMPANY	:	**Issued: November 2, 2007**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Judge

Synopsis

The Board denies a motion for summary judgment filed by a municipality in a challenge to a NPDES permit held by a quarry operation. The municipality failed to demonstrate that there were no genuine issues of material fact or that it was entitled to judgment as a matter of law regarding the interpretation of a permit condition. Specifically, a condition that requires the permittee-quarry to "maintain" a discharge rate does not necessarily represent a maximum discharge rate for the permit.

OPINION

Before the Board is a motion for summary judgment filed by the Appellant, Solebury Township in these consolidated appeals involving a NPDES discharge permit for a quarry operated by New Hope Crushed Stone (Permittee).

This matter has its genesis in a 2002 appeal from the renewal of the NPDES permit related to discharges from a quarry operated by the Permittee which is located in Solebury Township. In 2004 the Board issued an adjudication and remanded the permit to the Department for further consideration of the effect of the rate of discharge on the hydrogeologic balance of the Primrose Creek basin.[1] For reasons that have yet to become clear, the Department did not issue a new permit until 2006.[2] The appeals before us now are an appeal by Solebury Township stemming from a 2005 administrative order from the Department directed to the Permittee to complete the hydrogeologic study required by our 2004 adjudication, and also an appeal from the 2006 NPDES permit renewal. By order dated May 10, 2006, we consolidated the appeals for review. We have shepherded the parties through a lengthy discovery process and dealt with numerous other motions and have before us now dispositive motions from both sides. We have resolved the Permittee's motion for partial summary judgment by a separate opinion issued today. We presently turn our consideration to the Township's motion for summary judgment.

The crux of the Township's motion is the Township's contention that the 2006 NPDES permit issued to the Permittee contains a discharge limit of .5 million gallons per day (mgd). According to the Township, since the Permittee has been routinely discharging in excess of .5 mgd, the Board should grant its motion for summary judgment and revoke the Permittee's permit. The Permittee and the Department admit that the quarry has discharged more than .5 mgd, but contend that .5 mgd is not the discharge limit in the permit, but rather a minimum

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[1] *Solebury Township v. DEP*, 2004 EHB 95.

[2] Our remand order provided that the Permittee could discharge "no more than necessary to keep its pit dry enough to meet its production demands . . . ." during the pendancy of the Department's review.

discharge that must be maintained to preserve the flow in Primrose Creek, downstream from the quarry.

The purpose of summary judgment is to challenge the sufficiency of the evidence that the opposing party has to support his claim at hearing.[3] Accordingly, the Board will only grant summary judgment where the evidentiary materials which support the motion demonstrate that the moving party is entitled to judgment as a matter of law.[4] In considering the merits of a motion for summary judgment, we view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.[5] After reviewing the materials submitted by the Township in support of its motion and the responses from the Department and the Permittee, it is very clear that summary judgment is not merited.

Special Condition No. 8 of the Permittee's NPDES permit provides that:

> During active mining, upon completion of mining, and during the creation of the water impoundment, the permittee shall maintain a discharge from the quarry into Primrose Creek at an average continuous rate of 0.5 million gallons per day (1.9 million liter per day), except for extenuating circumstances (i.e. drought) where this discharge may not be met. This discharge shall continue until: the water in the quarry pit reaches a level of 98.0 feet (29.9 m) mean sea level (MSL) or it is determined that the natural water level may be lower than the expected level of 98.0 feet MSL.[6]

It is the Township's view that the clear meaning of this condition is to operate as a maximum limit on the amount of water that the Permittee is authorized to discharge from the

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[3] *Scalice v. Pennsylvania Benefits Trust Fund*, 883 A.2d 429 (Pa. 2005); *Jones v. SEPTA*, 772 A.2d 435 (Pa. 2001); *Jackson v. DEP*, 2005 EHB 496.

[4] *E.g., Global Ecological Services, Inc. v. Department of Environmental Protection,* 789 A.2d 789 (Pa. Cmwlth. 2001); *Barra v. DEP*, 2006 EHB 198.

[5] *Scalice; Jones.*

[6] Township Motion for Summary Judgment, Ex. B.

quarry pit. Accordingly, the Township argues that we must revoke the permit because the Permittee has routinely exceeded this "limitation" since the issuance of the permit.

The Permittee admits that it routinely discharges more than .5 mgd. However, both the Permittee and the Department contend that the Township has grossly misinterpreted Special Condition No. 8. With the support of deposition testimony of Department personnel, it is the Permittee's view that this condition is a *minimum* discharge rate which was placed in this permit, and the previous NPDES permit, to address the absence flow in Primrose Creek as a result of the Department's prior approval of mining through the creek. The Department supports this view.

After reviewing the motion and exhibits and the responses thereto, we find that the Township falls short in demonstrating that there is no issue of genuine material fact and that it is entitled to judgment in its favor. Not only does its argument appear to fail as a matter of grammar, the evidence of record cited by the Department and the Permittee are admissible evidence against the Township's interpretation of Special Condition 8.

First, based on a fair reading of Special Condition 8, we do not believe that "maintain" as used in the sentence, necessarily supports the Township's view that .5 mgd is the maximum discharge allowed by the permit. In common usage "maintain" means "to keep up or carry on; continue."[7] Therefore to "maintain a discharge rate from the quarry into Primrose Creek at an average continuous rate of 0.5 million gallons per day" means "to keep up or continue" the discharge. We do not see how this language necessarily precludes a discharge at a higher rate.

The Township argues that it is inappropriate to add language such as "at least" or a "minimum" into the sentence in order to interpret the condition to allow a greater discharge. We

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[7] "Maintain." Dictionary.com. The American Heritage® Dictionary of the English Language, Fourth Edition. Houghton Mifflin Company, 2004. http://dictionary.reference.com/browse/maintain (accessed: September 25, 2007).

agree. The addition of those words is unnecessary. Similarly, it is inappropriate to read the word "maximum" or "no more than" into the sentence to preclude a higher rate of discharge as advocated by the Township.

The Department's interpretation of this language is supported by the surrounding permit language and conditions. For example, Condition 8 also provides that the Permittee need not maintain an average continuous rate of discharge in "extenuating conditions (i.e. drought) where this discharge rate may not be met." If the discharge rate in the condition were meant to be a maximum, then the exclusion for drought conditions would be unnecessary. Since we assume that all the language in the permit is there for a reason, the Department's interpretation of the average continuous rate of .5 mgd to mean a minimum rate of discharge rather than a maximum is reasonable.

Further, Special Condition No. 9 clearly establishes a maximum discharge for the quarry. That condition reads: "The permittee is authorized to discharge, under the approved NPDES permit, only the amount of water required to keep the pit dewatered for normal mining operations." Clearly it is Condition 9 that sets the maximum discharge rate for the permit. We heard a great deal of testimony in the 2004 appeal of this permit about the necessity for keeping the Permittee's pit dry and the amount of pumping that may be necessary to achieve that. Based on the evidence at that hearing, our remand order allowed the Permittee to discharge a sufficient rate to keep its pit dry, but no "more than 4 mgd on a monthly average." The Township adduced no evidence in support of its motion for summary judgment which even suggests that a continuous average of .5 mgd is a realistic discharge rate which would allow the Permittee to continue to operate, or is necessary to maintain the hydrogeologic balance of the Primrose Creek Basin.

Finally, the deposition testimony of Department witnesses is clearly in opposition to the Township's interpretation of Special Condition No. 8. The excerpts from the depositions of Nathan Houtz and Michael Menghini simply do not support the Township's interpretation of Special Condition No. 8. Neither of them state that they meant to put the word "minimum" into the condition and failed to do so. Rather they testified that the purpose of the condition was to address concerns related to the flow of the Primrose Creek and that it was important that at least a certain level of flow be maintained in the channel. Accordingly, the purpose of Special Condition No. 8 is to address that concern. The Township did not put forth any other evidence from the record which opposes or contradicts this testimony. Clearly there is an issue concerning the proper interpretation of the witnesses testimony or a credibility determination which this Board has consistently held is inappropriate to resolve in a motion for summary judgment.[8] Therefore we certainly can not say that the Township's interpretation is correct as a matter of law, nor can we say that there is no genuine issue of disputed fact which would merit judgment in the Township's favor.

The Township in reply claims that the permit should be revoked because there are now no enforceable limits on the discharges allowed to the Permittee and that the permit does not comply with the Board's order that the Department consider what limit or limits are necessary and proper on a monthly average or other measure as the Department may deem appropriate to minimize the impact on the prevailing hydrologic balance of the Primrose Creek Basin. The only limit on the Permittee's discharges contained in the permit is "the amount of water required to

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[8] *E.g.*, *Upper Gwynedd Township v. DEP,* EHB Docket No. 2005-358-MG (Opinion issued January 30, 2007); *Lower Salford Township Authority v. DEP*, EHB Docket No. 2005-100-K (Opinion issued September 19, 2006); *Lower Paxton Township v. DEP*, 2001 EHB 753; *DLA v. DEP*, 2001 EHB 337.

keep the pit dewatered for normal mining operations." Whether this requirement is enforceable by Department inspections presents an issue of fact. The affidavit of Nathan Houtz submitted by the Department states that the Department can enforce this limitation by comparing the NPDES discharge, groundwater elevations of monitoring wells, precipitation and stream flow of Primrose Creek upstream of the mining site as a result of the increased monitoring requirements contained in the permit. In fact, Houtz says in his affidavit that this monitoring indicates that there has been no discharge in excess of this permit condition to date. The Township has submitted no contrary affidavit or other evidence of record in support of its contention that the permit limit is unenforceable.

Whether any other limit is necessary to maintain the prevailing hydrologic balance or to protect the other users of the water resource are the central factual issues in these appeals. Resolution of these issues clearly requires consideration of expert testimony with respect to the hydrologic study submitted to the Department and any other expert testimony the parties may offer. These issues, including any effect of drought, must be resolved as the result of an evidentiary hearing.

In sum, we find that the Township has not sustained its burden of demonstrating that Special Condition No. 8 represents a maximum discharge rate as a matter of law or that there is no genuine issue of material fact in dispute on that point. Neither the meaning of the word "maintain" in isolation nor the meaning of Condition 8 read as a whole, or in context with other conditions in the permit, support the Township's position. The Township's position is further undermined by other admissible evidence of record contrary to the Township's contention that Condition No. 8 represents a maximum discharge rate.

Although the Permittee and the Department devote a great deal of effort in their responses arguing that the Board lacks the jurisdiction to revoke the permit as requested by the Township, we need not reach this issue due to our ruling on the Township's initial premise. The issues involving the Board's jurisdiction are addressed in our opinion and order entered today on the Permittee's motion for partial summary judgment.

We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SOLEBURY TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-183-MG**
	:	**(consolidated with 2006-116-MG)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and NEW HOPE CRUSHED	:	
STONE & LIME COMPANY	:	

ORDER

AND NOW, this 2nd day of November, 2007, the motion for summary judgment by Solebury Township in the above-captioned matter is hereby **DENIED**.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Judge

DATED: November 2, 2007

c: **DEP Bureau of Litigation**
Attention: Brenda K. Morris, Library

For the Commonwealth, DEP:
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Southcentral Region

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MICHAEL HUCZKO	:	
	:	
v.	:	**EHB Docket No. 2007-183-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 3, 2007**

OPINION AND ORDER ON RULE TO SHOW CAUSE

By George J. Miller, Judge

Synopsis

The Board dismisses an appeal of a civil penalty assessment of $ 13,500 by the owner of certain underground storage tanks. The appellant signed a settlement agreement with the Department and offered no basis upon which the Board may set that agreement aside. Therefore, his appeal must be dismissed because there is no further relief that the Board can offer.

OPINION

In July 2007 Michael Huczko (Appellant) filed an appeal from an order of the Department which required him to take certain remedial measures and pay a $13,500 civil penalty in connection to violations of the Storage Tank Act which were observed at his facility located in Philadelphia, Pennsylvania. The sole objection related in the notice of appeal was "Dollar amount of Civil Penalty Assessment (13,500)."

Thereafter, the Department's compliance specialist negotiated a settlement agreement wherein the Appellant agreed to pay the total amount of the penalty in three equal installments of

$ 4,500 each. The Appellant signed the agreement in September, 2007. When the Appellant failed to withdraw his appeal before the Board, on November 1, 2007, the Board held a conference call with the parties because the appeal had not yet been withdrawn. The Appellant informed the Board that he would like forgiveness of the last payment due under the agreement due to financial hardship. The Board ordered Department counsel to consult with other officials of the Department in order to determine whether the Department was willing to grant the Appellant's request.

By letter dated November 8, 2007, the Department informed the Board that after review of the Appellant's compliance history and much deliberation, the Department was not willing to forgive the last payment due under the settlement agreement. Accordingly, the Board issued a Rule to Show Cause on the Appellant which required him to show cause why his appeal should not be dismissed in view of the settlement agreement. By letter dated November 25, 2007, the Appellant responded to the Board's order explaining that he had worked with the Department in good faith and had expended significant funds in order to comply with the remediation measures required by the Department's order. He states that his compliance has caused him "great financial strain" and asks for leniency and waiver of the final payment due under the agreement.

Unfortunately, the Board can not grant any relief to the Appellant in view of his signed agreement with the Department wherein he agreed to waive his appeal rights. The Appellant has not suggested that he was coerced into signing the agreement or that he did not have the ability to understand the agreement that he signed. Therefore, there is no relief that we can offer the Appellant and his appeal must be dismissed.[1]

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[1] *Morris Township v. DEP,* 2005 EHB 55 (where an event occurs which deprives the Board of the ability to provide effective relief, the appeal must be dismissed).

We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MICHAEL HUCZKO	:	
	:	
v.	:	**EHB Docket No. 2007-183-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 3rd day of December, 2007, the appeal of Michael Huczko in the above-captioned matter is hereby **DISMISSED**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

JUDGE LABUSKES CONCURS IN THE RESULT.

DATED: December 3, 2007

c: **DEP Bureau of Litigation**
Attention: Brenda K. Morris, Library

For the Commonwealth, DEP:
Gina M. Thomas, Esquire
Southeast Region

Appellant – *Pro Se:*
Mr. Michael Huczko
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SOLEBURY TOWNSHIP, BUCKINGHAM TOWNSHIP, & DELAWARE RIVERKEEPER, DELAWARE RIVERKEEPER NETWORK & AMERICAN LITTORAL SOCIETY	:	
v.	:	**EHB Docket No. 2002-323-L (Consolidated with 2002-320-L & 2003-012-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, Permittee	:	**Issued: December 6, 2007**

OPINION AND ORDER
ON PRELIMINARY ISSUES FOLLOWING REMAND

By Bernard A. Labuskes, Jr., Judge

Synopsis

(1) A party that does not appeal a Board order is barred from participating as a party in subsequent proceedings on remand. (2) The Board follows the reasoning and holding of the Commonwealth Court to the effect that a supplement to a petition for costs and fees under the Clean Streams Law should be allowed.

Procedural History

In a letter dated January 20, 1999, the Department of Environmental Protection ("DEP") approved an environmental assessment conducted by the Department of Transportation ("DOT") for a road construction project known as the U.S. Route 202 Section 700 bypass project. The approval included a Section 401 Water Quality certification. Solebury Township, Buckingham

Township, along with the Delaware Riverkeeper, Delaware Riverkeeper Network, and the American Littoral Society (collectively "Riverkeeper") filed separate appeals of the Section 401 certification, which we consolidated. On November 6, 2003, DOT requested that DEP rescind the 401 certification. DEP did so on November 9, 2003. On January 16, 2004, we granted DEP and DOT's joint motion to dismiss the appeal as moot.

On February 17, 2004, Riverkeeper, Buckingham Township, and Solebury Township filed applications for attorneys fees and costs. Solebury Township filed its application pursuant to the Clean Streams Law. Riverkeeper and Buckingham Township filed pursuant to the Costs Act. Riverkeeper and Buckingham Township subsequently supplemented their applications with a request for costs and fees pursuant to the Clean Steams Law as well.[1] The Board, in two separate opinions, denied the applications for costs and fees under both statutes.[2] Solebury Township and Buckingham Township (collectively, the "Townships") appealed the Board's denial of costs and fees under the Clean Streams Law to the Commonwealth Court. Riverkeeper did not appeal. No party appealed the Board's denial of costs and fees under the Costs Act. On December 8, 2004, the Commonwealth Court vacated the Board's decision denying costs and fees under the Clean Streams Law. DEP and DOT appealed that decision to the Supreme Court, which vacated the Commonwealth Court's order, and remanded the matter back to the Board.

On October 4, 2007, following a lengthy conference call among the original appellants, we issued an Order inviting legal memoranda on the following three issues:

- Whether Delaware Riverkeeper is entitled to participate as a party in this proceeding;

[1] Riverkeeper supplemented its application on February 20, 2004. Buckingham supplemented its application on February 23, 2004.

[2] EHB Docket No. 2002-323-K (Opinion denying applications for costs and fees under the Costs Act, March 4, 2004); EHB Docket No. 2002-323-K (Opinion denying applications for costs and fees under the Clean Streams Law, March 29, 2004).

- Whether Delaware Riverkeeper and Buckingham Township may pursue costs under the Clean Streams Law; and
- Any preliminary issue relating to the Costs Act.

DISCUSSION

I. Whether Delaware Riverkeeper is Entitled to Participate as a Party in this Proceeding

Riverkeeper argues that it is entitled to participate as a party on remand. Specifically, Riverkeeper argues that it should benefit from the Supreme Court ruling made on behalf of the Townships because its interests are identical to those of the Townships. Riverkeeper also argues that it made substantial contributions in this case when it was first before the Board in 2003. Riverkeeper contends that a non-appealing party may benefit from a ruling made on behalf of appealing parties on remand.

DEP and DOT argue that Riverkeeper is precluded from participating as a party under the doctrine of *res judicata*. We agree. *Res judicata* encompasses the effect one judgment has upon a subsequent trial or proceeding. *Fiore v. DEP*, 508 A.2d 371, 374 (Pa. Cmwlth. 1986); *Solomon v. DEP*, 2000 EHB 227, 232. The doctrine bars relitigation of issues previously litigated, *Keystone Building Corp. v. Lincoln Savings & Loan Association*, 360 A.2d 191 (Pa. 1976), and the Board will not hesitate to apply it in the proper situation. *Solomon v. DEP*, 2000 at 233; *Carl L. Kresge & Sons, Inc. v. DEP*, 2000 EHB 30, 51; *Babich v. DER*, 1994 EHB 541, 545; *Dunkard Creek Coal, Inc. v. DER*, 1993 EHB 536. For *res judicata* to apply, four conditions must exist: identity of the thing sued upon or for; identity of the cause of action; identity of the persons or parties to the action; and identity of the quality of or capacity of the parties suing or being sued. *Id.* If these four elements are present, matters which were or could and should have been litigated in a prior proceedings may not be relitigated or litigated in

subsequent proceedings. *Bethlehem Steel Corp. v. DER*, 390 A.2d 1383, 1389 (Pa. Cmwlth. 1978). Here, these four conditions obviously exist, and Riverkeeper does not suggest otherwise.

Riverkeeper argues that there is an exception to the *res judicata* doctrine. It contends that a non-appealing party may benefit from an appealing party's judgment when the rights and liabilities of the parties are so interwoven and dependent as to be inseparable. In this context, Riverkeeper argues that "a reversal as to one operates as a reversal to all." *See In re Shelley's Estate*, 135 A. 740, 742 (Pa. 1927). (Riverkeeper Memorandum at 8.) However, to the extent such an exception to the *res judicata* doctrine even exists, *see Federated Department Stores, Inc. v. Moitie, infra*, Riverkeeper's application for costs and fees is easily separable from those of the Townships. Riverkeeper's application was not dependent upon the Townships' applications, and vice versa. Riverkeeper employed its own attorneys and incurred separate costs and fees. Our analysis of whether an award of costs and fees is appropriate does not hinge on whether other parties filed an application. *See Big B Mining Co. v. DER*, 624 A.2d 713 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 633 A.2d 153 (Pa. 1993); *Kwalwasser v. DER*, 1988 EHB 1308, *aff'd*, 569 A.2d 422, 424 (Pa. Cmwlth. 1990). In short, there is nothing "inseparable" about Riverkeeper's and the Townships' applications.

Res judicata clearly bars non-appealing parties from gaining the benefit of co-parties' victory on appeal. *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 480 n.4 (1999); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 399 (1981). In *Federated Department Stores*, seven private plaintiffs brought an action in federal court against a group of department stores for price fixing. 452 U.S. at 395. They lost. Five of the seven plaintiffs appealed. *Id.* at 396. These five plaintiffs won on appeal, and their cases were remanded for further proceedings. *Id.* at 397. Meanwhile, the remaining two plaintiffs filed a new action, this

time in state court. This action was ultimately removed back to federal court, and dismissed on grounds of *res judicata*. *Id.* at 396-97. On appeal, the Court of Appeals for the Ninth Circuit reversed the dismissal, finding that *res judicata* should not apply to the two plaintiffs because "non-appealing parties may benefit from a reversal when their position is closely interwoven with that of appealing parties." *Id.* at 398, *citing Federated Department Stores v. Moitie*, 611 F.2d 1267, 1269 (9th Cir. 1980). Using arguments similar to those put forth by Riverkeeper, the Ninth Circuit stated that the doctrine of *res judicata* must give way to public policy and simple justice because the two plaintiffs' dismissal rested on a case that was effectively overruled on appeal in favor of the other five plaintiffs. *Id.* The U.S. Supreme Court reversed, holding that "such an unprecedented departure from accepted principles of *res judicata* is unwarranted." 452 U.S. at 399. In language directly applicable here, the Supreme Court stated:

> [T]his Court recognizes no general equitable doctrine, such as that suggested by the Court of Appeals, which countenances an exception to the finality of a party's failure to appeal merely because his rights are "closely interwoven" with those of another party.... Respondents here seek to be the windfall beneficiaries of an appellate reversal procured by other independent parties, who have no interest in respondents' case .... [I]t is apparent that respondents here made a calculated choice to forgo their appeals.

452 U.S. at 400-01. Although these federal cases are obviously not binding on us, we find them to be persuasive.

Riverkeeper made a tactical decision not to appeal. (Riverkeeper Memorandum at 5.) Now it is asking the Board to allow it to proceed as a party in spite of its earlier intentional course of conduct. We are unwilling to do so. The Townships gambled and won. Riverkeeper never made it to the table. The doctrine of *res judicata* precludes Riverkeeper from participating

as a party on remand.[3] *In re Estate of Litostansky*, 453 A.2d 329, 330 (Pa. 1982); *DER v. Wheeling-Pittsburgh Steel Corp.*, 375 A.2d 320, 324 (Pa. 1977).

Similarly, there is no *statutory* basis for allowing Riverkeeper to participate as a party on remand. Any petitions for review from Board orders must be filed with the Commonwealth Court within 30 days after entry of the order. 42 Pa.C.S. § 763(a)(1); Pa.R.A.P. 1512(a)(1). Failure to file an appeal within the 30-day time period precludes Riverkeeper from challenging the March 29, 2004 Order. *Stankus v. Pa. State Police*, 466 A.2d 619, 620 (Pa. 1983). This is true even though the Townships filed an appeal from the Order. *See In re Pittsburgh Wagon Works' Estate*, 54 A. 359, 360 (Pa. 1903) (a party must appeal within the prescribed period, notwithstanding an appeal has been taken by another party).

In sum, because Riverkeeper did not appeal the Board's March 29, 2004 Order, Riverkeeper may not participate as a party on remand.

II. Whether Buckingham Township may pursue costs under the Clean Streams Law

The Board's rules provide that an applicant seeking to recover fees and costs under more than one statute shall file a single application which sets forth, in separate counts, the basis upon which fees and costs are claimed under each statute. 25 Pa. Code § 1021.191. Unless otherwise specified by statute, the application must be filed with the Board within 30 days of the Board's order.[4] *See* 25 Pa. Code § 1021.172(b), 25 Pa. Code § 1021.181. 25 Pa. Code § 1021.182(c).

DEP and DOT argue that because Buckingham Township failed to file its application for costs and fees under § 307(b) of the Clean Streams Law within 30 days of the Board's March 29,

[3] Because the Townships appealed the Board's March 29, 2004 Order, it is not final as to them. *See Bearoff v. Bearoff Bros., Inc.*, 327 A.2d 72, 74 (Pa. 1974) (the doctrine of *res judicata* does not apply to issues reversed on appeal).

[4] Section 307(b) of the Clean Streams Law contains no time limitation on the filing of a request for costs and fees. 35 P.S. § 691.307(b).

2004 Order, Buckingham's application pursuant to that statute was untimely and not properly before the Board. The Commonwealth Court addressed this issue in its opinion, stating as follows:

> As an initial matter, there is no reason not to allow Buckingham leave to amend its request for fees and costs to include the Clean Streams Law as a ground for recovery. Buckingham timely filed its request for fees and costs under the Costs Act. As a consequence, DOT and DEP were on notice that Buckingham was seeking fees and costs. Further, Solebury had timely included the Clean Streams Law's fee shifting provision as a ground for relief. Therefore, DOT and DEP were also on notice that the Clean Streams Law was a ground for seeking costs and fees in this same action and for the same reasons. Where no prejudice can be shown to result from amending a claim for fees and costs, permission should be granted. *Scarborough v. Principi, 541 U.S. 401, 158 L. Ed. 2d 674, 124 S. Ct. 1856 (2004).*

Solebury Township v. DEP, 863 A.2d 607, 609-10 (Pa. Cmwlth. 2004), *rev'd on other grounds*, 928 A.2d 990 (Pa. 2007).

DEP and DOT would set us on the fool's errand of disregarding this aspect of the Commonwealth Court's ruling on the strained theory that the Supreme Court's decision vacated every aspect of the Commonwealth Court's ruling, including this one. We will decline the Departments' invitation to jump off that cliff. When the Supreme Court does not address an aspect of the intermediate court's decision, that aspect stands.

The Supreme Court remanded this case back to us for consideration of both of the Townships' applications for costs and fees. 928 A.2d at 1005. The Court's opinion logically and necessarily embraces Buckingham's pursuit of fees under the Clean Streams Law. *In re Crawford's Estate*, 169 A. 438, 439 (Pa. 1933).

Even if we could imagine that it would be appropriate and respectful to disregard the Commonwealth Court's ruling on this question, we would nevertheless find the Court's

conclusion to be eminently reasonable and in accordance with our rules. Accordingly, so that the record is free from doubt, Buckingham is hereby granted leave to amend its petition to include the Clean Streams Law as a ground for recovery.

III. Preliminary Issues relating to the Costs Act

Buckingham did not raise any issues relating to the Costs Act in its memorandum. The Board's March 4, 2004 Opinion and Order denying costs and fees under the Costs Act was not appealed by any party. As previously mentioned, an order of the Board that is not appealed cannot be later challenged in subsequent proceedings. *See* 42 Pa.C.S. § 763(a)(1); Pa.R.A.P. 1512(a)(1); *Fiore v. DEP*, 508 A.2d 371, 374-75 (Pa. Cmwlth. 1986). Accordingly, the Board's March 4, 2004 Order is final and cannot be challenged.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SOLEBURY TOWNSHIP, BUCKINGHAM TOWNSHIP, & DELAWARE RIVERKEEPER, DELAWARE RIVERKEEPER NETWORK & AMERICAN LITTORAL SOCIETY	:	
v.	:	**EHB Docket No. 2002-323-L (Consolidated with 2002-320-L & 2003-012-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, Permittee	:	

ORDER

AND NOW, this 6th day of December, 2007, it is hereby ordered that Delaware Riverkeeper, Delaware Riverkeeper Network, and the American Littoral Society may no longer participate as parties. The caption is hereby revised to read as follows:

SOLEBURY TOWNSHIP & BUCKINGHAM TOWNSHIP	:	
v.	:	**EHB Docket No. 2002-323-L (Consolidated with 2002-320-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, Permittee	:	

It is further ordered that Buckingham Township's petition for costs includes a request under § 307(b) of the Clean Streams Law, 35 P.S. § 691.307(b).

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

Judge George J. Miller did not participate in this Opinion.

DATED: December 6, 2007

c: **DEP Bureau of Litigation:**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

RICHMOND TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2007-034-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GRANDE LAND, L.P., Intervenor	:	**Issued: December 12, 2007**

OPINION AND ORDER ON MOTION TO DISMISS

By George J. Miller, Judge

Synopsis

The Board denies the motion of a municipality to dismiss its own appeal on the basis of mootness. The Department's approval of the Act 537 Plan update, which the Department claims deprives the Board of the ability to grant the municipality relief in its appeal of a Department approval of a private request, which has been appealed, is not final under the Environmental Hearing Board Act. Therefore, the Board is not deprived of the ability to provide meaningful relief to the Township with respect to the Department's grant of a private request.

OPINION

Richmond Township filed an appeal on January 11, 2007 from an order of the Department of Environmental Protection which granted a private request to approve a planning module pursuant to the Township's Act 537 Plan for a proposed residential subdivision known as Willow Crest. The developer for that subdivision, Grande Land, L.P. (Grande Land), intervened

in that appeal. In June 2007 the Department approved an update to the Township's 537 Plan, from which Grande Land filed an appeal.[1] The Township argues that its updated 537 Plan, as approved by the Department, effectively rescinds the approval of the private request, and therefore it seeks dismissal of its own appeal on the basis of mootness.[2] As we explain more fully below, we decline to dismiss the Township's appeal on the ground of mootness.

This is the first time, in our experience, that we have been faced with a motion to dismiss an appeal by a party which filed the appeal. It is, of course, the prerogative of any appellant to withdraw an appeal without seeking permission from the Board.[3] However, the Township here seeks a specific ruling by the Board to the effect that the Township's 2007 Act 537 Plan revision grants it the relief that it was seeking in its appeal because the updated plan allegedly rescinds the Department's action in granting Grande Land's private request. This proposition is problematic both as a matter of fact, and as a matter of law. First, pursuant to the Environmental Hearing Board Act, no action of the Department is final until the Board provides the parties with an opportunity to be heard:

> The department may take an action initially without regard to 2 Pa.C.S. Ch. 5 Subch. A, but no action of the department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board under subsection (g). If a person has not perfected an appeal in accordance with the regulations of the board, the department's action shall be final as to the person.[4]

Here, the 2007 plan revision was appealed by Grande Land, and until the Board holds a hearing on the plan update, the Department's approval of the plan update is not final. Since the action

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[1] EHB Docket No. 2007-198-MG.

[2] By letter, the Department joins the Township's motion.

[3] 25 Pa. Code § 1021.141(a)(1).

[4] Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. § 7514(c).

which allegedly provides the Township the relief it seeks it not final, we can not say as a matter of law that there is no relief that the Board may be able to grant the Township at some point in the future.[5] For example, if we sustain Grande Land's appeal and revoke the Department's approval of the Township's Act 537 Plan Update, the Township would be left with no ability to challenge the Department's approval of Grande Land's private request.

Second, we must deny the Township's motion on a factual basis: neither the private request nor the 2007 plan update were submitted as evidence of the record in support of the Township's motion. Therefore, even if the 2007 plan update were final, the Township has failed to carry its burden of proving that the Department did indeed rescind the approval of the private request with its approval of the plan update as alleged by the Township.

This Board has grave concerns about the circumstances under which the 2007 Plan Update occurred and whether Grande Land received proper notice that its private request approval was in jeopardy. The issues in these two appeals are so intertwined, that to grant the Township's motion would effect a premature ruling on the appeal of the plan update. At the very least such a ruling would so severely impact Grande Land's ability to protect whatever rights it may have under the Department's approval of its private request that we would do Grande Land a grave injustice by dismissing the Township's appeal as the Township requests.[6] Accordingly, by separate order issued today, we will consolidate the Township's appeal of the private request approval with Grande Land's appeal of the Township's Act 537 Plan Update.

We therefore enter the following:

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[5] A matter becomes moot when the Board can no longer provide effective relief. *Morris Township v. DEP*, 2005 EHB 55.

[6] A motion to dismiss can only be granted where there are no factual matters in dispute and the right to judgment is free and clear from doubt. We evaluate such motions in the light most favorable to the non-moving party. *Broad Top Township v. DEP*, 2004 EHB 500.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RICHMOND TOWNSHIP	:	
	:	
v.	:	
	:	**EHB Docket No. 2007-034-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GRANDE LAND, L.P., Intervenor	:	

ORDER

AND NOW, this 12th day of December, 2007, the motion of Richmond Township to dismiss its appeal in the above-captioned matter is hereby **DENIED**.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Judge

DATED: December 12, 2007

c: **DEP Bureau of Litigation**
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SOILAIR OF PA, LLC, GEOMATRIC, LLC AND ESTATE OF MARGARET CRON	:	
v.	:	**EHB Docket No. 2007-194-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 12, 2007**

OPINION AND ORDER ON MOTION TO DISMISS

By George J. Miller, Judge

Synopsis

The Board denies a motion to dismiss an appeal from a letter by the Department to a sewage enforcement officer which stated that a proposed alternate on-lot system did not conform to Department regulations. Although the Department's regulatory scheme under the Sewage Facilities Act may require the county health department's sewage enforcement officer to make a decision on a sewage permit application after the Board considers the Department's determination, the letter itself constitutes an action by the Department which is appealable to the Board.

OPINION

Before the Board is a motion to dismiss an appeal by SoilAir of PA and others (Appellants), from a letter written by the Department to Mr. Brendan O'Boyle, a sewage enforcement officer (SEO) employed by the Bucks County Health Department, wherein the

Department "determined that this proposed SoilAir installation may not be classified as an experimental or alternate system or technology under Section 73.71 or 73.72."[1] The Department argues in its motion that this letter does not constitute an action of the Department, and is therefore not appealable to the Board.

Facts

In May 2007, the Appellants submitted an application to the Bucks County Health Department (BCHD), for a permit to install a Geomatrix SoilAir System as an addition to a malfunctioning on-lot sewage system to correct ponding in the aggregate of the absorption area at a property known as the Cron Estate located in Doylestown Township, Bucks County.[2] The application was for an alternate on-lot sewage disposal system permit. The BCHD forwarded the application to the Department. By letter dated June 29, 2007, the Department concluded that the proposed system could not be classified as an experimental or alternate system or technology under the Department's regulations. By letter dated September 19, 2007, the BCHD sewage enforcement officer denied the Appellants' permit application, in part because "DEP has determined that this proposed SoilAir installation may not be classified as an experimental or alternate system or technology under Sections 73.71 or 73.72."

The Appellants appealed the Department's letter to the Board on August 3, 2007. The Department now moves to dismiss the appeal, arguing that it is not the Department's letter that should form the basis of an appeal, but the action is instead the BCHD SEO's ultimate decision on the permit. The Appellants oppose the motion. In their view, the letter constitutes a final

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[1] Department Letter dated June 29, 2007, Exhibit A of the Department's Motion to Dismiss.

[2] The Appellants include not only SoilAir and Geomatrix, LLC, which owns SoilAir, but also the property owner, the Estate of Margaret Cron by William Cron, Executor.

action of the Department which affects their personal or property rights, duties, obligations or liabilities.

Discussion

A motion to dismiss will only be granted where there are no material factual disputes and judgment in the movant's favor is clear and free from doubt.[3] The motion must be evaluated in the light most favorable to the non-moving party. As we explain more fully below, the Department's motion does not demonstrate that it is clearly entitled to judgment in its favor because the Department has not demonstrated that its letter is not a final action of the Department as a matter of law.

The Department argues that its role in reviewing the proposed system was merely advisory to the BCHD sewage enforcement officer. Specifically, the Department contends that under 25 Pa. Code § 73.72, an applicant for an alternate sewage disposal system[4] is required to submit plans to both the sewage enforcement officer and to the Department. The Department's role is to determine if classification as an alternate system is appropriate and provide review comments to the sewage enforcement officer. At that point the sewage enforcement officer is required to consider the comments of the Department, but, according to the Department, need not adopt them when acting on a permit application. Therefore, in the Department's view, the letter was merely "advisory" and by itself had no adverse effect on the Appellants. According to the Department, the relief that the Appellants seek lies not with the Board, but with an appeal from

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[3] *Boggs v. DEP*, 2003 EHB 389.

[4] An alternate sewage system is "a method of demonstrated on-lot sewage treatment and disposal not described in the regulations." 35 P.S. § 750.2.

the denial of the permit application by the sewage enforcement officer under the Local Agency Law.[5]

The Appellants counter that the language of the Department's letter is not simply "advisory," but rather is a final determination by the Department. In the Appellants' view, the sewage enforcement officer was not free to disregard the Department's determination, and an action under the Local Agency Law does not provide an adequate remedy. Specifically, the action under the Local Agency Law is from the denial of the permit by the BCHD SEO, and not the Department's underlying determination that the proposed system did not meet the requirements of an alternate disposal system.

As we have held many times, this Board has the authority to review any "action" of the Department which is final.[6] An "action" is "an order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification."[7] A letter may constitute an action of the Department.[8] Although there is no bright-line rule, the Board will consider many factors including the wording, substance, meaning and purpose of the letter, the practical impact, the regulatory and statutory context, the relief the Board may be able to offer, and any other indication of a letter's impact upon the recipient's personal or property rights.[9]

The Department argues that this letter can not be considered an action of the Department because it is merely advisory to the sewage enforcement officer who is responsible for acting

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[5] 2 Pa. C.S. §§ 551- 555 and §§ 751-754.
[6] *Borough of Kutztown v. DEP*, 2001 EHB 1115.
[7] 25 Pa. Code § 1021.2 (a).
[8] *Borough of Kutztown.*
[9] *E.g., Borough of Kutztown.*

upon permit applications. Since the sewage enforcement officer is free to reject the Department's comments, the letter can not be a final action. We disagree.

Under the Sewage Facilities Act regulations, obtaining a permit for an experimental or alternate method of on-lot sewage disposal is a two part process. The applicant is required to solicit a determination from the Department of whether classification of the system as an "alternate" system is appropriate:

> A person desiring to install an alternate sewage system shall submit complete preliminary design plans and specifications to the sewage enforcement officer *and the Department for review and comment* prior to submitting an application for a permit. *The Department will determine if classification as an alternate system is appropriate and provide review comments to the sewage enforcement officer.*[10]

Subsection (c) of the regulation details the criteria that the Department will consider when determining if classification of a system as an "alternate sewage system" is appropriate. Thereafter, the SEO must consider that determination and then grant or deny the permit application.[11] Although the Department's determination is sought and used in the context of a later action by another agency, that determination is nevertheless a "final" determination by the Department.[12]

The Sewage Facilities Act,[13] paralleling this two part process, clearly grants the Board the authority to review the Department's initial determination:

> Any order, permit, *or decision* of the department under this act, except as otherwise provided by section 10(10) and section 11 of this act, shall be taken, subject to the right of notice and appeal to the Environmental Hearing Board.[14]

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[10] 25 Pa. Code § 73.72(b) (emphasis added).
[11] 25 Pa. Code § 73.72(f).
[12] *See Boggs v. DEP,* 2003 EHB 389.
[13] Act of January 24, 1966, P.L. (1965) 1535, *as amended,* 35 P.S. §§ 750.1-750.20a.
[14] 35 P. S. § 750.16(b)(emphasis added)(footnote omitted).

Section 10(10) and 11 of the Sewage Facilities Act[15] refer to the certification of sewage enforcement officers and the State Board for Certification of Sewage Enforcement Officers, and do not exempt decisions by the Department concerning the designation of alternate sewage technologies. This Board's review is separate from the right to a hearing on the second part of the process, the SEO's permitting decision, provided by subsection (a).[16] That section states that a person aggrieved by an action of a local agency or sewage enforcement officer has a right to a hearing before the local agency.[17]

Our holding that the Department's determination is an appealable action under the Sewage Facilities Act is consistent with other cases where the Board has considered determinations made by the Department under Section 73.72 of the regulations.[18] In *Eljen Corporation v. DEP,*[19] the appellant sought the Department's approval to designate its on-lot wastewater treatment system for use as an alternate technology for sewage treatment as provided in 25 Pa. Code § 73.72. The Department denied the appellant's request by letter dated November 2004, but continued to correspond with the appellant, culminating in a letter dated July 2005, which was appealed to the Board. The Board dismissed the appeal as untimely based upon its conclusion that the July letter merely repeated what the Department had already decided in the November letter and that the appellant's failure to appeal the first letter was fatal to the appeal. Of importance to the resolving the present motion, however, is that in *Eljen* "[n]either party

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[15] 35 P.S. § 750.10(10) and 35 P.S. § 750.11.

[16] 35 P.S. § 750.16(a).

[17] The Act defines "local agency" as "a municipality, or any combination thereof acting cooperatively or jointly under the laws of the Commonwealth, county, county department of health or joint county department of health." 35 P.S. § 750.2.

[18] 25 Pa. Code § 73.72.

[19] 2005 EHB 918.

dispute[d] that the Department denied the application and that such denial is appealable."[20] While it is not mentioned in the opinion whether the *Eljen* appellant wanted to use its technology on a particular property and needed the Department's comments for a permit or whether the Department has some other use for Section 73.72, we find no reason to treat the SoilAir application differently from the Elgen application. If the Department's determination considering the Eljen application under Section 73.72 was an appealable decision, we believe that the substantively similar determination here should also be considered an appealable decision. That is, the Department used its discretion by applying the criteria of the regulation, and Department policy to a sewage disposal technology and concluded that it was not appropriate to classify the technology as an "alternate sewage system" for on-lot sewage disposal.

Our decision in *Boggs v. DEP,*[21] is also helpful. Read carefully, the issue in *Boggs* was not whether a letter by the Department under Section 73.72 affected personal or property rights, etc., but whether it was final. The Board concluded that the language of the letter was tentative and invited further submission by the applicant and therefore it was not appealable. Although the Board made observations about the regulatory context of the letter inasmuch as it preceded the actual permit application to the sewage enforcement officer, the Board also emphasized that the timing of the submission was not determinative and the fact that the sewage enforcement officer was the permitting authority did not mandate a conclusion that a letter under Section 73.72 would not be appealable.[22] By contrast, the language in the SoilAir letter is clearly the Department's last word on the issue. It includes no invitation to submit further documentation and explicitly states that "DEP has determined that this proposed SoilAir installation may not be

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[20] 2005 EHB at 919.
[21] 2003 EHB 389.
[22] 2003 EHB at 394 n.4.

classified as an experimental or alternate system or technology under Section 73.71 or 73.72." This language is not tentative nor does it suggest that the Department may reach a different conclusion at some point in the future.

Further, courts have also held that "when an agency's decision leaves a complainant with no other forum in which to assert her rights, privileges, or immunities, the agency's act is an adjudication."[23] Therefore, we must also be concerned that if we found that the Department's letter in the case does not constitute an action, the Appellants will be deprived of any sort of meaningful review of *the Department's* conclusion concerning the application of Section 73.72 to the proposed system. As the Department correctly points out, the BCHD SEO's ultimate action on the permit is subject to a hearing under the Local Agency Law.[24] However, the issue considered by the local agency in a hearing on the SEO's denial of the permit is not the *Department's* conclusion that the proposed system is not an appropriate alternate sewage system. The issue before the local agency is whether the *sewage enforcement officer* properly applied the regulations when denying the permit application. No doubt the SEO will argue that he appropriately relied upon the Department's comments. But whether the Department's conclusion was reasonable, appropriate and in accordance with the law in the first instance, will not be at issue. Rather, the inquiry of the local agency will be much like the Board's review of a landfill permit where the Department is required to consider the comments of another agency such as the Fish and Boat Commission. The Board's inquiry is whether the Department's reliance was independent and appropriate, but the substance of the Fish Commission's review is not within our authority to consider. Further, even if the reviewing agency did conclude that the Department

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[23] *Turner v. Pennsylvania Public Utility Comm'n*, 683 A.2d 942 (Pa. Cmwlth. 1996).

[24] Section 16 of the Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. § 750.16.

was incorrect, that agency has no authority to require the Department to remedy the situation: That authority rests solely with the Board.

The Department also argues that the Department's letter is not an appealable action because the SEO provided other reasons, in addition to the Department's determination, for ultimately denying the permit application. We find this irrelevant because we are not reviewing the SEO's determination, but the Department's. It may be that the SEO action can be sustained solely on the basis of the other factors identified by the SEO, but those are issues for the local agency to decide. The fact remains that the Department made a determination adverse to the Appellants and that that adverse determination impacted the Appellants' permit application.[25]

In sum, we conclude that the Department has not demonstrated that the SoilAir letter does not constitute a final appealable action of the Department. We therefore deny the motion to dismiss and enter the following:

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[25] We do not reach the issue of whether the SEO is in fact free to disregard the Department's determination.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SOILAIR OF PA, LLC, GEOMATRIX, LLC AND ESTATE OF MARGARET CRON	:	
	:	**EHB Docket No. 2007-194-MG**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 12th day of December, 2007, the motion to dismiss of the Department of Environmental Protection in the above-captioned matter is hereby **DENIED**.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Judge

DATED: December 12, 2007

c: **DEP Bureu of Litigation**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MARK S. ELSER	:	
	:	
v.	:	**EHB Docket No. 2007-225-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, CONCORD TOWNSHIP, Permittee, and CONCORD TOWNSHIP SEWER AUTHORITY, GLASGOW FARMS, L.P., RIDGE ROAD DEVELOPMENT, L.P., Intervenors	:	**Issued: December 14, 2007**

OPINION AND ORDER ON MOTION TO INTERVENE

By George J. Miller, Judge

Synopsis

The Board grants intervention to an individual whose property may be impacted by the Board's resolution of an appeal from the Department's approval of a sewage facilities planning module.

OPINION

Before the Board is a motion to intervene by Ewald Zittlau in an appeal from the approval of a sewage facilities planning module which provides sewage facilities for a proposed retail/commercial site in Concord Township, Delaware County. This appeal was filed by Mark

Elser, an individual[1], who objected to the approval on the basis that the application contained incomplete and inaccurate information, and that the proposed sewage system is not the most environmentally appropriate selection.[2] Chief among his concerns is the use of grinder pumps as part of the conveyance system, rather than a gravity sewer line.

In his petition to intervene and in response to Mr. Elser's objection to his intervention, Mr. Zittlau[3] contends that he is affected by the appeal because in his view, Mr. Elser advocates in his appeal to the Board that the proposed sewer line should follow a path along Concord Creek which runs through the middle of Mr. Zittlau's property, and will be environmentally detrimental.

The Board will grant Mr. Zittlau's motion to intervene in this appeal. Pursuant to the Environmental Hearing Board Act, "[a]ny interested party may intervene in any matter pending before the Board."[4] "Interested" has been defined as one who has a substantial, direct and immediate interest in the outcome of the matter.[5] This standard is much broader than the standard for intervention before courts; the Board can not consider factors such as whether the petitioner's interests are already represented by another party or whether his intervention will complicate or delay the proceedings.[6]

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[1] Mr. Elser has elected to proceed *pro se*.

[2] The Concord Township Sewer Authority and Glasgow Farms, L.P. and Ridge Road Development, L.P., the property developers have also intervened. *See* 25 Pa. Code § 1021.51(j). Concord Township is a party as the permittee.

[3] Mr. Zittlau is also proceeding *pro se*.

[4] Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. § 7514(c).

[5] *Borough of Glendon v. Department of Environmental Resources,* 603 A.2d 226 (Pa. Cmwlth.) *petition for allowance of appeal denied*, 608 A.2d 32 (Pa. 1992); *Conners v. DEP,* 1999 EHB 669.

[6] *Conners v. DEP*, 1999 EHB 669, 674; *see also Browning-Ferris v. Department of Environmental Resources*, 598 A.2d 1061 (Pa. Cmwlth. 1991).

In his petition Mr. Zittlau contends that he is a resident of Concord Township. He believes the Elser appeal is essentially an attempt to reroute the proposed sewer line along Concord Creek which runs through Mr. Zittlau's property. He contends that Mr. Elser raised similar objections before the Township during the Township's consideration of the plan amendment. He is concerned that if the Board were to adopt Mr. Elser's position that it could result in a proposal that would impact his property and be detrimental to the creek, the creek bed and the watershed area of his property.

Mr. Elser objects to Mr. Zittlau's intervention because in his view, Mr. Elser makes no specific allegation in his notice of appeal as to where the sewer line should be located. He claims only that neither the Township nor the Department had sufficient information to approve the plan amendment, and that they should have approved a gravity sewer as a conveyance system rather than the grinder pumps selected. He also argues that Mr. Zittlau's petition is procedurally defective and that his petition will unnecessarily delay the appeal process. Mr. Zittlau's response directly challenges the contention that Mr. Elser has no alternate plan based on Township records and the belief that the alternate sewer method of conveyance advocated by Mr. Elser could only be feasible if it was run through Mr. Zittlau's property.

We believe that Mr. Zittlau has made a sufficient showing of interest in the subject-matter of the appeal. It appears that his property was potentially affected by proposals which were considered by the Township and that evidence concerning these alternatives may be considered by the Board at some point. If we were to rule in Mr. Elser's favor and direct the Department to approve a gravity system, it may be that the topography of the area would require the location of sewer lines on Mr. Zittlau's property.

Further, even if Mr. Zittlau's participation may be a complicating factor to Mr. Elser in the prosecution of his appeal, we may not deny his petition to intervene on that basis.[7] As the Board is scheduled to meet with the parties in a pre-hearing conference in order to develop a schedule for pre-hearing proceedings, any legitimate concerns on the pace of the pre-hearing proceedings can be dealt with at that time. The Board frequently deals with contentions of intervening parties with our substantial delay in the disposition of appeals before it.

We therefore enter the following:

---

[7] *Connors v. DEP*, 1999 EHB 669.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARK S. ELSER	:	
	:	
v.	:	**EHB Docket No. 2007-225-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, CONCORD TOWNSHIP, Permittee, and CONCORD TOWNSHIP SEWER AUTHORITY, GLASGOW FARMS, L.P., RIDGE ROAD DEVELOPMENT, L.P., Intervenors	:	

ORDER

AND NOW, this 14th day of December, 2007, the petition to intervene of Ewald Zittlau in the above-captioned matter is hereby **GRANTED**. All future filings with the Board in this appeal are to be captioned as follows:

MARK S. ELSER	:	
	:	
v.	:	**EHB Docket No. 2007-225-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, CONCORD TOWNSHIP, Permittee, and CONCORD TOWNSHIP SEWER AUTHORITY, GLASGOW FARMS, L.P., RIDGE ROAD DEVELOPMENT, L.P., EWALD ZITTLAU, Intervenors	:	

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Judge

DATE: December 14, 2007

c: **DEP Bureau of Litigation**
Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BLUE MARSH LABORATORIES, INC.	:	
	:	
v.	:	**EHB Docket No. 2006-266-C**
	:	**(Consolidated w/ 2007-029-C)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 28, 2007**

OPINION AND ORDER ON DEPARTMENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

By Michelle A. Coleman, Judge

Synopsis:

The Board grants in part and denies in part the Department's Motion for Partial Summary Judgment. As a matter of law the Board dismisses objections set forth in the Appellant's November 29, 2006 appeal relating to any challenges to the Consent Order and Agreement executed between the parties. Additionally, the January appeal, consolidated with this matter, is dismissed for mootness due to the Department's rescission of the letter on which the appeal was based, leaving no issue for the Board to decide. The Department's motion is denied with respect to the Appellant's claims of selective enforcement raised in its November appeal and a hearing will be scheduled by the Board to hear those claims.

Opinion

Before the Environmental Hearing Board (Board of EHB) is the Department of

Environmental Protection's (DEP or Department) Motion for Partial Summary Judgment which seeks to dismiss certain objections raised by Blue Marsh Laboratories, Inc. (Appellant or Blue Marsh) in its November 29, 2006 appeal (November Appeal) and to dismiss the January 5, 2006 appeal (January Appeal) as moot. These two appeals were consolidated by the Board on February 2, 2007 and arise from a Consent Order and Agreement (COA or Consent Order) executed between the Department and the Appellant.

Standard for Summary Judgment

In order for the Board to grant summary judgment the record must establish that there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. *See* 25 Pa. Code § 1021.94(b); Pa. R.C.P. 1035.2; *Scalice v. Pennsylvania Benefits Trust Fund*, 883 A.2d 429 (Pa. 2005); *Jones v. Southeastern Pennsylvania Transportation Authority*, 772 A.2d 435 (Pa. 2001); *Donald Martz, Jr. v. DEP*, 2006 EHB 988. The record is defined as the pleadings, depositions, answers to interrogatories, admissions, affidavits and certain expert reports. Pa. R.C.P. 1035.2; *Wayne D. Holbert v. DEP*, 2000 EHB 796, 807-809, *citing County of Adams v. DEP*, 687 A.2d 1222, 1224 (Pa. Cmwlth. 1997). The Board must view the record in a light most favorable to the nonmoving party. *Holbert*, 2000 EHB 796, 808.

The Department's memorandum in support of its motion for partial summary judgment (Department's Memorandum) provides in separately numbered paragraphs the material facts and cites to the portion of the motion record that supports such material facts pursuant to the Board's Rules of Practice and Procedure, 25 Pa. Code § 1021.94a(c). *See* Department's Memorandum in Support (DEP Memo), p. 3-5. The Board's rule states that "all material facts in the movant's statement which are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed by citation conforming to the requirements of subsection (c)

demonstrating existence of a genuine issue as to the fact disputed. 25 Pa. Code § 1021.94a(f). The Appellant's response memorandum does not provide any responding statement to the material facts set forth in the Department's Memorandum. Therefore, the facts presented in the Department's Memorandum as the "undisputed material facts" are deemed admitted for purposes of this motion.

Factual Background

The Department is the accrediting authority for drinking water, nonpotable water and solid and chemical materials. DEP Memo, p. 4, ¶ 2. Blue Marsh is an environmental laboratory as defined under Section 4102 of the Environmental Laboratory Accreditation Act, 27 Pa.C.S. § 4102. DEP Memo, p. 4, ¶ 3. Blue Marsh has been accredited by the Department by the National Environmental Accreditation Conference since February 13, 2006. DEP Memo, p. 4, ¶ 4. The parties entered into a Consent Order and Agreement on July 20, 2006 after Blue Marsh had consulted with its attorney. DEP Memo, p. 4, ¶ ¶ 5, 6.

A letter dated November 9, 2006 (November Letter) was sent to Blue Marsh informing it that DEP would not accept the results of two proficiency tests because Blue Marsh failed to provide advanced notice to the DEP in accordance with the COA. *See* DEP Memo, p. 2; Department's Exhibit (DEP Ex.) E; Appellant's Memorandum in Response (App. Memo), p. 1. As a result, the Department suspended Blue Marsh's accreditation and Blue Marsh filed its November Appeal with the Board. *Id.* In a letter dated December 28, 2006 (December Letter), the DEP notified Blue Marsh indicating that it would not accept the same results and it was suspending additional fields of Blue Marsh's accreditation. DEP Memo, p. 2; DEP Ex. I; App. Memo, p. 2. Subsequently, Blue Marsh filed its January Appeal. *Id.* The Department sent a follow up letter to the December Letter stating that the December Letter was sent in error and it

was rescinding the second action on January 10, 2007. DEP Ex. G. No Blue Marsh employees were threatened with harm by the Department. DEP Memo, p. 4, ¶ 7. The only Blue Marsh employees that have knowledge of the circumstances surrounding the consolidated appeals are Debbie Wanner and Michael McKenna. DEP Memo, p. 5, ¶ 9.

November Appeal

The Board will first review the November Appeal and will address the January Appeal later in this Opinion. The November Appeal lists the following as objections to the Department's action:

> 1. The Department abused its discretion in changing the accreditation status. The Department is wrongfully selectively enforcing its rules and regulations against the appellant.
>
> 2. The Department wrongfully required and selectively required appellant to execute a consent order and agreement when no other laboratory has been required to do so.
>
> 3. The Department forced appellant to execute a consent order and agreement in order to obtain what appellant was entitled to receive with the alternative being the expenditure of large sums of legal fees and expenses and time of appellant which activity was unreasonable under the circumstances.
>
> 4. The action of the Department was contrary to the expressed understanding of the parties arrived at during the meeting of June 14, 2006 when the Department required appellant to be present in Harrisburg in the perpetration of selective enforcement of departmental regulations.
>
> 5. The activity of the Department is grounded solely upon a vendetta being exercised by Richard H. Sheibley against appellant in willful and wanton disregard of the rights of appellant.
>
> 6. The action of the Department violates the 5th and 14th Amendment rights and the Pennsylvania Constitutional rights of appellant in that it is without due process of law, the unreasonable selective enforcement of rules and regulations and done in the exercise of a vendetta against appellant.

Notice of Appeal, November 29, 2007 (Nov. NOA); DEP Ex. E.

The Department's Motion argues that it is entitled to summary judgment as a matter of law for the following reasons: the COA is a voluntarily entered agreement and is an enforcement action, not subject to appeal; Blue Marsh waived its right to appeal the COA; the appeal of the COA is not timely; and lastly, there is a heavy burden in demonstrating a claim of selective enforcement. Department's Motion for Partial Summary Judgment (DEP Motion), p. 2.

The Board agrees with the Department that any challenge to the content or validity of the Consent Order is improperly brought before the Board. As conceded by Blue Marsh in its response to the Department's Motion, "[t]hese appeals have nothing to do with the consent order except as a manifestation of the Department in selectively enforcing its rules and regulations and the vendetta against Blue Marsh. The consent order is evidence of the vendetta and nothing more." App. Memo, p. 3. Consistent with prior Board caselaw and the apparent agreement between the parties that the COA, itself, is not being challenged, any objections raised by the Appellant challenging the COA are, as a matter of law, not part of this consolidated appeal.

However, Appellant argues that the Department abused its discretion in the manner in which it obtained then enforced the COA. Appellant claims that the change of accreditation was an abuse of discretion based on the Department's selective enforcement of its rules and regulations. The remaining objections raised by Blue Marsh in its November Appeal deal with selective enforcement, invoking the equal protection clause. The equal protection clause of the United States Constitution is found in the 14th Amendment and the equal protection clause in the Pennsylvania Constitution is found in Article I. An equal protection analysis is the same for both the U.S Constitution and Pennsylvania Constitution. *William James v. Southeastern Pennsylvania Transportation Authority*, 477 A.2d 1302 (Pa. 1984).

The objections alleging selective enforcement and a vendetta against Blue Marsh carry, as presented in the Department's Memorandum, a heavy burden of proof. The Appellant must establish:

> at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e. based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

United States v. Torquato, 602 F.2d 564, 569 (3rd Cir.); *cert denied*, 444 US 941 (1979); *see generally United States v. Schoolcraft*, 493 U.S. 995 (1989); *Max Starr v. DEP*, 2002 EHB 799; *F.R.S., Inc. v. DEP*, 1988 EHB 947, 949-51, *aff'd*, 761 A.2d 634 (Pa. Cmwlth. 2000).

The Appellant's response memorandum provides deposition testimony of two employees, Debbie Wanner and Michael McKenna, of Blue Marsh. Debbie Wanner, the laboratory manager, is responsible for compliance with commonwealth and federal regulations. At her deposition she testified that the Appellant was treated differently because of the number of audits it had to endure and was "under closer scrutiny than any other laboratory." App. Memo, p. 5, *citing* Deposition of Debbie Wanner, p. 52 (attachment). She also testified that New York audited Blue Marsh three times in 12 months because of a phone call from DEP employee, Richard Sheibley. The Appellant also provided deposition testimony from another Blue Marsh employee, Michael McKenna, who indicated that Blue Marsh had dozens of audits in 2003 and that Sheibley makes phone calls to Blue Marsh audits, but does not call other laboratories during audits. App. Memo, p. 6.

In a recent adjudication at the Board, Judge Labuskes discussed the issue of selective enforcement claims, providing:

> In order to show that there has been constitutionally infirm selective enforcement, it is not enough to point out that similarly situated parties have been treated dissimilarly. A State Trooper cannot possibly ticket every driver exceeding the speed limit. It is no defense that there are other speeders. The equal protection clause only arguably comes into play if the speeder in question was selected based upon impermissible considerations. The administration of the law must not only be 'intentional or purposeful,' the courts use such phrases as 'invidious', 'malicious', 'bad faith' or 'administered with an evil eye.' *See, e.g., Barsky v. Department of Public Welfare*, 464 A.2d 590, 594 (Pa. Cmwlth. 1983).

UMCO Energy, Inc. v. DEP, 2007 EHB Docket No. 2004-245-L (Opinion issued March 19, 2007), slip op. 10-11, *aff'd UMCO Energy, Inc. v. DEP*, 724 C.D. 2007 (Pa. Cmwlth. filed December 12, 2007).[1] Consistent with Judge Labuskes' discussion provided above, a further review of relevant caselaw indicates that,

> even if other[s] . . . did receive treatment different from that given [to Appellant], such fact without more would not constitute invidious discrimination. Mere inequalities in the administration of a law do not give rise to a constitutional violation. Rather, there must be an element of intentional or purposeful discrimination on the basis of an arbitrary classification.

Murray Barsky v. Dept. of Public Welfare, 464 A.2d 590, 593 (1983), *aff'd, Barsky v. Dept. of Public Welfare,* 475 A.2d 742 (Pa. 1984); *see also F.R.S., Inc v. DEP,* 1998 EHB 947 ("There must be more proof of intentional discrimination beyond the mere fact that different facilities were treated differently."). *F.R.S.,* 1998 EHB at 949. Furthermore,

> it is not enough to sustain an equal protection claim to show that others have been treated differently or more leniently; it is

[1] The Commonwealth Court provided, "UMCO failed to prove factually that the Department enforced any statute, including either the Clean Streams Law or the Mine Subsidence Act, in a manner that discriminates against UMCO. Accordingly, we hold that UMCO's right to equal protection under the law was not offended by the Department's revision to UMCO's mining permit. UMCO v. DEP, ____ A.2d _____ (No. 724 C.D. 2007, Pa. Cmwlth. filed December 12, 2007), slip op. 18.

> necessary to show intentional and purposeful discrimination on the part of the administrative agency. *E.g., Barsky v. Department of Public Welfare*, 464 A.2d 590 (Pa. Cmwlth. 1983), *aff'd*, 475 A.2d 742 (Pa. 1984). The United States Supreme Court has held that a conscious exercise of selectivity in enforcement does not rise to the level of a constitutional violation. *Oyler v. Boles*, 368 U.S. 448 (1962).

F.R.S. Inc, 1998 EHB at 949.

The motion record before the Board indicates that the Appellant may have been audited more than other laboratories and these audits may have been at the direction of a DEP employee. The Appellant states in its memorandum that the evidence it presents is "unequivocal evidence that Richard Sheibley was treating Blue Marsh differently than any other Pennsylvania laboratory. It is classic evidence of unlawful selective enforcement and harassment." App. Memo, p. 5. The Board disagrees that this is "classic evidence of unlawful selective enforcement," however this evidence raises the question of whether the Department's actions were an abuse of discretion that should be explored more fully at a hearing.

At this time, Blue Marsh must disclose enough evidence to oppose the motion and establish that an issue for hearing exists. Since this is a motion for summary judgment the standard of review requires that the Board examine the record in a light most favorable to the nonmoving party, here, that is the Appellant. Given that a claim for violating the equal protection clause carries a heavy burden and the evidence presented by the Appellant suggests that it was treated differently, the Board finds that the Appellant should be given an opportunity to fully present evidence to support its claims.

Therefore, at this time the claims for selective enforcement are not dismissed and the Department's motion with respect to those claims is denied. The Appellant must be aware of the applicable caselaw, not only discussed here, but elsewhere, that discusses the heavy burden it

will have at a hearing to successfully establish such claims.

January Appeal

Turning to the January Appeal, the Board agrees with the Department that this appeal is moot because the case or controversy on which the January Appeal was based no longer exists. The December Letter, revoking Blue Marsh's accreditation, was rescinded by the Department on January 10, 2007 and reinstated Blue Marsh's accreditation. *See* DEP Memo, p. 5; DEP Ex. I. In *Morris Township*, the Board provided that:

> [i]t is axiomatic that if an event occurs during the appeal process which deprives the Board of the ability to provide effective relief or deprives and appellant of an actual stake in the outcome or a controversy, the appeal should be dismissed as moot.

Morris Township v. DEP, 2006 EHB 55, 56 (*citing Horsehead Resource Development v. DEP,* 780 A.2d 856 (Pa. Cmwlth. 2001), *petition for allowance of appeal denied*, 796 A.2d 987 (Pa. 2002)). The Board can only entertain appeals that present "an actual case or controversy [that] exists at all stages of the judicial process" . . . ." *Saucon Valley Sch. Dist. v. Robert O.*, 785 A.2d 1069, 1073 (Pa. Cmwlth. 2001). A matter becomes moot when an event occurs that deprives the Board of providing relief. *Rackoci v. DEP*, 2002 EHB 590, 591.

The Department's letter was rescinded leaving the Board no case or controversy to decide. *See Horsehead Development Co., Inc. v. DEP*, 780 A.2d 856 (Pa. Cmwlth. 2001) (an appeal before the Board is moot where the orders that were basis of the appeal are withdrawn); *Solebury Township v. DEP*, 2003 EHB 208 (rescission erases the Department's action to which Appellants had objected leaving the Board unable to grant relief). Therefore, the January Appeal is moot because the appeal was based on the December Letter which has been withdrawn and the Board has no relief that it can offer to the Appellant. We therefore enter the following order:

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

BLUE MARSH LABORATORIES, INC.	:	
	:	
v.	:	**EHB Docket No. 2006-266-C**
	:	**(Consolidated w/ 2007-029-C)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 28th day of December 2007, IT IS HEREBY ORDERED that the Department's Motion for Partial Summary Judgment is **granted in part and denied in part.**

IT IS FURTHER ORDERED that the matter at EHB Docket No. 2007-029-C is hereby **dismissed** and the docket will be marked closed and discontinued. All future filings with the Board shall contain the following caption:

BLUE MARSH LABORATORIES, INC.	:	
	:	
v.	:	**EHB Docket No. 2006-266-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ENVIRONMENTAL HEARING BOARD

Thomas W. Renwand

THOMAS W. RENWAND
Acting Chief Judge and Chairman

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: **December 28, 2007**

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