Environmental Hearing Board

Adjudications
and
Opinions

1992

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COMMONWEALTH OF PENNSYLVANIA
Maxine Woelfling, *Chairman*

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OF THE

ENVIRONMENTAL HEARING BOARD

1992

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1992.

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

ADJUDICATIONS

OPINIONS AND ORDERS

1992 DECISIONS

COMMONWEALTH OF PENNSYLVANIA
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KEYSTONE CEMENT COMPANY	:	
	:	
v.	:	EHB Docket No. 92-163-MR
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 7, 1992

OPINION AND ORDER
SUR
PETITION FOR SUPERSEDEAS

Robert D. Myers, Member

Synopsis

Where the Board concludes that, although DER is likely to prevail on the issue concerning a cement company's excess use of hazardous and residual waste, a suspension of the permits authorizing the use of such waste is not warranted, a supersedeas will be granted. In reaching this conclusion, the Board considers the potential economic harm to the Cement Company and its employees, the likelihood of environmental damage, and the balancing of interests.

OPINION

On April 17, 1992 Keystone Cement Company (Keystone) filed a Notice of Appeal from a March 31, 1992 Order of the Department of Environmental Resources (DER) which, *inter alia*, suspended Keystone's authority to store and burn hazardous and residual wastes at its manufacturing plant in East Allen

Township, Northampton County. With its Notice of Appeal, Keystone filed a Petition for Supersedeas. DER filed its Response to the Petition on April 28, 1992.

Another Notice of Appeal and Petition for Supersedeas, prepared on behalf of individuals identified as Certain of the Employees of Keystone Cement Company, was filed on April 24, 1992 (Board Docket No. 92-173-MR) seeking review of the same DER Order. On April 29, 1992 Saucon Association for a Viable Environment (SAVE), Lehigh Valley Coalition for a Safe Environment (LVCASE), Mrs. Suzanne Moschini, Mrs. Cynthia Orobono, Mr. Levi Borger, Mrs. Deborah Kelly, Mrs. Ramineh Shahri, Mrs. Nancy Weiland and Ms. Ruth Lynn (Proposed Intervenors) filed a Petition to Intervene in both appeals. They filed, at the same time, a document setting forth their opposition to the Supersedeas Petitions. Also on April 29, 1992 United Paperworkers International Union and the Teamsters Local Union 773 filed a legal memorandum as *amicus curiae*.

A hearing on Keystone's Petition for Supersedeas was held in Harrisburg before Administrative Law Judge Robert D. Myers, a Member of the Board, on April 30, 1992. DER and Keystone were represented by legal counsel. Since the hearing had been scheduled prior to the filing of the Employees' Petition and since the Employees' Petition is dependent on the outcome of Keystone's Supersedeas request, the Employees did not take an active part in the hearing. However, their legal counsel was permitted to present oral argument at the conclusion of the hearing.[1] Since the Petitions to Intervene had not yet been granted, the Proposed Intervenors were not permitted to take part in the hearing. However, their legal counsel was accorded the privilege of sitting at DER's counsel table.

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[1] The Employees also agreed to waive a hearing on their Petition.

The record consists of the pleadings, a hearing transcript of 271 pages and 23 exhibits. Keystone, the Employees and DER filed legal memoranda on May 5, 1992. The following factual situation appears from the record.

Keystone is a corporation which has operated a portland cement plant in East Allen Township, Northampton County, since 1928.[2] It currently employs about 250 persons and has an annual payroll of $9,000,000. Keystone utilizes two rotary cement kilns where temperatures in excess of 2500°F produce molecular changes essential to the making of portland cement. Since 1977 Keystone has used a mixture of coal and waste solvent fuels to fire its kilns. The waste solvent fuels are characterized as hazardous waste as defined in section 103 of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.103, and in 25 Pa. Code §260.2.

Under Air Quality Operating Permits Nos. 48-309-040 and 48-309-041, issued by DER on August 18, 1986 and reissued on August 21, 1991, Keystone was authorized to add waste solvent fuels to the fuel mixture at a rate not to exceed 10 gallons per minute for kiln #1 and not to exceed 30 gallons per minute for kiln #2. Keystone also possesses Hazardous Waste Storage Permit No. PAD002389559, issued December 27, 1991. It has storage capacity for approximately 75,000 gallons of waste solvent fuels.

Air Quality Plan Approvals Nos. 48-309-040B and 48-309-041B, issued by DER in March 1989, dealt with the burning of residual waste (as defined in section 103 of the SWMA, 35 P.S. §6018.103, and in 25 Pa. Code §260.2) as part of the fuel mixture in Keystone's kilns. Since issuance of these Plan Approvals, DER has issued only Temporary Air Quality Operating Permits Nos. 48-309-040B and 48-309-041B, the most recent of which were released by DER on January 14, 1992.

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[2] Keystone is a subsidiary of GIANT Group, Ltd.

Air Quality Plan Approvals Nos. 48-309-040C and 48-309-041C, issued by DER on December 27, 1991, concern modifications dealing with expanded use of hazardous and residual wastes in Keystone's kilns. These two Plan Approvals, the Hazardous Waste Storage Permit and the Temporary Operating Permits are subjects of other proceedings pending before the Board at Docket Numbers 92-041-MR, 92-042-MR, 92-043-MR, 92-048-MR and 92-060-MR.

On March 26, 1992 legal counsel for Keystone and its parent corporation, Christopher H. Marraro and Howard J. Wein, met with DER legal counsel, Michael D. Bedrin and Barbara L. Smith, and disclosed that an internal review occasioned by document requests in one of these other appeals had uncovered instances where the feed rates for waste solvent fuels had been exceeded. The number and extent of these exceedances were difficult to quantify, according to Marraro and Wein, because of deficiencies in Keystone's monitoring and inventory tracking systems. These deficiencies had been eliminated by improved systems installed in March 1992, and the exceedances had stopped. Marraro and Wein promised Keystone's full cooperation in any investigation DER wanted to conduct.

DER investigators arrived at Keystone's plant on the following day, toured the facility to become familiar with the process, and secured copies of Daily Operational Reports for the period December 31, 1988 through March 24, 1992. These Reports contained a variety of detailed data concerning daily production, operating hours and materials consumed. DER investigator Denise D. Strickland divided the number of hours of operation for each kiln into the gallons of waste solvent fuels consumed by that kiln to arrive at an average hourly consumption rate which was then converted to an average minute consumption rate for that date. This calculation revealed that kiln #2 was operated in excess of the 30 gallons-per-minute rate on 135 of the 310

operating days in 1989, 144 of the 312 operating days in 1990 and 61 of the 263 operating days in 1991.

Sometime during the latter part of 1991, the computer program used to compile the Daily Operational Reports was modified at the direction of Keystone's Chief Operating Officer, James Longenbach, to conceal the excess consumption of waste solvent fuels. When the gallons of fuel used during the daily period exceeded the 30 gallons-per-minute feed rate for kiln #2, the report would show only the maximum permitted amount (43,200 gallons for 24 hours of operation, for example). The computer would retain the overage in its memory and apply it, in part or in whole, during the next operating day when the fuel consumed was less than the maximum. Beginning on August 24, 1991 the Daily Operational Reports reflect the 43,200 gallon maximum for kiln #2 on 35 operating days up to November 26, 1991 (when the kiln was taken out of operation) and on 10 operating days between February 2 and February 23, 1992 (after the kiln had been placed back in operation on January 26, 1992).

The amount of waste solvent fuels consumed, as shown on the Daily Operational Reports, is not precise. The amount is determined by comparing the volume of waste solvent fuels in Keystone's storage tanks on a given day with the volume present on the preceding day and adjusting the figure by fuel deliveries. The volumes are determined by daily measurements (using a string and ball) of the liquid levels in the horizontal tanks and daily readings of the pressure gauge on the vertical tank. The volume determinations are not made at the exact same time everyday and may be made while waste solvent fuels are being added to, or removed from, the tanks. Moreover, the pressure readings can be influenced by temperature and barometric pressure. The amount

of waste solvent fuels consumed, as shown on the Daily Operational Reports, is nonetheless used by Keystone on its Pennsylvania Emission Data System (PEDS) reports filed annually with DER.

The waste solvent fuels consumed, as reflected on the Daily Operational Reports, was not enough to cause violations of the stack emission limits applicable to Keystone's plant.

On March 31, 1992 DER issued the Order prompting this appeal. After reciting the circumstances leading up to issuance, the Order (1) directed Keystone to cease immediately accepting and burning hazardous and residual waste; (2) suspended the Hazardous Waste Storage Permit, the Air Quality Plan Approvals issued on December 27, 1991, the authority to burn hazardous waste under the Air Quality Operating Permits reissued on August 21, 1991, and the authority to burn residual waste under the Temporary Air Quality Operating Permits issued on January 14, 1992; and (3) directed Keystone to have the hazardous and residual waste removed from its premises to an appropriate facility. On that same date Keystone suspended James Longenbach and replaced him with Terry Kinder, Keystone's Chief Executive Officer since June, 1989. Longenbach will never again be employed by Keystone, according to Kinder.

The hazardous and residual waste collectively account for about 50% of Keystone's fuel use. The other 50% is coal. DER's Order will necessitate the use of 100% coal, increasing Keystone's costs by approximately $400,000 a month.[3] The company experienced a pre-tax loss in 1991 in excess of $4 million. While a slight profit had been projected for 1992, having to burn 100% coal will generate another $4 million loss. If the Order is not superseded, Keystone will have to ask all of its employees, salaried and

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[3] Fuel costs could be lowered to a more competitive figure if Keystone upgraded the efficiency of its kilns. The cost of doing so, perhaps $50 - $60 million, is more than the company can handle in a depressed economy.

hourly, for a pay cut of 15% to 20% as well as reductions in benefits. If the employees refuse, the plant will have to be closed. Keystone also is threatened with the loss of a $5 million line of credit needed as operating capital.

Recently, Keystone has modified its monitoring and control systems by installing on the waste solvent fuel lines serving both kilns microprocessor-based liquid flow meters with feed-rate controls, deviation alarms, automatic interlocks and strip charts which record the actual gallon-per-minute feed rates. Richard A. Familia, who became president of Giant Resource Recovery, one of Keystone's sister companies, in February, 1992, has an extensive background in environmental compliance. After DER's Order was issued, he was sent to Keystone with authority to establish monitoring and control systems to insure compliance with DER permits. It is not clear whether he was responsible for specifying the new flow meters but expressed confidence in their reliability.

As currently programmed, the flow meters will automatically stop the flow of waste solvent fuels at 9.6 gallons per minute for kiln #1 and at 29 gallons per minute for kiln #2. These levels were established by accounting for equipment error and including a safety factor. When the flow reaches 1 gallon per minute below those levels, the high flow alarm will activate to alert the control room operator that the limits are being approached. This alarm is both audible and visual. The audible alarm can be silenced by the operator but the visual alarm continues to flash until the flow drops below the alarm point. If the flow is not reduced and reaches the cutoff point, it will be stopped automatically.

Familia has set up procedures for calibrating and verifying the flow meters, inspecting the components of the monitoring and control systems, and

invoking security to the computer database. He has also modified the organization so that Keystone's in-house vice-president for environmental affairs, Michael J. Luybli, and his staff report directly to him. The mission of this group is strictly compliance and not operations. The computer code can be changed only by Luybli or Familia. The system also is equipped with a modem which could be accessed by DER by telephone at any time.

To be entitled to a supersedeas, Keystone must show by a preponderance of the evidence (1) that it will suffer irreparable harm, (2) that it is likely to prevail on the merits, and (3) that there is no likelihood of injury to the public or other parties. Where pollution or injury to the public health, safety or welfare exists or is threatened, a supersedeas cannot be granted: section 4(d), Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7514(d); 25 Pa. Code §21.78. We are to balance the interests of the parties and the public: *Pennsylvania Public Utility Commission v. Process Gas Consumers Group*, 502 Pa. 545, 467 A.2d 805 (1983).

We have held that significant financial or economic injury constitutes irreparable harm: *Elmer R. Baumgardner et al. v. DER*, 1988 EHB 786. Certainly, the consequences described by Keystone's Chief Executive Officer fall within this category. While DER challenges the sufficiency of this testimony it presented no countering evidence. Accordingly, as we did in *Eugene Nicholas, t/d/b/a Nicholas Packing Company v. DER*, Board Docket No. 92-025-MR, Opinion and Order issued March 6, 1992, we will agree with Keystone that it will suffer irreparable harm if forced to discontinue using waste solvent fuels.

Despite all of Keystone's efforts to persuade us that the Daily Operational Reports are not reliable enough to establish permit violations, we

remain unconvinced for several reasons. First, it is obvious that Keystone's management considered them to be credible. Not only were the waste solvent fuels consumed data used on the annual PEDS report, the company modified the computer program to conceal the daily overages. When the circumstances were brought to the attention of the parent company, they decided on a full disclosure to DER. These actions place a significance on the Daily Operational Report figures that contradicts attempts to discount them. More important, however, is the extent and regularity of the overburnings. It occurred on nearly one-half of the operating days in 1989 and 1990. While it dropped in 1991, it still happened on one-third of the days (including those reported at the maximum). The excess consumed was less than 1,000 gallons only about 10% of the time. It exceeded 2,000 gallons about 67% of the time. On 46 occasions it topped 10,000 gallons. We are unwilling to attribute these overages to the inaccuracies described by Keystone's witnesses. Consequently, we do not consider it likely that Keystone will prevail on this issue.

The other issue is whether DER abused its discretion in suspending the permits and directing removal of the wastes. It clearly has the statutory authority to take such action: section 503(c) of the SWMA, 35 P.S. §6018.503(c), and section 6.1(c) of the Air Pollution Control Act (APCA), Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4006.1(c). Whether it should have exercised that power in this situation depends upon a consideration of a multitude of factors. DER cites the duration and regular nature of the violations - and these are important. It emphasizes Keystone's breach of the trust that necessarily underlies the permitting process - and the importance of this cannot be minimized, especially where hazardous waste is involved.

We must also weigh the fact that Keystone divulged the overburning to DER, removed the individual who authorized it and put in place state-of-the-art monitoring and control systems as well as organizational changes in effort to prevent it from happening again. We must keep in mind that plants where hazardous waste is beneficially consumed are desirable facilities. And we must place on the scales the fact that Keystone's stack emission limits were not exceeded despite the overburning.

Weighing these factors as carefully as we can, given the abbreviated record necessarily produced by a supersedeas proceeding, we find a near-perfect balance. We are loathe to second-guess DER on a matter of such importance, but we believe that an indefinite suspension of the permits was excessive. Keystone, in our opinion, is likely to prevail on this issue.

Harm to the public was not shown to have occurred as a result of the past overburning. That does not mean that harm will not occur in the future, however, if Keystone is allowed to resume burning waste solvent fuels. We are satisfied that the feed rates which have been in effect since 1986 will not produce stack emissions detrimental to the public health, safety and welfare. The risk is that Keystone will resume its past practice of ignoring those rates. While the monitoring and control systems that have been put in place are impressive, they will be no more trustworthy than the individuals operating them. The fidelity of Keystone's management and employees to environmental compliance has been thrown in doubt by practices as recent as three months ago. DER and the public are more than justified to be skeptical about promises of future performance. In the final analysis, however, there can be no other assurance. We must either rely on the integrity of permittees

or stop issuing permits entirely. Balancing the interests of the parties and the public, we conclude that the threat of environmental harm is not enough to warrant a denial of the supersedeas.

We admonish Keystone, its management and employees in the strongest terms possible that their investments and livelihoods have come within a hairsbreadth of extinction by their disregard of environmental regulations. Handling hazardous waste is one of the most sensitive undertakings in our society, demanding a scrupulous adherence to safety and health requirements. Any deviation from that standard in the future will be grounds for lifting the supersedeas. If you truly wish to avoid the irreparable harm that will entail, you must pay meticulous attention to the responsibilities imposed upon you in connection with the privilege of using hazardous and residual wastes.

During the supersedeas period, we will require Keystone at its own cost (1) to provide DER with 24-hour access to the monitoring and control systems (as Keystone already has offered to do), and (2) to provide DER with daily printouts of the gallon-per-minute feed rates of waste solvent fuels used in the kilns. These printouts will be delivered to DER's Wilkes-Barre office (or other designated location) within 24 hours after the close of the daily period to which they apply. DER, of course, may waive one or both of these requirements.

ORDER

AND NOW, this 7th day of May, 1992, it is ordered as follows:

1. Keystone's Petition for Supersedeas is granted.

2. DER's Order of March 31, 1992 is superseded until further notice.

3. Prior to resuming the use of waste solvent fuels, Keystone shall-

(a) certify to DER and the Board that all components of its monitoring and control systems, as described to the Board, are in place, calibrated and functional, and

(b) provide DER with 24-hour access to the monitoring and control systems, unless DER waives this requirement in writing.

4. While waste solvent fuels are being utilized, Keystone shall provide DER with daily printouts of the gallon-per minute feed rates of waste solvent fuels, to be delivered to DER's Wilkes-Barre office (or other designated location) within 24 hours after the close of the daily period to which they apply, unless DER waives this requirement in writing.

ENVIRONMENTAL HEARING BOARD

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: May 7, 1992

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J. P. MASCARO & SONS, INC.	:	
	:	
V.	:	**EHB Docket No. 89-580-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: May 8, 1992**

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

By Terrance J. Fitzpatrick, Member

Syllabus

The Board reverses a civil penalty assessment issued by the Department of Environmental Resources (DER) pursuant to the Solid Waste Management Act. The legal definition of the term "solid waste" includes, among other things, "residual waste;" therefore, DER erred in finding that the Appellant's permit, which authorized it to process "solid waste," did not authorize it to process "residual waste."

INTRODUCTION

This Adjudication involves an appeal by J. P. Mascaro and Sons, Inc. (Mascaro) from a civil penalty assessment issued by DER on October 30, 1989 in the amount of $19,215. Mascaro owns and operates the Mascaro transfer facility in Franconia Township, Montgomery County, Pennsylvania. The civil penalty was based on an alleged violation of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* and the regulations promulgated under this law. More specifically, DER alleged that Mascaro processed residual waste at its facility without a permit

authorizing this activity.

A hearing on this matter was held on November 7, 1990. Mascaro did not present any testimony at the hearing. DER presented testimony through compliance specialist Nancy Roncetti, and through waste management facilities manager Larry Lunsk. The parties filed post-hearing briefs on January 9, 1991 and January 10, 1991.

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

FINDINGS OF FACT

1. The Appellant in this proceeding is J. P. Mascaro & Sons, Inc. (Mascaro), a waste processor with offices at 320 Godshall Road, Harleysville, Montgomery County, Pennsylvania and with a solid waste processing facility, the Mascaro transfer station, in Franconia Township, Montgomery County, Pennsylvania.

2. The Appellee in this proceeding is the Department of Environmental Resources (DER), the executive agency of the Commonwealth with the duty and authority to administer and enforce the Solid Waste Management Act (SWMA), the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*; Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and the rules and regulations adopted under these laws.

3. On October 30, 1989, DER issued a civil penalty assessment of $19,215 to Mascaro, alleging that on December 1, 1988 Mascaro processed drums containing residual waste without a permit authorizing the acceptance of such waste, in violation of 25 Pa. Code §279.201(c) and Sections 301 and 302(a) of

the SWMA, 35 P.S. §§6018.301, 6018.302(a).

4. DER issued Solid Waste Permit No. 101237 to Mascaro on September 25, 1981. This permit authorized operation of a "solid waste" processing facility - i.e. the "Mascaro Transfer Station" (Commonwealth Exhibit 1 - "Exh. C-1").

5. The first page of Mascaro's permit stated that application number 101237 was made a part of the permit (Exh. C-1, Transcript 13 - "T. 13").

6. The first page of the permit provided: "See attachment for waste limitations and/or special conditions." The attachment (the second page of the permit) did not contain any waste limitations (Exh. C-1).

7. Mascaro's application stated that the transfer station would process "solid wastes" from residential, commercial, and industrial facilities. In a footnote on the application, Mascaro clarified that it was referring to solid wastes as referred to in the SWMA and 25 Pa. Code §75.1, but that no hazardous wastes would be accepted (Exh. C-2).

8. Both at the time the permit was issued and at the present time, the term "solid waste" included municipal, residual, and hazardous wastes (T. 26, 25 Pa. Code §75.1, 35 P.S. §6018.103).

9. Mascaro's permit authorized it to accept, among other things, residual waste.

10. Paragraph 3 of the civil penalty assessment, which states that Mascaro's permit authorizes it to operate a "municipal waste transfer station," does not accurately reflect the terms of Mascaro's permit.

DISCUSSION

This is an appeal by Mascaro from DER's assessment of a $19,215 civil

penalty. DER bears the burden of proof in this appeal. 25 Pa. Code §21.101(b)(1)(3), T.C. Inman, Inc. v. DER, 1988 EHB 613. In reviewing DER's imposition of a civil penalty assessment, the Board must determine two things: whether the appellant has violated the statute or regulations, and, if we find that the appellant has committed a violation, whether there is a "reasonable fit" between the severity of the violation and the amount of the penalty. Chrin Brothers v. DER, 1989 EHB 875.

In this case, it is not necessary to address the amount of the penalty because we find that Mascaro did not commit the violation upon which the civil penalty was based. Accordingly, we will limit our discussion to the issue regarding the violation.

Mascaro argues in its brief that its permit authorized it to handle residual waste. In support, Mascaro points out that its permit authorized it to handle "solid waste," and that the definition of this term includes residual waste, citing Section 103 of SWMA, 35 P.S. §6018.103, and the regulations at 25 Pa. Code §§75.1, 271.1. Therefore, Mascaro contends that DER erred in finding, in paragraph 4 of the civil penalty assessment, that the permit did not authorize processing of residual waste.

DER argues that Mascaro's permit did not authorize processing of residual waste. DER relies upon Mr. Lunsk's interpretation of the permit language - that Mascaro could only accept "municipal waste" from residential, commercial, and industrial sources (T. 14-15). The reasoning behind Mr. Lunsk's interpretation is that if an applicant intended to handle residual waste, he would have to be more specific about the source and type of waste involved (T. 40-41). DER also relies upon 25 Pa. Code §279.201(c), which provides that

an operator of a transfer facility may not allow residual waste to be handled there unless DER has specifically approved handling that waste in the permit.

The term "solid waste" is defined in the SWMA as:

> Any waste, including but not limited to, municipal, residual or hazardous wastes, including solid, liquid, semisolid or contained gaseous materials ...

35 P.S. §6018.103. The definition of solid waste stated in 25 Pa. Code §271.1 is virtually identical to that stated in the SWMA.[1] The term solid waste is defined in 25 Pa. Code §75.1 as follows:[2]

> Garbage, refuse and other discarded materials including, but not limited to, solid and liquid waste materials resulting from municipal, industrial, commercial, agriculture [sic] and residential activities.

Although stated in slightly different terms, the definition in Section 75.1 of the regulations is consistent with the definition of solid waste stated in Section 103 of SWMA.

It is obvious that DER's interpretation of Mascaro's permit is inconsistent with the above definitions. Section 103 of SWMA states expressly that the term solid waste includes, among other things, residual waste. DER's argument that the permit's authorization to process "solid waste" only encompasses processing of "municipal waste" from residential, commercial, and industrial sources does not have any basis in SWMA or the regulations.

DER's interpretation of the permit is disturbing. The Department is not free to brush aside the definitions in the statute whenever it finds those

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[1] Chapter 271 of DER's regulations is entitled "Municipal Waste Management - General Provisions."

[2] Chapter 75 of DER's regulations is entitled "Solid Waste Management."

definitions inconvenient. In the present case, DER's action is particularly egregious because it is attempting to place this strained construction upon the permit language years after the permit was issued, in a civil penalty proceeding.

Our conclusion that Mascaro's permit authorizes it to process residual waste is not affected by the language of 25 Pa. Code §279.201(c), which reads:

> A person or municipality that operates a transfer facility may not allow residual waste or special handling waste to be received or handled at the facility unless the Department has specifically approved handling that waste in the permit.

Chapter 279 of DER's regulations was adopted in 1988, after the issuance of Mascaro's permit. The question which this raises is whether the adoption of Section 279.201(c) had the effect of automatically revoking Mascaro's authority to process residual waste.

The adoption of this regulation does not alter our conclusion here because we find that Mascaro's permit was sufficiently specific to authorize it to process residual waste. Although Mascaro's permit does not contain the term "residual waste," it does contain the term "solid waste," which, as explained above, includes residual waste.[3] Moreover, if DER believes that Mascaro's facility cannot safely process residual waste, then

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[3] If we were to construe Section 279.201(c) of the regulations to require the actual term "residual waste" in the permit - so that the term "solid waste" was deemed insufficient to authorize handling of residual waste - we would be creating a conflict between this section of the regulations and the definition of "solid waste" in the SWMA. In this situation, we would be forced to honor the statute over the regulations. Tiani v. Commonwealth, DPW, 86 Pa. Commw. 640, 486 A.2d 1016 (1985).

DER can consider modifying the permit.[4]

Since we find that Mascaro has authority to process residual waste, we need not address whether Mascaro's handling of that waste constituted "processing" as defined in 25 Pa. Code §271.1.

CONCLUSIONS OF LAW

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

2. Mascaro's permit, issued in 1981, authorizes it to process "solid waste." This includes the right to process "residual waste" because the term solid waste is defined to include "residual waste." Section 103 of SWMA, 35 P.S. §6018.103.

3. DER's adoption in 1988 of 25 Pa. Code §273.201(c), which provides that DER must "specifically approve" handling of residual waste, did not have the effect of revoking Mascaro's previously granted authority to handle residual waste.

4. DER erred as a matter of law in concluding that Mascaro lacked authorization to process residual waste at its transfer facility.

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[4] DER's action here contrasts sharply with the action under appeal in Grand Central Sanitary Landfill, Inc. v. DER, EHB Docket No. 90-506-F (Opinion and Order issued July 11, 1991). In the Grand Central case, DER had modified a landfill operator's permit by revoking its authority to receive certain types of residual waste; this action was based upon 25 Pa. Code §273.201(d), which is virtually identical to 25 Pa. Code §279.201(c) except that the former applies to landfills and the latter applies to transfer stations. In the instant case, rather than taking the administratively responsible step of modifying Mascaro's permit, DER has charged Mascaro with illegal conduct and is attempting to impose a civil penalty.

ORDER

AND NOW, this 8th day of May, 1992, it is ordered that the appeal of J. P. Mascaro & Sons, Inc. is sustained, and the civil penalty assessment issued by the Department of Environmental Resources on October 30, 1989 is reversed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 8, 1992

cc: **For the Commonwealth, DER:**
Virginia Davison, Esq.
Superfund Enforcement
For Appellant:
William F. Fox, Jr., Esq.
Harleysville, PA

jm

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M. DIANE SMI
SECRETARY TO THE

ROBERT AND SHARON ROYER, et al. :
:
v. : EHB Docket No. 91-165-MR
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: May 8, 1992

OPINION AND ORDER
SUR
MOTION TO DISMISS

Robert D. Myers, Member

Synopsis

An appeal will be dismissed when it seeks review of DER's inaction, since the Board has no jurisdiction.

OPINION

Appellants filed a Notice of Appeal on April 24, 1991 seeking review of inaction on the part of the Department of Environmental Resources (DER) with respect to Appellants' requests to lift a moratorium on the issuance of sewage permits for lots in the Sandy Creek Forest Subdivision, Covington Township, Clearfield County. The requests were made in letters to DER dated May 8, 1990, July 16, 1990 and March 15, 1991. The last letter contained the following language:

> Please be advised that if I do not hear a response from you within ten (10) days of the date of this letter, I will assume that DER has determined to deny our request for an exemption from the ban.

DER did not respond and Appellants filed their appeal, claiming that DER's inaction amounts to a denial of their requests. On December 2, 1991 DER filed a Motion to Dismiss to which Appellants have filed no response.

As DER points out, this Board has held that DER inaction does not constitute action subject to appeal to this Board: *Westinghouse Electric Corporation v. DER*, 1990 EHB 515; *S. A. Kele Associates, Inc. v. DER*, Board Docket No. 90-223-F, Opinion and Order issued May 28, 1991; *Phoenix Resources, Inc. v. DER*, Board Docket Nos. 91-122-MR and 91-123-MR, Opinion and Order issued October 16, 1991. Appellants cannot convert DER's inaction into action simply by employing the language quoted above. Action involves a deliberate exercise of will or force and can never be presumed (except by legislative or regulational fiat) from a failure to act. Appellants' remedy is to request Commonwealth Court to invoke its equity powers by ordering DER to act. We have no such powers: *Marinari v. Commonwealth, Dept. of Environmental Resources*, 129 Pa. Cmwlth. 564, 566 A.2d 385 (1989).

ORDER

AND NOW, this 8th day of May, 1992, it is ordered as follows:

1. DER's Motion to Dismiss is granted.

2. The appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 8, 1992

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M. DIANE SMI
SECRETARY TO THE

CONSHOHOCKEN BOROUGH AUTHORITY	:	
	:	
v.	:	EHB Docket No. 91-276-MR
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 8, 1992

OPINION AND ORDER
SUR
MOTION TO DISMISS

Robert D. Myers, Member

Synopsis

DER's refusal to reverse a final decision on Federal grant participation in a wastewater treatment plant construction project is not an appealable action. To be timely, an appeal seeking to challenge the final decision must be filed within the appropriate appeal period following that final decision.

OPINION

This appeal was filed on July 9, 1991 by Conshohocken Borough Authority (Appellant) seeking review of a rejection by the Department of Environmental Resources (DER) of a request for Federal grant participation with respect to Change Order No. 10 of Contract No. 17, the Conshohocken Wastewater Treatment Plant (Grant No. C-421039). On November 20, 1991 DER filed a Motion to Dismiss the appeal as untimely. Appellant filed Objections to the Motion on December 20, 1991.

According to its Motion, DER maintains that its final action on Appellant's request for Federal grant participation for Change Order No. 10 was issued on November 5, 1990. Appellant requested reconsideration of this

decision by letters dated February 12 and 21, 1991. DER responded to these requests by letters dated April 9, 1991, affirming the November 5, 1990 denial. Informed during a telephone conversation on June 3, 1991 that some confusion existed regarding the April 9, 1991 letters, DER issued another letter on June 10, 1991 which reiterated the affirmation of the denial. The appeal is timely only if this latest letter can be viewed as DER's final action. DER, of course, contends that it cannot be considered in that manner; Appellant argues that it can.

This field was ploughed, disced and thoroughly harrowed by the Board in *Borough of Lewistown v. DER*, 1985 EHB 903, and *Lansdale Borough v. DER*, 1986 EHB 654. We held that DER's rejection of Federal grant participation is a final, appealable action even if the letter communicating the rejection does not specifically say so. We held further that a subsequent refusal by DER to reconsider the rejection is not an appealable action. The soundness of these decisions has not paled with time and govern our disposition of this appeal.

DER's November 5, 1990 letter stated that its rejection "constitutes the Department's final decision on Federal grant participation specific to this change order" but did not contain the "notice-of-appeal-rights" language commonly inserted in DER letters. The omission of this language was held to be of no consequence in the *Lewistown* case. Accordingly, the November 5, 1990 letter constituted DER's final decision. Appellant's February 12 and 21, 1991 letters were sent in response to this final decision - one requesting a "re-evaluation" and the other a "reversal of your previous determination." DER's April 9, 1991 letters informed Appellants that the November 5, 1990 determination would not be changed. Each letter stated that rejection of Appellant's requests "constitutes the Department's final decision on Federal grant participation specific to this change order" and contained the "notice-of-appeal-rights" language.

While the April 9, 1991 letters, on their face, appear to reflect appealable actions of DER, they amount to no more than a refusal by DER to alter its November 5, 1990 action.[1] According to *Lewistown* and *Lansdale*, such action is not appealable. The same must be said of DER's June 10, 1991 letter, which simply reiterated the substance of the April 9 letters. "To hold otherwise," as the Board observed in *Lewistown*, *supra* at 913, "would mean that DER decisions are never final in that a party who fails to timely appeal a DER decision can still challenge that decision by requesting DER to reconsider that decision, and then appealing to this Board DER's refusal to reconsider the decision." Or, as the facts of this case show, appealing DER's clarification of its refusal to reconsider.

ORDER

AND NOW, this 8th day of May, 1992, it is ordered as follows:

1. DER's Motion to Dismiss is granted.
2. Appellant's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

[1] We note that, even if these letters reflected an appealable action, Appellant's appeal was untimely since it was not filed until July 9, 1991.

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 8, 1992

cc: **Bureau of Litigation**
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sb

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M. DIANE SMI
SECRETARY TO THE

NEW HANOVER CORPORATION	:	
	:	
v.	:	EHB Docket No. 90-225-W
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, NEW HANOVER TOWNSHIP, COUNTY OF MONTGOMERY, and PARADISE WATCH DOGS	:	Issued: May 11, 1992

OPINION AND ORDER SUR DEPARTMENT OF ENVIRONMENTAL RESOURCES' MOTION FOR PARTIAL DISMISSAL OF NEW HANOVER CORPORATION'S APPEAL

By Maxine Woelfling

Synopsis:

A motion to dismiss portions of an appeal as a result of an appellant's failure to appeal a previous Department of Environmental Resources' (Department) action is denied where the Board is unable to determine the date, manner, and content of the notice received by the appellant.

OPINION

This matter was initiated with the June 5, 1990, filing of a notice of appeal by New Hanover Corporation (Corporation) challenging the Department's May 7, 1990, denial of the Corporation's re-permitting application for a municipal waste disposal facility in New Hanover Township, Montgomery County.

The procedural history of this matter is recounted most recently in the Board's March 21, 1991, opinions granting the petitions to intervene by the County of Montgomery (County) and New Hanover Township (Township) and the

Board's June 19, 1991, opinion denying the Corporation's motion for a protective order.

Now before the Board for disposition is the Department's motion to dismiss[1] those portions of the Corporation's appeal which challenge the County's compliance with §513 of the Municipal Waste Planning, Recycling, and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, 53 P.S. §4000.513, commonly referred to as Act 101.[2] The Department argues that the Board is without jurisdiction to hear the Corporation's claims in this regard because the Corporation failed to file an appeal within 30 days of receiving notice of the Department's March 16, 1990, letter to the County approving the implementing documents, which notice was allegedly received by the Corporation via an April 10, 1990, filing with the Commonwealth Court in James Marinari *et al.* v. Department of Environmental Resources, No. 159 M.D. 1989 (Commonwealth Court filing).[3]

The Corporation's October 29, 1991, response to the Department's motion in large part dwells on its substantive arguments relating to the County's compliance with §513 of Act 101. It also incorporates its response to jurisdictional arguments set forth in the County's September 16, 1991, motion for partial summary judgment, alleging that it never received notice through either the Commonwealth Court filing or publication in the Pennsylvania Bulletin.

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[1] This motion was included in a filing captioned, "Objections to New Hanover Corporation's Motion for Partial Summary Judgment and Motion to Dismiss Portions of Appeal." Obviously, the better practice would have been to file a separate motion.

[2] Section 513 of Act 101 requires counties to submit "all executed ordinances, contracts, or other requirements" that are necessary to, *inter alia*, implement their approved waste management plans to the Department within one year of its approval of the plans. This statutory provision does not address what the Department is to do with these submissions, although it does enumerate the criteria to judge whether the implementing documents accomplish their designated purpose.

The Corporation was not a party to the Department's actions with regard to the County plan, so its appeal period must be measured from the date notice of the Department's action is published in the Pennsylvania Bulletin, Lower Allen Citizens Action Group, Inc. v. Department of Environmental Resources, 119 Pa. Cmwlth. 236, 538 A.2d 1301 (1988), aff'd on reconsideration, ___ Pa. Cmwlth. ___, 546 A.2d 1330 (1988). Where the Department does not publish notice of its action in the Pennsylvania Bulletin, the appeal period runs from the date the third party otherwise receives actual or constructive notice of the Department's action, New Hanover Township *et al.* v. DER and New Hanover Corporation, EHB Docket No. 88-119-W (Opinion issued July 30, 1991). Because we must construe this motion in the light most favorable to the Corporation, Robert L. Snyder *et al.* v. DER, 1988 EHB 1084, and there is doubt concerning the manner and date of notice to the Corporation, we must deny the Department's motion.

The Department's only support for its contention is the Commonwealth Court filing. The Department makes no mention of publication of notice of its approval in the Pennsylvania Bulletin, much less provide any affidavit or other confirmation of any such publication or lack of publication. While the Corporation responds by stating that the Department did not publish notice of its approval, it also fails to attach an affidavit confirming this.[4] Since there is no evidence of notice via publication, we must ascertain whether notice was given through another means. That means of notice is alleged by the Department to be the Commonwealth Court filing, but it also is unsatisfactory. The Department does not cite us to any specific part of the

---

[4] We have searched the Pennsylvania Bulletin issues in the time period of the Department's March 16, 1990, letter and have uncovered no notice. While we are able to take official notice of this, Doreen Smith and Evelyn Fehlberg v. DER *et al.*, EHB Docket No. 86-523-W (Adjudication issued March 11, 1992), it is not our responsibility to develop the factual support for a party's position.

filing, and we can find only one statement pertinent to this issue. Paragraph 7 of the filing states, "On January 26, 1990, Montgomery County submitted all of the necessary plan implementation requirements, pursuant to Section 513 of Act 101, P.S. §4000.513, and the Department has determined this submission to be complete." The letter itself is not attached to the Commonwealth Court filing. At best, we can conclude that the Corporation knew on or about April 10, 1990, that the Department determined the County's §513 submission to be "complete," whatever that meant. Such phrasing logically implies that the Department had all the information that was necessary to undertake a review, not that it had taken a final action with regard to the County's implementing documents. We must, of course, resolve this doubt in favor of the Corporation and, accordingly, enter the following order.

O R D E R

AND NOW, this 11th day of May, 1992, it is ordered that the Department of Environmental Resources' motion to dismiss portions of New Hanover Corporation's appeal is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: May 11, 1992

cc: **For the Commonwealth, DER:**
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Southeastern Region
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and
Marc D. Jonas, Esq.
SILVERMAN AND JONAS
Norristown, PA
and
Mark A Stevens, Esq.
BALLARD SPAHR ANDREWS & INGERSOLL
Philadelphia, PA
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Mary Ann Rossi, Esq.
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For Paradise Watch Dogs:
John E. Childe, Esq.
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TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

BRODHEADS PROTECTIVE ASSOCIATION	:	
	:	
v.	:	**EHB Docket No. 91-349-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES, and	:	
PARADISE TOWNSHIP BOARD OF SUPERVISORS	:	
and POCONO TOWNSHIP BOARD OF SUPERVISORS,	:	
Permittees, and POCONO MOUNTAIN SCHOOL	:	**Issued:** May 12, 1992
DISTRICT, Intervenor	:	

OPINION AND ORDER SUR
MOTION TO LIMIT ISSUES

By Terrance J. Fitzpatrick, Member

Synopsis:

A motion to limit issues filed by the Intervenor is granted. Where the Department of Environmental Resources previously authorized two sewage treatment plants to process certain levels of flow, the Appellant may not challenge those flows in a later proceeding where DER has authorized that certain flows be directed to those two plants, but the total flows processed at the plants will still be within the previously authorized limits.

OPINION

This is an appeal by the Brodheads Protective Association (Association) from an action of the Department of Environmental Resources (DER) dated July 26, 1991 granting a revision to the official sewage facilities plans of Paradise and Pocono Townships, Monroe County. The background of this appeal is stated in a separate Opinion (issued on this same date) regarding the Association's motion for summary judgment, and will not be

repeated here.

This Opinion and Order addresses a motion to limit issues filed by Pocono Mountain School District, an intervenor in this proceeding. In its motion, the School District seeks to exclude from consideration at the hearing any evidence regarding whether the increased flows at the Mount Airy Lodge and Swiftwater treatment plants resulting from the new school building will cause degradation of the streams into which these plants discharge.[1] The School District contends that the increased flows at the two plants are both within the amounts which the plants have previously been authorized to discharge under their National Pollutant Discharge Elimination System (NPDES) permits. Therefore, the School District asserts that the Association's argument regarding degradation from those flows may not be considered here because it has already been decided.

The Association filed a response opposing the School District's motion. The core of the Association's argument seems to be that the current proposal to "split" the sewage from the new school between the Mt. Airy and Swiftwater plants is an interim measure, as evidenced by the safeguards which are built into the plan revision for handling flows in excess of the permitted capacity of the two plants.[2] The Association contends that, ultimately, the Mt. Airy plant will receive all the School District's flow and that the impact of this increased discharge must be considered in this plan revision.

We agree with the School District that the Association should be precluded from introducing evidence of stream degradation resulting from increased flows at the treatment plants. The reason for this is obvious; the Association is merely speculating when it states that all of the School

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[1] The Mt. Airy Lodge plant discharges into Forest Hills Run; the Swiftwater plant discharges into Swiftwater Creek.

[2] These safeguards consist of a plan to transport excess wastewater to a third treatment plant.

District's sewage will, at some point, be shipped to the Mt. Airy plant. Just as importantly, if at some point there is a proposal to ship all of the School District's sewage to the Mt. Airy plant, the Association will have the opportunity to challenge the proposal at that time.[3]

Accordingly, we will enter the following Order limiting the evidence at the hearing.

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[3] As the School District points out in its reply brief, the Association's response to the School District's request for admissions shows that the Association admits that the increased flows into the Swiftwater and Mt. Airy plants are both within those plants' authorized limits, and that any proposal to increase the flows from the plants would require planning approval separate from DER's approval which is under appeal here. (Association Response to Intervenor's Request for Admissions, filed April 14, 1992, para. 10, 14.)

ORDER

AND NOW, this 12th day of May 1992, it is ordered that:

1) The motion to limit issues filed by Pocono Mountain School District is granted.

2) The Brodheads Protective Association is precluded from introducing evidence regarding the legality or the impact of the flows from the Mt. Airy Lodge and Swiftwater Campus treatment plants.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: May 12, 1992

cc: **For the Commonwealth, DER:**
Barbara L. Smith, Esq.
Northeast Region
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For the Permittee:
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Paradise Township Board of Supervisors
Cresco, PA
For the Permittee:
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M. DIANE SMITH
SECRETARY TO THE BOARD

BRODHEADS PROTECTIVE ASSOCIATION	:	
	:	
v.	:	**EHB Docket No. 91-349-F**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES and	:	
PARADISE TOWNSHIP BOARD OF SUPERVISORS and	:	
POCONO TOWNSHIP BOARD OF SUPERVISORS,	:	
Permittees and POCONO MOUNTAIN SCHOOL	:	
DISTRICT, Intervenor	:	**Issued: May 12, 1992**

OPINION AND ORDER SUR
MOTION FOR SUMMARY JUDGMENT

By Terrance J. Fitzpatrick, Member

Synopsis:

A motion for summary judgment is denied for failure to set out clearly, in the motion, the alleged undisputed facts. In addition, the materials which are cited in the memorandum of law accompanying the motion fail to establish that there are no material questions of fact.

OPINION

This is an appeal by the Brodheads Protective Association (Association) from an action of the Department of Environmental Resources (DER) dated July 26, 1991 granting a revision to the official sewage facilities plans of Paradise and Pocono Townships, Monroe County. The purpose of these plan revisions was to provide for the sewage needs of Pocono Mountain School District, an intervenor in this proceeding, which plans to build a new school building on its Swiftwater Campus. In a nutshell, the plan revisions

call for treatment of the new building's sewage at two different treatment plants - the Mt. Airy Lodge plant (which would receive 8,000 gallons of the 13,800 gallons generated per day), and the existing treatment plant on the Swiftwater Campus (which would receive the remaining 5,800 gallons per day). There is no dispute between the parties that these additional flows at the two treatment plants are within the limits set by their respective National Pollutant Discharge Elimination System (NPDES) permits.

This Opinion and Order addresses a motion for summary judgment filed by the Association on April 2, 1992. In this motion, the Association contends, first, that DER erred in granting the plan revision of Paradise Township because the Township did not have a sewage facilities plan, or did not have a revised plan.[1] Second, the Association contends that DER erred by failing to consider the future needs of the Township in granting the revision. Third, the Association asserts that DER erred by failing to consider Sections 4 and 5 of the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§691.4, 691.5. Along with its motion, the Association filed a document entitled "Undisputable Facts," and a memorandum (with six attached exhibits) in support of its motion.

The School District filed a memorandum in opposition to the Association's motion. The School District contends that the motion should be denied because it is not supported by the proper types of material to establish that there are no material questions of fact. The School District also argues that the supporting materials fail to establish the following: that the Township does not have a sewage facilities plan, that DER failed to

---

[1] Although the Association appealed from DER's action with regard to the plans of both Paradise and Pocono Townships, the Association mentions only the Paradise Township plan in its motion for summary judgment.

consider future needs in granting the plan revision, and that DER failed to consider Sections 4 and 5 of the CSL, 35 P.S. §§691.4, 691.5.

The Board may grant summary judgment only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Pa. R.C.P. No. 1035(b). The evidence must be viewed in a light most favorable to the non-moving party. Ingram Coal Co. v. DER, 1990 EHB 395. In ruling on a motion for summary judgment, the Board is simply to determine whether there are triable issues of fact and is not to decide such issues. County of Schuylkill v. DER, 1990 EHB 1370.

Applying these standards to the instant case, the Association's motion for summary judgment must be denied. First, the Association's motion is fatally flawed due to the form in which it was filed. The motion itself is a scant two pages. The factual allegations in the motion are not tied to either the statement of "Undisputable Facts" or to the exhibits attached to the memorandum of law. As a result, we are forced to refer back and forth between the various documents to see if there is any evidence to support the contention that there are no material questions of fact.[2] Both the Board and the Courts have chided litigants for failure to properly support motions for summary judgment, and have denied such motions as a result. County of Schuylkill, supra, Laspino v. Rizzo, 40 Pa. Commw. 625, 398 A.2d 1069 (1979).

Second, even if we were to overlook the deficiencies in form described above, it is clear that the Association's motion lacks merit. With

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[2] One example of this difficulty is with regard to the Association's claim that Paradise Township does not have a sewage facilities plan. We have searched the statement of "Undisputable Facts" - in vain - for any evidence to support this allegation.

regard to each of the contentions raised in the motion, the Association has failed to demonstrate that there are no questions of fact which bar summary judgment. The Association cites the deposition of DER employee Paul Fosko for the proposition that Paradise Township does not have a sewage facilities plan; however, none of the pages which were cited support this proposition. In fact, Mr. Fosko refers to this plan - which the Association claims does not exist - at other places in his deposition (See Exhibit-C attached to Association's memorandum of law, pp. 61-62, 81-82). In addition, there is no direct support in the cited materials for the proposition that DER did not consider the future needs of Paradise Township in acting upon this plan revision. While it may be possible to read these materials as creating an inference that DER did not consider future needs, it is also reasonable to draw a contrary inference from them - which precludes us from granting summary judgment. County of Schuylkill, supra, Helinek v. Helinek, 337 Pa. Super 497, 487 A.2d 369 (1985). Finally, the Association cites no factual support whatsoever for the proposition that DER failed to consider Sections 4 and 5 of the CSL, 35 P.S. §§691.4, 691.5.

In summary, we find the Association's motion lacking both in form and in substance. Accordingly, we enter the following Order.

ORDER

AND NOW, this 12th day of May, 1992, it is ordered that the motion for summary judgement filed by the Brodheads Protective Association is denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATE: May 12, 1992

cc: **For the Commonwealth, DER:**
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Northeast Region
For the Appellant:
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Hummelstown, PA
For the Permittee:
Rebecca Sease, Secretary
Paradise Township Board of Supervisors
Cresco, PA
For the Permittee:
Jane Cilurse, Secretary
Pocono Township Board of
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Tannersville, PA
For the Intervenor:
Terry R. Bossert, Esq.
Bernard A. Labuskes, Jr., Esq.
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jm

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M. DIANE SMIT
SECRETARY TO THE B

THE SEWER AUTHORITY OF THE CITY OF SCRANTON	:	
v.	:	EHB Docket No. 91-370-MR
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 12, 1992

OPINION AND ORDER
SUR
MOTION TO DISMISS FOR LACK OF JURISDICTION

Robert D. Myers, Member

Synopsis

The 30-day appeal period applicable to a permittee seeking to challenge conditions in the permit begins on the date the permit is received, not the date it is published in the *Pennsylvania Bulletin*.

OPINION

The Sewer Authority of the City of Scranton (Appellant) filed a Notice of Appeal on September 9, 1991 seeking review of a National Pollution Discharge Elimination System (NPDES) Permit issued to Appellant by the Department of Environmental Resources (DER). On December 6, 1991 DER filed a Motion to Dismiss for Lack of Jurisdiction, contending that the appeal is untimely. Appellant filed Objections to the Motion on December 26, 1991.

According to allegations in the Motion which have been admitted by Appellant, the NPDES Permit was issued by DER on July 11, 1991, received by Appellant (according to a statement in the Notice of Appeal) on or about July

25, 1991, and recorded in the Office of the Recorder of Deeds of Lackawanna County on July 29, 1991. The issuance of the Permit was published in the August 10, 1991 edition of the *Pennsylvania Bulletin*.

The appeal can be considered timely only if the 30-day appeal period began to run on August 10, 1991, when the notice was published. 25 Pa. Code §21.52 (a) provides, in pertinent part that:

> jurisdiction of the Board shall not attach to an appeal from an action of [DER] unless the appeal...is filed with the Board within 30 days after the party appellant has received written notice of such action or within 30 days after notice of such action has been published in the *Pennsylvania Bulletin*....

We have held that, where a permittee is concerned, the appeal period begins on the date the permit is received, not on the date of publication in the *Pennsylvania Bulletin: City of Reading v. DER*, 1987 EHB 979. Applying that rationale here, it is apparent that the appeal is untimely and that we have no jurisdiction to hear it. Since the permit was recorded on July 29, 1991, it obviously had to be received on or prior to that date.

ORDER

AND NOW, this 12th day of May, 1992, it is ordered as follows:

1. DER's Motion to Dismiss for Lack of Jurisdiction is granted.

2. The appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 12, 1992

cc: **Bureau of Litigation**
Library: Brenda Houck
Harrisburg, PA
For the Commonwealth, DER:
Barbara L. Smith, Esq.
Northeast Region
For the Appellant:
Arthur J. Rinaldi, Esq.
RINALDI & RINALDI
Scranton, PA
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M. DIANE SMITH
SECRETARY TO THE BOA

WESTTOWN SEWER COMPANY	:	
	:	
v.	:	EHB Docket No. 92-135-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 12, 1992

OPINION AND ORDER
SUR TIMELINESS OF APPEAL

By: Richard S. Ehmann, Member

Synopsis

Where the records of this Board reflect receipt by the Board of Appellant's Notice Of Appeal thirty-one days after Appellant received the letter from the Department of Environmental Resources ("DER"), which it challenges by appeal, the appeal will be dismissed as untimely. It is the Board's records as to the date of an appeal rather than the hand written notations by the staff at the office of Appellant's counsel on a fax machine's transmittal which controls on the question of timeliness.

OPINION

On February 27, 1992, counsel for Westtown Sewer Company ("Westtown") received a letter from Joseph Feola of DER responding to counsel's letter of January 8, 1992. In Mr. Feola's letter he advises Westtown of DER's rejection of the proposed management plan Westtown submitted to DER to address an existing sewage overload in Westtown's sewerage system.

On April 1, 1992, the Board received an appeal by Westtown from the DER action set forth in this letter. Because it appeared that this appeal might be untimely filed under 25 Pa. Code §21.52(a) and thus the Board might have no jurisdiction over it, on April 6, 1992 we issued Westtown a Rule To Show Cause why the appeal should not be dismissed as untimely.

On April 24, 1992, Westtown filed Appellant's Response To Rule To Show Cause. In this Response Westtown again asserts receipt of the Feola letter on February 27, 1992, and avers that the last day for the filing of its appeal is March 30, 1992 and that it "faxed" its Notice Of Appeal to the Board on that date. Accordingly it concludes its appeal was timely.

Obviously, under 25 Pa. Code §21.52(a) Westtown's appeal had to be filed with this Board within thirty days of its receipt of DER's letter if we were to have jurisdiction over it. Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). It is equally obvious that Westtown is correct when it asserts that this means the appeal had to be filed by March 28, 1992, which is a non-business day so Westtown had until the close of business on March 30, 1992 (the next business day) to file this appeal. Where the "crunch" comes is that Westtown failed to meet the March 30, 1992 deadline.

The Board's records reflect receipt of this Notice Of Appeal on April 1, 1992. They do not show any filing of any type by Westtown on March 30, 1992.

To prove the timely filing of its appeal Westtown offers us a one page document bearing its attorney's name and address and a title of "Fax Cover Sheet". This page contains a handwritten notation saying that the Appeal was sent by fax from its counsel to this Board on March 30, 1992 at

4:00. The date and time are written in ink on the printed page. In addition, this page has stamped upon it the words "FAX SENT" and, at a blank space headed "Comments" in the middle of the page another hand written note saying "Confirmed Receipt". This page is Exhibit A to Westtown's response to our Rule.

The problem with Westtown's argument that this proves a timely appeal is that nothing on Exhibit A shows an acknowledgment by this Board of a successful transmittal on March 30, 1992 of this Notice Of Appeal. The Board received a Fax Cover Sheet with Westtown's Notice Of Appeal which is identical in all respects but two to Exhibit A. The sheet received by this Board does not contain either the stamped "FAX SENT" or the words "Confirmed Receipt". Moreover, the Fax Cover Sheet received by the Board was received by the Board with Westtown's Notice Of Appeal on April 1, 1992, not March 30, 1992.

The Notice Of Appeal form filed by Westtown states in bold capital letters:

> **THIS FORM AND THE CERTIFICATION OF SERVICE MUST BE RECEIVED BY THE ENVIRONMENTAL HEARING BOARD WITHIN 30 DAYS AFTER YOUR RECEIPT OF NOTICE OF THE ACTION OF THE DEPARTMENT OF ENVIRONMENTAL RESOURCES THAT YOU ARE APPEALING** (emphasis added).

25 Pa. Code §21.52(a) also makes it clear it is the date of filing with the Board which matters as to jurisdiction.

Obviously, it is the date on which the Board records receipt of the appeal which controls rather than the date written on a Fax Cover Sheet by an Appellant, its counsel or employees of its counsel. To hold otherwise would not only require us to ignore the plain language of this rule but also would

mean there would never be any future untimely appeals because the Appellants in those appeals would be free to select any filing date and we would be bound thereby.

As Westtown advances neither further evidence showing why its appeal was timely nor other argument supporting a contrary ruling, and our records show the appeal was untimely filed, we must enter the following order making this Rule absolute and dismissing this appeal.

ORDER

AND NOW, this 12th day of May, 1992, upon consideration of Westtown's Response to this Board's Rule To Show Cause, its Notice Of Appeal and our docket reflecting when this appeal was filed with this Board, it is ordered that our Rule To Show Cause is made absolute and this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 12, 1992

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
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Southeastern Region
For Appellant:
Robert J. Sugarman, Esq.
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M. DIANE SMITH
SECRETARY TO THE BOARD

EDMUND WIKOSKI	:	
	:	
v.	:	**EHB Docket No. 91-183-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: May 13, 1992**

OPINION AND ORDER
SUR
MOTION IN LIMINE AND MOTION
FOR A MORE SPECIFIC PRE-HEARING MEMORANDUM

Robert D. Myers, Member

Synopsis

Where legal objections set forth in a pre-hearing memorandum fall within the scope of objections contained in the Notice of Appeal, DER's Motion to prohibit the presentation of evidence on those objections will be denied. DER's Motion will be granted, however, to the extent it seeks to compel Appellant to identify expert witnesses and provide summaries of their testimony.

OPINION

On May 7, 1991 Appellant filed a Notice of Appeal from Compliance Order 91-5-070-N issued by the Department of Environmental Resources (DER) on March 29, 1991. The Compliance Order cited Appellant for violations of the Noncoal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, 52 P.S. §3301 *et seq.*, ordered him to cease mining immediately and to apply for a license and a "large noncoal mining permit".[1]

[1] A "large" permit apparently applies to operations producing 2,000 or more tons per year.

In the Notice of Appeal, Appellant objected to DER's action in broad, general language. When Appellant filed his pre-hearing memorandum on October 1, 1991, he set forth three specific legal objections to DER's inclusion of overburden in the tonnage calculation.

On October 16, 1991 DER filed a Motion in Limine and Motion For a More Specific Pre-Hearing Memorandum. Appellant answered the Motion on November 5, 1991 and DER replied on November 13, 1991. DER's Motion, in part, seeks to prevent Appellant from presenting evidence on the specific objections set forth in the pre-hearing memorandum, arguing that they are beyond the scope of the objections contained in the Notice of Appeal. Appellant argues to the contrary.

Our rules at 25 Pa. Code §21.51(e) require an appellant to state in the Notice of Appeal his factual and legal objections to DER's action. Any objection not so stated is waived. Since the proper raising of objections affects our jurisdiction, we are not at liberty to excuse an appellant from these requirements unless good cause is shown: *Pennsylvania Game Commission v. Commonwealth, Department of Environmental Resources*, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986). Good cause is not an issue here because Appellant insists that the objections in his pre-hearing memorandum are encompassed within those in his Notice of Appeal. Based on the standard applied by Commonwealth Court in *Croner, Inc. v. Department of Environmental Resources*, ____ Pa. Cmwlth. ____, 589 A.2d 1183 (1991), we agree.

DER's Motion also complains that Appellant's pre-hearing memorandum is defective because the identity of expert witnesses and summaries of their testimony are not included even though Appellant states an intention to present expert testimony. Certainly, DER is entitled to this information before being required to file its own pre-hearing memorandum.

ORDER

AND NOW, this 13th day of May, 1992, it is ordered that DER's Motion in Limine and Motion For A More Specific Pre-Hearing Memorandum is granted in part and denied in part, as follows:

1. The Motion is denied with respect to the legal objections contained in Appellant's pre-hearing memorandum; and

2. The Motion is granted with respect to the identity of expert witnesses and summaries of their testimony. Appellant shall supplement his pre-hearing memorandum, on or before May 29, 1992, by identifying expert witnesses and setting forth summaries of their testimony. Failure to do so will result in an order prohibiting the calling of any such witnesses. DER shall file its pre-hearing memorandum within fifteen (15) days after Appellant has filed his supplement.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: May 13, 1992

cc: **Bureau of Litigation**
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SECRETARY TO THE B

CONCERNED CITIZENS OF EARL TOWNSHIP AND DR. FRANK J. SZARKO	:	
v.	:	EHB Docket No. 88-516-MR
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and DELAWARE COUNTY SOLID WASTE AUTHORITY, PERMITTEE	:	Issued: May 21, 1992

OPINION AND ORDER
SUR
MOTION FOR PARTIAL SUMMARY JUDGMENT
AND TO LIMIT EVIDENCE

Robert D. Myers, Member

Synopsis

The Board grants partial summary judgment on issues concerning which a citizens group has not alleged standing. Partial summary judgment is denied with respect to an individual appellant who owns land in the vicinity of the landfill through which flow two streams that could be contaminated by the landfill. In reaching this result the Board considers administrative finality, jurisdiction, mootness and standing.

OPINION

These consolidated appeals challenge the November 16, 1988 issuance by the Department of Environmental Resources (DER) of a Solid Waste Management Permit Modification and a National Pollution Discharge Elimination System (NPDES) Permit to Delaware County Solid Waste Authority (DCSWA) in connection with expansion of the Colebrookdale Landfill located in Earl Township, Berks

County. The remaining appellants are Concerned Citizens of Earl Township (CCET) and Dr. Frank J. Szarko (Szarko).

Because of the complexity of the issues, discovery has been unusually extensive and the subject of repeated controversies. Just as a hearing was at last being scheduled for December 1991, DCSWA filed (on November 20, 1991) a Motion for Partial Summary Judgment and to Limit Evidence. The Board decided to entertain the Motion, even though it would force a postponement of the hearing, in the hope that it would bring about a narrowing of the issues and a reduction in hearing time. Both appellants responded to the Motion on December 10, 1991. DCSWA filed replies on December 17 and 20, 1991, and Szarko filed a Sur-Reply on January 3, 1992.

Despite the hopes of the Board, this exercise in paperwork has accomplished little in simplifying and expediting the ultimate resolution of these appeals.

In its Motion DCSWA identifies 25 issues raised by Szarko and 5 issues raised by CCET. Szarko cautions that he does not necessarily agree with DCSWA's characterization or numeration of his issues but makes no addition to the list. Accordingly, we will deal with the 30 issues stated by DCSWA. It is axiomatic that summary judgment can be rendered only if the pleadings, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party (DCSWA) is entitled to judgment as a matter of law: Pa. R.C.P. 1035(b). We must view the Motion in the light most favorable to the non-moving parties (CCET and Szarko): *Robert C. Penoyer v. DER*, 1987 EHB 131.

Szarko Issues

DCSWA claims that issues 5, 11 and 24 deal with the design of the Landfill approved by DER when it issued permits to DCSWA's predecessor in 1978 and 1983. Since Szarko filed no appeals from those permit issuances, DCSWA argues that the Board has no jurisdiction to adjudicate these 3 issues now. The argument is a correct statement of the law. It is not applicable in this instance, however, because Szarko's attack on these design features focuses on the manner in which they affect, or are affected by, the design approved in the 1988 Permits.[1] If the integrity of the systems installed pursuant to the earlier permits will be threatened by the design approved in 1988, or if the reverse is true, DER may have abused its discretion in issuing the 1988 Permits. Clearly, these are issues that could not have been litigated until the 1988 Permits were issued. Accordingly, they are within our jurisdiction on these appeals.

DCSWA makes another jurisdictional attack - on issues 5, 8, 9, 10, 11, 13, 14, 22 and 25 - based on Szarko's alleged failure to include these issues in his Notice of Appeal, as amended. Szarko's Notice of Appeal stated 3 specific objections and added: "Other items to be submitted after permits have been obtained and reviewed." Accompanying the Notice of Appeal was correspondence documenting Szarko's inability to review the Permits. Szarko filed an Amendment to his appeal on December 5, 1989, incorporating the grounds for appeal set forth by CCET and by the County of Berks (now withdrawn as a party) in their Notices of Appeal as well as additional grounds included in Szarko's deposition of February 9, 1989.

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[1] The 1988 Permits, *inter alia*, authorize DCSWA to place a new liner over trash already deposited on top of the liner and underdrain systems installed pursuant to the earlier permits and to deposit more trash on top of the new liner. This design feature is referred to as "overtopping".

A reservation contained in a Notice of Appeal that discovery is necessary in order to formulate additional grounds for appeal is effective under 25 Pa. Code §21.51(e): *Philadelphia Electric Company et al. v. DER et al.*, 1990 EHB 1032; *Raymark Industries, Inc. et al. v. DER*, 1990 EHB 1775. While Szarko did not use the word "discovery" in his reservation, he made it clear that he would have to review DER's Permits in order to state additional grounds for appeal. The examination of documents such as these is discovery: Pa. R.C.P. 4001(d) and 4009. Therefore, the reservation was effective and the Amendment to his Notice of Appeal must be considered.

As noted, Szarko incorporated into his Amendment the grounds for appeal set forth by Berks County and CCET in their Notices of Appeal. Berks County objected to issuance of the Permits primarily because of (1) DER's failure to comply with Article I, Section 27, of the Pennsylvania Constitution, (2) DER's failure to consider past, present and continuing surface water and groundwater pollution and (3) DER's failure to consider DCSWA's compliance status under the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*

CCET filed 2 Notices of Appeal, one challenging the Solid Waste Management Permit Modification and one challenging the NPDES Permit. With respect to the latter, CCET raised (1) DER's noncompliance with Article I, Section 27, of the Pennsylvania Constitution and (2) DER's violation of 33 U.S.C. §1342[2], 35 P.S. §691.5[3], and 25 Pa. Code §92.1 *et seq.*, because, *inter alia*, of DCSWA's unlawful conduct and compliance history. CCET's grounds for appeal from the Solid Waste Management Permit Modification are more numerous. In addition to Article I, Section 27, of the Pennsylvania

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[2] Part of the Clean Water Act (also known as Federal Water Pollution Control Act), Public Law 92-500, 86 Stat. 816, 33 U.S.C.A. §1251 *et seq.*

[3] Part of the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*

Constitution, CCET asserted violations of (1) 35 P.S. §6018.503(c) and (d)[4] because of DCSWA's compliance history, (2) 25 Pa. Code §273.111 and §273.131 dealing with application requirements, (3) 25 Pa. Code §273.251 *et seq.* and §273.281 *et seq.* relating, *inter alia*, to leachate collection and water quality monitoring, and (4) 25 Pa. Code §273.231 *et seq.* relating, *inter alia*, to cover, vegetation and slope requirements.

Issue 5 deals with an asserted violation of 25 Pa. Code §273.202. This section is part of Subchapter C of Chapter 273 which is referenced in 25 Pa. Code §273.131, one of the sections cited by CCET. Issue 8 alleges a condition violative of 25 Pa. Code §273.241, another section in Subchapter C of Chapter 273, and is also raised in Berks County's Notice of Appeal. Issue 9 challenges the integrity of the liner system, governed by 25 Pa. Code §273.251 *et seq.*, which was cited by CCET and is also part of Subchapter C. Issue 10 involves a number of regulatory provisions, including 25 Pa. Code §273.255 which was cited by CCET. Issue 11 also deals with the integrity of the liner system and is covered by 25 Pa. Code §273.251 *et seq.* Issue 13 objects to the erosion and sedimentation control plan, which is governed by 25 Pa. Code §273.151 and also referenced in 25 Pa. Code §273.131.

Issues 14 and 25 involve the NPDES Permit. CCET cited violations of 25 Pa. Code §92.1 *et seq.* While DCSWA's compliance history was specifically mentioned in connection with the citation, CCET was careful to indicate that it was only one among other violations of the NPDES regulations. 25 Pa. Code §92.31, dealing with effluent limits, comes within the scope of the citation.

The manner in which these grounds for appeal were stated certainly satisfies the standard applied by Commonwealth Court in *Croner, Inc. v. Department of Environmental Resources*, _____ Pa. Cmwlth. _____, 589 A.2d 1183

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[4] Part of the SWMA, 35 P.S. §6018.101 *et seq.*

(1991). Accordingly, they are properly before us. This is not true with respect to issue 22, however, which simply refers to "numerous issues which had not been satisfactorily resolved." Without at least some indication of the nature of those issues, they cannot be considered appropriate grounds for appeal.

DCSWA argues that issues 3, 5, 10, 13, 19 and 23 are now moot because of DER's issuance of a new Solid Waste Permit and an Earth Disturbance Permit to DCSWA on December 17, 1990. The Solid Waste Permit is the subject of another appeal filed by Szarko at Docket No. 91-049-MR. According to DCSWA, the erosion and sedimentation control measures and groundwater monitoring program approved in the 1990 Permits replace those in the 1988 Permits, rendering moot Szarko's issues relating to those aspects of the 1988 Permits. This includes issues 10, 13, 19 and 23.[5] In addition, DCSWA asserts that the alleged perennial stream referred to in issue 5 has now been re-directed, rendering that issue moot.

While Szarko denies that any of these issues is moot, he fails to satisfactorily explain his denial. Apparently, the 1990 Permits authorize expansion of the Landfill into an area contiguous to that covered by the 1988 Permits. It is possible that some of the drainage and other systems serving the two areas are fully or partially integrated, but that it not clear to us at this time. The dispute can be resolved, in our opinion, by consolidating the appeals for hearing. We denied Szarko's Motion to Consolidate on June 3, 1991 because of our concern that it would delay resolution of the 1988 appeals. Those appeals have not gone to hearing yet, however, and the appeal at Docket No. 91-049-MR is now ready for hearing. Accordingly, there is merit

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[5] DCSWA asserts that it also includes issue 3. However, that issue deals with erosion and sedimentation violations existing prior to the 1988 Permits and not with inadequacies of the erosion and sedimentation measures approved by the 1988 Permits.

to consolidating them now. To the extent that the 1990 Permits have mooted any of the issues, that will become apparent at the hearing.

Szarko's standing to litigate certain issues is contested by DCSWA. The Board has held that an appellant must demonstrate standing to prosecute every issue raised by his appeal: *Borough of Glendon v. DER*, 1990 EHB 1501. While Commonwealth Court reversed the Board's determination of lack of standing in that case (No. 18 C.D. 1991, No. 472 C.D. 1991, No. 517 C.D. 1991, Opinion issued January 28, 1992), it did not question the premise that standing must be shown with respect to every issue. We will continue to impose that requirement.

Szarko maintains that, since the Board has already determined that he has standing, the subject matter is closed for purposes of this litigation. The reference is to an Opinion and Order sur Motion to Dismiss Appeal, issued on January 26, 1990 (1990 EHB 83), in which the Board held that Szarko's allegations were sufficient to survive the Motion to Dismiss. Szarko's effort to raise this preliminary ruling to the status of a final decision must fail. As we said in *Philadelphia Electric Company et al. v. DER et al.*, 1989 EHB 678:

> Allegations of standing, of course, may be sufficient to survive a motion to dismiss but must be proved ultimately. The remaining members of the Coalition will be required to submit their proof at the hearing on the merits. In the meantime, the other parties to these appeals will have the opportunity to probe the allegations by way of discovery.

If we adjudicated standing on the basis of allegations in a pleading, without giving other parties occasion to probe these allegations or present

countering evidence, we would seriously undermine the concepts of fairness on which the judicial system is based. Needless to say, we cannot agree with Szarko's argument.

DCSWA first attacks Szarko's standing to litigate the NPDES Permit (issues 14 and 25), pointing out that the discharge point is approximately 1 mile downstream of Szarko's land on Manatawny Creek. Szarko asserts, however, that degradation of the stream (because the effluent limits are not strict enough) will affect the quality of the Manatawny even at his upstream location. He supports this assertion by an affidavit of Thomas Cahill, P.E., an expert in water resources engineering. Cahill's affidavit is not absolutely clear that his predicted decline in the water quality of the Manatawny will extend upstream as far as Szarko's land; but, since we must view DCSWA's Motion in a manner most favorable to Szarko, we will give Szarko the benefit of the doubt on this point at this time. However, we caution him that his standing depends upon a showing that the waters of the Manatawny will be degraded at his land.

In so ruling, we reject Szarko's argument that his status as a citizen of the Commonwealth, a resident of Oley Township and an inhabitant of the Manatawny Creek watershed, apart from any other consideration, give him standing to litigate these Permits. While any of those roles may be a vital element in proving standing, Szarko must go further and show a substantial, direct and immediate interest which he seeks to protect: *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975). This interest must be more than the abstract interest of all citizens in having others comply with the law: *William Penn, supra*, and must be in direct danger of harm caused by the issuance of the Permits.

Szarko's interest is tied to the land he owns at the confluence of Furnace Run and Manatawny Creek and the dwelling in which he and his family reside on a portion of the land. That interest must be shown to be in danger of direct and immediate harm in order for Szarko to have standing to raise issues 14 and 25, pertaining to the NPDES Permit.

DCSWA also disputes Szarko's standing to raise issues 1, 2, 4 to 12, and 14 to 25, which arise under the Solid Waste Management Permit Modification, arguing that Szarko's only concern is sedimentation. The rationale supporting this argument unfairly circumscribes Szarko's interest. While he complained about sediment being deposited at the mouth of Furnace Run, he also expressed apprehension about the contaminants entering Furnace Run from the Landfill and degrading the water flowing through his land. Because of the location of his land, it is apparent that any contamination that makes its way into either Furnace Run or Manatawny Creek (upstream of the confluence with Furnace Run) could have an adverse impact on the water flowing through Szarko's land.

DCSWA's hydrogeologic expert, Dr. A. A. Fungaroli, states in his affidavit that surface water from the Landfill discharges to Furnace Run and that groundwater either discharges to Furnace Run or flows "generally toward and in the direction of Furnace Run and then toward Manatawny Creek." If this is true, then it follows that surface water and groundwater contamination could have an impact on Szarko's land through which these two streams flow. While Fungaroli opines that "it is extremely unlikely that surface water or groundwater discharges to Furnace Run from the vicinity of the Colebrookdale Landfill will result in detectable concentrations of contaminants" at Szarko's land, Dr. John K. Adams, Szarko's hydrogelogic expert, disagrees.

In viewing this dispute in the light most favorable to Szarko, we hold that Szarko has standing to raise issues 1, 2, 4 to 12, 14 to 21 and 23 to 25. We have already ruled that issue 22 cannot be considered.

CCET Issues

Of the 5 issues raised by CCET, DCSWA recognizes only issue 30 - odors emanating from the Landfill - as viable. According to DCSWA, CCET has no standing to raise the other issues. CCET correctly points out that its standing is representational, based on alleged substantial, direct and immediate interests of its members. If it is shown that any of its members has such an interest, CCET will be accorded standing. As with Szarko, CCET must show standing with respect to each issue it elects to litigate: *Borough of Glendon, supra.*

The only information provided us regarding CCET derives from statements in its pre-hearing memorandum and assertions in its Response to DCSWA's Motion. According to these filings, CCET consists of about 70 members and has the purpose: "to protect the environment and educate the citizens of Earl Township to maintain and promote an interest in the civic and environmental affairs of the community." Many CCET members live in close proximity to the Landfill and are exposed daily to the "stench, litter, noise, truck traffic and events" of the Landfill which significantly deteriorate the quality of life of these members. Odors can be detected as much as a mile away from the Landfill, forcing many members to curtail or eliminate outdoor activities. The value of several members' homes has been adversely affected.

Attached to CCET's Response to DCSWA's Motion is an affidavit of Margaret McCloskey who avers that (1) she is a member of CCET, (2) she is routinely exposed to stench from the Landfill and, at times, is unable to enjoy the outdoors, (3) the expansion of the Landfill has changed the

esthetics of the area because, *inter alia*, of increased truck traffic, and (4) she believes the value of her home to have been severely reduced by operations at the Landfill.

We find nothing in these representations constituting substantial, direct and immediate interests in (1) the aquatic characteristics of Furnace Run (issue 26), (2) the siltation of Furnace Run (issue 27), (3) the adequacy of erosion control measures (issue 28) and (4) the wetlands adjacent to Furnace Run (issue 29). Accordingly, these issues will be stricken.

ORDER

AND NOW, this 21st day of May, 1992, it is ordered as follows:

1. DCSWA's Motion for Partial Summary Judgment and to Limit Issues is granted, in part, and denied, in part, as follows:

(a) The Motion is granted with respect to issues 22, 26, 27, 28 and 29; and

(b) The Motion is denied with respect to all other issues.

2. The appeal at 91-049-MR is consolidated into the appeals already consolidated at 88-516-M. No change of caption is necessary.

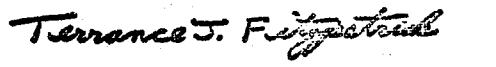
3. The appeals shall be placed on the list of cases to be scheduled for hearing.

ENVIRONMENTAL HEARING BOARD

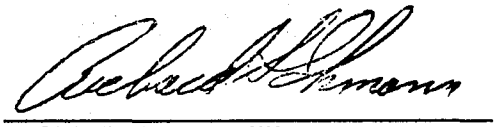
Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

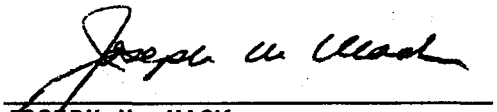
ROBERT D. MYERS
Administrative Law Judge
Member



TERRANCE J. FITZPATRICK
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 21, 1992

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COMMONWEALTH OF PENNSYLVANIA
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TELECOPIER 717-783-4738

M. DIANE SMI
SECRETARY TO THE

EMPIRE COAL MINING AND DEVELOPMENT, INC.	:	
	:	
v.	:	EHB Docket No. 90-344-F
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and MT. CARMEL TOWNSHIP SUPERVISORS, Permittee	:	Issued: May 21, 1992

OPINION AND ORDER SUR MOTION TO DISMISS

By Terrance J. Fitzpatrick, Member

Synopsis

A motion to dismiss filed by the Department of Environmental Resources (DER) is granted. A mine operator lacks standing to appeal DER's "Order and Modified Closure Plan" issued to a landfill operator where the mine operator has not alleged sufficient facts to show that it has any legal rights in connection with the area involved in the closure plan.

OPINION

This matter involves an appeal brought by Empire Coal Mining and Development, Inc. (Empire) of a DER order dated July 19, 1990 adopting, and ordering the landfill operator to implement, a "modified closure plan." DER's order was issued to the landfill's owner and operator - the Mount Carmel Township Supervisors, Northumberland County. (The landfill is located in Mount Carmel Township.) Empire operates a strip mine approximately one hundred and fifty feet from the toe of the landfill, and claims to possess rights to both the coal itself under the 60 acre landfill, and to enter upon

and use the surface as necessary to remove the coal. In its appeal, Empire objects to language in the modified closure plan which, Empire contends, adversely affects its right to conduct its mining operation.

This Opinion and Order addresses a motion to dismiss filed by DER. In this motion, DER argues, among other things, that Empire lacks standing to bring this appeal because Empire cannot show that it has any legal rights regarding the property which is involved in the modified closure plan. This argument is two-pronged. First, DER contends that Empire cannot show that its coal rights include the right to use the surface to remove the coal. Second, DER contends that Empire cannot show that the owner of the surface estate has granted Empire the right to use the surface.

Empire filed a response opposing DER's motion. Empire asserts that its rights to the coal estate include the right to use the surface without the permission of the surface owner. In support of its argument that surface mining rights run with the coal rights for this particular tract of land, Empire cites Mount Carmel R. Co., *et al.* v. M.A. Hanna Co., 371 Pa. 232, 89 A.2d 508 (1952). Empire further asserts that it does not need a lease from the surface owner to give it the right to conduct surface mining, because, as stated above, this right allegedly runs with the coal estate for this tract. Finally, Empire asserts that DER acted contrary to 25 Pa. Code §273.202(a)(3) by directing the Township to conduct landfill activities on the site without first obtaining an agreement with the owner of coal rights beneath the site - Empire - to provide support.

To have standing, a party must be able to show, among other things, that it has a substantial, direct, and immediate interest in the subject matter of the litigation. William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975), South Whitehall Twp. Police

Service v. South Whitehall Twp., 521 Pa. 82, 555 A.2d 793 (1989). As applied to this case, Empire must be able to show that it has a legal right to use the surface before we can find that it has an interest in challenging DER's action which mandates landfill closure activities on the surface. We find that Empire has not alleged sufficient facts to show that it has a legal right to use the surface; therefore, we conclude that Empire lacks standing to bring this appeal.

As DER points out, under Pennsylvania law a person who wishes to conduct surface mining of coal must either: 1) own or lease both the coal rights and surface rights, or 2) own or lease coal rights which include the right to employ the surface mining method. Stewart v. Chernicky, 439 Pa. 43, 266 A.2d 259 (1970).

Applying these principles here, it is clear that, first, Empire does not have permission from the owner of the surface rights to conduct surface mining. DER asserts, and Empire does not deny, that while Empire had such an agreement with the surface owner - Susquehanna Coal Company - that this agreement expired on November 11, 1990. (See, paragraphs 7, 8, 9, and 11 of DER's Motion and Empire's Response). Therefore, whether Empire has any right to conduct surface mining turns on whether Empire's coal rights include the right to conduct surface mining to remove the coal.

Empire has not produced or cited any evidence to support its position that its coal rights include a right to conduct surface mining. It has not referred to any document in the chain of title to the coal rights which supports Empire's claim of inherent authority to conduct surface mining. Instead, Empire argues that the inherent right of the owner of the coal rights in this particular tract to conduct surface mining was upheld in Mount Carmel R. Co., et al. v. M.A. Hanna Co., 371 Pa. 232, 89 A.2d 508 (1952).

The Board has addressed this argument in a separate appeal by Empire from DER's denial of Empire's application for a surface mining permit. In granting DER's motion for summary judgment in that appeal, the Board stated:

> In its Notice of Appeal and Response to DER's Motion, Appellant cites *Mount Carmel R. Co. et al. v. M.A. Hanna Co.*, 371 Pa. 232, 89 A.2d 508 (1952), as upholding Appellant's right to surface mine the "Jesse Brooks Tract" without the consent of the surface owner. [footnote omitted] That case involved the right of M.A. Hanna Co. to surface mine coal beneath a right-of-way owned and occupied by the railroad. Hanna claimed the right on the basis of reservations and restrictions contained in an 1891 document establishing the right-of-way. Since the grantor in that document (Hanna's predecessor in title) owned both the surface and the minerals, legal principles relating to the severance of the two estates were specifically stated to be irrelevant. Whether coal could be removed by surface mining or had to be removed by deep mining turned, the Supreme Court said, on "the interpretation of the words of the document ...." 89 A.2d 508 at 510 (italics in original). Their interpretation of the words found that surface mining was permissible.
>
> How this decision endows Appellant with the right to engage in surface mining on the Mining Site is an enigma. We have no certain proof that the Mining Site is part of the Jesse Brooks Tract. While the Official Coal Land Lease for Strip Mining between the County and Appellant indicates that the mining operation is to be located on the "Jesse Brooks Tract," we have no way of knowing whether this is the same tract as that involved in the *Hanna* case. Appellant maintains that we "must take judicial notice of the fact that there is only one Jesse Brooks Tract in Northumberland County since it is an original warrantee or patent as issued and therefore the portion of the Jesse Brooks Tract which [Appellant] has the right to mine" is the same as that involved in the *Hanna* case.
>
> This is certainly not a matter of universal knowledge; and we are not at liberty to supplement the record "by conducting a title

> search through any such extended concept of judicial notice": *Active Amusement Company v. Zoning Board of Adjustment*, 84 Pa. Cmwlth. 538, 479 A.2d 697 at 701 (1984).

Empire Coal Mining and Development, Inc. v. DER, EHB Dkt. No. 91-115-MR (Opinion and Order issued February 11, 1992, pp. 8-9). There is no reason why we should reach a different conclusion here; therefore, we find that Empire has not established that its coal rights include the right to remove the coal via the surface mining method.[1]

Finally, we disagree with Empire's argument that it has standing pursuant to 25 Pa. Code §273.202(a)(3), which provides that prior to conducting landfill activities on a site which has underlying coal deposits, the landfill operator must (unless he is the owner of the coal rights) obtain an agreement with the coal owner to provide support. Empire conveniently neglects to mention that this requirement only applies to areas which were permitted after April 9, 1988. 25 Pa. Code §273.202(a). DER's order states (and Empire does not contest this in its notice of appeal) that the Township Landfill was permitted on November 16, 1983 (order, para. B). Accordingly, this section is inapplicable here, and it cannot provide a basis for Empire's standing.

It follows from what we have stated above that Empire has not established its standing to prosecute this appeal. Accordingly, we will grant DER's motion to dismiss.

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[1] Empire also appears to argue that DER has ordered Empire to move its operations. This is incorrect inasmuch as DER's order was directed to the Township, not to Empire (order, para. 2).

ORDER

AND NOW, this 21st day of May, 1992, it is ordered that the motion to dismiss filed by the Department of Environmental Resources is granted, and the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD*

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 21, 1992

cc: **Bureau of Litigation**
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Central Region
For Appellant:
W. Boyd Hughes, Esq.
HUGHES, NICHOLLS & O'HARA
Scranton, PA
For Permittee:
Mt. Carmel Township Supervisors
Mt. Carmel, PA

jm

*Board Member Richard S. Ehmann concurs in the result only.

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ENVIRONMENTAL HEARING BOARD
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TELECOPIER 717-783-4738

M. DIANE SMI
SECRETARY TO THE

LEHIGH TOWNSHIP, WAYNE COUNTY	:	**EHB Docket No. 91-090-W**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** May 22, 1992

OPINION AND ORDER
SUR MOTION TO DISMISS

By Maxine Woelfling, Chairman

Synopsis

A motion to dismiss an appeal of a letter refusing to reconsider a decision regarding denial of a reimbursement grant and return of monies is granted. The refusal to reconsider is not an appealable action. Although the deadline for return of the monies specified in the letter is appealable, the appeal must nonetheless be dismissed because the issue was not raised in the notice of appeal.

OPINION

This matter was initiated with the March 7, 1991, filing of a notice of appeal by Lehigh Township, Wayne County (Township), seeking review of letters from the Department of Environmental Resources (Department) dated January 14, 1991, and February 8, 1991. The letters concerned grants to the Township for reimbursement of expenses incurred in administering the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1, *et seq.* The Board, in an opinion dated

September 6, 1991, dismissed the Township's appeal of the January 14, 1991, letter as untimely.[1] In another opinion dated November 13, 1991, the Board denied the Township's request for leave to appeal *nunc pro tunc*, rejecting the Township's argument that the Department failed to advise it that the January 14, 1991, letter was a final action which could be appealed to the Board.

On October 31, 1991, the Department filed a motion to dismiss the Township's appeal of the Department's February 8, 1991, letter, contending that the letter was not an appealable action. The Township responded to the Department's motion on November 14, 1991, alleging that the February 8, 1991, letter adversely affects the rights of the Township, although appearing to concede that there has been no action or adjudication by the Department in this matter (Township's Answer, ¶ 12, 13).[2]

Actions of the Department are appealable only if they are "adjudications" within the meaning of the Administrative Agency Law, 2 Pa.C.S.A. §101, or "actions" as defined at 25 Pa. Code §21.2(a)(1). To fall within either of these categories, the Department's letter of February 8, 1991, must have some impact on the Township's rights and duties. See Perry Brothers Coal Company v. DER, 1982 EHB 501, M. C. Arnoni Company v. DER, 1989 EHB 27, and James Buffy and Harry K. Landis, Jr., v. DER, 1990 EHB 1665, at 1692. Applying this standard to the February 8, 1991, letter, we must conclude that the letter as it relates to the amount and propriety of reimbursement, is not an appealable action.

The February 8, 1991, letter responds to the Township's January 22, 1991, letter which requests the Department to reconsider, *inter alia*, its decision to deny the Township's 1988 reimbursement grant application. The

---

[1] The Township has filed a petition for review of the Board's decision at No. 2142 C.D. 1991.

[2] On the other hand, the Township also appears to argue that the February 8, 1991, letter was the Department's first correspondence on the subject of the grants which could be inferred to be a final action.

February 8, 1991, letter restates the Department's findings as set forth in its April 24, 1990, and January 14, 1991, letters, and again requests the Township to repay the amount of the 1987 and 1988 reimbursements, less the amount of the approved 1989 reimbursement.[3]

The Board's recent decision in Conshohocken Borough Authority v. DER, EHB Docket No. 91-276-MR (Opinion issued May 8, 1992) is on point. There, we dismissed an appeal of the Department's refusal to reconsider its decision disallowing federal grant funding for a treatment plant change order. In holding that the Department's refusal to reconsider was not an appealable action, we stated:

> This field was ploughed, disced and thoroughly harrowed by the Board in *Borough of Lewistown v. DER*, 1985 EHB 903, and *Lansdale Borough v. DER*, 1986 EHB 654. We held that DER's rejection of Federal grant participation is a final, appealable action even if the letter communicating the rejection does not specifically say so. We held further that a subsequent refusal by DER to reconsider the rejection is not an appealable action. The soundness of these decisions has not paled with time and governs our disposition of this appeal.
>
> * * * * *
>
> While the April 9, 1991 letters, on their face, appear to reflect appealable actions of DER, they amount to no more than a refusal by DER to alter its November 5, 1990 action. According to *Lewistown* and *Lansdale*, such action is not appealable. The same must be said of DER's June 10, 1991 letter, which simply reiterated the sub-

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[3] The following passages from the Department's February 8, 1991, letter make it clear that the Department was merely restating its earlier position:

> The Township was informed in my letter of April 24, 1990 that there would be no reimbursement of the 1988 sewage enforcement expenses as recommended in the audit report. We felt it was not necessary to repeat this in our subsequent letters, since the decision to not pay on the 1988 expenses was made and the Township had been informed of it....
>
> We processed the Township's 1989 application for reimbursement and advised the Township and your office that the 1989 reimbursement of $8,248.26 would be applied to the repayment request of $12,518.57 for 1987. We requested that a check for the balance of $4,270.31 be forwarded to my office.

> stance of the April 9 letters. "To hold otherwise," as the Board observed in *Lewistown*, *supra* at 913, "would mean that DER decisions are never final in that a party who fails to timely appeal a DER decision can still challenge that decision by requesting DER to reconsider that decision, and then appealing to this Board DER's refusal to reconsider the decision." Or, as the facts of this case show, appealing DER's clarification of its refusal to reconsider.
>
> (footnote omitted)

The letter here, like the letter in Conshohocken, is merely a reiteration of earlier Department final actions and, as a result, does not constitute an appealable action.

There is one aspect of the Department's letter which does affect the Township's rights - the time specified for return of the monies owed to the Department. The last paragraph of the Department's February 8, 1991, letter states that a check in the amount of $4,270.31, made payable to the Commonwealth, should be sent to the Department within 30 days of the receipt of the letter. (emphasis added). However, the Township cannot challenge the new deadline for submitting monies owed to the Department, because it did not raise this particular issue in its notice of appeal. F.A.W. Associates v. DER, 1990 EHB 1791, 1796-7.

O R D E R

AND NOW, this 22nd day of May , 1992, it is ordered that the Department of Environmental Resources' motion to dismiss Lehigh Township's appeal of the Department's February 8, 1991, letter is granted.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING
Administrative Law Judge
Chairman

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

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

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

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

DATED: May 22, 1992

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Gouldsboro, PA

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M. DIANE SMITH
SECRETARY TO THE BOARD

PARADISE TOWNSHIP CITIZENS COMMITTEE, INCORPORATED, *et al.*	:	**EHB Docket No. 91-152-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and PARADISE TOWNSHIP, Permittee	:	**Issued:** May 22, 1992

OPINION AND ORDER SUR
MOTION TO QUASH AND RULE TO SHOW CAUSE

By Maxine Woelfling, Chairman

Synopsis

A motion to quash is granted. Where the Department fails to publish notice of an action in the Pennsylvania Bulletin, the appeal period for a third party runs from the date the party receives actual or constructive notice of the Department's action. "Constructive notice" is information or knowledge of a fact imputed by law to a person (although he may not have actually had it), because he could have discovered the fact by proper diligence and his situation was such as to require him to inquire into it. Actual notice to an attorney will be imputed to the client he represents. Notice of a plan approval will be imputed from an association to the officers of the association where the officers had actual notice of where they could have discovered that the plan had been approved and their positions in the association imposed a duty upon them to inquire into the matter. The Board will not disregard a corporate entity and impute knowledge from an association to the corporation under the theory that they are, in fact, one organization where it is inappropriate to "pierce the corporate veil." Even where a

corporation's officers refer to the corporation by different names, the Board will not "pierce the corporate veil" where there is no indication the corporation invoked corporate status for anything other than legitimate purposes or that it failed to observe corporate formalities. Notice to the chairman and secretary of a nonprofit corporation will be imputed to the corporation, even when the officers received the notice prior to incorporation.

A rule to show cause why an appeal should not be dismissed as untimely is made absolute where appellants admit in their response to the rule that they had notice of the Department's action at least two years prior to the filing of their appeal.

Appellants' request for allowance of an appeal *nunc pro tunc* is denied where the grounds presented relate to the substantive merits of their appeal.

OPINION

This matter was initiated with the April 18, 1991, filing of a notice of appeal by the Paradise Township Citizens Committee, Incorporated (Committee), Reynold Schenke, and Garland and Ora Hoover (collectively, Appellants) seeking review of the Department of Environmental Resources' (Department) April 15, 1987, approval of a 1974 Sewerage Feasibility Study as the official plan for Paradise Township, Lancaster County, as well as a revision to the official plan to incorporate a sewage treatment plant on Pequea Creek (collectively, official plan). Appellants allege numerous deficiencies in its preparation, review, and approval.

The procedural history of this matter is recounted in the Board's October 2, 1991, opinion denying Paradise Township's (Township) motion to quash for lack of jurisdiction. There, the Township's contention that the appeal was untimely was rejected because it was impossible for the Board to

determine whether the Department had published notice in the Pennsylvania Bulletin of its approval of the Township's official plan. The Board also noted that it was unable to ascertain the relationship of Appellants herein and the named appellants in Bobbi Fuller *et al.* v. DER and Paradise Township Sewer Authority, 1990 EHB 1726, aff'd at ___ Pa. Cmwlth. ___, 599 A.2d 248 (1991).

The order accompanying the Board's opinion directed the parties to file various documents to assist the Board in the resolution of this dispute. The Department was directed to file an affidavit concerning the publication of notice of the plan approval in the Pennsylvania Bulletin. A rule was issued upon Appellants Reynold Schenke and Garland Hoover to show cause why their appeals should not be dismissed as untimely in light of their testimony in Bobbi Fuller. And, all parties were directed to file a memorandum of law concerning whether knowledge of the plan approval could be imputed from the appellants in Bobbi Fuller to Appellants herein.

On October 17, 1991, the Department filed the affidavit of Timothy J. Finnegan, Water Quality Specialist Supervisor, Water Quality Planning Section of the Southcentral Regional Office. Mr. Finnegan's affidavit indicated that he searched the files pertaining to the Department's approval of the Township's official plan and found no evidence that notice of the plan approval was published in the Pennsylvania Bulletin.

On October 31, 1991, Appellants Schenke and Hoover responded to the Board's rule to show cause why their appeals should not be dismissed as untimely filed. Their response admitted that they did not appeal the plan approval in 1987 because they did not receive a copy of the approval letter and the Department did not publish notice of the plan approval. Schenke and Hoover further admitted that they were aware of the plan approval in 1989, but did not appeal it "because they were not aware that they could have" and "they

believed they had no grounds to appeal." They continued by asserting that because of alleged misrepresentations, the approval of the Lancaster County Planning Commission (Commission) was fraudulently obtained and, as such, constituted grounds for allowing their appeal *nunc pro tunc*.

The Appellants filed their memorandum on November 14, 1991. Despite the Board's express instructions in its October 2, 1991, order, the Appellants never specifically addressed the question of whether notice of the plan approval could be imputed to the Committee. Instead, the Appellants again contended that they did not file the notice of appeal when first made aware of the plan approval because they did not realize the application contained "misleading or fraudulent" information. They maintain that the application for plan approval was misleading because it contained a letter from the Commission to the Township stating that the plan was approved unconditionally. According to the Appellants, the approval was, in fact, only conditional, and the Township had promised to submit more detailed information so that the Commission would possess sufficient information to render a decision.

The Township and the Department filed their memoranda on November 15, 1991. The Department argued that the individual appellants had actual notice and that the Paradise Township Citizens Association (Association) and its officers had notice of the plan approval more than 30 days before the present appeal was filed and that this notice should be imputed to the Association's successor corporation, the Committee. The Township adopted the same position but also asserted that the information contained in the application was not misleading and even if the application were misleading, the Appellants had to file an appeal in the 30 day appeal period or petition for an appeal *nunc pro tunc*. According to the Township, the individual appellants and the Committee received notice because the Association knew of the plan approval on June 5, 1990, when counsel for the Association filed its list of intended exhibits

for the Fuller hearing; because the plan approval was discussed during the Fuller hearing, June 11-13, 1990; and because the Association had access to the minutes of the Township's supervisors' meetings, which minutes specifically referred to the plan approval. Neither the Department nor the Township cited any legal authority to support their contentions that knowledge of the plan approval could be imputed from the appellants in Bobbi Fuller to the present Appellants.

We will begin our analysis here with a statement of the obvious - the Board has no jurisdiction over appeals which are not timely filed. Joseph Rostosky v. Comm., Dept. of Environmental Resources, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). In the case of a third party appeal of a Department action, as is the case here, the appeal must be filed with the Board within 30 days after notice of the action has been published in the Pennsylvania Bulletin by the Department. Lower Allen Citizens Action Group, Inc. v. Dept. of Environmental Resources, 119 Pa. Cmwlth. 236, 538 A.2d 130 (1988), aff'd on reconsideration, ___ Pa. Cmwlth. ___, 546 A.2d 1330 (1988).

Where the Department has not published notice of its action in the Pennsylvania Bulletin, the 30 day period may be established in two ways. It may run from the date the third party receives actual notice of the Department's action, Doreen V. Smith and Evelyn Fehlberg v. DER, Herbert Kilmer, and Joseph Bendick, EHB Docket No. 86-523-W (Adjudication issued March 11, 1992). Or, it may run from the date the third party receives constructive notice of the Department's action, New Hanover Township *et al.* v. DER and New Hanover Corporation, EHB Docket No. 88-119-W (Opinion issued July 30, 1991). The permittee in New Hanover Township moved for partial summary judgment asserting, *inter alia*, that the third party appellant had failed to file its appeal of the Department's waiver of permitting requirements under the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as

amended, 32 P.S. §693.1 *et seq.*, in a timely fashion. The Department did not publish notice of its waiver in the Pennsylvania Bulletin, but New Hanover Township's counsel had received actual notice of the waiver. The Board imputed counsel's actual notice to his client and dismissed New Hanover Township's appeal as untimely filed.[1]

The Department and the Township concede that notice of the approval was never published in the Pennsylvania Bulletin. (Township's memorandum of law, p.3, N.T. 3; Department's affidavit filed October 17, 1991). Whether the Appellants filed their appeal within 30 days of receiving notice, therefore, depends on when they otherwise received actual or constructive notice of the Department's action.

In order to ascertain whether the Committee's appeal was timely, it is first necessary to describe the relationship of this organization to the Association.

---

[1] We wish to clarify a potential problem arising out of this passage from New Hanover Township:

> Since there are no publication requirements for permit waivers, we believe that the appeal period runs from the date the Township received actual notice of the waiver, which, in the case of the February 2, 1987, waiver, was on or about June 5, 1987, when the Township's counsel received notice, a material fact which is not disputed by the Township. New Hanover Township, p.9 (emphasis added)

The problem with this language is that the notice received by the appellants in New Hanover Township was constructive, not actual. "Actual notice" is positively proved to have been given to a party directly and personally, or such as he is presumed to have received personally because the evidence within his knowledge was sufficient to put him upon inquiry. Black's Law Dictionary, 4th Ed. "Constructive notice," by contrast, is "information or knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it." Id. Thus, New Hanover Township had constructive notice of the Department's action by virtue of its attorney's knowledge of it. See p.8, infra.

The facts are convoluted, but the differences among the parties' versions are minimal. The relationship between the Association, party appellant in Fuller, and the nonprofit corporation here, the Committee, is close. Reynold Schenke, co-chairman of the Association, is chairman of the Committee. (Township's memorandum of law, Ex. B; N.T. 157). Ora Hoover, secretary of the Association, is secretary of the Committee. (Township's memorandum of law, Ex. B; N.T. 129). Schenke and Mrs. Hoover were also two of the three incorporators of the Committee, incorporated on April 16, 1991. (Township's memorandum of law, Ex. C). Both organizations consist of members who are potential users of the public sewer system described in the plan revision or who live in the area of the proposed sewage system and are concerned with its impact. (Township's memorandum of law, Ex. B, N.T. 129; Ex. D, N.T. 3).

On June 5, 1990, in response to a pre-hearing order in the Fuller proceedings, counsel representing the Association filed a list of exhibits he intended to introduce at the hearing. The list included "correspondence to Carl Meshey approving Plan Revision to the Township's Official Sewerage Plan...." (Township's motion to quash, Ex. F). None of the submissions accompanying the motions or memoranda indicate that the Department's approval letter was admitted into evidence, although the contents of the official plan approved by the Department were discussed during the Fuller hearing and the official plan was admitted into evidence. (Township's motion to quash, Ex. G; N.T. 136).

Two members of the Association testified in Fuller: Reynold Schenke, a co-chairman of the Association, and Garland Hoover, a member of the Association and husband of Ora Hoover, the Association's secretary. (Township's memorandum of law, Ex. B; N.T. 129, 147). During the course of the Fuller hearings, the members and counsel of the Association referred to

the organization variously as the Paradise Township Citizens Committee, the Paradise Township Concerned Citizens Group, and the Concerned Citizens Committee. (Township's memorandum of law, Ex. B; N.T. 94, 129, 157, 180). In proceedings before the Lancaster County Court of Common Pleas, moreover, Mr. Schenke testified as follows:

> Q [Frank Mincarelli (Counsel for the Township of Paradise, the Paradise Township Board of Supervisors, and Paradise Township Sewer Authority)]: I get confused because I see so many names: Paradise Concerned Citizens Committee, Paradise Township Concerned Citizens, Paradise Township citizens Committee, Incorporated.
>
> A [Mr. Schenke]: That is correct. The last one is correct.
>
> Q Last one is correct. It's one organization?
>
> A Correct.
>
> (Township's memorandum of law, Ex. D, p.13)

It is clear that the Association had constructive notice of the plan approval before the Fuller hearing. On June 5, 1990, when counsel for the Association filed the list of intended exhibits, including the letter approving the plan revision, counsel showed he was aware of the plan approval. His notice is imputed to his client, the Association. See 3 P.L.E. Attorneys §45 and Yeager v. United Natural Gas Company, 197 Super. Ct. 25, 176 A.2d 455 (1961).

The Department and the Township would have us impute notice directly from the Association to the Committee because, they maintain, the Association and the Committee are essentially the same entity. As noted earlier in this opinion, the relationship between the Association and the Committee is close. Because the Committee is a nonprofit corporation, however, and because corporations are traditionally regarded as separate entities under the law, we

can impute notice from the Association to Committee only by disregarding the Committee's corporate form or "piercing the corporate veil."

It is inappropriate to disregard the Committee's corporate form here, however. The Township and the Department contend that a number of facts show that the Association and the Committee were, in reality, one organization: (1) Schenke and Ora Hoover were officers in both groups and were two of the three incorporators of the Committee; (2) both groups consist of members who are potential users of the public sewer system or who live in the area and are concerned with the system's impact; and (3) Association members and Committee members referred to their respective groups by various names, some overlapping, in proceedings before the Court of Common Pleas and before this Board in Fuller. The fact that the members and officers of the Association and the Committee are similar does not dictate that we disregard the corporate entity. The general rule in Pennsylvania is that a corporation shall be regarded as a separate entity even if its stock is owned entirely by one person. College Watercolor Group, Inc. v. William H. Newbauer, Inc., 468 Pa. 103, 360 A.2d 200 (1976); Kaites v. Dept. of Environmental Resources, 108 Pa. Cmwlth. 267, 529 A.2d 1148 (1987). Thus, even if the Township had shown that the Association and the Committee consisted of identical members or had the same officers, the Township would not have established that the corporate entity should be disregarded.

The fact that officers of the Committee sometimes referred to it by various names does not change the result. Factors which may justify disregarding the corporate form include undercapitalization, failure to adhere to corporate formalities, substantial intermingling of corporate and personal affairs and use of the corporate form to perpetrate a fraud. Department of Environmental Resources v. Peggs Run Coal Co., 55 Pa. Cmwlth. 312, 423 A.2d 765 (1980); Kaites. There is no indication that the Committee invoked

corporate status for anything other than legitimate purposes or that it failed to observe corporate formalities. The fact that the Committee's officers sometimes referred to the organization by different names is careless, perhaps, but it certainly does not reflect sufficient disregard of the corporate entity by the officers and members to justify disregarding the corporate form.

While the Board will not impute constructive notice from the Association to the Committee directly, we find it appropriate here to impute notice from the officers of the Committee to the Committee itself.

Whether notice to officers of a corporation will be imputed to the corporation itself is a question of the law of agency. As explained later in this opinion, both Ora Hoover and Reynold Schenke had notice of the plan approval as officers of the Association. Because Schenke and Mrs. Hoover did not form the Committee until April 16, 1991, and because the Township failed to establish that Mrs. Hoover or Schenke received notice anytime after incorporation, notice can be imputed to the corporation only if notice received by its agent before they entered into the agency is binding on the principal.

Pennsylvania case law on the question is sparse. The Pennsylvania Supreme Court held in Houseman v. Girard Mutual Building & Loan Association, 81 Pa. 256, 2 W.N.C. 573, 33 L.I. 108 (1876), that notice to an agent received before the agency relationship existed will not be imputed to the principal. No Pennsylvania court appears to have addressed the question this century, however. The decisions from other jurisdictions conflict on the question of whether information obtained before a person became an officer or agent will be imputed to the corporation after he becomes an officer or agent:

> Generally, ... notice to, or knowledge of, corporate officers or agents, in order to be imputable to the corporation, must have been received or acquired during the existence of the

> agency and while acting in the particular transaction to which the notice or knowledge relates. However, according to the better rule and the decided weight of authority, knowledge "possessed" by an agent while he or she occupies that relation and is executing the authority conferred upon the agent, as to matters within the scope of his or her authority, is notice to the principal, although such knowledge was acquired before the agency was created....
>
> Fletcher Cyc. Corp. §797 (Perm Ed)

The Second Restatement of Agency subscribes to the latter of the views outlined above, imputing knowledge of an agent to the principal even if it was received prior to the agency: "Except for knowledge acquired confidentially, the time, place, or manner in which knowledge is acquired by a servant or other agent is immaterial in determining the liability of his principal because of it." Second Restatement of Agency, §276. We agree that this is the better rule. Were we to hold that notice to officers received before the corporation was formed could not be imputed to the corporation, appellants could circumvent the Board's rules requiring that appeals be timely filed simply by incorporating within 30 days before they file the appeal.

Turning now to the individual named Appellants, two of them - Garland Hoover and Reynold Schenke - had actual notice of the plan approval. In response to the Board's October 2, 1991, rule to show cause in this matter, both Hoover and Schenke conceded that they knew of the plan approval in 1989 before explaining the reasons they did not appeal the plan approval at that time. Furthermore, Mr. Hoover testified in Bobbi Fuller at N.T. 135-142[2] regarding sewage facilities planning for both Paradise and Leacock Townships. He obviously had notice of the plan approval if he was testifying about the plan. Thus, we must dismiss Schenke's and Hoover's appeals as untimely.

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[2] We take official notice of this testimony. 1 Pa. Code §35.273 and Abbruzzese v. Comm., Bd. of Probation and Parole, 105 Pa. Cmwlth. 524 A.2d 1049 (1987).

Ora Hoover, meanwhile, had constructive notice of the plan approval. We established earlier in this opinion that the Association received notice because its attorney's knowledge of the plan approval is imputed to the Association. Ora Hoover received constructive notice of the plan approval by virtue of her position in the Association. She could have discovered that the plan had been approved had she been reading the documents the Association's attorney filed with the Board. Her position in the Association, moreover, imposed a duty on her to inquire into the matter. Because the Association's attorney had notice of the plan approval at least by the date of the hearing in Bobbi Fuller, and because that notice is imputed to Ora Hoover through the Association, we must conclude that she failed to file her appeal within 30 days of the notice.

One final issue must be addressed. Appellants[3] have requested that they be permitted to file this appeal *nunc pro tunc*. As grounds for doing so, they allege that the contents of the plan were misrepresented to the Commission; that, because of this misrepresentation, the approval of the Commission was not valid; and that the facts relating to this alleged misrepresentation were not discovered until the deposition of one Michael Domin of the Commission.[4] The bases for allowing an appeal *nunc pro tunc* are set forth in Eleanor Jeane Thomas v. DER and Resource Conservation Corp., EHB Docket No. 91-526-E (Amended Opinion issued March 30, 1992). What is presented by Appellants here does not fall into any of the recognized grounds. Rather, the reasons relate to the merits of Appellants' claims - namely, that the Department abused its discretion in approving the official plan. There is

---

[3] It is unclear whether this request related to the Committee or the individual named Appellants or all the Appellants. We will treat it as applying to all Appellants.

[4] This is contrary to the representations at pp.1-2 of Appellants' July 8, 1991, memorandum of law submitted in response to the Township's motion to quash, wherein they stated that the information was learned on April 12, 1991, during a review of Lancaster County Planning Commission records and that the appeal was filed shortly thereafter. According to that same memorandum, Mr. Domin's deposition was taken on May 24, 1991.

nothing to suggest that this information was hidden from Appellants in either 1987 or 1989 or that they could not have ascertained it as a result of a search of the Commission files in 1987 or 1989. As a result, we must deny their request to allow their appeal *nunc pro tunc*.

O R D E R

AND NOW, this 22nd day of May, 1992, it is ordered that:

1) The Board's rule of October 2, 1991, as it pertains to Garland Hoover and Reynold Schenke, is made absolute and their appeals are dismissed for lack of jurisdiction;

2) The Township's motion to quash with regard to Ora Hoover and the Paradise Township Citizens Committee, Inc. is granted and their appeals are dismissed as untimely; and

3) The request of Appellants for allowance of their appeal *nunc pro tunc* is denied.

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JOSEPH N. MACK
Administrative Law Judge
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DATED: May 22, 1992

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SECRETARY TO THE BOARD

STEVEN HAYDU	:	EHB Docket No. 92-154-MJ
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and PBS COALS CO., INC., Permittee	:	Issued: May 29, 1992

OPINION AND ORDER SUR MOTION TO DISMISS OR IN THE ALTERNATIVE TO STRIKE PART OF APPEAL

By Joseph N. Mack, Member

Synopsis

The appellant may reserve the right to raise additional issues in his appeal which are determined through discovery. Although the appellant characterizes his appeal as a "skeleton appeal", the appeal meets the requirements of 25 Pa.Code §21.51, and the permittee's motion to dismiss is denied.

OPINION

This matter originated as an appeal by Steven Haydu ("Haydu" or "the appellant") from a Bonding Increment Approval No. 1-00222-56803089-04 issued to PBS Coals Co., Inc. ("PBS") by the Department of Environmental Resources ("Department") for Job 24 on S.M.P. 568 03 089 in Shade Township, Somerset

County on April 13, 1992. The appeal sets out five major objections under section 3 in paragraphs A through E, as well as paragraph F, a reservation "to raise additional issues as may be determined by discovery prior to hearing".

The appellant in paragraph F also characterizes his appeal as a "skeleton appeal" even though it is a fully fleshed-out appeal with the exception of the reservation indicated above.

The permittee, PBS, on May 1, 1992 filed a Motion to Dismiss or in the Alternative to Strike Part of Appeal. The motion takes issue with the paragraph F reservation as well as the appellant's characterization of the appeal as a "skeleton appeal" and asks the Board to dismiss the appeal as a non-perfected skeleton appeal because it does not comply with the requirements of 25 Pa.Code §21.51.

An examination of the subject appeal indicates that the appellant has satisfied all of the requirements of 25 Pa.Code §21.51 as to caption (25 Pa.Code §21.51(a) and (b)), the appellant's home address and phone number (25 Pa.Code §21.51(c)), the action of the Department which is being appealed (25 Pa.Code §21.51(d)), and separate numbered paragraphs setting forth the objections to the action being appealed (25 Pa.Code §21.51(e)). This constitutes a full appeal whether or not mistakenly characterized as a "skeleton appeal" by the appellant. We therefore hold that the appeal will not be dismissed for failure to comply with 25 Pa.Code §21.51.

The balance of the motion asks us to strike paragraph 3F of the appeal because it contains a reservation of right to add to or amend the appeal after discovery is completed. We have examined this type of reservation recently in Raymark Industries et al v. Commonwealth of Pennsylvania, DER, 1990 EHB 1775 where we said the following:

> We have acknowledged that where it is alleged that discovery was necessary to formulate an

> issue and the right to amend was reserved in the notice of appeal, an opportunity to amend the notice of appeal is proper (though limited to add the grounds shown to have been "discovered") *Id.* at 1778.

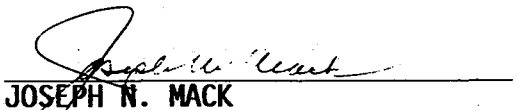
See also NGK Metals Corp. v. DER, 1990 EHB 958, and Commonwealth, Pennsylvania Game Commission v. Commonwealth, Department of Environmental Resources, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), aff'd on other grounds, 521 Pa. 121, 555 A.2d 812 (1989).

At this stage of the proceedings we are not aware of what discovery by the appellant may bring to light and, therefore, hold that the appellant may reserve the right to amend his appeal within the limits outlined in our Raymark Industries decision, supra. We, therefore, deny PBS' motion to strike paragraph 3F of the appeal.

O R D E R

AND NOW, this 29th day of May, 1992, the Motion to Dismiss or in the Alternative to Strike Part of Appeal is denied for the reasons set forth herein.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 29, 1992

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ENVIROTROL, INC.	:	**EHB Docket No. 91-388-W**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** June 1, 1992

OPINION AND ORDER SUR MOTION TO DISMISS

By Maxine Woelfling, Chairman

Synopsis

A motion to dismiss an amended notice of appeal is granted. An appellant must show good cause before the Board will allow it to amend its notice of appeal, even if the appellant included a clause, purporting to reserve the right to amend, in the initial notice of appeal. An appellant does not have good cause where it failed to object to a provision in a permit to store hazardous waste simply because it felt, at the time it filed the initial appeal, that it was unlikely to engage in the conduct the provision proscribed.

OPINION

This matter was initiated by the September 16, 1991, filing of a notice of appeal by Envirotrol, Incorporated (Envirotrol), seeking review of the Department of Environmental Resources' (Department) issuance of a permit to Envirotrol to store hazardous waste at a facility in Beaver Falls, Beaver County. Envirotrol, a Pennsylvania corporation engaged in the business of

reactivating spent carbon, challenged Part II, Paragraph N of the permit. That provision prohibited Envirotrol from storing spent carbon containing F032 hazardous waste.[1]

On October 21, 1991, Envirotrol filed an amended notice of appeal, which incorporated the original notice of appeal's challenge to Section II, Paragraph N of the permit, banning the storage of F032 waste materials. In addition, however, the amended appeal contested a provision in Section II, Paragraph B, which prohibits storing waste materials that contain a "loading of moisture and light volatiles" greater than fifty percent. Envirotrol made no reference to Section II, Paragraph B, or the moisture and volatiles limits, in the original appeal.

On February 27, 1992, the Department filed a motion to dismiss Envirotrol's amended notice of appeal. The Department argues that the Board lacks jurisdiction over the amended notice of appeal because Envirotrol filed the amended appeal more than 30 days after receiving notice of the action and specific objections not set forth in the notice of appeal are waived unless the appellant shows good cause, which, according to the Department, does not exist here.

Envirotrol filed objections to the motion to dismiss on March 19, 1992. Envirotrol maintains that good cause exists here because, in its original notice of appeal, it had expressly reserved the right to amend and because "further investigation was necessary to formulate the objection to the restriction on loading of light volatiles and moisture." (Envirotrol's Objections to Motion to Dismiss, ¶ 8). According to Envirotrol, it did not find the provision prohibiting the storage of waste with a loading of moisture or light volatiles greater than fifty percent objectionable because the

---

[1] F032 hazardous waste is generated from wood-preserving processes utilizing chlorophenolic formulations. 40 CFR §261.31(a)

activated carbon Envirotrol typically treated was bituminous coal-based. Well-drained, bituminous-based carbon in aqueous phase applications, Envirotrol maintains, generally has a moisture content of between forty and fifty percent by weight. Envirotrol had second thoughts about the limits on the amount of moisture and volatiles after discovering that a potential customer, American Norit Company, Inc. (American Norit), used activated carbon produced from lignite coal, instead of the usual bituminous variety. Unlike bituminous carbons, lignite-based carbon apparently absorbs fifty-five to sixty percent moisture when used in aqueous phase applications. It is unclear from Envirotrol's response to the Department's motion whether it knew American Norit utilized lignite-based carbon at the time Envirotrol filed the original notice of appeal or how long after discovering that information Envirotrol filed the amended notice of appeal.

Except in the case of *nunc pro tunc* appeals, jurisdiction of the Board extends only to appeals filed within 30 days of notice of the Department's action. 25 Pa. Code §21.52(a); Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). Section 21.51(e) of the Board's rules, 25 Pa. Code §21.51(e), meanwhile, provides, in pertinent part:

> Any objection not raised by the appeal shall be deemed waived, provided that, upon good cause shown, the Board may agree to hear such objection or objections. For the purpose of this subsection, good cause shall include the necessity for determining through discovery the basis of the action from which the appeal is taken.

The Commonwealth Court construed §21.51(e) of the Board's rules in Pennsylvania Game Commission v. DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), aff'd on other grounds 521 Pa. 121, 555 A.2d 812 (1989), holding that "a decision to allow a party to amend an appeal to include new grounds, after the thirty-day period has run, is analogous to a decision to allow any agency

appeal *nunc pro tunc*." 509 A.2d 877 at 885. The Court distinguished appeals to the Board from civil suits, where leave to amend should be liberally granted. The Board "need not grant the petition [to amend a notice of appeal] absent a showing of good cause." 509 A.2d 877 at 886. This Board has previously held that good cause includes instances of fraud or breakdown in the operation of the Board, or where discovery was necessary to formulate issues and the notice of appeal reserved the right to amend. Raymark Industries, Inc., *et al.* v. DER, 1990 EHB 1775.

Envirotrol maintains that it can amend its original notice of appeal because, as noted above, the appeal contained language purporting to reserve Envirotrol's right to amend. Envirotrol is incorrect, however. The "right to amend" a notice of appeal is not conferred by an appellant upon itself. Rather, it is within the discretion of the Board, in accordance with the applicable precedents, to bestow that opportunity upon an appellant. Raymark Industries, Inc. *et* v. DER, *supra*. Even though it included the "right to amend" clause in its original notice of appeal, therefore, Envirotrol must demonstrate good cause before the Board will allow it to amend its notice of appeal.

Envirotrol asserts that it did not, at the time it filed its notice of appeal, realize that the moisture and volatiles limits in Section II, Paragraph B, of the permit might interfere with its plans to receive lignite-based carbon from American Norit. That does not constitute good cause, however.

The situation here is not akin to those instances where discovery is necessary to ferret out additional grounds for appeal. Indeed, Envirotrol does not contend that this additional grounds was ascertained through discovery and admits that it did not initially challenge the moisture and

volatility limits in the permit because it typically accepted only bituminous-based carbon. Rather, the basis for amending its appeal is potentially acquiring a customer which utilizes lignite-based carbon.

The phrase "good cause" in 25 Pa. Code §21.51(e) does not encompass any problem which may arise after the filing of an appeal. Some circumstances may best be addressed by other remedies. For instance, where, after the issuance of a permit, information becomes available which may have resulted in the inclusion of different permit conditions, modification of the permit under either 25 Pa. Code §270.31(a)(2) or (b)(2) may be the best means to address such a problem. Otherwise, the Board, in allowing amendment of the notice of appeal, would be placed in the difficult position of resolving an issue which was not contemplated by either party during the processing of the permit application.

O R D E R

AND NOW, this 1st day of June, 1992, it is ordered that the Department's motion to dismiss Envirotrol's first amended notice of appeal is granted. The Board retains jurisdiction over the allegations set forth in Envirotrol's notice of appeal filed on September 16, 1991.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
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Richard S. Ehmann

RICHARD S. EHMANN
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JOSEPH N. MACK
Administrative Law Judge
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DATED: June 1, 1992

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M. DIANE SMITH
SECRETARY TO THE BOA

ROY and MARCIA CUMMINGS, RONALD BURR and JOHN and RITA C. MILAVEC

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES

EHB Docket No. 91-494-E (Consolidated)

Issued: June 10, 1992

OPINION AND ORDER
SUR DER'S MOTION TO DISMISS
TWO OF THE THREE CONSOLIDATED APPEALS

By: Richard S. Ehmann, Member

Synopsis

The Environmental Hearing Board grants the Department of Environmental Resources' (DER) Motion to Dismiss Two of Three Consolidated Appeals which asserts that we lack jurisdiction to hear two challenges to DER's denial of mine subsidence insurance claims that the Board of Claims has transferred to us. Under the Judicial Code at 42 Pa.C.S. §5103, the Board of Claims was authorized to transfer these matters to us, as the Commonwealth Court has decided that the Environmental Hearing Board, rather than the Board of Claims, has jurisdiction over such claims. The date upon which the transferred actions were commenced before the Board of Claims is beyond the thirty day period following DER's denials, however, so that we are without jurisdiction over them. Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). Moreover, our exercise of jurisdiction over the transferred actions as appeals *nunc pro tunc* is not warranted. See Suburban

Cable TV Co., Inc. v. Commonwealth, 131 Pa. Cmwlth. 368, 570 A.2d 601 (1990), affirmed, 527 Pa. 364, 591 A.2d 1054 (1991); Falcon Oil Company, Inc. v. DER, No. 1960 C.D. 1991 (Slip Op. issued May 14, 1992).

OPINION

Before the Environmental Hearing Board is DER's Motion to Dismiss two of the three appeals consolidated at the instant docket number. The complicated procedural history surrounding the appeals is as follows.

On October 9, 1987 Roy and Marcia Cummings (Cummings) and Ronald Burr (Burr) filed separate appeals with the Environmental Hearing Board from DER's September 10, 1987 denial of their claim for coverage under their mine subsidence insurance policies for damages to their homes on Stonebrook Drive in Peters Township, Washington County. Cummings' appeal was assigned EHB Docket No. 87-435-R, while Burr's appeal was assigned EHB Docket No. 87-434-R. Both Cummings and Burr were represented by the same counsel. DER moved to dismiss both appeals on December 24, 1987 on the basis that jurisdiction over these coverage denials rested with the Board of Claims rather than the Environmental Hearing Board.

While DER's motion was pending, Cummings and Burr commenced actions before the Board of Claims on February 8, 1988 by filing complaints seeking damages from DER under their mine subsidence insurance policies for the same property damage involved in the appeals before the Environmental Hearing Board. The Cummings' action was assigned Docket No. 1217 and Burrs' action was assigned Docket No. 1218.

On August 31, 1988, we issued an Order denying DER's Motion to Dismiss, ruling that the Environmental Hearing Board, rather than the Board of Claims, had jurisdiction to review DER's denial. See 1988 EHB 749. DER then

petitioned to amend our August 31, 1988 Order so as to permit it to take an interlocutory appeal to Commonwealth Court; we granted this request by an Order dated November 21, 1988. See 1988 EHB 1129. EHB Docket Nos. 87-434-R and 87-435-R were then consolidated along with a related appeal (EHB Docket No. 87-436-R) at EHB Docket No. 87-434-R. Upon Commonwealth Court's review of our interlocutory order, the sole question before the Court was whether jurisdiction over these types of appeals lies with the Board of Claims or with the Environmental Hearing Board. On April 28, 1989, a panel of the Commonwealth Court issued an Opinion in which it determined jurisdiction properly rested with the Environmental Hearing Board and remanded to us for further proceedings. Commonwealth, DER v. Burr, et al., 125 Pa. Cmwlth. 475, 557 A.2d 462 (1989). Based upon the Court's decision, both Cummings and Burr filed praecipes to discontinue their actions before the Board of Claims on May 25, 1989. The Board of Claims denied the praecipes by an Order issued August 2, 1989, however, stating that it had exclusive jurisdiction over contractual claims against the Commonwealth. DER, rather than Cummings and Burr, then filed Petitions for Review in the Nature of a Writ of Prohibition with the Commonwealth Court (Nos. 260 M.D. 1989 and 261 M.D. 1989) in an attempt to force the Board of Claims to discontinue the actions. While DER's petitions were pending before Commonwealth Court, Cummings and Burr filed second praecipes to discontinue their Board of Claims actions which the Board of Claims struck on October 18, 1989, stating it would retain jurisdiction "until an appellate court order is received."[1]

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[1] DER's Petition for Review in the Nature of a Writ of Prohibition was addressed to the original jurisdiction, and not the appellate jurisdiction, of the Commonwealth Court pursuant to 42 Pa.C.S. §761(c).

On October 18, 1989, Cummings and Burr filed praecipes to discontinue their appeals before the Environmental Hearing Board. We ordered EHB Docket Nos. 87-435-R and 87-434-R withdrawn and the dockets closed and discontinued.

During the same period while the Cummings and Burr matters were pending on the Board of Claims' docket, two other cases involving challenges to DER's denial of mine subsidence insurance policy claims (to which Cummings and Burr refer here as "the companion cases") were brought before the Board of Claims. When Raymond and Candia Phillips (Phillips) attempted to discontinue their action before the Board of Claims, the Board of Claims refused to discontinue the matters and instead ruled on the merits of their claim. Upon the Phillips' appeal to Commonwealth Court from the Board of Claims' Orders, the Court *en banc* held jurisdiction rested with the Environmental Hearing Board and not the Board of Claims. The Court accordingly vacated the Board of Claims' orders on June 28, 1990 and remanded the Phillips matter, directing the Board of Claims to transfer it to the Environmental Hearing Board. Phillips v. DER, 133 Pa. Cmwlth. 598, 577 A.2d 935 (1990), *allocatur denied*, ___ Pa. ___, 593 A.2d 424 (1991). In the other matter before the Board of Claims involving DER's denial of a mine subsidence insurance claim, an action brought by Dale H. and Maryleona Clapsaddle and Joseph and Stephanie Sopcak, the Board of Claims refused to transfer the matter to the Environmental Hearing Board unless and until a writ of prohibition ordering it to do so was issued. Upon a petition for review in the nature of a writ of prohibition filed by the claimants, the Commonwealth Court on June 28, 1990 vacated the Board of Claims' orders and granted the petition, ordering the Board of Claims

to transfer the matters to the Environmental Hearing Board. Clapsaddle v. Commonwealth, Bd. of Claims, 133 Pa. Cmwlth. 605, 577 A.2d 939 (1990), *allocatur denied*, ___ Pa. ___, 593 A.2d 424 (1991).

On November 13, 1991, the Board of Claims ordered the Cummings and Burr actions at Docket Nos. 1217 and 1218 transferred to the Environmental Hearing Board.[2] We assigned the Cummings matter EHB Docket No. 91-494-E and the Burr matter EHB Docket No. 91-496-E. These matters were then consolidated at the present docket number. (A third appeal was also consolidated at Docket No. 91-494-E but is not relevant to DER's motion.) On February 27, 1992, counsel for Cummings and Burr withdrew his appearance; these parties are now both represented by the same new counsel.[3]

In its motion to dismiss filed on April 6, 1992, DER contends the Board of Claims' transfer of the Cummings and Burr matters to us was improper because the Board of Claims lacked authority to transfer the cases. DER's motion further argues that we cannot exercise jurisdiction over the

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2 The Commonwealth Court docket sheets attached to DER's Reply as Appendices 1 and 2 reflect that after issuing a rule to show cause, the Commonwealth Court dismissed Nos. 260 M.D. 1989 and 261 M.D. 1989 on December 9, 1991.

3 New counsel for Cummings and Burr contends on their behalf that the withdrawals were ineffective because appeals were pending in the Clapsaddle and Phillips matters, removing the Environmental Hearing Board's ability to take action in the Cummings and Burr matters because of Pa.R.A.P. 1551(a)(2), 1701(a), and 1736. Pa.R.A.P. 1551(a)(2) states, "No question shall be heard or considered by the court which was not raised before the government unit except [q]uestions involving jurisdiction of the government unit over the subject matter of the adjudication." Pa.R.A.P. 1701(a) provides that a government unit may no longer proceed in a matter after review of a quasi-judicial order is sought. Similarly, Pa.R.A.P. 1736(b) provides for an automatic supersedeas upon the taking of an appeal by certain parties. These appellate rules were obviously inapplicable to prevent our action in closing EHB Docket Nos. 87-435-R and 87-434-R, in which there were no pending appeals. Upon Cummings' and Burr's withdrawals of these two appeals, those matters were ended. See 25 Pa. Code §21.120(e).

transferred matters because the February 8, 1988 commencement date for the actions before the Board of Claims was well beyond the thirty day period for filing an appeal from DER's September 10, 1987 action before the Environmental Hearing Board under 25 Pa. Code §21.52(a) and that the transfers cannot be regarded as *nunc pro tunc* appeals. DER alternatively asserts that the doctrine of laches prevents Cummings and Burr from bringing these claims before us because of the delay occasioned between their withdrawal of EHB Docket Nos. 87-435-R and 87-434-R and the Board of Claims' transfer of the actions before it to us. DER's motion must be construed in the light most favorable to Cummings and Burr. New Hanover Corporation v. DER, et al., EHB Docket No. 90-225-W (Opinion issued May 11, 1992).

We disagree with DER's claim that the Board of Claims lacked authority to transfer the Cummings and Burr matters to us. Section 5103(a) of the Judicial Code, 42 Pa. C.S. §5103, dealing with transfer of erroneously filed matter, provides:

> (a) **General rule.**-- If an appeal or other matter is taken to or brought in a court or magisterial district of this Commonwealth which does not have jurisdiction of the appeal or other matter, the court or district justice shall not quash such appeal or dismiss the matter, but shall transfer the record thereof to the proper tribunal of this Commonwealth, where the appeal or other matter shall be treated as if originally filed in the transferee tribunal on the date when the appeal or other matter was first filed in a court or magisterial district of this Commonwealth. A matter which is within the exclusive jurisdiction of a court or district justice of this Commonwealth but which is commenced in any other tribunal of this Commonwealth shall be transferred by the other tribunal to the proper court or magisterial district of this Commonwealth where it shall be treated as if originally filed in the transferee court or magisterial district of this Commonwealth on the date when first filed in the other tribunal.

In Suburban Cable TV Co., Inc. v. Commonwealth, 131 Pa. Cmwlth. 368, ____, 570 A.2d 601, 611 (1990), affirmed, 527 Pa. 364, 591 A.2d 1054 (1991), the Commonwealth Court *en banc* stated that pursuant to §5103, "appeals wrongly filed in a 'tribunal' will not be deemed unfiled but will be treated as filed in the proper court -- if the law designates a court -- as if originally filed in the transferee court on the date filed in the erroneous place."[4] The circumstances in Suburban Cable involved an appeal to the Court filed by Warner Cable Corp. of Pittsburgh and Warner Annex Cable Communications, Inc. (Warner), seeking review of the Board of Finance and Revenue's dismissal of Warner's petition for review on the basis of its untimeliness. Warner's petition had erroneously been accepted by the Board of Appeals of the Department of Revenue for filing, and, when the Board of Appeals discovered its error and sent Warner's petition to the Board of Finance and Revenue, the Board of Finance and Revenue refused to accept jurisdiction or treat it as timely filed. The Commonwealth Court reversed the decision of the Board of Finance and Revenue, reasoning that if a court case wrongly filed an administrative tribunal is to be treated as if correctly filed, an administrative proceeding filed with the wrong tribunal should be treated as if filed in the correct one. Suburban Cable, at ___, 570 A.2d at 611. The Court further noted that regardless of whether Warner's petition with the

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4 A "tribunal" is defined by 42 Pa.C.S. §5103(d) as including the Board of Claims, the Board of Property, the Office Administrator for Arbitration Panels for Health Care and any other similar agency. We have previously held this Board to be such a tribunal. Thomas Fahsbender v. DER, 1988 EHB 417. The cases cited in DER's brief for the proposition that a tribunal may not transfer a matter to another tribunal are inapposite for that proposition since in those cases the Commonwealth Court was construing the language found in the pre-amendment version of 42 Pa. C.S. §5103 which did not contain a provision for tribunals.

Board of Finance and Revenue were treated as an allowable transfer, with the original time of filing preserved, or as the allowance of an appeal *nunc pro tunc* because of the circumstances in that case, Warner's appeal should be deemed effective.

In the present matter, although we believe the Board of Claims had the authority to transfer the Cummings' and Burr's actions to the Environmental Hearing Board,[5] the date upon which those proceedings were commenced before the Board of Claims, February 8, 1988, fell outside the thirty day period after Cummings and Burr received notice of DER's denials, so that our jurisdiction cannot attach to these matters. Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976); Petromax, Ltd. v. DER, EHB Docket No. 92-083-E (Opinion issued April 23, 1992).

The response to DER's motion filed by Cummings and Burr urges us to treat the transferred matters as appeals *nunc pro tunc*, citing Suburban Cable, for the reason that the "procedural morass in these appeals was not understood by either counsel for appellants or that of DER." Although the Commonwealth Court in Suburban Cable discussed allowance of an appeal *nunc pro tunc* as a basis for deeming the appeal involved in that case to be effective, the Court's decision in Falcon Oil Co., Inc. v. DER, No. 1960 C.D. 1991 (Slip Op. issued May 14, 1992), makes it clear that an appeal *nunc pro tunc* is only allowable when there is "fraud or some breakdown" in our procedure or when

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[5] Clearly, by its orders in Phillips and Clapsaddle, the Commonwealth Court has indicated that it is appropriate for the Board of Claims to transfer challenges to DER's denial of mine subsidence insurance claims filed in that tribunal to the Environmental Hearing Board.

there exist unique and compelling factual circumstances establishing a non-negligent failure to file a timely appeal. Neither of these requisites to an appeal *nunc pro tunc* have been met by Cummings and Burr.

Cummings and Burr contend that other considerations such as equitable and judicial estoppel should prevent DER from objecting to the transfer of these matters and that were we to dismiss these matters, they will have been denied their rights to due process of law and equal protection under both the Pennsylvania and United States Constitutions. These arguments cannot succeed, however, since jurisdiction can be raised as an issue at any time, and the time for taking an appeal is jurisdictional and cannot be extended for the types of allegations which Cummings and Burr raise. Thomas Fitzsimmons v. DER, 1986 EHB 1190; Falcon Oil, *supra* at 3. Because Cummings' and Burr's actions were filed with the Board of Claims beyond the thirty day period following DER's denials, we must grant DER's motion and dismiss the transferred actions for lack of jurisdiction over them.[6]

O R D E R

AND NOW, this 10th day of June, 1992 it is ordered that the Department of Environmental Resources' Motion to Dismiss Two of Three Consolidated Appeals for lack of jurisdiction is granted. It is further

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6 Cummings and Burr also argue sanctions should be imposed upon DER pursuant to 25 Pa. Code §21.124 for its failure to file an answer the complaints transferred from the Board of Claims, and that these sanctions should consist of not requiring Cummings and Burr to prove the assertions contained in their complaints at a merits hearing. Although we are dismissing these matters for lack of jurisdiction, we note that DER filed answers to Cummings' and Burr's complaints before the Board of Claims and there was no need for DER to file answers with the Environmental Hearing Board.

ordered that the appeals at EHB Docket Nos. 91-494-E are unconsolidated and the appeals of Roy and Marcia Cummings at 91-494-E and Ronald Burr at 91-496-E are dismissed for lack of jurisdiction in the Environmental Hearing Board.

ENVIRONMENTAL HEARING BOARD

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TERRANCE J. FITZPATRICK
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Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 10, 1992

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

SPANG & COMPANY	:	
	:	
v.	:	EHB Docket No. 87-042-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 16, 1992

OPINION AND ORDER
SUR APPELLANT'S
SECOND PETITION TO REOPEN RECORD

By: Richard S. Ehmann, Member

Synopsis

The Board denies the appellant's second petition to reopen the record in this reopened appeal after remand of the appeal to us by the Commonwealth Court. A party cannot delay our adjudication of a matter by continuing to gather evidence and by filing successive petitions to reopen the record pursuant to 1 Pa. Code §35.231 long after a merits hearing has been conducted; otherwise, the administrative adjudicatory process continues *ad infinitum*. Where appellant did not act with diligence in attempting to put the additional data asserted by its second petition before the Board, and the Department of Environmental Resources' (DER) ability to meet this evidence will be prejudiced by its lack of an opportunity to engage in discovery of this new material and expert opinion based thereon, we will not sustain the petition.

OPINION

Spang and Company (Spang) commenced the instant appeal on January 29, 1987 challenging an order issued to it by DER on January 6, 1987 which

modified Spang's amended proposal for closure of three lagoons at its manufacturing facilities in East Butler, Butler County. After the parties engaged in pre-hearing procedure, a hearing on the merits was held on March 1, 2, and 3, 1989 before former Board member William A. Roth.

At the hearing, DER bore the burden of proof regarding the propriety of its closure order, which had been based on DER's determination that Spang's lagoons contained hazardous wastes. DER offered evidence to show that the treatment process at Spang's drill pipe plant at its Manufacturing and Tool division produced sludge of a type listed as a hazardous waste and that this sludge had been discharged to Spang's lagoons.[1]

Prior to our issuance of an adjudication of the merits, Spang filed a Petition to Reopen the Record (first petition) on July 21, 1989, pursuant to 1 Pa. Code §35.231, seeking to introduce certain new evidence regarding discharges to the lagoons from its Magnetics division. This new evidence consisted of an analysis of an April 6, 1989 sample of filter cake from the wastewater pretreatment facility at Spang's Magnetics division. Spang subsequently filed a Motion For Hearing on Appellant's Petition To Reopen the

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[1]Spang's facility consisted of a Manufacturing and Tool division and a Magnetics division. The Manufacturing and Tool division's drill pipe plant copper-plated drill pipes and joints, utilizing a copper cyanide solution as part of the process. The pipes were rinsed in water following plating. This rinse water, after being treated in treatment tanks in an effort to remove the free cyanide, was discharged into lagoon A; lagoon A's effluent discharged to lagoon B; and lagoon B's effluent discharged into Bonnie Brook Creek. The sludge from the bottom of lagoons A and B was removed and stored in lagoon C. As of April of 1984, Spang modified its treatment system by removing the sludge accumulated at the bottom of its treatment tanks prior to reaching the lagoons and by placing this sludge in drums identified as "Hazardous Waste Class F006" for off-site disposal. The principal hazardous component of F006 (a hazardous waste listed on the EPA list at 40 C.F.R. Subpart D) is cyanide. A more detailed description of the procedural history of this matter is set forth in our adjudication. See 1990 EHB 308.

Record and affidavits in support of its first petition and its motion. After reviewing DER's responses thereto, we denied Spang's petition and motion and issued an adjudication of the merits on March 27, 1990. See 1990 EHB 308. Upon an appeal by Spang, the Commonwealth Court, in Spang & Co. v. DER, 140 Pa. Cmwlth. 306, 592 A.2d 815 (1991), reversed our decision on this petition, stating that we should have applied the requirements of the General Rules of Administrative Practice and Procedure found at 1 Pa. Code §35.231(a) to the petition. It then determined that Spang's first petition met this standard and remanded the matter to us with the direction to grant Spang's first petition.

Upon remand, on January 16, 1992 we held a telephone conference call with counsel for both parties and issued an Order directing them to complete all discovery sought in connection with the matter for which the record has been reopened, i.e., the April 6, 1989 sample of filter cake, and to file any amendments to their pre-hearing memoranda necessitated by this discovery and the Commonwealth Court's remand order. After engaging in discovery, DER filed a Motion to Dismiss Spang's Objections to DER's Interrogatories and for Sanctions and a Motion in Limine. On March 17, 1992, Spang filed its Second Amended Pre-Hearing Memorandum, in which it states it intends to demonstrate at the reopened merits hearing that wastewater discharged to its lagoons prior to 1988 from the Powdered Metals department and Ferrite department of its Magnetics division contained the cyanide found in the lagoons' sludges. Spang's amended pre-hearing memorandum then lists several additional documents which Spang intends to introduce at the reopened hearing. On March 30, 1992, Spang filed its Supplemental Answers to DER's Interrogatories. DER filed its Amendment to Pre-Hearing Memorandum on March 31, 1992. We then issued an

Order on April 1, 1992, ruling on DER's Motion To Dismiss Spang's Objections and Motion for Sanctions.

By our Opinion and Order dated April 17, 1992, we granted DER's Motion in Limine in part and denied it in part, limiting the evidence to be heard at the reopened merits hearing to the analytical evidence identified in Spang's first petition and the expert testimony on how that evidence relates to Spang's previously-raised contentions.

On April 22, 1992, Spang filed its Re-Answers to DER's Interrogatories with us. Spang then filed a Second Petition to Reopen the Record (second petition) on May 7, 1992 pursuant to 1 Pa. Code §35.231(a). It followed this Petition with a document captioned "Appellant's Exhibits to be Presented at Hearing", filed on May 18, 1992, which in addition to the exhibits listed in its Second Amended Pre-Hearing Memorandum lists still more exhibits Spang intends to try to introduce at the reopened hearing.

Presently before the Board is Spang's Second Petition.[2] Spang seeks to have admitted into the reopened record "all of the factual data and the expert opinions which are set forth in Spang's Second Amended Pre-Hearing Memorandum and attachments thereto and in Spang's Answers, Supplemental Answers and Reanswers to DER's Interrogatories," based upon its

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[2] We will review Spang's second petition according to the standard set forth in 1 Pa. Code §35.231(a) and not against the standard contained in 25 Pa. Code §21.122, which DER urges us to apply. Although we have issued an adjudication in this matter and Spang's second petition was filed after our issuance of that adjudication, our review of the second petition under 25 Pa. Code §21.122 would not be proper here because of the Commonwealth Court's decision ordering us to reopen the record to hear the evidence advanced in Spang's first petition. Until we have heard the additional evidence contained in Spang's first petition we do not know the impact that evidence will have on our previously issued decision here. We therefore must treat Spang's second petition as if it was filed after the close of the merits hearing but before an adjudication was issued.

interpretation of the Commonwealth Court Opinion as indicating that all evidence relevant to showing the possibility of an alternative, non-hazardous source of cyanide in the lagoons should be entered into the record in this case. Spang's second petition alleges that since the Commonwealth Court Opinion was issued, Spang has developed considerable factual data and has retained the services of an expert witness and that these facts and opinions based thereon could not have been presented at the merits hearing because DER did not develop its theory that the sole source of the cyanide in the Spang lagoons was the Manufacturing and Tool division's electroplating line until after the merits hearing.

We do not interpret the Commonwealth Court's Opinion in Spang, *supra*, in the fashion urged by Spang. The Court took care to note that we have discretion in deciding whether to grant a petition under 1 Pa. Code §35.231(a), even where the petitioning party has met the standard found in that regulation, citing the petitioning party's lack of diligence and the prejudice to the opposing party as non-exclusive examples of matters we may consider in exercising our discretion. Spang, *supra*, at ___, 592 A.2d at 820. At least equally important as these factors is the consideration that there must be a point at which the parties are no longer engaged in gathering evidence and seeking its addition to the record so that this Board can render its adjudication without being confronted by successive petitions to reopen the record to introduce yet more evidence. A party cannot delay our resolution of a matter by continuing to generate new evidence after a merits hearing has been held. Otherwise, the administrative adjudication process of

this Board could continue *ad infinitum*. The Commonwealth Court obviously did not intend for its Opinion in Spang, *supra*, to bring about such an absurd result in this matter.

The additional evidence asserted by Spang's first petition (which the Court considered) related to the results of the April 6, 1989 sample of filter cake collected shortly after the merits hearing. The Commonwealth Court noted that Spang's supporting affidavit indicated this wastewater stream was analyzed in the normal course of Spang's business and was not analyzed for the purpose of the proceedings before the Board. Spang, *supra* at note ___, 592 A.2d at note 12.

Unlike the data advanced in Spang's first petition, much of the data which Spang seeks to introduce into the record through its second petition was not developed until long after the conclusion of the merits hearing, clearly demonstrating a lack of diligence on Spang's part. At the time when Spang filed its notice of appeal in 1987, it indicated three sources of wastewater which was discharged to its lagoons. It did not allege the wastewater from its Magnetics division contained any amount of cyanide, but did indicate treated cyanide was discharged from its Manufacturing and Tool division's pipe-plating plant. DER's pre-hearing memorandum asserted that samples collected from the lagoons' sludges contained cyanide, one of the constituents found in the hazardous waste which DER was alleging to be present in the lagoons. When DER filed its post-hearing brief, it contended that the only known source of cyanide discharged to the lagoons was Spang's pipe-plating plant, based in part on the testimony of Spang's expert witness, Timothy Kiester. Spang then filed its first petition to reopen and argued in its post-hearing brief that the presence of cyanide in its lagoons was

attributable to wastewater discharges from its Magnetics division. It was for consideration of the evidence asserted in Spang's first petition, the April 6, 1989 filter cake sample, that this matter was reopened. Nevertheless, Spang has continued to compile other materials and testimony it hopes to use as evidence and to conduct testing at its Magnetics division in order to buttress its argument that the Magnetics division was the source of non-hazardous amounts of cyanide in the lagoons' sludges and, thus, its pipe-plating plant was not the sole source the cyanide found in the lagoons, so that DER has not proven the lagoons contained hazardous wastes discharged from the pipe-plating plant.

Spang has thus tried to continue to expand the scope of the matter for which the Commonwealth Court has reopened this record. Its first petition and post-hearing brief asserted only the results of the April 6, 1989 filter cake sample. Spang's Second Pre-Hearing Memorandum and its Exhibits to be Presented at Hearing show Spang seeks to introduce evidence going far beyond this April 6, 1989 sample, consisting of analyses of sampling conducted prior to the hearing in 1988 and subsequent to the hearing, as recently as February of 1992. Also attached to Spang's Exhibits to be Presented at Hearing is the affidavit of Timothy Keister, sworn on March 13, 1992. In his affidavit, Mr. Keister states that he was retained by Spang in January of 1990 to analyze Spang's scrapped ferrites and that he detected trace quantities of cyanide in those materials in February of 1990. Keister further states that Spang retained his services after the Commonwealth Court's remand so that he could analyze Spang's ferrite manufacturing process, including its raw materials.

He also indicates that he did not conduct an in-depth investigation of the Powder Core Manufacturing process because it is a recognized generator of trace quantities of cyanide.

In its Second Amended Pre-Hearing Memorandum, Spang states that the operations and raw materials to produce powdered metals powder cores at its facility have been essentially unchanged since 1958, and the processes and raw materials used to produce ferrites at its facility have been essentially unchanged since 1974, when ferrites were added to Spang's product line. Even if we accept Spang's argument that DER did not develop its "sole source" theory until after the merits hearing, it fails to explain why Spang did not include data pre-dating the merits hearing in its first petition, and instead delayed until after the close of discovery regarding the information addressed by its first petition to attempt to bring this "new" information before the Board.[3]

Likewise, Spang's second petition offers no explanation for undertaking an investigation in 1992 of whether the wastewaters from its Magnetics division contained cyanide which was discharged to the lagoons, long after it was aware that the source of the cyanide in its lagoons was at issue.

DER alleges in its verified Response that the first time that DER learned that Spang might be developing new evidence for the reopened merits hearing was from the deposition testimony of Spang's expert witness, Timothy Keister, given on February 20, 1992, at which Mr. Keister indicated that

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[3]Some of the documents listed in Spang's Exhibits to be Presented at Hearing were included in its Re-Answers to DER's Interrogatories, but those Re-Answers were not filed until April 22, 1992.

during the week prior to the deposition, he had begun to develop additional evidence solely for purposes of the reopened merits hearing, including conducting additional analyses of samples of filter cake and of various raw materials at Spang's facilities. DER's response further alleges that Keister could not testify as to whether the information to be derived from the February 1992 sample analyses would affect his expert opinion since he had not yet obtained the results (and obviously had formed no expert opinion based on them.) As is pointed out by DER, Spang had not disclosed in the conference call among the Board and the attorneys for the parties held on January 16, 1992 for the purpose of setting the discovery schedule that it intended to gather any such additional evidence for purposes of the reopened merits hearing.

While the additional evidence Spang desires to make part of the record may have relevancy to its theory of the case, Spang's clear lack of diligence in collecting this additional data (which in volume and content is substantially beyond that addressed in its first petition) is not addressed or explained by Spang's second petition. Moreover, were we to grant Spang's second petition, allowing Spang to introduce this additional factual data and expert opinion would work to DER's prejudice, since DER has had no opportunity to undertake discovery of this new material and expert opinion based thereon, let alone prepare rebuttal thereto. As we have previously indicated, this Board disfavors "trial by ambush." Midway Sewerage Authority v. DER, 1990 EHB 1554. We accordingly deny Spang's second petition to reopen in accordance with the foregoing Opinion and enter the following Order.

ORDER

AND NOW, this 16th day of June, 1992, it is ordered that Spang's Second Petition to Reopen Record is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: June 16, 1992

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
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RON'S AUTO SERVICE	:	
	:	
v.	:	EHB Docket No. 91-207-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 17, 1992

ADJUDICATION

By Richard S. Ehmann, Member

Synopsis

A motion for directed verdict filed in an appeal to this Board is only proper at the close of the presentation of the evidence and is reviewed based upon all of the evidence presented by the parties. It is no defense to a motion for directed verdict, as opposed to a motion for non-suit, for DEP to argue that it has presented a *prima facie* case or that there are disputes between the parties as to material facts.

The presumption of liability of an owner/operator of underground gasoline storage tanks found in Section 1311 of the Storage Tank and Spill Prevention Act applies to the owner of underground gasoline storage tanks located 30 feet from gasoline contaminated subsurface soils, in an appeal from an order to retain a consultant to study and report on both the extent of contamination and proposals to clean it up. Where the legislature explicitly recognizes the need for prompt cleanups of contamination incidents

and empowers DER to issue orders regarding cleanups and orders which will aid in enforcing the Act, ample authority exists for issuance of DER's Order to this gasoline service station owner/operator.

Background

On April 22, 1991, DER issued Ron's Auto Service ("Ron's") an administrative order to hire a consultant to fully investigate and develop any response to the gasoline found in a sump in the basement of the bank branch adjacent to the retail gasoline service station operated by Ron's in West Middlesex Borough, Mercer County. DER's Order recites that it is issued pursuant to Sections 1302, 1304 and 1309 of the Storage Tank and Spill Prevention Act ("Spill Act"), the Act of July 6, 1989, P.L. 169, No. 32, 35 P.S. §§6021.1302, 6021.1304 and 6021.1309. It also asserts it is issued pursuant to the authority found in Sections 5, 316, 402, 501 and 610 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§691.5, 691.316, 691.402, 691.501 and 691.610 and Section 1917-A of the Administrative Code of 1929, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17.

On May 22, 1991 we received Ron's appeal from that order. Thereafter, the parties conducted limited discovery and filed their respective Pre-Hearing Memoranda. After the filing of the parties' Joint Stipulation and on December 18, 1991 and December 19, 1991, the Board conducted the hearings on the merits of the issues raised in this appeal. Thereafter, as ordered, DER filed its Post-Hearing Brief. In response, Ron's filed not just a responding Post-Hearing Brief but a Motion For Directed Verdict and supporting Brief. On

April 10, 1992, DER filed its Motion In Opposition To Appellant's Motion For Directed Verdict and supporting Brief.

A transcript of the hearing in this appeal of 197 pages, 3 Exhibits and the parties' Joint Stipulation constitute the factual record. After a full and complete review of the record we make the findings of fact set forth below, rule on the merits of the Motion For Directed Verdict and adjudicate the merits of Ron's Appeal.

FINDINGS OF FACT

1. Appellant is Ron's, owned and operated by Ronald E. Holt. Ron's is located at Main and Erie Streets in West Middlesex Borough, Mercer County. (Ron's Notice Of Appeal)

2. Appellee is DER, which is the agency of the Commonwealth of Pennsylvania authorized to administer the Clean Streams Law, *supra*, and the Spill Act, *supra*. (DER's Order attached to Ron's Notice Of Appeal)

3. Ronald E. Holt took title to this property in a deed from Quaker State Oil Refining Corporation dated June 29, 1982. (R-1)[1]

4. At Ron's, there are two gasoline pumping islands and an automotive service area located in bays in the service station's garage building. (T-13)

5. As of 1991, Ron's had four underground storage tanks at the property, three of which were for gasoline and the fourth for used oil. (T-12)

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1 "R-__" references an Exhibit offered by Ron's. "C-__" is an exhibit offered by DER and "T-__" references a page citation in the hearing's transcript.

At a point in the year preceding DER's involvement with the Bank and Ron's, the tank used to store regular gasoline had been taken out of service because of possible problems. (T-12, 142)

6. On March 25, 1991, a representative of First National Bank of Mercer contacted DER about gasoline fumes in the basement of its branch bank in West Middlesex. (T-11-12)

7. Susan Vanderhoof ("Vanderhoof"), a DER Water Quality Specialist dealing with underground storage tanks and groundwater contamination incidents, was sent to investigate. In the course of her employment by DER she has inspected about 150 sites with leaking storage tanks. (T-9, 10, 12)

8. Upon reaching the bank, Vanderhoof went to its basement where there were strong gasoline fumes, with the strongest fumes found at a dewatering sump. (C-1; T-12) The sump is an 18-inch diameter pipe located 12 feet below the earth's surface with a pump in it which extracts groundwater to prevent its infiltration into the basement. (T-94, 101)

9. While at the bank, Vanderhoof used a microtip meter to confirm the existence of an ionizing compound in the bank's basement which, from the smell, she assumed was gasoline. (T-13, 17)

10. After collecting this sample, Vanderhoof went next door to Ron's to talk to Ronald E. Holt. (T-13) Ron's underground gasoline storage tanks are located about 20 to 30 feet horizontally across the ground's surface from the sump in the bank's basement. (T-14)

11. The sample collected from the liquids within the bank's sump on March 25, 1991 was taken from the top several inches of the liquid in the

sump. Vanderhoof cannot say how deep the sump is because it had liquid in it. (T-24)

12. The bank installed the sump about a week before Vanderhoof's inspection to keep water from infiltrating into the building's basement. The pump in the sump connects by pipe directly to the storm sewer. (T-12-14, 26-28; C-1)

13. There is no place between the sump and the storm sewer in the sump pump's piping to collect a sample of what is pumped out. The storm sewer discharges to the stream at the bottom of the hill. (T-28)

14. No samples were taken of any discharge to this stream or of the storm sewer's content and none were taken at Ron's. (T-23-24, 29)

15. Vanderhoof could not tell the sump's age by looking at it; her information on its newness came from a bank employee. (T-49-50)

16. After the completion of her inspection, Vanderhoof prepared the report of the inspection which is Exhibit C-1. (T-15)

17. There are no other gas stations in the immediate vicinity of the bank and Ron's at present (T-21), but, according to Holt, at some point in time in the past there were retail gasoline sales at a building across the street which is now a drug store and at locations about 1,000 feet north and 1,000 feet south of Ron's station (T-129). Ronald E. Holt does not know if the gasoline tanks at those locations were removed or not. (T-129)

18. The ultraviolet analysis of the sample collected by Vanderhoof from this sump shows there is gasoline in this sample, according to

DER's Sherri Trometter ("Trometter"), who the parties stipulated was an expert in laboratory analytical procedures. (T-58-59, 63-64)

19. The sample's analysis showed it contained approximately 160 parts of gasoline per million parts of water. However, because the sample was not analyzed to the tenths of a milliliter of volume of the sample, it could not be more accurately analyzed as to the parts per million (ppm) of gasoline. (C-2; T-75-76)

20. On December 12, 1991, Vanderhoof returned to the bank and Ron's. Again, she encountered strong fumes in the bank's basement. In the sump there were globules of a black material floating on the surface of the water in the sump. Vanderhoof collected a sample of the sump's contents during this December visit, too. (T-18)

21. Vanderhoof has no samples showing pollution of the stream at the point where the storm sewer discharges, but states the gasoline mixed with water in the sump would be pollutional. (T-27-29) Vanderhoof has not visited the location where the sewer discharges to the stream. (T-29)

22. Vanderhoof does not know if the water at the sump is a spring or not. (T-36)

23. Don Hegberg is employed by DER as a hydrogeologist (T-81) but has never conducted a groundwater study for DER, although on DER's behalf he has reviewed studies done by others. (T-85) He has never conducted a hydrogeologic study to determine the source of contamination. (T-86)

24. The topography of the area around Ron's and the bank is generally flat with a slight slope from Ron's toward the bank and from the bank to the southwest toward the Shenango River. (T-93)

25. Generally topography indicates the groundwater flow's direction, i.e., it follows the slope of the topography. (T-93)

26. By operation, the sump's pump may create a zone of influence where it draws groundwater and contaminants toward it. (T-94) The bank's sump pump would draw in groundwater and contaminants from the tank area at Ron's. (T-97)

27. Groundwater in this area moves from the property on which Ron's is located to the bank's land and then toward the river (T-95). In the vicinity of Ron's and the bank, though Hegberg did not look for other sources, he believes that Ron's tanks are the most probable source of this gasoline. (T-97-98)

28. Hegberg did not conduct a hydrogeologic investigation of groundwater flow beneath this area and did not check DER's files to see if one had been done for this area by others. (T-99-100) Other than looking at the surface and at the sump, he conducted no other investigation. He dug no pits and did not locate the depth in the ground of the upper most aquifer.

29. Hegberg never checked to see if there were other storage tanks upgradient of those at Ron's because others are supposed to do that. (T-109)

30. In Hegberg's opinion, the aquifer involved in the situation here is most likely an unconfined aquifer, i.e., there is no confining impermeable layer above it to prevent surface water infiltration. (T-104-105)

31. How long gasoline will stay in the groundwater and how far it will travel varies with site conditions at each site and the subsurface soil's permeability. (T-107, 115)

32. To Hegberg, the gasoline in the bank's sump was very pungent and between his March and December visits to the sump, the sump's contents appear to have worsened in terms of contamination. (T-108, 114)

33. Ronald E. Holt keeps a record of all of the gas he sells, as required by law. He does this by using a calibrated stick which is lowered into the tank to measure volume, and by reading the volume sold on his pumps and comparing the two to see if there is any loss. (T-129-132) His comparisons of these records shows no loss of product at Ron's, but temperature, atmosphere and other conditions impact on the accuracy of stick readings. (T-132-133)

34. There was a possible problem with the regular gas tank which caused Ron's to take it out of service in April of 1991. (T-141-142)

35. In the last half of the 1950's, Wessex Corporation (a general contractor), was hired to build the current building housing this branch of the bank. (T-160, 164)

36. When Wessex excavated the foundation hole for the new bank, gasoline ran into it from the side and bottom, filling the hole and necessitating evacuation of people from surrounding buildings. (T-160-161, 168-172)

37. The soil in the bank's excavation was sandy (T-168) and there wa sufficient gasoline and water in the foundation hole to require installation and use of an oil separator in draining the excavation. (T-161, 170)

38. Over the advice of Wessex not to build on this site because of this incident, the bank decided to have the building completed. Wessex completed it in 1959. (T-162-164) As completed, the building had additional features built on it to minimize problems with any gasoline remaining after Wessex pumped the pit out, and checks by Emil Koledin of Wessex for six to eight years thereafter showed no fume problem in the bank. (T-162-165)

39. Quaker State Oil Refining denied all responsibility (T-162) as t the gasoline in the foundation hole but admitted a fitting on one of the line from one of its tanks had cracked. (T-173)

40. In unconsolidated subsurface materials like those found around the bank, contaminants and groundwater move quickly compared to movement through bedrock, so the materials from 30 years ago would not be present today. (T-193-194)

41. The petroleum found at the bank's sump at the time of the DER inspection was fresh, not that released 30 years ago. (T-193, 195)

DISCUSSION

Since this appeal is from issuance of an administrative order to Ron's by DER, it is clear that under our rules it is DER which bears the burden of proof. See 25 Pa. Code §21.101(b)(3). DER does not disagree with this assignment of the burden of proof and contends it has met same.

At the close of DER's case-in-chief, Ron's orally moved for a directed verdict. (T-124) Ron's argued that to make a case under the Clean Streams Law, DER had to prove pollution and that DER needed to show a violation of one of its standards to prove pollution. It then argued that DER showed only gasoline in the sump and that it has no standard for gasoline. Before Ron's argued orally that DER failed to prove its Spill Act case, the sitting Board Member properly advised him that such relief as it sought, i.e., a directed verdict, had to be granted by all five Board Members because, if granted, it would be a final order in the appeal and thus that the Board Member could not grant this motion. See Hubert D. Taylor v. DER et al., 1991 EHB 1926. Accordingly, Ron's agreed to brief and argue these issues in its post-hearing brief. (T-126-127)

Ron's Post-Hearing Brief is, in fact, a Motion For Directed Verdict and supporting Brief. The Motion argues DER may issue an order under Section 316 of the Clean Streams Law, 35 P.S. §691.316, if there is pollution or a danger of pollution and that pollution is defined as a violation of standards set by DER. It also argues DER may issue an order under Section 1309 of the Spill Act, 35 P.S. 6021.1309, only if it finds a danger of pollution or "release" and a "release" only exists if certain federal standards are exceeded. Ron's then argues that no discharges or releases to waters of the Commonwealth in exceedance of any state or federal standard were established by DER. Ron's further argues that DER is not authorized by statute to issue Ron's this order unless it establishes that Ron's was responsible for a discharge or release in violation of a standard and that it proved neither.

Though DER filed the first post-hearing brief in the matter, that Brief did not address these issues, except tangentially in discussing the evidence, and, as a result, DER filed its Motion In Opposition To Appellant's Motion For Directed Verdict and supporting brief as a response to Ron's Motion.[2] In this responding motion DER argues that a directed verdict is improper where material facts are in dispute, or where, as here, a *prima facie* case is made out by DER, that DER has demonstrated violations under both Acts by a preponderance of the evidence, and that material issues of fact are in dispute as to gasoline contamination of the soil and groundwater in the area of Ron's and the tank.

Motions for directed verdict are at best uncommon before this Board because they are normally directed at removing the case from the jury's consideration and we have no juries in proceedings before this Board. See Pa. R.C.P. 226. However, they are not unheard of, as we do receive requests for directed adjudications and for non-suits. See, e.g., Reading Company and Consolidated Rail Corporation v. DER, EHB Docket No. 90-192-MR (Adjudication issued March 3, 1992), and Hubert D. Taylor, *supra*. When the chaff of jury's participation issues are stripped away from the kernel of the challenge raised in this Motion, the question presented is whether DER has proven sufficient

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[2] The Board does not understand why many attorneys appearing before it file Motions In Opposition to Appellant's Motion, whether as to Directed Verdicts, Summary Judgments or otherwise. That is not proper practice. A response or answer to the motion, as opposed to a counter motion, together with a brief supporting such an answer or response is all that is necessary.

facts to set forth a basis on which it can hang at least one of its legal theories. In saying this, we explicitly reject DER's argument that we should deny this Motion because there are material issues of fact in dispute between the parties. Such an argument may apply in jury trials but not before us. As a Board we must test DER's facts while acting as both judge and jury just as a Common Pleas Court judge does in any non-jury trial or when weighing the evidence after a motion for a directed verdict. We also reject DER's argument that we deny this Motion because DER has made out a *prima facie* case. We read both Pa.R.C.P. 226(b) and 9 Standard Pa. Practice 2d §58.76 to correctly suggest a motion for a directed verdict comes at the close of the presentation of evidence in a case, not at the close of the "plaintiff's" case-in-chief (when a motion for non-suit may properly be made). The Board as a whole must consider this Motion's merit after receipt of all of the evidence to be offered by both sides, and we are considering all of this evidence when evaluating Ron's Motion. So, questions of making out a *prima facie* case no longer have merit.

Accordingly, we now turn to whether a violation of either statute has been established by DER. If it has, then we need not look further to see if other theories of liability have been proven to deny Ron's motion. Clearly DER is authorized to issue orders as needed to aid in enforcement of the provisions of this Act. See 35 P.S. §6021.1309. It is also empowered by the Act to issue orders for corrective actions. See 35 P.S. §6021.107(g).

In relevant part, Section 1311 of the Spill Act, 35 P.S. §6021.1311, provides:

> [I]t shall be presumed as a rebuttable presumption of law in ... administrative proceedings that a person who owns or operates an ... underground storage tank shall be liable without proof of fault, negligence or causation, for all damages, contamination or pollution within 2,500 feet of the perimeter of the site of a storage tank containing or which contained a regulated substance of the type which caused the damage, contamination or pollution. Such presumption may be overcome by clear and convincing evidence that the person so charged did not contribute to the damage, contamination or pollution.

In the instant case Ron's underground tanks are between 20 and 30 feet from the bank's sump and thus are within 2,500 feet. Ron's tanks store or stored gasoline which is a regulated substance as defined in Section 103 of the Spill Act, 35 P.S. §6021.103, and gasoline is the contaminant or pollutant found in the sump at the bank according to the chemical analysis of the liquid in the sump conducted in DER's laboratory. Moreover, there is no question that for gasoline to have reached this sump the gasoline had to travel through the sandy soils surrounding the bank building thus contaminating that soil. The need for prevention of contamination of the lands of the Commonwealth was one of the findings of the legislature when it adopted this statute. See Section 102(a)(1),(2)and (6) of the Spill Act, 35 P.S. §6021.102(a)(1),(2) and (6). Accordingly, in this administrative law proceeding we find, as DER urges, that this presumption of liability applies to Ron's.[3]

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[3] In so doing we do not discount the likelihood of the occurrence of groundwater contamination here. The sump's purpose is obviously to keep underground water from entering the bank's basement. It is also obvious, since the evidence shows the sump to be more than ten feet below the ground's surface and at least partially filled with water, that either a groundwater aquifer of some type must be intercepted by the foundation or there is a (footnote continues)

This presumption of Ron's liability applies unless rebutted by the clear and convincing evidence of one of four types as outlined in Section 1311(b), 35 P.S. §6021.1311(b). The only evidence offered by Ron's which could be argued to fall within these four groups was the testimony by Emil Koledin of Wessex about gasoline contamination of the bank site when the bank building was constructed in the late 1950's. Clearly there was a contamination incident then and clearly that is evidence that Ron's did not contribute to that contamination incident, since at the time Ron's did not exist and the gas station was owned by Quaker State. However, we have no evidence that this gasoline is still in place over 30 years later. Indeed Koledin testified that Wessex pumped out much of the gasoline and that after completing the bank building, he monitored the bank for fumes for at least six years but detected none. Moreover, this gasoline smelled fresh to DER's staff and DER's hydrogeologist opined that in the unconsolidated sandy soils of this area 30-year-old gasoline would not be the problem seen today. Accordingly,

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(continued footnote)
spring at this location. Either is a water of this Commonwealth which is now polluted by gasoline. Moreover, contrary to Ron's assertion, a DER standard of 30 parts per million for oil and its products, as found in 25 Pa. Code §97.63(b), is violated. This regulation prohibits a discharge of oil-bearing waste waters containing more than 15 ppm and the sample's analysis shows 160 ppm in the sample from the sump. However, as Ron's correctly points out, DER has failed to prove a discharge from Ron's tanks. Although circumstantial evidence points at these tanks as the only possible source and DER's hydrogeologist opined that they were the most likely source, we have found that DER has proven a violation of the Spill Act and thus need not address whether there is proof of a violation of the Clean Streams Law.

especially since Ron's admits since the presumption applies to a recent possible problem with one of its gasoline storage tanks, we do not find this presumption rebutted.

Because the presumption applies, DER need not show a release from these tanks at Ron's; under the Spill Act Ron's is the presumed factual cause of the contamination. Since the presumption is not rebutted, this means that as to this appeal Ron's released the gasoline now in this soil. Accordingly, we must deny Ron's Motion and proceed to adjudicate the merits c this issuance of this Order consistent with the findings recited above. In turn, these findings force us to conclude that DER has proven the factual support for its administrative order under the Spill Act.

In reaching this conclusion, we agree with Ron's that but for this presumption DER failed to prove a release of contaminants or pollutants from Ron's storage tanks under the Spill Act.[4] DER's staff did little more than look at the land's surface, the adjacency of the bank and Ron's, and sample the sump's content. DER did not check for a discharge from the storm sewer o even into the storm sewer. It did not dig any pits or holes from which it could extract a sample of the groundwater outside the bank or at Ron's. It did not analyze groundwater flows or depth in this area, except surficially, nor, prior to issuance of its order, did it conduct any analysis of the natur of the subsurface soils. Thus, had this statutory presumption not existed, w

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[4] We need not address whether a case for an order pursuant to Section 1917-A of the Administrative Code was made but observe the conditions here vary greatly from those in Reading Company et al., *supra*, where we found no evidence of public injury and thus no reason to invoke Section 1917-A.

might not have sustained DER's order to Ron's to hire a consultant to do a groundwater investigation in this area and propose remediation if revealed to be necessary.[5]

However, we cannot ignore Section 1311's presumption, and, as recited above, there is ample authorization for DER to issue this order found at 35 P.S. §6021.1309 and 35 P.S. §6021.107(g). Clearly, since the legislature recognizes in Section 102(b) of the Spill Act, 35 P.S. §6021.102(b), the need to have prompt cleanups where regulated substances are released from tanks, in this circumstance DER's Order was statutorily authorized and not an abuse of its discretion. Since, as stated above, we must deny Ron's motion and there is no other defense to this order offered on Ron's behalf, we sustain DER's action. Accordingly, we make the following conclusions of law and enter the following Order.

CONCLUSIONS OF LAW

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

2. Where an appeal is taken from issuance of an administrative order, it is DER, as the agency issuing this order, which bears the burden of proof pursuant to 25 Pa. Code §21.101(b)(3).

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[5] DER is capable of conducting an investigation which leaves no doubt as to releases or violations of the Clean Streams Law, *supra*. See C & L Enterprises et al. v. DER, 1991 EHB 514 and Gabig's Service v. DER, 1991 EHB 1856.

3. A single Board Member lacks the authority under this Board's rules to grant a motion for directed verdict because such an order is a final order which can only be entered by the full Board.

4. A motion for directed verdict is properly made only at the close of the hearings on the merits of an appeal.

5. In review of the evidence pursuant to a motion for directed verdict all evidence before the Board must be considered.

6. Because this Board's members decide both the fact and legal issues, i.e., sit without a jury, and considering when a motion for directed verdict may properly be made in the course of an appeal, it constitutes no defense to such a motion to argue the motion should be denied for the reason that there are material facts in dispute between the parties.

7. Because of the timing of a motion for directed verdict in the course of an appeal, as opposed to a motion for non-suit, it is no defense to such a motion for directed verdict to argue that it should be denied because the non-moving party has made out a *prima facie* case.

8. Gasoline is a regulated substance under the Spill Act.

9. Where gasoline contaminates soils within 30 feet of underground gasoline storage tanks the presumption that the owner/operator of those tanks is liable in regard thereto as set forth in Section 1311 of the Spill Act applies in an appeal from an administrative order issued by DER to that operator regarding this contamination.

10. Because Ron's has failed to offer clear and convincing evidence to rebut this presumption of liability for this contamination, Ron's is liable therefor.

11. Since this statutory presumption applies, DER is not required to prove a release from these tanks to justify issuance of its order under the Spill Act.

12. Because Section 1309 of the Spill Act authorizes DER to issue the orders necessary to aid in enforcement of this Act, Section 107(g) of the Act authorizes DER's issuance orders for corrective actions, and the legislature explicitly recognized the need for prompt cleanups of released regulated substances in Section 102(b) of the Spill Act, ample statutory authority exists for DER's issuance of the order to Ron's to hire a consultant to study the scope and extent of the gasoline contamination in this area and report his study's results and remediation proposals, if any, to DER.

ORDER

AND NOW, this 17th day of June, 1992, it is ordered that Ron's Motion For Directed Verdict is denied and its appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
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JOSEPH N. MACK
Administrative Law Judge
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DATED: June 17, 1992

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M. DIANE SMITH
SECRETARY TO THE BOARD

CITY OF PHILADELPHIA, STREETS DEPARTMENT :
:
v. : EHB Docket No. 91-420-E
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: June 17, 1992

OPINION AND ORDER
SUR
TIMELINESS OF APPEAL

By: Richard S. Ehmann, Member

Synopsis

Where a party stipulates in a joint stipulation of facts filed with this Board as to a date on which it received written notice of DER's actions which it has appealed, that party has made a judicial admission of a fact which it may not later contradict. While in situations involving motions to dismiss untimely appeals the dismissal issues must be considered in the light most favorable to the non-moving party, where the date of receipt of notice of DER's actions stipulated to by the appellant is more than thirty days before that party's appeal was filed with this Board, the appeal must be dismissed as untimely.

OPINION

This appeal by the City of Philadelphia, Streets Department ("Philadelphia") arises from a Department of Environmental Resources ("DER") letter dated September 5, 1991 conditionally approving Philadelphia's proposed

Municipal Waste Management Plan, as submitted pursuant to the Municipal Waste Planning, Recycling and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, 53 P.S. 4000.101 *et seq.* According to this Board's records the Board received Philadelphia's appeal by facsimile transmitted from Philadelphia's counsel to the Board on October 9, 1991.

In its Pre-Hearing Memorandum which we received on February 6, 1992, DER states its letter notifying Philadelphia of this conditional approval was sent to Philadelphia by facsimile transmitted to Philadelphia on September 5 and by mail as a regular letter which Philadelphia says it received on September 11, 1991. When this statement appeared in DER's Pre-Hearing Memorandum, Philadelphia made no response.

Thereafter, this Board issued its standard Pre-Hearing Order No. 2 on February 7, 1992, which required the parties to file a joint stipulation covering several topics including the facts upon which the parties could agree. Our Pre-Hearing Order No. 2, which is issued when the hearing date is set, is designed to facilitate an expeditious hearing. On March 31, 1992 (in anticipation of the merits hearing then scheduled for April 14 and 15, 1992) the parties filed a joint stipulation signed on behalf of each party by its respective counsel. Paragraph 17 of this Joint Stipulation Of Appellant And Appellee provides:

> 17. The Department on September 5, 1991 issued a **conditional** approval of the City's Municipal Waste Management Plan, which the City received by facsimile transmission on September 5 before receiving the mailed copy on September 11. (emphasis in original)

Because the factual stipulation by Philadelphia raised questions for this Board as to the timeliness of Philadelphia's appeal and hence our jurisdiction to hear same, we cancelled the scheduled merits hearing, and on

April 13, 1992 issued Philadelphia a Rule To Show Cause why its appeal should not be dismissed as untimely.

Philadelphia has filed an unsworn and unverified response to this Rule. In it, Philadelphia says it has no record to show the facsimile transmission occurred. It also says that neither its counsel nor the Commissioner of the Department of Streets had any awareness of any attempt at facsimile transmission of DER's letter at the time the appeal was filed and that the appeal was filed in a good faith belief that Philadelphia first received notice of DER's conditional approval on September 11, 1991. Philadelphia then says its telefacsimile logs do not show receipt of this "fax." Finally, Philadelphia says its stipulation to fact No. 17 "was an oversight and does not reflect the knowledge or belief of the City."

On May 20, 1992, in response to our order to it to do so, DER filed a response to Philadelphia's contentions. Included with it are an affidavit by the DER employee who sent the facsimile transmission to the effect that the facsimile transmission occurred on September 5, 1991 as initially alleged by DER.

It is clear that pursuant to 25 Pa. Code §21.52(a) our jurisdiction does not attach to an appeal unless the appeal is filed with the Board within thirty days after a party appellant receives written notice of DER's action. Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). Thus, if Philadelphia received this fax on September 5, as alleged by DER and stipulated to by Philadelphia, its last day to file a timely appeal was on Monday, October 7, 1991. An appeal filed on October 9, 1991 would be untimely and we would lack the jurisdiction to entertain same.

We note initially in deciding this issue that in its response to our Rule, Philadelphia does not say the facsimile transmitted from DER to Philadelphia did not occur. Instead, it says it has no log that it occurred and that the Commissioner and Philadelphia's lawyer lacked knowledge of any attempted facsimile transmission of this type at the time the appeal was filed. Frankly, this response is not an absolute denial and is troubling to us since it leaves open the possibility Philadelphia was faxed this approval. DER's Reply points this out also and, based upon the affidavits attached to its Reply, goes on to aver that there are other persons in the Streets Department with whom DER talked regularly as representatives of Philadelphia on these matters and the fax was sent to one of these people.

However, the key here is not this equivocation but Philadelphia's stipulation to the fact that this fax transmission occurred. Philadelphia's Brief In Support Of Its Response which we received on May 21, 1992 (the day after the last date to timely file same) does not address the legal significance of this stipulation. Rather, it correctly points out that motions to dismiss untimely appeals are to be construed in a light most favorable to the non-moving party and concludes that there is inadequate proof it received this approval on September 5, 1991. We do not need to reach this issue and weigh the evidence in this fashion.[1] By stipulating to the facts in Paragraph No. 17 of the Joint Stipulation Philadelphia has made a judicial admission which it cannot now contradict. The most recent case discussing the

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[1] If we were to weigh the evidence, we have an unsworn and unverified assertion in Philadelphia's response to our Rule to the effect that it has no record of getting the "fax" from DER and an affidavit from the DER employee who faxed this letter to Philadelphia stating that this was done. The scales are clearly tipped toward DER based upon these filings.

law in Pennsylvania on judicial admissions is Nasim v. Shamrock Welding Supply Company, 387 Pa. Super. 225, 563 A.2d 1266 (1989), appeal denied, 525 Pa. 619, 577 A.2d 890 (1990). There in its review of the law on judicial admissions the Court said:

> It is well established that a judicial admission is an express waiver made in court or preparatory to trial by a party or his attorney, conceding for the purposes of trial, the truth of the admission. Jewelcor Jewelers & Distributors, Inc. v. Corr, 373 Pa. Super. 536, 542, 542 A.2d 72, 75 (1988). It has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted, so that the opposing party need offer no evidence to prove it and the party by whom the statement was made is not allowed to disprove it. Jewelcor Jewelers, *supra*, at 542, 542 A.2d at 75. A principal element of a judicial admission is that the fact has been admitted for the advantage of the admitting party, and consequently, a judicial admission cannot be subsequently contradicted by the party that made it. Jewlcor Jewelers, *supra* at 543, 542 A.2d at 76.

387 Pa. Super. at ____, 563 A.2d at 1267.

It is obvious Philadelphia has admitted this fact in preparation for trial as it is contained in this Joint Stipulation, just like Shamrock Welding Supply made certain admissions in the Petition To Join Additional Defendants which it filed in the cited opinion. Philadelphia made this admission because in exchange, it got DER to admit certain facts and because the admitted facts no longer need be proven through the taking of testimony, thus shortening trial time and reducing the numbers of witnesses. Clearly this admission, when made, was thus made with intention of creating an advantage for Philadelphia. Accordingly, Philadelphia cannot now contradict it. This being true, its admission shows that its appeal was untimely and case law compels this Board to enter the following Order.

O R D E R

AND NOW, this 17th day of June, 1992, it is ordered that this Board's Rule To Show Cause is made absolute and this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
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JOSEPH N. MACK
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DATED: June 17, 1992

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M. DIANE SMITH
SECRETARY TO THE BOARD

CITY OF PHILADELPHIA, STREETS DEPARTMENT :
:
v. : EHB Docket No. 92-051-E
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: June 18, 1992

AMENDED OPINION AND ORDER
SUR
DEPARTMENT OF ENVIRONMENTAL RESOURCES'
MOTION TO LIMIT ISSUES

By: Richard S. Ehmann, Member

Synopsis

A DER Motion To Limit Issues, which seeks to bar an attack upon the validity of the Department of Environmental Resources' (DER) Conditional Approval of Philadelphia's Act 101 Plan, is granted in this appeal from DER's civil penalty assessment based on non-compliance by Philadelphia with those conditions. Since we dismissed Philadelphia's prior appeal from DER's Conditional Approval of this Act 101 Plan because it was untimely filed, DER's action is now final and the doctrine of collateral estoppel bars an attack on these conditions in the instant civil penalty assessment appeal.

OPINION

On January 2, 1992 DER issued a civil penalty assessment against the City of Philadelphia ("Philadelphia") in the amount of $15,000 for alleged violations by Philadelphia of its Municipal Waste Management Plan as promulgated under the Municipal Waste Planning, Recycling and Waste Reduction

Act, the Act of July 28, 1988, P.L. 566, No. 101, 53 P.S. §4000.101 *et seq.* ("Act 101") and conditionally approved by DER on September 5, 1991.

On January 31, 1992, Philadelphia filed an appeal from DER's assessment with this Board. In it, Philadelphia says the September 5, 1991 Conditional Approval on which DER bases this assessment is invalid and not in accordance with law. It avers that certain conditions in the Conditional Approval are not in accordance with the law, are an abuse of DER's discretion and are beyond the scope of DER's regulatory authority. It also says DER's determination that Philadelphia violated provisions of the Conditional Approval was in error and not in accordance with law and that the assessment of $15,000 was arbitrary, capricious, unreasonable and excessive.

Thereafter, as ordered, Philadelphia filed its Pre-Hearing Memorandum. In its Pre-Hearing Memorandum Philadelphia recites the issuance of DER's Conditional Approval and Philadelphia's appeal therefrom to this Board. It then goes on in part to attack all 13 conditions in the Conditional Approval and to specifically attack Conditions 5, 7, 11 and 12. It is for alleged violations of Conditions 5, 7 and 12 that DER assessed the civil penalty at issue here.

Thereafter, DER filed the instant Motion. The motion does not challenge Philadelphia's right to question DER's allegations of violations of these conditions or its right to query as to the amount of the penalty assessed for the alleged violations but attacks Philadelphia's challenges to the conditions themselves. DER argues the doctrine of administrative finality bars Philadelphia from raising in this appeal the issues which have been raised or which could have been raised in the appeal from DER's Conditional Approval docketed at EHB Docket No. 91-420-E. It seeks to limit the issues in

this appeal so as to exclude challenges to these conditions in this proceeding.

In the Memorandum of Law accompanying its Motion DER asserts the doctrine of administrative finality bars any party failing to file a timely appeal from a DER action, from collaterally attacking that action in a subsequent proceeding to enforce it. DER then contends it is Philadelphia's intention to challenge DER's Conditional Approval in this civil penalty assessment appeal and that Philadelphia is entitled to a single bite of the apple, i.e., it can challenge DER's Conditional Approval in the appeal at Docket No. 91-420-E only.

On June 2, 1992 Philadelphia faxed us its response to DER's Motion. In it, Philadelphia asserts DER knew or should have known from the Notice of Appeal that these issues were being raised here so there is no prejudice to DER in their being specified for the first time in Philadelphia's Pre-Hearing Memorandum. Philadelphia also asserts the doctrine of administrative finality should not bar Philadelphia raising this issue because: (a) Board opinions issued between the date on which DER conditionally approved Philadelphia's Act 101 Plan (September 5, 1991) and the present have clarified Philadelphia's rights and the law; (b) Philadelphia did not know the extent it was aggrieved by DER's actions until the penalty was assessed; (c) the conditional approval's issuance by DER is different from what occurred in the other appeals where the doctrine of administrative finality was applied; and (d) the Conditional Approval, DER's notice to Philadelphia of its violation of that approval and the instant civil penalty assessment should be considered a "single" action by DER in terms of their impact on Philadelphia, thus that the doctrine does not apply.

On June 17, 1992 we issued an Opinion and Order dismissing Philadelphia's appeal from DER's Conditional Approval docketed at EHB 91-420-E because it was not timely filed and thus we lacked jurisdiction to hear it under Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). We point this out because of its impact on this appeal and the merits of this motion.[1]

When we issued that opinion, the only challenge to DER's Conditional Approval which might have been timely filed, was ended. DER's action in conditionally approving Philadelphia's Act 101 Plan became final. Because DER's action on the Act 101 Plan is final, the doctrine of collateral estoppel bars an attack on the conditions in DER's approval in this appeal from its civil penalty assessment. George and Barbara Capwell v. DER, 1987 EHB 174; Pittsburgh Coal and Coke, Inc. v. DER et al., 1986 EHB 704; Antrim Mining, Inc. v. DER, 1988 EHB 105; Toro Development Company v. Commonwealth, 56 Pa. Cmwlth. 471, 425 A.2d 1163 (1981).

It is true that this doctrine cannot be universally applied in all matters coming before us. For example, in Kent Coal Mining Company v. Commonwealth, DER, 121 Pa. Cmwlth. 149, 550 A.2d 279 (1988) ("Kent"), the Commonwealth Court reversed this Board and, based on the language in Section 18.4 the Surface Mining Conservation And Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.22 and 25 Pa. Code §86.202(a), allowed an attack on the merits of the underlying violations in an appeal from a civil

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[1]We previously issued this Opinion and Order Sur DER's Motion to Limit Issues on June 12, 1992, but, since the Opinion and Order was inadvertently issued prior to the issuance of our Opinion and Order Sur Timeliness of Appeal at Docket No. 91-420-E, we have withdrawn our June 12 Order and issued the Opinion and Order at docket No. 91-420-E so that upon reissuance of this Opinion and Order the two opinions are issued in the proper sequence.

penalty assessment based on those violations despite the lack of an appeal from the prior DER administrative order finding Kent Coal had violated certain regulations. In accord with Kent, *supra*, see Gerald Booher v. DER, 1990 EHB 285 ("Booher"). In Kent and Booher, however, these were statute sections and regulations expressly authorizing such subsequent attacks. There are neither regulations nor statute sections which authorize such collateral attacks where the appeal ~~is~~ from a civil ~~penalty~~ ~~assessed~~ under Act 101. Accordingly, Kent and Booher are distinguishable from the scenario in the instant appeal.[2]

As to Philadelphia's argument, citing Dithridge House Association v. Commonwealth, DER, 116 Pa. Cmwlth. 24, 541 A.2d 827 (1988), that the policy of equitable administration of laws overrides the doctrine of administrative finality, we point out that this opinion is not based on the doctrine of administrative finality. Further, the statute involved in that appeal had been amended to exclude Dithridge House Association from the permit requirements of that Act, but the amendment became law after the permit application was denied so the court held it would be inequitable to now bar the appeal challenging the need for a permit based on a permit denial under the unamended statute. No such statutory change has occurred here. Indeed the only changed circumstance pointed to by Philadelphia is our decision in Washington County v. DER, ~~EHB~~ Docket No. 91-168-MJ (Opinion and Order issued April 2, 1992). That opinion declared that DER lacked the authority to impose certain conditions it placed in Washington County's Act 101 Plan. The

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[2]Philadelphia's Memorandum of Law cites Bologna Mining Company v. DER, 1989 EHB 270, and argues a different interpretation of Kent. Because the language in the statute and regulation quoted by the Court in Kent as grounds for the Court's decision there does not appear in Act 101, Bologna Mining Company, *supra*, does not apply here, either.

Washington County, *supra*, decision is no basis for invocation of that policy here because Philadelphia could have timely challenged all 13 conditions placed on its Act 101 Plan by DER but failed to do so. Its challenge could have been for the same reasons advanced by Washington County to the extent the conditions are the same (to the extent they are not, that opinion is irrelevant to the instant proceeding). Moreover, if we were to hold otherwise we would be authorizing new appeals whenever subsequent opinions by this Board further interpreted any particular statutes or regulations and no DER action would ever be able to be said to be considered final.[3]

ORDER

AND NOW, to wit, this 18th day of June, 1992 it is ordered that DER's Motion To Limit Issues is granted and Philadelphia is prohibited from offering this Board evidence in this appeal which attacks the validity of the conditions contained in DER's September 5, 1991 Conditional Approval of Philadelphia's Act 101 Plan.[4]

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[3]In an attack on the doctrine of administrative finality here, Philadelphia argues a change in circumstance between the time of issuance of DER's initial order and the subsequent enforcement proceeding allows an attack on the initial order. In support of this contention it cites Arthur Richards Jr., M.D. et al. v. DER et al., 1990 EHB 382 ("Richards") and The Florence Mining Company v. DER, 1991 EHB 1301 ("Florence"). Neither Richards nor Florence says this. Richards allows only those challenges to a renewal of a permit arising from evidence not available when the permit was first issued. In Florence, where a permit was issued and later reissued for a larger area, we denied summary judgment to DER because it failed to make the requisite showing to be entitled to such a judgment. We did not authorize subsequent challenges to prior unappealed permits in ignorance of the doctrine of administrative finality. Finally, we point out we have not decided the merits of this motion based on application of this doctrine, so these cases are inapplicable.

[4]See note 1 on page 4 of the Opinion which accompanies this Order for the reason we have issued this amended order.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: June 18, 1992

cc: **Bureau of Litigation**
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For Appellant:
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M. DIANE SMIT
SECRETARY TO THE E

BIG B MINING COMPANY	:	
	:	
v.	:	**EHB Docket No. 83-215-G**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: June 19, 1992**

OPINION AND ORDER
SUR
PETITION FOR PAYMENT OF COUNSEL FEES, COSTS AND EXPENSES

Robert D. Myers, Member

Synopsis

A permittee seeking recovery of counsel fees, costs and expenses under section 4(b) of Pa. SMCRA in connection with a permit application proceeding must prove that DER's action was patently unjust and oppressive, a flagrant abuse of governmental power. In the absence of evidence that DER's action contained these elements, the Board denies the petition.

OPINION

This Petition was filed by Big B Mining Company, Inc. (Big B) on March 13, 1989 seeking legal fees, costs and expenses totalling $43,875.[1] The Board denied the Petition in an Opinion and Order issued March 12, 1990, holding that the Legislature did not intend the fee provisions of section 4(b)

[1] This amount includes time spent by Big B's legal counsel in connection with an appeal to Commonwealth Court. Our statutory authority is limited to proceedings before us. We have no authority to award fees and expenses arising out of court proceedings.

of the Pennsylvania Surface Mining Conservation and Reclamation Act (Pa. SMCRA), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.4(b), to apply to permittees in permit application proceedings. Our decision was reversed and the Petition was remanded by an Opinion and Order of the Commonwealth Court of Pennsylvania issued on August 27, 1991 at No. 740 C.D. 1990, ____ Pa. Cmwlth. ____, 597 A.2d 202 (1991). We must now reconsider Big B's Petition consistent with Commonwealth Court's ruling.

That ruling dealt only with the applicability of the fee provisions to permit application proceedings. It did not consider (because it was not before the Court in this case) the factors the Board is to evaluate in exercising the discretion given to it by the Legislature in section 4(b) of Pa. SMCRA. Our approach, historically, has been to seek guidance from the fee provisions of section 525(e) of the Federal Surface Mining Control and Reclamation Act (Fed. SMCRA), Public Law 95-87, 91 Stat. 447, 30 U.S.C.A. §1275(e), and from the so-called Costs Act, Act of December 13, 1982, P.L. 1127, 71 P.S. §2031 *et seq.*, as well as the regulations adopted under both statutes: *Sheesley v. DER et al.*, 1982 EHB 85; *James E. Martin v. DER*, 1986 EHB 101; *Jay Township et al. v. DER et al.*, 1987 EHB 36; *Robert Kwalwasser v. DER et al.*, 1988 EHB 1308; *Pearl Marion Smith v. DER et al.*, 1990 EHB 1281.

Commonwealth Court was called upon to review only one of these decisions - *Robert Kwalwasser v. Commonwealth, Dept. of Environmental Resources et al.*, 131 Pa. Cmwlth 77, 569 A.2d 422 (1990). While the Court upheld our use of the "prevailing party" test which we borrowed from Fed. SMCRA and the Costs Act, it did not discuss the propriety of our appropriating the test from these sources. When Big B's Petition was first before us, we denied it primarily because permit application proceedings are not included in the fee provisions of Fed. SMCRA and the Costs Act. As noted at the outset,

Commonwealth Court rejected this reasoning. While the import of the Court's decision is open to argument, we interpret it to mean just what it says - that it is improper for the Board to pay heed to the provisions of other statutes when the language of Pa. SMCRA is clear and unambiguous. So construed, *Big B* (dealing with what proceedings are covered by section 4(b) of Pa. SMCRA) does not affect *Kwalwasser* (dealing with the exercise of our discretion in covered proceedings).

Under Fed. SMCRA a permittee may recover fees and expenses when the government or private party engages in bad faith for the purpose of harassing or embarrassing the permittee: 43 CFR §4.1294. Under the Costs Act, an applicant must show that the position of the government agency was not substantially justified. Both terms suggest, at the least, that the agency action must amount to more than an abuse of discretion. It must be the type of governmental action that goes beyond the realm of reasonableness. In the absence of any other standard imposed on us by section 4(b) of Pa. SMCRA, we elect to apply a similar standard here. While not requiring a showing of bad faith, we will insist that a permittee convince us that DER's action was patently unjust and oppressive, a flagrant abuse of governmental power.

Big B's Petition does not contain any allegation concerning the nature of DER's action, relying simply on the allegation that Big B is the prevailing party. While prevailing party status is essential, it is not enough where a permittee is involved. We have reviewed the proceedings and conclude that, while its legal position was rejected, DER's action did not contain the elements described above. Accordingly, we reject Big B's Petition.

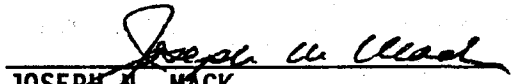
ORDER

AND NOW, this 19th day of May, 1992, it is ordered that the Petition for Payment of counsel Fees, Costs and Expenses, filed by Big B Mining Company, Inc., is denied.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

Board Chairman, Maxine Woelfling, and Board Member, Richard S. Ehmann, are recused.

DATED: June 19, 1992

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M. DIANE SMIT
SECRETARY TO THE E

RAYMOND G. OSTROWSKI	:	
	:	
v.	:	**EHB Docket No. 91-561-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: June 19, 1992**

OPINION AND ORDER
SUR
MOTION TO DISMISS FOR LACK OF JURISDICTION

Robert D. Myers, Member

Synopsis

The Board dismisses an appeal filed beyond the 30-day period provided in 25 Pa. Code §21.52(a) because it has no jurisdiction to entertain it.

OPINION

Raymond G. Ostrowski (Appellant) filed a Notice of Appeal on December 23, 1991 seeking review of the action of the Department of Environmental Resources (DER) denying coverage for damages under Appellant's Mine subsidence Insurance policy. The action was taken in a letter dated November 15, 1991. On March 11, 1992 DER filed a Motion to Dismiss for Lack of Jurisdiction to which Appellant has filed no response.

In its Motion, DER alleges that the denial letter was sent to Appellant by certified mail which Appellant received on November 18, 1991; that the Notice of Appeal was filed with the Board on December 23, 1991; that, since this is more than 30 days beyond the date when Appellant was notified of

DER's action, the appeal is untimely. DER requests that the appeal be dismissed for lack of jurisdiction. Attached to the Motion are two sworn affidavits with attachments. One of the attachments is a copy of the U.S. Postal Service Domestic Return Receipt for certified mail, reflecting a delivery date of November 18, 1991 and Appellant's signature.

As noted, Appellant filed no response to DER's Motion. The allegations, therefore (which are amply supported), will be accepted as true. It is clear that the appeal must be dismissed. In order for Appellant to invoke our jurisdiction, he was required to file his Notice of Appeal within 30 days after receiving notice of DER's action: 25 Pa. Code §21.52(a); *Rostosky v. Commonwealth, Dept. of Environmental Resources*, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). That 30-day period began to run on November 18, 1991 and ended on December 18, 1991, a Wednesday. Appellant's Notice of Appeal was received five days later on December 23, 1991.

Since Appellant has made no request for an appeal *nunc pro tunc* and has not otherwise stated any reasons for missing the filing deadline, it is unnecessary for us to consider an exception to §21.52(a).

ORDER

AND NOW, this 19th day of June, 1992, it is ordered as follows:

1. DER's Motion to Dismiss for Lack of Jurisdiction is granted.

2. Appellant's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
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EHB Docket No. 91-561-MR

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 19, 1992

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M. DIANE SMI
SECRETARY TO THE

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
v.	:	EHB Docket No. 91-181-CP-F
CHAPIN & CHAPIN, INC.	:	Issued: June 22, 1992

OPINION AND ORDER SUR MOTION FOR SANCTIONS

By Terrance J. Fitzpatrick, Member

Synopsis

A motion for sanctions filed by the Department of Environmental Resources (DER) is granted in part and denied in part. The Board will impose sanctions when a party repeatedly violates the discovery rules, even though the party has not violated a Board Order compelling discovery. Instead of barring the Defendant from introducing any evidence, however, the Board elects only to prohibit testimony from one of Defendant's witnesses.

OPINION

This proceeding involves a complaint for civil penalties filed by DER pursuant to Section 9.1 of the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, as amended, 35 P.S. §4009.1. The Defendant is Chapin and Chapin, Inc. (Chapin), an Ohio Corporation which operated a portable batch

concrete manufacturing plant in Lycoming Township, Lycoming County, during 1990.[1]

This Opinion and Order addresses a motion for sanctions filed by DER. This motion is based upon several alleged violations by Chapin of the rules governing discovery. DER contends that Chapin only responded to DER's request for production of documents and first set of interrogatories after DER filed motions to compel, which the Board granted. In addition, DER argues that Chapin failed to produce Bruce Chapin for deposition, despite DER's serving of several notices of deposition upon Chapin. More specifically, DER avers that Chapin failed to produce Bruce Chapin for deposition on February 11, 1992, despite the Board's denial on February 10, 1992 of Chapin's motion for protective order. DER asserts that, following the Board's denial, it issued a revised notice to depose Bruce Chapin on March 24, 1992, but that Chapin refused to honor this notice as well.

Chapin filed a response to DER's motion for sanctions, asserting that sanctions are inappropriate because it has provided the discovery sought by DER. Chapin argues, specifically, that the delay in its response to DER's interrogatories was due to a serious illness in Bruce Chapin's family. Chapin contends that it sought an extension from DER on this basis, but that DER refused to acquiesce. With regard to DER's request for production of documents, Chapin asserts that it informed DER that the documents were available for inspection and copying at a mutually convenient time. Finally, with regard to the deposition of Bruce Chapin, Chapin asserts that the delay in conducting this deposition was due to DER's refusal to subpoena Mr. Chapin. Chapin argues that DER was required to serve a subpoena (as opposed to sending

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[1] Chapin supplied concrete in connection with a PennDOT road project. The precise period during which the plant was operated is in dispute.

a "notice of deposition") because Mr. Chapin, an Ohio resident, is not a party to this proceeding. Chapin further asserts that it was under no obligation to produce Bruce Chapin for deposition on February 11, 1992 because the Board's February 10, 1992 Order, while denying Chapin's motion for protective order, did not order Bruce Chapin to appear. Moreover, Chapin asserts that the notice of deposition improperly identified Bruce Chapin, rather than Chapin and Chapin, Inc., as the deponent.

The Board's rules provide that the Board may impose sanctions upon a party for failure to abide by a Board Order or a Board rule of practice and procedure. 25 Pa. Code §21.124. The Board's rules further provide that discovery in Board proceedings shall be in accord with the Pennsylvania Rules of Civil Procedure (Pa.R.C.P). 25 Pa. Code §21.111. Rule 4019, Pa.R.C.P., governs sanctions for failure to comply with the discovery rules. Under this rule, a court may impose sanctions for a party's failure to "make discovery or to obey an order of court respecting discovery." Pa.R.C.P 4019(a)(1)(viii).

In the present case, we find that sanctions are appropriate due to Chapin's repeated violations of the rules governing discovery. First, Chapin failed to comply with the discovery rules regarding interrogatories. Chapin violated Pa.R.C.P 4006(2) by failing to serve answers or objections to DER's interrogatories within thirty days of Service.[2] Chapin's argument that DER unreasonably refused to grant an extension for answering the interrogatories falls on deaf ears, at this point, because Chapin did not file either objections or a motion for protective order within the thirty day response period. See, Pa.R.C.P 4019(a)(2). Moreover, we note that after Chapin filed

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2 DER served the interrogatories on or about September 9, 1991. Chapin did not answer the interrogatories until November 22, 1991 - after DER filed a motion to compel.

answers to DER's interrogatories, DER filed another motion to compel - contending the answers were incomplete. The Board granted this motion on February 10, 1992, compelling Chapin to submit complete answers.

In addition, Chapin failed to comply with the rules with regard to DER's request for production of documents. Pa.R.C.P 4009(b)(2) requires that the party upon whom such a request is served shall serve a written response within thirty days of receiving the request. DER filed a motion to compel production of documents on January 28, 1992, and Chapin filed a response on February 17, 1992 - admitting that it had not filed a formal response to DER's request for production. As a result, the Board issued an Order on February 21, 1992, granting DER's motion to compel.[3]

Finally, and most importantly, Chapin did not comply with the discovery rules with regard to DER's attempts to depose Bruce Chapin. Pa.R.C.P 4019(a)(1)(iv) provides that the court may impose sanctions if:

> a party or an officer, or managing agent of a party or a person designated under Rule 4007.1(e) to be examined, after notice under Rule 4007.1, fails to appear before the person who is to take his deposition.

Since Chapin admits that Bruce Chapin is an officer of Chapin (motion for protective order dated February 7, 1992, para. 8), it appears, at first blush, that Chapin is subject to sanctions for failing to produce Bruce Chapin on five separate dates for which DER served notices of deposition. Chapin argues, however, that it was not obliged to produce Bruce Chapin in accord with DER's notices because Mr. Chapin is not a party to this proceeding. Accordingly, Chapin contends that Mr. Chapin was only subject to deposition if

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3 The parties disagree over whether Chapin, despite its failure to file a formal response to DER's request, made a legitimate offer to allow DER to inspect and copy the documents prior to our granting of DER's motion to compel. We are unable to resolve this disagreement on the record before us.

DER served a subpoena upon him and agreed to pay his reasonable expenses, citing Pa.R.C.P 4007.1(a).

Chapin's argument is unpersuasive. DER was not required to resort to the procedure for deposing non-parties in order to depose Bruce Chapin - an officer of Chapin. This conclusion is obvious on the face of Pa.R.C.P 4019(a)(1)(iv), which states that sanctions may be imposed if an officer of a party fails to appear for a deposition after notice under Pa.R.C.P 4007.1.

We believe that the above violations of the discovery rules warrant sanctions, even though Chapin has not violated a Board Order compelling discovery.[4] Both the Courts and the Board have noted that, in practice, sanctions are not usually imposed unless a party defies an order compelling discovery. See, Griffin v. Tedesco, 355 Pa. Super. 475, 513 A.2d 1020, 1024 (1986), Donan v. DER, 1990 EHB 1601, 1605. However, the Courts have stated that Pa. R.C.P. 4019(a)(1) allows imposition of sanctions for failure to comply with the discovery rules so long as the severity of the sanction matches the severity of the violation. Griffin, 513 A.2d at 1023, Dunn v. Maislin Transport Limited, 310 Pa. Super. 321, 456 A.2d 632, 634 (1983). In the instant case, we will not allow Chapin to escape sanctions on the basis that its behavior could have been worse. While Chapin did, ultimately, provide the discovery sought by DER, it certainly had to be dragged out of them. Sanctions are necessary to express our disapproval of this behavior, and to discourage dilatory tactics in other proceedings.

Having decided that sanctions are appropriate, we must next decide

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4 Chapin's failure to produce Bruce Chapin on February 11, 1992, despite the Board's denial of its motion for protective order, cannot, technically, be characterized as disobeying a Board Order. Pa.R.C.P. 4012(a) provides that a court may, in addition to denying a motion for protective order, order that a party provide discovery.

what the sanctions should be. DER requests that we preclude Chapin from presenting evidence regarding any of the allegations in DER's Complaint and from presenting evidence regarding the allegations in Chapin's Answer and New Matter. Imposition of this sanction would limit Chapin's role at the hearing to cross-examining DER's witnesses. In our view, this sanction is more severe than Chapin's behavior warrants; such a sanction should be reserved for a situation where a party has disregarded a Board Order compelling discovery. Instead, we will bar Chapin from introducing any testimony from Bruce Chapin. This is appropriate since Chapin's failure to produce Bruce Chapin for deposition was the most serious of Chapin's violations of the discovery rules. We believe that this sanction is appropriate in light of the violations of the discovery rules by Chapin.[5]

Accordingly, we enter the following Order.

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5 DER submitted a copy of Bruce Chapin's deposition transcript to the Board on June 16, 1992 (in compliance with a Board Order dated June 11, 1992), and we have read this transcript before issuing this Opinion and Order. We have not considered, however, the assertions raised by DER in its cover letter accompanying the deposition transcript.

ORDER

AND NOW, this 22nd day of June 1992, it is ordered that:

1) DER's motion for sanctions is granted in part and denied in part.

2) Chapin is barred from introducing testimony from Bruce Chapin at the hearing on the merits.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: June 22, 1992

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jm

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M. DIANE SMITH
SECRETARY TO THE BOARD

RUTH S. BODY	:	
	:	
v.	:	EHB Docket No. 88-498-F
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and DELAWARE COUNTY SOLID WASTE AUTHORITY,	:	
Permittee	:	Issued: June 23, 1992

OPINION AND ORDER SUR MOTION FOR SUMMARY JUDGMENT, AND CROSS-MOTION FOR SUMMARY JUDGMENT

By Terrance J. Fitzpatrick, Member

Synopsis

The Board denies the Appellant's motion for summary judgment, and grants the Permittee's cross-motion for summary judgment. Under the Eminent Domain Code, title to the mineral rights underlying the area of the proposed landfill expansion passed from the Appellant to the Permittee at the time the Permittee filed a declaration of taking in the Court of Common Pleas. Therefore, the Department of Environmental Resources (DER) was not precluded from granting the permit by 25 Pa. Code §273.120(b), which requires that the permit applicant either own such mineral rights or have an agreement with the owner providing that mining will not be conducted.

OPINION

This is an appeal by Ruth S. Body (Body) from DER's granting of a permit application allowing the expansion of the Colebrookdale Landfill in Earl Township, Berks County. The recipient of this permit was the Delaware County Solid Waste Authority (Authority). In her appeal, Body contends that

under 25 Pa. Code §273.120(b), DER could only grant the permit if it found that the Authority either owned the mineral rights beneath the landfill or had an agreement with the owner providing that mining would not occur. Body contends that she owns mineral rights beneath the proposed area of the expansion, and that the Authority filed a "declaration of taking" in the Court of Common Pleas of Berks County. Body further asserts that she has filed preliminary objections to the declaration of taking, and that until these preliminary objections are ruled upon by the Court, no determination can be made that the Authority is the owner of the mineral rights. Therefore, Body contends that DER erred in concluding that the Authority owned the mineral rights.

This Opinion and Order addresses Body's motion for summary judgment and the Authority's cross-motion for summary judgment. In her motion, Body argues that the Authority's filing of a declaration of taking did not pass title to the Authority because the declaration was not properly filed and because proper security was not filed. See, Section 402 of the Eminent Domain Code (Code), Act of June 22, 1964, P.L. 89, as amended, 26 P.S. §1-402. Alternatively, Body argues that if title did pass to the Authority, the Berks County Court has authority to revest title in Body if she prevails on her preliminary objections. See, Section 406(e) of the Code, 26 P.S. §1-406(e). Therefore, Body argues that DER should not have issued the permit until the Authority could show that Body's preliminary objections had been dismissed in a "final non-appealable decision." (Body motion for summary judgment, para. 12.)

In its cross-motion for summary judgment, the Authority argues that the Board lacks jurisdiction to entertain Body's appeal because the Code vests

exclusive jurisdiction over property condemnation matters in the courts of common pleas. See Sections 303 and 401 of the Code, 26 P.S. §§1-303, 1-401. The Authority contends that the Board has held that it lacks jurisdiction over title disputes, citing Swanson v. DER, 1984 EHB 681. The Authority further argues, in the alternative, that it owns the mineral rights because title to the rights passed immediately to the Authority when it filed the declaration of taking, citing Section 402(a) of the Code, 26 P.S. §1-402(a).

The Board may grant summary judgment only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Pa.R.C.P. No 1035(b), Ingram Coal Co. v. DER, 1990 EHB 395.

The essential facts here are undisputed. Body acknowledges in her notice of appeal, and both parties concede in all of their filings seeking summary judgment, the following facts: that the Authority has filed a declaration of taking, that Body has filed preliminary objections to the declaration, and that the Court has not yet ruled on the preliminary objections. The only questions in this proceeding are legal - does the Board have jurisdiction to decide the question presented here, and, if so, did DER err in concluding that the Authority owned the mineral rights in the area of the landfill's expansion.

On the jurisdictional question, we find that while we do not have jurisdiction to adjudicate the parties' rights under the Eminent Domain Code, we do have jurisdiction to interpret and evaluate the Code to the extent necessary to rule upon ownership of the mineral rights under 25 Pa. Code §273.120(b). This conclusion is consistent with Board precedent. See,

Swanson v. DER, 1984 EHB 681, 682, Cooper v. DER, 1982 EHB 250, 257-259. In Cooper (which was cited with approval in Swanson), DER had denied an encroachment permit because the applicant had not secured releases from owners of affected riparian property, as required by DER's regulations. The applicant disputed DER's assertions regarding ownership of the affected property. The Board concluded that while it lacked authority to adjudicate title to the property in question, that it could evaluate the ownership question as necessary to determine whether DER's action was consistent with its regulation. Cooper, 1982 EHB at 258, 259. This conclusion was necessary in order for the Board to carry out its statutory obligation to review and rule upon actions of DER. *Id.*

The analysis in Cooper is equally applicable here. Unless the Board can evaluate the ownership question - which requires us to evaluate the Eminent Domain Code - we cannot fulfill our responsibility to determine whether DER's action was consistent with 25 Pa. Code §273.120(b).

Having determined that we have jurisdiction to review the ownership question, we find that DER did not err in determining that the Authority owned the mineral rights beneath the area of the landfill expansion. Section 402 of the Eminent Domain Code, 26 P.S. §1-402, provides in relevant part:

> (a) Condemnation under the power of condemnation given by law to a condemnor, which shall not be enlarged or diminished hereby, shall be effected only by the filing in court of a declaration of taking, with such security as may be required under section 403(a), and thereupon the title which the condemnor acquires in the property condemned shall pass to the condemnor on the date of such filing, and the condemnor shall be entitled to possession as provided in section 407.

The Authority emphasizes the language that title "shall pass to the condemnor

on the date of such filing" in support of its position that it owns the mineral rights. Body, on the other hand, argues that this passing of title is conditional upon the condemnor filing "such security as may be required under section 403(a)." Body contends that sufficient security has not been filed, and that she has filed preliminary objections raising this issue.

We disagree with Body's argument that title did not pass to the Authority upon the date of filing the declaration of taking. The conclusion that title did pass, despite Body's preliminary objections regarding the adequacy of the security, is inescapable from an examination of Section 406 of the Code, 26 P.S. §1-406. This Section reads, in relevant part:

> (a) Within thirty days after being served with notice of condemnation, the condemnee may file preliminary objections to the declaration of taking. The court upon cause shown may extend the time for filing preliminary objections. Preliminary objections shall be limited to and shall be the exclusive method of challenging (1) the power or right of the condemnor to appropriate the condemned property unless the same has been previously adjudicated; (2) the sufficiency of the security; (3) any other procedure followed by the condemnor; or (4) the declaration of taking. Failure to raise these matters by preliminary objections shall constitute a waiver thereof.
>
> * * * *
>
> (e) The court shall determine promptly all preliminary objections and make such preliminary and final orders and decrees as justice shall require, including the revesting of title ...

It is clear from the language in subsection (e), authorizing the court to issue an order "revesting" title, that title passes to the condemnor even where adequate security has not been filed with the declaration of taking. If title did not pass automatically in this situation, there would be no need to

authorize the court to issue an order revesting title. Therefore, we find that title passed to the Authority upon its filing of the declaration of taking.

Body argues, in the alternative, that even if title did pass automatically to the Authority, that DER should not have issued the permit until her preliminary objections had been dismissed in a "final non-appealable decision." Body points out that until this time, there is a possibility that revesting of the title will occur.

We disagree with this argument. Under 25 Pa. Code §273.120(b), DER was called upon in this case to determine whether the Authority owned the mineral rights in question. Based upon our reading of the Eminent Domain Code, we have concluded that DER was correct in concluding that the Authority was the owner. Body cites no authority for the proposition that DER was compelled to defer its decision on the Authority's permit application based upon the bare possibility that she might be successful in having the Court of Common Pleas, upon review of her preliminary objections, revest title in her. In fact, this argument runs counter to Section 402(a) of the Code, 26 P.S. §1-402(a), which provides that title vests in the condemnor upon the filing of the declaration of taking.

Accordingly, we enter an Order denying Body's motion for summary judgment, and granting the Authority's cross-motion for summary judgment.[1]

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[1] In light of our granting summary judgment to the Authority, it is not necessary to discuss or rule upon the Authority's motion to dismiss and motion to strike or limit issues.

ORDER

AND NOW, this 23rd day of June, 1992, it is ordered that the motion for summary judgment filed by Ruth S. Body is denied, and the cross-motion for summary judgment filed by the Delaware County Solid Waste Authority is granted. It is further ordered that this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

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RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATE: June 23, 1992

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M. DIANE SMITH
SECRETARY TO THE BO

POLAR/BEK, INC.	:	
	:	
v.	:	**EHB Docket No. 91-387-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** June 23, 1992

OPINION AND ORDER SUR
MOTION FOR RECONSIDERATION

By Joseph N. Mack, Member

Synopsis

Polar/Bek's motion for reconsideration of the Board's order granting summary judgment to the Department of Environmental Resources based on the Board's finding that Polar/Bek's appeal was barred by the doctrine of administrative finality is denied. Polar/Bek's motion fails to present compelling and persuasive reasons justifying reconsideration under 25 Pa. Code §21.122.

OPINION

This matter originated with the filing of an appeal by Polar/Bek, Inc. ("Polar/Bek") on September 16, 1991 from an August 22, 1991 letter of the Department of Environmental Resources ("DER") refusing to conduct a start-up inspection of a spa and pool facility ("facility") because of Polar/Bek's failure to construct the facility in accordance with a special condition of

its construction permit requiring the installation of four surface skimmers. The letter also explained that an operating permit could not be issued until an inspection had been conducted verifying compliance with the construction permit conditions.

On January 24, 1992, DER filed a motion for summary judgment asserting that Polar/Bek's appeal was barred by the doctrine of administrative finality because Polar/Bek had failed to appeal the four-skimmer requirement at the time the construction permit had been issued. Polar/Bek responded to DER's motion on March 3, 1992 arguing that DER's July 2, 1991 letter approving the construction permit was not a final order and, thus, was not an appealable action.

In an Opinion and Order issued on April 29, 1992, the Board determined that the July 2, 1991 communication from DER was a final, appealable action and that Polar/Bek's failure to appeal the four-skimmer requirement at that time precluded Polar/Bek from challenging it in its appeal of DER's August 22, 1991 letter denying an operating permit to Polar/Bek. The Board, therefore, granted DER's motion for summary judgment and dismissed Polar/Bek's appeal.

The matter now before the Board is a motion for reconsideration filed by Polar/Bek on or about May 7, 1992. DER filed an answer to the motion on May 18, 1992.

In its motion, Polar/Bek repeats the argument made in its opposition to DER's summary judgment motion, that because the July 2, 1991 letter was one in a series of communications with DER regarding the facility and because it

contained no notice of appeal rights. it could not have been a "final" action of DER. Polar/Bek argues that the Board's holding will result in applicants having to appeal every communication from DER during the permit review process which appears to be adverse since, Polar/Bek argues, without the requirement that an appealable action contain a notice of appeal rights, it will be impossible to determine what does or does not constitute a final action of DER.

In its answer to Polar/Bek's motion for reconsideration, DER argues that Polar/Bek has failed to provide sufficient grounds for reconsideration as set forth in the Board's rules at 25 Pa. Code §21.122.

The Board's rules at 25 Pa. Code §21.122 provide in relevant part as follows:

> **§21.122 Rehearing or reconsideration**
> (a) The Board may on its own motion or upon application of the counsel, within 20 days after a decision has been rendered, grant reargument before the Board *en banc*. Such action will be taken only for compelling and persuasive reasons, and will generally be limited to instances where:
> (1) The decision rests on a legal ground not considered by any party to the proceeding and that the parties in good faith should have had an opportunity to brief such question.
> (2) The crucial facts set forth in the application are not as stated in the decision and are such as would justify a reversal of the decision. In such a case reconsideration would only be granted if the evidence sought to be offered by the party requesting the reconsideration could not with due diligence have offered the evidence at the time of the hearing...

25 Pa. Code §21.122(a); J. C. Brush v. DER, 1991 EHB 258.

Polar/Bek argues that the July 2, 1991 communication from DER was not a final appealable action. As noted hereinabove, this argument was raised by Polar/Bek in its response to DER's motion for summary judgment and was thoroughly examined by the Board in its April 29, 1992 Opinion and Order granting DER's motion, and, thus, is not grounds for reconsideration.[1]

Polar/Bek argues that a second reason for reconsidering our earlier decision is that it did not consult an attorney until after the appeal period for the July 2, 1991 communication had run and "[t]hus it would be purely speculative to question whether [the attorney] would have filed an appeal within 30 days of the July 2 communication if he had been consulted in time." In the aftermath of our April 29, 1992 Opinion and Order, however, Polar/Bek

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[1] Polar/Bek contends in its motion that

> There is some confusion as to which of the communications from DER is the "final", "appealable" communication which must be appealed within the 30 day period. DER's view is that it is the communication of July 2, 1991 [containing the construction permit for the facility], while the Appellant's view is that it is the communication of August 22, 1991 [containing the denial of the operating permit for the facility]. This Board has agred with DER's position. We would urge the Board to reconsider, and decide that it was the August 22, 1991, communication which started the running of the 30 day appeal period.

What Polar/Bek fails to understand is that both communications were "final", appealable actions because both contained a decision or determination by DER which affected Polar/Bek's personal or property rights, privileges, immunities, duties, liabilities, or obligations. 25 Pa. Code §21.2; Ed Peterson and James Clinger v. DER, 1990 EHB 1224.

argues that "[i]f the attorney for Polar/Bek were consulted at the inception of the contact with DER in a similar case, he would feel obligated to advise applicants to file a formal appeal with this...Board over each and every communication which had the appearance of being adverse." Whether Polar/Bek's attorney would have filed an appeal after the July 2, 1991 communication if he had been consulted earlier or whether he would give such advice to clients in future situations are irrelevant to the finding that the July 2 communication was a final, appealable action and are not grounds for reconsideration.

Because Polar/Bek has raised no grounds for reconsideration which are compelling and persuasive, as required by 25 Pa. Code §21.122, its motion for reconsideration must be denied. J. C. Brush, supra.; City of Harrisburg v. DER, 1989 EHB 365.

O R D E R

AND NOW, this 23rd day of June, 1992, it is hereby ordered that Polar/Bek's motion for reconsideration is denied.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
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RICHARD S. EHMANN
Administrative Law Judge
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JOSEPH N. MACK
Administrative Law Judge
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DATED: June 23, 1992

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M. DIANE SMITH
SECRETARY TO THE BOAI

BROWNING-FERRIS INDUSTRIES OF OHIO, INC.	:	
	:	
v.	:	EHB Docket No. 92-030-E
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES NORTHWEST SANITARY LANDFILL, INC. Intervenor, WASTE MANAGEMENT OF PENNSYLVANIA, INC., Intervenor and MERCER COUNTY SOLID WASTE AUTHORITY	: : : : : :	Issued: June 24, 1992

OPINION AND ORDER
SUR
TRI-COUNTY INDUSTRIES, INC.'S
MOTION FOR INTERVENTION AND CONSOLIDATION

By: Richard S. Ehmann, Member

Synopsis

In an appeal challenging the Department of Environmental Resources' (DER) approval of a revision to a county's solid waste plan which changed the primary landfill designation contained in the plan, the Board denies a Petition to Intervene. Where the petitioner is neither a permitted landfill owner nor applicant and alleges only that a related corporate entity has pending with DER for approval an application for a landfill permit, for which it would serve as a hauler, and DER has expressed its intention to deny this application, the petitioner's interest is not sufficiently substantial, immediate and direct as to meet the Board's standard for intervention.

Pagnotti Enterprises, Inc. d/b/a Tri-County Sanitation Company v. DER, EHB Docket No. 92-039-E (Opinion issued April 9, 1992).

Further, the Board denies the motion for consolidation of this appeal and another appeal filed by the petitioner at Docket No. 92-063-E without prejudice to this motion later being refiled since we have previously directed the parties to brief issues which will enable us to determine the scope of both appeals and thus whether consolidation is appropriate.

OPINION

The instant appeal arose when on January 16, 1992, DER approved a revision to the Mercer County Solid Waste Plan ("Revised Plan"), which plan was created pursuant to the Municipal Waste Planning, Recycling and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, No. 101, 53 P.S. §4000.101 *et seq.*

According to the "pleadings"[1] by the parties filed with regard to this Motion, the sole effect of the revision was to change the landfill which is the primary site for disposal of Mercer County's municipal waste from Waste Management of Pennsylvania, Inc.'s ("WMP") Lake View Landfill, located in Erie

[1]We have relied upon the uncontested factual allegations set forth in Tri-County Industry, Inc.'s Motion For Intervention and Consolidation, DER's Response and New Matter in opposition to this motion, and Tri-County Industries, Inc.'s Reply to New Matter. After receiving the Motion For Intervention and Consolidation, we advised the parties that any response thereto must be filed with the Board by May 29, 1992. We received DER's Response and New Matter on May 29, 1992. Again, we allowed all parties to respond thereto. Subsequently we also received a letter from intervenors Northwest Sanitary Landfill, Inc. and Lake View Landfill, only to clarify a factual allegation contained in DER's Response. No other parties have filed responses of any type. Accordingly, we decide this motion as if they agree with the factual assertions in these "pleadings" for purposes of disposition of this motion.

County,[2] to Northwest Sanitary Landfill, Inc.'s ("NSL") landfill, located in Butler County.[3] (Motion For Intervention and Consolidation at Paragraphs 4-6; DER's Response at Paragraphs 4-6).

BFIO appealed this approval of the "Revised Plan" when notice thereof was published in the Pennsylvania Bulletin. Thirteen days prior to the hearing on the merits of BFIO's appeal, Tri-County Industries, Inc. ("TCI") filed the instant Motion For Intervention And Consolidation. It seeks to allow TCI to intervene on BFIO's side and to allow this appeal and an appeal by TCI to be consolidated. In a conference telephone call with counsel for all parties, except counsel for BFIO, counsel indicated their clients opposed both intervention and consolidation. Accordingly, we cancelled the merits hearing in this appeal to allow these parties to file their responses to this Motion. Only DER has done so. Its Response contained New Matter[4] which averred a series of facts which DER contends show that TCI is not entitled to the relief sought in its Motion. Accordingly, we allowed TCI and the other parties to respond thereto. With this said we now turn to the issues raised in this Motion.

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[2]Under the revision, Lake View Landfill remains a backup disposal site (Motion For Intervention and Consolidation at Paragraph 6; DER's Response at Paragraph 6).

[3]NSL is owned by WMP (Motion For Intervention and Consolidation at Paragraph 4; DER's Response at Paragraph 4; Intervenor's letter dated June 9, 1992).

[4]New Matter is proper in fact pleading under the Rules of Civil Procedure as to pleadings only and not in motions and responses thereto.

Intervention

Citing Browning-Ferris Inc. v. Department of Environmental Resources, __ Pa. Cmwlth.____, 598 A.2d 1057 (1991), and Browning-Ferris, Inc. v. Department of Environmental Resources, __ Pa. Cmwlth.___, 598 A.2d 1061 (1991) (collectively "BFI's"), TCI says it has a direct interest in the outcome of the appeal and will gain or lose by operation of our decision. TCI claims it is attacking DER's approval of the Mercer County Solid Waste Plan for irregularities in its drafting, DER's approval and the selection process which selected those landfills as the sole disposal facilities. TCI avers it will gain if it has an opportunity to have its landfill selected as a designated landfill under this plan and will lose that chance and the economic benefit therefrom if BFIO's appeal is denied. In addition, TCI makes other allegations but they deal with consolidation rather than the holdings of BFIs.

In response, DER avers that previously TCI and DER settled differences over TCI's Mercer County Landfill through a Consent Order and Adjudication entered on April 17, 1990 by this Board in Tri-County Industries, Inc. v. DER, EHB Docket No. 89-607-E. (DER's New Matter at Paragraphs 4-5) According to DER, TCI is now obligated by that settlement to close this landfill and may no longer accept municipal waste there. (DER's New Matter at Paragraphs 7-10) DER also states that while another corporation has applied for a permit to operate a landfill at that site (on adjacent land), TCI has no applications for landfill permits pending with DER and TCI has failed to aver in its motion how its interest as a waste hauling company is affected by the outcome of BFIO's appeal. (DER's New Matter at Paragraphs 11, 13, 15-17) DER cites the test in Borough of Glendon v. Commonwealth, DER, __ Pa. Cmwlth.___, 603 A.2d 226 (1992) ("Glendon"), i.e., TCI's interest must be substantial,

immediate and direct to be allowed to intervene and attack DER's actions here, and concludes TCI should not be allowed to intervene. (DER's New Matter at Paragraphs 17-18)

In its response to these DER allegations, TCI admits them but says the current applicant for a landfill permit at the site of TCI's closed landfill is related to it as both corporations are owned by a common parent and, while separate entities, they both have an interest in seeing the Mercer Plan revised. (TCI's Reply to New Matter at Paragraph 13) TCI also avers that as a hauler it will save money if a permit is issued to the current applicant for a permit and that site is incorporated as a designated facility into Mercer County's plan. (TCI's Reply to New Matter at Paragraph 17) TCI also avers it sought incorporation of the applicant's landfill into this plan. (TCI's Reply to New Matter at Paragraph 17)

Clearly TCI is not entitled to intervene on the basis of its former landfill's continued existence. TCI admits it can no longer accept wastes for disposal there (TCI's Reply to New Matter at Paragraph 15) TCI is obviously monitoring the closed site. These facts do not give it standing under either the BFIs or Glendon. It also has no application for any new permits pending with DER which, if issued by DER, might give it some interest to protect.

The Motion To Intervene, standing alone, does not meet the test for intervention. It is repeatedly premised on the mistaken idea that TCI has a landfill interest, which it admits it does not. The only allegation which might convey standing is the unspecific allegation in TCI's Reply to New Matter that as a waste hauler TCI will save money if the other corporation's application for a landfill permit is approved by DER at some point in time in the future and, if Mercer's revised plan is further revised to authorize

disposal thereat, then TCI will save money. However, DER's New Matter indicates it has already notified the applicant for this new permit of its intent to deny that application and TCI admits this is so in its Reply to New Matter. (DER's New Matter at Paragraph 12; TCI's Reply to New Matter at Paragraph 12)

In Pagnotti Enterprises, Inc. d/b/a Tri-County Sanitation Company v. DER et. al., EHB Docket No. 92-039-E (Opinion issued April 9, 1992) ("Pagnotti"), we discussed Glendon and the BFIs and attempted to reconcile same.[5] We will follow that decision here and hope for some clarification from the Commonwealth Court soon. Using the "BFI/Glendon" test in Pagnotti we must deny the Motion as it pertains to intervention. TCI has not shown a sufficiently substantial, immediate and direct interest to be allowed to intervene in favor of BFIO's attack on DER's decision. There are too many contingencies to TCI's interest to find it is immediate and, since it is not a permitted landfill owner or applicant, its interest does not appear sufficiently direct, either.

Consolidation

DER approved Mercer County's original Solid Waste Plan on March 6, 1991 (Paragraph 6 of DER's Response and New Matter). Neither our docket nor TCI's Notice of Appeal at Docket No. 92-063-E or Motion suggests any timely appeal of that plan. Nothing in the "pleadings" in the instant appeal suggests any timely appeal by BFIO from DER's March 6, 1991 approval of this

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[5]In that opinion we did address, by footnote, the unreported opinion in Paradise Watch Dogs v. Commonwealth, DER, No. 2143 C.D. 1990, but not the subsequent opinion of Commonwealth Court in Wheelabrator Pottstown, Inc. v. Commonwealth, DER, No. 1451 C.D. 1991 (Opinion issued April 20, 1991) ("Wheelabrator"). Unfortunately, Wheelabrator does nothing to clarify the issues concerning the test for intervention.

original plan, either. Rather, BFIO appealed from the DER approval of the revision to the plan which makes NSL's landfill the primary disposal site for Mercer County's waste with WMP's Lake View Landfill as its backup site. While TCI's Notice of Appeal at Docket No. 92-063-E attacks the Mercer County Solid Waste Plan in fact, it also clearly says it is appealing from the DER's January 16, 1992 Approval of this revision. If TCI's appeal is any type of challenge to the Mercer County Plan as unrevised, it clearly may have serious problems as to untimeliness and our ability to hear same. Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). Despite these potential problems as to a challenge to the unrevised plan, the January 16, 1992 DER approval of a revision appears to be clearly challengable by timely appeals. Arthur Richards, Jr., V.M.D. v. DER et al., 1990 EHB 382 ("Richards"); The Florence Mining Company v. DER, 1991 EHB 1301 ("Florence"). Insofar as these appeals by BFIO and TCI challenge this revision only, then a strong case exists for consolidation of the appeals for trial. Of course that does not mean TCI could offer evidence as to issues raised solely by BFIO, but it is clear that there are common witnesses and issues in the two appeals so judicial economy could be served by consolidation.

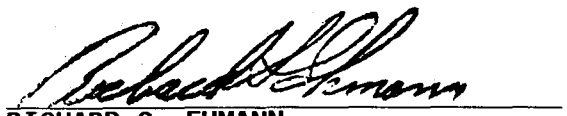
By orders in both the BFIO and TCI appeals dated June 16, 1992, we have asked the parties therein to brief certain issues relating to the issues raised by Richard and Florence as applied to those appeals and the scope of the relief we give if the appeals are successful. We also directed the parties in TCI's appeal at Docket No. 92-063-E to address whether TCI had standing to raise certain issues in light of the status of its closed landfill and the lack of any new applications for permits in its name. Upon receipt of the briefs of the parties in those appeals on these issues, we will be able to

determine the scope of both appeals, the extent of the relief we may grant and the question of TCI's standing. Accordingly, we deny TCI's Motion at this time without prejudice to it to remake the motion at a point subsequent to our determination of the issues to be addressed by those briefs and we issue the following Order.

ORDER

AND NOW, this 24th day of June, 1992, the TCI's Motion For Intervention And Consolidation is denied as to intervention and denied without prejudice to its being refiled subsequently as to consolidation as set forth in the foregoing opinion.

ENVIRONMENTAL HEARING BOARD



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: June 24, 1992

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M. DIANE SM
SECRETARY TO THE

ALTOONA CITY AUTHORITY	:	
	:	**EHB Docket No. 90-570-MJ**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** June 26, 1992

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

By Joseph N. Mack, Member

Synopsis

Summary judgment is granted to the Department of Environmental Resources ("DER") on the issue of whether the Altoona City Authority ("the Authority") is an "owner or occupier" within the meaning of §316 of the Clean Streams Law, 35 P.S. §691.316. However, summary judgment is denied on the issue of equitable estoppel and on the issue of whether the actions required to be taken pursuant to DER's order will result in a violation of the Hazardous Sites Cleanup Act, 35 P.S. §6020.101 *et seq.*, because questions of material fact remain and the law is not clearly in favor of DER.

OPINION

This matter was initiated with the December 27, 1990 filing of a notice of appeal by the Authority, seeking review of a November 26, 1990 order ("the order") of DER concerning the cleanup of two waste disposal pits located on the site of the Easterly Sewage Treatment Plant ("ESTP"), Blair County, Pennsylvania, which is currently operated by the Authority. According to

DER's order, the waste pits had been constructed at the ESTP site as early as 1953 and had been used throughout the 1950's and 1960's for disposal of hazardous and industrial waste. The Authority is under a 1989 consent decree with DER and the federal Environmental Protection Agency to construct certain improvements at the ESTP. The Authority began construction work in the summer of 1989 and in August 1989 notified DER of the existence of the two pits. DER conducted a preliminary investigation from August through November 1989 and determined that discharges from the waste pits had caused groundwater contamination and threatened to pollute a nearby river. DER's order of November 26, 1990 required the Authority to take measures to clean up the site.

On April 19, 1991, DER filed a motion for partial judgment asserting that the Authority had raised several baseless grounds in its appeal. The Authority submitted a brief in opposition to DER's motion on May 9, 1991. On August 8, 1991, the Board issued an Opinion and Order granting DER's motion in part and denying it in part. Judgment was granted to DER on the issue of the economic impact of its order. Judgment was granted in favor of the Authority with respect to a paragraph in DER's order dealing with enforcement action under the Hazardous Sites Cleanup Act ("HSCA"), Act of October 18, 1988, P.L. 756, 35 P.S. §6020.101 *et seq.* DER was denied judgment on the pleadings on the following issues: whether the actions the Authority was required to take pursuant to DER's order would violate the HSCA; the Authority's liability under §316 of the Clean Streams Law ("CSL"), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, at §691.316; and equitable estoppel.

The matter now before the Board is a motion for summary judgment filed by DER on March 17, 1992. The Authority filed an opposition to DER's motion on April 7, 1992, asserting that disputed issues remain regarding

material facts and the application of law to fact.

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035(b); Summerhill Borough v. Commonwealth, DER, 34 Pa. Cmwlth. 574, 383 A.2d 1320 (1978). Motions for summary judgment must be viewed in a light most favorable to the non-moving party. Robert C. Penoyer v. DER, 1987 EHB 131.

In the Opinion and Order of August 8, 1991, the Board denied judgment on the pleadings to DER on the issue of the Authority's liability under §316 of the CSL, 35 P.S. §691.316, because nowhere in the pleadings had it been clearly established that the Authority was an owner or occupier of the site in question, as required by §316. Section 316 reads in relevant part as follows:

> **§691.316. Responsibilities of landowners and land occupiers**
>
> Whenever the department finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the department may order the landowner or occupier to correct the condition in a manner satisfactory to the department or it may order such owner or occupier to allow a mine operator or other person or agency of the Commonwealth access to the land to take such action. For the purpose of this section, "landowner" includes any person holding title to or having a proprietary interest in either surface or subsurface rights...

35 P.S. §691.316

With its motion for summary judgment, DER has provided copies of a portion of the Authority's pre-hearing memorandum (Exhibit A to Motion), the

composite deed draft for the waste water treatment facility (Exhibit B to Motion), and a portion of the Authority's answers to DER's first set of interrogatories (Exhibit C to Motion), all of which establish that the Authority is the owner of the site involved in this appeal. According to the deed draft and the Authority's answers to DER's interrogatories, the Authority has been the owner of a major portion of the site on which the pits are located since 1950 and acquired the remaining balance from Penn Central Railroad in 1978, although it did not take over actual operation of the treatment facility until 1986. Moreover, the Authority's opposition to DER's motion begins by saying that "[t]he Authority does hold title to the land upon which the two waste pits which are the subject of DER's November 26, 1990 order are located." Thus, we find that the Authority is the owner of the site within the meaning of §316 of the CSL.

DER argues that once we have determined that the Authority is the owner of the site, pursuant to §316 we must find that it is liable for any condition existing at the site which is causing or is threatening to result in the pollution of groundwater or surface water.

As the Board stated in its Opinion and Order of August 8, 1991, fault is not a prerequisite for liability under §316 of the CSL, and an owner or occupier of property may be held liable for any condition on his or her property causing water pollution or a threat thereof, regardless of whether he or she caused or contributed to it. Altoona City Authority v. DER, 1991 EHB 1381, 1389; National Wood Preservers, Inc. v. Commonwealth, DER, 489 Pa. 221, 414 A.2d 37 (1980); Western Pennsylvania Water Co. v. Commonwealth, DER, 127 Pa. Cmwlth. 26, 560 A.2d 905 (1989), aff'd per curiam, 402 Pa. Super. 319, 586 A.2d 1372 (1991); Commonwealth, DER v. PBS Coals, Inc., 112 Pa. Cmwlth. 1, 534 A.2d 1130 (1987), appeal denied, 551 A.2d 218 (1988). Thus, as the owner of

the site, the Authority may be held liable under §316 for any condition at the site causing water pollution or a threat thereof, regardless of whether it caused or contributed to it.

However, the Authority argues that DER should be equitably estopped from ordering the Authority to clean up the site. The Authority contends that at the time DER issued the permit for construction of the ESTP, it was aware of the two waste pits on the site and had knowledge that construction would include excavation in the area of the pits. The Authority argues that DER acted improperly in issuing the permit, given the potential for causing a release from the pits, and in not requiring remediation of the site at that time, and, therefore, should be estopped from now ordering the Authority to remediate the site.

As noted in our August 8, 1991 Opinion and Order, it is firmly established that a governmental agency may not be estopped from performing its statutory duties and responsibilities. Commonwealth, DER v. Philadelphia Suburban Water Co., 135 Pa. Cmwlth. 283, 581 A.2d 984 (1990), allocatur denied 593 A.2d 427 (1991); F.A.W. Associates v. DER, 1990 EHB 1791. Thus, where an agency's representatives have been lax or negligent in carrying out their duties in the past, that cannot act to estop the agency from enforcing the law. F.A.W. Associates, supra at 1796. However, as also noted in our earlier Opinion and Order, there are certain cases where equitable estoppel may be asserted against a government agency. The elements which must be present in order for equitable estoppel to be applied against a government agency are as follows: the agency (1) must have intentionally or negligently misrepresented some material fact, (2) knowing or having reason to know that the other party would justifiably rely on the misrepresentation, and (3) inducing the other party to act to his detriment because of his justifiable reliance on the

misrepresentation. Yurick v. Commonwealth, 130 Pa. Cmwlth. 487, 568 A.2d 985, 989 (1989).

In the affidavit which accompanies the Authority's opposition (Exhibit A to Opposition), Andronic Pappas, the Authority's Chairman, states that on November 3, 1989, after the Authority discovered the existence of the waste pits, Mr. Pappas attended a meeting with Mark McClellan, then Deputy Secretary of DER. According to Mr. Pappas, at this meeting DER agreed to perform the clean-up and incineration of the hazardous waste in the pits.[1] The alleged agreement by DER to clean up the site was also referenced in a news release issued by DER on November 3, 1989. (Exhibit C to Opposition) The Authority asserts that in reliance upon this alleged agreement by DER, the Authority (a) gave DER access to conduct the investigation and clean-up at the ESTP; (b) provided DER with an area for the construction of an impoundment for the waste which was to be removed from the pits and gave DER permission to use the impoundment area to store the waste until DER could have it incinerated; (c) provided personnel and equipment for use by DER in conducting its investigation and remedial activities; (d) redesigned and rescheduled construction of improvements to the ESTP; and (e) refrained from supervising and overseeing investigation and remedial activity which the Authority believes could have been completed in less time and at less cost than under DER's supervision. (Exhibit A to Opposition) According to the Authority, instead of completing the clean-up and incineration of waste, DER filled the

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[1] In its opposition to DER's motion, the Authority also contends that at the November 3, 1989 meeting DER acknowledged the Authority's financial inability to pay for remedial work at the site. However, as the Board noted in its Opinion and Order of August 8, 1991 DER was under no obligation to consider the economic impact of its order on the Authority, and judgment was granted to DER on the issue of economic impact. Altoona City Authority, supra at 10.

impoundment to capacity, stopped excavating the waste from the pits, left the waste in the impoundment, and ordered the Authority to complete the clean-up.

In its motion, DER states that after the Authority notified DER of the existence of the waste pits and DER conducted its investigation thereof, DER took interim response action pursuant to the HSCA and then issued the November 1990 order to the Authority for the necessary additional abatement activity.

However, the Authority asserts that DER had knowledge of the existence of the waste pits at the site at least as early as February 1973 and was aware that the previous owner of the tract upon which the western pit is located, Penn Central Railroad, had improperly closed the pits in a manner which concealed their presence. Yet despite this knowledge, the Authority contends, DER approved design and construction plans and issued permits for construction of the ESTP which would cause a release from the pits, without any prior warning to the Authority of the presence of the pits.

DER does not address this argument in its motion. Nor are there sufficient facts before the Board to make a determination as to whether there is any merit to the Authority's claim or whether the claim provides sufficient grounds for applying equitable estoppel against DER. Because questions of material fact remain open with respect to the Authority's assertion of equitable estoppel and because this motion must be viewed in a light most favorable to the non-moving party, summary judgment is denied DER on the issue of equitable estoppel.

Finally, DER has moved for summary judgment regarding the Authority's claim that complying with DER's order would require it to violate provisions of the HSCA. While the Authority does not address this in its opposition to the motion, we must, nonetheless, deny DER's motion. Whether complying with

DER's order will result in a violation of the HSCA turns not only on the requirements of that statute, but also the reasonableness of the remediation measures required by DER's order. Since there are outstanding questions of material fact regarding the remediation measures, and because a motion for summary judgment must be viewed in the light most favorable to the Authority, we must deny summary judgment to DER on the HSCA issue.

ORDER

AND NOW, this 26th day of June, 1992, upon consideration of DER's motion for summary judgment and the Autnority's opposition thereto, it is ordered that summary judgment is granted to DER on the issue of "ownership" under §316 of the Clean Streams Law. However, summary judgment is denied with respect to the issues of equitable estoppel and the Hazardous Sites Cleanup Act.

ENVIRONMENTAL HEARING BOARD

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JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 26, 1992

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M. DIANE SMITH
SECRETARY TO THE BOARD

MCDONALD LAND & MINING COMPANY, INC. and ~~SKY HAVEN COAL~~, INC.	:	EHB Docket No. 89-096-MJ
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 2, 1992

OPINION AND ORDER SUR SECOND PETITION TO REOPEN RECORD

By Joseph N. Mack, Member

Synopsis

A second petition to reopen the record for the purpose of presenting additional evidence after the hearing has closed but before an adjudication has been rendered is denied for failure to demonstrate that there has been a material change in the facts such as would justify a reopening of the record.

OPINION

This matter was initiated with the filing of appeals by McDonald Land & Mining Company, Inc. ("McDonald") and Sky Haven Coal Company ("Sky Haven") on November 17, 1989 and December 12, 1989, respectively, challenging compliance orders issued by the Department of Environmental Resources ("DER") in connection with acid mine drainage allegedly found at a mine site located in Lawrence Township, Clearfield County. The appeals were consolidated on January 23, 1990.

A hearing was held on this matter on October 23-24, 1990, and January 28-29, 1991. Post-hearing and reply briefs have been submitted by the parties. An adjudication is pending.

On June 21, 1991 McDonald filed a Petition to Reopen Record alleging that new evidence warranted a reopening of the record. In an Opinion and Order issued on July 29, 1991, the Board denied the Petition because McDonald had not demonstrated (1) that circumstances had changed, (2) that it could not with due diligence have presented the evidence at the time of hearing, or (3) that the evidence was such as would compel a different outcome.

The matter now before the Board is a Second Petition to Reopen Record ("Second Petition") filed by McDonald on June 9, 1992. In it, McDonald has reiterated the arguments made in its earlier Petition with respect to seeps designated as "Seep 2-C" and "Seep 1-B". McDonald asserts that the record should be reopened to introduce evidence showing that Seep 2-C has completely dried and that Seep 1-B has "moved" 76.32 feet to the east to a location which McDonald designates as "Seep 2-B". McDonald also wishes to introduce evidence that a new seep, "Seep 3-B", appeared in the Spring of 1992 at a location 26.64 feet east of Seep 2-B. According to McDonald this demonstrates a further movement of Seep 1-B in an easterly direction. McDonald contends that these constitute material changes of fact which justify reopening the record.

Sky Haven filed objections to McDonald's Second Petition on June 29, 1992, disputing McDonald's allegations that Seep 1-B has migrated and that Seep 2-C has completely dried. Sky Haven contends that a damp area of ground remains at the location of Seep 2-C. With respect to Seep 1-B, Sky Haven contends that the overland flow is contained within the original area affected by the seep, although the point of flow continues to appear at somewhat varied locations depending on seasonal and weather conditions.

DER filed no response to McDonald's Second Petition.

Petitions to reopen the record for the purpose of supplementing it with additional evidence after the hearing has closed but before an adjudication has issued are governed by §35.231 of the General Rules of Administrative Practice and Procedure, 1 Pa. Code §31.1 *et seq.*, at §35.231. Spang & Company v. Commonwealth, DER, ____ Pa. Cmwlth. ____, 592 A.2d 815, 818 (1991), allocatur denied, ____ Pa. ____, 600 A.2d 543 (1991). Paragraph (a) of that section provides as follows:

> **§35.231. Reopening on application of party.**
> (a) *Petition to reopen.* After the conclusion of a hearing in a proceeding or adjournment thereof sine die, a participant in the proceeding may file with the presiding officer, if before issuance by the presiding officer of a proposed report, otherwise with the agency head, a petition to reopen the proceeding for the purpose of taking additional evidence. The petition shall set forth clearly the facts claimed to constitute grounds requiring reopening of the proceeding, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing.

1 Pa. Code §35.231(a). The decision to reopen a record is within the discretion of the administrative agency. Lower Providence Township v. DER, 1986 EHB 391, 393.

In its Second Petition, McDonald has reiterated the same evidence it sought to present by its original Petition to Reopen, the only differences being that another new seep (Seep 3-B) has allegedly appeared since its earlier Petition and that even more time has passed since the alleged drying-up of Seep 2-C. As noted above, Sky Haven disputes these allegations.

For the same reasons stated in our Opinion and Order on McDonald's first Petition, we find that McDonald has not presented grounds sufficient for

a reopening of the record. The new evidence which McDonald seeks to present, even if true, is not such a material change in facts as to justify reopening the record to take additional testimony thereon. As stated recently in Spang & Company v. DER, EHB Docket No. 87-042-E (Opinion and Order Sur Appellant's Second Petition to Reopen Record, issued June 16, 1992):

> ...there must be a point at which the parties are no longer engaged in gathering evidence and seeking its addition to the record so that this Board can render its adjudication without being confronted by successive petitions to reopen the record to introduce yet more evidence. A party cannot delay our resolution of a matter by continuing to generate new evidence after a merits hearing has been held. Otherwise, the administrative adjudication process of this Board could continue *ad infinitum*.

Id. at p. 5-6.

In conclusion, because McDonald has failed to present sufficient grounds which would justify a reopening of the record, its Second Petition must be denied.

O R D E R

AND NOW, this 2nd day of July , 1992, it is hereby ordered that the Second Petition to Reopen Record filed by McDonald Land & Mining Company, Inc. is denied.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: July 2, 1992

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

MEARLE E. GATES	:	
	:	
v.	:	EHB Docket No. 91-519-MJ
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and C & K COAL COMPANY, Permittee	:	Issued: July 2, 1992

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

By Joseph N. Mack, Member

Synopsis

Summary judgment is granted to the permittee in this appeal of DER's release of bonds posted by the permittee in connection with its surface mining operation. Although the appellant may have a cause of action against the permit for damages to the appellant's property allegedly caused by the permittee's blasting, DER is not required to withhold the release of bonds for any such alleged damage where the property in question is not located within the bonded area.

OPINION

This matter was initiated by Mearle E. Gates ("Gates") on December 2, 1991 with a notice of intent to file an appeal from the Department of Environmental Resources' ("DER's") November 19, 1991 letter advising Gates of DER's decision to release bonds posted by C & K Coal Company ("C & K") for its surface mining operation in Chest and White Townships, Cambria County. The letter state

in relevant part as follows:

> This letter is written in response to your letter dated November 5, 1991. William Wanco, Blasting Inspector, contacted you on November 12, 1991 and explained that bond release could not be held up for claims on blasting damage.
>
> The Department considers this bond release objection resolved and will proceed with recommendation for bond release...

The appeal was perfected on February 3, 1992 and stated Gates' objection as follows:

> My objections are due to the fact that C & K Coal Company have [sic] failed to recognize their responsibility for the damage they did to my property by blasting. Approximately $25,000.00.

The matter now before the Board is a motion for summary judgment filed by C & K on March 23, 1992.[1] In its motion, C & K states that the bonds which were released had been posted to insure reclamation of the area which C & K's mining had affected and to insure that the mining operations had not polluted the waters of the Commonwealth. C & K argues that, pursuant to §4(g) of the Surface Mining Conservation and Reclamation Act ("SMCRA"), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq., at §1396.4(g); §315 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., at §691.315; and 25 Pa.Code §86.174, the allegation that a surface mine operator failed to settle a blasting claim of a third party

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[1]Although C & K's motion is captioned "motion for summary judgment", the body of the motion refers to it as a "motion for judgment on the pleadings" or failure to state a cause of action upon which relief may be granted. Because, in ruling on C & K's motion herein, we rely on the affidavit and other supporting documentation accompanying the motion, we shall treat it as a motion for summary judgment. Davis Coal v. DER, EHB Docket No. 90-347-MJ (Opinion and Order Sur Motion for Judgment on the Pleadings/Motion for Summary Judgment issued February 21, 1991).

located off the bonded area does not constitute a basis upon which DER could deny the release of a surface mining bond.

The Board notified Gates of C & K's motion and advised him that any objections thereto were to be filed no later than April 13, 1992. No response was received from Gates. Nor did DER file a response.

Turning to C & K's motion, summary judgment may be granted where the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035(b); Summerhill Borough v. Commonwealth, DER, 34 Pa. Cmwlth. 574, 383 A.2d 1320 (1978).

According to the affidavit of C & K's Vice President of Engineering, James J. Kindel, between January 1978 and June 1989 C & K[2] conducted surface mining operations on properties in Chest Township, Cambria County, owned by GRC Coal Company and various individuals not including Gates. On August 1, 1981, Gates notified C & K that his residence had sustained blasting damage. C & K notified GAB Business Services which investigated the complaint and determined that C & K was not responsible for the damages which Mr. Gates had claimed to be resulting from the mining operation. GAB Business Services advised Gates of its conclusion in writing. Mr. Kindel states in his affidavit that Gates did not institute a lawsuit against C & K on his claim, and the statute of limitations for filing any such claim has now run. See 42 Pa. C.S.A. §5524(3). C & K argues that the release of the bonds in question is conditioned on C & K's compliance with SMCRA, the Clean Streams Law, and the regulations

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[2]C & K formerly conducted business under the name "Cambria Coal Company". (Affidavit of James Kindel)

thereunder. C & K further argues that there is nothing in the bonds which obligates it or its surety to satisfy the claim of a third party for damages which allegedly occurred to a residence located off the bonded area, particularly where the underlying claim is barred by the statute of limitations.

Pursuant to §4(d) of SMCRA, prior to the commencement of surface mining, a permittee must file with DER a bond for the land affected by its operation, conditioned on the permittee performing all the requirements of, inter alia, SMCRA and the Clean Streams Law. 52 P.S. §1396.4(d).

With regard to release of the bond, §4(g) of SMCRA provides that "...if [DER] is satisfied the reclamation covered by the bond or portion thereof has been accomplished as required by [SMCRA], it may, in the case of surface coal mining operations, upon request by the permittee release in whole or in part the bond..." according to the schedule set forth therein. 52 P.S. §1396.4(g). Section 86.174 of the regulations contains the standards which the "entire permit area or a portion of the permit area" must meet for the release of bonds thereon. 25 Pa.Code §86.174. Stage I release of bonds requires that the permit area be backfilled and regraded to approximate original contour and that drainage controls be installed in accordance with the reclamation plan. 25 Pa.Code §86.174(a). In order to secure Stage II release, the following standards must be met: topsoil has been replaced and revegetation established, reclaimed lands are not contributing suspended solids to stream flow or runoff in excess of the regulations or permit conditions, soil productivity of prime farmland has been returned to the required level, and a plan for management of a permanent impoundment has been implemented if applicable. 25 Pa.Code §86.174(b). Finally, Stage III bond release may occur only after the permittee has successfully completed mining and reclamation such that the area in question is capable of supporting postmining land use, and the permittee has achieved compliance with the requirements of the applicable statutes and regulations,

the permit conditions, and the applicable period of liability under 25 Pa.Code §86.151. 25 Pa.Code §86.174(c).

Here, Gates is asserting that C & K's bonds should not have been released because C & K's blasting allegedly caused damage to Gates' property located off the bonded area. However, the bonds in question were posted to insure that the permit area would be reclaimed and restored in accordance with the requirements of SMCRA, the CSL, and §86.174 of the regulations. As C & K notes in its supporting brief, there is nothing in the bonds which obligates C & K or its surety to satisfy the claim of a third party for damages which allegedly occurred off the bonded area. Although Gates may have a course of action against C & K for any damages to his property allegedly caused by C & K's blasting, subject to the applicable statute of limitations, he cannot invalidate DER's bond release on this basis. The bonds were not intended to cover such cla

Thus, because no material facts are in dispute and because we have determined C & K to be entitled to judgment as a matter of law, we grant summary judgment to C & K and dismiss Gates' appeal.

ORDER

AND NOW, this 2nd day of July , 1992, upon consideration of C & K' motion for summary judgment, it is ordered that summary judgment is granted to C & K, and the appeal of Gates at Docket No. 91-519-MJ is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 91-519-MJ

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

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack
JOSEPH N. MACK
Administrative Law Judge
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DATED: July 2, 1992

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MEARLE E. GATES	:	
	:	
v.	:	**EHB Docket No. 91-519-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and C & K COAL COMPANY, Permittee	:	

CONCURRING OPINION BY BOARDMEMBER RICHARD S. EHMANN

Because I read Commonwealth, DER v. Chester A. Ogden et al., 93 Pa. Cmwlth. 153, 501 A.2d 311 (1985) as being applicable to the issues raised by C&K's motion for summary judgment in this appeal and to be dispositive thereof, I concur in the order entered as a result of the majority's opinion.

RICHARD S. EHMANN
Administrative Law Judge
Member

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TER-EX, INC.	:	
	:	
V.	:	**EHB Docket Nos. 83-138-G**
	:	**84-394-G**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: July 8, 1992**

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

By the Board

Synopsis

A gas well spacing order which is based upon data from the pool as a whole is legal despite the fact that data from one existing well suggests that its drainage area is much smaller. An integration order is remanded, however, when the evidence reveals that part of the land included in the order is not underlain with gas reserves that are economically recoverable.

Procedural History

This case arose as a result of a timely appeal (Docket No. 83-138-G) filed with the Board on July 18, 1983, by Ter-Ex, Inc. (Ter-Ex) from the June 16, 1983 issuance by the Department of Environmental Resources (DER) of Spacing Order No. 14, and a timely appeal (Docket No. 84-394-G) filed by Ter-Ex on November 23, 1984 from DER's October 24, 1984 issuance of Integration Order No. 14-1. The Spacing Order and the Integration Order were issued by DER's Division of Oil and Gas Regulation (now the Bureau of Oil and Gas Management) pursuant to the Oil and Gas Conservation Law, Act of July 25,

1961, P.L. 825, as amended, 52 P.S. §401 *et seq.*, upon application filed on December 14, 1981 and amended on January 8, 1982 by DER's Bureau of Forestry acting on behalf of DER's Bureau of State Parks. This unusual circumstance, of one DER bureau making application to another DER bureau, arose out of a concern that Ter-Ex's Ramaley No. 2 well near Keystone State Park in Westmoreland County was depleting natural gas underlying the Commonwealth's land. The Spacing Order established mandatory spacing units of about 320 acres; the Integration Order apportioned the royalties from the Ramaley No. 2 well among the owner of the land, Martin L. Bearer, t/d/b/a North Cambria Fuel Company (Bearer), the Commonwealth and other landowners.

Pennsylvania Natural Gas Association (PNGA) and Bearer were denied intervention in the appeal docketed at 83-138-G but were granted status as *amici curiae* (Opinion and Order issued January 10, 1984, 1984 EHB 511; Order issued May 14, 1984). Bearer filed his own appeal from the Integration Order (Docket No. 84-391-G) but withdrew it on February 13, 1985. Ter-Ex's Motion for Summary Judgment was denied in an Opinion and Order issued July 13, 1984, 1984 EHB 700. On the same date, the Board informed the parties of its tentative decision that DER bore the burden of proof. The decision was affirmed in an Order issued January 24, 1985.

The appeals, while never consolidated, were scheduled to be heard together on numerous occasions, but the hearings were continued at the request of the parties. Eventually, the parties agreed to have the appeals adjudicated on the basis of a submitted record and briefs. The record consists of stipulations, affidavits, depositions, the transcript of a public hearing held by DER's Division of Oil and Gas Regulation on July 7, 1982, and

the numerous exhibits attached to these documents. DER and Ter-Ex filed briefs on April 23, 1986; PNGA on April 25, 1986. DER and Ter-Ex filed reply briefs on May 7, 1986.

Edward Gerjuoy, the Board Member assigned to these appeals, left the Board on January 1, 1987 without having prepared an Adjudication. William A. Roth, the Board Member who took over responsibility for these appeals following Mr. Gerjuoy, also left the Board without having prepared an Adjudication. This Adjudication is based upon a draft prepared by former Board Hearing Examiner Thomas M. Ballaron. The authority of the Board to render an adjudication from a cold record was decided in *Lucky Strike Coal Co. and Louis J. Beltrami v. DER*, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988). Any issues not raised in the briefs are deemed waived.

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

FINDINGS OF FACT

1. Ter-Ex is a Texas corporation authorized to do business in the Commonwealth of Pennsylvania, with a registered address of North Point Building, 9800 McKnight Road, Pittsburgh, PA 15237. Ter-Ex is engaged in the exploration and production of natural gas for sale at the wellhead (2/23/84 Stip.).[1]

2. DER is the executive agency of the Commonwealth of Pennsylvania with the authority and duty to administer the Oil and Gas Conservation Law, Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17, and the rules and regulations promulgated under these statutes.

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[1] Stipulations Between Parties received by the Board on February 23, 1984.

3. On May 17, 1981, Ter-Ex applied to DER's Division of Oil and Gas Regulation for a permit to drill a gas well in Derry Township, Westmoreland County, pursuant to the Oil and Gas Conservation Law. The application was approved and Drilling Permit No. WES-21883 was issued on June 17, 1981 (2/23/84 Stip.).

4. Ter-Ex drilled and completed the Ramaley No. 2 well, on the basis of the Drilling Permit, on July 10, 1981, and began selling gas from the well on August 31, 1981 (2/23/84 Stip.).

5. The Ramaley No. 2 well is situated on a 153-acre parcel of land composed of two tracts owned by Bearer (N.T. 85[2]; 3/19/86 Stip.[3]).

6. Keystone State Park, owned by the Commonwealth, abuts this 153-acre parcel on the northwest, north and northeast. The Ramaley No. 2 wellhead is about 593 feet from the nearest Keystone State Park boundary (Walker affidavit[4]).

7. The Ramaley No. 2 well penetrated the Onondaga Chart formation and the underlying Oriskany Sandstone formation in the Dry Ridge Gas Pool (2/23/84 Stip.; Walker affidavit).

8. The Dry Ridge Gas Pool is located in Unity and Derry Townships, Westmoreland County, northwest of Latrobe. It is approximately 3,700 feet wide and 6 miles long, trending in a southwest-northeast direction from a point near U.S. Route 30 at Denison through Unity Township and across Loyalhanna Creek into Keystone State Park in Derry Township (Walker affidavit).

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[2] The transcript of the public hearing held by DER's Division of Oil and Gas Regulation on July 7, 1982.

[3] Stipulation of Facts received by the Board on March 19, 1986.

[4] Affidavit of John T. Walker dated March 17, 1986.

9. The discovery well (which first demonstrated the presence of natural gas) in the Dry Ridge Gas Pool was the Steiner well completed on August 20, 1946 (2/23/84 Stip.; 3/19/86 Stip.; Walker affidavit).

10. The presence of marketable quantities of natural gas in the Dry Ridge Gas Pool was determined when the Roskovensky well was completed on July 31, 1963. From that date to July 10, 1981 seven additional wells have been completed (N.T. 24-25; 2/23/84 Stip.; 3/19/86 Stip.).

11. The acreage on which each of these wells has been placed is referred to as the spacing unit. Ideally, each spacing unit encompasses the area that will be drained by the well located on it. A voluntary spacing unit is one determined by the developer of the well. A mandatory spacing unit is one set by DER in a spacing order. The spacing units for the wells completed in the Dry Ridge Gas Pool up to July 10, 1981 were all voluntary (2/23/84 Stip.; Walker affidavit; 3/18/86 Bossart affidavit[5]).

12. The following data apply to the wells in the Dry Ridge Gas Pool:

(a) *Steiner* - completed on August 20, 1946 to a sub-sea elevation[6] of -7162 on a voluntary spacing unit of 104 acres. The well encountered the Onondaga Chert at -6347 and the Oriskany Sandstone at -6542. It produced 737,000 thousand cubic feet (MCF) of gas before being plugged and abandoned. The Steiner well drained a different fault block from the other wells in the Dry Ridge Gas Pool and will not be considered further in this Adjudication (2/23/84 Stip.; 3/19/86 Stip.);

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[5] Affidavit of Paul N. Bossart, Jr. received by the Board on March 18, 1986.

[6] Sub-sea elevation is an elevation below sea level and is expressed in feet prefixed by a minus sign.

(b) *Roskovensky* - completed on July 31, 1963 to a sub-sea elevation of -6470 on a voluntary spacing unit of 628 acres. The well encountered the Onondaga Chert at -6241 and the Oriskany Sandstone at -6393. This well produced 1,014,647 MCF of gas before it was plugged as unproductive on September 15, 1971 (2/23/84 Stip.; 3/19/86 Stip.);

(c) *Miller* - completed on May 11, 1964 to a sub-sea elevation of -6427 on a voluntary spacing unit of 570 acres. This well encountered the Onondaga Chert at -6226 and the Oriskany Sandstone at -6378. It produced 425,973 MCF of gas before being plugged and abandoned on October 31, 1966 (3/19/86 Stip.);

(d) *Lemmon* - completed on May 14, 1964 to a sub-sea elevation of -6485 on a voluntary spacing unit of 577 acres. It encountered the Onondaga Chert at -6282 and the Oriskany Sandstone at -6432. It had produced 3,135,592 MCF of gas as of 1986, when it was still producing (3/19/86 Stip.);

(e) *Eidemiller* - completed on July 8, 1964 to a sub-sea elevation of -6369 on a voluntary spacing unit of 613 acres. This well encountered the Onondaga Chert at -6160 and the Oriskany Sandstone at -6309. It had produced 1,178,721 MCF of gas as of 1986, when it was still producing (3/19/86 Stip.);

(f) *Keck* - completed on August 11, 1964 to a sub-sea elevation of -6361 on a voluntary spacing unit of 538 acres. This well encountered the Onondaga Chert at -6156 and the Oriskany sandstone at -6308. It produced 131,256 MCF of gas before it was plugged and abandoned on August 12, 1966 (3/19/86 Stip.);

(g) *Huff* - completed on December 8, 1964 to a sub-sea elevation of -6604 on a voluntary spacing unit of 320 acres. This well encountered the Onondaga Chert at -6370 and the Oriskany Sandstone at -6524. It produced 92,467 MCF of gas before it was plugged as a deep well and converted to a

shallow gas well in September 1967 (2/23/84 Stip.; 3/19/86 Stip.; Walker affidavit);

(h) *Forbes-Carr* - completed on July 10, 1980 to a sub-sea elevation of -6480 on a voluntary spacing unit of 348 acres. This well encountered the Onondaga Chert at -6265 and the Oriskany Sandstone at -6421. It had produced 298,985 MCF of gas as of 1986, when it was still producing (2/23/84 Stip.; 3/19/86 Stip.; Walker affidavit); and

(i) *Ramaley No. 2* - completed on July 10, 1981 to a sub-sea elevation of -6589 on a voluntary spacing unit of 153 acres. This well encountered the Onondaga Chert at -6327 and the Oriskany Sandstone at -6475. It had produced 106,319 MCF of natural gas as of 1986, when it was still producing (2/23/84 Stip.).

13. The Dry Ridge Gas Pool is situated on, and along the northwest side of, the crestal axis of the Fayette anticline. Moving along the strike of the anticline from southwest to northeast, the Huff well is the first one to be encountered; then the Eidemiller well, 3,696 feet from Huff; then the Miller well, 3,960 feet from Eidemiller; then the Keck well, 5,511 feet from Miller; then the Roskovensky well, 3,696 feet from Keck; then the Lemmon well, 4,554 feet from Roskovensky; then the Forbes-Carr well, 3,564 feet from Lemmon; and then the Ramaley No. 2 well, 4,356 feet from Forbes-Carr (3/19/86 Stip.; Walker affidavit).

14. The wells in the Dry Ridge Gas Pool average 4,200 feet apart. On this basis, each can be expected to drain 300 to 400 acres. The voluntary spacing units average between 400 and 500 acres (Walker affidavit).

15. The location of the two Ter-Ex wells (Forbes-Carr and Ramaley No. 2) reflects this pattern, indicating a drainage area for each well in excess of 300 acres (Walker affidavit).

16. The voluntary spacing unit established by Ter-Ex for the Ramaley No. 2 well - 153 acres - is well below this figure. A spacing unit of 300 acres or more would include land in Keystone State Park (Walker affidavit).

17. On December 14, 1981, following completion of the Ramaley No. 2 well, the Bureau of Forestry and the Bureau of State Parks filed an application with the Division of Oil and Gas Regulation for a mandatory spacing order covering the Dry Ridge Gas Pool, as provided for in the Oil and Gas Conservation Law. This application was amended on January 8, 1982 to request an integration order (2/23/84 Stip.).

18. A public hearing on the application was held by the Division of Oil and Gas Regulation in Pittsburgh on July 7, 1982 (2/23/84 Stip.).

19. Spacing Order No. 14 was issued in response to the application on June 16, 1983. This Order held, *inter alia*, that (1) the Dry Ridge Gas Pool extended northeast of Ter-Ex's voluntary spacing unit surrounding Ramaley No. 2 well; (2) the Ramaley No. 2 well was draining these lands; (3) a spacing order was necessary to protect the correlative rights of the Commonwealth and other adjacent owners and to promote the efficient and economic development of the undeveloped northeast portion of the Dry Ridge Gas Pool; (4) the mandated spacing units generally would be square, contiguous, 320-acre parcels with the wells located approximately in the center; (5) the mandatory spacing units for the Ramaley No. 2 well and the undeveloped parcel to the northeast were fixed; and (6) the size and shape of the units for the other existing wells would be varied to conform to the oil and gas property lines then existing (Spacing Order No. 14).

20. In making its decision, DER relied principally upon the spacing and production history of the wells drilled and completed in the Dry Ridge Gas Pool by 1981 (Spacing Order No. 14).

21. The mandatory spacing unit surrounding the Ramaley No. 2 well was not a complete square. The northeast, southeast and northwest boundaries represented three sides of a square but the southwest boundary was somewhat irregular in order to be contiguous with the Forbes-Carr spacing unit. The acreage was 298 rather than 320 (Spacing Order No. 14; Integration Order No. 14-1).

22. Gas wells in the Dry Ridge Gas Pool produce gas from fractures in the Onondaga Chert/Oriskany Sandstone formations. This deep gas reservoir of Middle and Lower Devonian age is generally encountered at sub-sea elevations of -6100 to -6500 (the formations dip toward the northwest). The two formations are essentially parallel throughout the Dry Ridge Gas Pool with the Onondaga Chert immediately overlying the Oriskany Sandstone (Walker affidavit).

23. The Dry Ridge Gas Pool is limited on the southeast by a major fault system which parallels the Fayette anticline and creates a permeability barrier to the flow of gas. This fault system is located 1,400 to 2,240 feet southeast of the Ramaley No. 2 well. The other limits of the Dry Ridge Gas Pool are delineated by the gas-water contact zone[7] which is encountered at sub-sea elevations of -6525 to -6600 (2/23/84 Stip.; Walker affidavit).

24. The Oriskany Sandstone is an aereally extensive sandstone containing varying amounts of secondary calcium carbonate and silica cement, and very little or no clay minerals or shale. The sand grains are tight, brittle and fracture easily. The gas reservoir or pay-zone within the Oriskany Sandstone consists of the intergranular spaces within the sandstone itself, or the fracture openings, or both (Walker affidavit).

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[7] This is the point where lighter, lower-density gas meets heavier, higher-density water in the gas-bearing formations.

25. The Onondaga Chert formation is one of the densest and hardest rock types to drill and one which, when unfractured, has essentially no porosity or permeability. Chert is composed of dense silica dioxide which is amorphous (like glass). As a result, the only spaces in the Onondaga Chert for gas and water are naturally occurring fractures (Walker affidavit).

26. The primary gas reservoir for the Dry Ridge Gas Pool is the Oriskany Sandstone. The Onondaga Chert is of secondary importance, containing economically recoverable gas reserves only as a result of gas migration from the Oriskany Sandstone upward into the Onondaga Chert through natural fractures (Angerman affidavit[8]; Holman affidavit[9]).

27. Natural gas enters a well bore where the bore intercepts natural fractures in the gas-bearing formations. These natural fractures can be supplemented by man-made fractures produced by hydraulic fracturing (Walker affidavit).

28. Hydraulic fracturing (commonly called "fracking") involves the injection of pressurized fluids against the face of a well bore until the formations break down or fracture. Then fluids and sand (used as a propping agent) are pumped into the man-made fractures to extend them outward from the well bore to connect with natural, gas-bearing fractures (Walker affidavit).

29. The evidence is not sufficient to conclude whether hydraulic fracturing increases the drainage area of a well or merely allows a more rapid recovery of the gas within the same drainage area.

30. All of the wells in the Dry Ridge Gas Pool except the Ramaley No. 2 well have been fracked (Walker affidavit).

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[8] Affidavit of Thomas W. Angerman.

[9] Affidavit of Robert L. Holman.

31. Gas enters the Ramaley No. 2 well bore at a sub-sea elevation of -6393 which is in the Onondaga Chert and from a sub-sea elevation of -6475, which is in the Oriskany Sandstone (Walker affidavit; Holman affidavit).

32. The ultimate gas production which could be economically and efficiently recovered from the Ramaley No. 2 well was calculated both by DER's and Ter-Ex's experts to be 137,000 MCF, using the production history of the well and a standard straight line production decline method of determining the remaining economically recoverable reserves (Walker affidavit; Holman affidavit; Angerman affidavit).

33. Knowing the economically recoverable gas reserves for a well, it is possible to compute the drainage area for the well from the porosity, permeability, water saturation, gas saturation and porosity thickness of the gas producing formations (Walker affidavit).

34. These specific reservoir characteristics of the Ramaley No. 2 well are not known (Walker affidavit).

35. None of the tests or procedures that would have produced this data were conducted: core samples of the Onondaga Chert and Oriskany Sandstone formations adjacent to the Ramaley No. 2 well, pressure build-up and draw-down tests, induction resistivity logs, or density logs (Walker affidavit).

36. The data used by the parties in calculating the drainage area of the Ramaley No. 2 well was inferred from data from other wells in the Dry Ridge Gas Pool (Walker affidavit).

37. Walker calculated the drainage area of the Ramaley No. 2 well as 352 acres, based upon his conclusion that the well was drawing gas only from a thin zone in the Onondaga Chert - a net porosity thickness of only one foot (Walker affidavit).

38. The Oriskany Sandstone, not the Onondaga Chert, is the primary gas reservoir, and the net porosity thickness of the producing formation is a relatively constant seven feet, as derived from the results of down-hole density logs run on other wells in the pool (Holman affidavit).

39. The porosity of the Oriskany Sandstone throughout the Dry Ridge Gas Pool varies from 5% to 7%; Holman's average of 6% is appropriate (Holman affidavit).

40. Water saturation of the Oriskany Sandstone is approximately 40%; gas saturation is approximately 60% (Holman affidavit).

41. These factors suggest that the drainage area of the Ramaley No. 2 well is approximately 51 acres (Holman affidavit).

42. A square, 51-acre spacing unit with the Ramaley No. 2 well in the center would extend into Commonwealth lands northwest of the well (Walker affidavit).

43. The drainage area calculation of the Ramaley No. 2 well is an areal calculation. If the gas-bearing formations are intercepted by the gas-water contact zone within that area, the boundaries of the reservoir of economically recoverable gas will be limited accordingly (Walker affidavit).

44. The top of the gas-water contact zone in 1964 was at a uniform sub-sea elevation of approximately -6600 throughout the Dry Ridge Gas Pool (Walker affidavit).

45. As gas was withdrawn from the pool, the gas-water contact zone rose but only about 20 feet (from -6600 to -6580) by 1982. The limited rise in elevation resulted from the low compressibility of water (Walker affidavit).

46. The gas-bearing Onondaga Chert and Oriskany Sandstone dip toward the northwest at the Ramaley No. 2 well toward Keystone State Park. As a

result, the gas-bearing formations come closer to the gas-water contact zone northwest of the well (Walker affidavit).

47. Based on Walker's analysis (which used seismic survey data compiled by Seismograph Service Corporation in 1964 and drilling records for each well in the Dry Ridge Gas Pool), the gas-bearing formations intercept the gas-water contact zone on Commonwealth lands about 300 feet northwest of the voluntary spacing unit established by Ter-Ex for the Ramaley No. 2 well (Walker affidavit).

48. The Ramaley No. 2 well drainage area and the Ramaley No. 2 mandatory spacing unit include lands in Keystone State Park that are underlain by natural gas in economically recoverable quantities (Walker affidavit).

49. The Ramaley No. 2 mandatory spacing unit also includes Commonwealth lands where the gas-bearing formations are below the gas-water contact zone (Walker affidavit).

DISCUSSION

The Board's order of January 24, 1985 placed the burden of proof upon DER, but granted the agency the right to re-argue the issue at the hearing. In its brief, DER asserted the identical arguments raised earlier before Board Member Gerjuoy, and contended that spacing orders were not orders in the classical sense because they did not direct affirmative action to be taken to correct a violation of law. Rather, a spacing order was intended to protect correlative rights and to assure the efficient and economic development of the resource. Gerjuoy disagreed with this rationale when it was first presented. He perceived the spacing order as a unilateral change imposed by DER in the conditions of the drilling permit received by Ter-Ex and used by the company to drill and complete its Ramaley No. 2 well. The permit did not restrict or limit the size of the spacing unit except as required by the Oil and Gas

Conservation Law. To this end, Ter-Ex formed a 153-acre voluntary spacing unit around the Ramaley No. 2 well which placed the wellhead more than 500 feet from the nearest boundary. This was proper and in full accord with Section 6, 58 P.S. §406, of the Oil and Gas Conservation Law, which dictated that the only spacing restriction on locating a well, absent a mandatory spacing order, was that the well be located at least 330 feet from the nearest outside boundary line of the lease on which the well was located. As a result, Gerjuoy held that DER, as the asserter of the need for the spacing order expanding the spacing unit from 153 acres to 298 acres, should bear the burden of its justification.

In reviewing this decision in light of DER's renewed arguments, it is evident that the circumstances presented by the issuance and appeal of Spacing Order No. 14 and Integration Order No. 14-1 do not fall precisely into the format presented by the Board's rules. However, Ter-Ex's appeal dovetails more closely with the rule set forth in 25 Pa. Code §21.101(b)(2) and (b)(3), than any other. The Board endorses Gerjuoy's reasoning and affirms the Order issued January 24, 1985. To carry its burden of proof, DER must show by a preponderance of the evidence that Spacing Order No. 14 and Integration Order No. 14-1 were authorized by law and were not an abuse of discretion: *Warren Sand and Gravel Co., v. DER*, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975); *Consol. Pennsylvania Coal Company v. DER*, 1990 EHB 645.

Well spacing is an important feature in the efficient, economical development of a natural gas pool which is one of the purposes of the Oil and Gas Conservation Law (Historical Note following 58 P.S. §401). If the wells are too close together they will not produce to their fullest potential; if they are too far apart they will not recover all of the gas in the pool. Selecting the proper spacing in the Dry Ridge Gas Pool is complicated by the

gas-bearing formations which are so impermeable that gas is found only in natural fractures. The number and size of these fractures can vary widely from one location to another. If a well happens to intercept these fractures, production can be beneficial. If it misses, production can be non-existent. This reality appears in the production records of the Dry Ridge Gas Pool wells where natural flows ranged from 0 MCF to 2,477 MCF. After the creation of man-made passages by hydraulic fracturing, the flows ranged from 3,844 MCF to 6,000 MCF (not including the Ramaley No. 2 well which was not fracked).

When DER was called upon to mandate spacing units for the Dry Ridge Gas Pool, eight wells already had been placed on voluntary spacing units designed without government intervention by those in the business of gas field development. It is understandable that DER placed a great deal of reliance on this historical data indicating that each well would drain 300-500 acres. Since the voluntary spacing unit surrounding the Ramaley No. 2 well was only 153 acres, it is understandable that DER considered it to be too small. To expand the size of this spacing unit, however, DER needed affirmative evidence providing a rational geophysical basis for including the additional area: *Pennzoil Company and Westrans Petroleum, Inc. v. DER*, 1974 EHB 252. That evidence, of necessity, had to prove that the gas pool extended beneath the expanded spacing unit and that the Ramaley No. 2 well drained it.

DER relied, of course, on the performance data and statistics of the existing wells. Ter-Ex contends that this was improper, that DER should have relied instead on specific data applicable to the Ramaley No. 2 well. Unfortunately, most of that data is unknown: porosity, permeability, water saturation, gas saturation, net porosity thickness of the gas-bearing formations. Apparently, Ter-Ex did not record the appropriate information from which this data is derived while the well was being drilled. The record

gives no hint whether the information can be gathered in some other way at a later time. In any event, Ter-Ex's experts, like DER's, reached their conclusions on the basis of data from the other wells.

DER argues that, not only was this necessary, it was also proper. Section 7(4) of the Oil and Gas Conservation Law, 58 P.S. §407(4), requires spacing units to be of "uniform size" and no smaller than the "maximum area that can be drained by one well...." To achieve this result, according to DER, average data from all the developed wells must be given greater weight than the specific data from one well.

Section 7 gives detailed instructions to DER with regard to well spacing. When DER issues a spacing order, it is supposed to cover all lands underlain by the gas pool, establishing the acreage to be embraced within each unit, the shape thereof and the permissible well-drilling area. The units are to be uniform in size and shape, but may be varied to take account of already-completed wells and already-established property lines so long as they encompass the areas which will be drained by wells located on them. In reaching its decision, DER is to consider, *inter alia*, the existing well-spacing plan, the depth at which gas-bearing formations have been found, the nature and character of the formations, the maximum area that may be drained efficiently and economically by one well, and any other available geological or scientific data which may have probative value.

It is clear from these instructions that, even though its intervention may be prompted by concerns over one particular well, DER's duty extends to the entire pool. All the lands lying above the pool must be divided into spacing units and the spacing units must (with some exceptions) be of uniform size and shape, reflecting the maximum area that one well can drain. To fulfill its duty, DER must consider available data from the pool as

a whole in an attempt to determine the maximum area one well can drain. In the Dry Ridge Gas Pool, that data varies considerably from one well to another. The four wells that are no longer producing - Roskovensky, Miller, Keck and Huff - had total productions ranging from 92,467 MCF to 1,014,647 MCF. Two of the wells still functioning - Lemmon and Eidemiller - have both been producing since 1964 but Lemmon's total output is nearly three times that of Eidemiller. The other two still functioning wells - Forbes-Carr and Ramaley No. 2 - have had annual productions averaging 50,000 MCF and 21,000 MCF, respectively. Part of this disparity, of course, may relate to the fact that Ramaley No. 2 has not been fracked.

The point is: with such divergent information there is no alternative but to deal in generalities. And since they were compiled from historic data going back to 1963, the generalities reflect past well-spacing practices. DER's decision to divide the pool into 320-acre spacing units (with some variance for existing units) is a soundly-based determination of the maximum area one well is likely to drain in the Dry Ridge Gas Pool. The fact that available data may suggest that the Ramaley No. 2 well is draining a smaller area does not undermine the soundness of DER's determination for several reasons. First, the spacing units are required to be the same general size and shape. Second, the drainage calculation for the Ramaley No. 2 well *may* be distorted somewhat because the well has not been fracked. Third, the mandatory spacing unit established for this well is only 298 acres, about 7% less than the 320-acre standard employed for the pool.

DER's decision to make the mandatory spacing units square in shape also is appropriate. Ideally, the shape of the unit should correspond with the drainage pattern of the well; but in formations like the Onondaga Chert and Oriskany Sandstone, such patterns (even if discoverable) are bound to be

highly irregular. Delineating spacing units that reflect drainage patterns and, at the same time, are generally uniform in size and shape would be an enormous (if not impossible) task. The Oil and Gas Conservation Law does not require this precision. Square units obviously cannot mirror actual drainage patterns, but they reasonably accomplish the purposes of the statute.

Ter-Ex contends that, even if the size and shape of the mandatory spacing units are appropriate, DER still must prove that gas, in economically recoverable quantities, underlies the expanded area of the Ramaley No. 2 spacing unit. DER has not disputed this contention and we will consider it part of the burden of proof.

The evidence is clear that, even if the drainage area of the Ramaley No. 2 well is only 51 acres, a square spacing unit of that size would include Commonwealth lands in Keystone State Park. Potentially, gas from beneath those lands is being drained by the well. The evidence suggests that the gas-bearing formations continue in their northeastern strike into those lands. The uncertainty surrounds the point where the northwestern dip of the formations intersects the gas-water contact zone. Beyond that point, gas is not economically recoverable.

No evidence has established that point with any precision; but DER's Walker has inferred it from the data available. He places it on Commonwealth lands about 300 feet northwest of the boundary of the voluntary spacing unit established by Ter-Ex for the Ramaley No. 2 well. While Walker's calculation shows that the gas-bearing formations on part of the Commonwealth lands are above the gas-water contact zone, it also shows that they are below the zone on other parts. Yet this fact is not apparent in Integration Order No. 14-1 which includes all of the lands within the 298-acre spacing unit. Since the lands in question are Commonwealth lands and since DER is a Commonwealth

agency, it is our opinion that, to avoid any appearance of collusion, Integration Order No. 14-1 must reflect the presence of the gas-water contact zone. If the zone can be more accurately located without the undue expenditure of time and money, that should be considered. But since participation in the profit from the Ramaley No. 2 well is based upon the assumption that gas underlies the entire 298 acres in economically recoverable quantities, the facts do not support it. Accordingly, we will remand Integration Order No. 14-1 to DER for revision. Since we have found Spacing Order No. 14 to be appropriate, we will not remand it.

Ter-Ex's arguments on the applicability of the Oil and Gas Conservation Law and on the procedural requirements for issuance of spacing and intergration orders were discussed and dismissed in the Opinion and Order denying its Motion for Summary Judgment (1984 EHB 700). We have reviewed this decision and affirm it.[10]

CONCLUSIONS OF LAW

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

2. DER has the burden of proving by a preponderance of the evidence that Spacing Order No. 14 and Integration Order No. 14-1 are lawful and appropriate exercises of DER's discretion.

3. The Oil and Gas Conservation Law requires DER to establish spacing units for the entire gas pool -- units of uniform size and shape that can each be economically and efficiently drained by one well.

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[10] We also disagree with Ter-Ex's argument that the orders were void because Ter-Ex was not permitted to cross-examine witnesses during the hearing before DER (Brief, pp. 16-18). The time and place for Ter-Ex to vindicate its right to cross-examine was in a hearing before this Board. *See, Borough of Carlisle v. Commonwealth, DER*, 16 Pa Cmwlth. 341, 330 A.2d 293 (1974).

4. To meet this requirement DER must consider available data from the pool as a whole.

5. DER's determination to divide the Dry Ridge Gas Pool into 320-acre spacing units (with some variance for existing units) is supported by the available data from the entire pool.

6. The fact that the Ramaley No. 2 well may actually be draining a smaller area does not undermine DER's determination.

7. DER's decision to make the mandatory spacing units square in shape is appropriate.

8. The Ramaley No. 2 well drains Commonwealth lands in Keystone State Park.

9. On some of these lands, the gas-bearing formations lie below the gas-water contact zone. As a result, the gas is not economically recoverable.

10. Integration Order No. 14-1 does not reflect this fact.

11. DER's issuance of Spacing Order No. 14 and Integration Order No. 14-1 satisfied procedural requirements of the Oil and Gas Conservation Law.

12. The Oil and Gas Conservation Law contemplates the unitization and integration of existing gas wells.

ORDER

AND NOW, this 8th day of July, 1992, it is ordered as follows:

1. Ter-Ex's appeal of Spacing Order No. 14 is dismissed.

2. Ter-Ex's appeal of Integration Order No. 14-1 is sustained in part. The Order is remanded to DER for action in accordance with this Adjudication.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

Chairman Maxine Woelfling and Member Richard S. Ehmann are recused.

DATED: July 8, 1992

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M. DIANE SMITH
SECRETARY TO THE BC

AL HAMILTON CONTRACTING COMPANY	:	EHB Docket No. 88-113-W
	:	(Consolidated Docket)
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 9, 1992

OPINION AND ORDER SUR MOTION TO LIMIT ISSUES

By Maxine Woelfling, Chairman

Synopsis

A motion to limit issues to exclude evidence relating to a compliance order that was subsequently vacated is granted.

OPINION

On February 7, 1989, the Department of Environmental Resources (Department) issued a Groundwater Study Order (Order) requiring Al Hamilton Contracting Company (Hamilton) to monitor the quality and movement of ground and surface water on its Caledonia Point and Caledonia Pike mine sites in Covington Township, Clearfield County. Hamilton filed a notice of appeal at Docket No. 89-045-W on February 27, 1989, and also petitioned the Board to supersede the Order. On April 19, 1989, following an April 6 hearing, the Board granted Hamilton's petition and stayed the Order pending an adjudication on the merits.

On September 15, 1989, the Board consolidated Hamilton's appeal at Docket No. 89-045-W with its appeal at Docket No. 88-113-W from an earlier

compliance order regarding allegedly unlawful discharges from the Caledonia Pike mine site. A hearing on the merits of the consolidated appeals was scheduled for September 17-19 and October 3, 1990.

The Department vacated the Order on August 24, 1990, and subsequently filed a motion to limit issues on September 7, 1990.[1] The Department's motion sought to bar Hamilton from raising any legal and factual issues related to its appeal of the now-vacated Order. The Department argued that once it vacated the Order, Hamilton no longer had a stake in the outcome of an adjudication regarding that Order. Furthermore, because Hamilton received the relief it sought in that appeal, the Board could no longer grant effective relief. The Department reasoned that since the underlying appeal was now moot, any issues relating to it should no longer be considered in the adjudication of the remaining appeals consolidated at Docket No. 88-113-W.

In its response to the Department's motion Hamilton contended that consideration of these issues was essential to the meaningful hearing to which it is entitled on each appeal to this Board. In order to receive a meaningful hearing, Hamilton asserts that the Board must consider all evidence relevant to its appeals; relevant evidence is defined by Hamilton to include all issues and facts raised by each Department enforcement action from 1980 through 1989. By definition, therefore, the legal and factual issues raised by Hamilton's appeal of the Order are relevant. Because they are relevant, the Board must consider those issues in its adjudication of the other appeals consolidated at Docket No. 88-113-W.[2]

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[1] It is unclear why the Department has not filed a motion to dismiss Hamilton's appeal at Docket No. 89-045-W as moot.

[2] Despite Hamilton's argument that the issues related to the appeal of the (footnote continued)

It is clear that Hamilton's appeal of the Order is now moot. By vacating the Order, the Department gave Hamilton the relief it sought when it filed its appeal with the Board. Accordingly, the Board can no longer grant any effective relief with respect to that Order. See Commonwealth v. One 1978 Lincoln Mark V, 52 Pa. Cmwlth. 353, 415 A.2d 1000, 1002 (1980); Roy F. Magarigal v. DER, EHB Docket No. 91-329-MR (Opinion issued April 16, 1992); and New Hanover Corp. v. DER, 1991 EHB 1127.

Hamilton's argument is similar to that raised in New Hanover Corp. v. DER, *supra*. There, appellant argued that the Board should not dismiss an appeal as moot because the issues raised by the appeal were essential to the determination of issues raised in a later appeal. *Id.* at 1128. The Board nevertheless dismissed the appeal as moot because it could no longer grant the relief appellant had requested. *Id.* at 1129. The Board further held that appellant's arguments ignored the purpose of the mootness doctrine, which is to allow tribunals to expend their resources on issues in controversy. Similarly here, Hamilton argues that the Board should continue to consider issues raised in an appeal that is now meaningless simply because they may be relevant to other ongoing appeals. Hamilton's argument conflicts with the Board's opinion in New Hanover Corp., *supra*. Because the appeal underlying the legal and factual issues in question is now moot, the Board may no longer consider these issues.

(Continued footnote)
Order are relevant, its conduct at the hearing indicates otherwise. Both Hamilton and the Department focused their attention exclusively on Compliance Order No. 88-H-008 and discharges from the Caledonia Pike mine site.

O R D E R

AND NOW, this 9th day of July, 1992, it is ordered that the Department's motion to limit issues is granted.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: July 9, 1992

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M. DIANE SMITH
SECRETARY TO THE BC

CENTRE LIME AND STONE COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 88-271-F**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: July 9, 1992**
and BELLEFONTE LIME CO., INC., Permittee	:	

OPINION AND ORDER
SUR MOTION FOR RECONSIDERATION

By Terrance J. Fitzpatrick, Member

Synopsis

A Motion for Reconsideration of Interlocutory Opinion and Order will be denied where no exceptional circumstances are present.

OPINION

This matter involves an appeal brought by Centre Lime and Stone Company, Inc. (Centre) objecting to the Department of Environmental Resources (DER) reissuance of a surface mining permit to Bellefonte Lime Company, Inc. (Bellefonte), for mining in Spring Township, Centre County. Centre contests those provisions of the permit which allow Bellefonte to mine below the water table. Centre contends that discharged ground and surface water from Bellefonte's activities will seep into Centre's deep mine, resulting in added pumping costs, and - if the discharge is polluted - endangering Centre's employees.

The procedural history is set forth in our decision issued on July 11, 1991 (1991 EHB 1144). That decision concerned Bellefonte's motion to

compel Centre to answer more fully certain interrogatories. We granted Bellefonte's motion with regard to some interrogatories, and denied it as to others.

On July 25, 1991, Bellefonte submitted a Motion for Reconsideration of our decision issued on July 11, 1991. On August 13, 1991, Centre Lime filed a response to the Motion for Reconsideration. The motion asks us to reconsider and re-examine those same interrogatories and responses that have previously been determined as sufficient by the Board.

The Board's rules of practice and procedure provide that reconsideration will be granted only for "compelling and persuasive reasons" and will generally be limited to instances where:

> (1) The decision rests on a legal ground not considered by any party to the proceeding and that the parties in good faith should have had an opportunity to brief such question.
>
> (2) The crucial facts set forth in the application are not as stated in the decision and would justify a reversal of the decision. In such a case reconsideration would only be granted if the evidence sought to be offered by the party requesting the reconsideration could not with due diligence have offered the evidence at the time of the hearing.

25 Pa. Code §21.122(a).

With regard to interlocutory orders, such as the one involved here, reconsideration will be granted only when "exceptional circumstances" are shown. City of Harrisburg v. DER, 1991 EHB 87, Baumgardner v. DER 1989 EHB 400, Raymark Industries Inc. v. DER, 1991 EHB 186. Applying these standards, Bellefonte's Motion for Reconsideration must be denied.

In Baumgardner, supra, the "exceptional circumstances" which justified reconsideration consisted of new evidence in the form of test

results, not available to DER at the initial hearing, that directly refuted earlier testimony regarding the danger of pollution from Baumgardner's recycling activity. The new evidence had a crucial impact upon this pivotal issue and resulted in reversal of the previous order. By contrast, Bellefonte has not offered any new facts or legal grounds justifying reversal of the order; it has simply presented the same basic arguments as offered in its original motion.

Granting reconsideration under these circumstances would have the undesireable effect of encouraging requests for reconsideration of interlocutory orders. Therefore, we will deny Bellefonte's motion without engaging in a rehash of Bellefonte's arguments.

ORDER

AND NOW, this 9th day of July, 1992, it is ordered that Bellefonte's Motion for Reconsideration is denied.

ENVIRONMENTAL HEARING BOARD

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: July 9, 1992

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M. DIANE SMITH
SECRETARY TO THE BC

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	EHB Docket No. 90-034-CP-W
v.	:	
U.S. WRECKING, INC.	:	Issued: July 10, 1992

ADJUDICATION

By Maxine Woelfling, Chairman

Synopsis

Where defendant violated the National Emissions Standards for Hazardous Air Pollutants (NESHAPS) regulations by its failure to notify the Department of Environmental Resources (Department) of its demolition of a structure containing asbestos material and its improper removal and storage of this material, it is subject to civil penalties pursuant to the Air Pollution Control Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 *et seq.* (APCA). Defendant's violations were knowing and wilful, and given the crucial role of the filing of notifications in the asbestos control program, a larger penalty is imposed for its deterrent effect. A total civil penalty of $18,500 is assessed by the Board.

INTRODUCTION

This matter was initiated by the Department on January 19, 1990, with the filing of a complaint for civil penalties pursuant to §9.1 of the APCA.

The complaint sought $25,000 in civil penalties from U.S. Wrecking, Inc. (U.S. Wrecking) for its alleged violations of the NESHAPS[1] during the demolition of two buildings at 7 and 9 East King Street in the City of Lancaster (Job Site).

Throughout the pendency of this matter U.S. Wrecking's disregard of the Board's rules of practice and procedure, as well as the Board's orders, has led to the imposition of severe sanctions. Its failure to comply with the Board's November 23, 1990, order compelling it to respond to the Department's discovery requests resulted in the Board's April 17, 1991, sanction order. All facts which were the subject of the Department's interrogatories were deemed established in accordance with the Department's claims, and U.S. Wrecking was barred from introducing any documents which were not produced. U.S. Wrecking also failed to file its pre-hearing memorandum as required by the Board's orders, and, in an order dated April 23, 1991, the Board precluded it from presenting its case-in-chief.

A hearing on the merits was conducted before Board Chairman Maxine Woelfling on June 18, 1991. U.S. Wrecking was represented by counsel at the hearing.

The Department contends in its August 8, 1991, post-hearing brief that the insulation material on the Job Site contained asbestos and that U.S. Wrecking violated the asbestos notification, removal, and disposal provisions of the NESHAPS regulations. A civil penalty of $25,000 was requested, taking into account wilfulness, deterrent effect, harm, and the EPA's penalty policy

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[1] The NESHAPS are promulgated at 40 CFR Pt. 61 and are incorporated by reference at 25 Pa. Code §124.3. The United States Environmental Protection Agency (U.S. EPA), pursuant to §112(d) of the Federal Clean Air Act, 42 U.S.C.A. §7142(d) has delegated the authority to enforce the NESHAPS in Pennsylvania to the Department. See 25 Pa. Code §124.1.

for NESHAPS violations. The Department also argued that any evidence related to its offers to settle the violations with U.S. Wrecking prior to filing the complaint for civil penalties should be stricken by the Board.

U.S. Wrecking did not file a post-hearing brief.

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

FINDINGS OF FACT

1. Defendant is U.S. Wrecking, a Pennsylvania corporation with a business address of P. O. Box 1269, Lancaster, PA 17603. (N.T. 5)[2]

3. U.S. Wrecking is engaged, *inter alia*, in the business of demolishing and renovating buildings. (N.T. 5)

4. During the course of its business U.S. Wrecking removes asbestos and asbestos-containing materials. (N.T. 28)

5. The Department is the agency with the authority to administer and enforce the APCA and the NESHAPS regulations.

6. Asbestos is a naturally occurring mineral. (N.T. 8)

7. Friable asbestos is crumbly and rendered into powder with normal hand pressure. In this state, the fibers are easily released into the atmosphere. (N.T. 26)

8. Asbestos is a recognized carcinogen; the inhalation of asbestos fibers may cause mesotholioma, lung cancer, asbestosis, and other pulmonary diseases. (N.T. 9)

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[2] References to the transcript of the hearing on the merits are denoted by "N.T.___," while references to the Department's exhibits are indicated by "Ex. C-___."

9. Operators of demolition projects are required to file a notification form with the Department ten days before the start of demolition. (N.T. 19, 27)

10. The notification forms require the operator to indicate, *inter alia*, the type and amount of asbestos-containing materials, the techniques for removal, and the manner of disposal. (Ex. C-3)

11. The notification forms are kept on file in the Department's offices and are maintained in the normal course of business. (N.T. 25)

12. The notification requirements enable the Department to inspect demolition projects to assure that proper asbestos removal techniques are being utilized to protect the public and the environment. (N.T. 19)

13. Asbestos-containing material must be wetted during removal and storage. (N.T. 27)

14. Asbestos-containing components being removed from a facility must be carefully lowered to the ground. (N.T. 27)

15. After wetting, all asbestos-containing materials must be sealed in leak-tight containers and properly labeled. (N.T. 14, 28)

16. The purpose of these handling and storage measures is to prevent the emission of asbestos fibers into the atmosphere. (N.T. 14)

17. On February 17, 1988, while on his lunch break, William L. Groeber, the Department's Lancaster District Air Quality Supervisor, observed the Job Site. (N.T. 9, 12)

18. A sign at the Job Site stated that the work was being done by U.S. Wrecking. (N.T. 41)

19. Mr. Groeber observed that the buildings had been gutted of all walls and ceiling materials. In the ceiling, he saw a large insulated duct, partially dismantled, extending 150 feet to the back of the building. The

duct was about 20 inches in diameter, tapering to ten inches in diameter in the front of the building. (N.T. 10)

20. Mr. Groeber also saw a large pile of rubble between the buildings which was approximately 20 feet in diameter and five feet high; the pile contained various demolition materials such as bricks, lumber, plaster material, ceiling material and a large chunk of duct work measuring ten inches in diameter and five or six feet in length. (N.T. 10-11)

21. Mr. Groeber, who holds a B.S. in Biology and an M.S. in Environmental Engineering, has been employed as the Air Quality Supervisor for the Lancaster District for six years.

22. Mr. Groeber has taken several training courses related to asbestos. (N.T. 8)

23. Based on his experience, Mr. Groeber was concerned that the duct contained asbestos. (N.T. 12)

24. The insulation material around the detached duct was dry, crushed, and exposed. This material was not sealed or identified as asbestos, nor was it isolated in any way. (N.T. 12-14)

25. There was no notice regarding asbestos at the Job Site. (N.T. 13-14)

26. Mr. Groeber did not observe any containment or removal equipment commonly used in demolition projects involving asbestos-containing materials. (N.T. 13-14)

27. As of February 5, 1988, U.S. Wrecking had not yet filed a notification form with the Department. (N.T. 18-19)

28. The Department had previously sent a letter and a copy of the NESHAPS regulations to Arthur Mellinger, President of U.S. Wrecking. The

letter specifically referred to the notification requirement. (N.T. 28; Ex. C-4)

29. U.S. Wrecking had submitted notifications for renovation and demolition projects in the past, and, therefore, had knowledge of this requirement. (N.T. 28)

30. Using a plastic sandwich bag he found on the premises, Mr. Groeber collected a sample of the insulation he found at the Job Site on his February 5, 1988, inspection. (N.T. 12)

31. When Mr. Groeber returned to the office he secured the sample in a sample jar and placed a security seal on it. He also filled out a Sample Submission Data Sheet for the sample which was marked as No. 3333330. (N.T. 14-15)

32. Mr. Groeber placed the sample in a locked cabinet in his locked office over the weekend. The following Monday, February 8, 1988, the sample was hand-delivered to the Department's Harrisburg laboratory. (N.T. 16)

33. When the sample was received at the laboratory the seal was intact. (N.T. 92)

34. Sample No. 3333330 was analyzed by James Yoder of the Department's Bureau of Laboratories. (N.T. 92)

35. At the time of the hearing on the merits, Mr. Yoder was the certification officer responsible for inspecting laboratories at the Department's Bureau of Laboratories. Prior to this position, he was a chemist in the Air Chemistry Section in the Bureau of Laboratories for a four-year period during which he performed microscopic identification of asbestos. (N.T. 78; Ex. C-6)

36. Although Mr. Yoder has received specific training regarding asbestos and its analysis and has performed several hundred asbestos sample

analyses, most of his coursework and sample analysis was done after the time of the analysis of Sample No. 3333330. (N.T. 79-80)

37. Polarized light microscopy, a generally accepted technique for asbestos identification, employs a specialized microscope to identify the asbestos fibers based on crystallographic and morphological characteristics. (N.T. 80)

38. The Department's laboratory is currently certified for asbestos analysis. The polarized light microscope is maintained and calibrated monthly in accordance with industry practice. (N.T. 90-91)

39. Mr. Yoder follows a routine procedure when performing polarized light microscopy asbestos analysis. Each step involves determination of specific optical properties in order to identify the material. (N.T. 84-89)

40. To determine the quantity of material, the original sample is examined under a hood with a stereomicroscope. (N.T. 90)

41. Mr. Yoder determined that Sample No. 3333330 contained 50-75% chrysotile asbestos, and he recorded this information on the laboratory sample report form. (N.T. 93; Ex. C-2)

42. Mr. Yoder recorded his analysis results on the Sample Submission Data Sheet and logged these results onto the mainframe computer. (N.T. 91-92; Ex. C-1)

43. Chrysotile asbestos is one of six regulated forms of asbestos. (N.T. 97)

44. Mr. Yoder informed Mr. Groeber of the analysis results via telephone on February 9, 1988. (N.T. 17, 93)

45. Mr. Mellinger telephoned Mr. Groeber on February 5, 1988, and stated that the fallen ductwork at the Job Site had only recently been

discovered and would be treated as asbestos-containing material. (N.T. 19-20, 24)

46. During this call, Mr. Groeber again advised Mr. Mellinger that the Department requires notification of such demolition projects. (N.T. 24)

47. U.S. Wrecking submitted an Asbestos Demolition/Renovation Notification Form to the Department on February 8, 1988. (N.T. 24-25; Ex. C-3)

48. This form estimated that 320 linear feet, or 208 square feet, of friable asbestos, existed at the Job Site. (Ex. C-3)

49. On February 11, 1988, Mr. Groeber issued a Notice of Violation to Mr. Mellinger outlining the violations of regulations that were found at the February 5, 1988, inspection. (N.T. 27-28; Ex. C-5)

50. Mr. Groeber made a second visit to the Job Site on February 12, 1988, and found it in the same condition as it had been on February 5, 1988. (N.T. 25)

51. The pile of debris, including the chunk of ductwork, remained on the Job Site. (N.T. 26)

52. The asbestos-containing debris was neither wetted nor isolated and sealed. (N.T. 26-27, 34)

53. The partially dismantled duct hanging from the ceiling on February 5, 1988, had fallen to the ground. (N.T. 27)

54. Mr. Groeber conducted a follow-up inspection at the Job Site on February 19, 1988, and found that the demolition work was in compliance with the applicable regulations. (N.T. 31)

55. U.S. Wrecking employees were present during the improper demolition. (N.T. 5)

56. The Department did not conduct any air quality monitoring at or near the Job Site.

57. On January 18, 1990, the Department filed a complaint for assessment of civil penalties under Section 9.1 of the Air Pollution Control Act.

DISCUSSION

We begin this matter with a discussion of the relevant standards of review. The Department's task is two-fold here - it must prove to the Board by a preponderance of the evidence that U.S. Wrecking violated the applicable statutes and regulations and that there is a basis for the Board to assess civil penalties. 25 Pa. Code §§21.101(a) and 21.101(b)(1) and DER v. Lucky Strike Coal Company and Louis J. Beltrami, 1987 EHB 234, aff'd Lucky Strike Coal Company and Louis J. Beltrami v. Department of Environmental Resources, 119 Pa. Cmwlth. 440, 546 A.2d 447 (1988). Because U.S. Wrecking has not filed a post-hearing brief, it has waived any legal arguments which would defeat or mitigate the Department's claims to civil penalties. As a result, it is unnecessary for the Board to address any arguments in the Department's post-hearing brief dealing with U.S. Wrecking's attempts during the course of the hearing on the merits to mitigate the penalty amount. Lucky Strike, *Id*; DER v. Allegro Oil and Gas Company, 1991 EHB 821. Here, we must conclude that the Department has established that U.S. Wrecking violated the APCA and the regulations adopted thereunder and that it is entitled to civil penalties from U.S. Wrecking for those violations.

Violations of the NESHAPS Regulations

If the amount of friable asbestos in a facility being demolished is at least 80 linear meters (260 linear feet) on pipes or at least 15 square

meters (160 square feet) on other facility components, the NESHAPS regulations require the operator of the demolition project to notify the Department at least ten days before initiating the demolition. 40 CFR §§61.145 and 61.146.[3] The evidence establishes that U.S. Wrecking did not timely notify the Department of its intention to undertake the demolition project at the Job Site and that it was subject to the notification requirements.

Since U.S. Wrecking did not file its notification form until February 8, 1988, and the demolition project at the Job Site was well underway on February 5, 1988, when Mr. Groeber discovered it during the course of his lunchtime walk, it is obvious that U.S. Wrecking did not timely file the notification form.[4]

The presence of asbestos-containing material on the Job Site is confirmed by analysis of the sample collected by Mr. Groeber on February 5, 1988, and by U.S. Wrecking's own admission on the notification form. Analysis of the sample collected by Mr. Groeber indicates the presence of the chrysotile form of asbestos in the sampled insulation material; the chrysotile form of asbestos is subject to the NESHAPS standards for asbestos. The notification form eventually filed by U.S. Wrecking indicated that the amount

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[3] Subsequent to the filing of the Department's complaint for civil penalties, the NESHAPS regulations pertinent to asbestos were amended. See 55 F.R. 48414 (November 20, 1990). The Board has applied the version of the regulations in effect at the time of the occurrence of the alleged violations. Rushton Mining Company *et al.* v. DER, 1976 EHB 117.

[4] The Department urges us to make this finding based on the principle that the absence of a business record - in this case, the absence of an entry on the Department's log of receipt of asbestos notification forms - is evidence that the event recorded never occurred. We make our finding on the basis of common sense.

of asbestos-containing material was such that U.S. Wrecking was required both to submit a notification form under 40 CFR §61.141 and to adhere to the handling and disposal requirements of 40 CFR §§61.148 and 61.152. (Ex. C-3)

NESHAPS regulations specify that asbestos material must be wetted while being stripped, and must remain wetted until collected for disposal. 40 CFR §61.147(c). Any removed asbestos material is to be carefully lowered to the ground to prevent asbestos emissions. 40 CFR §61.147(b). In some cases, an exhaust system may be employed to control asbestos emissions. 40 CFR §61.147(c)(2).

The evidence presented at the hearing establishes that no such measures were used. On his February 5, 1988, visit to the premises, Mr. Groeber observed the asbestos material, noting that it was "very dry" and crumbled easily (N.T. 12, 13). He did not observe any wetting equipment, containment materials or devices used for asbestos removal (N.T. 13). On February 12, 1988, Mr. Groeber found the pile of debris, including a chunk of duct work, remained. Again, the building was not wetted (N.T. 26).

Mr. Groeber also testified that at the time of his first visit to the premises on February 5, 1988, the building was gutted of all walls and ceiling material (N.T. 9-10). Accordingly, we can deduce the asbestos materials were improperly removed in violation of 40 CFR §61.147.

NESHAPS regulations also specify that all asbestos-containing material, after being wetted, shall be sealed in leak-tight containers and labeled with a warning. 40 CFR §61.152. The testimony establishes this was not done. On the two occasions that Mr. Groeber visited the site, the asbestos insulation was lying on the floor as part of a pile of demolition

debris (N.T. 12-14, 26). He specifically noted that its condition was very dry and that it was not isolated or labeled in any way (N.T. 12-14, 26). Consequently, we must conclude that U.S. Wrecking violated 40 CFR §61.152.

Calculation of Penalty Amount

Having found that U.S. Wrecking violated the NESHAPS regulations and, therefore, the APCA,[5] we turn now to calculation of the penalty amounts. This entails a determination of the number of days of violation for each violation and the amount to be assessed per day of violation, taking into account the factors in §9.1 of the APCA.[6]

Under 40 CFR §61.146, U.S. Wrecking was required to submit a notification form ten days before initiating demolition at the Job Site. There is nothing in the record to establish when demolition began at the Job Site, so we must calculate the days of violation with reference to when the Department discovered the illegal demolition. Since the Department discovered the violation on February 5, 1988, the notification form was required to be

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[5] Violation of a regulation adopted pursuant to the APCA constitutes unlawful conduct. §8 of the APCA.

[6] Section 9.1 of the APCA provides:

> In addition to proceeding under any other remedy available at law, or in equity, for a violation of a provision of this act, or a rule or regulation of the board, or an order of the department, the hearing board, after hearing, may assess a civil penalty upon a person for such violation. Such a penalty may be assessed <u>whether or not the violation was wilful</u>. The civil penalty so assessed shall not exceed ten thousand dollars ($10,000.00), plus up to two thousand five hundred dollars ($2,500.00) for each day of continued violation. In determining the amount of the civil penalty, the hearing board shall consider the <u>wilfulness of the violation, damage or injury to the outdoor atmosphere</u> of the Commonwealth or its uses, and other relevant factors....

filed on or before January 26, 1988. The form was not filed until February 8, 1988, so we have the initial violation (*i.e.* that on January 26, 1988) and 13 days of continuing violation.

The violations of 40 CFR §§61.147 and 61.152 for improper removal and storage of asbestos were discovered first on February 5, 1988; were found to still be occurring on the second inspection, February 12, 1988 (N.T. 12-14, 26); and were corrected by the time of the Department's third visit to the Job Site on February 19, 1988 (N.T. 31). The Department urges us to find a continuing violation of 14 days, but we cannot do so, for there is no evidence in the record to support a finding that U.S. Wrecking's violations continued between the dates of the Department's second and third visits to the Job Site. DER v. Lucky Strike Coal Company and Louis J. Beltrami, *id.* at 248-249. Consequently, we find an initial violation on February 5, 1988, and seven days of continuing violations.

Section 9.1 of the APCA directs the Board to consider the wilfulness of the violation, damage or injury to the outdoor atmosphere of the Commonwealth or its uses and other relevant factors. We will analyze each of these factors in turn.

The Board has interpreted the concept of a wilful violation under this Act to require more than a knowledge of a violation; it must also be conduct without justifiable excuse. DER v. Pennsylvania Power Company, 1976 EHB 147, at 172. There was ample evidence presented here to conclude that these violations were wilful.

U.S. Wrecking had prior knowledge of the applicable asbestos regulations and had complied by submitting notification forms for past projects (N.T. 28). U.S. Wrecking had been reminded of these regulations and sent both notification forms and a copy of the Bureau of Solid Waste

Guidelines in May of 1985 (N.T. 28; Ex. C-4). Moreover, U.S. Wrecking did not respond immediately in correcting the violations once notified. After his initial February 5, 1988, inspection, Mr. Groeber testified that during a phone conversation that same day, Mr. Mellinger spoke about the fallen duct work and stated he intended to treat this as asbestos-containing material (N.T. 24). U.S. Wrecking did not submit its one page notification form until February 8, 1988, three days later (N.T. 25; Ex. C-3), and did not act to correct these violations until sometime after the February 12, 1988, inspection when the storage and disposal violations were still occurring (N.T. 12-14, 26). These violations could have been remedied promptly; notification could have been hand-delivered and the area could have been properly isolated and the materials removed to avoid any further exposure (N.T. 34-35).

U.S. Wrecking was aware of the regulations and, even when made aware of its violations, chose not to act. U.S. Wrecking's only attempt to defend its actions was its argument that U.S. Construction, Inc. had done the work at this site and it, therefore, should be responsible (N.T. 38-59). However, due to its failure to respond to the Department's discovery requests, one of which related to this contention, the interrogatories were deemed answered in the Department's favor. We find U.S. Wrecking's actions were wilful.

In accordance with §9.1, the Board is also to consider damage or injury to the outside atmosphere of the Commonwealth of its uses. Although the Department presented evidence on the amounts of asbestos on the Job Site, the hazards of asbestos, especially when in a dry or friable form, and the haphazard way this site was demolished and left with open piles of debris exposed, the Department did not present any evidence of damage to the

atmosphere. Apparently no air quality monitoring was done. Without such scientific evidence, it is impossible to quantify the damage to the environment which may have been caused by the improper demolition.

The Department also argues that the protection of public health, safety, and welfare is an important purpose of the APCA and, therefore, should be a factor considered in assessing a civil penalty. The Board has previously linked the degradation of the outdoor atmosphere with the consideration of the detriment to public health and welfare when assessing a civil penalty under the APCA. Pennsylvania Power, at 178. While we have found that workers were present during the demolition,[7] we cannot make any finding as to the threat to public health and safety without any scientific evidence establishing the level of asbestos emissions and the risk associated with that level.

The only other factor considered under the phrase, "other relevant factors" is the deterrent effect such a penalty would have. In Pennsylvania Power the Board stated, "...the civil penalties section, since it does not rely on intent, means that penalties can and should be assessed as a cost of polluting in order to deter insults to the environment and to contribute to their elimination." Pennsylvania Power, at 176. The kind of conduct that occurred here is certainly conduct that should be deterred. The burden of compliance is not too weighty. And, the Department went out of its way to mail U.S. Wrecking a notice advising it of current asbestos notification and removal requirements as early as May, 1985. Because the notification requirement, in particular, is the keystone of the asbestos compliance program, violations of that requirement must be discouraged.

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[7] If they were not, the project could not have been accomplished.

In light of the wilfulness of U.S. Wrecking's violations and in order to deter future violations, we will assess a civil penalty of $2,000 for the initial violation of 40 CFR §61.146 and $500 per day for the 13 days of continuing violation, for a total of $8500.[8] Similarly, we will assess a civil penalty of $1500 for each of the initial violations of 40 CFR §§61.147 and 61.152 and $500 per day for the seven days of each continuing violation, for a total of $10,000. The sum of all civil penalties imposed is $18,500.[9]

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of this proceeding. §9.1 of the APCA.

2. The Department bears the burden of proving that U.S. Wrecking violated the APCA and that there is a basis for the Board to assess civil penalties. 25 Pa. Code §21.101(a) and (b)(1).

3. U.S. Wrecking, in failing to file a post-hearing brief, waived its opportunity to argue any defenses or mitigating factors.

4. Owners or operators of demolition projects are required to notify the Department of all demolition or renovation operations containing at least 80 linear meters or 15 square meters of friable asbestos at least ten days before demolition begins. 40 CFR §§61.145 and 61.146.

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[8] The Department has not argued for a particular civil penalty for each of the violations. It has, however, asserted that a total civil penalty of $25,000 is reasonable, given the maximum penalty which could be assessed by the Board under §9.1 of the APCA.

[9] The Department suggests that the assessment of a large penalty is warranted because the EPA would impose a maximum penalty of $5000 per day per violation pursuant to its penalty policy. While we look to federal regulations and policies for guidance in some circumstances, we will not do so here in light of the penalty amounts prescribed by state law.

5. U.S. Wrecking failed to submit a notification form ten days prior to the beginning of its demolition of the Job Site in violation of 40 CFR §61.146.

6. U.S. Wrecking initially violated 40 CFR §61.146 on January 26, 1988, and its violation continued for 13 more days until February 8, 1988.

7. Owners or operators are required to keep asbestos materials wetted until collected for disposal. These materials must also be carefully lowered to the ground, not dropped or thrown. 40 CFR §61.147 (b-f)

8. Asbestos materials are to be disposed of in accordance with the requirements of 40 CFR §61.152, including placing wetted materials into sealed, leakproof containers.

9. On or before February 5, 1988, U.S. Wrecking improperly removed and stored asbestos-containing material in violation of 40 CFR §§61.147 and 61.152.

10. U.S. Wrecking's violations of 40 CFR §§61.147 and 61.152 continued until February 12, 1988.

11. Section 9.1 of the APCA authorizes the Board to impose civil penalties of up to $10,000 per violation and up to $2500 per day of continuing violation.

12. Relevant factors to be considered by the Board in assessing a civil penalty include the wilfulness of the violation, damage or injury to the outside environment of the Commonwealth, any detriment to public health and welfare, and the deterrent effect of the civil penalty. §9.1 of the APCA and DER v. Pennsylvania Power Company, 1976 EHB 147.

13. U.S. Wrecking's violations of the NESHAPS violations were knowing and wilful.

14. Because of the pivotal role of the notification requirement in the asbestos control program, a larger penalty for violations of the requirement will deter non-compliance.

15. The Department failed to establish damage or injury to the outside environment or to public health and welfare.

16. A civil penalty of $2000 for U.S. Wrecking's initial violation of 40 CFR §61.146 and $500 per day for each day of continuing violation is appropriate.

17. A civil penalty of $1500 for each of U.S. Wrecking's violations of 40 CFR §§61.147 and 61.152 and $500 per day for each day of continuing violation is appropriate.

O R D E R

AND NOW, this 10th day of July 1992, it is ordered that civil penalties in the amount of $18,500 are assessed against U.S. Wrecking for violations of the APCA. This amount is due and payable immediately into the Clean Air Fund. The Prothonotary of Lancaster County is ordered to enter the full amount of the civil penalty as a lien against any property of U.S. Wrecking, together with interest at the rate of 6% per annum from the date hereof. No costs may be assessed upon the Commonwealth for entry of the lien on the docket.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

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DATED: July 10, 1992

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M. DIANE SMITH
SECRETARY TO THE BOARD

EMPIRE SANITARY LANDFILL, INC.	:	EHB Docket No. 90-467-W
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 10, 1992

OPINION AND ORDER SUR MOTION FOR SUMMARY JUDGMENT

By Maxine Woelfling, Chairman

Synopsis

A motion for summary judgment is granted in part and denied in part. Conditions in a solid waste management permit prohibiting a landfill from accepting new out-of-state waste except to fill certain existing contracts or unless the out-of-state waste is matched by a fixed proportion of new in-state waste violate the Commerce Clause of the U.S. Constitution because the conditions discriminate against interstate commerce, they were not authorized by Congress, and the state's objectives could be accomplished by less discriminatory means. The permit conditions limiting waste from out-of-state are not within a special realm of state authority protected by the Tenth Amendment to the U.S. Constitution; the Tenth Amendment is not implicated unless the national political process operated in a defective manner. Summary judgment is not appropriate on the issue of whether a permit condition limiting the amount of waste which the landfill can receive was authorized under Article I, §27, of the Pennsylvania Constitution, where the moving party

has not introduced any evidence which would show whether there was a reasonable effort to minimize the environmental incursion or that the benefits would outweigh the environmental harm. A condition requiring the landfill to conduct traffic studies on a street is unreasonable where the landfill accounts for only 21% of the truck traffic using it.

OPINION

The present controversy[1] has its genesis in a solid waste management permit (No. 100933) issued by the Department of Environmental Resources (Department) to Empire Sanitary Landfill, Inc. (Empire) on March 14, 1986. The permit, which was issued pursuant to the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* (Solid Waste Management Act), authorized Empire to dispose of solid waste on a 25.74 acre site in the Lackawanna County municipalities of Ransom Township and Taylor Borough (Empire's motion for summary judgment, ¶ 6(a); Department's answer, ¶ 6(a)). The permit was amended on May 22, 1987, to authorize the expansion of the site to 487.16 acres, of which 150 acres were a lined disposal area; the disposal of 5000 tons per day (TPD) as a daily maximum; and an increase of up to 10% of this daily volume if approved by the Department (Empire's motion for summary judgment, ¶ 6(b); Department answer, ¶ 6(b)). Empire advised the Department that it intended to continue operating under the April 9, 1988, municipal waste management regulations, filing the necessary

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[1] The complex procedural history of this matter is set forth in the Board's opinion at 1990 EHB 1534 denying Empire's request for supersedeas of the Board's opinion at 1990 EHB 1270 denying Empire's motion to enforce a settlement agreement; the Board's opinion at 1990 EHB 1660 denying Empire's request to adjudicate the merits on the basis of the record of the November 1 and 2, 1990, supersedeas hearing; the Board's opinion at 1991 EHB 66 dismissing as moot Empire's appeal of the April 6, 1990, modification to its solid waste permit at Docket No. 90-187-W; and the Board's opinion at 1991 EHB 102 granting Empire's request for supersedeas.

repermitting applications (Empire's motion for summary judgment, ¶ 6(c); Department's answer, ¶ 6(c)). The Department thereafter, on August 16, 1988, issued a modification to Empire's permit which restricted construction and operation to Pads 2 through 4 (Empire's motion for summary judgment, ¶ 6(f); Department's answer, ¶ 6(f)).

The Department has modified Empire's permit twice since then. On April 6, 1990, the Department issued a modification to Empire's permit (the April permit) decreasing the maximum daily volume to 3,953 TPD, lowering the average daily volume to 3,109 TPD,[2] limiting the imported daily waste volume to 3,109 TPD,[3] and imposing various restrictions relating to vehicular access to the landfill (Exhibit binder in support of Empire's motion for summary judgment, p.64; Empire Sanitary Landfill v. DER, 1991 EHB 102. Empire appealed the issuance of the April permit at EHB Docket No. 90-187-W.

The Department issued the second of the two permit modifications (the October permit) on October 29, 1991. The October permit expressly superseded the April permit where there were discrepancies between the two permits.[4] The October permit imposed a 5,000 TPD maximum daily waste volume;[5] limited out-of-state waste to waste received pursuant to Empire's contracts with Bridgewater Resources, Inc. (BRI), Morris County Transfer Station, Inc., and

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[2] Computed over a calendar year quarter.

[3] Computed over a calendar year quarter.

[4] The first page of the October permit states:

> All conditions of the attached permit amendment/ modification shall supersede conditions in the original permit if discrepancies or inconsistencies become evident.

[5] Computed over a calendar year quarter.

Chambers Development Company, Inc.; imposed a "base Pennsylvania Municipal Waste " volume of 317 TPD for purposes of Empire's seeking additional waste capacity under Executive Order 1989-8; and restricted vehicular access to the landfill and required Empire to conduct a biannual traffic study. Empire appealed the issuance of this permit modification at EHB Docket No. 90-467-W.

The October permit implemented standards contained in Executive Order 1989-8 (Department's answer, ¶ 6(f)), which was adopted pursuant to Article I, §27 of the Pennsylvania Constitution; the Solid Waste Management Act; and the Municipal Waste Planning, Recycling, and Waste Reduction Act, the Act of July 28, 1988, P.L. 5561, 53 P.S. §4000.101 *et seq.* (Municipal Waste Act). The Executive Order contained provisions related to the restrictions on imported waste and the average daily waste volume set in the October permit. Pending development of the Pennsylvania Municipal Waste Management Plan, Section 1(a)(1) of the Executive Order prohibited the Department from approving modifications to existing municipal waste disposal permits which would authorize an expansion of disposal capacity unless the applicant demonstrated a need for additional capacity and showed that at least 70% of the municipal waste received at the facility was generated in Pennsylvania and accepted pursuant to county implementing documents specified in §513(b) of the Municipal Waste Act or such other documents as the Department deemed acceptable. Section 2(a), meanwhile, directed the Department to establish maximum and average waste volume limits for operating municipal waste landfills "based on the actual daily volume disposed at the landfill and reported to the Department for the days the facility was in operation during the period of October 26, 1988, to June 30, 1989." The operator could petition the Department for additional waste volumes if required to implement "signed and binding contracts" which were entered into prior to October 17,

1989, and which called for performance during the period of time from October 17, 1989, to the adoption of the Pennsylvania Municipal Waste Management Plan. Operators of municipal waste disposal facilities could also request increases in waste volume limitations in their permits, provided that at least 70% of the additional waste was generated in Pennsylvania.[6]

By order dated October 31, 1990, the Board consolidated the October permit appeal with the April permit appeal at EHB Docket No. 90-187-W and, on November 1 and 2, 1990, the Board conducted a supersedeas hearing on the consolidated actions.

By order dated December 26, 1990, Paragraphs 3, 4, 5, 6, 7, and 9(b) of the October permit were superseded. Our opinion in support of that order outlined the reasons that Empire was likely to prevail on the merits with regard to its contentions that: the volume limitations in the permit are unconstitutional restrictions on interstate commerce; the reductions in the waste volume limitations in Empire's permit are not authorized by the Municipal Waste Act or the Solid Waste Act; and, the requirement to perform traffic studies is unreasonable where the relevant roadway is a heavy industrial and commercial corridor and trucks traveling to or from Empire constitute only 21% of the traffic. We also concluded, however, that the Department was likely to prevail on the question of whether the Department abused its discretion when it restricted the use of an intersection by trucks

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[6] The Commonwealth Court recently ruled that the Executive Order was unconstitutional because it violated the doctrine of separation of powers as expressed in Article IV, Section 15, and Article II, Section 1 of the Pennsylvania Constitution. See National Solid Wastes Management Association v. Robert P. Casey and the Department of Environmental Resources, ___ Pa. Cmwlth. ___, 600 A.2d 260 (1991). The Commonwealth has appealed that decision to the Pennsylvania Supreme Court, 95-M.D. Appeal Docket 1991. The National Solid Wastes Management decision is not dispositive of this appeal, however, for the Department has cited other grounds for the permit conditions contested by Empire, and, the Board, therefore, must proceed to consider them.

traveling to or from the facility during the hours of peak use by the motoring public. Id.

Between the time of this Board's order superseding Paragraphs 3, 4, 5, 6, 7, and 9(b) of the October permit and the Board's opinion explaining that order, we ruled on a Department motion to dismiss Empire's appeal of the April permit as moot because the October permit rendered the April permit null and void. We granted the motion at 1991 EHB 66, after unconsolidating the appeals and again designating Empire's appeal of the October permit as Docket No. 90-467-W.

On April 16, 1991, Empire filed a motion for summary judgment and a supporting memorandum of law. Empire argued that it is entitled to summary judgment on the same issues considered as likely grounds for Empire's success on the merits in the supersedeas hearing, namely: (1) whether the imported waste volume limitations violated the Commerce Clause of the United States Constitution, Article I, §8; (2) whether the average daily waste volume limitation of 3,900 tons exceeded the Department's statutory authority or abused its discretion; and (3) whether the Department abused its discretion by requiring the biannual traffic study.

The Department filed an answer and memorandum in opposition on May 31, 1991, maintaining that the record contains unresolved issues of fact and that Empire was not entitled to judgment as a matter of law. According to the Department, the imported waste volume limits do not violate the Commerce Clause; the waste volume and waste origin requirements are authorized by the Municipal Waste Act, the Solid Waste Management Act, and Article I, §27 of the Pennsylvania Constitution; and the traffic study requirement falls within the Department's power to regulate the transportation of solid waste, as delineated in Pennsylvania Environmental Management Services, Inc. v. DER,

1984 EHB 94, and TRASH, Ltd. and Plymouth Township v. DER *et al.*, 1989 EHB 486, aff'd, 132 Pa. Cmwlth. 642, 574 A.2d 721 (1990). On July 22, 1991, Empire filed a reply brief and a corrected reply brief.

The Board is empowered to grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of Law. Robert L. Snyder *et al.* v. Department of Environmental Resources, ___ Pa. Cmwlth. ___, 588 A.2d 1001 (1991). We will examine Empire's challenges with regard to the imported waste restrictions, the waste volume limitations, and the biannual traffic studies requirement separately below.

Imported Waste Restrictions

Paragraphs 4, 5, 6, and 7 of Part III of the October permit restrict the amount of waste Empire can accept from sources outside Pennsylvania. The provisions prohibit Empire from accepting new out-of-state waste except to fill certain existing contracts or unless the out-of-state waste is matched by a fixed proportion of new in-state waste.

Empire asserts that the imported waste volume limitations of its permit violate the Commerce Clause of the United States Constitution because they constitute a discriminatory barrier to interstate commerce and were not authorized by Congress. The Department, however, contends that the permit provisions do not discriminate against interstate commerce, that they were authorized by Congress when it enacted the Resource Conservation and Recovery Act, the Act of October 21, 1976, P.L. 94-480, as amended, 42 U.S.C. §6901 *et seq.* (RCRA), and that they fall within the sphere of state sovereignty protected by the Tenth Amendment to the U.S. Constitution.

The Supreme Court has recently issued two opinions ruling on whether state restrictions on the importation of out-of-state waste violate the Commerce Clause: Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, *et al.*, (S. Ct.) No. 91-636 (Opinion issued June 1, 1992), and Chemical Waste Management, Inc. v. Alabama, (S. Ct.) No. 91-471 (Opinion issued June 1, 1992). A number of other courts have also recently ruled on the same question. See, *e.g.* National Solid Wastes Management Association v. Alabama Department of Environmental Management, 910 F.2d 713 (11th Cir. 1990), cert. denied ___ U.S. ___, 111 S. Ct. 2800 (1991) (Alabama law restricting the import of hazardous wastes from 22 states that lack treatment or disposal facilities violated the Commerce Clause because it constituted an unjustified barrier to an object of interstate commerce); Government Suppliers Consolidating Services, Inc. v. Indiana, 753 F.Supp. 739 (S.D. Ind. 1990) (Indiana law imposing tipping fee on disposal of out-of-state waste in Indiana violated the Commerce Clause because the state failed to demonstrate that Indiana waste was inherently safer than out-of-state waste, and the legitimate goal of preserving state landfill space could be accomplished without discriminating against out-of-state waste); National Solid Wastes Management Association v. Ohio, 763 F.Supp 244 (S.D. Ohio 1991) (an Ohio law which allowed solid waste management districts within the state to set different waste disposal fees depending on the place of the waste's origin violates the Commerce Clause because, by treating wastes from inside the state differently from wastes from outside the state, the law discriminated against interstate commerce, and because the state failed to support its claim that different fees were necessary to cover higher costs of regulating those wastes); American Trucking Associations, Inc. v. Maine, 595 A.2d 1014 (Me. 1991) (Maine law that required all trucks carrying hazardous

materials to pay flat per-truck license fee violates the Commerce Clause because the fee burdens interstate commerce by favoring in-state over out-of-state transporters, and other, less discriminatory alternatives are available); Hazardous Waste Treatment Council v. South Carolina, 945 F.2d 781 (4th Cir. 1991) (hazardous waste treatment trade association is likely to prevail on claim that provisions of South Carolina laws violate the Commerce Clause where the state compelled in-state facilities to give preferences to in-state waste and to bar waste from specific states); Chemical Waste Management, Inc. v. Louisiana Department of Environmental Quality, ___ F.Supp. ___, 33 ERC 1400 (M.D. La. 1991) (Louisiana law banning importation of hazardous waste from foreign nations violates the Commerce Clause because it discriminates against waste solely based upon its place of origin and state failed to present legitimate local concerns that justified the burden imposed on interstate and foreign commerce); Stephen D. DeVito Jr. Trucking Inc. v. Rhode Island Solid Waste Management Corp., ___ F.Supp ___ (D. R.I. 1991) (Rhode Island public corporation may not implement regulation banning transport of solid waste generated in state to licensed disposal facilities outside the state, because the regulation's burden on interstate commerce outweighs any public benefit from the regulation, and the trucking company challenging the regulation was likely to prevail on the claim that the regulation is a protectionist measure which violates the Commerce Clause).

County barriers to waste from outside the county have also been challenged. See, *e.g.* Diamond Waste, Inc. v. Monroe County, ___ F.2d ___, 33 ERC 2001 (11th Cir. 1991) (County resolution barring the transportation of solid waste into the county from areas outside the county violates the Commerce Clause because, although the resolution does not facially discriminate, the impact on interstate commerce would be more than incidental

if all counties adopted such a resolution, and less restrictive measures are available).

The imported waste restrictions in the October permit violate the Commerce Clause of the U.S. Constitution; the restrictions, though not authorized by Congress, erect a barrier to interstate commerce.

The Supreme Court, in Philadelphia v. New Jersey, 437 U.S. 617 at 622-23 (1978), expressly concluded that the interstate movement of solid and liquid wastes is commerce, and it is well settled that even in the absence of a congressional exercise of power, the Commerce Clause prevents the states from erecting barriers to the free flow of interstate commerce. Cooley v. Board of Wardens, 12 How. 299 (1852); see Great Atlantic and Pacific Tea Co. v. Cottrell, 424 U.S. 366, 370-371 (1976). Where, however, "activities of legitimate local concern overlap with the national interests expressed by the Commerce Clause...the Court in the absence of congressional guidance is called upon to make the 'delicate adjustment of the conflicting state and federal claims.' H. P. Hood & Sons, Inc. v. D W. Mond, 336 U.S. 525, at 553 (Black, J., dissenting)..." Great Atlantic and Pacific Tea Co. v. Cottrell, 424 U.S. 366, at 371; see Hunt v. Washington State Apple Advertising Com., 432 U.S. 333, 350 (1977).

The "delicate adjustment" performed depends on the nature of the state action at issue: when determining whether a state has overstepped its role in regulating interstate commerce, courts distinguish between state laws that burden interstate transactions only incidentally and those that affirmatively discriminate against such transactions. Statutes in the first group violate the Commerce Clause only if the burdens they impose on interstate trade are clearly excessive in relation to the putative local benefits, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), while laws in the

second group are subject to more demanding scrutiny: the state must demonstrate both that the regulation serves a legitimate local purpose and that the purpose could not be served as well by nondiscriminatory means. Hughes v. Oklahoma, 441 U.S. 322 at 336 (1979) and Maine v. Taylor, 477 U.S. 131 at 138-39 (1986). "'When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor out-of-state interests, [the courts] have generally struck down the statute without further inquiry.'" Healy v. Beer Institute, Inc., 491 U.S. 324, 337 n. 14 (1989) (quoting Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 579 (1986)).

The permit conditions here facially discriminate against the importation of out-of-state waste. Insofar as the issue of discrimination is concerned, they are indistinguishable from the New Jersey statute challenged in Philadelphia. In each instance, a state expressly required that in-state waste be treated differently from out-of-state waste. "Discrimination" is not a self-defining term, but the most wide-ranging consensus about the term is in its application to explicitly protectionist provisions. See Gunther, Constitutional Law, 11th Ed., p.276.

Nor does the state have a legitimate local interest to justify such discrimination. The Department concedes that there is no qualitative difference between Pennsylvania waste and waste generated out-of-state (Department's answer, ¶ 6(j)). Absent such a difference, the only basis the Department can have for treating out-of-state waste differently is its place of origin, and this type of discrimination is precluded by Philadelphia v. New Jersey. 437 U.S. 617. In Philadelphia, the appellants challenged a New Jersey statute which prohibited the importation of solid wastes into the state. In striking down the statute as unconstitutional, the Court did not

engage in a balancing test, as the statute was discriminatory on its face and the state failed to prove a compelling need for distinguishing between in-state and out-of-state waste.[7] It did not matter that the ultimate aim of the statute was to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution. 437 U.S. 617 at 626. Whatever the ultimate purpose of the statute, the state could not accomplish its goals by discriminating against commerce coming from outside the state absent some reason "apart from their origin" to treat them differently. Id. at 627.

The Department maintains that the restrictions on imported waste are necessary to achieve an essential goal: "the reduction of waste to protect the health and welfare of the citizens [of Pennsylvania] from the consequences of its disposal." (Department's memorandum of law in opposition, p.45) That end can be accomplished, however, by less discriminatory means. The Department could, for instance, limit the amount of waste disposed of in Pennsylvania landfills without distinguishing between waste generated inside and waste generated outside the state.[8] However laudable the Department's stated objectives may be, they cannot be pursued by unconstitutional means. As Justice Cardozo observed in the Commerce Clause case Baldwin v. G.A.F.

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[7] In Philadelphia, the State of New Jersey admitted that there was no basis to distinguish out-of-state waste from domestic waste. As noted earlier in this opinion, Pennsylvania here concedes that there is no qualitative difference between waste generated in-state and that generated outside the state.

[8] Many of the Supreme Court's Commerce Clause opinions have contained specific descriptions of alternative regulations that the Court deemed to be nondiscriminatory. See *e.g.* Hunt, 432 U.S. at 354; Dean Milk Co. v. City of Madison, 340 U.S. 349 at 354-355. Unless enacted into law, however, no alternative can be tested against constitutional standards. That would be a case for another day.

Seelig, Inc., 294 U.S. 511 (1935), the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division." *Id.* at 523.

Our conclusion is in accord with the Supreme Court's recent decision in Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, *et al.*, No. 91-636 (Opinion issued June 1, 1992). In that decision, the Supreme Court held that a Michigan law, prohibiting private landfill operators from accepting solid waste that originates outside the county in which the landfill is located, violated the Commerce Clause. Using the same analytical framework it employed in Philadelphia v. New Jersey, *supra*, the Court concluded that the Michigan statute discriminated against interstate commerce by authorizing counties to treat waste from outside the counties differently, and that non-discriminatory means were available which would allow the state to respond to the health and safety concerns it sought to address by the statute. Rather than discriminating against out-of-state waste, the Court noted, Michigan could have limited the amount of waste that each landfill could accept regardless of the origin of the waste.

A state statute that erects a barrier to interstate commerce may nonetheless be upheld where Congress authorizes the state to regulate in such a manner. See White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204 (1983). Because of the important role the Commerce Clause plays in protecting the free flow of interstate trade, state regulation is exempt from the implied limitations of the clause only when the congressional direction to do so is "unmistakably clear." South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 at 91 (1984).

Here there is no unambiguous statement of any congressional intent to alter the limits of state power otherwise imposed by the Commerce Clause. The Department contends that Congress authorized state regulation of interstate trade in waste when Congress enacted RCRA and empowered the Environmental Protection Agency (EPA) to set municipal waste planning requirements for the states. There is nothing in RCRA, however, to support such a conclusion. While the objectives of Subchapter IV, pertaining to state or regional solid waste plans, do encourage states to develop methods for disposal of solid waste which are environmentally sound, RCRA contains no unambiguous congressional direction authorizing the Commonwealth to discriminate against out-of-state waste. Nor did Congress by enacting RCRA, delegate to the EPA the power to authorize states to regulate interstate commerce in waste. RCRA simply contains no clear grant of that power.

Our conclusion regarding RCRA is in accord with Hazardous Waste Treatment Council v. South Carolina, 945 F.2d 781 (4th Cir., 1991). In that case, the Fourth Circuit Court of Appeals held that a federal district court properly granted a preliminary injunction against enforcement of certain South Carolina laws and executive orders where the enactments appeared to discriminate against hazardous waste from out-of-state. The Court of Appeals found that the appellee, a hazardous waste treatment trade association, was likely to prevail in its claim that the South Carolina provisions violate the Commerce Clause. In reaching that conclusion, the court, quoting New England Power Co. v. New Hampshire,[9] 455, U.S. 331 (1982), expressly rejected the

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[9] New England Power is a particularly strong and succinct modern statement, by a unanimous court, condemning state restrictions on the export of natural resources. For many years, the New England Power Company had exported most of the energy generated at its power stations in New Hampshire. (footnote continued)

assertion that RCRA manifested any clear congressional intent to permit states to burden interstate commerce.

Nor do the permit limitations on interstate waste encroach upon the sovereign authority of the states, protected from federal encroachment by the Tenth Amendment, as the Department maintains. According to the Department, the imported waste limitations are necessary "to fulfill [the state's] sovereign duty and protect the public health and safety." (Department's memorandum in opposition, p.39). The Department also argues that the standard of review should be stricter where, as here, legislation or other state action is challenged on the basis of the dormant, unexercised commerce power:

> The [Supreme] Court's reliance on the process protections of Congress ... does not apply with equal force where Congress has not acted and a state power is being questioned under the dormant commerce clause. No "national political process" will have served to protect the states' prerogatives. Thus, the Tenth Amendment's protection of state sovereignty must be considered far more carefully where the state's fundamental authority may be affected by a dormant Commerce Clause analysis.
>
> (Department's memorandum in opposition, p.38.)

We disagree. The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

(Continued footnote)
In 1980, a New Hampshire agency withdrew the Company's authority to export the locally generated power. The agency acted pursuant to a New Hampshire law banning the exportation of energy whenever the agency determined that the energy "is reasonably required for use within this state and that the public good requires that it be delivered for such use." The major issue in the case turned on New Hampshire's unsuccessful claim that Congress, in the Federal Power Act, had expressly consented to the export restriction.

The most important recent Tenth Amendment case decided by the Supreme Court is Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 105 S. Ct. 1005 (1985). In Garcia, the Court held that the Tenth Amendment does not serve as an affirmative constitutional restriction on the authority of Congress to legislate under power otherwise conferred by the Commerce Clause. The Court expressly overruled the short-lived rule of National League of Cities v. Usery, 426 U.S. 833, 96 S. Ct. 2465 (1976), which had interpreted the Tenth Amendment to prohibit federal incursion into areas that would impair the states' ability to perform their "traditional government functions." Id. at 852, 96 S. Ct. at 2474. Instead of the Usery rule, which Garcia found to be "unsound in principle and unworkable in practice," 469 U.S. at 546, 105 S. Ct. at 1015, the Court held that the principal and basic protection of state sovereignty is found in the various forms of state participation in the federal system. Id. at 550-556, 105 S. Ct. at 1017-20. That is, state autonomy is ensured, and its contours are defined, through a constitutional scheme that envisions a state role in the national political process, rather than through a substantive judicial review of the challenged federal action. Id. at 554, 105 S. Ct. at 1019. This principle was reemphasized and succinctly stated in South Carolina v. Baker, 485 U.S. 505, 108 S. Ct. 1355 (1988) (plurality opinion):

> Garcia holds that limits are structural, not substantive--*i.e.*, that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity.
>
> 108 S. Ct. at 1360.

Thus, in the absence of "some extraordinary defects in the national political process" that might deprive the states of their right to participation, Baker, 108 S. Ct. at 1360-61, or some express constitutional guaranty of state

integrity in a certain area, see Garcia, 469 U.S. at 550, 105 S. Ct. at 1017, "nothing in Garcia or the Tenth Amendment authorizes the courts to second guess the substantive basis for congressional legislation." Baker, at 1361.

We know of no authority, nor does the Department cite any in its memorandum, which would support the Department's contention that claims of state sovereignty are entitled to more deference under the Tenth Amendment where the exercise of that state sovereignty is alleged to conflict with the dormant Commerce Clause, as opposed to a federal statute promulgated under the Commerce Clause. In fact, after an exhaustive search of the federal and Pennsylvania caselaw, we failed to discover a single case holding that a power reserved to Congress under the dormant Commerce Clause conflicts with the Tenth Amendment. At most, the policy considerations dictate that claims of state sovereignty are entitled to equal--not greater--deference when they conflict with the dormant Commerce Clause. The Department contends that, in the dormant Commerce Clause situation, no "national political process" will have operated to protect the states' prerogatives. This argument is, however, incorrect. As Baker and Garcia, discussed above, illustrate, the Tenth Amendment analysis focuses on whether the national political process "operate[d] in a defective manner." Baker, at 1361. Congress has the power to authorize the states to regulate interstate commerce if it so desires. Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946), and Northeast Bancorp v. Board of Governors, 472 U.S. 159 (1985).[10] There is no reason

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[10] In Benjamin, the Court held that a discriminatory tax imposed by South Carolina on insurance premiums did not violate the Commerce Clause since Congress had passed the McCarran-Ferguson Act, reserving to the states the power to regulate insurance and providing that no federal statute shall be construed to invalidate any state insurance law or tax unless the federal statute specifically relates to insurance. In Northeast Bancorp, meanwhile, (footnote continued)

why the national political process is less likely to be defective when Congress chooses to act than when Congress chooses not to act. The message of Baker and Garcia is that it is the process of making the choice--and not the choice itself--which is the focus of inquiry under Tenth Amendment analysis.

Even assuming that the Tenth Amendment authorizes certain state activities which would otherwise, under a dormant Commerce Clause analysis alone, be precluded, the Department cannot prevail here. The Department does not assert that the national political process failed to operate properly; instead, the Department maintains that no national political process protects the states' interests unless Congress affirmatively acts. The mere fact that Congress has failed to enact legislation, however, does not amount to a defect in the national political process: Congressional inaction, for better or for worse, is part of that process. "Where...the national political process did not operate in a defective manner, the Tenth Amendment is not implicated." Baker, 108 S. Ct. at 1360-61.

Waste Volume Limitations

Paragraphs 2 and 3 of Part III of the permit limit the maximum amount of waste Empire may accept on any given day or in any quarter. Empire contends that the Department does not possess the legal authority to reduce Empire's maximum and average daily waste volumes. Empire also argues that the out-of-state volume limitations contained in Paragraphs 4, 5, 6, and 7

(Continued footnote)
the Court held that a discriminatory Massachusetts statute governing interstate bank acquisitions did not violate the Commerce Clause because Congress, in the Bank Holding Company Act and the Douglas Amendment to that Act, had specifically authorized this form of protectionism in the banking industry.

effectively reduced Empire's daily maximum volume to less than the figure set forth as the daily maximum in Paragraph 2. Paragraphs 2 and 3 will be addressed separately.

Paragraph 2 contains the limit for the daily maximum. The Department contends the limit is authorized under Article I, Section 27 of the Pennsylvania Constitution, and under Section 503 of the Solid Waste Management Act and Section 1112 of the Municipal Waste Act and the regulations promulgated thereunder. We disagree.

While on its face Paragraph 2 provides that Empire may accept a daily maximum of 5,000 tons, other provisions of the same permit essentially reduce Empire's daily maximum to less than the 5,000 TPD limit. Paragraphs 4, 5, 6, and 7 - discussed earlier with regard to Empire's Commerce Clause challenge - implement a complex scheme limiting the amount of out-of-state waste Empire can accept. Even if Empire were to receive the maximum amount of out-of-state waste possible under its pre-existing contracts, the landfill could not realistically approach the 5,000 TPD maximum. To accept an additional 445 TPD in out-of-state waste, Empire would have to locate and accept an additional 1,038 TPD of Pennsylvania waste.[11] As noted in our supersedeas opinion,

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[11] The October permit assigned Empire a daily maximum of 5,000 TPD and a base Pennsylvania volume of 317 TPD. Under the permit, if Empire accepts the maximum amount possible under its contracts (3,200 TPD) and succeeds in obtaining the daily maximum, then:

$$3{,}200 \text{ tons/day} + 317 \text{ tons/day} + x + y = 5{,}000 \text{ tons/day}$$
$$x = 1{,}483 \text{ tons/day} - y$$

where

y = new non-Pennsylvania waste (out of state waste accepted outside of contracts specifically approved in Paragraph 4

and

x = total amount of Pennsylvania waste less the base Pennsylvania waste volume.

(footnote continued)

however, Mr. Mariani testified that, although Empire has been committed to obtaining as much Pennsylvania waste as possible, Empire cannot compete with out-of-state landfills since landfills outside Pennsylvania need not comply with Department requirements for liners and modules (Supersedeas opinion, pp. 11-12; Empire's exhibits in support, pp. 71-72). In short, the Department may have reinstated the 5,000 TPD maximum in Paragraph 2, but, by implementing Paragraphs 4, 5, 6, and 7, the Department effectively reduced Empire's daily maximum. As noted earlier in this opinion, Paragraphs 4, 5, 6, and 7 violate the Commerce Clause. Because Paragraph 2 must be read to incorporate the provisions of Paragraphs 4, 5, 6, and 7, Paragraph 2 also violates the Commerce Clause.

We need not decide whether the daily volume limit set in Paragraph 2 was authorized under Pennsylvania law. Even if, as the Department contends, it were, that would not cure the Commerce Clause problem, and the Supremacy

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(Continued footnote)

Since, under the permit, new non-Pennsylvania waste may account for no more than 30% of the total of new non-Pennsylvania waste and the amount of Pennsylvania waste received beyond the base Pennsylvania volume, the maximum amount of new out-of-state waste which can be received is:

$$y = .30\ (y + x)$$

$$\frac{y}{.30} = y + x$$

$$x = \frac{y}{.30} - y$$

Substituting for x:

$$1{,}483 \text{ tons/day} - y = \frac{y}{.30} - y$$

$$1{,}483 \text{ tons/day} = \frac{y}{.30}$$

$$y = 445 \text{ tons/year}$$

$$x = 1{,}483 \text{ tons/day} - 445 \text{ tons/day}$$

$$x = 1{,}038 \text{ tons/day}$$

Clause, in Article VI of the U.S. Constitution, makes it clear that in any conflict between state and federal law, federal law controls. Empire, therefore, is entitled to summary judgment with regard to Paragraph 2.

As for Paragraph 3, which provides that Empire may receive no more than 3,900 tons of waste per day per quarter (daily average), the Department contends that paragraph was authorized by the same sources which authorized Paragraph 2 - namely, Article I, Section 27 of the Pennsylvania Constitution, Section 503 of the Solid Waste Management Act, and Section 1112 of the Municipal Waste Act and the regulations promulgated thereunder. Empire, however, maintains that the Department did not, in fact, rely on any of these sources of authority when the Department reduced the limit and that, even if the Department did, none of the sources cited by the Department authorize the action here.[12]

Mr. McDonnell, Program Manager for the Bureau of Solid Waste Management at the Department's Wilkes-Barre Office, who testified in the supersedeas hearing as to the factors he considered when he set the 3,900 TPD quarterly limit, stated that the ceiling was selected on the basis of: 1) Empire's pre-existing contracts to accept out-of-state waste and Pennsylvania waste, 2) the amount of residual waste the landfill typically received, and 3) a cushion designed to allow Empire flexibility in its residual waste business[13] (1991 EHB 115-116; Empire exhibit in support, pp. 74-75). In an

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[12] Unlike the permit provisions discussed heretofore in this opinion, Empire did not assert that Paragraph 3 violates the Commerce Clause. Nor is the Commerce Clause implicated as it was with Paragraph 2.

[13] Empire was contractually obligated to accept 3,200 TPD of out-of-state waste and up to 600 TPD of Pennsylvania waste. In addition, Empire typically received 25 TPD of residual waste. The remainder of 75 TPD was intended to serve as a cushion for Empire. See Footnote 12 at 1991 EHB 116.

affidavit submitted with the Department's exhibits opposing the motion, McDonnell stated, "Similar to Empire's April permit, the October permit was issued according to (and implements) the Department's 1988 municipal waste regulations (Department Exhibit D opposing the motion, p.10 at ¶ 33).

Empire contends that Article I, Section 27, does not authorize the Department to act if Empire complied with all the applicable statutes and regulations. In support of its position, Empire relies upon the Supreme Court's opinion in Payne v. Kassab, 468 Pa. 226, 361 A.2d 263 (1976), and the Commonwealth Court's opinion in Community College of Delaware County v. Fox, 20 Pa. Cmwlth. 335, 342 A.2d 468 (1975).

To resolve the conflicts between environmental and social concerns in Article I, Section 27 issues, Payne enunciated a three-fold standard:

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

Under the Payne v. Kassab test, the Department is required to do more than simply determine whether there has been compliance with all natural resources statutes and regulations. As is evident from the formulation of the Payne v. Kassab test itself, compliance is merely the first of the requirements. The Department must also determine whether there has been a reasonable effort to minimize the environmental incursion and whether the environmental harm clearly outweighs the benefits to be derived. Empire, however, has not established that there was a reasonable effort to minimize the environmental

incursion or that the benefits would outweigh any concomitant environmental harm. Empire does not address either issue in its motion or briefs. It is unsettled at present whether the Payne v. Kassab test is applicable here.[14] While it is the test typically applied in Article I, Section 27, actions, the Commonwealth Court's recent opinion in National Solid Wastes Management Association v. Casey and DER, *supra*, held that the Payne v. Kassab test is not the standard of review in cases involving legislation which expressly states that one of its purposes is to implement Article I, Section 27, for, in essence, that judgment has already been made by the General Assembly in enacting the Solid Waste Management Act and the Municipal Waste Act.[15]

There remains some doubt, therefore, whether the Payne v. Kassab test is applicable here. If it is, Empire is not entitled to summary judgment since it failed to establish material facts necessary to show that it is entitled to judgment as a matter of law. And, notwithstanding the resolution of the Article I, Section 27 issue, we are still left with the issue of whether Paragraph 2 was authorized by either §503 of the Solid Waste Management Act or §1112 of the Municipal Waste Act. It is not evident that there are no outstanding issues of material fact with regard to the

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[14] As noted earlier in this opinion, the Commonwealth has appealed the Commonwealth Court's decision in National Solid Waste Management Association to the Pennsylvania Supreme Court. Under Pa.R.A.P. No. 1736(b), an appeal by the Commonwealth acts as an automatic supersedeas of the order appealed from.

[15] Section 102 of the Solid Waste Management Act, 35 P.S. 6018.102, provides:

> It is the purpose of this act to ... (10) implement Article I, Section 27 of the Pennsylvania Constitution.

Section 102(b) of the Municipal Waste Act, 53 P.S. 4000.102(b), uses identical language:

> It is the purpose of this act to ... (13) implement Article I, Section 27 of the Constitution of Pennsylvania.

Department's exercise of its authority. Therefore, because summary judgment may be entered only in cases that are free from doubt, MacCain v. Montgomery Hospital, 396 Pa. Super. 415, 578 A.2d 970 (1990), this Board cannot enter summary judgment for Empire with regard to the waste volume limitation in Paragraph 3.

Traffic Study Requirement

The final aspect of Empire's motion for summary judgment pertains to the traffic study requirement in Paragraph 9, which requires that Empire conduct biannual traffic studies on Keyser Avenue until the Pennsylvania Turnpike Commission completes the construction of the interchange between Keyser Avenue and the Pennsylvania Turnpike. Paragraph 9 also provides that Empire must submit a separate traffic impact study within three months of the interchange becoming operational.

Empire contends that, by imposing the traffic study requirements, the Department abused its discretion and acted outside its authority. While Empire concedes that the Department possesses the authority to regulate the transportation of solid waste, Empire argues that the traffic study requirement is inappropriate because it is not sufficiently related to the transportation of waste. The Department, meanwhile, maintains that the traffic study requirement is sufficiently related to the transportation of solid waste because:

1) Empire generates 21% of the truck traffic on Keyser Avenue;

2) Empire is the "major generator" of truck traffic on Keyser Avenue;

3) In the immediate vicinity of the landfill, garbage trucks account for 82% of the truck traffic on Keyser Avenue;

4) The truck route is approaching capacity;

5) If no action is taken, trucks serving Empire will have a significant impact on traffic safety; and,

6) The traffic study requirement is reasonably limited in duration and scope.

(Department's brief in opposition, pp. 32-35.)

This Board examined the Department's authority to consider traffic safety issues under the Solid Waste Management Act in Pennsylvania Environmental Management Services, Inc. v. DER, 1984 EHB 94, wherein the Board noted that the language in §§102(4) and 104(6) of the statute empowers the Department to regulate the transportation of solid waste and that regulation of traffic safety was an "inherent and necessary factor to be considered in the regulation of solid wastes...." 1984 EHB at 148. See also, TRASH, Ltd. and Plymouth Township v. DER *et al.*, 1989 EHB 486, aff'd 132 Pa. Cmwlth. 652, 574 A.2d 721 (1990).

Because the Department's authority to consider traffic effects when issuing solid waste permits emanates from its power to regulate the transportation of solid waste, any proposed regulation of traffic must be reasonably related to the transportation of waste. Here, however, a sufficient nexus does not exist between the two. Trucks traveling to or from Empire account for only 21% of all truck traffic on Keyser Avenue (Empire's motion, ¶ 6(r); Department's answer, ¶ 6(r)). The proportion of total traffic would be still less. Furthermore, Empire is not the only business on Keyser Avenue which generates truck traffic. The facilities which line the road include a mobile home manufacturer, a food distribution facility, light manufacturing facilities, retail businesses, and truck terminals (Empire's motion, ¶ 6(s); Department's answer, ¶ 6(s)).

Trucks traveling to Empire may indeed contribute to traffic problems on Keyser Avenue; in light of the relatively small percentage of truck traffic Empire contributes, however, it is unreasonable to require Empire to conduct and finance the traffic study single-handedly.

O R D E R

AND NOW, this 10th day of July, 1992, it is ordered that:

1) Empire's motion for summary judgment is granted with respect to the conditions in Paragraphs 2, 4, 5, 6, and 7 and the traffic studies requirements in Paragraph 9 of the October permit; and

2) Empire's motion is denied with respect to the condition in Paragraph 3 of the October permit.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
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Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: July 10, 1992

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

SPANG & COMPANY	:	
	:	
v.	:	EHB Docket No. 87-042-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 14, 1992

OPINION AND ORDER
SUR APPELLANT'S MOTION IN LIMINE

By: Richard S. Ehmann, Member

Synopsis

The Board denies appellant's Motion in Limine, which requests us to rule that a laboratory analysis report which it intends to offer into evidence at the reopened merits hearing is admissible and that the chain of custody for the filter cake sample which was the subject of the report has been established. A stipulation the parties entered into (prior to collection of the filter cake sample) regarding the chain of custody of samples taken by the parties could not have included this laboratory report, nor have the parties entered any such stipulation after the filter cake sample was collected. Additionally, statements contained in the affidavit of the appellant's expert and Appellant's Re-Answers to the Department of Environmental Resources' (DER) Interrogatories concerning the chain of custody of the filter cake sample do not sufficiently establish custody of the sample for purposes of our granting this motion.

OPINION

This appeal was taken by Spang & Company (Spang), challenging and administrative order issued to it by DER on January 6, 1987 which modified Spang's amended proposal for closure of three lagoons at its manufacturing facilities in East Butler, Butler County.[1] After we denied Spang's first Petition to Reopen the Record (first petition) and issued our adjudication, Spang successfully appealed our denial of its first petition to the Commonwealth Court. See Spang & Company v. DER, 149 Pa. Cmwlth. 306, 592 A.2d 815 (1991). The remanded matter is again before the Board for consideration of the evidence asserted by Spang's first petition and a hearing is presently scheduled to occur on September 3 and 4, 1992 so the Board can receive evidence pertaining to the matter for which the record has been reopened.[2] We are now asked to rule upon Spang's Motion in Limine, in which it requests the Board to enter an Order directing that the laboratory analysis report on the wastewater from Spang's powdered metals and ferrites facilities (the report) is admissible into evidence and that Spang need not introduce extrinsic evidence as to the chain of custody of the sample analyzed in the report.

Spang claims the parties stipulated at the March 1989 hearing that no extrinsic evidence would have to be introduced to establish a chain of custody

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[1]A more detailed description of the facts and procedures surrounding this case can be found in our Adjudication at 1990 EHB 308; in our Opinion and Order Sur DER's Motion in Limine, issued April 17, 1992; and in our Opinion and Order Sur Appellant's Second Petition to Reopen Record, issued June 16, 1992.

[2]We have scheduled this matter from July of 1992 at Spang's request because its counsel says his witnesses are unavailable for the July dates.

for laboratory testing results, citing the transcript of the March 1989 hearing and attaching pages 233-234 of that transcript as Exhibit A to its motion. The stipulation which is contained in the record is as follows:

> MR. JUGOVIC: There was a stipulation between counsel about not having to bring in lab persons and chain of custody, but that the documents would be subject to cross examination to the extent the person is familiar. It is not as of record.
>
> HEARING EXAMINER: Well, let's just say it now so it is here. The parties stipulate you don't have to bring in the lab personnel to go through each and every step of this?
>
> MR. KUIS: That is correct.
>
> MR. JUGOVIC: Yes, your Honor.

(Notes of Testimony of the March 2, 1989 hearing at pp. 233-234)

In its Response to Motion in Limine, DER agrees that the parties reached a stipulation with respect to the scientific evidence to be introduced at the March 1989 hearing and says that the stipulation provided for introduction of specific documents into evidence without objection, but subject to cross-examination. DER states that this stipulation did not encompass the laboratory results contained in Spang's first petition since those documents did not exist prior to the March 1989 hearing, and claims that the parties have not entered into any stipulation regarding the evidence contained in Spang's first petition. In view of DER's response, Spang cannot successfully argue the stipulation DER entered at the merits hearing includes the report which was advanced in its first petition, where that report was not generated until after the conclusion of the March 1989 hearing and DER clearly was not stipulating to anything concerning it at the March 1989 hearing.

In the alternative, Spang's motion asserts that the chain of custody for the sample analyzed in the report was as follows: "After collecting a composite sample of the filter cake waste, Timothy Keister placed the sample in a polyethlene [sic] container, sealed the container by placing a lid on it, and personally transported the sample to the laboratory where it was analyzed." Spang cites its Re-Answers to Appellee's First Set of Interrogatories at n.2 and urges this chain for custody was corroborated at Keister's February 13, 1992 deposition and in Keister's affidavit dated March 13, 1992. Spang states that counsel for DER has indicated that the chain of custody of the sample analyzed in the report will be at issue in the reopened merits hearing. It then contends that it has made a showing which is "more than adequate" to establish the chain of custody and requests us to render such a ruling in advance of the hearing in order to save time and effort at the reopened merits hearing.

We believe it would be inappropriate for us to render a pre-hearing ruling that Spang has established a chain of custody of the filter cake sample where the only showing Spang has made of this chain of custody is contained in an affidavit and its re-answers to interrogatories and neither of these documents is part of the record of the hearing. Spang's own motion points out that DER intends to question the chain of custody at the reopened merits hearing, and DER's response, opposing Spang's Motion, shows DER does not acquiesce to the chain of custody as presented by Spang's motion. Although our courts have ruled that physical evidence may be admitted into evidence despite the presence of gaps in the testimony regarding its custody, see, e.g., Lackawanna Refuse Removal, Inc. v. Department of Environmental Resources, 65 Pa. Cmwlth. 372, 442 A.2d 423 (1982), we do not have before us

any testimony taken subject to DER's right to cross-examine the witness from which we can ascertain whether gaps exist in Spang's chain of custody.

Moreover, Keister's affidavit does not account for custody of the filter cake sample after he delivered it to William Sabatose, who is the President and Chief Chemical Analyst of Analytical Services, Inc., nor has Mr. Sabatose's custody of the sample been shown through Spang's Re-Answers to Appellee's First Set of Interrogatories at n.2, where Spang merely states that if Mr. Sabatose testifies, he will describe the chain of custody and the handling of the sample. As we have no testimony before us regarding the chain of custody taken subject to DER's right to cross-examination, Spang's Motion in Limine is accordingly denied.

ORDER

AND NOW, this 14th day of July, 1992, Spang & Company's Motion in Limine is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: July 14, 1992

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M. DIANE SMITH
SECRETARY TO THE BOARD

WESTTOWN SEWER COMPANY	:	
	:	
v.	:	EHB Docket No. 92-100-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 14, 1992

OPINION AND ORDER SUR
DEPARTMENT OF ENVIRONMENTAL RESOURCES'
MOTION TO DISMISS

By: Richard S. Ehmann, Member

Synopsis

A letter from the Department of Environmental Resources ("DER") to Westtown Sewer Company ("WSC") stating that DER cannot further process WSC's private request for DER to Order a township to revise its Official Plan dealing with sewage disposal until WSC submits additional information, specified in the regulations, is not an action or adjudication of DER. Thus, it is not appealable by WSC to this Board.

OPINION

On February 4, 1992, DER's Joseph Feola wrote to counsel for WSC, responding to a letter from WSC's counsel making a "Private Request to Revise the Act 537 Plan of Westtown Township, Chester County" on WSC's behalf. Feola's letter indicated that DER could not process this request because the request was lacking four different types of information mandated in 25 Pa. Code §71.14(a),(b) and (c). DER's letter went on to say DER will continue the

procedure for such requests set forth in Section 71.14(d) once WSC has forwarded this information. On March 12, 1992, WSC filed an appeal from this letter with this Board.

On May 12, 1992, we received a DER Motion To Dismiss this appeal with attachments and a Memorandum Of Law In Support Of Motion To Dismiss. DER's Motion and supporting Memorandum Of Law assert that not every piece of correspondence by DER is an appealable action or adjudication of DER. DER asserts that this Board only has jurisdiction over appeals from such actions or adjudications and that this letter is neither. Thus it concludes no appeal lies from DER's letter and therefore this appeal must be dismissed.

WSC has filed "Appellant's Brief" in response to our notice to it that it could file a response to DER's Motion (with a supporting brief, if appropriate). It filed no Answer, Reply or Response to the Motion. After first arguing that the cases cited by DER are distinguishable from the circumstances in this appeal,[1] WSC says that in a companion federal proceeding DER has urged the federal court to abstain because of proceedings before this Board and this Board cannot let DER assert a contrary position through this motion. Next, WSC asserts that DER has agreed to a private revision through responses to other submissions by WSC and by responses at meetings so DER is using this "pretext" to cover denial. WSC then asserts that DER's refusal to acknowledge that it previously agreed to a private revision, DER's refusal being conceded by WSC to only be implicit, constitutes an action of DER, and thus the implicit refusal to acknowledge the alleged

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[1] Counsel for WSC and all parties to appeals to this Board are advised that when they refer to specific cases in a brief, a citation to more than the name of the parties in the cited cases is expected.

prior agreement existing in this letter makes this letter appealable. WSC further asserts that the issue here is not accuracy of DER's description of the regulations but whether DER can use such pretexts "to avoid its own undertakings" and whether DER can impose "Catch 22's" to avoid dealing with an environmental problem (and if DER does engage in such conduct, is this arbitrary and capricious?) Finally, WSC says the Motion to Dismiss must be denied because affidavits are not appropriate for consideration in a Motion To Dismiss. For authority for this proposition WSC says "See Pa.R.C.P. Rule ____". WSC's two and a half page brief provides no citations to any authority supporting any of these contentions, and, though apparently WSC intends it to be both its Brief and its Answer, (the Brief makes certain factual assertions, such as that DER has previously received the information DER's letter says must now be submitted), it is unverified.

As this Board has previously advised WSC and its counsel in Westtown Sewer Company et al. v. DER, EHB Docket No. 91-269-E (Opinion and Order issued February 4, 1992), every piece of correspondence issued by DER does not create for the recipient thereof a right to appeal from it to this Board. Pursuant to the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7511 *et seq.*, the legislature created this Board as an independent quasi-judicial agency. See 35 P.S. §7513. It vested this Board with the power and duty to hold hearings and issue adjudications on orders, permits, licenses or decisions of DER. 35 P.S. §7514. Thus, this Board may not adjudicate the rights of WSC and allegations of injury thereto by DER whenever WSC might wish us to do so after WSC engages in correspondence with DER, but we must wait until DER has made a decision or issued an order, permit or license before we may do so.

We have discussed DER "actions" which are appealable to us on **many occasions**, also. In Plymouth Township v. DER, 1990 EHB 974 ("Plymouth"), we said:

> Actions of the Department are appealable only if they are "adjudications" within the meaning of the Administrative Agency Law, 2 Pa.C.S.A. §101 or "actions" as defined at 25 Pa. Code §21.2(a)(1). Adjudications are defined as those actions which affect the personal or property rights, privileges, immunities, duties, liabilities or obligations of the parties. An appealable action is defined in 25 Pa. Code §21.2(a) as follows:
>
> > Any order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any person, including, but not limited to, denials, modifications, suspensions and revocations of permits, licenses and registrations; orders to cease the operation of an establishment or facility; orders to correct conditions endangering waters of the Commonwealth; orders to abate air pollution; and appeals from and complaints for the assessment of civil penalties.

In Plymouth, DER wrote a letter to a permit applicant advising it of the additional information the applicant had to submit before DER could make a decision on the application. A third party appealed from the letter to that applicant. As we said there, "[u]ntil DER receives the specific information it requested, the pending application cannot be processed or approved"; and, thus, we found the letter was not a final action on this permit application and hence an appealable DER action. See also New Hanover Corporation v. DER, 1989 EHB 1075.

Not cited to us by either party but also on point is S.A. Kele Associates v. DER, 1991 EHB 854. There, the appellant, a real estate developer, made a private request to DER to revise the official sewage facilities plan of Richland Township, Bucks County, and, after receiving

comments from the township on this request, DER did not act to either grant or deny the developer's request so the developer appealed. DER responded with a Motion To Dismiss, which we granted, again because DER had not yet acted on the revision. In accord see Phoenix Resources, Inc. v. DER, 1991 EHB 1681, and Robert and Sharon Royer et al. v. DER, EHB Docket No. 91-165-MR (Opinion and Order issued May 8, 1992).

Turning the light from these decisions on this appeal's letter we see DER has not made a decision as to the merits of WSC's private request. In essence, DER's letter says "send us this information so that we can proceed to process your request." Moreover, this letter is no adjudicatory action on WSC's request because clearly DER does not reach a decision on the merit of WSC's request in it. At most DER's letter represents a decision to defer a final action until all of the information is provided to DER on which to make a sound decision. That type of decision may be inaction from WSC's position but it is precisely the type of an action DER should take where the regulations spell out the submissions a party is to make to DER and they have yet to be made. Indeed, if DER is required by regulation to consider certain information before it acts and that information is not provided, any DER decision made prior to WSC having an opportunity to submit it for DER review would be challengable in an appeal to this Board as being an abuse of DER's discretion.

As to WSC's argument concerning pending allegedly companion federal proceedings, abstention and DER's maintenance of contrary positions, we reject same. This is an argument to be made to that court, not to us. Moreover, our docket reflects proceedings between DER and WSC at Docket No. 91-269-E and Docket No. 92-116-E which are still before us, in addition to the instant

matter, so an assertion of abstention may be appropriate. Further, the alleged federal court proceeding's existence is not inconsistent with DER's filing of this motion in the instant appeal. If the DER letter is not a final action of DER, we must dismiss because we lack jurisdiction over this appeal; the pendency of another proceeding in another forum does not vest us with jurisdiction over an appeal which we otherwise are not able to hear.

We also reject WSC's unverified assertion as to DER's agreement to a private revision through its responses to other WSC submissions and orally at meetings. Oral expressions of opinion by DER employees are not DER actions appealable to us. JEK Construction Company, Inc. v. DER, 1990 EHB 535. WSC says DER's past agreement was explicit and this letter is now an implicit rejection of that agreement. This assertion is a mere "bootstrapping" attempt to make a request for more information into a decision on the merits of WSC's request so that WSC may challenge it in an appeal to this Board; we will not sanction such shenanigans. Clearly, if WSC wants to have DER render a decision on its private request, it may promptly provide the information DER requests or advise DER, by letter, that WSC will not provide the information and that DER should make its decision on the private request's merits as it stands because WSC will not make further submissions.

WSC also asserts DER may be imposing "Catch 22's" to avoid dealing with environmental problems and when DER undertakes such actions its conduct is arbitrary and capricious. How DER's insistence on submission by WSC of the information spelled out by 25 Pa. Code §71.14 is a Catch 22 or is arbitrary or capricious is not spelled out or discussed in WSC's Brief but merely asserted, as are other of WSC's "arguments". Since according to Mil-Toon Development Group v. DER, 1991 EHB 209, DER is as bound by these regulations as WSC, it

would be arbitrary and capricious if DER did not comply therewith rather than the other way around as asserted by WSC. Since WSC never offers an explanation to us as to how such conduct is a "Catch 22", we will not hazard guesses because it is WSC's duty to lucidly advance any argument it wishes us to consider.

Finally, WSC argues the Motion must be dismissed because affidavits are not appropriate for consideration with regard to Motions To Dismiss. As to this assertion, WSC refers to "Pa.R.C.P. ____". Again, we point out the lack of explanation for the assertion and the lack of any citation to authority for this proposition in WSC's Brief. Even if we assume the rules of civil procedure govern Motions To Dismiss filed with this Board (an assumption not established by our prior handling of such motions), nothing in those rules prohibit a movant's filing of affidavits. See William Fiore d/b/a Municipal and Industrial Disposal Company v. DER, 1990 EHB 1628. This DER Motion deals with the lack of jurisdiction over this appeal because the appeal challenges a non-final action. The only Rule within the Pennsylvania Rules of Civil Procedure which we can find from which WSC might make this "affidavits" argument is Pa.R.C.P. 230.1, which deals with Motions For Non-Suit. Rule 230.1 addresses such motions when offered at the close of the presentation of plaintiff's case. Clearly other rules, such as Pa.R.C.P. 1035, allow affidavits as support for Motions For Summary Judgment. If a prohibition on affidavits as to motions for non-suits exist in the Rules of Civil Procedure, which is not clear, it is not applicable to a motion of the type before us in this appeal dealing with jurisdiction. Accordingly, we reject this assertion by WSC as well and enter the following Order.

O R D E R

AND NOW, this 14th day of July, 1992 it is ordered that DER's Motion To Dismiss is granted and WSC's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
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Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: July 14, 1992

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

LOBOLITO, INC.	:	
	:	
v.	:	EHB Docket No. 92-147-E
	:	(Consolidated)
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 15, 1992

OPINION AND ORDER
SUR PETITION TO INTERVENE
OF NORTH POCONO C.A.R.E.

By: Richard S. Ehmann, Member

Synopsis

The Board grants a citizens group's petition to intervene in two consolidated appeals brought by a land developer who is seeking to construct and operate a sewage treatment plant which would discharge sewage into the Lehigh River. Where the petitioning intervenor wishes to intervene on the side of the Department of Environmental Resources (DER), it need only show an interest by which it will gain or lose depending upon our adjudication of the propriety of DER's return of the planning module for new land development. Since the appellant is contending that a deemed approval of the planning module occurred, and the petitioning group has members who live adjacent to the Lehigh River (which is alleged to be a high quality cold water fishery) who use the river for aesthetic and recreational purposes, the petitioner has shown it stands to gain or lose its interest in the river's quality depending upon the outcome of this appeal.

OPINION

Before the Board is a petition to intervene filed by North Pocono Citizens Alert Regarding the Environment (C.A.R.E.), which seeks to intervene in two consolidated appeals brought by Lobolito, Inc. (Lobolito), which proposes development of a 220 acre tract of land located in Lehigh Township, Wayne County, which it is seeking to subdivide.

Lobolito's first appeal, which was filed on April 7, 1992 and assigned Docket No. 92-147-E, sought review of a letter dated March 9, 1992 from DER returning to Clifton Township and Lehigh Township all copies of the planning module submission as requested.

Lobolito's second appeal, which was also filed on April 7, 1992 and assigned Docket No. 92-161-E, makes these same factual allegations and challenges DER's March 9, 1992 letter to Lehigh Township which explains Clifton Township's request for a return of the planning modules and states that since a valid revision to Clifton Township's Official Sewage Facilities Plan no longer exists for serving the portion of the project located in Lehigh Township, the project's wastewater needs were not adequately addressed and DER was returning a copy of the planning module submission to Lehigh Township.

Both of Lobolito's appeals challenge DER's return of the planning module to the respective townships for a variety of reasons, including an argument that a deemed approval of the planning module occurred under DER's regulations and that DER is not authorized to return a planning module, so the planning module is still before DER for approval.

In its Petition to Intervene filed on June 17, 1992, North Pocono C.A.R.E. alleges that it is a group comprised of 200 people which has its principal office at P.O. Box 596, Moscow, PA 18444 and that it is a branch of

C.A.R.E., a non-profit corporation from Dunmoore, Pennsylvania, whose purpose is to protect the environment in Lackawanna County. North Pocono C.A.R.E. asserts that a number of its members live near or adjacent to the Lehigh River, that they use the river for aesthetic and recreational purposes, and that they have worked to enhance the river as a watershed resource. It claims these members' interests will be harmed by the sewage treatment plant's discharge to the Lehigh River if the project is approved and a sewage discharge to the river permitted. The petition further alleges that North Pocono C.A.R.E.'s interests will not be adequately represented by DER. It offers to place evidence before the Board showing that DER's action is not appealable here as it is not a final action, that Clifton Township was justified in rescinding its approval of the planning module and requesting its return, and that the citizens of the community support Clifton Township's decision and are deeply concerned for the protection of the Lehigh River.

In response to this petition, DER has stated that it is not opposed to North Pocono C.A.R.E.'s intervention. Lobolito filed its Response on June 29, 1992, expressing its opposition to intervention. In its Response, Lobolito argues North Pocono C.A.R.E. has failed to demonstrate a direct, immediate, and substantial interest in the issues involved in this appeal, that it has failed to explain why its interests will not be adequately represented by DER, and that the evidence it offers to produce is unnecessary to the determination of the issues raised in this appeal.

As we explained in Pagnotti Enterprises, Inc., d/b/a Tri-County Sanitation Company, EHB Docket No. 92-039-E (Opinion issued April 9, 1992), a series of opinions by the Commonwealth Court on intervention in proceedings before us has clouded the question of the criteria a petition to intervene

must meet before it can be granted. In its Opinions in Browning-Ferris, Inc. v. Department of Environmental Resources, __ Pa. Cmwlth. ___, 598 A.2d 1057 (1991) and Browning-Ferris, Inc. v. Department of Environmental Resources, __ Pa. Cmwlth. ___, 598 A.2d 1061 (1991) (collectively "the BFI's") issued on October 23, 1991, a panel of the Commonwealth Court rejected our application of our five-pronged test for intervention and stated that Section 4(e) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7514(e) allows intervention in appeals before the Board by any interested party. "Interested" was defined as meaning the person or entity seeking to intervene must gain or lose by direct operation of the Board's ultimate decision. On January 28, 1992, a different panel of the Commonwealth Court in Borough of Glendon v. Commonwealth, DER, ___ Pa. Cmwlth. ___, 603 A.2d 226 (1992), without mentioning the BFI's, stated that a person seeking to challenge a governmental action must have a direct, substantial, and immediate interest to have standing to do so.

In Pagnotti, *supra*, we decided that we would attempt to reconcile the Court's Opinions in the BFI's and Borough of Glendon, and devised what we described as the BFI/Glendon test for reviewing petitions to intervene.[1] Under this test, we look to see whether the intervenor seeks to support or oppose the government action. Where the petitioning intervenor intends to support the action, the BFI's allow any interested party to intervene. Where

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[1] We further noted in Pagnotti that in an unreported opinion of a panel of the Commonwealth Court in Paradise Watch Dogs v. Commonwealth, DER, No. 2143 C.D. 1990, dated August 9, 1991, that President Judge Craig applied the Board's five-pronged intervention test in reversing the Board's decision. Additionally, the Commonwealth Court's panel decision in Wheelabrator Pottstown, Inc. v. DER, No. 1451 C.D. 1991 (Opinion issued April 20, 1991) applied the standard discussed in the BFI's without mentioning the Borough of Glendon standard, so that the test for intervention was not clarified.

the petitioning intervenor seeks to oppose the government action, it will only be permitted to intervene if it can demonstrate an interest which is substantial, immediate, and direct.

In the instant matter, North Pocono C.A.R.E. seeks to intervene in support of DER's returning the planning module to the townships. Thus, it must show it is an "interested party" under the BFI's, i.e., that its interest is more than a general interest in the proceedings and that it will gain or lose by direct operation of the Board's decision. North Pocono C.A.R.E.'s interest in these appeals is sufficient to meet this test. North Pocono C.A.R.E. is alleging that the interests of its members who live adjacent to the Lehigh River, to which the proposed sewage facility will discharge, in using the river for its aesthetic and recreational value will be harmed if the project is approved and a discharge of treated sewage is authorized conceptually. The petitioners further assert that the Lehigh River is a high quality cold water fishery which is important to the petitioners, whose members have worked on projects to protect and enhance the river as a watershed resource. While the allegations made by North Pocono C.A.R.E.'s petition are less specific than we would like to see, they are sufficient to show that at least some of the group's members stand to gain or lose their interest in the quality of the Lehigh River, which runs adjacent to some of their properties. If that river is presently designated a high quality cold water fishery, as North Pocono C.A.R.E. alleges, and DER's deemed approval of the planning module at issue has occurred, approving the concept of the discharge of treated sewage into the river thus potentially lessening its quality, the petitioner's interests in the river for aesthetic and recreational purposes stand to be affected. Thus, North Pocono C.A.R.E. will

be allowed to intervene in this appeal. Some of the testimony offered in the Petition to Intervene appears to be irrelevant to the issues which are on appeal, however, so we will preclude North Pocono C.A.R.E. from introducing that testimony at the merits hearing, i.e., the township residents' support of Clifton Township's request to return the planning module or their concern for protection of the river.

O R D E R

AND NOW, this 15th day of July, 1992, the Petition to Intervene filed on behalf of North Pocono C.A.R.E. is granted and the caption of this appeal is amended to read:

LOBOLITO, INC.	:	
	:	
v.	:	**EHB Docket No. 92-147-E**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and NORTH POCONO C.A.R.E., Intervenor	:	

It is further ordered that North Pocono C.A.R.E. shall comply with Pre-Hearing Order No. 1 at Docket No. 92-147-E on the same schedule as DER. North Pocono C.A.R.E.'s participation will be confined to the issues raised by DER's challenged letters and Lobolito's appeals therefrom. It is further ordered that North Pocono C.A.R.E. shall not be permitted to offer evidence at the ~~merits hearing as to the support by township~~ residents of Clifton Township's request to return the planning module or its members' concern for protection of the river.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: July 15, 1992

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M. DIANE SMITH
SECRETARY TO THE BOARD

SPANG & COMPANY	:	
	:	
v.	:	EHB Docket No. 87-042-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 16, 1992

**OPINION AND ORDER SUR
APPELLANT'S MOTION FOR RECONSIDERATION,
OR IN THE FIRST ALTERNATIVE,
MOTION FOR CLARIFICATION, OR IN THE SECOND ALTERNATIVE,
MOTION TO AMEND THE BOARD'S INTERLOCUTORY ORDER**

By: Richard S. Ehmann, Member

Synopsis

The Board denies each of the appellant's three alternative motions. Appellant has not established the presence of any exceptional circumstances necessitating reconsideration of our interlocutory June 16, 1992 Order. Nor has appellant shown that our June 16 Order was inconsistent with our April 17, 1992 Opinion regarding the Department of Environmental Resources' (DER) Motion in Limine (which had sought to exclude certain of appellant's evidence from the reopened merits hearing). In addition, there is no substantial question of controlling law, the immediate appeal of which will materially advance the ultimate termination of this litigation, where our ruling was consistent with the Commonwealth Court's Opinion in this matter and the reopened merits hearing is scheduled to occur on September 3 and 4, 1992.

OPINION

The instant matter arises from an appeal by Spang & Company (Spang) from an administrative order issued to it by DER on January 6, 1987 which modified Spang's amended proposal for closure of three lagoons at its manufacturing facilities in East Butler, Butler County.[1] After the parties undertook pre-hearing activities a hearing on the merits was held on March 1, 2, and 3 of 1989. Prior to our issuance of an adjudication of the merits, Spang filed a Petition to Reopen the Record (first petition) on July 21, 1989, seeking to introduce into evidence an analysis of an April 6, 1989 sample of filter cake from the wastewater pretreatment facility at Spang's Magnetics division. After denying Spang's first petition, we issued an adjudication on March 27, 1990. See 1990 EHB 308. Upon Spang's appeal, the Commonwealth Court in Spang & Company v. DER, 140 Pa. Cmwlth. 306, 592 A.2d 815 (1991), reversed our decision on Spang's first petition and remanded the matter to us with instructions to grant Spang's first petition. Once the remanded matter was before the Board, we held a conference call with the parties on January 16, 1992 and issued an order giving them a period of time in which to complete any discovery in connection with the matter for which the record was reopened, i.e., the April 6, 1989 filter cake sample, and to file amendments to their pre-hearing memoranda. In response to a Motion in Limine filed by DER, we issued an Opinion and Order on April 17, 1992 in which we denied DER's motion in part and granted it in part. Spang then filed a Second Petition to Reopen

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[1] A more detailed description of the facts and procedure surrounding this case can be found in our Adjudication at 1990 EHB 308, in our Opinion and Order Sur Department of Environmental Resources' Motion in Limine issued April 17, 1992, and in our Opinion and Order Sur Appellant's Second Petition to Reopen Record issued June 16, 1992.

the Record (second petition) which we denied by an Opinion and Order issued on June 16, 1992. After receiving the instant alternative motions on June 23, 1992, we received DER's response.[2]

Motion For Reconsideration

Spang's Motion For Reconsideration requests us to reconsider our June 16, 1992 Opinion and Order.[3] We have interpreted our rules at 25 Pa. Code §21.122 as providing for reconsideration following final decisions of the Board, but we have held that we are empowered to reconsider any of our rulings at any time prior to final adjudication. Raymark Industries, Inc., et al. v. DER, 1991 EHB 186. When we grant reconsideration of interlocutory decisions, however, it is only when extraordinary circumstances are present. City of Harrisburg, 1991 EHB 87; Baumgardner v. DER, 1989 EHB 400. Since the record in this matter was reopened after we issued our Adjudication for consideration of certain evidence advanced by Spang and this evidence could potentially change our decision on the merits, we will review Spang's motion against the criteria for reconsideration of an interlocutory order.

Spang's motion contends Spang acted with diligence in preparing its case, asserting that when it was "unfairly surprised" by the theory raised by DER in its post-hearing brief (that Spang's drillpipe plant was the sole source of any cyanide entering the lagoons), it promptly filed its first petition. Spang claims that once it believed DER had exhausted its right to review of the Commonwealth Court's decision, on January 14, 1992, it "retained

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[2]Spang also filed a Motion in Limine on June 30, 1992, which is not addressed in this Opinion but will be examined in a separate Opinion.

[3]We note that Spang's Motion For Reconsideration does not request reconsideration by the Board *en banc*.

the services of an expert to analyze the record and make whatever investigations he deemed necessary to support his theory", and that prior to that time, Spang had no reason to develop this evidence. Further, Spang asserts that upon receiving our January 16, 1992 order, it "immediately began the diligent preparation of its case".

Spang's motion also urges that our June 16 Order's suggestion that it is conducting "trial by ambush" and that DER would suffer prejudice from the admission of the evidence its second petition sought to introduce was an erroneous conclusion by the Board. Spang claims that by March 16, 1992, when it filed its Second Amended Pre-Hearing Memorandum, it had provided all of the testing data and analyses upon which its expert intends to reply and that this evidence was then amplified by its Re-Answers to DER's Interrogatories filed on April 22, 1992. Additionally, it states that a properly noticed videotaped deposition of Spang's expert occurred on June 8, 1992, and that counsel for DER elected not to attend and cross-examine the expert on his opinion or examine the documents upon which Spang would rely at the hearing. Spang then argues that it is DER which has conducted "trial by ambush" by raising the "sole source" issue in its post-hearing brief for the first time, by failing to attend the June 8 deposition but then seeking to prevent that deposition's use, and by filing its Motion in Limine.[4] Moreover, Spang asserts that there is a proceeding pending before the United States Environmental Protection Agency (EPA) which involves many of the same issues before the Board and that Spang stands to be prejudiced in that EPA

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[4]Spang does not explain how the evidence it sought to introduce through its second petition bears upon any alleged change of DER's theory in DER's amended pre-hearing memorandum, and we will not speculate on this point.

proceeding if the EPA chooses to rely on the evidentiary findings made by this Board.

Spang's argument as to its diligence in putting the evidence before the Board merely rehashes what we already considered in making our June 16 ruling: that Spang was made aware of DER's sole source theory when DER filed its post-hearing brief, that Spang promptly sought to reopen the record to place a specific piece of evidence rebutting that theory before the Board, and that Spang waited until after the remand to the Board to retain an expert to examine the record concerning this theory and to begin to conduct an investigation to rebut it. Spang does not suggest that DER could have examined its expert at the February 20, 1992 deposition, when the expert was concurrently engaged in conducting his examination. Rather, Spang points to a deposition of this expert which was taken after the close of the discovery period as DER's forgone opportunity to probe its expert regarding his investigation. Further, the EPA's decision as to whether it will follow the findings made by the Board in this proceeding is of no bearing to our decision, since we concern ourselves only with matters which are within our jurisdiction. Thus, we see no exceptional circumstance which compels us to reconsider our June 16 Opinion.

Motion For Clarification

In its Motion For Clarification, Spang urges that our April 17, 1992 Opinion and our June 16, 1992 Opinion contain conflicting orders bearing on its ability to prepare evidence for hearing and it requests us to clarify these orders on the issue of whether Spang may present the evidence found in its Second Amended Pre-Hearing Memorandum.

There is no inconsistency between what we have ordered concerning the evidence which Spang may seek to introduce at the merits hearing. Our April 17, 1992 Opinion ruled on DER's two-pronged Motion in Limine. Regarding the first prong of DER's motion, we ordered Spang's evidence to be limited to the analytical evidence as to the cyanide in the Magnetics division's treatment plant sludge identified in Spang's first petition (i.e., the April 6, 1989 sample of filter cake), but indicated that Spang could present expert testimony on how that piece of evidence relates to the evidence Spang had previously offered at the March 1989 hearing and the contentions Spang had made at that hearing, including the contention concerning whether the lagoons' contents can be classified as hazardous wastes. When Spang filed its Second Petition, we stated that its Second Amended Pre-Hearing Memorandum and its Exhibits to Be Presented at Hearing showed Spang intended to introduce evidence into the hearing which went beyond the scope of the matter for which the record had been ordered reopened by Commonwealth Court, i.e., our consideration of the April 6, 1989 sample, and, consistent with our April 17 Opinion we indicated that in denying its second petition we would not expand the scope of this reopened hearing as sought by Spang. We accordingly deny Spang's Motion for Clarification.

Motion to Amend the Board's Interlocutory Order

In this motion, Spang seeks to have us amend our June 16 order to incorporate a statement in accordance with the requirements of 1 Pa. Code §35.225 and 42 Pa.C.S. §702 in order to allow it to pursue an interlocutory appeal to the Commonwealth Court. Under 42 Pa.C.S. §702, the motion must show that: 1) there exists a controlling question of law; 2) on this question of law, there is a substantial ground for difference of opinion; and 3) it is

likely that an appeal may materially advance the ultimate termination of the merits of the appeal. See The Carbon Graphite Group, Inc. v. DER, 1991 EHB 461. Here, Spang contends our order prevents it from presenting relevant evidence and is not in accordance with the standard found at 1 Pa. Code §35.231(a) or with the Commonwealth Court opinion in this case.[5] Spang claims that the evidence which our order excluded from the hearing is "of the type" the Commonwealth Court deemed to be relevant, and that judicial economy will be served by allowing the Commonwealth Court to make a ruling on this evidence at this time, since, if the evidence is excluded from the hearing and Spang then successfully appeals its exclusion to Commonwealth Court, the potential exists for yet another remand of the matter and a third evidentiary hearing before this Board. Should such a scenario occur, Spang asserts it would only further delay the resolution of this appeal.

We cannot agree that this matter involves a controlling question of law on which there is a substantial ground for difference of opinion. In our June 16 Opinion we pointed out that the Spang Court indicated in its Opinion that we have discretion in deciding whether to grant a petition brought under 1 Pa. Code §35.231. While there might be room for disagreement on the decision we reached in the exercise of our discretion, there is no question that we have such discretion, even if the petitioner meets that section's standard by showing material changes of fact which have occurred after the conclusion of the hearing. See Spang, at ___, 592 A.2d at 820. Further, we

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[5]Spang's Motion states that our opinion is not in accordance with 25 Pa. Code §21.231(a), and, since no regulation exists at that citation, we have assumed Spang means 1 Pa. Code §35.231(a), which is the section of the General Rules of Administrative Practice and Procedure dealing with reopening of the record that we applied in ruling on its second petition.

do not believe that an immediate appeal from our June 16 order will materially advance the ultimate termination of this litigation, where we have scheduled the reopened merits hearing to be held on September 3 and 4, 1992[6] and it should not take the Board long to render its decision on whether the evidence admitted at that hearing affects our prior Adjudication in this matter. In the event that Spang is unsuccessful and wishes to seek an appeal our Adjudication before the Commonwealth Court, it will have that opportunity. We therefore deny Spang's Motion to Amend our June 16 order.

ORDER

AND NOW, this 16th day of July, 1992, it is ordered that Spang & Company's Motion For Reconsideration, or in the First Alternative, Motion for Clarification, or in the Second Alternative, Motion to Amend the Board's Interlocutory Order is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: July 16, 1992

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
George Jugovic, Jr., Esq.
Western Region

For Appellant:
Ronald L. Kuis, Esq.
Pittsburgh, PA

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[6]Previously, the merits hearing had been set for July 9 and July 10, 1992 and then moved to July 29 and 30, 1992, it was postponed the first time to allow time for preparation of this opinion with the July date selected to accommodate the trial calendar of Spang's counsel and a second time at Spang's request because of the unavailability of either of its witnesses.

COMMONWEALTH OF PENNSYLVANIA
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M. DIANE SMITH
SECRETARY TO THE BOARD

ENVIRONMENTAL OUTREACH	:	
	:	
v.	:	EHB Docket No. 91-312-MJ
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and NORTHWEST SANITARY LANDFILL, Permittee	:	Issued: July 16, 1992

OPINION AND ORDER SUR MOTION FOR SUMMARY JUDGMENT

By Joseph N. Mack, Member

Synopsis

A motion for summary judgment is treated as a motion to dismiss and this appeal is dismissed for lack of standing where the Appellants have failed to demonstrate that they will suffer substantial, direct and immediate harm or injury as a result of the issuance of a Solid Waste Disposal and/or Processing Permit to Northwest Sanitary Landfill, Inc.

OPINION

On June 28, 1991, the Commonwealth of Pennsylvania, Department of Environmental Resources ("Department" or "DER") issued Solid Waste Disposal and/or Processing Permit No. 100585 ("permit") to Northwest Sanitary Landfill, Inc. ("Northwest") for the construction and operation of a solid waste disposal site located in Clay Township, Butler County.

The appellant Environmental Outreach Non-Profit Citizens Organization ("EO") appealed the issuance of the permit on July 26, 1991. The appeal alleges

that the permit was issued by the Department contrary to §1003 of the Solid Waste Management Act ("SWMA"), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq, at §6018.1003; Governor's Executive Order 1989-8; and various provisions of 25 Pa.Code Chapters 271 and 283.[1] The appeal further alleges that the appellants were denied due process in the application review process, that "by issuing the permit, DER has failed to abate [a] continuing public nuisance", that the "[c]onstruction design, technology and operational plans for the landfill are not in compliance with the specifications under Title 25 of [the] Pa. Code"; and finally that "the permit application did not address the need for additional permits." The original appeal was filed by EO and Carl Robert Hirth, Jr. of West Sunbury, PA. However, Hirth withdrew as an individual appellant by order dated January 10, 1992. Pre-hearing memoranda were filed by the parties as follows: appellant on December 9, 1991, Northwest on January 21, 1992, DER on January 30, 1992.

On March 3, 1992 Northwest filed a Motion for Summary Judgment stating, inter alia, that EO did not allege or demonstrate standing, i.e., a "substantial interest that is directly and immediately impacted by the issuance of the Permit" either in its notice of appeal or in its pre-hearing memorandum, and, further, that the period of discovery having closed, cannot now do so. EO filed objections to the Motion for Summary Judgment on March 25, 1992, together with a memorandum of law. Because we are dealing with the question of whether EO has standing to bring this appeal, we elect to treat Northwest's Motion for Summary Judgment as a Motion to Dismiss ("motion") for lack of standing. See Grand Central Sanitation, Inc. v. DER, 1990 EHB 695, 696.

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[1]Sections enumerated are as follows: 25 Pa.Code §§271.111, 271.112, 271.124, 271.125, 271.126, 271.127, 271.142 (b & c), 271.143, 271.201, 271.202, 271.203, 283.108, 283.109, 283.253.

The deposition of Mark Riddell, EO's designated representative, established that EO was formed in 1990 for the purpose of opposing the reopening of the subject landfill, that the purpose of EO is to protect the environment, and that, to date, its sole activity has been the review of the subject permit. (Deposition of Riddell, pages 11, 14-15)

In order for EO to have standing to bring this appeal, its members must demonstrate that they have a substantial interest which has been directly and immediately affected by the permit. William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269, 280 (1975). A "substantial" interest is one where there is "some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law." William Penn, 346 A.2d at 282. The term "direct" means that there is a causal connection between the harm complained of and the action being appealed. Id. Finally, an "immediate" interest is one which is more than a merely remote consequence of the action or judgment, focusing on the proximity of the action and injury to the person challenging it. Id. at 283.

We find that EO has made no showing of substantial interest and direct harm. When EO's representative, Mark Riddell, was asked, at page 42-44 of his deposition, about the effect of the landfill on himself or any members of the appellant non-profit corporation, Mr. Riddell could not and did not identify any direct harm that would be visited upon EO or its members by the permitted landfill. In a detailed examination of the deposition, we are only able to find that Mr. Riddell speculates on the additional traffic that might be on the highway as a result of the landfill and which might make delivery of his mail more difficult. (Deposition, page 41) He clearly indicated no other complaint except a general interest in clean water. He indicated that he felt the water supplies of some individuals could be affected but that none of these were members of EO. (Deposition, pages 43, 44) The pre-hearing

memorandum of EO indicates only that "Members of the group were, and are, concerned with the environmental damage that could result from opening a landfill on a site previously closed for violations of environmental protection statutes." (EO Pre-Hearing Memorandum, page 3)

After a thorough search of the pleadings, depositions, answers to interrogatories and admissions, we find that the above-recited allegations constitute all of the harm alleged by EO and its members. We find that these do not constitute the "immediate", "substantial", or "direct" interest sufficient to justify standing to challenge the issuance of the permit herein. William Penn Parking, supra; Saul v. DER, 1990 EHB at 283. EO has failed to demonstrate with any particularity how it or its members will be directly affected by issuance of the permit. Jerry Haney and Pocono Environmental Club v. DER, 1987 EHB 997, 998. A general, abstract interest in seeing that the environmental statutes and regulations are complied with is not sufficient to convey standing. William Penn, 346 A.2d at 282; Larry D. Heasley v. DER and County Landfill, Inc., EHB Docket No. 91-031-MJ (Opinion and Order Sur Motion to Dismiss/Motion for Summary Judgment issued May 13, 1991), p. 4.

EO argues in its memorandum of law that there has been a change in the definition of the "interest" necessary for standing, and cites us to Browning-Ferris Industries, Inc. v. Department of Environmental Resources, ____ Pa. Cmwlth. ____, 598 A.2d 1057 (1991). However, Browning-Ferris does not deal with standing to maintain an appeal, but rather with the standards for becoming an intervenor in a case before the Board. That case does not deal with William Penn Parking in any way, and we continue to be bound by William Penn Parking on the question of "standing" for an appellant.

Because we are dismissing this case based on lack of standing, we do not reach the question of due process raised in the appeal.

ORDER

AND NOW, this 16th day of July, 1992, it is ordered that Northwest Sanitary Landfill's motion for summary judgment, treated as a motion to dismiss, is granted and the appeal of Environmental Outreach at Docket No. 91-312-MJ is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

Board Member Richard S. Ehmann has a dissenting opinion which is attached.

DATED: July 16, 1992

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M. DIANE SMIT
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ENVIRONMENTAL OUTREACH	:	
	:	
v.	:	**EHB Docket No. 91-312-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	

DISSENTING OPINION OF BOARD MEMBER
RICHARD S. EHMANN

My fellow Board Members have declared their willingness to treat Northwest Sanitary Landfill's ("Northwest") Motion For Summary Judgment as a Motion to Dismiss and to grant same. I cannot agree and must dissent.

The standard for granting or denying motions for summary judgment are clearly set forth in our prior decisions. A movant must show there are no material facts on which there is a genuine dispute and it is entitled to judgment as a matter of law. Concerned Residents Of the Yough, Inc. v. DER et al. ("Cry v. DER"), 1990 EHB 38. However, we consider such motions in the light most favorable to the non-moving party. Robert C. Penoyer v. DER, 1987 EHB 131.[1]

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[1]Even treating the instant Motion for Summary Judgment as a Motion to Dismiss, as does the majority opinion, the motion must be reviewed in a light most favorable to the non-moving party, and all doubts must be resolved against the moving party. New Hanover Corporation v. DER et al., EHB Docket No. 90-225-W (Opinion issued May 11, 1992); Harlan J. Snyder et al. v. DER et al., 1988 EHB 1084.

Having read and reread the Notice Of Appeal, the Pre-Hearing Memorandum filed on behalf of Environmental Outreach Non-Profit Citizens Organization ("EO") and the deposition of its representative Mark R. Riddell, I do not agree that EO lacks standing. In saying this, I do not endorse the inarticulate nature of the materials filed on EO's behalf and I further understand how they can be read to make the question of standing a close one, but the majority's opinion puts EO out of court and I do not believe this should occur except in a clear case, which this is not.

As the majority opinion points out, for EO to have standing its members must demonstrate a substantial interest which is directly and immediately impacted by issuance of this permit for operation of a landfill by Northwest. Riddell's deposition identifies his concern with the landfill as increased truck traffic (Deposition page 41). It also addresses concerns for EO's other members, but only indirectly. For example, on Page 57 it contains the following exchange:

> Q. Do you have any concern about the construction of the landfill?
> A. I personally don't, but members of our group do.
> Q. What are those concerns?
> A. Specifics are spelled out in the memorandum.
> Q. As a Designee for Environmental Outreach, would you state for the record the concerns of your organization with respect to the construction of the landfill?
> A. Again the specifics are in the memorandum.

Similar colloquies referencing the contents of EO's Pre-Hearing Memorandum exist from this point in the deposition to its end. See pages 57, 58, 61, 69, 71, 72, 73, 79, 81, and 84. Indeed many of the deposition's questions thereafter begin by seeking information beyond that in EO's Pre-Hearing

Memorandum, thus limiting how Riddell might have demonstrated EO's interests in his deposition testimony. For example, on Deposition page 69, Northwest's counsel had the following exchange with Mr. Riddell.

> Q. I have never asked you this before. Other than the information contained in the prehearing memorandum prepared by the Appellants in this matter, there any other facts which would support your contention that DER failed to abate a public nuisance at this site?
> A. Other than what's in here?
> Q. Other than what's in the prehearing memorandum.
> A. Not to my knowledge, no.

Thus, to examine EO's standing and determine whether its members have any substantial interest, we must turn to EO's 24-page Pre-Hearing Memorandum. Even using this document, standing is not explicitly set forth. However, the Pre-Hearing Memorandum contains statements addressing typical local interest appeals issues, such as:

> ... The landfill capacity as permitted will result in a 160 foot mountain of municipal waste. This mountain will be taller than the highest point in nearby West Sunbury. This will interfere with the scenic and aesthetic values for which the people of the area moved there. In addition the constant noise, traffic congestion, and foul odors which are incident to the operation of the landfill interfere with the property owners' enjoyment of their property. (Pre-Hearing Memorandum Page 11)
>
> ... During the opening months of the landfill's operation, there has been a great deal of noise. Those who live close to the landfill state that this annoyance has been known to continue after operating hours. Finally, the odors which have resulted form exhuming old garbage buried on the site have been exceedingly foul causing neighbors to complain to the D.E.R. Abatement procedures have been tried but have not been effective.
>
> ... Operators must also collect any litter blown offsite on a weekly basis. The fence constructed on this landfill is not sufficient to control blowing litter. Adjacent

> property owners report a constant intrusion of litter on and across their properties. No effort is being made to collect such blown litter. (Pre-Hearing Memorandum Page 14)
>
> ... The odor containment plan is also inadequate as the neighbors of this landfill were forced to complain to D.E.R. Although measures were taken to abate the odor by landfill management, the foul odors continued for days. The measures taken were ineffective and the plan inadequate. (Pre-Hearing Memorandum Page 23)

This Pre-Hearing Memorandum thus clearly demonstrates a series of allegedly adverse impacts on area residents by Northwest's landfill but fails to demonstrate clearly whether these residents are also members of EO or not. However, this Pre-Hearing Memorandum was not designed to address standing, which Northwest raised subsequent to its being filed. It was filed prior to Riddell's deposition, too. Accordingly, fault does not lie with EO's Pre-Hearing Memorandum in this regard. Moreover, one's spring need not be contaminated to have standing. Certain interests may be damaged without there being a pecuniary loss. One need not live in a tree to protest the clear cutting which will destroy it. Under these circumstances I cannot find the factual issues involving EO's standing to be clear and free from doubt. The burden of proving such a lack of dispute falls on Northwest, as the movant. Thus, under Cry v. DER, I would deny this motion.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATE: July 16, 1992

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M. DIANE SMITH
SECRETARY TO THE BOARD

RONALD E. JOHNSON
t/a INDIANA FUEL & OIL COMPANY :
: EHB Docket No. 90-537-MJ
v. :
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: July 21, 1992

ADJUDICATION

By Joseph N. Mack, Member

Synopsis

The Board finds that the assessment of a civil penalty to the appellant for placing petroleum products in unregistered underground storage tanks is proper but substitutes its discretion for that of DER in reducing the amount of the penalty.

BACKGROUND

This matter originated on December 11, 1990 when the appellant Ronald E. Johnson t/a Indiana Fuel and Oil Company (Indiana Fuel) filed an appeal seeking the Board's review of an assessment of civil penalty by the Department of Environmental Resources ("Department" or "DER") dated November 9, 1990 and received by the appellant on November 13, 1990. The civil penalty assessment was in the amount of $16,000 and alleged, *inter alia*, that the penalty was levied against Indiana Fuel for placing unleaded gasoline, a regulated product, into an unregistered underground storage tank located at Paps Grocery

store in Kent, Indiana County on four separate occasions, August 10, August 17, August 27 and August 31, 1990, in violation of §503(b) of the Storage Tank and Spill Prevention Act of July 6, 1989, P.L. 169, No. 32, 35 P.S. §6021.101 *et seq.* ("Storage Tank Act").

The parties submitted a Joint Pre-Hearing Stipulation to the Board on April 26, 1991, which limited the issues to the amount of the penalty.

A hearing on this matter was held on May 10, 1991, at which time the parties also submitted an Amendment to the Joint Pre-Hearing Stipulation. Nine exhibits were admitted at the hearing, all of which were introduced by DER. ("Comm. Ex.") Post-hearing briefs were filed by Indiana Fuel and the Department on August 26, 1991 and August 28, 1991, respectively. The Department also filed a Reply Brief on September 11, 1991.

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

FINDINGS OF FACT

1. The Commonwealth of Pennsylvania, Department of Environmental Resources is the agency with the duty and authority to administer and enforce the Storage Tank Act and Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17.

2. Indiana Fuel is a sole proprietorship with a business address of 449 Twolick Drive, Indiana, PA 15701, and is a wholesale distributor of petroleum products that delivers gasoline directly to retail facilities. (Stip. 1)[1]

3. Ronald E. Johnson is the owner and operator of Indiana Fuel. (Stip. 1)

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[1] "Stip.___" refers to a fact stipulated to by the parties in Section E of the Joint Pre-Hearing Stipulation filed by the parties on May 26, 1991.

4. Pap's Grocery is a convenience store and gasoline filling station owned by Ronald Kimmel with a business address of Main Street, Kent, Pennsylvania. (Stip. 4) In August 1990, there were two 5,000 gallon underground storage tanks located at Pap's Grocery which were used to store gasoline for retail sale on the premises. (Stip. 5)

5. On the dates of August 10, 17, 27 and 31, 1990, Indiana Fuel delivered a total of between 12,000 and 13,000 gallons of gasoline into the underground storage tanks at Pap's Grocery. At the time, the tanks were not registered under §503 of the Storage Tank Act. (NT. 62, 63)[2]

6. Ronald Johnson t/a Indiana Fuel became aware of the distributor responsibilities under the Storage Tank Act up to one month prior to August 5, 1990, the date on which unregistered tanks could no longer be filled with regulated product. (NT. 95-96)

7. DER did not communicate directly with the distributors of regulated substances with reference to their responsibilities under the Storage Tank Act. (NT. 97-98)

8. Indiana Fuel obtained most of its information on the Storage Tank Act from its dealer association, Pennsylvania Petroleum Association ("PPA"). (NT. 97-98)

9. The director of the PPA advised Indiana Fuel that in the interim after the August 5, 1990 deadline and until tank owners received their registration stickers from DER, the use of an affidavit signed by the tank owner stating that the owner's tanks had been registered would be sufficient verification of storage tank registration. (NT. 99) This position was not set forth in a July 24, 1990 letter from Arthur Davis, Secretary of DER, to

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[2] "NT. ____" refers to a page in the notes of testimony in the hearing of this matter.

the executive vice president of the PPA with regard to what action should be taken when selling product to registered tank owners who had not yet received their registration stickers. (Comm. Ex. A)

10. On August 10, 1990, Ronald Kimmel, the owner of the underground storage tanks at Pap's Grocery, signed an affidavit provided by Indiana Fuel stating that the tanks were registered. (Comm. Ex. F; NT. 104, 137-138)

11. Indiana Fuel kept track of its customers' status in the process of registration and offered to assist them with telephone numbers and addresses for registration. (NT. 100-101)

12. There was no evidence that either of the storage tanks in question in this case had leaked or were in danger of leaking. (NT. 91)

13. The net profit realized by Indiana Fuel on the petroleum product delivered to Pap's Grocery was approximately $500.00. (NT. 108)

14. The DER Compliance Specialist in the Southwest Pittsburgh Regional Office developed a Civil Penalty Worksheet to standardize the format for developing penalties under the Storage Tank Act. (NT. 69-70; Comm. Ex. K)

15. The worksheet developed by the Compliance Specialist in the Southwest Pittsburgh Regional Office was designed to provide a tabular method of arriving at a civil penalty for all types of violations arising under the Storage Tank Act. However, the worksheet does not list all circumstances or issues the Department might consider in assessing a civil penalty under 35 P.S. §6021.1307. (NT. 69-70; Comm. Ex. K)

16. The violation of knowingly placing product in an unregistered storage tank is considered by the Department to be a "priority violation". A "priority violation" is one which the Department considers important to pursue in as many cases as staff time and resources would allow. (NT. 75-76)

17. Although DER regarded Indiana Fuel's conduct as a "priority" violation, it considers there to be other violations of higher priority. At the time it assessed the penalty in this case, DER had no adopted policy with respect to rating this type of violation. (NT. 75)

18. At the time it assessed the penalty in this case, the Department did not have a set penalty amount for all violations considered to be priority violations. (NT. 78)

19. In setting the amount of the penalty assessed in this case, the Department concluded that the actions of Indiana Fuel were reckless because Indiana Fuel was aware of the requirements of the Storage Tank Act and decided to take the risk of filling the tanks in violation of the Act. (NT. 84-85) The Department assessed the penalty at the maximum end of the range for reckless behavior. (NT. 85)

20. One of DER's major considerations in assessing the penalty for the violation in this case was the deterrent value. (NT. 76-77)

21. Tim Drier, with DER's Bureau of Water Quality Management, was involved in the internal DER meeting at which the amount of the civil penalty was set. Drier does not recall whether the Civil Penalty Worksheet was used at the meeting in calculating the $16,000 civil penalty assessed in this case. (NT. 55, 66, 74)

22. Ronald Kimmel, the owner of the unregistered storage tanks which were filled by Indiana Fuel, was assessed a penalty in the amount of $200 for failing to register his tanks. (NT. 147-148)

23. The Civil Penalty Worksheet introduced into evidence at this hearing is a worksheet directed at water quality problems and does not reflect the penalty considerations set out at 35 P.S. §6021.1307. (Comm. Ex. K)

DISCUSSION

This appeal of a civil penalty assessment under the Storage Tank Act is one of first impression before the Board. The burden is on the Department to demonstrate that the imposition of the penalty is not an abuse of discretion and that the amount of the penalty was properly assessed. 25 Pa. Code §21.101(a) and (b)(1); Gerald E. Booher v. DER, 1991 EHB 987.

Section 503(a) of the Storage Tank Act requires that every owner of an underground storage tank, except as specifically excluded by regulation or by the Department, register said tank with the Department. 35 P.S. §6021.503(a). Paragraph (b) of this section carries the prohibition that, after August 5, 1990, no one may sell, distribute, deposit, or fill an underground storage tank with any regulated substance[3] unless the tank is properly registered with the Department. 35 P.S. §6021.503(b).

The evidence establishes that on four separate occasions after August 5, 1990, Indiana Fuel sold and placed petroleum in unregistered underground storage tanks at Pap's Grocery Store in violation of §503(b) of the Storage Tank Act. (F.F. 5)[4]

The Storage Tank Act has built into it a specific "Civil Penalty" section, to wit 35 P.S. §6021.1307, which reads in pertinent part as follows:

> ...The civil penalty so assessed shall not exceed $10,000 per day for each violation. In determining the amount of the penalty, the department shall consider the willfulness of the violation; damage to air, water, land or other natural resources of this Commonwealth or their uses; cost of restoration and abatement; savings resulting to the person in consequence of the violation; deterrence of future violations; and other relevant factors.

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[3] Petroleum products are included within the Storage Tank Act's definition of "regulated substance". 35 P.S. §6021.103.

[4] "F.F. ____" refers to a finding of fact herein.

The Department produced no evidence that there had been damage to the air, water, land or other natural resources of the Commonwealth. Nor was any evidence produced as to cost of restoration and abatement. Thus, the factors remaining to be considered with respect to the penalty assessment are as follows: degree of willfulness, savings resulting to Indiana Fuel as a result of its actions, deterrence of future violations, and any other relevant factors which may have been considered.

The Department presented as evidence a Civil Penalty Worksheet (Comm. Ex. K), which was developed by DER to standardize the format for developing penalties under the Storage Tank Act. (F.F. 14) However, the Worksheet seems to be adapted more to water quality violations than to the enumerated considerations of the Storage Tank Act set out in 35 P.S. §6021.1307 and above. (F.F. 23) The Worksheet has only one area which is reflective of the Storage Tank Act and that has to do with "savings to violator", for which DER assessed $500. The balance of the worksheet deals primarily with "seriousness" and "culpability". The penalty levels within each category range from $50 to $10,000 for seriousness, and from $100 to $10,000 for culpability. The Department assessed an amount of $1,875 under the "seriousness" label for each of the four dates on which a violation occurred with a notation that this amount "includes deterrence of future violations". There is no breakdown as to how much of this amount is assigned to deterrence, which is one of the factors to be considered under the Storage Tank Act penalty section. 35 P.S. §6021.1307.

The other portion of the Worksheet deals with "culpability", which appears to correlate to the "willfulness" factor contained in 35 P.S. §6021.1307. In this category, DER assessed $2,000 per violation which falls at the maximum end of the "recklessness" range. DER considered Mr. Johnson's

and, therefore, Indiana Fuel's behavior to have been "reckless", or "willful", because Johnson acted with knowledge of the prohibition under §503(b) of the Storage Tank Act. Mr. Johnson takes the position that even if the tanks were not registered, it was not willful conduct on his part to fill them because there was some confusion as to what constituted registration. Moreover, Mr. Johnson testified that he attempted to keep track of his customers and their status in the process of registration, and had offered to assist them with telephone numbers and addresses for registration. (F.F. 11)[5]

Moving to the amount of the penalty and the method of calculation, we are disturbed by two aspects of the Department's action. First, the discussion of the amount of the penalty to be assessed seems to have taken place without any reference to the penalty provisions of the Storage Tank Act. Based on the testimony of DER's witnesses, it appears that an amount was chosen by DER and that amount was subsequently broken down on the Worksheet referenced in this appeal. Secondly, rather than mirroring the factors contained in the civil penalty section of the Storage Tank Act, 35 P.S. §6021.1307, the Worksheet appears to be more aligned with assessing a penalty under the water quality statutes, by dealing with such matters as seriousness of the action as an imminent threat, priority violation, and Class I pollution. (Comm. Ex. K)

In reviewing the sum of the penalty, we find that DER properly assessed $500 for "savings to violator" in an attempt to remove the profit

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[5] We note that Indiana Fuel did not raise as an issue the disproportion between its penalty of $16,000 and the penalty assessed against the owner of the unregistered tanks, Ronald Kimmel. Whereas Indiana Fuel received a $16,000 penalty from DER for filling the unregistered tanks, Mr. Kimmel was penalized only $200 for failing to register the tanks. (F.F. 22)

from the transactions. This assessment is adequately justified by the evidence and the penalty section of the Storage Tank Act itself.

However, we do not agree with DER's characterization of Indiana Fuel's conduct as "reckless", particularly in light of the confusion surrounding Arthur Davis' letter of July 24, 1990 and the manner in which distributors of regulated substances were to deal with tank owners who had not yet received registration stickers. Indiana Fuel acted on advice from the PPA, one of the channels through which DER had disseminated information regarding the Storage Tank Act to distributors, and the PPA had advised Indiana Fuel and other distributors that until tank owners received their registration stickers from DER, the use of an affidavit signed by the tank owner stating that the owner's tanks had been registered would act as sufficient verification of registration in the interim. (F.F. 9) Moreover, Mr. Johnson attempted to track the status of his customers with respect to registration of their tanks. (F.F. 11)

In light of these circumstances, we do not find that Indiana Fuel's conduct was willful or reckless. Rather, Indiana Fuel's actions fall within the category of negligent behavior. Therefore, we cannot uphold the Department's assessment of $2,000 per violation at the maximum end of the recklessness range for a total of $8,000.

Where the Board determines that DER has abused its discretion in assessing a civil penalty, we may substitute our discretion for that of DER and modify a civil penalty assessment. Chrin Brothers v. DER, 1989 EHB 875; Booher, supra. If we were to apply DER's Civil Penalty Worksheet, the penalty range for negligent behavior is $100-$500. Although, as we have previously stated, the Worksheet does not parallel the language of 35 P.S. §6021.1307, the willfulness of the violator's conduct is one factor to be considered in

assessing a penalty under the Storage Tank Act. We find that an assessment of $125 per violation at the lower end of the negligence range is an appropriate penalty for Indiana Fuel's actions. We, therefore, assess a total of $500 for negligent behavior.

We also find that the Department failed to meet its burden of proof with respect to the final factor of its calculation, "seriousness", for which it assessed $1,875 per violation for a total of $7,500. The Department presented no evidence of harm or threat of harm to the environment by this action, and although DER considered this to be a "priority violation", it provided little information as to how it arrived at this determination. Finally, although we agree that deterrence is a factor to consider under 35 P.S. §6021.1307, DER was unable to show what, if any, of this amount was to act as a deterrent to future violations. Where there is no evidence of pollution or threat thereof and where there is no indication of the value placed upon deterrence of future violations, we cannot find that DER acted reasonably in arriving at its assessment of $7,500.

In summary, we find that DER met its burden of proof with respect to $500 of the penalty which was the amount of profit realized by Indiana Fuel as a result of its transaction. However, we find that DER did not meet its burden of proof with respect to its assessment of $8,000 for reckless behavior. Substituting our discretion for that of DER, we assess $500 for negligent behavior, arriving at a total of $1,000. We also find that DER failed to meet its burden of proof with respect to that portion of its assessment relating to seriousness. We find that a total penalty of $1,000 in this case will be a sufficient deterrent to future violations.

CONCLUSIONS OF LAW

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

2. In this appeal of a civil penalty assessment, the burden of proof rests with DER to demonstrate that the penalty and amount were properly assessed and were not an abuse of discretion. 25 Pa. Code §21.101(a) and (b)(1); Booher, supra.

3. The Storage Tank Act prohibits distributors of any regulated substances from selling or placing product in an underground storage tank after August 5, 1990, unless the tank was registered in accordance with §503(a) of the Act. 35 P.S. §6021.503(a) and (b).

4. On four separate occasions, Indiana Fuel placed petroleum, a regulated substance, in unregistered underground storage tanks at Pap's Grocery in violation of §503(b) of the Storage Tank Act. 35 P.S. §6021.503(b)

5. In assessing a civil penalty under the Storage Tank Act, DER is required to consider the following factors: willfulness of the violation; damage to air, water, land, or other natural resources; cost of restoration and abatement; savings resulting to the person in consequence of the violation; deterrence of future violations; and any other relevant factors. 35 P.S. §6021.1307.

6. The Board may substitute its discretion for that of the Department and modify a civil penalty assessment when it finds that the Department has abused its discretion in either assessing the penalty or in setting the amount of the penalty. Chrin Brothers, supra.

7. The Department met its burden of proving that it was proper to assess a civil penalty against Indiana Fuel for violating the Storage Tank Act.

8. However, the Department failed to meet its burden of proof with

respect to the amount of the penalty assessed. Therefore, the Board may substitute its discretion for that of DER in setting the amount of the penalty.

O R D E R

AND NOW, this 21st day of July, 1992, it is ordered that the appeal of Ronald E. Johnson t/a Indiana Fuel and Oil Company from the Department's civil penalty assessment of $16,000.00 is sustained in part and dismissed in part, and the amount of the penalty is modified to $1,000.00.

ENVIRONMENTAL HEARING BOARD

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JOSEPH N. MACK
Administrative Law Judge
Member

DATED: July 21, 1992

cc: DER, Bureau of Litigation
Library: Brenda Houck
For the Commonwealth, DER:
David A. Gallogly, Esq.
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ar

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NEVILLE CHEMICAL COMPANY :
:
v. : EHB Docket No. 92-225-E
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: July 21, 1992

OPINION AND ORDER
SUR PETITION FOR SUPERSEDEAS

By: Richard S. Ehmann, Member

Synopsis

Where the petitioner seeks a supersedeas of a Department of Environmental Resources ("DER") refusal to grant it an exemption from the application of certain hazardous waste regulations, the net effect of granting such a petition would be to grant the exemption thus changing the status quo that existed prior to DER's decision. Accordingly, as we lack the authority to do so, that aspect of the Petition must be denied. Where a Petitioner fails to demonstrate both a lack of injury to the public or the environment and the likelihood of its success on the merits of this appeal, the remainder of the relief sought in the Petition must be denied as well.

OPINION

By letter dated June 16, 1992, (Plaintiff's Exhibit N)[1] DER wrote to Neville Chemical Company ("Neville") advising it of DER's decision to revoke the Beneficial Reuse or Recycling exemptions DER had issued to Neville

[1]Neville's documents admitted into the record are identified as "Plaintiff's Exhibit-___ ". DER's exhibits are "C-__".

in 1983 as to Neville's "unreacted oil", also known as distillates, LX-830 or heating oil (hereinafter "LX-830"). In addition, DER's letter also approved the burning of the oils recovered from groundwater recovery wells Nos. 2C and 78 ("recovery wells oil")[2] as a Beneficial Reuse or Recycling exemption under 25 Pa. Code §261.6(a). Finally DER's letter also denied a similar exemption to Neville as to oils generated by operation of the wastewater treatment plant at Neville's chemical manufacturing plant ("plant oil") on Neville Island (Neville Township) in Allegheny County.

On June 30, 1992, Neville appealed challenging DER's revocation of its exemption as to LX-830 and its refusal to grant Neville an exemption as to the plant oil. Simultaneously it filed its Petition For Supersedeas in regard thereto. On July 6, 1992 we received DER's Response To Amended Petition For Supersedeas.[3]

Because Neville wished to conduct a "test burn" of the LX-830 and plant oil right away we scheduled a hearing immediately but made it one of limited duration. It occurred on July 7, 1992. We issue this Opinion and Order based on the testimony elicited at that hearing, the parties' exhibits, and the allegations admitted by DER's Response to Neville's Petition.

This matter had its beginnings in 1983 when on September 16, 1983 Neville wrote to DER (Plaintiff's Exhibit B) seeking an exemption for what is described in Neville's letter as both a fuel oil and an unreacted oil created

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[2]Oil removed from wells which pump contaminates from the groundwater beneath the area around Neville's plant to prevent its further spread. This operation is conducted pursuant to an agreement between Neville and DER which is not at issue in this proceeding.

[3]Neville had filed amendments in the form of an Amended Petition For Supersedeas with us on July 2, 1992 to correct errors in the affidavit accompanying its initial Petition.

as a co-product when petroleum feedstock were used by Neville to manufacture a series of hydrocarbon resins for commercial sale. After the exchange of added information (Plaintiff's Exhibits C and D) DER issued Neville an exemption from DER's hazardous waste regulations for LX-830 pursuant to 25 Pa. Code §75.265(e)(1) (Plaintiff's Exhibit E). This exemption allowed Neville to burn LX-830 as a fuel for its boilers and industrial heaters and also to sell LX-830 to other companies for use as a fuel. While Neville appears to be asserting that it sought an exemption for more than LX-830, it is clear from Neville's October 4, 1983 letter (Plantiff's Exhibit D) to DER that the exemption sought was solely for LX-830. According to the testimony at the supersedeas hearing and the exhibits it is clear that Neville then began mixing the exempt LX-830 with the unexempt plant oil, the unexempt but now exempted recovery wells oils and other materials including but not limited to unused commercial chemical products, solvents (used as cleaning solutions) and paradene to create a mixture to be used as a fuel for its boilers and heaters. These other "materials" are identified in part in the diagrams attached to C-5 and the statements by Neville's Terry Mikoloski set forth in C-13. Neville contends DER was told subsequent to the LX-830 exemption's issuance that plant oil and recovery wells oil was mixed with LX-830, but we have no evidence that Neville obtained any exemption from DER for any of those other waste streams until DER issued its June 16, 1992 letter wherein the exemption solely for the recovery well oils was granted while an exemption for the plant oil was denied and the LX-830 exemption was revoked.

Plant Oil

Based upon this scenario, we cannot grant a supersedeas to Neville as to the plant oil. Although not raised or addressed by the parties, if we were to grant supersedeas as to this waste stream we would be authorizing conduct by Neville not previously approved by DER. As a Board we have consistently held in supersedeas opinions that we will not grant a supersedeas which alters the *status quo ante*. Joseph R. Amity t/d/a Amity Sanitary Landfill v. DER, 1988 EHB 766: Empire Sanitary Landfill, Inc. v. DER, 1991 EHB 102. As pointed out in the Joseph R. Amity v. DER, *supra* opinion denying supersedeas of DER's rejection of a request to dispose of solid waste in a new location at a landfill, under our precedent we lack the authority to grant Neville the relief sought.

In taking this position we do not rule on the merits of the contention in Neville's Petition For Supersedeas that DER has no jurisdiction under the Resource Conservation and Recovery Act, 42 U.S.C. §6901 *et seq.* ("RCRA"), to prevent Neville from burning this oil. As Neville's counsel was advised by the Board prior to the supersedeas hearing, if Neville believes this assertion it has no need of supersedeas from this Board. Neville has not cited any case authority to us for this proposition. Moreover, DER's June 16, 1992 letter was not issued pursuant to RCRA but pursuant to regulations promulgated under Pennsylvania's Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, No. 97, as amended, 35 P.S. §6018.101 *et seq.*, and it acted in response to Neville's request for exemption which we do not believe would have been submitted to DER if Neville believed DER had no authority to act as it now contends.

LX-830

We turn now to the more difficult problem of supersedeas as to LX-830 which Neville has burned, at least since 1983. As to supersedeas with regard thereto there is no issue of the alteration of the *status quo ante* and thus we evaluate Neville's Petition and the evidence using the tests found in 25 Pa. Code §21.78. McDonald Land & Mining Company, Inc. v. DER, 1991 EHB 129, and, in so doing, we conduct a balancing test amongst these factors, Pennsylvania Fish Commission et al. v. DER, 1989 EHB 619.

Irreparable Harm To Neville

Neville argues it will be irreparably harmed unless supersedeas is granted because of the cost of disposal of LX-830 as a hazardous waste coupled with the cost of purchase of natural gas as a replacement fuel. It also argues such harm if it is denied the ability to conduct a 10 day "test burn" as part of its attempt to qualify the combustion of its blended fuel (LX-830, plant oil and recovery wells oil) interim status with the United States Environmental Protection Agency ("EPA") pursuant to 40 C.F.R. Part 266, Subpart H. Obviously since we cannot grant supersedeas as to fuel oil which contains the plant oil, all we consider is the impact of the loss of the interim status if no test burn of LX-830 and recovery wells oil occurs. Here Neville argues strongly that absent a test burn it cannot complete a certification of compliance and absent such a certification of compliance Neville would lose its chance at interim status which could allow it to burn "hazardous waste fuel oil on site until EPA would grant a Part B permit under RCRA, which could take years". At the close of the hearing counsel for Neville argued against denial of supersedeas saying that was throwing Neville into the "blackhole of EPA" as to the interim status under RCRA. Insofar as

we agree that such a blackhole may exist for Neville's LX-830 without a test burn, Neville has established irreparable harm in regard to the test burn period. More than irreparable harm must be shown however before supersedeas is granted. The other factors are discussed below after we consider the irreparable harm factor for the period after a test burn would be complete.

It is less clear that Neville has established irreparable harm based on cost of the disposal of LX-830 as a hazardous waste and the purchase of natural gas after such a test burn is completed. According to the evidence Neville switched from LX-830 to natural gas for a period of time in 1991 as part of its attempts to retain interim status under RCRA for its burning of LX-830. This occurred without any apparent economic harm to Neville. Further, Neville argues its position is identical to that of Keystone Cement in Keystone Cement Company v. DER, EHB Docket No. 92-163-MR (Opinion issued May 7, 1992), where we granted supersedeas of DER's suspension of a permit to burn waste fuel on site. This is not so. Keystone Cement Company v. DER, *supra* is factually at variance with this matter. There Keystone's employees were caught repeatedly violating terms of a permit issued to it by DER which limited the quantity of hazardous wastes which could be burned, however, management stepped in and took steps to prevent any recurrence of the violations, including dismissal of the responsible employee. As a result and after a balancing of the factors set forth in Section 21.78 including substantial economic harm to Keystone, the sitting Board Member granted supersedeas. Here, employee sanctioned violations with management corrections have not occurred; rather, Neville disputes both the authority of DER to act as it has and DER's conclusions that certain of its wastes are hazardous. Insofar as there are violations at Neville, the evidence is less than

convincing that Neville has acted with the same vigor as did the Keystone management to correct same; rather, here, the management appears to be involved in the decisions to allow any "violations" to occur. In turn, this bears on the weight to be given economic loss as irreparable harm. Certainly the fact that a company may not make as large a profit by compliance with environmental laws does not justify violations of these enactments the Solid Waste Management Act, *supra* or the regulations promulgated thereunder. Nor is the occurrence of any increase in costs automatically irreparable harm. If DER prevails on the merits, the cost of natural gas as a fuel and disposal of LX-830 as a hazardous waste is not unreasonably on Neville but rather is an ordinary cost to it of its business decisions to engage in the manufacturing processes it has selected. William Fiore v. DER, 1983 EHB 528. Nevertheless, though this is a close case on this issue, we will find irreparable harm here as to LX-830 because the potential economic harm to Neville, if it ultimately prevails, could clearly be significant. McDonald Land & Mining Company, Inc. v. DER, *supra*.

Irreparable harm is only one factor which Neville must prove under 25 Pa. Code §21.78, however. Accordingly, we now turn to the others.

Likelihood Of Injury To The Public

In addressing this supersedeas issue Neville admits it has burned LX-830 blended with other materials in the past but says it has discontinued that practice. It also asserts it is operating in compliance with all of its air and water pollution control permits. Thus it concludes supersedeas as to LX-830 will not cause a public nuisance, harm the public, cause pollution or harm the environment. Neville's Vice President William Roper testified to the discontinuance of the blending of all these waste streams and his opinion as

to Neville's compliance with its permits. He further opined as to the lack of harm to the public or the environment.

In response to the Petition, DER argues that it is impossible to assess the risk of injury to the public because no one, including Neville, knows what it is blending with LX-830 and the characteristics thereof. DER also argues that under these circumstances, compliance with Neville's permits cannot be determined in this hazard information vacuum but that it is known that human carcinogens are contained in the LX-830 burned by Neville. While not explicit, DER thus seems to be saying while Neville may assert a lack of harm it is not provable, and, thus, since Neville has the burden of proof as to its Petition's allegation, it cannot meet this burden.

DER called as its witnesses to rebut Mr. Roper both David Waldorf of DER's Bureau of Solid Waste Management (the bureau generating the letter challenged in this appeal) and James Ruffing, an air pollution control engineer for Allegheny County's Bureau of Air Pollution Control. Ruffing has monitored Neville's activities from the standpoint of its compliance with its air pollution control permits on behalf of the County for over ten years. Apparently, based in part upon the testimony given, Ruffing said the County is not clear as to what Neville is burning as a fuel. According to Ruffing the County previously thought Neville was burning a blended fuel in its boilers, the largest part of which was plant oil, with LX-830 being a minor fraction of the rest. It learned the reverse is true only recently. He said that the County lacked adequate information on LX-830 and what it consisted of, that the County had sought this information from Neville but had received inadequate responses. He indicated Neville was not currently in compliance with the County's air pollution requirements as to the fuels burned in the

boilers and heaters. Ruffing also opined that there was too little information available for him to conclude a lack of injury to the public if LX-830 continues to be burned. We understand his concerns. C-29 is a letter Neville wrote to EPA on March 6, 1992 about LX-830 saying in part that it has never blended anything with LX-830 for use as fuel contrary to an untrue contrary assertion contained in DER's letter of August 15, 1991 (Plaintiff's Exhibit F). In the instant proceeding Neville says it has now stopped blending the other oils and the various materials referenced above with LX-830 to produce its fuel. Clearly, these two Neville positions are either in opposition to each other because stopping this blending means it had to have occurred previously or Neville is being less than clear and forthright with these three regulatory bodies. Further, in light of the above and the numerous Notices of Violation issued by DER to Neville concerning its waste disposal practices (C-4, C-6, C-7, C-9, C-14, C-20, C-22) concern legitimately exists that we cannot blindly subscribe to Mr. Roper's opinions that Neville is in compliance with all of its permits and there is no threat of harm if supersedeas is granted. When Mr. Waldorf's testimony is added, this becomes even clearer. Waldorf testified to being told by Neville's Terry Mikoloski in 1990 that materials in drums marked recovered solvent contains pure and contaminated solvents and these materials are burned as fuel. He also indicated his inquiry in April of 1990 (C-14) as to when Neville began using "safety solvent" at its plant (drums labeled safety solvent and also labeled as a hazardous waste having been found at Neville's plant) was responded to by letter of April 18, 1990 (C-15) in which Neville said it began using this solvent in the fourth quarter of 1989. When, by letter of April 27, 1990, he pointed out that this was not true since it was observed at the plant during

DER inspections on September 21, 1988 and August 29, 1989, Neville replied (C-17) that Neville did not know when it began using this solvent. This inability to determine when hazardous wastes began to be generated through the solvent's use and willingness to burn drums of materials as fuel is unsettling. Even putting aside DER's other concerns, including those about toluene and chlorobenzene, Neville's responses to DER's information requests and the possible unapproved burning of Neville's hazardous wastes rather than its proper disposal, we do not find Neville has met its burden of proving to us that we can conclude under §21.78 that there will be neither harm to the public nor a threat of harm to the environment if supersedeas is issued.

Likelihood Of Success On The Merits

On this aspect of the test for whether to grant supersedeas Neville begins by asserting that DER has the burden of proof (true as to the merits hearing only) and cannot meet it. However, at this stage Neville bears the burden of proving this last assertion to us and, of course, this assignment of the burden at the merits hearing only applies as to LX-830 since Neville bears the burden of proof at the merits hearing under 25 Pa. Code §21.101(a) and (c) as to the plant oil.

DER's letter says it revoked Neville's exemption because Neville was burning not just exempted LX-830 but LX-830 blended with other non-exempt substances. DER also says it has been told by Neville that LX-830 is derived from spent solvents and that Neville's wastewater treatment plant regularly treats listed hazardous waste. We believe Neville correctly infers from this statement's location in DER's letter that this is also intended as a basis for

revocation of this exemption. However, DER's letter is much less than clear on its face as to why this impacts on exemption not for plant oil but for LX-830.

Reading DER's letter, Plaintiff's Exhibit-B, Plaintiff's Exhibit-C, Plaintiff's Exhibit-D, Neville's Petition and DER's Response together, suggests that initially DER understood that LX-830 was created from a petroleum feedstock and Neville sought to exempt it from the requirements of the hazardous waste regulations because it was only a hazardous waste based on its being ignitable. Its ignitability would thus make it only a characteristic hazardous waste. When Neville sought this exemption Neville never indicated whether or not LX-830 also contained any listed hazardous wastes. DER approved the exemption on this basis. DER also assumed that absent further exemptions, LX-830 was all that Neville would burn, i.e., it would burn no waste streams or hazardous wastes. DER then became aware that plant oil, used automobile motor oil, recovery wells oil and other materials were blended with LX-830 by Neville and burned as a blended fuel and that the plant waste water treatment plant was treating water containing listed hazardous wastes, so that in DER's mind the plant oil contained listed hazardous wastes. DER also was concerned that LX-830 was not produced solely from petroleum feedstocks but from solvents. In the hearing Neville's proofs show no solvents in LX-830 but DER's proofs show solvents and oil from various sources blended with LX-830 prior to burning this blended fuel. They also show these other fuel constituents contain listed hazardous wastes and a lack of disclosure of same by Neville when the exemption was sought. The evidence also shows LX-830 does not have constant never-varying chemical formulate, but changes chemical composition depending on the feedstocks (including coal tar

feedstocks) used and resin product being manufactured. Further, it shows that Neville submitted information to DER (C-8) showing Neville considers LX-830 to be a solvent which contains constituents which are human carcinogens and constituents which are themselves listed hazardous wastes. It also shows that plant oil and recovery wells oil were blended with LX-830 with the knowledge of DER but without DER's approval, i.e., the issuance of a permit or exemption for the burning of listed hazardous wastes. Finally, the record shows Neville discontinued the blending and burning of recovery wells oil or treatment plant oil with LX-830 in August of 1991. There is also no evidence that other materials are currently burned with LX-830.

With this evidence as a basis Neville asserts Section 503 of the Solid Waste Management Act, *supra*, 35 P.S. §6018.503, applies and that DER cannot meet the standards set forth therein for revocation of this exemption. While DER denies the section applies to exemptions under 25 Pa. Code §261.6, it never explains how it reaches this conclusion or offers any analysis of what law does apply to exemption revocation.

Section 503 provides in relevant part:

> (c) In carrying out the provisions of this act, the department may deny, suspend, modify, or revoke any permit or license if it finds that the applicant, permittee or licensee has failed or continues to fail to comply with any provision of this act, the act of June 22, 1937 (P.L. 1987, No. 394), known as "The Clean Streams Law," the act of January 8, 1960 (1959 P.L. 2119, No. 787), known as the "Air Pollution Control Act," and the act of November 26, 1978 (P.L. 1375, No. 325), known as the "Dam Safety and Encroachments Act," or any other state or Federal statute relating to environmental protection or to the protection of the public health, safety and welfare; or any rule or regulation of the department; or any order of the department; or any condition of any permit or license issued by the department; or if the department finds that the applicant, permittee or licensee has shown a lack of ability or intention to comply with any provision of this act or any of the acts referred to in this subsection or

> any rule or regulation of the department or order of the department, or any condition of any permit or license issued by the department as indicated by past or continuing violations. (Emphasis supplied).

35 P.S. §6018.503(c).

At least at this stage in this appeal, and absent an explanation to the contrary from DER, we see no reason to find that Section 503(c) does not apply to the revocation of this exemption. However, Section 503(c) says DER may revoke this exemption based on Neville's past or present violations of this act, or any other environmental protection statute, regulation, permit condition or DER order. The evidence offered by the parties can be read to show violations of the Solid Waste Management Act by Neville. These involve the burning of hazardous wastes as contained in the plant oil and other materials without any DER exemption allowing this to occur.

As to air pollution, at least some violations of the County's requirements appear to have occurred based upon Mr. Ruffing's testimony. Mandatory fuel analyses data has not been submitted as required. Fuel blends approved for combustion in permits issued by the County to Neville have been changed without notice to or approval of the County's air pollution staff. This is of concern because such air pollution control permits are issued based on a set of parameters such as fuel composition and the degree of its combustion because they determine the type and amount of pollutants emitted as a result of combustion. Obviously, when the parameters change so do the pollutants emitted, and thus the permits' validity is called into question. More disturbing, perhaps, is Ruffing's statement that the chloride levels in the LX-830 as currently burned are too high to be from petroleum feedstocks, leading him to conclude that something has been added to these feedstocks to cause this increased chloride level. This is of concern because Ruffing also

testified that combustion of such fuels containing chlorides produces hydrogen chloride gas and may also produce either phosgene or dioxin.

Thus, there is evidence showing at least past violations of the Solid Waste Management Act and existing violations of Allegheny County's air pollution control requirements.

Allegheny County has an air pollution program because of the delegation of the responsibility to address air pollution within the County to it pursuant to Section 12(b) of the Air Pollution Control Act, the Act of January 8, 1960 P.L. (1959) 2119, as amended ("Air Act"), 35 P.S. §4012(b) and 25 Pa. Code Chapter 133. One requirement for such a delegation is that the County's control of air pollution be with standards at least as stringent as those of DER. See 25 Pa. Code §133.4. In turn, this means violations of the County permits are also violations of Section 8, 13, and 13.4 of the Air Act, 35 P.S. §4008, 4013 and 4013.4.

We have taken pains to point out these violations of the Air Act because each such violation and past violation of the Solid Waste Management Act, *supra*, appears independently to be sufficient under Section 503 of the Solid Waste Management Act, *supra*, to allow DER to lawfully revoke Neville's exemption for LX-830. If at the merits hearing these or other violations are proven by DER, then DER may prevail on the merits, even if Section 503 does apply. We do not decide that issue at this time. However, in light of this conclusion Neville has not shown us a likelihood that it will prevail on the merits using its Section 503 theory.

Neville also asserts that DER deprived it of due process by revoking the exemption without a reasonable opportunity to contest that revocation decision. Section 4(c) of the Environmental Hearing Board Act, Act of July

13, 1988, P.L. 530, No. 94, 35 P.S. §7514, allows DER to act without first affording Neville a hearing prior thereto. Neville's right to a hearing before us is an adequate protection of its due process rights. Commonwealth, DER v. Borough of Carlisle, 16 Pa. Cmwlth. 341, 330 A.2d 293 (1974), Commonwealth, DER v. Steward, 24 Pa. Cmwlth. 493, 357 A.2d 255 (1976).

Next, having addressed Neville's EPA-RCRA/DER-lack-of-authority argument above, Neville argues DER's failure to give Neville a hearing or allow it to file an application for the appropriate permit before threatening to put Neville out of business is a sufficient abuse of discretion, citing Elmer R. Baumgardner, et al. v. DER, 1988 EHB 786 ("Baumgardner") to grant supersedeas. As stated above, DER need not provide a hearing before acting. The legislature said in Section 4(c) of the Environmental Hearing Board Act that DER may act without regard to 2 Pa. C.S. Chapter 5 Subchapter A dealing with and requiring hearings by Commonwealth agencies before they act because Neville may appeal here. Where DER is legislatively authorized to act without such hearings, then acting without such a hearing is not an abuse of its discretion.

Because Neville does not specify what permits it means in this argument, we interpret Neville's argument as to applying for other permits to mean its applications for a new exemption for LX-830 and the plant oil. DER did act in a way as to LX-830 and an application for a new exemption, but, as to this revocation, that fact does not create a ground for finding Neville is likely to prevail on the merits for the following reasons. Firstly, Neville points to no legal authority for the proposition that DER must give it time to apply for a new exemption when it revokes a prior exemption and we know of none. Secondly, unlike its action in Baumgardner, DER did not order Neville

to close or cease doing business. Under the terms of DER's June 16, 1992 letter, Neville may remain in business manufacturing these same resins if it wishes to do so. In regard thereto and importantly Neville can burn natural gas as a fuel because its boilers and heaters used in this manufacturing process were previously fitted to burn that fuel alternatively. Thirdly, unlike the appellants in Baumgardner, Neville has not shown a lack of injury to the public. Finally, there is no evidence that DER is announcing a policy change in issuing its revocation of this exemption, whereas in Baumgardner it announced its interpretation of the law that used oil was solid waste for the first time in its order requiring closure of the oil recycling facility. Accordingly, Baumgardner is inapplicable here and we reject this argument.

Finally, citing Keystone Cement Co. v. DER, *supra*, Neville argues DER's action is so arbitrary, so capricious and such an abuse of discretion in precluding Neville from this environmentally safe and beneficial use of this hazardous waste and that we should find Neville is likely to prevail on the merits. We have already discussed why Keystone Cement Co. v. DER, *supra*, is factually inapplicable to the instant proceeding and indicated that Neville has not proven the environmental soundness of burning LX-830. While burning LX-830 as a fuel is clearly economically beneficial to Neville, that fact is not sufficient reason at this time to find DER's action is so arbitrary, capricious and abusive of its discretion to warrant finding a likelihood Neville will prevail on the merits.

Accordingly, we enter the following Order.

ORDER

AND NOW, this 21st day of July, 1992, it is ordered that Neville's Petition For Supersedeas is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: July 21, 1992

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

HARBISON-WALKER REFRACTORIES	:	EHB Docket No. 91-268-MJ
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 23, 1992

OPINION AND ORDER SUR
MOTION OF APPELLANT TO COMPEL
ANSWERS TO INTERROGATORIES

By Joseph N. Mack, Member

Synopsis

A motion by the appellant to compel answers to interrogatories is granted, and the Department of Environmental Resources is directed to answer interrogatories relating to its policy on certain enforcement matters.

OPINION

This is an appeal by Harbison-Walker Refractories ("Harbison-Walker") from an order issued by the Greensburg District Mining Office of the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER") directing Harbison-Walker to treat certain discharges emanating from the Smith Mine Site into Laurel Run and other tributaries to Meadow Run in Stewart Township, Fayette County. The order was received by Harbison-Walker on June 6, 1991 and an appeal was filed on July 5, 1991.

This Opinion and Order addresses a Motion to Compel Answers to Interrogatories filed by Harbison-Walker on June 15, 1992 and addressed to DER. A memorandum in support of the motion was filed on July 6, 1992. The

motion asks the Board to compel DER to answer six interrogatories to which it has objected, specifically Interrogatories No. 11, 12, 13, 14, 45 and 49, all of which deal with internal policy of DER, either written or otherwise, and the method by which that policy is or is not used, as applied to the appellant herein.

Discovery before the Board is governed by the Pennsylvania Rules of Civil Procedure. 25 Pa. Code §21.111. Rule 4003.1(a) outlines the scope of discovery and allows for the discovery of any matter not privileged which is relevant to the subject matter of the appeal. Relevancy is to be broadly construed for purposes of discovery. County of Westmoreland v. DER, 1987 EHB 633. A matter is relevant if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Pa. R.C.P. 4003.1(b).

DER objects to each of the interrogatories on the following basis: "The Department objects to this interrogatory as irrelevant, beyond the scope of discovery and not likely to lead to discoverable material. Pa. R.C.P. 4003.1(b). Policies are completely irrelevant to issues of liability, and will not advance the issue(s) of liability. Commonwealth of Pennsylvania v. Barnes and Tucker Co., 455 Pa. 392, 319 A.2d 871 (1974); Bologna Mining Co. v. DER, 1989 EHB 270; C & K Coal Company v. DER, 1987 EHB 786.

In its memorandum of law in support of its motion, Harbison-Walker acknowledges that the cases cited by DER stand for the proposition that where a person is liable under a statute, that person cannot avoid or ameliorate the liability based upon a policy. Harbison-Walker also acknowledges that its liability for abatement of the acid discharges at the Smith Mine Site is an issue in this appeal, but disputes that it is the only issue in this appeal. Harbison-Walker points out that its notice of appeal raises a number of

issues, among them reclamation of the mine site, laches, estoppel, discriminatory enforcement, and abuse of discretion, and that the policy information requested by the interrogatories is relevant to these issues.

DER filed a response to Harbison-Walker's motion to compel on July 6, 1992, together with a memorandum in support of its response. In its memorandum, DER argues that only those matters relevant to the issue on appeal are discoverable, and that its policies are not relevant to determining Harbison-Walker's liability in this matter. DER cites a number of cases in support of its argument, including Commonwealth, DER v. Harmar Coal Co., 452 Pa. 77, 306 A.2d 308 (1973); Bologna Mining, supra; C & K Coal Co. v. DER, 1987 EHB 786 ("C & K Coal I"); and C & K Coal Co. v. DER, 1987 EHB 796 ("C & K Coal II").

It is true that where an agency's policy conflicts with a statute, the statute must prevail. C & K Coal I, supra at 788, 789. Policy cannot be the determining factor where a statute is specific on its face, and the Board will consider whether there has been a violation of the statute or regulation in determining the liability of the appellant. However, we do not read the cases cited by DER as excluding the discovery of DER policy in this matter.

In C & K Coal II, C & K had filed a motion for sanctions against DER for failure to respond to interrogatories regarding DER's policies in connection with the issuance of a compliance order to treat discharges at its surface coal mine. The motion was denied and DER was not required to answer the interrogatories in question. However, that opinion relied on the decision in C & K Coal I issued one day earlier at 1987 EHB 786, in which the Board had granted DER's motion to limit issues. In its appeal, C & K had relied on an alleged unwritten policy of DER which was inconsistent with a provision of the statute under which the compliance order had been issued. In granting DER's

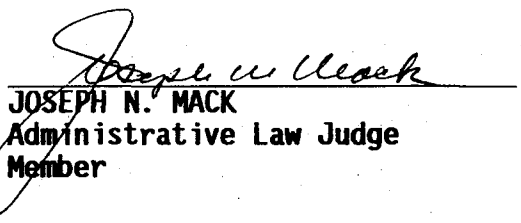
motion to limit issues, the Board held "...as between law and inconsistent, unwritten policy, it is the law which prevails." 1987 EHB at 789.

In the present case, there is no indication that Harbison-Walker is attempting to escape liability by relying on a policy which is inconsistent with the applicable statutes. Moreover, as Harbison-Walker has pointed out, there are a number of issues which have been raised in this appeal to which an inquiry into policy matters may be relevant or lead to the discovery of relevant, admissible evidence. We, therefore, grant Harbison-Walker's motion to compel.

O R D E R

AND NOW, this 23rd day of July, 1992, it is hereby ordered that the motion to compel filed by Harbison-Walker is granted, and DER is ordered to answer interrogatories number 11, 12, 13, 14, 45, and 49 as are set forth in the initial set of interrogatories propounded to DER.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: July 23, 1992

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TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BO

CENTRE LIME & STONE COMPANY, INC.	:	
	:	
v.	:	EHB Docket No. 91-143-F
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 28, 1992
and BELLEFONTE LIME CO., INC., Permittee	:	

OPINION AND ORDER SUR
MOTION TO DISMISS APPEAL FOR MOOTNESS

By Terrance J. Fitzpatrick, Member

Synopsis

A motion to dismiss on the basis of mootness is granted. The action under appeal here is a letter of the Department of Environmental Resources (DER) which revised a permit condition regarding pumping rates from a mine. The appeal is moot because DER and the permittee have since signed a consent order and agreement (COA) which provided for a further revision to the pumping rates. The Appellant here has also appealed the COA, and the Board can only grant effective relief in that appeal.

HISTORY

On April 10, 1991, Centre Lime & Stone Company, Inc. (Centre Lime) filed a Notice of Appeal from a letter dated March 8, 1991, written by Terry L. Confer, Monitoring and Compliance Manager of the Bureau of Mining and Reclamation of the Hawk Run Office, DER. The letter authorized Bellefonte Lime Co., Inc. (Bellefonte) to continue to pump in excess of 3,000 gallons per

minute (gpm) so long as the water level in a particular monitoring well did not exceed an elevation of 1,030 feet. (Bellefonte's Motion to Dismiss, p. 1.) The parties hereto are also parties to other related appeals which are pending at Docket Nos. 88-271-F and 91-362-F; the former relates to an appeal of the permit, the latter to an appeal of a COA.

Bellefonte Lime owns and operates a limestone quarry located in Spring Township, Centre County, Pennsylvania. Bellefonte conducts mining operations at the Gentzel Quarry pursuant to SMP No. 1479401. Bellefonte must discharge water into the Eby Sink in order to mine below the water table.

Centre Lime is engaged in the mining of lime products by both the surface mining method and the deep mining method. Centre Lime's mine is adjacent to Bellefonte's mine. Centre Lime believes that the discharged water will recirculate into its non-coal mine, resulting in additional pumping costs.

By order dated June 1, 1990, DER attached special conditions to the Permit (pursuant to authorization to mine No. 301684-1479401-01-3), restricting the pumping rate of pit water to 3,000 gpm, restricting the ground water elevation in observation well OW-9 to an elevation of 1,015 feet above sea level, and requiring the installation of grout around the pit water injection well casings.

By letter dated March 8, 1991, DER revised the above conditions and allowed Bellefonte to pump in excess of 3,000 gpm as long as the water level in monitoring well OW-9 did not exceed an elevation of 1,030 feet. The letter clearly authorized this pumping until March 22, 1991. It is this letter which Centre Lime now appeals.

On August 1, 1991, Bellefonte and DER entered into a COA. The COA

recites that Bellefonte conducted certain pump tests after January 2, 1991, and submitted data to DER regarding such tests. The COA allows Bellefonte to pump water from the quarry into the treatment basins at an average daily rate of up to 6,000 gpm. Further, Bellefonte may pump water into its treatment basins until the level of 1,030 above sea level is reached at the Eby Sink.

This Opinion and Order addresses Bellefonte's Motion to Dismiss on Ground of Mootness. Bellefonte contends in its Motion to Dismiss that as a result of Bellefonte and DER entering into a COA on August 1, 1991, the pumping and water level provisions of both the authorization to mine and the letter have, in effect, been retracted. Therefore, Bellefonte argues, the complaints raised by Centre Lime in this appeal regarding the alleged invalidity of the pumping rate and water level authorized by the letter are moot, since they and the provision in the authorization to mine to which they relate have been superseded, and, in effect, retracted, by the COA. Centre Lime's appeal, according to Bellefonte, is therefore moot.

On August 18, 1991, DER filed a letter in response to Bellefonte's Motion to Dismiss. DER, concurring in the motion, contends that Paragraphs 6 and 7 of the COA now govern Bellefonte's pumping from its quarry. Accordingly, DER asserts that this appeal is moot.

Centre Lime filed its response to Bellefonte's Motion to Dismiss on August 28, 1991. Centre Lime contends that the signing of this COA does not, in itself, nullify and void the preceding letter and prior order. Rather, Centre Lime argues, the COA merely gives rise to an additional appeal. Centre Lime insists that DER has attempted to circumvent the requirements of 25 Pa. Code §21.120 and also to avoid submitting the COA to this Board for approval. Centre Lime accuses Bellefonte and DER of collaborating in an attempt to

conceal the existence of the COA negotiations. The relief Centre Lime seeks in this appeal is the reinstatement of the limitations contained in the June 1, 1990 Order. Centre Lime contends that DER has not retracted the June 1, 1990 Order which attached special conditions to the permit restricting the pumping rate. Based upon this, Centre Lime argues that the appeal is not moot.

The March 8, 1991 letter provided the following pertinent information:

> I have received your letter of February 26, 1991 in which you have requested an extension to allow pumping rates in excess of 3,000 gallons per minute. Bellefonte Lime Company is hereby authorized to continue their current pumping test until March 22, 1991 so long as the water level in monitoring well OW 9 does not exceed an elevation of 1,030 feet.

(emphasis added.)

The August 1, 1991 COA explains in detail procedures for sampling of effluent and pump tests that Bellefonte must conduct to be in compliance with this COA. Further, paragraph 6 of the COA placed a ceiling of 6,000 gpm on the average daily pumping rate. Paragraph 7 adopted the terms in the March 8, 1991 letter with respect to the elevation not to exceed 1,030 feet.

The Board will dismiss a case as moot when, due to a change in circumstances, the Board is no longer able to grant effective relief. See Decom Medical Waste Systems, Inc. v. DER, 1990 EHB 460 (and cases cited therein). It is clear that the Board can no longer grant effective relief in this appeal, because the COA contained a revision to the pumping rates which goes beyond the terms of the March 8, 1991 letter which is under appeal here.

Thus, it is clear that the COA has mooted this appeal.[1] We note that Centre Lime has filed an appeal from the COA at EHB Docket No. 91-362-F. Centre Lime must seek relief from the Board in the latter appeal.

Since we will dismiss this appeal as moot, there is no need to discuss Bellefonte's motion to strike Centre Lime's pre-hearing memorandum.

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1 In fact, it is probably true that the March 8, 1991 letter has become moot by its own terms, since the letter authorizes pumping in excess of 3,000 gallons per minute "until March 22, 1991."

ORDER

AND NOW, this 28th day of July, 1992, it is ordered that Bellefonte's motion to dismiss the appeal on grounds of mootness is hereby granted, and this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING
Administrative Law Judge
Chairman

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

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

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

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

DATED: July 28, 1992

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TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BO

U.S.P.C.I. OF PENNSYLVANIA, INC.	:	
	:	
v.	:	**EHB Docket No. 91-392-F**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and UNION COUNTY BOARD OF COMMISSIONERS, Intervenor	:	**Issued: July 28, 1992**

OPINION AND ORDER SUR MOTION FOR SUMMARY JUDGMENT, and CROSS-MOTION FOR SUMMARY JUDGMENT

By Terrance J. Fitzpatrick, Member

Synopsis

The Board denies a motion for summary judgment filed by the Appellant, and grants, in part, a cross-motion for summary judgment filed by the Department of Environmental Resources (DER). Under 25 Pa. Code §§269.12 and 269.28, DER must deny a Phase I siting application for a hazardous waste facility where the Soil Conservation Service (SCS) has determined that the site contains Class I agricultural land, even though the SCS's determination was made after the application for Phase I approval was filed. Summary judgment on the entire appeal cannot be granted to DER because there remains an outstanding issue regarding the legality of DER's regulations.

OPINION

This is an appeal by U.S.P.C.I. of Pennsylvania, Inc. (USPCI) from an action of DER dated August 22, 1991. In this action, DER denied USPCI's Phase I siting application for a hazardous waste incinerator, resource

recovery facility, and ash mono-fill on a 110 acre site in Gregg Township, Union County. DER's denial of the application was based upon 25 Pa. Code §269.28, which provides, among other things, that hazardous waste treatment and disposal facilities may not be sited in farmlands identified as Class I agricultural land by the SCS. In its appeal, USPCI contends that the soils were improperly classified by the SCS, that DER misinterpreted certain of its regulations, and that certain of DER's regulations are invalid.

This Opinion and Order addresses a motion for summary judgment filed by USPCI, and a cross-motion for summary judgment filed by DER. USPCI raised three arguments in its motion:

> 1) that DER erred by interpreting its regulations to allow the SCS to change its classification of the soils on the site after the date upon which USPCI filed its Phase I application,
>
> 2) that DER erred by denying the application in its entirety when only the ash mono-fill, and not the incinerator and resource recovery facility, were proposed to be built on top of the alleged Class I soils, and
>
> 3) that DER should have given USPCI the opportunity to submit additional information or to modify the design of the facility in response to the SCS's reclassification of the soils.

By letter dated March 26, 1992, USPCI informed the Board that it was no longer seeking summary judgment based on the second and third arguments outlined above. USPCI's letter was prompted by DER's approval on March 12, 1992, of a revised Phase I application by USPCI which had reconfigured the facilities on the site to attempt to avoid the alleged Class I soils.[1] Accordingly, we will limit our discussion to USPCI's first argument.

USPCI bases its argument on the language of 25 Pa. Code §269.28,

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1 DER's approval of USPCI's revised application was appealed by the Union County Board of Commissioners at EHB Docket No. 92-151-F.

which provides that facilities may not be sited in "farmlands identified as Class I agricultural land by the Soil Conservation Service." USPCI argues that since "identified" is past tense, the regulation refers to classifications which have occurred in the past - before the siting application was filed. USPCI asserts that the siting regulations for municipal waste processing facilities provide that compliance should be determined as of the date of the first newspaper notice of the application (See, 25 Pa. Code §283.202),[2] and that the Board should reach the same conclusion regarding the siting provisions for hazardous waste processing facilities.

USPCI also asserts that its interpretation of the siting regulation is supported by the policies underlying the siting criteria. USPCI quotes the following language from the preamble to the regulations:

> The criteria provide concrete guidance to assist industrial planners and other waste managers in selecting sites ... . These areas can be readily identified and have known boundaries which have been mapped or are capable of being mapped for each facility. The approach is to eliminate at the outset those locations which the criteria identifies as environmentally unacceptable under any conditions and wnich can be readily defined geographically.

USPCI Memorandum of Law, p.10, quoting from 15 Pa. Bulletin 3335 (September 21, 1985) (emphasis supplied by USPCI). In addition, USPCI points out that the Department's "Guidance Document"[3] provides that "a list of Class I soils

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2 The Environmental Quality Board has recently adopted a similar regulation for the siting of residual waste processing facilities. See, 22 Pa. Bulletin 3389, 3571 (July 4, 1992) (section 297.202(c)).

3 The Guidance Document is officially entitled: "The Department's footnote continued

in Pennsylvania is available from the United States Soil Conservation Service or the County Conservation District Office." USPCI contends that this language means that this information may be relied upon as dispositive, because there is nothing to indicate that the information may be unreliable or subject to change.

In its cross-motion for summary judgment, DER contends that the plain language of its siting regulations required it to deny USPCI's application based upon the SCS's determination that there were Class I soils on the site. DER argues that there is no language in 25 Pa. Code §269.28 to indicate that the SCS's classification of the soils on a site is frozen as of the time of the application. DER also asserts that the lack of an explicit time limitation in Section 269.28 must be compared with the inclusion of time limitations in other statutes and regulations, citing e.g., Section 511 of the Municipal Waste Planning, Recycling and Waste Reduction Act, 53 P.S. §4000.511. (Providing that a permit for certain facilities [such as landfills] will not be granted where the facility is to be located within 300 yards of certain features [such as parks], provided that these features are "existing prior to the date the department has received an administratively complete application for a permit for such facilities.")

The Board may grant summary judgment when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

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continued footnote
Guidance Manual for Permitting of Commercial Hazardous Waste Treatment or Disposal Facilities." DER was required to develop this document pursuant to Section 309(b) of the Hazardous Sites Cleanup Act, Act of October 18, 1988, P.L. 756, No. 108, 35 P.S. §6020.309(b).

Pa. R.C.P. 1035(b), Ingram Coal Co. v. DER, 1990 EHB 395.

The issue raised by both motions is whether, under the regulations, DER is required to deny a Phase I siting application for a hazardous waste facility based upon the SCS's determination that there is Class I agricultural land on the site, where the SCS made this determination after the siting application was filed. There are no material questions of fact regarding this issue; both parties acknowledge in their respective motions that DER's denial of USPCI's application was based upon a reclassification of the soils on the site after USPCI filed its application. The question is a legal one requiring an interpretation of DER's regulations.

The regulations regarding siting of hazardous waste treatment and disposal facilities are contained in 25 Pa. Code, Chapter 269. DER's consideration of siting questions is divided into two phases. In "Phase I," DER determines whether there are certain features on the site (such as Class I soils, wetlands, etc.) which automatically preclude siting a facility in that area. See, 25 Pa. Code §269.12. These "exclusionary criteria" are listed at 25 Pa. Code §§269.21 - 269.29. In "Phase II," DER considers a number of "environmental, social, and economic suitability factors which may affect the a location for a proposed facility." 25 Pa. Code §269.13(a).[4]

In ruling upon DER's interpretation of these regulations, we are required to defer to DER's interpretation unless it is clearly erroneous. Mathies Coal Co. v. Commonwealth, DER, 522 Pa. 7, 559 A.2d 506 (1989), Baumgardner v. DER, 1988 EHB 786, 792. For the reasons which follow, we find that DER did not err in interpreting the regulations to require it to deny USPCI's Phase I application despite the fact that the SCS's reclassification

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4 The factors considered in Phase II are listed at 25 Pa. Code §§269.41 - 269.50.

of the soils on the site occurred after USPCI filed its Phase I application.

Section 269.12 of the regulations reads as follows:

> §269.12. Phase I.
>
> Phase I exclusionary criteria are established in §§269.21--269.29 (relating to Phase I exclusionary criteria) and prohibit the siting of a hazardous waste treatment or disposal facility in an excluded area delineated under these criteria. The Department will deny a permit application without further review if the Department determines the proposed facility is located in an excluded area. Phase I criteria apply to hazardous waste treatment or disposal facilities, except for the following:
>
> (1) A facility sited and substantially constructed in good faith prior to the effective date of this chapter.
>
> (2) Modifications to a facility within the existing facility site.

(emphasis supplied.) The underscored language is plain and unambiguous.[5] It compels DER to deny a Phase I application if the facility is located in an excluded area. The only exceptions to this rule are for facilities which were sited and substantially constructed in good faith prior to the effective date of the regulations, and for modifications to a facility within a facility site. There is no exception for a situation where an exclusionary feature comes into existence after the filing of the application but before DER makes its decision.[6] The enumeration of these exceptions requires us to presume

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5 The plain meaning rule applies to the interpretation of regulations as well as statutes. See, Commonwealth, DER v. Rannels, __ Pa. Commw. ___, __ A.2d __, No. 2162 C.D. 1991 (May 22, 1992) (Slip Op. at 7.)

6 The drafters of the regulations surely knew how to create such an exception if one were intended. Section 511(a) of the Municipal Waste Planning, Recycling and Waste Reduction Act, 53 P.S. §4000.511(a), provides footnote continued

that no other exceptions were intended. See, 1 Pa. C.S. §1924, Glendon Energy Co. v. DER, 1990 EHB 1512, 1516, affirmed, ___ Pa. Commw. ___, 603 A.2d 226, 237 (1992).

USPCI's argument that the classification of the soils on its site must be determined as of the time of its application is based upon the language of Section 269.28 of the regulations. This section reads:

> §269.28 Agricultural Areas.
>
> Treatment and disposal facilities may not be sited in agricultural areas established under the Agricultural Area Security ~~Law~~ (3 P.S. §901-915) or in farmlands identified as Class I agricultural land by the Soil Conservation Service.

(emphasis supplied.) We disagree with USPCI's construction of this section. The question which we must resolve is whether the status of agricultural land on the site is fixed as of the time the application is filed or as of the time DER makes its decision. Section 269.28 does not provide a clue to resolving this question. USPCI emphasizes that the word "identified" is past tense; however, use of the past tense is consistent with either interpretation of the regulations. For example, in this case, at the time DER made its decision the soils had been "identified" as Class I agricultural lands. The key question is: identified when? As stated above, we believe that the language of Section 269.12 required DER to consider SCS's classification of the land as of the time DER made its decision.

Finally, policy considerations do not persuade us to interpret the regulations differently. The policy arguments cut both ways. USPCI is

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continued footnote
that municipal waste landfills, etc., may not be sited within 300 yards of schools, etc., "existing prior to the date the department has received an administratively complete application for a permit for such facilities."

correct that allowing DER to consider determinations made by the SCS after an application is filed makes site selection more difficult and uncertain for a prospective applicant.[7] But it is also true that refusing to consider such soil determinations would amount to a refusal to protect a feature of the land which was deemed important enough in the regulations to warrant a rejection of the siting application. This is a difficult choice, but we agree with DER that the regulations resolve this question in favor of protecting the land.

Based upon the above reasoning, we will grant partial summary judgment to DER. The summary judgment is only partial because USPCI's notice of appeal raises an issue which was not addressed in these motions: whether the siting regulations are legal. We will require USPCI to inform us within three weeks as to how it wishes to proceed to resolve this remaining issue.

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[7] Regardless of how we rule on the question before us, site selection will be difficult and uncertain for an applicant. Even if an applicant satisfies all of the Phase I exclusionary criteria, it still must gain Phase II approval, which requires DER to consider a host of factors which "may affect the suitability of a location for a proposed facility." 25 Pa. Code §269.13(a) (emphasis supplied).

ORDER

AND NOW, this 28th day of July, 1992, it is ordered that:

1) USPCI's motion for summary judgment is denied.

2) DER's cross-motion for summary judgment is granted in part and denied in part. DER is granted summary judgment on the issue of whether it interpreted its regulations properly (as discussed in the foregoing Opinion), but it is denied summary judgment on the issue of whether its regulations are legal.

3) USPCI shall inform the Board within three weeks of the date of this Order as to how it wishes to proceed on the remaining issue in this appeal.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATE: July 28, 1992

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TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOA

FRANK T. PERANO, t/d/b/a CEDAR MANOR MOBILE HOME PARK	:	
v.	:	EHB Docket No. 92-195-MR
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 29, 1992

OPINION AND ORDER
SUR
PETITION FOR SUPERSEDEAS

Robert D. Myers, Member

Synopsis

Where DER denies a Public Water Supply Permit application for a new well placed in service on the basis of an emergency permit and refuses further extensions of the emergency permit, the Board will supersede the latter action. Although it is uncertain whether or not Appellant is likely to prevail on the merits (challenging DER's so-called 100-foot rule), he has raised significant legal issues and has made out a substantial case. Balancing the interests of the parties and the public, the Board concludes that the people served by the new well have the most compelling interest, best protected by allowing the new well to remain in operation while the appeal is pending. The *status quo* preserved by superseding DER's action in refusing to extend the emergency permit is the lawful operation of the well.

OPINION

Frank T. Perano, t/d/b/a Cedar Manor Mobile Home Park (Appellant), filed a Notice of Appeal on May 28, 1992 seeking review of the May 1, 1992

denial by the Department of Environmental Resources (DER) of Public Water Supply Application No. 2291508 for Well No. 6 in Appellant's mobile home park in Londonderry Township, Dauphin County. On June 10, 1992 Appellant filed a Petition for Supersedeas.

DER filed a Motion to Dismiss Appellant's Petition on July 2, 1992, which was denied preliminarily during a Board conference call on July 6, 1992. DER filed its Response to the Petition on that same date.

A hearing on the Petition was held in Harrisburg on July 8, 1992 before Administrative Law Judge Robert D. Myers, a Member of the Board. Both parties were represented by legal counsel and presented witnesses and exhibits in support of their respective positions. DER renewed its Motion to Dismiss at the outset of the hearing and it was taken under advisement--to be disposed of along with the Petition for Supersedeas. Post-hearing memoranda of law were filed by both parties on July 15, 1992. The record consists of the pleadings, a hearing transcript of 244 pages and 35 exhibits.

The following facts appear from the record. Appellant owns a mobile home park (known as Cedar Manor) on an 82-acre tract of land in Londonderry Township, Dauphin County. Cedar Manor was begun in 1969 and, when Appellant acquired it in 1984, had spaces for 201 units. Early in 1989 Appellant received municipal approval to expand the park by 113 spaces to a total of 314. As of the date of the hearing, there were 252 spaces available for occupancy. Cedar Manor has its own sanitary sewage collection system and treatment plant; and has its own water system, consisting of on-site wells, treatment facilities and distribution lines. It is served by piped natural gas; no oil heat is allowed.

During 1988 residents of Cedar Manor began complaining to DER about water outages and inadequate water pressure. About this same time James A.

Humphreville, a Consulting Geologist, studied the groundwater resources available to supply the needs of Cedar Manor. He concluded that the yield of the existing wells, as reported to him, was sufficient to meet the demands of the mobile home park if expanded to 300 units. At the time only 3 of Cedar Manor's 5 wells were supplying the system. One well had been abandoned and the remaining well, although permitted, had not been equipped with controls or a pump.

Appellant met with DER representatives on February 2, 1989 to discuss water problems in Cedar Manor. He was admonished to correct existing problems and not to expand the mobile home park without increasing the water supply. The number of persons served by the system increased from 550 at the end of 1988 to 815 at the end of 1989, to 928 at the end of 1990, and to 978 at the end of 1991. The average daily water use rose from 28,000 gallons per day to nearly 39,000 gallons per day over the same period. Appellant equipped and activated an additional well, with DER's knowledge, in 1990. Residents continued to complain of inadequate pressure, however.

Pressure and supply problems affected all four wells on the system during the summer drought of 1991 and became critical in July. Eichelbergers, Inc., a well drilling and water system service company, performed pressure tests on the four wells and inspected all of the equipment on July 19, reporting to Appellant that the problem involved a drop in the water table. After investigating the feasibility of connecting to public water systems in the vicinity, Appellant decided to drill another well.

Alexander McIntyre, Appellant's Consulting Engineer, was informed of the decision and he telephoned Crystal Newcomer, Chief of Technical Services in DER's Bureau of Community Environmental Control, on July 26, 1991. McIntyre informed her of the water emergency and of the need for drilling an

additional well. She referred him to H. Thomas Fridirici, a Regional Hydrogeologist for DER. McIntyre called him, explained the urgency of the situation and requested him to come to Cedar Manor to approve the site of the well prior to drilling. Fridirici stated that his workload would not permit him to do that for several weeks but authorized the drilling to go ahead.

There is some uncertainty about what else was said during these telephone calls. Newcomer testified that she warned McIntyre that DER was getting more strict about what it would permit in the 100-foot radius surrounding the well--stating that a playground would be acceptable but not "any more complicated human activity." McIntyre replied, according to Newcomer, that mobile homes could be moved, if necessary, to comply with this requirement. McIntyre testified that he did not remember these statements. Fridirici testified that he told McIntyre that DER did not want "any buildings or obvious sources of pollution" in the 100-foot radius and that McIntyre indicated that there were areas in the park where that could be done. McIntyre was not called to rebut this testimony and it was not dealt with in his direct or cross examination. He simply testified that Fridirici told him, "You know the rules. Go ahead and do it."

After speaking with Fridirici, McIntyre informed Appellant that he could proceed without prior site approval. Appellant contacted Eichelbergers, Inc. and was told that any location in the mobile home park would produce water of equal quantity and quality. Accordingly, Appellant selected a site on a vacant space at the end of Joan Street adjacent to the boundary between the original section of Cedar Manor and Phase I of the expansion area. He selected this site because it was central to the developed areas of the mobile

home park. Spaces for mobile homes surround the site except toward the northwest where presently undeveloped Phase II of the expansion area is located. Five occupied mobile homes are within a 100-foot radius of the site.

Eichelbergers, Inc. was drilling the well when, on August 2, Renee Bartholemew, a Sanitarian in DER's Bureau of Community Environmental Control whose duties included inspections of Cedar Manor's water system, ordered a halt to the operation on the mistaken belief that it was unauthorized. Appellant informed McIntyre of this and he went to Newcomer's office to request something in writing to evidence authorization to drill the well. Newcomer gave him a handwritten memo which, *inter alia*, included the following statement:

> Be aware that to get a Regular PWS [Public Water Supply] permit, a 100' radius must be controlled by the supplier.

Drilling resumed and was completed on the following day to a depth of 300 feet. Steel casing was installed and grouted to a depth of 65 1/2 feet.

Pump tests revealed an adequate yield and laboratory tests revealed that the water was potable. Based on this data, McIntyre wrote to Newcomer on August 13 requesting an emergency permit to enable the well (referred to as Well No. 6) to be put into service as soon as possible. Fridirici went to Cedar Manor the next day, observed the presence of mobile homes within the 100-foot radius of Well No. 6 and noticed a pile of trash in the undeveloped area about 250 feet northwest of the well. Newcomer wrote to Appellant on August 16 notifying him that a 60-day emergency permit would be issued upon his acceptance of four stated conditions. One of them was the following:

> You shall submit an application for a new water supply source and treatment system for [Cedar Manor] within 60 days from the effective date of this permit. You should be aware that well No. 6's

> location presently does not meet the 100 feet radius requirement. This requirement will apply for any groundwater source.

On the 19th Appellant responded to this letter in writing accepting all of the conditions.

On August 21 Fridirici sent a letter to Appellant detailing the procedure for obtaining a regular permit. The letter contained the following language:

> The permittee must control a minimum of 100 foot radius around each wellhead. Every effort must be made to preserve the natural state of the recharge area to prevent new sources of contamination.

Well No. 6 was placed in service on August 30.

Appellant filed an application for a regular permit in September or October 1991.[1] DER commented on the application in a letter dated November 27 which referred, *inter alia*, to the nearby trash pile and to the following:

> The information included indicates that the well is located within 100 feet of adjacent trailers. Both you and your consulting engineer were aware of this requirement before drilling this well. You must submit justification for the location of the well with regard to Chapter 109 source protection requirements.

Also on November 27 DER extended the emergency permit for 60 days.

McIntyre replied to DER's comment letter on December 17. His justification for the location of Well No. 6 was as follows:

> The location of the well was based on several factors. The geologist on the well drillers staff felt that at this point we would get a maximum yield from the well. This point was central to the

---

[1] There is confusion about the date. McIntyre's transmittal letter is dated September 19, but DER's comment letter refers to an October 15 filing date. Humphreville's report, which apparently accompanied the application, is dated October 12. Since the filing date is not crucial to our decision, we have made no effort to resolve the uncertainty.

> existing park areas. It was ideally suited to permit service to both the old and new sections in a most efficient distribution network. This particular area is very passive with no pedestrian or vehicular traffic. This location accommodates property line considerations and assures the owners control of the area. The location is not subject to sources of pollution. Sewage in the park is collected and treated in an on site treatment plant. The discharge of the plant is downstream of the well by a distance of over 1000 feet.

DER issued an additional 45-day extension to the emergency permit on January 17, 1992, stating as follows:

> The issuance of this second extension of the emergency permit is to allow you necessary time to comply with the 100-foot radius requirement for well protection. The Department will not issue any extension of this emergency permit after the expiration date if the 100-foot radius requirement is not met. In addition, no water supply permit will be issued if this requirement is not implemented.

Despite this language, a further extension to May 1 was issued on February 18 following a meeting between the parties. At this and other meetings Appellant and his consultants attempted to convince DER either that the 100-foot rule was being observed or that it should be waived. When the extension expired on May 1, DER denied the permit application, refused to extend the emergency permit but agreed to withhold enforcement action while Appellant filed an appeal and requested a supersedeas from this Board. DER's denial letter sets forth five reasons for its action. Reasons 4 and 5 read as follows:

> 4. Section 109.603 of the Pennsylvania Safe Drinking Water regulations (25 Pa. Code §109.603) states "Prior to the development of a new source or modification of an existing source, the water supplier shall take reasonable efforts to obtain the highest quality sources available. The supplier shall take reasonable measures to protect the source from existing or foreseeable sources of contamination." Because Well No. 6 is not protected by at least a

100-foot radius of control, it is not protected from potential existing or foreseeable sources of contamination.

5. Section 109.602(c) of the Pennsylvania Safe Drinking Water regulations (25 Pa. Code §109.602(c)) states "The Department's Public Water Supply Manual sets forth design standards which the Department finds to be acceptable designs. Other designs may be approved by the Department if the applicant demonstrates that alternate design is capable of providing an adequate and reliable quantity and quality of water to the public." The construction of the Well No. 6 does not conform to the design standards in the Public Water Supply Manual relating to well construction (§3.3.3). Specifically, this well is not protected by at least a 100-foot radius of control as required for wellhead protection. In addition, the applicant has not demonstrated that Well No. 6, which does not have at least a 100-foot radius where human activities are strictly controlled, is capable of providing an adequate and reliable quality of water to the applicant's customers.

As noted in DER's denial letter, the 100-foot rule is derived from §3.3.3 of DER's Public Water Supply Manual which is referenced in the regulations at 25 Pa. Code §109.602, pertaining to the design of water systems. Section 3.3.3, entitled "Location and protection", states that a well is to be located far enough from possible sources of pollution that subsurface flows of contaminated water will not reach it. To accomplish this, the proposed well site must be carefully surveyed to evaluate the nature and proximity of potential sources of pollution and their relationship with the underlying geology and groundwater. DER is to be consulted during this field survey. Protection of the proposed well site must be provided through ownership, easements or zoning. The water supplier should "control" all land within a 100-foot radius of the well and any additional land necessary to protect the supply from potential sources of pollution identified in the survey.

The purpose of the 100-foot requirement is to create a buffer, attenuation and remedial action zone around the well. It attempts to separate pollution sources from the recharge area of the well and to provide time and space for the taking of remedial action if pollution does occur. There is no particular significance to 100 feet; it is used by DER as a minimum. It is also waived (20% of the sites in 1991) when there are no alternatives for the location of the well.

In addition to the five mobile homes situated within 100 feet of Well No. 6, there are parked automobiles and at least one storage shed. Children, adults and pets engage in outdoor activities within the area. Appellant owns the land where the mobile homes are placed but it is leased to the occupants on a month-to-month basis. Under ordinary circumstances, DER's unwillingness to approve this site would have been absolutely clear to Appellant before any drilling had taken place. Because of the water emergency, however, Appellant was unable to wait for DER's site inspection.

To comply with the 100-foot rule now, Appellant either would have to drill a new well at a different site or move the five mobile homes surrounding Well No. 6. The cost of drilling, equipping and placing Well No. 6 into operation as part of the water system was about $45,000. To drill a new well and place it in operation is estimated to cost $23,000 (some of the facilities could be transferred from Well No. 6). To prepare spaces and move the five mobile homes would cost $90,000 to $100,000. In addition, Appellant would lose the rental from these five abandoned spaces, totalling $13,560 per year. DER points out that Appellant receives total annual rentals in the neighborhood of one-half million dollars.

Incurring additional costs is unnecessary, according to Humphreville, because of several factors. One is the size of the recharge area, estimated

by Humphreville to be a 400-foot to 500-foot radius from the well. DER's 100-foot rule would provide protection only for a small portion of this area. Another factor is the activity associated with the five mobile homes within the 100-foot circle. Humphreville sees this as presenting no "appreciable potential" for groundwater pollution. The third factor is the well casing which will protect the wellhead from the entry of contaminants to a depth of 65 1/2 feet. Based on these factors, Humphreville concludes that imposition of the 100-foot rule would do little or nothing additional to protect the water supply.

Since it went into service on August 30, 1991, Well No. 6 has provided adequate quantities of potable water to the Cedar Manor water system. DER has received some complaints of low pressure but has been unable to verify them.

In deciding whether or not to grant a supersedeas, we are to consider, *inter alia*, (1) irreparable harm to Appellant, (2) the likelihood of Appellant prevailing on the merits, and (3) the likelihood of injury to the public or other parties. Where pollution or injury to the public health, safety or welfare exists or is threatened, a supersedeas cannot be granted: section 4(d), Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7514(d); 25 Pa. Code §21.78.

It is clear that it will cost Appellant a substantial sum of money to comply with the 100-foot rule now. It is also clear that he will be unable to recover this money from DER or anyone else if his appeal ultimately is sustained. We have held such economic loss to constitute irreparable harm: *Silverbrook Anthracite Inc. v. DER*, 1988 EHB 365. See also *AFSCME v. Commonwealth*, 77 Pa. Cmwlth. 37, 465 A.2d 62 (1983).

Whether or not Appellant is likely to prevail on the merits is uncertain. Protection of public water supplies is an important duty imposed upon DER by the Pennsylvania Safe Drinking Water Act, Act of May 1, 1984, P.L. 206, 35 P.S. §721.1 *et seq.* Part of that protection naturally involves the design and construction of public water supply facilities. This is dealt with in Chapter 109, Subchapter F, of the regulations at 25 Pa. Code. Section 109.602, entitled "Acceptable design," makes clear that public water systems are to be designed "to provide an adequate and reliable quantity and quality of water" and to provide "protection from failures of source, treatment, equipment, structures or power supply." Subsection (c) states--

> [DER's] *Public Water Supply Manual* sets forth design standards which [DER] finds to be acceptable designs. Other designs may be approved by [DER] if the applicant demonstrates the alternate design is capable of providing an adequate and reliable quantity and quality of water to the public.

Our preliminary decision, contrary to Appellant's argument, is this does not elevate the Water Supply Manual to the status of an unpromulgated regulation. Section 109.602(c) declares the provisions of that Manual to constitute acceptable designs but does not mandate their use. Other designs can be submitted and approved, if they can satisfy the goal of the regulations. DER's administration of the Act also suggests that the Manual, at least with respect to the 100-foot rule, is not treated as a regulation. During 1991, the rule was waived in about 20% of the cases. This demonstrates adherence to the flexibility of the regulations rather than a slavish insistence upon the precise terms of the Manual.

Part of the acceptable design, according to §3.3.3 of the Manual, is locating a well far enough from existing or potential sources of contamination that it will not be affected by them. No serious challenge can be made to the

reasonableness of this as a general requirement. Nor, in our opinion, can it be argued that it is unreasonable generally to require the water supplier to control the land within a 100-foot radius of the well and land beyond that point which is necessary to protect the water source. The essential inquiry, of course, involves the meaning of "control." Although the term is not defined in the Manual and has not been judicially construed in this context, it can only mean, in our opinion, the power to protect the water source from contaminants. Such power, to be effective, would have to extend to regulation of surface and subsurface activities--the type of regulation achievable by ownership, easement or zoning (the methods cited by the Manual).

Although Well No. 6's recharge area is much more extensive, according to Humphreville, DER has been concerned only with the 100-foot radius. No buildings or obvious sources of pollution could exist in that area, according to Fridirici's alleged statement to McIntyre on July 26, 1991. Newcomer's alleged remark to McIntyre on the same date approved a playground use but no more complicated human activity. Fridirici's August 21, 1991 letter referred to preserving the natural state of the recharge area. The denial letter of May 1, 1992 mentioned the absence of an area where human activities are strictly controlled. The testimony of these two DER witnesses emphasizes that strict control prohibits residential activity, the use of lawn chemicals, and the changing of oil. Ownership is a virtual necessity but is not enough if the land is leased to others. The bottom line, according to this evidence, is (1) ownership undiminished by leases and (2) unoccupied land in a natural state.

We are not prepared to accept this definition of "control" at this point. The record, necessarily abbreviated because of the time constraints on supersedeas hearings, has not been developed enough to convince us that DER's

definition is valid. The only human activities in the vicinity of the wellhead that were described by DER witnesses are similar to those associated with a playground--a use which Newcomer stated was permissible. There is nothing in the record at this point to convince us that a genuine threat of pollution exists within the 100-foot radius, unless we are to conclude that residential activity *per se* rises to this level. We are not prepared to do that, especially in an area where there are no septic systems or fuel oil tanks. Moreover, we have no DER response as yet to Humphreville's opinions on the size of the recharge area and the effectiveness of the well casing.

While we are not prepared to accept DER's definition of "control" at this point, we also are not prepared to reject it out of hand in the context of a high density residential development like Cedar Manor. Even though the recharge area may be much more extensive, even though the well is cased, and even though the pollution potential of the residential activity may not be great, we are not convinced that DER abused its discretion by insisting that for this minimal distance of 100 feet the land be in its natural state, unoccupied and within Appellant's exclusive possession.

We recognize further that Appellant and his authorized representative, McIntyre, may have been aware of DER's position from the outset. If so, Appellant tacitly agreed to it when he proceeded to drill the well. In any event, he expressly accepted it as a condition to the issuance of the emergency permit. If he disagreed with DER's interpretation, he apparently kept it from DER for several months. These circumstances, and the fact that Appellant could have avoided the problem easily by locating the well a short distance away on the undeveloped Phase II of the expansion area, impair the merits of his position.

Although we are unable to decide whether or not Appellant is likely to prevail on the merits, we are satisfied that he has raised "significant legal issues" and has made a "substantial case" as defined in *Pa. P.U.C. v. Process Gas Consumers Group*, 502 Pa. 545, 467 A.2d 805 (1983). Following the direction of that case, we will treat this prerequisite as having been met as we proceed to "balance the interests of all parties, and the public where applicable . . . ." (467 A.2d 805 at 809).

In balancing these interests we must consider the likelihood of injury to the public or other parties. Allowing Well No. 6 to remain in operation pending the outcome of this appeal poses some threat to the residents of Cedar Manor in the form of polluted water. A greater harm will be placed on them, in our opinion, by denying a supersedeas. Denying a supersedeas will force either a shutdown of Well No. 6 or the relocation of the residents within 100 feet of the well (some of whom have lived there for many years). When asked, during the hearing, why DER issued an emergency permit with knowledge that the 100-foot rule had been violated, Newcomer responded as follows:

> Because we -- the Department's goal is to supply the residents or citizens of the Commonwealth with drinking water. Our goal is not to, for lack of a better word, punish the supplier. Our goal is to protect the citizens of the Commonwealth. If they ran out of water, that is not protecting them (N.T. 154).

That goal has continuing merit, in our judgment. Well No. 6 has been operating for nearly a year, supplying adequate quantities of potable water to the residents of Cedar Manor. Forcing a shutdown of the well would harm the residents more than Appellant. We are loathe to make the innocent suffer once again from inadequate water supply when Well No. 6 is performing favorably. There is, as noted, some potential for contaminants to enter the water source

for Well No. 6 but this risk is acceptable, in our judgment, when measured against the inconvenience, frustration and potential health risks of inadequate supply.

Since the only problem with Well No. 6 is the proximity of the mobile homes and since that problem can be resolved (if Appellant is unable to sustain his appeal) by relocating them, we are persuaded that the interests of the residents can best be served by allowing the well to remain in operation while this appeal proceeds to a final determination. We also are convinced that there is no need to force an immediate relocation of the nearby residents, some of whom have lived there for many years. The uncontaminated operation of Well No. 6 for nearly a year suggests that these particular residents pose little threat to the water source of Well No. 6.

DER argues, with strong precedential support, that a permit denial cannot be superseded because preserving the *status quo* would authorize unpermitted (i.e. illegal) activity. We will not depart from this long line of cases or the sound principles on which they are based. The circumstances before us, however, do not fit squarely within these precedents. Here we have two DER actions to consider. One is the denial of Appellant's application for a regular permit for Well No. 6. That action should not, and will not, be superseded. The other is DER's refusal to extend the emergency permit which legalized Well No. 6's operation for nearly a year. That refusal was coupled with a stated willingness to allow the well to continue functioning while Appellant filed an appeal and sought a supersedeas. The *status quo* established by the emergency permit and its implied extension is the lawful operation of Well No. 6 from August 30, 1991 to the date of this Opinion and Order. In superseding DER's action refusing further extensions of the emergency permit, we are preserving this lawful *status quo*.

ORDER

AND NOW, this 29th day of July 1992, it is ordered as follows:

1. Appellant's Petition for Supersedeas is granted in part and denied in part.

2. DER's refusal to extend the emergency permit is superseded and the permit is extended until final action is taken on this appeal, subject to the following conditions:

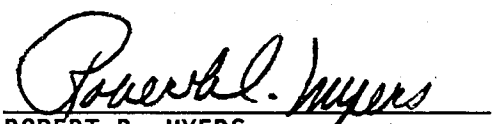
(a) Appellant shall take steps to prohibit the residents of the five mobile homes within the 100-foot radius of Well No. 6 from engaging in activities that could pose a threat of contamination to the water supplying Well No. 6; and

(b) Appellant shall leave vacant any of said mobile home spaces that become unoccupied during the period the supersedeas is in effect.

3. DER's denial of the regular permit application is not superseded.

4. DER's Motion to Dismiss the Petition for Supersedeas is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: July 29, 1992

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M. DIANE SMI
SECRETARY TO THE

WESTTOWN SEWER COMPANY	:	
	:	
v.	:	EHB Docket No. 91-386-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and CHESTERFIELD DEVELOPMENT CORPORATION	:	
and WESTTOWN TOWNSHIP, Intervenors	:	Issued: July 30, 1992

ADJUDICATION

By Richard S. Ehmann, Member

Synopsis

In an appeal of a letter from the Department of Environmental Resources ("DER") to appellant sewer company determining that appellant's sewage treatment plant ("STP") was hydraulically overloaded, the Board finds DER properly determined that the hydraulic overload exists under the definition found at 25 Pa. Code §94.1, based upon discharge monitoring reports appellant submitted to DER. Upon determining that appellant's STP was currently overloaded, DER properly advised appellant of its obligations under 25 Pa. Code §94.21(a). Regarding alleged improper or illegal motives on the part of DER in making its determination, we cannot review DER failures to act, its exercise of prosecutorial discretion, or claims of violations of 42 U.S.C. §1983 since that is beyond our jurisdiction. Appellant's contention that

DER's "purported action" under 25 Pa. Code §94.2 is invalid must fail where the evidence does not show DER acted pursuant to that section of the regulations. Further, DER's requirement that the township in which appellant's STP is located must have submitted an amended Act 537 Plan before DER would consider appellant's application to expand the capacity of its STP to exceed the plant capacity approved in the township's existing Act 537 Plan was not contrary to law or an abuse of DER's discretion. Where no revision to the township's Act 537 Plan had been submitted and there was no permit application for plant expansion submitted to DER, discussions among appellant and the township and DER concerning appellant's plans to expand its plant capacity in the future are insufficient by themselves to demonstrate compliance with either 25 Pa. Code §94.21 or §94.22.

Background

On August 14, 1991, DER's Joseph Feola wrote to Peter DeFeo, president of Westtown Sewer Company ("WSC"), indicating that DER's review of the Discharge Monitoring Reports submitted by WSC to DER showed WSC's sewage treatment plant in Westtown Township, Chester County, was hydraulically overloaded. The letter went on to say that as the overload existed, the regulations in 25 Pa. Code Chapter 94 required WSC both to submit to DER a plan to reduce the overload and provide needed capacity and to restrict new connections to the sewers tributary to WSC's plant until DER approved WSC's plan and schedule for implementation of the plan.

On September 13, 1992, WSC filed an appeal from this letter with this Board.

Thereafter, under a letter dated October 9, 1991, DER moved to consolidate the instant appeal with another WSC appeal docketed at Docket No. 91-269-E.

While that DER motion was pending, Westtown Township ("Township") petitioned to intervene in this appeal (the Township had already filed a Petition seeking leave to intervene in the appeal at Docket No. 91-269-E). Also during the pendency of that motion, Chesterfield Development Corporation ("Chesterfield") petitioned to intervene in both appeals. By an Order dated November 6, 1991 issued by Board Chairman Woelfling, the appeals were consolidated, Chesterfield and the Township were granted intervenor status and the consolidated appeals were assigned to Board Member Ehmann.

Thereafter the Board issued a series of orders on November 8, 1991, November 20, 1991, December 5, 1991, December 9, 1991, January 6, 1992 and January 14, 1992 to resolve discovery disputes between the parties and to modify discovery deadlines to accommodate WSC's counsel.

During the completion of discovery and by Order dated January 7, 1992, we directed the parties to brief the question as to whether the letter of June 7, 1991, which was the subject of Westtown's appeal at Docket No. 91-269-E, constituted either a final action or adjudication of DER. After receipt of those briefs and on February 4, 1992, we issued an opinion and order finding DER's letter to be nonappealable and dismissing the appeal at Docket No. 91-269-E (while simultaneously unconsolidating it with the instant proceeding).

On February 10, 11, and 12, 1992, we conducted the hearings on the merits of the parties' contentions.[1] Subsequently, DER, WSC and the Township filed their Post-Hearing Briefs as ordered. The record before us includes a 660 page hearing transcript, Joint Stipulation as to facts and 43 separate exhibits.

After a thorough and complete review of the record in this appeal, we make the following findings of fact.

FINDINGS OF FACT

1. The Appellant is Westtown Water Treatment Company, doing business under the name of Westtown Sewer Company. It is a corporation registered to do business within the Commonwealth of Pennsylvania with a business address of 1492 Westtown Road, Westtown, PA 19395 and a mailing address of P.O. Box 2000, Media, PA 19603. (Stip.)[2]

2. DER is the appellee and the agency within the executive branch of the government charged with administering the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* ("Clean Streams Law") and the regulations found at 25 Pa. Code Chapters 71 and 95. (T-76)

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1 Chesterfield elected neither to attend the hearings nor to file a Post-Hearing Brief.

2 References to Stip. are references to the parties' Stipulation Of Facts, which is also Board Exhibit No. 1. P-__ is a reference to an admitted WSC exhibit, where as DER-___ refers to an exhibit offered by DER which has been admitted. Finally T-___ refers to a page in the transcript of the merits hearing.

3. WSC owns and operates a sewage treatment plant ("STP") on Westtown Road in Westtown Township, Chester County, the effluent from which is discharged into the East Branch of Chester Creek. (Stip.)

4. On February 13, 1980, DER issued National Pollutant Discharge Elimination System Permit (NPDES) No. PA0031771 ("Part I" permit) to WSC authorizing the discharge of STP effluent in an amount not to exceed 290,000 gallons per day (gpd) average monthly flow. The permit also establishes effluent limitations for specific pollutants and mandates certain monitoring requirements. (Stip.; DER-7)

5. As required by Condition II B of Part A of WSC's Part I Permit, WSC submits Discharge Monitoring Reports ("DMRs") to DER on a monthly basis. (DER-7) These DMRs report the plant's average monthly flow to DER and the United States' Environmental Protection Agency. (DER-7)

6. WSC's Water Quality Management Permit No. 1575402 ("Part II Permit") is Exhibit DER-8; it also contains a flow limitation of 290,000 gpd. (T-199)

7. In drawing the hydraulic overload conclusions contained in the letter of August 14, 1991 (DER-22) which WSC appealed, DER reviewed DMRs submitted to it by WSC for the months of April, May and June of 1991. (T-85, 90; DER-4p, DER-4q, DER-4r)

8. Normally DER reviews a whole year's DMR data to decide if there is a hydraulic overload, but this was not available for WSC's STP because the

flow meter at the STP was recording flows wrongly until recalibrated in March of 1991; so, DER reviewed the data for the first three months following the meter's repair. (T-92-93)

9. David Moore ("Moore") is the president of W.G. Malden, Inc., a company which calibrates and repairs flow meters. (T-140) Moore has worked on the meter at WSC's STP plant at Mr. DeFeo's request. (T-141)

10. The meter at WSC's STP is a Badger Model X701 float type system which measures water flowing over a weir and records same. (T-142)

11. Moore has worked on 600 or more of this type of meter. (T-142)

12. In August of 1990 the meter's float arm was sticking at 100%, with flows exceeding the meter's maximum capacity of 180 gallons per minute ("gpm"), and Moore repaired the meter. (T-145-147)

13. 180 gpm equals a daily flow of 259,200 gpd, as calculated using a formula of: 180 gpm x 60 minutes x 24 hours = 259,200 gpd. (T-147)

14. On March 15, 1991, Moore returned to the STP and removed the flow meter, took it back to the company's shop, calibrated it to a new capacity of 1.5 mgd and reinstalled the meter at the STP. (T-151)

15. As of March 15, 1991 the meter recorded flows accurately. (T-152)

16. In December of 1991, Moore was called back to the STP by WSC to again repair the meter, which he found was reading flows at a little higher rate than was actually occurring. (T-156) Moore did not know when this "high" reading began to occur and said it could have been a week or a month

before he revisited the plant in December. (T-152, 156) It is even possible the meter could have begun to read high two days after it was reinstalled in March. (T-156-157)

17. According to WSC's DMRs for April, May and June of 1991, the average monthly flows for these months were 390,000 gpd, 420,000 gpd and 320,000 gpd respectively while July 1991's average monthly flow was 330,000 gpd. (T-168-170; DER-4p, DER-4q, DER-4r, DER-4s)

18. DER's inspector who visited the STP in May and July of 1991 observed the flow meter on both visits and detected no problems with its operation (T-171-172), but she did not measure the flow independently and is unable to say the meter was completely accurate. (T-177-178)

19. Peter DeFeo is a certified sewage treatment plant operator. (T-424) He conceived of the WSC facilities initially and participated in its construction and operation since the mid 1960's, including its past expansions on treatment capacity. (T-224-227)

20. When the existing STP was initially constructed, portions of it were built larger than necessary so as to facilitate future expansion. (T-227, 499-500)

21. Mr. DeFeo does not see any evidence of a hydraulic overload at the STP (T-389-390, 402), although prior to the flow meter's repair he believed the plant's flow capacity had been reached on a consistent basis (T-254) and permits had been issued in 1990 and 1991 to allow developers to connect their developments' sewage flows to this plant. (T-251-252)

22. As these DER approved customers connected to WSC's plant, Mr. DeFeo believed the STP "was to become overloaded". (T-456)

23. Ralph Bucci, a registered professional engineer (T-508-509), was the initial design engineer for WSC's STP (T-498-499) and currently is a consultant for the Township. (T-495) When he inspected the STP for the Township it was obvious to him that the plant had received some high flows. (T-510)

24. The STP is hydraulically overloaded.

25. After DER's staff reviewed the three months of flow meter readings contained in WSC's DMRs, DER's Joseph Feola as Regional Water Quality Manager then determined the plant was hydraulically overloaded as defined in 25 Pa. Code §94.1 (T-85-86), so he followed the standard procedure and issued the routine overload letter. (T-87, 93-94; DER-22)

26. DER's letter to WSC (DER-22) informed WSC that because DER had found a hydraulic overload, WSC was required to comply with 25 Pa. Code §94.22 by: (a) submitting, within 90 days, a written plan setting forth the actions to be taken to reduce the overload and provide the needed capacity ("a management plan"), and (b) restricting new connections to only those which fell within the exception found in 25 Pa. Code Chapter 94 until DER received and approved a management plan. (Stip.)

27. On January 8, 1992, WSC sent DER a management plan. (Stip.; T-135)

28. As of the hearing date, DER had found WSC's proposed management plan inadequate but had not written the letter notifying WSC in writing of this conclusion. (T-137-138)

29. WSC's Part I permit states on its face that it expires on July 10, 1990 unless renewed (T-205), but WSC contends DER agreed to treat its application for an increase in volume of the discharge from this plant to 530,000 gpd also as an application to renew this existing NPDES permit. (T-239-240) This application for approval of an increased discharge from this plant by amendment of the NPDES permit was submitted to DER in September of 1990. (P-18)

30. Prior to submission of the application to amend its NPDES Permit to increase the volume of the discharge from this STP, WSC's president was advised orally and in writing by his consulting engineers that the engineers believed that DER would return this application, i.e., not agree to the request for increase in flow because the Township's Official Plan adopted pursuant to the Clean Streams Law and the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, No. 537, as amended, 35 P.S. §§750.1 *et seq.* ("Act 537") and ("537 Plan") had not been amended to provide for this additional volume of discharge. (DER-27, DER-28)

31. As of the hearing, DER had not acted on WSC's application to increase the volume authorized to be discharged in the Part I Permit because the Township never submitted either its township-wide revised 537 Plan or revision of its pre-existing Act 537 Plan solely as to WSC's facility to DER until December 16, 1991. (P-64; T-97, 350-351, 369, 477)

32. In an attempt to cooperate with WSC regarding expansion of its plant prior to submission of the revision to the Township's township-wide 537 Plan, DER said it would accept WSC's application for an increased volume of discharge before the revision's submission and would act on it as soon as the Township's revised 537 Plan was approved. (T-363)

33. DER also suggested to WSC's consulting engineer that WSC prepare a "mini-537" covering the drainage area flowing to the STP for the Township to submit to DER and the consulting engineer discussed this with Mr. DeFeo. (T-566) On September 6, 1990, Mr. DeFeo instructed his consultants not to prepare such a mini-537 because Mr. DeFeo believed the Township's submission of the township-wide 537 Plan revision would be made soon and thus this would be duplicative. (T-387, 452; DER-27)

34. Prior to submission of its completely revised 537 Plan to DER, the Township made at least two other submissions of documents to DER for its preliminary analysis of certain materials dealing with portions of its Act 537 planning process and WSC's plant expansion. (P-7, 22; T-318, 344, 348-349, 540-541)

35. WSC wrote to DER seeking to obtain a private revision to the ~~Township's Official Plan but DER did not act on~~ the request because it did not contain the materials required for such a request. (T-101-102) DER advised WSC of this by letter dated February 4, 1992. (T-102-103)

36. WSC never prepared any revision to the Township's 537 Plan as to its STP on behalf of the Township for the Township to submit to DER. (T-412-413)

37. According to the Township's projections (P-75) for the next five years, additional flows of up to 124,225 gpd could be sent to WSC's STP. (T-305-307)

38. On October 29, 1991, WSC advised DER by letter that it would submit a management plan to DER to address the STP's hydraulic overload based alternatively on a planned expansion to 530,000 gpd and on the presently authorized flow. (T-646-647)

39. The Township was and still is in favor of expansion of WSC's plant but continues to want this to occur after completion of the 537 Plan approval process. (T-477)

40. Since 1990 DER has agreed and continues to agree to an expansion of the capacity of WSC's plant to 530,000 gpd once the 537 Plan is submitted by the Township and approved by DER. (T-652)

DISCUSSION

Because DER is asserting the existence of a hydraulic overload at WSC's STP it bears the burden of proof with regard thereto in this proceeding. See 25 Pa. Code §21.101(a). As to this appeal this means DER must show us what the volume of flow authorized to be treated and discharged by this STP is and that it is exceeded to the degree that a hydraulic overload exists at the STP as this term is defined by the regulations found in 25 Pa. Code Chapter 94.

DER's Feola said he used the definitions found in 25 Pa. Code §94.1 in concluding this overload existed and in preparing the letter of August 14, 1991, which is challenged by WSC. Under the hydraulic overload definition in

§94.1, it is clear that exceedance of the average daily flow upon which the permit and plant design are based by the average flow reaching the plant for each month of a recent three month period is the key to hydraulic overload determination. It appears Feola properly determined a hydraulic overload exists at this plant.

The Part II Permit issued to WSC for its plant limits the gallonage of flow to this plant to 290,000 gpd (DER-8, DER-9). NPDES Permit No. 0031771 (DER-7) issued for this STP sets the same numbers of gallons.[3] The DMRs filed with DER by WSC for the months of April, May and June of 1991 reflect flow data gathered by WSC from the STP's flow meter which was repaired in March of 1991. It was this data which Feola says DER used. Each DMR showed that 290,000 gpd figure was exceeded, with the maximum exceedance of 130,000 gpd occurring in May (420,000 gpd minus 290,000 gpd = 130,000 gpd exceedance). Clearly these are three consecutive months which are very recent, when one

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3 The parties wasted a great deal of time at the hearing arguing over whether WSC had timely sought renewal of this permit or not. The permit's face page said it expired on July 10, 1990. The testimony showed a timely filed application for renewal would keep it alive even if the renewal were not issued by July 10, 1990. It also showed a DER agreement to treat WSC's application to increase the gallonage allowed from this plant in this NPDES permit as an application to renew the permit at the old gallonage figure but no agreement by DER to do this if WSC's application for increased flow was not timely filed. The evidence clearly showed that WSC never filed the application to increase the plant's capacity until September of 1990 -- long after the NPDES expired by its own terms. (See P-18 and DER-28) If this NPDES permit was still valid, its gallonage limit applied. If it is invalid because it expired, then WSC was not authorized to discharge any effluent from this STP to the East Branch of Chester Creek. See 25 Pa. Code §92.3.

considers the fact that DER's letter is dated August 14, 1991 and that DER could not have WSC's DMR for June until it was sent to DER in July. Thus, it appears Feola properly concluded that a hydraulic overload existed.

To counter such a conclusion, WSC argues that there is much doubt about the accuracy of the readings from the flow meter installed and maintained for WSC at its STP. Mr. DeFeo is the president of WSC, which operates as a private (non-municipal) public utility. He is also WSC's supervisory sewage treatment plant operator, although he did not design the plant and is not an engineer. DeFeo says he saw no evidence of any overload. He also says he thought his repaired meter was reading a little high, so in December of 1991 he had the meter repairman come back and check the meter. The repairman (Mr. Moore) says when the meter was checked in December it was reading a little high. He could not say when it began to read a little high, whether it was a week or a month earlier. When pressed, Mr. Moore said it was a possibility (he did not say probability) that this meter could have begun to read a little high as early as a few days after it was last repaired in March of 1991.

Finally, WSC offers the testimony of Mr. DeFeo that he questioned flows soon after the meter's reinstallation but did not seek to repair the meter until December and instead looked for ways to cut the infiltration and inflow of extraneous waters into the sewage collection, transmission and treatment system. While we could fairly characterize Mr. DeFeo's testimony on behalf of WSC as self-serving, since WSC's revenues will not increase if a hydraulic overload means it cannot connect new customers to its STP, and thus

discount all of it, we do not disbelieve his attempt to remove infiltration and inflow. However, that activity is more consistent in our mind with a recognition of an overload and an attempt to eliminate it than it is with questioning the flow meter readings. This is particularly true since Mr. De Feo admits that prior to the March 1991 meter repair he believed that his plant was consistently receiving flows at the amount authorized by his permits.

Saying this, we specifically reject the contention in WSC's brief that the evidence shows the flows at the plant were substantially below the maximum level prior to the March repair. The evidence does not show this. The testimony of Mr. Moore shows the flow meter was virtually useless in recording flows prior to March of 1991, and this is confirmed by the inspection in February of 1991 as testified to by DER's Dolchak and Mr. DeFeo's testimony about his belief that the permitted average flow capacity was being achieved. Moreover, the flow meter showed the plant's capacity was being exceeded as soon as the meter was repaired, and this flow meter was the only flow measurement device successfully used by either party to measure flow. Accordingly, such a contention on behalf of WSC lacks credibility.

Finally, while we might like to have heard Mr. Moore tell us how high a little high might have been, that testimony was not offered by WSC and is, in this case, immaterial. As DER's Post-Hearing Brief correctly points out, WSC as permittee, is bound by the numbers it reports on the DMRs it submits to

DER. Commonwealth, DER v. Monessen, Inc., EHB Docket No. 90-540-CP-E (Opinion issued March 11, 1992).[4] Thus we sustain DER's finding of a hydraulic overload.

After announcing DER's finding of a hydraulic overload, DER's letter goes on, saying:

> It will be necessary for the Westtown Sewer Company, as permittee, to comply with Section 94.22 of Chapter 94. This section requires that the permittee:
>
> 1. Submit to the Southeast Regional Office within ninety (90) days of receipt of this letter, a written plan setting forth the actions to be taken to reduce the overload and provide the needed capacity to achieve compliance. The plan must include a schedule showing the dates each step toward compliance will be completed.
>
> 2. Restrict new connections to the sewer system tributary to the overloaded sewerage facilities to only those connections which fall within the exceptions stated in Section 94.55, 94.56 and 94.57 of Chapter 94 until the requested plan and schedule is approved by the Department. A copy of Chapter 94 is enclosed for your use.

(DER-22)

Regarding this portion of its letter, DER argues it does not constitute an appealable action because it merely informs WSC of its obligations under the regulations. In response, WSC argues that the portion of the letter requiring a written plan and schedule was an abuse of DER's

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4 As in Commonwealth, DER v. Monessen, Inc., *supra*, the flow figures on WSC's DMRs are sworn to as complete and accurate. (See DER-4) Here, that is done by William R. Root as agent for WSC. Root conducted day-to-day STP operations for WSC. (T-407, 413, 427, 441, 444-446, 461; DER-4(p), DER-4(q), DER-4(r))

discretion because it already had submitted an informal plan to expand the plant's capacity before DER. We address these arguments serially.

25 Pa. Code §94.21(a) provides that where DER determines a hydraulic overload exists then the permittee of the overloaded facility shall:

> 1. Prohibit new connections to the overloaded facility except under the standards found in 25 Pa. Code §94.55-94.57, and
>
> 2. Within 90 days submit to DER a written plan and schedule to reduce the overload and provide needed additional capacity.

Since this is what is required by this regulation, it is clear DER's letter merely recites the regulation's requirement. Had DER not announced its determination that WSC's STP was hydraulically overloaded in this same letter, its argument would have merit and its recitation of the regulations would not be appealable. Borough of Bellefonte v. DER, 1990 EHB 521. However, the finding of an existing overload impacts on WSC precisely because of the non - discretionary nature of the requirements imposed on WSC by §94.21(a) once the overload was found to exist. The two portions of this letter are thus indivisible portions of a whole and inseparable. Accordingly, we must reject DER's argument.

Rejection of DER's argument does not mean that WSC prevails, however. WSC's appeal launches no attack upon the underlying validity of Section 94.21; rather it challenges DER's decision, the timing thereof and DER's methodology in applying the regulation.

Accordingly, we next turn to WSC's arguments. Borrowing a page from Oliver Stone's "JFK", WSC offers to prove a conspiracy by DER and the Township

which does not involve John F. Kennedy's assassination or Jimmy Hoffa's disappearance but allegedly involves their decision to squeeze WSC out of the sewage treatment business with the Township taking over WSC's plant for a fraction of its cost. At the merits hearing, the Board Member conducting the hearing granted a DER motion to bar historical evidence of this alleged conspiracy for the period from 1985 to 1991. In its Post-Hearing Brief WSC asserts the Board's refusal to hear testimony as to DER's motivation behind determining a hydraulic overload was a direct violation "of Section 1983 of the Federal laws, 42 U.S. Code" and that for this Board to ignore this claim involves "this Board in the implementation of that illegal action". WSC then says that WSC has initiated a civil rights suit in "Federal Court" because of our refusal to litigate this issue but that that suit does not "excuse this Honorable Board responsibility" and then it again asserts these improper DER motives require that "any adjudication of a hydraulic overload ... be banned".

At the merits hearing the sitting Board Member made it clear he would not hear evidence in this appeal about DER's alleged failure to act on WSC's private request to revise the Township's 537, its alleged failure to act on the township-wide revision of the Township's 537 Plan, its alleged failure to approve WSC's proposed plan to correct the hydraulic overload or its alleged failure to act on WSC's pending application to renew its NPDES permit. We affirm those rulings because as we have said previously, a DER failure to act on such matters is not appealable to us. Phoenix Resources, Inc. v. DER, 1991 EHB 1681; S.A. Kele Associates v. DER, 1991 EHB 854; Lankenau Hospital v. DER, et al., 1990 EHB 1264; North Penn Water Authority and North Wales Water

Authority v. DER, 1988 EHB 215.[5] We also affirm the ruling barring WSC - offered "DER motivation testimony" because we are not empowered to review DER's exercise or decision not to exercise its discretionary enforcement powers. Fern E. Smith v. DER, et al., 1991 EHB 1116. Clearly testimony about why DER has elected to make this determination in 1991 insofar as it fits into WSC's conspiracy theory addresses the exercise by DER of such power. In short, where DER's action is in accordance with applicable law, its motives in taking its action are irrelevant. Sechan Limestone Industries, Inc. v. DER, et al., 1986 EHB 134. As we have taken pains to point out many times in the past we are not a court of general jurisdiction but are a quasi-judicial administrative tribunal with only that adjudicatory authority legislatively bestowed on us by the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7513. By Section 4 of this Act, 35 P.S. §7514, we are authorized to hear appeals on orders, permits, licenses or decisions; we are not authorized to conduct proceedings under federal law whether it involves Section 1983 or any other section of "42 U.S. Code". Of course, this does not mean DER may violate the state or federal constitutional rights of WSC, as WSC

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5 When subsequent to this hearing DER acted on WSC's submissions, appeals have been taken to this Board by WSC. When DER rejected WSC's plan to address this hydraulic overload as inadequate, WSC filed an appeal with us, but did so in an untimely fashion. See Westtown Sewer Company v. DER, EHB Docket No. 92-135-E (Opinion issued May 12, 1992). Westtown has challenged that opinion in an appeal to the Commonwealth Court. WSC's appeal from DER's refusal to process WSC's request for revising the Township's 537 Plan was denied as not being an appeal from an action or adjudication of DER. See Westtown Sewer Company v. DER, EHB Docket No. 92-100-E (Opinion issued July 14, 1992). At Docket No. 92-116-E is WSC's pending appeal of a DER order to it to correct a series of conditions at the STP.

alleges it is trying to do through this course of conduct. We specifically make no findings in regard thereto, however, because our jurisdiction does not extend to enforcement of these allegedly violated rights. That is for another forum.

As to the allegation that DER's actions were extraordinary and inconsistent with normal regulatory practice, we agree that this may have occurred insofar as DER offered a mini-537 option to WSC (rejected by WSC) and agreed to treat the request to expand the flow authorized by NPDES permit for WSC's plant (not actually submitted to DER until after WSC's Part I permit expired) also as a request to renew this permit at its existing flow. However, those offers were to WSC's benefit and, if inconsistent with normal practice, were inconsistent in favor of WSC, not against it. WSC was not hurt thereby.

Section B of WSC's brief argues that DER's "purported action", under Section 94.2 (as amended) is invalid and unenforceable. Section 94.2 is a section of this Chapter of the regulations dealing with the Chapter's purpose. It provides:

> This chapter is intended to require the owners and operators of sewerage facilities to manage wasteloads discharged to the sewerage facilities in order to accomplish the following objectives:
>
> (1) Prevent the occurrence of overloaded sewerage facilities.
>
> (2) Limit additional extensions and connections to an overloaded sewer system or a sewer system tributary to an overloaded plant.
>
> (3) Prevent the introduction into POTWs of pollutants

which will interfere with the operation of the plant or pass through or otherwise be incompatible with the plant.

(4) Improve opportunities to recycle and reclaim municipal and industrial wastewaters and sludges.

There was no evidence in the record suggesting that DER acted pursuant to this Section. Mr. Feola testified that DER used the hydraulic overload definition found in 25 Pa. Code §94.1 to act under 25 Pa. Code §94.21 (T-86), but there is no suggestion of actions under Section 94.2. Since parties are expected to point out with some clarity what their legal arguments are when filing their post-hearing briefs, and under Lucky Strike Coal Company, et al. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988) are deemed to abandon those issues not raised therein, we will not place ourselves in the position of guessing which other section of these regulations WSC's counsel might have meant by this citation (with the possibility we guess wrong) or discuss how our guessed section impacts on our result. There are twenty-two separate sections of regulations in Chapter 94. WSC could have meant to reference any of them in this portion of the brief; it references other sections of the regulations elsewhere in its brief but references Section 94.2 twice in this portion of the brief. We have treated the brief as if it means Section 94.2 here, as it says, and reject this argument because there is no evidence DER acted pursuant thereto as alleged.

The next section of WSC's Brief, according to its caption, argues that DER's action under Section 94.21 is invalid because WSC had complied with Section 94.22. However, WSC urges that DER acted as if WSC had not submitted any plans when in fact there had been such submissions which DER refused to

formalize "when the crunch came". WSC says that DER's converting this matter into a Section 94.22 action was invalid, arbitrary and illegal.

To try to interpret this section of WSC's brief in relation to this adjudication some "clarification" is necessary. DER's August 14, 1991 letter to WSC said it was written pursuant to Section 94.22. This was apparently a typographical error and it was written under the authority of Section 94.21. Section 94.22 deals solely with projected future overloads, whereas Section 94.21 deals exclusively with existing overloads, and DER's letter refers to an existing overload at the STP. WSC was aware of this error prior to the start of these proceedings. By Order dated January 7, 1992, we required the parties to stipulate that the proper section was §94.21 or brief the issue of which section was proper. That stipulation was made, acknowledged by WSC's counsel and reaffirmed in the record on the first day of hearing. (T-71-72)

In light of this caption to this argument in WSC's Brief, this stipulation and the lack of any evidence DER converted this to a Section 94.22 action, we treat the portion of this argument supporting "to convert this into a 94.22 action" as an error by WSC similar to DER's incorrect citation in its letter of August 14. Accordingly, WSC's argument is addressed as if referencing Section 94.21.

The evidence before us shows that Mr. DeFeo always dreamed of the STP's expansion as this portion of the township became suburbanized. Apparently the existing overloaded STP is itself an expansion of the initial sewage treatment facility. (T-227) The record makes it clear that Mr. DeFeo wants to further expand his plant's service area and number of customers. It

is also clear he has discussed these plans with DER and the Township and that neither the Township nor DER opposes expansion. As of August 14, 1991, while such discussions had occurred and preliminary responses had been favorable, the necessary submissions for approval of this concept and the documents to actualize it had not been made by WSC, contrary to the allegations in its Brief.

Under Act 537 and the regulations found in 25 Pa. Code Chapter 71, a municipality must develop a plan for how it will address existing and projected sewage disposal needs in the municipality. See 35 P.S. §750.5 and 25 Pa. Code §71.11. After DER approval of this plan the municipality is required to see it is implemented. See 25 Pa. Code §71.31. Thereafter, as new sewage disposal needs arise which are not addressed in this plan or the plan becomes outdated for other reasons, municipalities are required to revise these plans to restore their vitality in regards to sewage collection, treatment and disposal planning. See 25 Pa. Code §§71.12 and 71.13.

It is clear that the Township's Official Plan as approved by DER did not provide for any expansion of WSC's plant to flows in excess of 290,000 gpd. It is also clear, despite WSC's allegations, that it had an application to expand this plant before DER, that WSC's application for the permit amendment to allow this expansion was filed in September of 1991 (a month after DER sent WSC the letter challenged in this appeal). Thus, no application was in fact before DER. Further, it is clear that the Township's revision to the Township's 537 Plan was not filed with DER until December of 1991. Finally, DER's letter to WSC of September 9, 1991 acknowledging receipt

of WSC's permit application (P-50) warned WSC that until the revision to the Township's 537 Plan was approved, WSC's permit application would not be approved. (This is exactly what WSC had been warned about by its own engineers before it filed this application.) All of this evidence shows that all WSC had done was discuss a concept with DER. It had not prepared the revision of the Township's Plan for township approval and submittal to DER. It had rejected submission of a "mini-537" to cover WSC's plant, as proposed by DER to speed up the planning and permitting process for WSC, and its plant was hydraulically overloaded according to its own DMRs. This being the case, even though the Township may have intended to file its plan revision "soon", as of August of 1991, soon was four months off and DER's acting to respond to the overload was a reasonable and legal response under Section 94.21.

Nor can WSC properly argue it had complied with Section 94.22 so action under Section 94.21 was unwarranted. In point of fact, no plan of the type specified in Section 94.22(1) was then filed with DER and we have no evidence before us to support the idea of submission of any plan to limit new connections to WSC's system based on then available capacity as specified in Section 94.22(2). All we have is the same discussion of an expansion of the plant set forth above. That is not sufficient for compliance with Section 94.22. Even if such a discussion is sufficient under Section 94.22, here there was an existing overload, not merely a projected future overload (which causes activation of Section 94.22's requirements) and DER acted to address the existing condition (which it is only authorized to do by Section 94.21).

At this point we also take pains to point out that both Sections 94.21 and 94.22 explicitly require that plans prepared to address existing (Section 94.21) and projected (Section 94.22) overloads be consistent with the applicable 537 Plan. Thus, even if DER wanted to consider WSC's September 1991 application to expand this plant to 530,000 gpd, it had to do so against the backdrop of a plan saying 290,000 gpd, i.e., a plan with which the application is inconsistent unless and until the Township's December revision submissions are approved by DER. Thus, DER could not have approved this expansion without violating its own Chapter 94 regulations. DER is as bound by its own regulations as WSC. Mil-Toon Development Group v. DER, 1991 EHB 209; Willowbrook Mining Company v. DER, Docket No. 90-346-E (Adjudication issued March 20, 1992). Accordingly, DER could not lawfully do so.

Under these circumstances, while it may not suit WSC to proceed with plant expansion and to address overload issues through the statutorily and regulatorily prescribed steps in the order set forth therein, DER cannot be faulted for following them and for responding to WSC's overload evidence as it did. Accordingly, we make the following Conclusions of Law and enter the following Order.

CONCLUSIONS OF LAW

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

2. Where DER determines a hydraulic overload exists in an STP and advises a party of its regulatorily prescribed obligations based upon that determination, it is DER's burden to prove the overload exists.

3. Where pursuant to its NPDES permit, a sewage treatment plant owner/operator submits DMRs to DER showing his plant is hydraulically overloaded, the owner/operator is bound by the numbers contained in those submissions.

4. Where a permittee submits DMRs showing the average monthly flow for three consecutive months exceeds that allowed in its NPDES Permit, DER may properly determine under 25 Pa. Code §94.21 that a hydraulic overload of the plant is occurring.

5. Where DER's finding of an existing overload impacts on WSC precisely because of the nondiscretionary nature of the requirements imposed on WSC by §94.21(a) once an overload is found to exist, the portions of the letter reciting DER's finding of an overload and setting forth the requirements in this regulation are indivisible parts of an inseparable whole rather than constituting an unappealable recitation of regulatory requirements.

6. Where a DER letter determining the existence of a hydraulic overload is challenged on appeal, the Board properly excludes offered testimony on the allegedly illegal or invalid motives behind DER's issuance of this letter. So long as DER's action is in accordance with the applicable law, its motives in taking the action are irrelevant.

7. Since this Board lacks the authority to review an alleged DER failure to act on a private revision to a Township's 537 Plan, it was proper for it to exclude testimony about DER's allegedly bad motives in failing to process this private request.

8. This Board is a quasi-judical independent administrative tribunal with limited jurisdiction; it lacks the authority to entertain claims of violation of 42 U.S.C. §1983.

9. DER's requirement that the Township's 537 Plan be amended before DER would consider an application to expand the capacity of WSC's plant beyond the capacity approved in the Township's existing plan was lawful, normal and proper exercise of its power under 25 Pa. Code Chapters 71 and 94 of DER's Rules and Regulations.

10. Where there is no evidence in the record of any action by DER under 25 Pa. Code Section 94.2, allegations of such actions are properly rejected.

11. A party is deemed to abandon all arguments not raised in its post-hearing brief.

12. Where a revision to the Township's 537 Plan is not submitted to DER and there is no permit application for plant expansion filed with DER, the fact that there were favorable discussions about some future plant capacity expansion does not show compliance by the permittee with 25 Pa. Code Sections 94.21 or 94.22.

ORDER

AND NOW, to wit, this 30th day of July, 1992, it is ordered that WSC's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: July 30, 1992

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M. DIANE SM
SECRETARY TO THE

CITY OF HARRISBURG	:	
	:	
v.	:	EHB Docket No. 91-250-MJ
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COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: August 11, 1992
and DAUPHIN COUNTY INTERMUNICIPAL	:	
SOLID WASTE AUTHORITY, Permittee	:	

OPINION AND ORDER SUR MOTION IN LIMINE

By Joseph N. Mack, Member

Synopsis

The City's motion in limine is granted, and none of the parties shall be permitted to present testimony and other evidence at hearing related to the City's prior negotiations for the retrofitting of its incinerator. This evidence is not relevant to the issue of whether the Dauphin County Municipal Waste Management Plan complies with Act 101.

OPINION

This case involves an appeal by the City of Harrisburg ("the City") of the Department of Environmental Resources' ("the Department's") approval of the Dauphin County Municipal Waste Management Plan ("the Plan") submitted by the Dauphin County Intermunicipal Solid Waste Authority ("the Authority"). The subject of this Opinion and Order is a motion in limine filed by the City

on or about July 20, 1992. The Authority responded on August 5, 1992 with an answer and supporting memorandum of law. The Department, by letter dated July 31, 1992, indicated that it did not intend to file a response to the motion.

The City seeks to limit all issues relating to the City's negotiations with Katy-Seghers, Inc. regarding the potential sale or retrofitting of an incinerator owned and operated by the City. Negotiations between the City and Katy-Seghers took place over a one-year period commencing in 1989, but did not culminate in an agreement between the two entities.

The Authority sought to elicit information regarding the City's negotiations with Katy-Seghers through discovery, to which the City objected. The Authority filed a motion to compel, contending that this information was relevant to the issue of the City's ability to undertake a retrofitting of its facility, which it had raised in its notice of appeal. In an Opinion and Order issued on February 27, 1992, the presiding Board Member granted the Authority's motion to compel since the City had raised the issue of retrofitting in its appeal.

The City argues that, by presenting evidence relating to the City's unfulfilled negotiations with Katy-Seghers, the Authority is attempting "to inject issues which are legally and factually irrelevant to the issues raised on appeal", and that such matters relate in no way to the City's challenge to the Plan.

The Authority argues that the relevancy of this information depends in part on the evidence to be presented by the City at the hearing on this matter. The Authority asserts that the Katy-Seghers information relates to a number of issues including the proposal presented by the City to the Authority, the City's ability to retrofit the incinerator, and the City's ability to perform as per its proposal.

The Authority notes that the Board found this information to be relevant for discovery. However, as noted in the Opinion and Order of February 27, 1992 granting the Authority's motion to compel, relevancy is to be construed broadly for purposes of discovery, Centre Lime and Stone Co. v. DER, 1991 EHB 1144, but is not the equivalent of admissibility at hearing. Del-Aware Unlimited, Inc. v. DER, 1988 EHB 850.

This appeal involves a challenge to whether the Dauphin County Plan complies with the provisions of Act 101. The Authority wishes to present evidence dealing with negotiations which took place between the City and Katy-Seghers regarding the possible retrofitting of the City's facility which did not culminate in any agreement. Although this information was a proper subject for discovery which could have led to the discovery of admissible information, it by itself does not bear on the central issue of this case.

Therefore, the subject of the City's negotiations with Katy-Seghers shall be excluded from this appeal, and none of the parties, including the City, shall be permitted to present evidence or testimony on this subject at the hearing.

O R D E R

AND NOW, this 11th day of August, 1992, it is hereby ordered that the motion in limine filed by the City of Harrisburg is granted.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 11, 1992

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JAMES HANSLOVAN, et al.	:	
	:	
v.	:	EHB Docket No. 90-076-MR
	:	(consolidated)
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: August 12, 1992
and CLOE MINING COMPANY, INC., Permittee	:	

ADJUDICATION

By the Board

Synopsis

The Board upholds the issuance of a surface mining permit for a site in Brady Township, Clearfield County, after finding that Appellants failed to prove (1) that notice of the filing of the application was not published in the locality of the site; (2) that alleged deficiencies in the publishing of the notice were prejudicial to them; (3) that the dip of the strata would direct contaminants from the mining site to their residences; (4) that mining activities authorized by the permit were likely to produce acid mine drainage; and (5) that auger mining would pose a threat to their lands and domestic water supplies.

Procedural History

James Hanslovan, Larry Fulton and Jack McCorkle (Appellants) filed a Notice of Appeal (Board Docket No. 90-076-MR) on February 15, 1990 seeking

review of letters issued by the Department of Environmental Resources (DER) on January 18 and 22, 1990, in connection with the application of Cloe Mining Company, Inc. (Cloe) for a surface coal mining permit in Brady Township, Clearfield County. On March 9, 1990 Appellants filed another Notice of Appeal (Board Docket No. 90-106-MR) seeking review of DER's issuance of the permit to Cloe on February 9, 1990. The two appeals were consolidated at Board Docket No. 90-076-MR on May 4, 1990.

Cloe's Motion to Dismiss for lack of jurisdiction was denied in an Opinion and Order dated November 1, 1990 (1990 EHB 1351). A hearing was held in Harrisburg on April 9, 10 and 11, 1991 before Administrative Law Judge Robert D. Myers, a Member of the Board. Cloe and DER were represented by legal counsel but Appellants chose to represent themselves. At the conclusion of the hearing it was agreed that the record would remain open for the deposition of Charles G. Walton which would be taken at a time and place agreeable to the parties. The deposition was held in Punxsutawny on June 14, 1991 but was not filed with the Board until November 25, 1991.

In the meantime, Cloe filed a Motion for Dismissal of Appeal as moot to which Appellants and DER filed responses. This Motion was denied in an Order dated December 5, 1991. Appellants filed their post-hearing brief on January 6, 1992; Cloe filed its post-hearing brief on February 5, 1992; and DER filed its post-hearing brief on February 19, 1992. The record consists of the pleadings, a hearing transcript of 625 pages, the deposition of Charles G. Walton and 49 exhibits.[1]

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[1] Exhibits admitted into the record are the following: A-1 to A-4, A-7, A-10 to A-16, A-20 to A-22, A-24 to A-33, A-35 to A-41, A-43 to A-48, A-50, footnote continued

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

FINDINGS OF FACT

1. Appellants are landowners and residents of Brady Township, Clearfield County, with mailing addresses at R.D. 1, Luthersburg, PA 15848 (Notices of Appeal).

2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Surface Mining Conservation and Reclamation Act (SMCRA), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.*, and rules and regulations adopted pursuant to said statute.

3. Cloe is a Pennsylvania corporation with its principal place of business at 103 N. Gilpin Street, Punxsutawney, PA 15767. It is engaged in the surface mining of bituminous coal (Exhibit A-2).

4. On August 28, 1989 Cloe filed with DER an application for a permit to conduct surface mining and auger mining activities on the Schindley #1 site in Brady Township, Clearfield County (Exhibit A-2).

5. The site consists of 107.2 acres and is located approximately 8000 feet west of Luthersburg along the north side of SR 4004. SR 4009 is about 800 feet to the west; and Limestone Run is about 600 feet to the north (Exhibits A-1, A-2, A-4, P-1).

6. The site occupies part of the north flank of a ridge that bounds Limestone Run valley on the south (Exhibits A-4 and P-1).

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continued footnote
A-51, A-53 and Hanslovan Report; P-1 to P-4; Walton deposition exhibits 1 to 4 (designated W-1 to W-4). Appellants' objections to Walton's testimony during the deposition are overruled except with respect to exhibits 5 to 9.

7. Appellants reside more than 1000 feet southwest of the site on the south flank of the ridge (N.T. 75, 197; Exhibits A-4 and W-4).

8. Cloe gave public notice of the filing of its application by advertising in *The Progress*, a daily newspaper published in Clearfield, Clearfield County, on the following dates: August 16, 23 & 30 and September 6, 13 & 20, 1989 (Exhibit A-1).

9. Appellants and some of their neighbors subscribe to *The Courier-Express*, a daily newspaper published in DuBois, Clearfield County (N.T. 11-12, 45, 69).

10. Brady Township is closer to DuBois than it is to Clearfield (Rand McNally Commercial Reference Map of Pennsylvania, 1983).

11. Appellants became aware of Cloe's application in late November 1989. In December they discussed their concerns with Robert E. Weiss, a hydrogeologist in DER's Hawk Run office who was acting as lead reviewer of Cloe's application (N.T. 45, 310-311; Exhibit A-7).

12. On January 8, 1990 Appellants documented procedural and substantive objections to Cloe's application in a full-page letter to Jon E. Hawk, Chief of Permits and Services in DER's Hawk Run office. In the letter, Appellants also requested a public meeting (N.T. 411-412; Exhibit A-7).

13. On January 18, 1990 Weiss acknowledged receipt of Appellants' January 8, 1990 letter and informed them that their request for a public meeting was denied because of untimeliness (Exhibit A-12).

14. On January 22, 1990 Gary J. Byron, District Mining Manager in DER's Hawk Run office, also responded to Appellants' January 8, 1990 letter assuring them that DER would consider their objections (Exhibit A-31).

15. Sometime subsequent to Byron's January 22, 1990 letter, DER

decided to grant Appellants' request for a public meeting. A meeting was held in Luthersburg on February 7, 1990 of which notice was given by telephone a day or two in advance (N.T. 87, 114, 346, 427).

16. Appellants attended the public meeting on February 7, 1990 and had full opportunity to present their objections (N.T. 47, 68-72, 114-117, 179-180, 320, 423; Exhibit A-11).

17. Weiss and Hawk had been considering Appellants' objections since receipt of their letter of January 8, 1990 (N.T. 323, 422).

18. On February 8, 1990 Hawk signed the Written Findings Document, concluding that DER's technical review of Cloe's application had resulted in a determination that it met the requirements of applicable statutes and regulations (N.T. 461-462; Exhibit A-47).

19. DER issued Surface Mining Permit No. 17890118 to Cloe on February 9, 1990 approving surface mining and auger mining of the site (Exhibit A-36).

20. On that same date Weiss sent a letter to Appellants advising them of the permit issuance and responding specifically to each of their objections (Exhibit A-10).

21. Appellants filed their Notices of Appeal on February 15 and March 9, 1990, respectively.

22. A spring, which provides water for domestic use at Appellant McCorkle's residence, was first brought to DER's attention during the public meeting on February 7, 1990. Weiss and Hawk concluded before permit issuance that this spring was not hydrologically connected to the site. Nonetheless, the spring was sampled by Weiss on February 23, 1990 (N.T. 69-71, 351-355, 424; Exhibit A-43).

23. DER already had water samples from surface springs at groundwater monitoring points between McCorkle's spring and the site (N.T. 354).

24. Cloe's permit to mine the site involved the Middle Kittanning coal seam and a small portion of the Lower Freeport coal seam (N.T. 429-430, 501, 540; Exhibit A-2).

25. The geologic structure on the site reflects the regional structure: strata trend northeast and dip northwest (N.T. 198, 265, 325, 551; Walton deposition, p. 22).

26. In the western 600 feet of the site is a localized paleotopographic "valley" dipping toward the southwest. Between this "valley" and the residences of Appellants the strata resumes a northwest dip (Walton deposition, pp. 23-39; Exhibits W-2, W-3 and W-4).

27. Groundwater flow on and adjacent to the site is away from Appellants' residences (N.T. 332, 552-553, 619-620; Walton deposition, pp. 23-39, 54; Exhibits W-2, W-3 and W-4).

28. A pre-application review by Weiss had generated concerns about the production of acid mine drainage, particularly with respect to the massive sandstones and toxic shales found on the eastern portion of the site. As a result, Cloe was directed to submit an overburden analysis and interpretation (N.T. 327, 366; Exhibit A-24).

29. Using the acid-base accounting method, Cloe established the presence of a significant calcium carbonate or lime-rich unit in the overburden that would provide a buffering or neutralizing effect. Excess alkalinities of over 3000 tons per acre were measured (N.T. 327-328, 367-369, 451, 541; Walton deposition, pp. 47-48; Exhibits P-4 and W-4).

30. Historically, mining of the Middle Kittanning coal seam in the Brady Township area has not produced acid mine drainage but mining of the Lower Kittanning coal seam has produced it (N.T. 431, 540; Walton deposition, p. 55).

31. Previous mining of both the Middle Kittanning and Lower Kittanning coal seams had taken place in the vicinity of the site, but previous on-site mining had involved only the Middle Kittanning coal seam (N.T. 501, 536).

32. No pollutional discharges existed on the site. Wells in the vicinity of the site exhibited high alkalinities. Discharges in the vicinity of the site reflected acceptable water qualities except at several locations which were influenced by the Lower Kittanning coal seam (N.T. 327, 379, 431, 451, 493-494, 536-539; Walton deposition, pp. 54-56; Exhibits P-1 and P-4).

33. The neutralizing effect of the on-site overburden would not be materially lessened even if the sandstones are channel sandstones (326-327, 365-368, 372, 430, 555-556; Walton deposition, pp. 41-46).

34. In its application, Cloe proposed to do auger mining at two locations on the site, one in the eastern portion and one in the western portion. In the western portion, the augering was proposed to proceed in a southwest direction up to or near the boundaries of the site (Exhibits A-16 and A-26).

35. Auger mining may have a greater potential for producing acid mine drainage because the overburden (with its alkaline strata) is not disturbed. This potential may be offset, in whole or in part, by the flooding of the auger holes when the water table returns to its pre-mining elevation (N.T. 276, 293-295, 561-562; Walton deposition, pp. 48-50; Exhibit A-53).

36. DER expressed concern about the proposed augering in the western portion of the site because of possible impacts upon domestic water wells south of the site. As a result, Cloe revised its application to delete auger mining activities in areas closer than 300 feet to these wells (N.T. 442, 589-592; Exhibits A-24 and A-25).

37. DER approved the concept of auger mining when it issued the permit but included a special condition prohibiting auger mining until an Auger Safety Permit is requested and issued. This special condition was included so that an inspection of the highwall on the western portion of the site would be made prior to allowing auger mining in that area. If the geologic structure exposed in the highwall indicated that domestic water wells south of the site could be impacted, augering would not be allowed (N.T. 403, 442-443; Exhibit A-36).

38. By reason of the geologic structure, the nature of the overburden and the prohibition against auger mining within 300 feet of the domestic water wells south of the site, there was no likelihood that any water supply source would be contaminated, diminished or interrupted by the mining operation (N.T. 332, 437-438, 590-592; Walton deposition, pp. 56-57; Exhibits P-4 and W-4).

39. As of the date of the hearing, Cloe had completed coal extraction on the western portion of the site and was in the process of backfilling. No surface mining or augering had been done in the western-most 1,050 feet of the site and Cloe had no intention of moving into that area[2]

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[2] The Board has been informed that Cloe has applied for bond release for the 14.6 acres that were left undisturbed on the western portion of the site. This information is *dehors* the record and will not affect our Adjudication.

(N.T. 503-507, 516-519; Exhibit P-2).

40. The paleotopographic "valley" (see Finding of Fact No. 26) which dips toward the southwest is in the area undisturbed by Cloe in the western portion of the site (N.T. 515).

41. When DER inspected the highwall exposed at the western-most limit of mining, prior to allowing auger mining, there was no evidence of channel sandstones and the pit floor sloped toward the west-northwest (N.T. 404, 445-450, 514).

42. Cloe's mining activities have had no adverse impact on surface or groundwater in the vicinity of the site (N.T. 65, 73, 220, 520, 543, 568).

DISCUSSION

Appellants have the burden of proof: 25 Pa. Code §21.101(c)(3). To carry the burden they must prove by a preponderance of the evidence that DER acted unlawfully or abused its discretion in issuing Surface Mining Permit No. 17890118 to Cloe for the Schindley #1 site.

Throughout these proceedings, Appellants have complained that they were not given proper notice of Cloe's application. The Legislature's commitment to public involvement in the permit issuance process is apparent from section 4(b) of SMCRA, 52 P.S. §1396.4(b), where public notification, public comment and public hearing requirements are spelled out. The applicant is to give public notice "in a newspaper of general circulation, published in the locality where the permit is applied for, once a week for four consecutive weeks." Written objections to issuance of the permit may be filed with DER during the "public comment" period which ends 30 days after the last publication of the public notice. If objections are filed and an "informal

conference" is requested during the public comment period, DER must hold one, in the locality where the mining is proposed to take place, within 60 days after the end of the public comment period. DER must decide whether or not to issue the permit within 60 days after the informal conference.

These statutory provisions are supplemented by regulations at 25 Pa. Code §86.31--§86.34. The filing of the application is to be advertised "in a local newspaper of general circulation in the locality of the proposed mining activities" (§86.31(a)). "Written comments or objections" may be submitted within 30 days after the last publication of the advertisement (§86.32(a)). If one is requested, DER must hold a conference within 60 days after the close of the public comment period and give notice by placing an advertisement in a "newspaper of general circulation in the locality of the proposed mine" at least 2 weeks in advance (§86.34(b)). A record must be made of the conference and DER must make findings on the issues raised within 60 days (§86.34 (b) and (e)). Within the same time period, DER must decide whether or not to issue the permit (§86.34 (f)).

To residents in the area of the proposed mining site, the opportunity to submit objections, to expound them at an informal conference and to have DER make findings on them is a valuable statutory prerogative. Since the time period for invoking this prerogative is limited, public notice of the filing of the application is a crucial step in the process. This notice is not merely to inform the general public of the application, it is to inform the specific persons who are most likely to be affected by the mining operation--those who reside in the vicinity. That is why SMCRA and the regulations require the notice to be published "in the locality" of the proposed mine site.

"Locality" is not defined in these enactments and, probably, is incapable of precise definition in the rural areas where most mining activities are conducted. "Newspapers of general circulation" (as defined in the Act of July 9, 1976, P.L. 877, 45 Pa. C.S.A. §101) serving those areas usually cover a wide geographic territory. For this reason, great care must be exercised to make certain that the newspaper chosen actually circulates in the area where the mining will take place.

Notice of Cloe's application was published in *The Progress*, a newspaper based in Clearfield, the County Seat of Clearfield County. Since Brady Township is in Clearfield County, the publication presumptively was legitimate. Appellants assert, however, that *The Progress* does not circulate in Brady Township. That municipality is served by *The Courier-Express*, a newspaper published in Du Bois, another borough in Clearfield County closer to the mining site than Clearfield. Unfortunately for Appellants, they did not carry their burden of proof in this regard. The only competent evidence was testimony by Appellants themselves who stated that they knew of "no one in our area that got The Clearfield Progress" (N.T. 69) and that "The Courier-Express is delivered to the majority of the residents in our area" judging by the number of red delivery boxes lining the roads (N.T. 109-110).

All the other evidence that was offered on this issue was hearsay.[3] While we can accept such evidence on certain conditions, that which was offered here was inadmissible under any of the views expressed by the Supreme Court in *Commonwealth, Unemployment Compensation Board of Review v. Ceja*, 493 Pa. 588, 427 A.2d 631 (1981). The competent evidence before us establishes,

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[3] This often is the case with *pro se* litigants whose understanding of hearsay evidence is even less than that of many lawyers.

at the most, that residents in the vicinity of the mining site prefer *The Courier-Express*. But SMCRA and the regulations do not require publication in a newspaper preferred by the residents. It is only necessary that the newspaper chosen actually circulates in the locality of the mining site. To carry their burden of proving that the publication was inadequate, Appellants had to show that *The Progress* does not circulate in their area. They did not do this and their objections must be dismissed.

Appellants claim that, since they did not have notice of Cloe's application, they could not file written objections or request an informal conference. DER argues that, even though Appellants may not have been aware of Cloe's application until after the close of the public comment period, they did in fact submit written objections which DER treated just as seriously as those timely made.[4] A public hearing was held where Appellants discussed their objections and DER responded to each of the objections in writing at the time the permit was issued. These statements are supported by the evidence. Nonetheless, Appellants insist that their statutory prerogatives were not fully honored. They had only a few days' notice of the public hearing rather than a two-weeks published notice. No record was made of the hearing; and DER's written responses were not equivalent to the "findings" required by 25 Pa. Code §86.34(e). We have viewed the videotape Appellants made of the public hearing (Exhibit A-11) and we are satisfied that Appellants had a full opportunity to discuss their objections with the DER personnel who were

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[4] Appellants claim that, since the permit was issued on February 9, 1990, two days following the public meeting, DER could not have given serious consideration to their objections. DER points out that Appellants had submitted their objections in writing a month earlier and that DER had considered them during that time.

processing Cloe's permit and with Cloe's representatives. The short notice and the absence of a formal record were not prejudicial. We have also reviewed DER's written responses to Appellants' objections (Exhibit A-10). While they might not be as extensive as Appellants wished, they do announce DER's essential finding on each of the points. Appellants were not prejudiced in this respect either.

We commend DER for attempting to extend to Appellants all of the benefits they would have been entitled to if they had filed their objections in a timely fashion. We caution DER, however, that these attempts must not be looked upon as curing an improper advertisement. The requirement of public notice is the foundation for public involvement in the permit issuance process, as mandated by the Legislature. As such, it is too important to be left to the discretion of the applicant without any but the most cursory DER oversight. Greater care must be exercised by those processing permit applications to make certain that the notice was published in a newspaper that actually circulates in the area where the mining is proposed to take place.

Appellants' remaining objections go to the technical merits of the permit application. The most significant of these involves the dip of the strata on and adjacent to the site. Appellants concede that the geologic structure on the site reflects the regional structure, trending northeast and dipping northwest. However, they maintain that in the western 600 feet of the site the structure dips southwest in the direction of their residences and domestic water supplies. Mining activities anywhere on the site, but especially in the western portion, could result in contaminants migrating in this direction.

Since the southwestern dip (or roll) is at odds with the local and

regional structure and is based essentially on measurements in one drill hole taken separately from the others, the presence of the phenomenon is not free from doubt.[5] Nonetheless, drillings performed for another coal company in the area between the western boundary of Cloe's site and Appellants' residences confirm the northwestern dip of the strata in that area. Thus, even if the southwestern dip truly exists on the western portion of Cloe's site, it is an isolated occurrence--a localized paleotopographic "valley" as Walton termed it. Any contaminants directed southwest by that "valley" would not reach Appellants' land; they would be deflected northwest by the intervening structure.

Another major concern of Appellants is the production of acid mine drainage. The presence of sandstones on the site raised DER's concerns also and Cloe was directed to submit an overburden analysis and interpretation. Employing the acid-base accounting method (one of the DER-approved procedures), Cloe established the presence of a significant calcium carbonate (or lime-rich) unit in the overburden. The neutralizing effect of this material was determined to exceed by far the acid-producing potential of the other strata. DER relied on this analysis, in part, in deciding to issue the permit. But other factors also played a part.

One of these was Cloe's intention to mine the Middle Kittanning coal, a seam that historically has not been productive of much acid mine drainage in the area. Of more importance were surface and groundwater samples on and

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[5] No hint of a southwestern dip was observed in the exposed highwall closest to the area during Cloe's mining operations on the western portion of the site. However, this was several hundred feet away from the pertinent drill hole (N.T. 448-449). Cloe did not mine the area surrounding this drill hole (N.T. 515).

adjacent to the site which were free of pollution and reflected high alkalinities despite previous mining. The only exceptions were at points influenced by the Lower Kittanning coal seam--a known producer of acid mine drainage. Despite Appellants' efforts to discount the significance of all of these factors, they failed to prove that DER abused its discretion in issuing the permit. The experts debated whether the sandstones were channel sandstones or barrier sandstones but the point is only of academic interest in this case. The alkalinities are so excessive that even channel sandstones will be neutralized.

Cloe's proposal to auger mine on the site was challenged by Appellants for two primary reasons: the southwestern dip of the strata and the increased potential for acid mine drainage. Cloe proposed to auger mine at two locations--one on the eastern portion of the site and one on the western portion. Augering at the western location, which caused Appellants' greatest concern, was to be done in a southwest direction along 1200 feet of highwall. The augering originally was to extend to the site boundary but was later changed to exclude areas that were within 300 feet of domestic water wells south of the site. This change was made because of a concern that augering could impact the quantity and quality of water in these wells.

Appellants contended that the southwestern dip of the strata on this portion of the site coupled with the southwest direction of the augering posed a threat to their water supplies. We have already ruled that the southwestern dip of the strata is a localized feature that does not extend beyond the mining site. Hence, it cannot become an avenue for contaminants to enter Appellants' water supplies. The potential for augering to produce acid mine drainage is less clear. Appellants argued that, since augering does not

disturb the overburden, there is no neutralization to offset the acid emanating from the coal seam. Cloe disputes this thesis and, in addition, claims that the auger holes will be flooded when the water table resumes its normal level after backfilling, eliminating the oxygen needed for acid production.

The evidence, frankly, is not enough to enable us to choose between these theories. We have assumed, therefore, that both are partly true. Augering may have a greater acid mine drainage potential, some or all of which may be offset by flooding the auger holes after backfilling. Even with this assumption, we cannot find a realistic threat to Appellants' water supplies. The intervening structure will deflect any contaminants toward the northwest away from their properties. In addition, the permit only approved the possibility of augering. A special condition, requiring Cloe to obtain an Auger Safety Permit before actually doing any auger mining, was inserted in the permit in order to enable DER to inspect the exposed highwall. If that inspection disclosed geologic structure or strata that could impact adjacent water supplies, augering would be prohibited.

The highwall was, in fact, inspected, was found to be acceptable for augering and an Auger Safety Permit was issued. It did not cover the 1200-foot area originally proposed by Cloe because Cloe voluntarily halted its mining operations 1,050 feet inside the western boundary of the site. The only augering done in that area was in a 150-foot section just north of the Don Logan property (Exhibit P-2). This augering and, indeed, all of Cloe's mining activities had no adverse impact on any of the domestic water supplies in the vicinity at the time of the hearing. Appellants have failed to show a violation of law or abuse of discretion in the issuance of the permit.

COMCLUSIONS OF LAW

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

2. Appellants bear the burden of proving by a preponderance of the evidence that DER acted unlawfully or abused its discretion in issuing Surface Mining Permit No. 17890118.

3. Appellants did not carry the burden of proving that *The Progress* does not circulate in the area of Cloe's mining site.

4. Appellants were not prejudiced by any deficiency in publishing the notice of Cloe's application.

5. The southwestern dip of the strata in the western 600 feet of the mining site, if it exists at all, is an isolated occurrence that is not found between the mining site and Appellants' residences.

6. The northwestern dip of the strata between the mining site and Appellants' residences would deflect contaminants away from Appellants' land.

7. Appellants did not carry the burden of proving that acid mine drainage is likely to be produced by the mining activities authorized by Surface Mining Permit No. 17890118.

8. Appellants did not carry the burden of proving that auger mining would pose a threat to their land and domestic water supplies.

9. Appellants did not carry the burden of proving that DER acted unlawfully or abused its discretion in issuing Surface Mining Permit No. 17890118.

ORDER

AND NOW, this 12th day of August, 1992, it is ordered that Appellants' appeals are dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

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JOSEPH N. MACK
Administrative Law Judge
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DATED: August 12, 1992

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SECRETARY TO THE B

DALE H. CLAPSADDLE and
MARYLEONA CLAPSADDLE, his wife
and JOSEPH J. SOPCAK and STEPHANIE
R. SOPCAK, his wife

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

EHB Docket No. 91-331-E

Issued: August 12, 1992

ADJUDICATION

By Richard S. Ehmann, Member

Synopsis

In an appeal from denial of a claim under a DER issued mine subsidence insurance policy, the claimants have the burden of showing by a preponderance of the evidence that the damage to their homes was caused by a mine subsidence event. Mine Subsidence Insurance Policies issued by DER do not insure structures against damage from all types of subsidence events but only mine subsidence events. When a claimant fails to demonstrate the nexus between the damage suffered and mine subsidence, DER's initial coverage decision must be sustained and the appeal must be denied.

Procedural Background

The instant proceeding was begun on October 30, 1987 when Dale H. Clapsaddle and Maryleona Clapsaddle, his wife (collectively "Clapsaddle") and

Joseph J. Sopcak and Stephanie R. Sopcak, his wife (collectively "Sopcak") filed suit against the Commonwealth of Pennsylvania's Department of Environmental Resources ("DER") before the Commonwealth's Board of Claims. The suit was based on DER's issuance of mine subsidence insurance policies to Clapsaddle and Sopcak for their homes in Peters Township, Washington County, the damaging of these homes allegedly by the subsidence in the subjacent coal mine and DER's refusal to honor these claims because the damage was not caused by mine subsidence.

In May of 1989, Sopcak and Clapsaddle petitioned the Board of Claims to transfer this appeal to the Environmental Hearing Board. The basis for the request was the decision by the Commonwealth Court in Commonwealth, DER v. Ronald Burr, et al., 125 Pa. Cmwlth. 475, 557 A.2d 462 (1989), holding that this Board rather than the Board of Claims had jurisdiction over matters such as the instant proceedings. That petition was denied by the Board of Claims, and an appeal in the form of a Petition For A Writ of Prohibition was filed with the Commonwealth Court by Clapsaddle and Sopcak. DER subsequently joined therein, while the Board of Claims opposed the Petition. By Order dated June 25, 1990, the Commonwealth Court entered an order granting the petition and ordered the transfer of these claims to this Board. See Dale H. Clapsaddle et ux., et al. v. Commonwealth, Board of Claims, 133 Pa. Cmwlth. 605, 577 A.2d

939 (1990). An appeal from this decision to the Supreme Court was taken by the Board of Claims which the Supreme Court treated as a Petition For Allowance Of Appeal and denied by order dated June 17, 1991.[1]

On August 13, 1991, the transfer of these claims was made to this Board, and we issued Pre-Hearing Order No. 1 in this appeal on August 21, 1991. Thereafter, we moved this matter through discovery to a merits hearing as expeditiously as possible. Those hearings were held on December 12, 13, 16 and 17, of 1991. Since that time we have received the parties' post-hearing briefs.

After a full and complete review of the entire record in this matter, including the 730 page transcript and the 39 Exhibits offered by the parties, we make the following findings of fact.

FINDINGS OF FACT

1. Sopcaks, who are husband and wife, are residents of Peters Township, Washington County, with a postal address of 315 Stonebrook Drive, McMurray, Pennsylvania, 15317. (Appellants' Complaint and DER's Answer to Complaint)[2]

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[1] This Per Curiam Order is found at Clapsaddle v. Commonwealth, Board of Claims, ___Pa. _____, 593 A.2d 424 (1991) and Commonwealth, DER v. Commonwealth, Board of Claims, ___Pa. ___, 593 A.2d 425 (1991).

[2] Reference to T-__ herein are to the hearing transcript. References to C-__ are references to DER's Exhibits. References to A-__ are references to Appellants' Exhibits. B-___ is a reference to a Board Exhibit. The parties were unable to stipulate to any facts. Other references are self-explanatory.

2. Clapsaddles, who are husband and wife, are residents of Peters Township, Washington County, with a postal address of 327 Stonebrook Drive, McMurray, Pennsylvania, 15317. (Appellants' Complaint and DER's Answer To Complaint)

3. DER is an administrative agency of the Commonwealth of Pennsylvania with the responsibility for administration of the Commonwealth's Coal Mine Subsidence Insurance Program as initially established pursuant to the Act of August 23, 1961, P.L. 1068, as amended, 52 P.S. §3201 *et seq.* (Appellants' Complaint and DER's Answer To Complaint)

Sopcak's House

4. Sopcak purchased his home in 1972. (T-29)

5. William C. Krueger was the first owner of Sopcak's house, which was constructed in 1966 on a wooded slope which runs downhill to the east from Stonebrook Drive to a tributary of Brush Run at the rear of the house lot. (A-18, 24; C-2; T-9, 12)

6. Though Mr. Krueger was not offered as an expert witness, he stated that the house was built on a flat bench which was cut into the sloping hillside lot and that the house was not built on fill. (T-10, 12)

7. When the house was built, its front porch was built above grade and above the house's foundation, and Krueger had no idea what its porch rests upon. (T-25)

8. In August of 1984, Sopcak applied to DER for Mine Subsidence Insurance in the amount of $80,000. (A-2, 3; T-29-30)

9. When DER's pre-insurance inspection of Sopcak's house was made on August 8, 1984, it reported the house exterior was "okay", the basement was completely furnished, the integral garage showed a cracked floor and there were step cracks in the right wall under the house support. (A-2, 21)

10. The floor cracks were only hairline cracks at the time of DER's pre-insurance inspection and the step cracks were in the north wall of Sopcak's house next to the driveway. (T-31) The latter cracks were 1/16 of an inch in width. (T-31)

11. Sopcak first noticed additional damage to his home on May 29, 1985. (T-33)

12. The brick and siding at the front of his house (west side of house) to the right of the entry were separating (T-33), with cracks appearing in the brick veneer at the southwestern corner of the house. (T-35)

13. On the south side of the house, the chimney was separating from the house to the point that Sopcak could fit his finger into the crack between the fireplace and house structure adjacent to it. (T-35) This separation crack may be as much as 3/4 of an inch (T-35-36) and is visible inside and outside of the house. (T-36)

14. Sopcak's concrete patio has cracks in it and it is separating from the edge of the house. (T-39) Krueger installed the patio. (T-24)

15. The cracks in the garage are larger than at the time of DER's inspection and now run beneath the carpet in the game room floor. (T-40) This crack did not exist when Sopcak bought the house. (T-40-41)

16. Sopcak is not sure if these cracks appeared suddenly or not, but when he went looking for them he found them. (T-57)

17. Sopcak had an addition which he designed himself added to his house seven or eight years ago (1983 or 1984). (T-69) Sopcak is not an architect and has no formal education as an engineer but he holds a title of manufacturing engineer for an electric transformer manufacturer. (T-28)

Clapsaddle House

18. Dale H. Clapsaddle is the business manager for the Peters Township School District and has held this position since 1972. Prior to this, he was a cost studies industrial engineer for U.S. Steel. (T-192)

19. Clapsaddle has lived at this address since the house was built in 1969. (T-210) As with Sopcak's house, Clapsaddle's house has an integral garage entered from the rear of the house. (A-21, 24)

20. Clapsaddle applied to DER for mine subsidence insurance on June 1, 1984 and the DER pre-insurance inspection report form shows the exterior, interior and basement were okay, but small hairline cracks were noted in the garage floor. (A-2; T-202)

21. In June of 1985, while he was outside his house, Clapsaddle heard a loud metallic noise, and, when he looked up above the large window in his living room, he saw that the dentil molding (house trim under the gutters (T-207)) was "bowed out through the center". (T-204) When he and his wife went around to the rear of their home, they observed that the downspout on the driveway side of the house had come off the house and the downspout at the front of the house was "pushed out and twisted". (T-204)

22. Further inspection showed that the window sash on the driveway side (north) of the Clapsaddles' bedroom would no longer close enough to allow it to be locked. (T-205)

23. Since June of 1985, Clapsaddle has noticed step cracks in the brick veneer at the southeast corner of his house and larger cracks in the garage floor running on into the basement area. (A-21; T-207-208) The first of these cracks was discovered on the day he noticed the dentil molding. (T-213)

24. Prior to 1985 these conditions did not exist. (T-213)

25. Because water would no longer flow down his gutters to his existing downspouts, Clapsaddle concluded that the elevation of his house had shifted, and he put downspouts on the other (southern) end of his gutters to prevent water from spilling out of the gutters over the side of the house. (A-21; T-209)

26. Step cracks have also appeared in the brick veneer on the east side of the Clapsaddle house at the corner by the garage entrance. (T-210) They did not exist before 1985. (T-210) Further cracks have appeared on the southern side of the house which travel in a westerly direction. (A-21; T-210-211)

27. Like the Sopcak property, the Clapsaddle lot slopes from Stonebrook Drive toward the lot's rear and a bench was cut into this slope on which to build the house's foundation. (T-215-216)

28. Sopcak and Clapsaddle both believe their homes were not built on fill. (T-12, 213) The fill created by the benching of the slopes for

construction of the foundations was pushed toward the rear of their respective lots. (T-12; 213, 215)

29. In 1980-81 Clapsaddle installed a series of two decks around the southern and eastern edge of the first floor of his house, together with a set of stairs leading from the decks down to the ground level. (A-21; T-226-228) Clapsaddle designed the deck and stairs. (T-228) The decks are attached to Clapsaddle's house. (T-228) The larger deck is approximately 16 feet by 16 feet. (T-228-229)

The Montour No. 4 Mine

30. Beneath a significant portion of Peters Township, including the area surrounding Stonebrook Drive, is the underground coal mine known as the Montour No. 4 Mine, previously operated by Consolidation Coal Company ("Consol"). (A-4; C-2) The mine is roughly 10 miles by 10 miles in size and also extends beneath portions of Allegheny County. (T-273-274)

31. The mine operated in the Pittsburgh Seam of Coal at least from the 1940's up until September 3, 1980. (A-4; C-2)

32. The Montour No. 4 Mine is located approximately 260 feet beneath the Clapsaddle and Sopcak houses. (C-2; T-20)

33. The coal mined in this area of the Montour No. 4 was mined in the "room" and pillar method, wherein coal is extracted from a room and pillars are left behind for surface support. (A-4; T-443-444)

34. In mining the coal beneath the area around Stonebrook Drive and the Peters Township Middle School, the amount of coal removed, and thus the

amount left in place in the pillars for surface support, was not constant. (T-443-445)

35. Beneath one portion of the school, no coal was removed; beneath other portions of the school and the Brush Run Tributary behind the Sopcak and Clapsaddle houses only 40% of the coal was removed. (A-18; C-2; T-445)

36. Beneath still other portions of the school and in the area west of Stonebrook Drive, 65% of the coal was removed and long narrow pillars were left in place as shown on Exhibit 6 of C-2. (T-444)

37. In the area directly beneath Stonebrook Drive, virtually all of the coal was removed by full retreat mining. (T-242, 445)

38. Full retreat mining is mining where rooms (from coal extraction) and pillars are created and the mining company later returns and removes the coal acting as pillars, retreating from the area mined in this fashion on a pillar by pillar basis. (T-242, 445)

39. Clapsaddle's home is built over an area of full retreat mining, whereas Sopcak's house, with the exception of its northeast corner, is built on a solid block of coal. (Exhibit 6 to C-2; T-476)

40. In August of 1980, an accumulation of water in the Montour No. 10 mine broke through the barrier between the Montour No. 10 mine and Montour No. 4, flooding Montour No. 4. (T-243)

41. According to the information available to the parties' experts, in 1980 the then active Montour No. 4's fire boss discovered this water at the

mine's No. 25 Coal Face flowing at a rate of approximately 36,000 feet per minute, with a velocity of from 3.5 to 4 feet per second, in a fifteen foot wide opening there. (T-243, 662)

42. This velocity of water is sufficient to move gravel-sized pieces of materials in areas of full retreat mining but not pieces of caved roof rock of larger size. (T-662)

43. This flow of water at this velocity was found 2,000 feet from Stonebrook Drive (T-251) and, ultimately, despite pumping by Consol, flooded and forced closure of Montour No. 4. (T-270-271)

44. There are no measurements of the velocity of the water flowing into the mine any closer to the homes on Stonebrook Drive than that estimated by Consol's Fire Boss; however, velocity should decrease substantially when this water flows through a 100 to 500 foot wide area of full retreat mining. (T-591, 596)

The 1984 School Subsidence Event

45. In 1984, St. Benedict's Church was located on Abbington Drive in Peters Township. (A-5) Located adjacent to the church to the east but facing onto McMurray Road was the Peters Township School District's middle school. (A-5) Across McMurray Road to the east from the school is a Bell Telephone Company building. (A-4, 5; T-50) These three structures and Abbington Drive on the one hand and Stonebrook Drive on the other form an inverted capital "T". (A-20)

46. Stonebrook Drive runs roughly in a south to north direction and is generally perpendicular to Abbington Drive. (A-5)

47. In 1984, the middle school's walls began to crack and the condition worsened over a brief period of time until the school was razed. (A-4; T-200-201)

48. An investigation of this occurrence was conducted by the federal Department of the Interior's Office of Surface Mining ("OSM"), which concluded the cause of the school's damage was mine subsidence occurring in the Montour No. 4 mine. (A-4, 6; T-201)

49. Reparable damage also occurred in the same period in 1984 to St. Benedict's Church and the telephone company's building and OSM also diagnosed the cause of that damage as subsidence in the Montour No. 4 mine. (A-4, 6, 7, 8)

50. OSM drew this conclusion after undertaking extensive investigation of subsurface exploration, and, based upon this investigation, OSM conducted a mine subsidence abatement project in which it injected grout into Montour No. 4 beneath the school buildings and the surrounding areas within 125 feet of the school, which OSM considered to represent the area influenced by subsidence. (A-4)

51. Three homes at the southern end of Stonebrook Drive (the end near the school) but on its uphill side submitted mine subsidence insurance claims to DER in 1985 and 1986, asserting they suffered subsidence related damage, and, without conducting a detailed investigation of the claims, DER honored these claims based on their proximity to the school and church. (A-4; C-2; T-419-420, 528)

52. In 1985 and 1986, five other subsidence insurance claims, including those of Sopcak and Clapsaddle, were also submitted to DER for damage to homes on Stonebrook Drive allegedly caused by mine subsidence in Montour No. 4; all eight homes had secured subsidence insurance during 1984. (C-2; T-428) DER initially agreed to pay one of these claims for damage to another house at the southern end of Stonebrook Drive, but subsequently advised all five claimants that in its opinion the damages to their houses did not result from mine subsidence. (A-4; C-2; T-429)

53. DER observed repairs to the house at 339 Stonebrook in the summer of 1986. This house was one of the three homes at which DER had honored the mine subsidence damage claim. At that time, DER's staff observed that the house was built on fill material and had a deep foundation, a broken sewer pipe and overall shallow voids in the fill beneath the basement. These facts, plus the 260 feet of rock and earth between the house's basement and the mine's roof, led DER's staff to believe the broken sewer line caused the "piping" of finer soil particles and the creation of these voids. In turn, DER's staff concluded that when the soils recompacted beneath the basement's concrete floor, the house was damaged, and thus the damage was not mine subsidence-related. (C-2; T-525-526)

54. As a result of this reassessment, DER reinvestigated all eight subsidence claims and, in so doing, looked at all of the other homes on Stonebrook Drive. As a result of this reinvestigation, DER concluded that the damage to these homes had causes other than mine subsidence in Montour No. 4. (A-12; C-2; T-419-420, 428-429)

55. Consol prepared maps of the area mined, showing the amount of the coal remaining for surface support. These maps were consulted by the expert witnesses for both sides. (A-17, 18; C-2)

56. The maps of mining in the Montour No. 4 are quite accurate. (T-250, 266, 654)

57. William Bates ("Bates") is a mining consultant with a degree in mining engineering and is a licensed professional engineer who testified as an expert witness in the area of mining and mine subsidence on behalf of Sopcak and Clapsaddle. (T-231-233)

58. According to Bates, when pillars are removed in an area of full retreat mining, the roof falls and, to provide a stable platform, the miners will collapse portions of the roof. This can occur because of a phenomenon in rock mechanics that when a foot of solid material is broken up it occupies one third more space than it previously did in its unbroken state. Thus, according to Bates, with a six foot seam of coal such as the Pittsburgh Seam, caving in eighteen feet of ceiling will fill the twenty-four foot space (18 foot caved in plus the 6 foot seam) and the main roof is thus supported. (T-242) No experts disagreed with Bates on this point.

59. Since the full retreat mining in this area of Montour No. 4 occurred in the 1940's, this area of full retreat mining is geologically stable unless something has occurred to make it unstable. (T-243)

60. DER conducted an analysis of the stability of the pillars in the areas where full retreat mining did not occur, using a pillar stability

formula generally accepted for use in this part of Pennsylvania. (C-2; T-445-446)

61. In order to try to account for pillar deterioration, prior to using this formula, DER subtracted three feet from each pillar's dimension based on recommendations from the OSM geologists who investigated the mine subsidence incident at the church and school. (T-447-448, 484) Based on these calculations using this formula, the only area of marginally stable mine pillars is the area shown as A-1 on map 6 of Exhibit C-2. (C-2; T-447-448). This is the area which OSM also concluded was the location of the mine subsidence which damaged the school and church. (A-4; C-2; T-447-448) Within this area are the church, Abbington Drive and a portion of the school, but none of the homes on Stonebrook Drive. (C-2)

62. One of the reasons that three feet in pillar diameter was removed by DER in its calculations was to account for the water flowing in the mine and its impact on pillar stability, since the pillar stability formula used to analyze stability was for a dry mine. (T-486)

63. The mine pool's elevation rose in Montour No. 4 before the mine subsidence incident at the school. (T-456)

64. The flooding of Montour No. 4 and the rise and fall of the mine's pool due to pumping did not cause or contribute to mine subsidence or damage the Clapsaddle or Sopcak houses. (T-456)

65. While Consol pumped water out of Montour No. 4 for some time, this pumping did not lower the water level in the portion of Montour No. 4 beneath Stonebrook Drive. In the area of Montour No. 4 below Clapsaddle's

house the mine's roof is at 774 feet in elevation, but Consol's pumping never lowered the elevation of the mine's water below 794 feet. (T-455)

Pillar Punching

66. Much of the floor of the Pittsburgh Seam in Montour No. 4 is a claystone. Bates' experience in this mine elsewhere than beneath the Clapsaddle and Sopcak houses shows the mine floor has four inches of a hard silt claystone lying over softer fire clay (T-264), and, as the hard silt clay was worn away by the operation of mine vehicles in those areas, ruts formed in the softer clay. (T-268)

67. If soft fire clay was softened by water flooding this mine, the pressure downward on the existing pillars from the 260 foot thick roof area (between the mine and the ground's surface) might cause the pillars to punch into the clay (also referred to as plastic flow (T-267)), causing surface subsidence. (T-246-247)

68. Neither Bates nor any other witness has seen the floor of the mine in the area beneath the Clapsaddle and Sopcak houses. (T-269)

69. The drill log in the nearest drill hole in the OSM study undertaken at the school is from 600 to 800 feet from the Clapsaddle and Sopcak houses and shows the mine's floor consists not of claystone but of a medium hard to hard shale. With a hard shale floor in this area pillar punching is very unlikely to have occurred. (T-437)

70. Sopcak's house is 600 feet from the school area while Clapsaddle's house is 1,000 feet from this area. (T-518)

71. No damage claims were filed for the houses on the same side of the street and between Clapsaddle's house and Sopcak's house (and no subsidence damage occurred in them), nor were there claims filed for the houses on the same side of the street as Sopcak's house and Clapsaddle's house which lie between Sopcak's house and the three houses on which DER honored claims (nor were they damaged). (T-428, 518-519)

72. All of the witnesses who testified as experts in mine subsidence for both sides, except Richard Grey, agreed that generally in mine subsidence situations there should be a common pattern to the damage to the houses if the damage to the houses is caused by a single subsidence incident. (A-4, 12, 17, 18; T-240-241, 284, 428-429, 523)

Subsidence At The Creek

73. Dr. A. Neil Styler ("Styler") is a project manager for Geo Mechanics, Inc. who has a B.S. in mining engineering and a Ph.D. in rock mechanics and who testified as an expert witness in the field of mine subsidence on behalf of Sopcak and Clapsaddle. (T-279-282)

74. Initially, Styler's soils engineering firm was hired by Peters Township to evaluate the damages to all of the houses on Stonebrook Drive for which mine subsidence damage claims had been filed with DER to see if there was mine subsidence. (T-169)

75. Styler's initial report was prepared in January of 1987 (A-4) prior to DER's preparation of the report which is Exhibit C-2. (A-4; C-2) Styler's initial report, concluded there was mine subsidence damage to these two homes. (A-4; T-170)

76. Peters Township also had Styler and Geo Mechanics prepare a second report in October of 1987 (A-12) evaluating the Murray & Associates' report prepared for DER. (T-159) It concluded that the Murray & Associates' report was in error in concluding that the damage to the houses was not mine subsidence related. (A-12)

77. Styler concludes in his first report that the barrier pillar adjacent to the school collapsed, causing subsidence damage there, based on his analysis of OSM's report, even though OSM said this was only one possibility and ultimately concluded that the subsidence at the school had occurred in another area where coal extraction was at a much higher rate with resulting loss of surface support. (T-650-651)

78. In Styler's second report he concludes differently and suggests that pillars supporting Brush Run's Tributary Creek behind the Sopcak and Clapsaddle houses collapsed, causing the damage to them. (A-12; T-651)

79. Mr. Bates, the other expert for Sopcak and Clapsaddle, disagrees with Styler and says in his report (A-17) there is no evidence of such a subsidence event. The experts for DER agree with Mr. Bates. (C-2; T-652-653)

80. A study of the creek's flow by DER's Edward Motycki ("Motycki") shows the stream gains in flow volume from a point north and upstream of the Clapsaddle house to a point near the school (at the southern end of Stonebrook Drive) and loses flow from that point to a point in the stream southwest of the school. (T-451-452)

81. If there had been subsidence of the stream pillars in the area of the Clapsaddle and Sopcak houses, the stream should have lost in volume of flow in this area. (T-451, 653)

82. If subsidence occurred here, there should have been damage to Stonebrook Drive itself. An inspection of the road showed none and the discussions with the township's manager disclosed no repairs of this road. (T-461, 526-527)

83. Frequent indicators of mine subsidence damage are ruptures to utility lines. DER received no reports of such problems in this area. (T-430, 442-443)

84. The broken sewer line at the house at No. 339 Stonebrook Drive is not a ruptured utility line because this is an in-house service line broken at a point beneath the basement floor. (T-525-526)

85. If a pillar had collapsed near the stream area, it should have ruptured the public sewer lines between the pillar and the house at 339 Stonebrook Drive, rather than skipping over them to only hit this one line. The force needed to rupture this line at this location would have severely damaged the house. (T-459-460, 574, 669)

86. Edward Motycki is the engineering supervisor and oversees DER's mine subsidence engineering staff at the DER office in McMurray, Pennsylvania. (T-392, 395) This office's staff is responsible for the investigation of all mine subsidence claims in Southwestern Pennsylvania, and Motycki has either conducted site inspections for DER concerning subsidence damage claims or supervised the staff doing this work since 1982. (T-395-397)

87. Motycki first became personally involved in the Stonebrook Drive claims in the summer of 1986. (T-418) He conducted a full examination of the eight claims on this street in September of 1987. (T-427) This inspection looked at all of the homes on this street, not just the eight claimants' houses. (T-427)

88. Motycki concluded from this investigation that while the houses had sustained damage, it was not caused by mine subsidence. (T-429, 432) Thereafter, it was only because Peters Township kept insisting that DER pay all eight of the claims based on Styler's report that DER hired Murray & Associates. (T-433) DER hired Grey's firm for one final evaluation of all of the data only after Geo Mechanics' Styler produced his second report. (T-456-457)

89. Though the majority of the damage on the Clapsaddle house is on the same side of the house as the school, this is also the same side of the house as the downslope side of the house and lot. (T-462-463) The soils on this lot are fine grained plastic soils. (C-5;T-546) When examined, the soils were found to be fairly wet and soft in the downslope pit dug by Murray next to Clapsaddle's house. (C-5; T-434-435, 558) The addition of a deck to the rear of Clapsaddle's house also added stress to the house with no added foundational support for the deck being provided. (T-555)

90. The front porch at Clapsaddle's house had no foundation under it but was constructed on a slab. A slab floats on the ground's surface, moving up and down with freezes and thaws and increases and decreases in seasonal moisture. (T-556-558) While pilasters were placed under a portion of

Clapsaddle's front porch and there are cinder blocks under the front portion of the porch, there is no foundation under the cinder blocks, which means the porch is only supported at one edge. This support acts as a hinge, worsening the impact of any movements up and down at the other side of the porch. (T-558, 723-725)

91. The damage to the Clapsaddle house did not result from mine subsidence. (T-574, 608-609, 639)

92. As at the Clapsaddle house, the later addition built on the Sopcak house "seven or eight years ago" (T-69) places added weight on the rear wall of the Sopcak house as does the deck, exacerbating the problem of rear wall movement common in low side houses, i.e., houses built on the low sides of roads with lots sloping downhill away from the road. (T-555-556)

93. Also, as with the Clapsaddle house, Sopcak's front porch was built without a foundation but with pilasters supporting only one side of it, allowing "hinged" movement with freezes and thaws or changes in soil moisture. (T-557) This is the "worst" way to construct a porch, with the right way being to build a foundation or to let it float. (T-578-579)

94. The front horizontal cracks in Sopcak's house are classic examples of lateral earth pressure. (C-5; T-575)

95. The damage to the Sopcak house is not from mine subsidence. (T-429, 495, 503, 522-523, 559-560, 574, 655)

96. The pattern of damage to the houses on Stonebrook Drive is consistent with normal upside lot and downside lot damage. (T-609)

DISCUSSION

The first issue which we must address in this appeal concerns which party bears the burden of proof on the matters before us. Here, the parties disagree. Even though Section 21.101(a) of our rules suggests the burden of proof shall be as at common law and generally the burden is on the party asserting the affirmative, which as to insurance coverage would be Clapsaddle and Sopcak, their counsel does not agree that the burden is entirely theirs. Clapsaddle and Sopcak's counsel argues insurance contracts are to be liberally construed in their favor and against DER as the entity which drew up the insurance contract. They then argue this applies to all ambiguities or doubts and thus since the contract only excludes losses caused by erosion, landsliding or normal shrinking or expansions of foundations, floors, walls or ceilings, it is up to DER as the insurer to prove the damage to these houses was caused by one of these exceptions.

In an off the record argument at the merits hearing in this appeal, counsel for Clapsaddle and Sopcak also asserted certificates of insurance issued by DER cover all subsidence damage to these houses unless the damage is from one of the specific exceptions outlined above. At that time the sitting Board member advised both parties that they should cover this argument in their post-hearing briefs but that the burden of proof of damage from mine subsidence was assigned to Clapsaddle and Sopcak.

We agree with that ruling for several reasons. Firstly, of course, our rules require it. See 25 Pa. Code §21.101(a). Clearly Sopcak and Clapsaddle are asserting damage to their homes, that the damage was caused by

mine subsidence and that these insurance policies cover this damage. It is thus obvious that they are asserting the affirmative here and under Section 21.101(a) they have the burden of proof. Secondly, DER is not statutorily authorized to issue "all risk" subsidence insurance.

Originally in 1961, the legislature created the Anthracite And Bituminous Coal Mine Subsidence Fund and an Anthracite and Bituminous Coal Mine Subsidence Board, with the powers and duties laid out in the Act of August 23, 1961, P.L. 1068, as amended, 52 P.S. §3201. As the first section of that statute recites, it applies to subsidence in the anthracite and bituminous regions caused by mining that occurred thirty years or more ago. A common fund and bond amongst area residents was created by this Act to combat such subsidence. Nothing in this statute suggests insurance provided under it covers all subsidence damage to structures regardless of cause. This Act was rewritten by the Act of July 1, 1971, P.L. 188, No. 26, as amended, 52 P.S. §3201 *et seq.*, which changed the fund's name to the Coal and Clay Mine Subsidence Insurance Board Fund, administered by the Coal and Clay Mine Subsidence Insurance Board. Section 3204 states the fund's purpose is "insuring from the moneys such owners against the damages resulting from subsidence of coal or clay mines."[3] Moreover, in Phillips v. Commonwealth, DER, 133 Pa. Cmwlth. 598, 577 A.2d 935, (1990), the Commonwealth Court recognized the underlying dispute on claims is whether or not mine subsidence

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[3] This Act subsequently makes this Board's employees employees of DER (52 P.S. §3222) and states that when claims are made against the fund DER shall be entitled to any and all defense against such a claim. See 52 P.S. §3215.

caused the damage to a claimant's property. Finally, the insuring agreements between DER and these parties provides under the word "Coverage" that the policy covers loss to the insured structure "caused by lateral or vertical subsidence of the earth from past or present coal or clay mining operations." (A-3) Thus, it is clear these policies only insure against damage caused by coal and clay mine subsidence. Since statutorily DER could only issue insurance against damage from mine subsidence because DER is not statutorily authorized to insure against other risks, it follows that to prevail DER need not prove an exception from coverage for all risks or else be found liable to Clapsaddle and Sopcak. Whether as Appellants from DER's denial of coverage or Complainants in a suit against this fund before the Board of Claims, Clapsaddle and Sopcak must show the nexus between the damage to their homes and the risk insured against, i.e., mine subsidence. As a result, there is insufficient proof if all that is shown is damage which might have resulted from any of several different types of subsidence and a contract insuring only against damage from mine subsidence.

In coming to this conclusion, we do not reach the question of whether the statement that "Coverage" does not cover loss from erosion, landsliding or the normal settling, shrinkage or expansion of foundations, floors, walls or ceilings constitutes an "Exception" from "Coverage", what that means and who has the burden of proof as to any exceptions. Although we are inclined to say DER must prove them if it asserts them, DER need not prove an exception to escape liability under these policies of insurance if Clapsaddle and Sopcak do not prove the damages to their respective houses is from mine subsidence.

The next issue presented is how much evidence Sopcak and Clapsaddle must offer to meet their burden. Their Post-Hearing Brief contends there must only be "a tipping of the scales in their favor" (a preponderance of the evidence), citing DeLing Hosiery, Inc. v. Margulies, 364 Pa. 45, 70 A.2d 854 (1950). We agree with these appellants that the test is a "fair preponderance of the evidence" test, but we have defined it differently. In Midway Sewage Authority v. DER, 1991 EHB 1445, we held the concept requires:

> the evidence of facts and circumstances on which [the party] relies and the inferences logically deducible therefrom must so preponderate in favor of the basic proposition he is seeking to establish as to exclude any equally well-supported belief in any inconsistent proposition.

Id. at 1476 (citing Henderson v. National Drug Co., 343 Pa. 601, ___, 23 A.2d 743, 748 (1942)). We then went on to say the evidence cannot simply equal that opposed to the proposition. We explained:

> The evidence must preponderate. It must be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established.

Id. at 1477. It is with this test for preponderance of the evidence that we turn to the record before us.

Surprisingly, there is much in the record about which there is no dispute. The parties agree that these homes and the rest of those on Stonebrook Drive were built over Consol's Montour No. 4.

As to the mine itself, they agree it is a mine of the 6 foot thick Pittsburgh Seam of coal and is approximately 260 feet beneath these homes. They also agree that the mine operated from at least the 1940's through

September of 1980 and that it closed in 1980 when water apparently accumulated in Consol's Montour No. 10 mine and broke into the Montour No. 4 mine, flooding it. Concerning this flooding, the parties also agree that the volume of water flowed at a high rate later (either 3.5 or 4.0 feet per second, depending on which party's expert was testifying) in the opening at which Consol estimated it.

The parties also agree Consol pumped large quantities of water from Montour No. 4 which caused fluctuation in the level of water in this mine.

Finally, as to this mine, the parties agree it was mined using the room and pillar methodology, whereby rooms were cut out of this solid vein of coal, leaving the sides of the rooms as pillars to support the surface. In mining this seam in this fashion, the size of the rooms and thus the size of the pillars varies in different sections of the mine. In the 1940's, retreat mining occurred in the portion of the Montour No. 4 beneath the location where the Clapsaddle house would be built in the late 1960's. Retreat mining occurs where a coal company cuts into the seam, creating rooms and pillars and then, retreating toward an escape point, mines the pillars, caving in sufficient portions of the mine's roof to fill up the area created by the coal's removal. This methodology removes virtually all the coal. Other areas nearby have had 45% to 65% of the Pittsburgh Seam's Coal removed via room and pillar mining. Sopcak's house, with the exception of its northeastern corner, sits upon a solid block of unmined coal as did the original portion of the nearby township middle school.

The parties also agree that the Sopcak and Clapsaddle houses were built in the 1960's on the low side (eastern) of Stonebrook Drive which, in turn, runs across the face of the hillside, so that some homes in this development are built on the low side and some on the high side of this road. The backs of the Sopcak and Clapsaddle house lots slope from Stonebrook Drive toward a small tributary of Brush Run. This tributary also sits on a series of nearly solid blocks of coal left in place by Consol to protect the stream.

At the southern end of Stonebrook Drive, where it intersects with Abbington Drive and on Abbington Drive's southern side, sits St. Benedict's Church. Next to it, on the east but facing onto McMurray Road is the site of the former Peters Township School District's Middle School, and still further to the east is a Bell Telephone Company Building housing telephone call switching equipment. On a map, these three buildings and Abbington Drive form an inverted capital T, with Stonebrook Drive as the perpendicular leg of this T.

There is no dispute amongst the parties that in 1984 cracks began to appear in the middle school's walls and that the condition worsened over a brief period and despite repairs until the school was razed. Reparable cracks appeared in the church and telephone company buildings during this same period. An investigation of this incident by OSM concluded mine subsidence in a portion of Montour No. 4 (which had 65% coal removal during the room and pillar mining) had caused this damage. OSM also stabilized the area by pumping grout into the area of the mine beneath the school and within 125 feet of the school.

The parties also agree that the owners of the first three homes on the uphill side of Stonebrook Drive, moving from the school toward Sopcak's house, had mine subsidence insurance, submitted claims to DER based on their insurance, and had the claims honored by DER. It is not disputed that Sopcak and Clapsaddle applied to DER for mine subsidence insurance in 1984 and were issued policies by DER after DER inspected their homes.

Finally, none of the parties disagree that the Sopcak and Clapsaddle houses have damages to them today which were not recorded as observed by DER's staff when it conducted a pre-insurance inspection of each house.

Based on these facts alone, we have damage, insurance coverage and substantial nearby subsidence damage. Thus, there begin to be suspicions that the damage to the Sopcak and Clapsaddle houses could be subsidence-related, even though Sopcak's house is 600 feet from the subsidence area and Clapsaddle's house is 1,000 feet from it. A review of all of the evidence, however, dispels the aura of attractiveness of this suspicion.

While the owners of eight homes on this street have now claimed mine subsidence damage to their homes, only two of these matters are before us in this appeal.[4] Moreover, while eight claims have been made, there are many

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[4] Out of these eight claims, three were honored by DER, two are pending before this Board in this consolidated appeal proceeding, one which had also been rejected by DER and appealed to this Board has been withdrawn by the claimant, and the remaining two appeals were dismissed by this Board as untimely filed. See Roy and Marcia Cummings, et al. v. DER, EHB Docket No. 91-494-E (Opinion issued June 10, 1992). An appeal to the Commonwealth Court is pending as to this dismissal. The denial of a ninth claim has recently been appealed to this Board and is pending before us as John and Rita Milavec v. DER, EHB Docket No. 92-084-E.

other homes on this street for which no claims have been submitted, including the two homes between the Sopcak and Clapsaddle houses and the several homes between the Sopcak house and the area of agreed upon subsidence damage at and around the site of the former Middle School.

As we cannot enter the flooded Montour No. 4 to see the current conditions existing beneath these claimants' houses, we must rely upon the expert witnesses offered by the parties and their respective theories and opinions. Sopcak and Clapsaddle called two experts on their behalf, while DER offered three experts in rebuttal. Unfortunately, neither side's cross examination was able to punch significant holes in the contentions advanced by the opponent's experts, so we are forced to balance conflicting expert conclusions.

To tie the damage to the Sopcak and Clapsaddle homes into the subsidence in the area of the school, the claimants' experts suggest the mine flooding washed away the materials supporting the roof in the areas which were retreat mined, causing further subsidence there. They also assert both that the mine flooding weakened the pillars and that Consol's pumping of Montour No. 4 caused the water levels in the mine to rise and fall, thus wetting and drying the pillars, weakening and causing pillars to collapse. Finally, the claimants' experts also assert the mine floors became wet and this made the floor plastic, so the pillars were punched into the floor by the force of the weight of the 260 feet of overburden/roof which these pillars support, and this, too, caused surface subsidence.

According to Mr. Bates, underlying much of the Pittsburgh seam of coal is a layer of claystone. In his experience at places in Montour No. 4 other than the area beneath the school and these two houses (the mine is approximately 10 miles wide by 10 miles long), the coal is underlain with four inches of hard silt claystone overlying a soft fire clay. He also says that mining activities (running mining equipment over the hard silt claystone) wears it away and that water flooding this area also softens this material and the softer fire clay beneath it. When these materials soften they become more plastic and then the weight on the pillars of the roof above them causes the pillars to punch into the clay. In turn, he says this can cause surface subsidence and caused subsidence here.

We reject this theory for a mine subsidence connection here because Bates did not know if claystone exists beneath the Sopcak and Clapsaddle houses or, if it did, its condition, and because according to DER's Ed Motycki, his review of the OSM study included review of the data as to OSM drillings in the school area, which went through the mine floor at that point. According to Motycki, this drill log data from only 600 to 800 feet away shows the area's mine floor to be of a medium/hard shale rather than the silt claystone or a fire clay necessary to support this theory.

When the retreat mined area was mined in the 1940's, Bates says the coal seam's ceiling was collapsed enough that it filled the void created by the mining and collapsed ceiling. The parties do not disagree that there is a phenomenon in rock mechanics that when a foot of solid material is broken up it fills one third more space. So, 18 feet of ceiling was caved in and it

filled up the 6 foot void from mining this seam plus the 18 feet of solid ceiling space, i.e., it filled the one third more space which is the mine's void. This collapsed material then supported the main roof from 1940 until the 1980's. When the water in Montour No. 4 was discovered by Consol in 1980, it was found at a point roughly 2,000 feet away from the homes before us in this appeal at Montour No. 4's No. 25 coal faces. There was one "measurement" of flow made in the fifteen foot wide opening. According to depositions of Consol's fireboss (the person who discovered this water) in a proceeding other than the instant case, the water was flowing at a depth of 16 inches in the fifteen foot wide opening, with a flow rate of 3,600 cubic feet per second. Bates says this allows a calculation of a flow rate of 4 feet per second. In turn, he opines that the rate is a strong enough flow to wash things away. Sopcak and Clapsaddle experts say that this water washed away enough of the caved roof materials that further settlement occurred on the surface at these houses.

Again, of course, we have no hard evidence to support his proposition because of our inability to enter this portion of Montour No. 4. We do know that the area which was retreat mined by Consol is 100 to 200 feet wide rather than 15 feet wide and we know that DER's experts suggest even in the 15 foot wide area the velocity of the water is 3.5 feet per second, not 4.0 feet per second. Moreover, on behalf of DER, Mr. Gray opined that this low a velocity of water could only transport grains of this material or gravel-sized pieces and there is very little of this small sized gravel in this roof fall material and it tends to be "cobble sized" or larger. Moreover, according to DER's

evidence, once this area of the mine filled with water it was never drawn down by pumping, so we do not have a situation like a hose squirting water on loose surface gravel, but rather a 24 foot tall, mostly rock filled room of much larger width, which, where it is not filled with caved roof, is filled with water. This not only creates a buoyancy to help support this roof, thus lessening subsidence possibilities, but disburses the velocity of this water over a broader deeper area, dissipating its force. In short, we believe that based on the above, there is no proof of this cause of mine subsidence and resulting damage to the claimants' properties.

Sopcak's and Clapsaddle's experts also assert that pillars deteriorate, and that potentially inadequate pillars weakened by this flooding, coupled with the raising and lowering of the water level in the mine caused by Consol's pumping, must have collapsed. Mr. Motycki of DER concedes that flooding will weaken pillars. However, Motycki disputes any weakness was caused by Consol's pumping of the mine's water which raised and lowered the height of the water in the mine. Motycki does not say this could not happen, rather, he reviewed the mine pool's elevation by studying Consol's records of the mine pool's elevation and then comparing the mine pool's height with the height of the coal in this mine, and concluded that the portion of Montour 4 below these houses always remained flooded even during the pumping, i.e., Consol never pumped out enough water to cause level changes in this area. Finally, DER points out that this mine pool's level rose before the mine

subsidence damaged the school, so the timing of the flooding of Montour No. 4 is wrong if it is asserted to have caused damage to these two homes which occurred subsequent to that Middle School subsidence incident. (T-456)

In response to the contentions of flooding weakening the surface support pillars even without a wetting and drying cycle caused by pumping of the mine pool, Motycki used a formula to calculate pillar safety to conclude that in a dry mine the pillars in this portion of Montour No. 4 would be safe. This formula is generally accepted in southwestern Pennsylvania as a valid methodology to compute pillar safety factors.

Motycki found no pattern of damage common to both houses. On this, DER's other experts agreed, but Sopcak's and Clapsaddle's experts disagreed (Bates specifically found such a pattern). By at least negative implication from this expert testimony, we believe it is fair to say if there is a single subsidence event damaging all the homes, the damage pattern should be common. Motycki also eliminated the school subsidence event as the cause of these Claimants' damage because of the very large (175 foot wide) pillar between the church and the Stonebrook Drive homes.[5] According to Motycki's calculations, in a dry mine the formula shows all of the pillars he analyzed, whether located north, east, south or west of these homes, have a safety

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[5] On behalf of claimants, Dr. Styler appeared to disagree with Motycki here, but did so based on the unverified assumption that the mine map which Bates (claimants' other expert) said is very accurate, was inaccurate and that the pillars had been mined in unrecorded mining, thus weakening them. Other than the closeness in time of the school subsidence event and the discovery of damage to these homes, there is no evidence to support this assumption in the record. (T-654)

factor above 1.0 - the point, using this formula, at which a pillar is safe.[6] It is only when 3 feet of pillar diameter is subtracted from each analyzed pillar to cover pillar deterioration from all causes (including flooding) that the safety factor for any pillars falls below 1.0. Even in this circumstance, the pillars located immediately north, east and west remain safe when tested via this formula, with average safety factors of 2.75 in area B and 3.22 for area C.[7] It is only to the south of these homes in area A-1, the area beneath the church and a portion of the school, i.e., south of Stonebrook Drive, that any pillar's safety factor falls below 1.0.[8] Not coincidentally, this is the area where buildings were damaged by subsidence and is the area which all of the experts say OSM concluded had subsided.[9] Accordingly, we cannot find mine subsidence damage to the Sopcak and Clapsaddle houses based on this opinion evidence.

Dr. Styler also opined on behalf of Sopcak and Clapsaddle that pillars beneath the small surface stream behind their homes had collapsed,

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6 Of course, pillar safety analysis was not done in the areas in which retreat mining occurred, as the pillars there no longer exist.

7 In area C, which is beneath the surface stream behind these houses only pillar No. 28's safety factor falls below 1.0, while the remaining 36 are all safe using this calculation. Pillar 28 is located on the eastern side of area C, the side away from these two houses, and is separated from them by at least two pillars with adequate safety factors.

8 This pillar analysis is set forth in detail in Exhibits 6 through 14 to Motycki's report, which is Exhibit C-2.

9 The OSM report was not offered as an exhibit but all experts testified to having consulted it in the process of their respective investigations of these claims.

causing subsidence and the structural damage to their homes. None of DER's experts agreed with this assertion. More importantly, Mr. Bates, the other expert for Sopcak and Clapsaddle, concluded in his report that there was no evidence to support any suggestion that pillars beneath this stream had collapsed. Further, DER's staff conducted a flow monitoring study which shows that in this area behind the two homes the stream increases in flow. This is important, since Motycki has indicated that if subsidence occurred beneath the stream, experience shows it should lose water volume through subsidence-caused cracks in the portion of the mine roof beneath this stream. Again, not surprisingly, DER's study showed such a water volume decrease occurred in a lower portion of the stream near the church and school. We are forced by this evidence to conclude no mine subsidence event occurred in the pillars beneath the portion of the stream behind Clapsaddle and Sopcak's house.

Counsel for Clapsaddle and Sopcak also offered us testimony as to the numbers of mine subsidence claims in Peters Township and the numbers of claims above Montour No. 4 since this mine flooded. This testimony does not change the result. The claims in Peters Township are scattered across the entire township; they occur above Montour No. 4 and above other coal mines as well. They show that people in this township live above coal mines and thus run the risk of mine subsidence damage to surface structures, but that is all they show. They do not prove the validity of these claims, and neither does evidence showing an increase in claims in Peters Township after subsidence damage to the school and church. As DER's counsel made clear in testimony from her witnesses, the number of mine subsidence insurance claims rise after

the occurrence of a well publicized subsidence event. Such a phenomenon is not uncommon; the newspapers commonly report on the increased numbers of persons applying for flood insurance after a flood and handgun sales increase when reports of serial killers circulate in the media.

Further, counsel for Sopcak and Clapsaddle also introduced testimony from DER's Steve R. Jones. Jones is Chief of a mine subsidence control section within DER's Bureau of Abandoned Mines Reclamation. Jones indicated his section studied subsidence insurance claims in the Peters Township area and sought to have a portion of the township added to the National Abandoned Mines Lands Inventory of OSM. (T-110-111) This portion of Peters Township included the Stonebrook Drive homes, and the request sought to have OSM earmark 126 million dollars of federal funds to deal with mine subsidence damage which might occur in this area in the future. (T-115) Jones' Bureau was not successful in this attempt. (T-127) OSM earmarked only from 4 to 11 million dollars and reduced the size of Jones' 880 acre proposal to a series of small areas. (T-127) Importantly, Jones agreed his job was to create proposals for DER to present to OSM to generate and maximize OSM funding. (T-120-121) His job is to crunch numbers to increase this inventory of such lands in Pennsylvania in order to maximize our state's share of OSM's pie. (T-125) While this is an important job, considering all of the abandoned mine problems in this state, it is of no relevance to the question of the propriety of DER's denial of the coverage claims by Sopcak and Clapsaddle.

Lastly, counsel for Sopcak and Clapsaddle elicited testimony from his clients that the damage to their homes occurred suddenly and, coupled this

with evidence, that DER's pre-insurance inspections of each house did not show the damage now complained of by these claimant appellants. Though minor damage was shown on DER's written pre-insurance inspection forms and nothing like what Clapsaddle and Sopcak now find wrong with their homes is recorded thereon, that is not sufficient evidence to convince us that the damage was mine subsidence related. DER's inspection might have been haphazard or the damages have arisen after the inspection; the fact they were not reported means they were not seen. This is a piece of proof suggesting they might not have occurred at that time but it still does not show that if they occurred subsequently they were caused by mine subsidence. Moreover, as Mr. Gray noted, while subsidence from other causes may occur slowly and over time, other causes of subsidence damage can cause the same abrupt movements in a structure that mine subsidences causes. (T-680) Thus, without better evidence that the damage was mine subsidence caused, this evidence does not, by itself, preponderate in Sopcak and Clapsaddle's favor as to this issue.

Finally, DER's experts disagreed with the conclusion that mine subsidence was the cause of the damage to these two homes and opined that there were other causes for the damage, not unimportantly including the construction of additions to the houses which changed the stresses on the homes in areas of the houses where damage subsequently was found. Moreover, they pointed out the lack of reported damage to area underground utility lines or roads, both of which are frequently damaged in mine subsidence events, and the lack of evidence of damage to Stonebrook Drive based on inspection of it.

In short, considering all of the evidence, Clapsaddle and Sopcak have damaged homes, but they failed to prove by a preponderance of the evidence that the damage to their homes was related to mine subsidence. As a result, we cannot find DER erred in denying either claim, and we make the following conclusions of law and enter the following Order.[10]

CONCLUSIONS OF LAW

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

2. The insurance polices issued to Sopcak and Clapsaddle by DER under the Act of July 1, 1971, P.L. 188, No. 26, as amended, 52 P.S. §3201 *et seq.*, provide insurance coverage to Sopcak and Clapsaddle for damages to their homes caused by mine subsidence only; the policies do not cover "all risks".

3. Sopcak and Clapsaddle, as the parties contending they are entitled to coverage of damage to their homes under their mine subsidence insurance policies and that DER erred in denying same, have the burden of proof as to the nexus between this damage and a mine subsidence event.

4. Sopcak and Clapsaddle must prove the damage to their houses arose from mine subsidence by a preponderance of the evidence as this term is defined in Midway Sewage Authority v. DER, *supra*.

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10 Because we have decided this appeal in this fashion, we do not reach certain arguments such as whether claimants' repair estimates are fairer than those of DER or vice versa and whether DER has the burden of proof as to exceptions from coverage.

5. Because Sopcak and Clapsaddle have failed to prove by a preponderance of the evidence that the damage to their houses was caused by mine subsidence, their appeals cannot be sustained.

ORDER

AND NOW, to wit, this 12th day of August, 1992, it is ordered that the appeal of Sopcak and Clapsaddle is dismissed.

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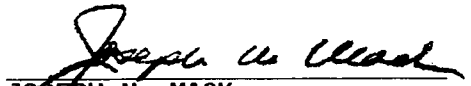

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 12, 1992

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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
v.	:	**EHB Docket No. 91-181-CP-F**
CHAPIN & CHAPIN, INC.	:	**Issued: August 13, 1992**

OPINION AND ORDER SUR
MOTION FOR REHEARING AND RECONSIDERATION *EN BANC*, and
MOTION FOR CERTIFICATION OF INTERLOCUTORY ORDER

By Terrance J. Fitzpatrick, Member

Synopsis

A motion seeking reconsideration of an interlocutory order imposing sanctions upon the Appellant is denied because the Appellant does not show that exceptional circumstances are present. This is so because the Appellant is simply raising the same arguments which were rejected when sanctions were imposed. A motion for certification of interlocutory order is denied because the Appellant has not shown that the sanction order involves a controlling question of law.

OPINION

This proceeding involves a complaint for civil penalties filed by the Department of Environmental Resources (DER) against Chapin and Chapin, Inc. (Chapin) pursuant to Section 9.1 of the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, as amended, 35 P.S. §4009.1. DER's complaint alleges that, during 1990, Chapin operated a portable batch concrete plant (an "air contamination source") without the required permit and without the proper

controls.

This Opinion and Order addresses Chapin's "Motion for Rehearing and Reconsideration *En Banc* and Motion for Certification of Interlocutory Order," filed on July 6, 1992.[1] Chapin's motion is in response to the presiding Board Member's Opinion and Order dated June 22, 1992, which granted, in part, DER's motion for sanctions. Specifically, the Opinion and Order barred Chapin from introducing the testimony of Bruce Chapin as a sanction for Chapin's violations of the discovery rules.

Chapin's motion contends that there are exceptional circumstances present here which warrant reconsideration. Chapin argues that the sanctions are excessive and unprecedented because Chapin did not violate a Board Order compelling discovery. Moreover, Chapin contends that excluding Bruce Chapin's testimony will foreclose Chapin from presenting a meaningful defense to DER's complaint. In the event the Board denies reconsideration, Chapin requests that the Board certify this matter for an interlocutory appeal pursuant to 42 Pa. C.S. §702(b) and Pa. R.A.P. 1311(a). Chapin contends that certification of this matter is appropriate because the sanction which was imposed effectively "throws Chapin & Chapin out of court." (Motion, para. 27.)

DER filed a memorandum in opposition to Chapin's motion. DER contends that reconsideration is inappropriate here because Chapin's arguments are simply a rehash of the arguments Chapin raised in response to DER's motion for sanctions. DER also argues that certification of the presiding Board Member's order for interlocutory appeal is not justified because the Order does not involve a controlling question of law and because an interlocutory

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[1] Although styled as two motions, Chapin requested both forms of relief in one motion.

appeal would delay the ultimate termination of this litigation.

We will address Chapin's motion for reconsideration first. The Board has held that reconsideration of interlocutory orders will be granted only when "exceptional circumstances" are present. Ramagosa v. DER, 1991 EHB 1904, Baumgardner v. DER, 1989 EHB 400. The arguments raised by Chapin in its motion are similar to the arguments which it raised in response to DER's motion for sanctions. Chapin's arguments were considered, and rejected, in the June 22, 1992 Opinion and Order, and we see no reason to upset that determination. Barring the testimony of one of Chapin's witnesses was an appropriate response to Chapin's pattern of conduct of violating the discovery rules. Accordingly, we will deny Chapin's motion for reconsideration.

We next address Chapin's motion for certification of interlocutory order. The Judicial Code provides, in relevant part:

> (b) **Interlocutory appeals by permission.**--When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.

42 Pa. C.S. §702(b).

We find that the question involved here does not meet the standards of the above section; therefore, we will deny Chapin's request for certification. Chapin has not established that it is defenseless as a result of the sanction imposed upon it. Chapin has listed two other witnesses, besides Bruce Chapin, in its pre-hearing memorandum, and it may be that Chapin

can support at least some of its defenses through the testimony of these witnesses. In addition, DER will bear the burden of proof here (25 Pa. Code §21.101(b)(1)), and Chapin will have the opportunity to cross-examine DER witnesses. Thus, Chapin has not shown that the question involved here is controlling.

In light of the above, we enter the following order.

ORDER

AND NOW, this 13th day of August 1992, it is ordered that Chapin's "Motion for Rehearing and Reconsideration *En Banc* and Motion for Certification of Order for Interlocutory Appeal" are both denied.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
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JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 13, 1992

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

M. DIANE SM
SECRETARY TO THI

BROWNING-FERRIS INDUSTRIES OF OHIO, INC.	:	
	:	
v.	:	EHB Docket No. 92-030-E
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES NORTHWEST SANITARY LANDFILL, INC., Intervenor, WASTE MANAGEMENT OF PENNSYLVANIA, INC., Intervenor and MERCER COUNTY SOLID WASTE AUTHORITY	: : : : : : :	Issued: August 21, 1992

OPINION AND ORDER
SUR DER'S MOTION TO DISMISS OR
IN THE ALTERNATIVE TO LIMIT ISSUES

By: Richard S. Ehmann, Member

Synopsis

The Board denies the Department of Environmental Resources' ("DER") Motion To Dismiss this appeal, which challenges DER's approval of a revision to a county's solid waste management plan that changed the primary landfill designation contained in the plan. DER has failed to show that the appellant, which has a permitted landfill, lacks standing. At this point in this appeal, it appears that appellant's interest in having its landfill designated as a disposal site by this revised plan may be substantial, direct, and immediate. DER's alternative Motion to Limit Issues is denied in part, since Appellant's notice of appeal raises as an issue that the county failed to explain its reason for selecting the landfill designated by the revision and that DER accordingly should not have approved the revision. DER's Motion to Limit Issues is granted in part insofar as appellant's notice of appeal does

not raise as an issue whether the revised plan describes alternative facilities. Commonwealth, Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa.Cmwlth. 78, 409 A.2d 877 (1986), affirmed on other grounds, 521 Pa. 121, 555 A.2d 812 (1989).

OPINION

On January 18, 1992, the Pennsylvania Bulletin published notice that on December 17, 1991, DER had approved a revision to the Mercer County Municipal Waste Management Plan pursuant to the Municipal Waste Planning, Recycling and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, No. 101, 53 P.S. §4000.101 *et seq.* ("Act 101"), as administered by the Mercer County Solid Waste Authority ("MCSWA"). On January 23, 1992, Browning-Ferris Industries of Ohio, Inc. ("BFIO") timely appealed.

In March of 1991, the MCSWA secured DER's approval of an Act 101 Plan which provided that Mercer County's municipal waste would be disposed of at Waste Management of Pennsylvania, Inc.'s ("WMP") Lake View Landfill in Erie County. BFIO took no appeal from DER's 1990 approval of this initial Act 101 Plan. The December 17, 1991 revision changed the primary landfill from WMP's Lake View Landfill to Northwest Sanitary Landfill, Inc.'s ("NSL") landfill in Butler County. NSL is a wholly-owned subsidiary of WMP and its landfill appears to be located closer to Mercer County than the Lake View Landfill. In the Act 101 Plan's revision, Lake View Landfill is retained as a backup to the NSL disposal site.

With this factual backdrop, we issued an order on June 16, 1992 directing all parties to brief two questions which our review of their Pre-Hearing Memoranda and the Notice of Appeal revealed to us. These questions were: (1) Is BFIO limited in this appeal to a challenge of the Act

101 Plan's revision by its failure to have appealed timely from the initial plan's approval? and (2) To what extent is this Board limited in the relief it can grant BFIO, in the event BFIO is successful, by BFIO's failure to appeal DER's initial approval of the Act 101 Plan?

In part in response to this Order, on July 1, 1992, DER filed a Motion To Dismiss Or In The Alternative To Limit Issues. DER seeks dismissal of BFIO's appeal because it alleges BFIO does not have the requisite standing to challenge DER's approval of the revision. It is this motion we address herein and, while addressing it, we address in part the first issue raised in our Order of June 16, 1992.

DER's Motion argues that in putting its initial Act 101 Plan together, MCSWA solicited bids from waste disposal firms and BFIO did not submit a bid. WMP's bid offered Lake View Landfill or NSL's facility, alternatively. MCSWA submitted a Plan to DER which was approved by DER and called for use of the Lake View Landfill. Thereafter, MCSWA signed a contract with WMP providing for disposal not at Lake View but at NSL's site. When DER became aware of this inconsistency, it advised MCSWA that MCSWA could not implement the approved plan with this contract and urged MCSWA to revise the plan to make it and the contract consistent. MCSWA agreed to do so. DER says it is this revision of the Plan which is challenged by BFIO. Based on these facts, DER says BFIO has failed to show it has a substantial interest which was directly and immediately affected by DER's approval of the revision. DER asserts that BFIO cannot make such a showing because if the revision's approval was an abuse of DER's discretion initially, the approved Act 101 Plan remains valid and Mercer County's solid waste must be hauled to Lake View Landfill for disposal. WMP's and NSL's joint Response To DER's Motion To

Dismiss concurs in the position adopted in DER's Motion. MCSWA did not respond to the Motion and filed no response to our Order of June 16, 1992.

In response to DER's Motion, BFIO filed its Response To EHB June 16, 1992 Order And PA DER Motion To Dismiss Or In The Alternative To Limit Issues.[1]

In this filing, BFIO acknowledges that it took no timely appeal from DER's approval of the initial unrevised Act 101 Plan and states that BFIO does not challenge that Plan now, but it argues that that failure does not preclude a challenge to DER's approval of the revision. It then alleges the unrevised plan did not select NSL's facility as an alternative or backup site but mentioned Lake View Landfill only and that at the time the unrevised plan was approved, neither NSL's landfill nor BFIO's landfill was permitted. It then asserts, contrary to DER's assertion, that several significant factual changes occurred in the time between the approval of the original Act 101 Plan and the approval of the revision. Not only did NSL receive a permit from DER for its facility but BFIO's Carbon Limestone Landfill was permitted, too. In addition, BFIO says that in this period it asked MCSWA to be given an opportunity to be considered in a revision and of the Act 101 Plan MCSWA said it would do so if a revision was made, but then failed to give BFIO that opportunity. BFIO says since its landfill is even closer to the more populous

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[1]In Response to DER's Motion, which is supported by an affidavit, a certification by the Board that BFIO took no appeal initially, BFIO's responses to DER Interrogatories, BFIO's responses to DER's Request For Admissions, a copy of the Pennsylvania Bulletin and other documentation, BFIO filed only its Response, which is unverified and which it refers to as a Brief. This Brief makes assertions as to facts *de hors* the record. In the past we have tried to warn prospective parties of the hazards with this approach. See Footnote 2 in Estate of Charles Peters, et al. v. DER, et al., EHB Docket No. 90-421-W (Opinion issued March 25, 1992). Those who will not heed these warnings may pay the penalty for ignoring same.

municipalities in Mercer County than NSL's landfill, and in allegedly revising the Act 101 Plan solely because NSL's landfill is closer than Lake View Landfill, MCSWA failed to utilize a fair, open and competitive process or to consider any options which became available after the original plan's approval by DER (obviously including BFIO's newly permitted facility). BFIO says this is required by 53 P.S. §4000.502(f).

When a Motion to Dismiss is filed with us, the burden on the movant is substantial, firstly because such motions must be construed in a light favorable to the non-moving party, i.e., BFIO. New Hanover Corporation v. DER, et al., EHB Docket No. 90-225-W (Opinion issued May 11, 1992), and secondly because all doubts must be resolved against the movant. Harlan J. Snyder, et al. v. DER, et al., 1988 EHB 1084 ("Snyder").

With this test before us, we turn to standing as defined above for further definition of "substantial", "immediate" and "direct". DER correctly points out that we have defined these terms in S.T.O.P., Inc. v. DER, et al., EHB Docket No. 91-382-W (Opinion issued March 5, 1992). There we said:

> A "substantial interest" is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law. South Whitehall Township Police Service v. South Whitehall Township, 521 Pa. 82, 86; 555 A.2d 793, 795 (1989). An interest is "direct" if the matter complained of caused harm to the party's interest. Id. at 86-87, 555 A.2d at 795. The "immediacy" of an interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it. Id. at 87, 555 A.2d at 795. In other words, the injury cannot be a remote consequence of the action. William Penn, 346 A.2d at 283, and McColgan v. Goode, 133 Pa. Cmwlth. 391, 576 A.2d 104 (1991).

DER argues that BFIO's interest is not substantial because if BFIO is successful, Mercer County's wastes go to WMP's Lake View Landfill pursuant to

the unrevised Act 101 Plan rather than to NSL's newly permitted landfill. It concludes that this means BFIO can get no meaningful relief, i.e., a chance to get some of these wastes sent to its landfill, so its interest is equal to that of the general public. While this argument is at least facially attractive, a close inspection of it shows it must be rejected for several reasons.

First the argument is circular. It asserts that if BFIO is successful in the hearing on the merits of its appeal, BFIO can obtain no meaningful relief, therefore BFIO should not be found to have standing to raise its challenges to the merits of DER's arguments. However, under this rationale, BFIO can never be successful on the merits because it never gets to prosecute its appeal to the point we hold a merits hearing. Borrowing baseball terminology, its side is retired before ever sending a player up to bat. The line of DER's argument, if accepted, would also preclude many, if not all, other challenges to future plan revisions because unless an appellant has successfully challenged the prior version of the plan or has such a challenge pending before us, all it could obtain by way of relief is a reversion to the last prior DER approved revision of the plan.

One further result of DER's argument is that no landfill operator can ever secure review of DER's approval of a revision of an Act 101 plan, which revision changes the landfill designated as the primary disposal site. Such a result either disenfranchises landfill operators with regard to rights of appeal or causes certain DER revision approvals to successfully evade scrutiny by this Board. Neither result is acceptable.

More importantly, such a result is inconsistent with how this Board addresses rights to appeals in other planning scenarios. For example, under

the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, No. 537, 35 P.S. §750.1 et seq., ("Act 537"), every municipality within this Commonwealth must adopt a comprehensive plan for sewage services within its borders, which proposed plan must then be approved by DER. See 35 P.S. §§750.8 and 750.10. Thereafter, as revisions to that plan become necessary, they, too, must be submitted to DER for approval.[2] Nothing in any of the many opinions written on sewage planning suggests a lack of standing in those who appeal from DER approvals of plan revisions on the theory advanced here by DER. Act 537 Sewage Plans and their revisions, like those under Act 101, are the skeletons upon which the purposes of the act are fleshed out over future months and years. Suggestions of limits on timely appeals which seek review to changes in such skeletons must be viewed cautiously. There is more than ample reason to find appealability here, especially since even DER terms this change in the MCSWA Act 101 Plan a "major revision". This is particularly true if the assertions in BFIO's Notice of Appeal and Response are proven to be true and if DER was aware of them but failed to evaluate them in giving approval to this revision. Finally, with regard to the issue of whether BFIO has a substantial interest, we point out that if BFIO was denied an opportunity to submit a proposal during consideration of this major revision by MCSWA and DER, its interest may well exceed that of the general populace. Since we cannot say for sure at this point in time whether this occurred or not, we must resolve this doubt against DER according to Snyder, *supra*.

With regard to the question of the direct impact on BFIO's interest, DER alleges no direct impact on BFIO by DER's approval of the revision because

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[2]For a discussion of Act 537 planning see Baney Road Association v. DER, et al. EHB Docket No. 91-137-E (Opinion issued April 10, 1992).

it was not DER who shut BFIO out of the revision process, but MCSWA. DER approved the major revision submitted by Mercer. If it approved the revision, the revised Act 101 plan appears to be required to comport with Section 502 (f)(2) (53 P.S. §4000.502 (f)(2)) in regard to providing reasonable assurances that the county utilized a fair, open and competitive process in changing from its selection of the Lake View Landfill to NSL's landfill. Thus, DER's approval appears to be approval of the revision as comporting with Section 502 (f)(2) and it is that approval which is challenged here. Accordingly, while DER is correct that BFIO's claim that MCSWA ignored it in preparing this revision may not be reviewable by this Board, the alleged DER ratification of such conduct is reviewable. Moreover, since DER could have rejected this major revision for non-compliance with this section of the act, we are unwilling to say at this point in this appeal that DER's actions did not have a direct impact on BFIO's interest.

We also find BFIO's interest is immediately impacted by DER's approval of the proposed revision. The impact of DER's approval of the MCSWA's proposed revision sanctified MCSWA's revised plan as complying with Act 101. If relevant circumstances obtained when DER approved this proposed revised plan which DER failed to take into account in approving same, DER's decision immediately impacted on BFIO's interest. BFIO's landfill was shut out of consideration by this approval. To argue that it is MCSWA which acted improperly as to BFIO and thus that the causal connection to BFIO's injury is remote, as DER does here, is to ignore the fact that DER's approval certified that that allegedly improper MCSWA action comports with Act 101's requirements. Stated simply, the exact opposite is true. Accordingly, we must deny DER's Motion as to the standing issue raised therein.

DER's Motion alternatively seeks to limit issues. It asserts only one issue was raised in BFIO's Notice of Appeal, to wit, the issue discussed above involving 53 P.S. §4000.502(f)(2). It is clear that this is the only issue raised by BFIO's appeal and equally clear that BFIO cannot now challenge MCSWA's unrevised Act 101 Plan. In response to the Motion BFIO responds: "BFIO does not intend to challenge the Original Plan".[3]

DER says BFIO is asserting the revised plan fails to explain in detail the reason for selecting NSL's landfill and whether the revised plan describes alternative facilities. DER asserts both issues are new issues. As to the former issue, it is clear that BFIO is asserting that as part of the revision process MCSWA had to explain to DER how its selection of NSL's landfill met the terms of 53 P.S. §4000.502(f)(2)'s requirement but that it failed to do so and that thus DER should not have approved same. Insoafar as that is what is asserted, it is not a new ground for appeal. That is the issue raised in BFIO's Notice of Appeal, and thus DER's motion must fail in regard thereto. If more were being asserted, it is clear that it would be barred under Commonwealth, Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa.Cmwlth. 78, 509 A.2d 877 (1986), affirmed on other grounds, 521 Pa. 121,

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[3] On page 11 of its Memorandum Of Law, DER asserts it gave only a very limited review and did not engage "in a full blown data review that the original Plan (or a permit) would require". While this may be true, the revised plan is what is before the Board for review and the scope of our review of DER's action deals in turn with the adequacy of DER's review, at least where it is possible that DER's giving of only a limited review may have been an error on DER's part. In adjudicating the merits of this appeal, we must determine whether the scope of this review was adequate and whether, as BFIO states, circumstances changed in the period between DER's initial March 6, 1991 approval of Mercer County's Act 101 Plan and its December 17, 1991 approval of the revision thereto, which DER failed to adequately consider during its review of the proposed revision. Arthur Richards, Jr., V.M.D., et al. v. DER, et al., 1990 EHB 382.

555 A.2d 812 (1989) ("Game Commission"). As to the latter issue, however, this is clearly a new issue raised for the first time in BFIO's Pre-Hearing Memorandum. Under "Game Commission", since leave to amend to add this issue to the appeal was not granted by this Board, this issue may not now be raised. It is an untimely raised issue. DER's motion as it pertains to this issue is sound and must be granted.

Accordingly, we enter the following Order.[4]

ORDER

AND NOW, this 21st day of August, 1992, it is ordered that DER's Motion To Dismiss is denied. It is further ordered that DER's Motion To Limit Issues is granted as the challenge set forth in BFIO's Pre-Hearing Memorandum that MCSWA's revision failed to describe alternative facilities and BFIO is barred from pursuing same further in this appeal. Finally, for the reason set forth in the opinion, DER's Motion To Limit Issues is denied as to the issue of whether BFIO may raise the issue of the alleged failure of MCSWA to explain in detail the reason for selecting NSL's landfill.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: August 21, 1992

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[4]In so doing, we are conscious of the fact this opinion does not address the scope of the relief this Board may grant in adjudicating the merits of this matter. That issue will be addressed when we issue an adjudication on the merits of this appeal, if then appropriate.

cc: **Bureau of Litigation**
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SECRETARY TO THE BOARD

PAUL F. BURROUGHS AND ADRIANNE BURROUGHS and PAUL F. CURRY AND SUE A. CURRY	:	EHB Docket No. 92-055-MJ
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and MILLCREEK TOWNSHIP SEWER AUTHORITY, Permittee	:	Issued: August 24, 1992

OPINION AND ORDER SUR
MOTION TO DISMISS

By Joseph N. Mack, Member

Synopsis

The Department's entry into a consent order and agreement is a matter subject to review by the Board.

OPINION

This matter originated on February 10, 1992 and was perfected on February 25, 1992 with Paul F. Burroughs, Adrianne Burroughs, Paul F. Curry, and Sue A. Curry (herein collectively referred to as the "Appellants") filing an appeal from a Consent Order and Agreement ("COA") entered into on January 7, 1992 by the Department of Environmental Resources ("DER"), Millcreek Township ("Township"), and Millcreek Township Sewer Authority ("Authority") with respect to the Township's sewage collection system. Specifically, the COA deals with a bypass line ("Kearsarge Bypass") which had been constructed without an NPDES permit. Pursuant to the COA, the Township and Authority, were assessed a civil penalty and ordered to conduct a sewage flow study and

implement a schedule by which the Kearsarge Bypass is to be removed.

On May 6, 1992, DER filed a motion to dismiss the appeal and a supporting brief. In its motion and brief, DER asserts that the appeal seeks to challenge DER's exercise of its prosecutorial discretion which is not subject to the Board's review. DER specifically contends that the Appellants are seeking to require DER to exercise its prosecutorial discretion to (1) eliminate other alleged unpermitted bypasses not identified by the Appellants or in the COA, (2) require the Township and Authority to take additional measures in eliminating the Kearsarge Bypass, and (3) take action on certain factors which should have been considered prior to or in the process of entering into the COA. In addition, DER disputes the Appellants' claim in paragraph 2 of the notice of appeal that by entering into the COA, DER has issued a "de facto permit" to the Township and Authority authorizing discharges from the Kearsarge Bypass.

In response, the Appellants filed an answer and brief in opposition to DER's motion on June 1, 1992. The Appellants "agree that the Department has abused its prosecutorial discretion in selecting its enforcement remedy", but contend that they are challenging "the content of the exercise of the Department's discretion as set forth within the four corners of the COA." (App. Brief, p. 2)

In a conference call with the Board member assigned to this matter, held on June 11, 1992, both sides presented oral argument in support of their respective positions.[1]

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[1] Although the Appellants' brief in opposition to DER's motion states at one point "Nor are the Appellants challenging the COA into which the Department entered with the Township and the Authority..." (App. Brief in Opposition, p.4), counsel for the Appellants stated during oral argument that the Appellants are challenging both the "content and effect" of the COA.

The central issue herein is whether prosecutorial discretion applies to a consent order and adjudication entered into by DER with, in this case, a third party. The seminal case on the issue of prosecutorial discretion is Downing v. Commonwealth of Pennsylvania Medical Education and Licensure Board, 26 Pa. Cmwlth. 517, 364 A.2d 748, (1976), cert. den. 436 U.S. 910. In an opinion written by Judge Blatt, the court states that it is "an exercise of an agency's prosecutorial discretion ... in deciding whether or not to press charges against individuals whom it regulates". (Emphasis added) 364 A.2d at 749. The court held that an agency's exercise of such discretion is not properly subject to judicial review because such action is not adjudicatory in nature.

A question we must ask in the present case is whether any action has been taken by DER which is subject to our review. The case most closely approximating the present one is Throop Property Owners v. DER and Keystone Landfill, Inc., 1988 EHB 391. In an almost analogous situation, the Throop Property Owners Association ("Throop") filed an appeal from a COA entered into between DER and Keystone for the abatement of violations at the Keystone Landfill. Throop objected to the COA superseding a previous closure order, and argued that the COA was inadequate and unlawful because it failed to resolve problems posed by Keystone's operations. Keystone moved to dismiss the appeal on the basis of lack of standing, claiming that the COA was a discretionary enforcement action by DER and, thus, not reviewable by the Board. DER joined in the motion. Throop countered by arguing that, although DER has discretion to decide whether to take action, once it decides to act, its action is subject to review. In ruling that Throop did have standing to appeal, the Board reasoned that the COA was in fact a final order or determination affecting the personal or property rights of the appellants in

accordance with the Administrative Code and 25 Pa. Code §21.2(a)(1). The Board held, "Although the Department had discretion to select the COA as a means of enforcement...the COA itself...is a final action of the Department affecting the personal and property rights of the members of the Throop Association, and as such, is subject to challenge by those affected, and [is subject to] review by this Board. 1988 EHB at 396.

We find that the COA in this particular situation, like that in Throop, affects the personal and property rights of the appellants, at least two of which own property downstream of the bypass facility, and is, in fact, an action which is reviewable by the Board.

Counsel for the DER noted in his oral argument that if DER had taken no action with respect to the Kearsarge Bypass and the matters involved with the COA, that would have been an exercise of DER's prosecutorial discretion which would not have been subject to review by the Board. He is correct in this statement, referring again to Downing, supra. However, when the Department takes an action which does have an effect on the personal and property rights of others it is subject to challenge by those affected and, therefore, is subject to review by this Board.

We note that certain paragraphs of the notice of appeal, particularly paragraphs 1.D and 1.F, appear to challenge DER's failure to address other allegedly unpermitted bypasses or connections to the sewage line. If in fact, the appellants are objecting to DER's failure to take action against matters not pertaining to the Kearsarge Bypass and which are outside the scope of the COA, that constitutes a challenge to DER's prosecutorial discretion which is not subject to the Board's review. However, at this point we do not have

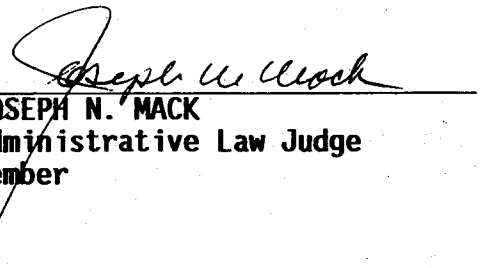
sufficient facts before us to discern from the notice of appeal whether paragraphs 1.D and 1.F pertain to matters unrelated to the Kearsarge Bypass which would not be subject to the Board's review.

In consideration of the above, we enter the following order:

O R D E R

AND NOW, this 24th day of August, 1992, upon consideration of the motion to dismiss filed by DER and the appellants' response thereto, it is ordered that the motion to dismiss is denied.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 24, 1992

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COMMONWEALTH OF PENNSYVANIA, PENNSYLVANIA FISH COMMISSION, and LITTLE CLEARFIELD CREEK WATERSHED ASSOCIATION, Intervenor v. COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and AL HAMILTON CONTRACTING COMPANY, Permittee:	:	EHB Docket No. 86-338-W
	:	Issued: August 25, 1992

OPINION AND ORDER
SUR LITTLE CLEARFIELD CREEK WATERSHED ASSOCIATION'S
PETITION FOR ATTORNEYS FEES

By Maxine Woelfling, Chairman

Synopsis:

A petition for attorneys fees and costs filed pursuant to §4(b) of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P. L. 1198, as amended, 52 P.S. §1396.4(b) (SMCRA), is denied. The Board looks to federal regulations promulgated at 43 CFR §4.1294 for guidance and determines that the petitioner, an intervenor, is not entitled to an award because its participation and, hence, contribution to a determination of the issues were minimal.

DISCUSSION

The request for attorneys fees presently before the Board for disposition has its genesis in the Board's adjudication in Pennsylvania Fish Commission and Little Clearfield Creek Watershed Association v. DER and Al

Hamilton Contracting Company, 1991 EHB 740. There, the Board reversed the Department of Environmental Resources' (Department) approval of revisions to Surface Mining Permit No. 17803167 which authorized Al Hamilton Contracting Company (Hamilton) to conduct surface coal mining within 25 feet of a stream and to auger mine beneath the stream. Thereafter, on February 6, 1992, the Little Clearfield Creek Watershed Association (Association), which had intervened on the side of the Pennsylvania Fish Commission (Commission), filed a petition for the payment of attorneys fees and costs in the amount of $516.48 pursuant to §4(b) of SMCRA.

The Department filed its objections to the Association's petition on February 26, 1992, arguing, inter alia, that because the Commission had conducted all the litigation, the Association was a prevailing party in name only and, therefore, not entitled to an award of fees and costs. Hamilton raised similar objections in its February 27, 1992, answer to the petition.

Section 4(b) of SMCRA provides, in relevant part, that the Board, in its discretion, may order the payment of costs and attorneys fees reasonably incurred in proceedings pursuant to that statutory section. Because there are no standards in §4(b) relating to how the Board is to exercise its discretion in determining the propriety and amount of any award, we have looked to two other sources for guidance--the federal Surface Mining Control and Reclamation Act, 30 U.S.C §1201 *et seq.* (federal SMCRA), and the Act of December 13, 1982, P.L. 1127, 71 P.S. §2031 *et seq.*, commonly referred to as the Costs Act.

Unlike the other requests for attorneys fees considered by the Board, which involved permittees or third party appellants, the Board is presented here with a request by an intervenor which supported the position of the

ultimately successful third party appellant.[1]

Although the situation is novel, the regulations implementing the attorneys fees provisions of federal SMCRA provide some assistance in evaluating the Association's request. In particular, 43 CFR §4.1294(b) authorizes an award:

> (b) From OSM to any person, other than a permittee or his representative, who initiates or participates in any proceeding under the Act, and who prevails in whole or in part, achieving at least some degree of success on the merits, upon a finding that such person made a substantial contribution to a full and fair determination of the issues.

It is undisputed that the Association prevailed, achieving a degree of success on the merits. What is left for the Board to analyze is the Association's participation in the proceeding and the degree of its contribution to "a full and fair determination of the issues". A review of the docket in this appeal reveals that the Association did little more than file its petition to intervene.

Shortly after filing its appeal, the Commission filed a petition for supersedeas. The Association then filed its 2 page petition to intervene. No objections were filed, and the intervention was granted. The supersedeas hearing was held November 12 and 25, 1986, and Commission counsel represented both the Commission and the Association at that hearing.

The Commission filed both its memorandum in support of its petition for supersedeas and its pre-hearing memorandum on behalf of itself and the Association. The supersedeas was granted by the Board in an order dated March 23, 1987, and confirmed in a May 23, 1989, opinion.

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[1] The third party appellant, the Commission, has not sought an award of attorneys fees and costs.

In letters to the Board dated May 16, 1989, and September 12, 1989, the Association's counsel informed the Board that he would not attend either the pre-trial conference or the hearing on the merits of the appeal, nor would the Association introduce any exhibits, Further, the Association adopted the position, arguments and stipulations regarding evidence, expert testimony and exhibits made by the Commission at the hearing on the merits.

A hearing on the merits of the appeal was held on January 9, 1990. Chairman Woelfling advised the parties at that time that the Association had adopted the Commission's legal position and would not be appearing at the hearing. (Transcript, at 6-7). The Commission filed a post-hearing brief under its own name only. The Association filed no post-hearing brief.

It is apparent from the docket that both the participation and contributions of the Association were minimal. Under such circumstances, an award of attorneys fees and costs is not justified.

O R D E R

AND NOW, this 25th day of August, 1992, it is ordered that the petition of the Little Clearfield Creek Watershed Association for attorneys fees and costs is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

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ROBERT D. MYERS
Administrative Law Judge
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Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
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RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 25, 1992

cc: See next page for service list

Docket No. 86-338-W

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M. DIANE SMITH
SECRETARY TO THE BC

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**EHB Docket No. 89-158-CP-W**
v.	:	
WAWA, INC.	:	**Issued:** August 25, 1992

OPINION AND ORDER SUR MOTION FOR PARTIAL SUMMARY JUDGMENT AND TO LIMIT ISSUES

By Maxine Woelfling, Chairman

Synopsis

Summary judgment is granted in part and denied in part in a civil penalties proceeding. A permittee is liable for exceedances of its fecal coliform effluent limitations reported on the Discharge Monitoring Reports (DMRs) submitted pursuant to its National Pollutant Discharge Elimination System (NPDES) permit despite claims of inaccuracy in the methodology used to analyze the samples. Similarly, the permittee will be held liable for exceedances of average monthly effluent limitations for three other parameters on the basis of the DMRs submitted. The Board will not grant summary judgment on the issue of whether a violation of an average monthly limitation for a parameter must be regarded as a violation on every day of the month in question; there are outstanding questions of material fact regarding sampling protocol. Summary judgment will be denied on the issue of flow exceedances where the results in the DMRs cannot be related to the flow limitations in the

NPDES permit.

Summary judgment will be granted on the issues that the Department of Environmental Resources (Department) was not barred by both previous settlement agreements and laches from filing a complaint for civil penalties. The letter agreements in question cover violations not addressed in the complaint for civil penalties and do not prohibit the Department from seeking penalties for future violations. The complaint also is not barred by laches (assuming, the defense of laches is available) because no prejudice has been suffered by the defendant. The defendant must still comply with the terms and conditions of its NPDES permit while undertaking the elimination of its discharge through connection to the public sewer system.

OPINION

This matter was initiated by the Department's June 9, 1989, filing of a complaint for civil penalties pursuant to §605 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605 (Clean Streams Law). The complaint alleged that Wawa, Inc. (Wawa) had discharged industrial waste from a wastewater treatment plant at its dairy and fruit processing facility in Middletown Township, Delaware County, into Rocky Run Creek and the sanitary sewers of Middletown Township in violation of its NPDES permit and various provisions of the Clean Streams Law.[1]

On February 4, 1991, the Department filed a motion for partial summary judgment and motion to limit issues, requesting the Board to hold Wawa liable for all exceedances reported in its DMRs for the period from June 9,

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[1] The Department has been delegated authority to administer and enforce the NPDES program pursuant to §402 of the Clean Water Act, 33 U.S.C. §1342. NPDES permits constitute permits for purposes of §§202, 307, and 315 of the Clean Streams Law. See City of Bethlehem v. DER, EHB Docket No. 85-452-W (Opinion issued April 22, 1992).

1984, through June 9, 1989.[2] More specifically, the Department contends that Wawa exceeded its limitations for total suspended solids (TSS), five day biochemical oxygen demand (BOD_5), ammonia nitrogen as nitrogen (NH_3-N), fecal coliforms, and flow.[3] The Department further argues that a violation by Wawa of its average monthly effluent limitations must also be regarded as an exceedance of that limitation for each day of the month in question. Finally, the Department contends that it was not estopped from filing its complaint as a result of laches or the existence of previous settlement agreements.

Wawa responded to the Department's motion on March 27, 1991, asserting that summary judgment cannot be granted to the Department because of outstanding issues of material fact related to flow. Since the other violations are in part dependent on flow, summary judgment cannot be granted with respect to them, either. Finally, Wawa asserts that fecal coliform exceedances could not be established because the analytical technique for measuring the bacteria also measured a type of bacteria used to seed Wawa's wastewater treatment plant.[4]

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[2] Levels of pollutants in a discharge and, hence, compliance with the effluent limitations in the NPDES permit, are reported on a permittee's DMRs. DER v. Monessen, Inc., EHB Docket No. 90-540-CP-E (Opinion issued March 11, 1992).

[3] Initially, the Department alleged that Wawa had committed 3176 exceedances of its effluent limitations. The Department subsequently amended its motion for summary judgment and complaint to allege a total of 3234 exceedances. Thereafter, by letter dated March 13, 1992, the Department again amended its compilation of alleged exceedances to 3187.

[4] Wawa also, on April 17, 1991, filed a motion for oral argument on the Department's motion for summary judgment, particularly on the issue of how many violations may be inferred from a violation of an average monthly limitation. Wawa argues that oral argument is warranted because this is a novel issue of first impression with widespread public policy consequences. The Department, in a letter dated April 18, 1991, indicated that it did not "strongly oppose" Wawa's motion. We will deny Wawa's motion. While we agree footnote continued

As we have often stated, the Board is authorized to grant summary judgment when there are no outstanding issues of material fact and the moving party is entitled to judgment as a matter of law. We may only grant the motion where the moving party's right to summary judgment is clear and free from doubt, and the motion must be construed in the light most favorable to the non-moving party. Empire Sanitary Landfill, Inc. v. DER, 1991 EHB 1572.

The Board has previously examined the issue of whether DMRs may be used to establish a permittee's liability for exceedances of the effluent limitations in its NPDES permit. We first held in Lower Paxton Township v. DER, 1987 EHB 282, that a permittee could indeed be held liable for violations of its effluent limitations where its DMRs indicate exceedances of those limitations. Then, in DER v. Monessen, *supra*, we rejected a claim by a permittee that it could not be held liable for violations on the basis of its DMRs where it alleged reporting inaccuracies. In so holding, we followed the opinion of the majority of federal courts which have considered this issue.

Here, as in Monessen, Wawa is asserting that it should not be held liable for exceedances of the fecal coliform limitations in its permit because the analytical methodology for measuring fecal coliforms was flawed. More specifically, Wawa claims that the exceedances were attributable to a bacteria used to "seed[5] the treatment plant (affidavit of Hugh Hanson, Ex. A to Wawa's response to the Department's motion). And, here, as in Monessen, we must hold that Wawa's claim of inaccuracy cannot defeat the Department's

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continued footnote
with Wawa's assertion that the issue is one of first impression and that its resolution may have widespread public policy consequences, we fail to see how oral argument will illuminate an issue which involves complex technical data relating to sampling protocol and statistical analyses.

[5] To seed is to introduce microorganisms for the purpose of stimulating the treatment process. Webster's New Collegiate Dictionary (1976).

motion. If we were to hold otherwise, we would be thwarting the public policy reasons behind the DMR system - to encourage compliance with the law through a self-monitoring system, thus conserving government resources and emphasizing permittee responsibility. Consequently, we must grant the Department's motion for partial summary judgment on this issue and hold Wawa liable for all exceedances of the fecal coliform limitations reported on Wawa's DMRs for the period in question.

We turn now to the parties' arguments regarding flow,[6] which may be grouped into several categories. The Department has sought summary judgment regarding Wawa's alleged exceedances of the flow limitations in the NPDES permit, also contending that Wawa is liable for violations for every day of the month in which it exceeded a monthly average limitation. More specifically, the Department is asking that we hold Wawa liable for 92 violations of the Clean Streams Law on the basis that Wawa reported a maximum flow of 0.0640 MGD[7] for the period August 1, 1986, to August 31, 1986; an average flow of 0.069 MGD for the period June 1, 1987, to June 30, 1987; and a monthly average flow of 0.081 MGD for the period August 1, 1987, to August 31, 1987.[8]

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[6] The flow rate is the volume of wastewater discharged over a specified time. Lee, Environmental Engineering Dictionary (Government Institutes, 1989).

[7] "MGD" signifies million gallons per day.

[8] We have ascertained this after paging through 43 sets of DMRs covering the period in question. The Department did not, either in the body of the motion or the exhibits attached thereto, attempt to identify when a particular effluent limitation was exceeded. Rather, it presented us with a total number of exceedances for a particular limitation and left it to the Board to identify when the alleged exceedances took place by examining DMRs. If the Department wishes the Board to grant its motion for summary judgment, the footnote continued

There is a fundamental flaw in the Department's argument which is readily apparent from an examination of the terms and conditions of Wawa's NPDES permit. The permit states, "The permittee is authorized to discharge 0.06 MGD during the period from issuance through expiration." Logically, Wawa is authorized to discharge wastewater at a flow not to exceed 0.06 MGD. But, the Department bases its allegations of violations on the DMRs and flow monitoring there is expressed differently than the flow limitations.

The DMR for August, 1986, shows a flow of 0.0454 MGD as an average and 0.0640 MGD as a maximum.[9] The definitions in the permit of the terms "average monthly" and "maximum daily" vary somewhat, depending on whether the limitation is a mass or concentration limit:

* * * * *

> c. The "average monthly" mass discharge means the total discharge by weight during a calendar month divided by the number of days in the month that the production or commercial facility was operating. Where less than daily sampling is required by this permit, the average monthly mass discharge shall be determined by the summation of all the measured daily discharges by weight divided by the number of days during the calendar month when the measurements were made.
>
> d. The "maximum daily" mass discharge means the total discharge by weight during any calendar day.

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continued footnote
burden is on the Department to clearly set forth the uncontested material facts.

[9] The terminology on the DMR is not identical to that in the effluent limitations portion of the permit ("average monthly," "maximum daily," and "instantaneous maximum" are used to express effluent limitations, while the blank DMR attached to the permit uses the terms "minimum," "maximum," and "average"). We will interpret the DMR results in accordance with the definitions in the permit of "average monthly" and "maximum daily," for, otherwise it would be difficult to correlate the monitoring results with the limitations of the permit.

e. The "average monthly" concentration means the arithmetic average of all the daily determinations of concentration made during a calendar month.

* * * * *

g. The "maximum daily" concentration means the daily determination of concentration for any calendar day.

* * * * *

(Department motion for judgment, Ex. A, Part A, Paragraph 2)

"Daily determination of concentration" is, in turn, defined as "either the concentration of a composite sample taken during a calendar day or the arithmetic average of all grab samples taken during a calendar day." None of these definitions, however, appear to be relevant to a measurement of flow. Furthermore, there is no indication in the Department's motion, supporting exhibits, or memorandum of law how "average" and "maximum" are defined for purposes of measuring flow.[10] Similar difficulties exist with respect to the other two months in which the Department is alleging flow exceedances. Because we must construe this motion in the light most favorable to Wawa, we must conclude that there are disputed material facts and deny summary judgment on this issue.[11]

The other exceedances for which the Department seeks to hold Wawa liable are TSS, BOD_5, and NH_3-N. The limitations applicable to these

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[10] The Department makes no effort to relate the method of sampling (in this case, continuous) to how the monitoring results are expressed.

[11] It is arguable that the Board could find Wawa liable for three violations of the Clean Streams Law based on the DMRs, but we hesitate to do so without a clear articulation of the relationship between the flow limitations in the permit and the monitoring methodology and results. Because of our ruling on the flow issue, it is unnecessary to address the question of whether Wawa is liable for 92 exceedances of the flow limitations.

parameters are expressed in terms of load (mass of pollutants per period of time - *e.g.* pounds per day) and concentration (mass of pollutants per volume of wastewater - *i.e.* milligrams per liter). By the application of simple and well-known mathematical formulae concentrations can be converted to mass loadings and vice versa.[12] The Department's arguments here are simple - exceedances reported on DMRs submitted in accordance with the permit requirements constitute admissions of violations of the Clean Streams Law and any exceedance of a monthly average effluent limitation must be regarded as an exceedance for each day of the month in question. Wawa, on the other hand, asserts that without essential flow data, none of the violations of the TSS, BOD_5, and NH_3-N effluent limitations can be established. We will first examine the relationship between flow and the effluent limitations in question.

As noted above, the effluent limitations for TSS, BOD_5, and NH_3-N are expressed in two ways: average monthly and maximum daily for mass limitations and average monthly, maximum daily, and instantaneous maximum for concentration limits. Although one may convert from mass limitations to concentration limits and vice versa, the two sets of limitations stand alone.

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[12] Expressed simply as

$$\text{Concentration} = \frac{\text{mass}}{\text{volume}}$$

$$\text{Flow} = \frac{\text{mass}}{\text{time}}$$

Therefore,

$$\text{Mass Loading} = \frac{\text{mass}}{\text{time}}$$

Pursuant to 25 Pa. Code §21.109, we take official notice of these formulae. Fry Communications, Inc. v. DER, 1991 EHB 1734, at 1746, n.10.

This is because they serve a different purpose, one which is evident from the manner in which they are expressed. The concentration limits assure protection of the receiving stream at any point in time, while the load limits assure protection over a longer period of time. Furthermore, it is not necessary to ascertain flow in order to determine whether the other discharge limitations in an NPDES permit have been exceeded, for the flow limitation and the effluent limitations in the permit impose independent obligations on the discharger. Nor is it necessary to possess production data to determine whether effluent limitations are exceeded, for both flow rates and production data, as well as wastewater characteristics, are taken into account in setting the effluent limitations. 40 CFR §§122.21(g)(3), (5), and (7) and 122.45. To hold otherwise would render NPDES permits very difficult to enforce, as the Department (and presumably the discharger through the DMR system) would, in essence, have to sample the discharge and then perform detailed calculations to factor in flow and production data. This defeats one of the purposes of the permitting and monitoring system, namely to have readily identifiable (and enforceable) limitations in the permit.

Our conclusion here must be the same as our conclusion regarding Wawa's exceedances of the fecal coliform limits. Where the DMRs submitted by Wawa indicate an exceedance of the permit limits, Wawa is bound by the results on the DMRs, and we will hold it liable for the exceedances indicated by the DMRs and grant summary judgment to the Department on these issues.

Next we consider the Department's argument that if we conclude that Wawa has violated the average monthly limits in its permit, we must hold it liable for violating the permit limits on each and every day of the month in question. The Department supports its position with federal appellate court decisions, as well as a lengthy discussion of why the water quality standards

system dictates this conclusion. On the other hand, Wawa disputes that such a conclusion can be reached, noting the sampling methodology and statistical analyses which are employed in reporting monitoring results.

As for the Department's assertions that the water quality standards system compels this conclusion, there is nothing in the pleadings, briefs, etc. on file which identifies whether the effluent limitations in Wawa's permit are water quality or technology based. There are no water quality criteria for TSS and BOD_5, two of the parameters at issue, and NH_3-N is regulated through water quality limitations.[13] Even beyond this factual deficiency, Wawa disputes material facts regarding the import to be attached to the monitoring. Thus, we cannot grant summary judgment based on this rationale.

The Department's other theory is that decisions of the various federal appellate courts compel this result. The Board does look to federal precedents for guidance, particularly in the case of federally-delegated regulatory programs. See, *e.g.*, Big B Mining Company, Inc. v. DER, EHB Docket No. 83-215-G (Opinion issued June 19, 1992). The difficulty with adopting these federal precedents here is that they do not consider precisely the same issue now before us and they are not consistent with our precedent regarding continuing violations.

Two of the four decisions cited by the Department - Chesapeake Bay Foundation Inc. v. Gwaltney of Smithfield Ltd., 791 F.2d 304 (4th Cir. 1986) (24 ERC 1417), vacated on other grounds, Gwaltney of Smithfield Ltd. v. Chesapeake Bay Foundation, 484 U.S. 49 (1987), and Atlantic States Legal

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[13] See 25 Pa. Code §§93.7-93.9. BOD_5 and TSS are conventional pollutants and regulated through technology-based effluent limitations. See §304(a)(4) of the Clean Water Act, 33 U.S. §1314(a)(4) and 40 CFR §401.16.

Foundation Inc. v. Tyson Foods Inc., 897 F.2d 1128 (11th Cir. 1990) (31 ERC 1201) - deal with the semantics of §309(d) of the federal Clean Water Act, 33 U.S.C. §1319(d): penalties per day of violation versus penalties per violation. Both decisions acknowledge the situation where a discharger may find itself in violation of a monthly average because of a single day's discharge, but rather than analyze the practical aspects of the sampling method, the decisions dismiss the arguments with a declaration that the perceived unfairness may be redressed with a reduction in the amount of penalty.[14] Another of the decisions, EPA v. City of Green Forest, 921 F.2d 1394 (11th Cir. 1990) (32 ERC 1508), turned on the issue of whether it was error for the District Court not to instruct the jury that a violation of a 30-day average effluent limitation constituted 30 separate, daily

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[14] Or, as the Eleventh Circuit Court of Appeals observed in Atlantic States Legal Foundation, *Id*,

> We find the reasoning of the Fourth Circuit persuasive and consistent with the language of section 1319(d). Although the maximum penalty for a monthly violation may seem high, we note, as did the *Gwaltney* court, that section 1319(d) only serves to set a maximum penalty. In choosing the correct penalty to be awarded, the district court may take into account the reasons why the daily average limitation was violated in a particular month. For instance, one polluter may violate its daily average because it discharges just below the limit of the daily maximum every day of the month. Another polluter may violate the daily average because it has an excessive discharge on a single day. It may be appropriate for the district court to assess higher penalties for the polluter engaging in high discharges on a daily basis than for the polluter who violates the monthly limitation because of a single discharge.
>
> 31 ERC at 1210.
> (footnote omitted)

violations.[15] The last decision, a Third Circuit Court of Appeals decision, PIRG of New Jersey v. Powell Duffryn Terminals Inc., 913 F.2d 64 (3rd Cir. 1990) (31 ERC 1905), observes in footnote 29 that the question of whether an exceedance of a thirty day average limit must be regarded as thirty violations is "interesting" but need not be considered because PIRG expressly waived it at oral argument.

The situation which is most analogous to this issue is that of establishing a continuing violation. We held in DER v. Lucky Strike Coal Company and Louis J. Beltrami, 1987 EHB 234, 248, aff'd, Lucky Strike Coal Company and Louis J. Beltrami v. Department of Environmental Resources, 119 Pa. Cmwlth. 440, 546 A.2d 447 (1988) that:

> DER's request to impose penalties for continuing violations is denied. In DER v. Medusa Corporation, 1978 EHB 149, the Board held that civil penalties cannot be assessed for continuing violations of the weight rate standard of the Air Pollution Control Act and 25 Pa. Code §123.13 in the absence of test data to support such an inference. DER admits that the sizing plant did not discharge wastewater unless it was, in fact, in operation. DER seeks penalties for continuing violations for the period between November 20, 1979 and January 10, 1980. There are numerous dates in this period that the sizing plant was not in operation. The present situation is distinguishable from a case where acid mine drainage can continuously discharge from a culvert on a mine site without any additional affirmative action by the defendant. See Lawrence Coal Company v. DER, 1978 EHB 149, 549 (where defendant was liable for continuing violations for acid mine drainage from a mine site). Since DER offers no evidence to support an inference of continuing violations on these idle dates, the Board will only impose penalties for dates which the plant was in operation without a functioning pump, and/or dates in which test data reveals a discharge.

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[15] The Eleventh Circuit held that it was not error, although in *dicta* it agreed with the theory.

See also, *e.g.* DER v. U.S. Wrecking, Inc., EHB Docket No. 90-034-CP-W (Adjudication issued July 10, 1992).

It is difficult, based on the record presently before us, to conclude that Wawa's violation of an average monthly limit must be viewed as a violation of that limit for each and every day of the month in question. Taking the extreme example, how can we conclude that Wawa violated its average monthly limit on, for instance, August 2, 1987, when no samples of wastewater were taken and no production occurred on the day in question? Without more on the record concerning how monitoring is conducted and given what we believe to be the unsettled nature of the law on this issue, we must deny the Department's motion.

Two other issues remain, the first of which is whether the Department was barred from instituting this proceeding as a result of two letter agreements with Wawa.[16] The Department maintains that the letters clearly and unequivocally indicate that they are in settlement of specific violations pre-dating those at issue here. Wawa contends that the agreements must be construed against the Department and that since the letters are ambiguous regarding future enforcement actions by the Department, we must resort to parol evidence to ascertain the parties' intentions. We find no ambiguity in the letters. Indeed, each is clear on its face that the proposed civil penalty is in settlement of the enumerated violation. Consequently, the Department was not barred by the two letters from bringing this civil penalty action, and we will grant the Department's motion on this issue.

Finally, the Department requests the Board to hold that it is not

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[16] The first letter, dated September 23, 1983, involves allegedly non-complying discharges on September 14 and 21, 1983, and October 3, 1983. The second letter, dated May 28, 1985, involves an incident on March 7, 1985.

barred by laches from bringing this action. Wawa contends that the complaint was so barred because the Department was aware of Wawa's exceedances since October, 1982; did not advise Wawa of its intention to seek penalties until late 1986 or early 1987; and did not file its complaint until June, 1989.

There are two elements to the defense of laches - an inexcusable delay in bringing suit and prejudice to the responding party as a result of the delay. Western Pennsylvania Water Co. v. Board of Property Assessment, 124 Pa. Cmwlth. 133, 555 A.2d 1357 (1989). Because it is an equitable doctrine, it has been held not to be assertable in an action at law, Department of Revenue v. City of Philadelphia, 5 Pa. Cmwlth. 358, 290 A.2d 734 (1972). As we observed in Plymouth Township v. DER *et al.*, 1990 EHB 1288, its application to administrative proceedings has generally been limited to disciplinary proceedings (*e.g.* suspension or revocations of professional licenses and registrations), Weinberg v. State Board of Examiners of Public Accountants, 76 Pa. Cmwlth. 216, 463 A.2d 1210 (1983).

Viewing the facts in the light most favorable to Wawa and assuming that Wawa may assert the defense of laches in this proceeding, we cannot conclude that both elements of laches are present. The essence of Wawa's arguments regarding prejudice is that it pursued connecting its facility to a publicly-owned treatment works rather than upgrade its wastewater treatment facility. More specifically:

> Wawa innocently relied on the Department's implicit representation that it should connect into the sewer system by pursuing this option rather than upgrading the treatment plant. Upgrading the plant would have cost about the same amount as constructing the force main. Upgrading the plant could have been done immediately, but Wawa pursued the force main connection because it believed that this is what the Department wanted. Had Wawa upgraded the treatment plant rather than connect it to the sanitary sewer system, it would not now be subject to the monthly charges which

> come when an entity ties into the sewer system. Answer to Interrogatory No. 43. There was no economic benefit for Wawa in tying into the sewer; rather, it pursued a course of action at its own cost only to be told when arrangements to tie into the sewer were finalized that the Department intended to penalize Wawa. All of this clearly constitutes detriment suffered by Wawa.
>
> (Wawa Memorandum of Law in Opposition to Motion for Partial Summary Judgment and Motion to Limit Issues, p.33).

There is no assertion here that Wawa was somehow induced to tie into the public sewer system by representations from the Department that it would refrain from seeking civil penalties or taking enforcement action. Furthermore, Wawa had an obligation to comply with the Clean Streams Law and the terms and conditions of its NPDES permit even while it was in the process of tying into the public sewer system. The Department was authorized by the Clean Streams Law to employ a number of remedies, including seeking civil penalties, to secure Wawa's compliance. Under these circumstances, we cannot discern any prejudice to Wawa.[17] Therefore, we will grant the Department's motion on the issue of laches.[18]

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[17] In light of our finding of no prejudice to Wawa, it is unnecessary to consider whether there was inexcusable delay on the part of the Department in bringing the complaint for civil penalties.

[18] Wawa raises the issue of estoppel in its answer to the Department's motion. Because the Department has not sought summary judgment on this issue, the Board need not address it.

O R D E R

AND NOW, this 25th day of August, 1992, it is ordered that:

1) Wawa's motion for oral argument is denied;

2) The Department's motion for summary judgment is denied with regard to the issue of flow exceedances and whether a violation of an average monthly effluent limitation is to be regarded as a violation of that limit for every day of the month in question; and

3) The Department's motion is granted on all of the remaining issues.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
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Richard S. Ehmann

RICHARD S. EHMANN
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Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
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DATED: August 25, 1992

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M. DIANE SMITH
SECRETARY TO THE BOARD

JAY TOWNSHIP, et al.	:	
	:	
v.	:	EHB Docket No. 91-401-MR
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: August 26, 1992
and ENVIRITE CORPORATION and MT. ZION	:	
LANDFILL DEVELOPMENT CORPORATION,	:	
Permittees	:	

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Robert D. Myers, Member

Synopsis

The Board denies summary judgment on Appellants' claim that a permit issued by DER for a residual waste landfill violated provisions of the Air Pollution Control Act, the Surface Mining Conservation and Reclamation Act, the Coal Refuse Disposal Act, the Solid Waste Management Act, the Dam Safety and Encroachments Act and the underlying regulations. The entry of summary judgment is prevented either because of the existence of factual disputes or because Appellants are not entitled to judgment as a matter of law.

OPINION

These consolidated appeals involve the issuance by the Department of Environmental Resources (DER) of Permit No. 301196 for a Solid Waste Disposal and/or Processing Facility in Jay Township, Elk County. The facility, to be known as Mt. Zion Residual Waste Landfill, is to be owned and operated by

Envirite Corporation (Permittee). On March 10, 1992 Appellants filed a Motion for Summary Judgment together with an affidavit, exhibits and supporting brief. The Motion was supplemented on March 18, 1992 by the filing of an additional affidavit. Permittee filed its Response, affidavits and brief on April 7, 1992.

In their Motion, Appellants claim that they are entitled to summary judgment on issues relating to alleged violations of the Air Pollution Control Act (APCA), Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 *et seq.*; the Surface Mining Conservation and Reclamation Act (SMCRA), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.*; the Coal Refuse Disposal Act (CRDA), Act of September 4, 1968, P.L. 1040, as amended, 52 P.S. §30.51 *et seq.*; the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*; the Dam Safety and Encroachments Act (DSEA), Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 *et seq.*; and the regulations adopted pursuant to these statutes.

We can grant summary judgment if the pleadings, answers to interrogatories, and admissions on file, together with the affidavits, if any, show (1) that there is no genuine issue as to any material fact and (2) that the moving party is entitled to judgment as a matter of law: Pa. R.C.P. 1035 (b). We must view the Motion in the light most favorable to the non-moving party: *Robert C. Penoyer v. DER*, 1987 EHB 131.

Air Pollution Control Act (APCA)

Appellants contend that the landfill will be an air contamination source, according to the definition in section 3 of the APCA, 35 P.S. §4003, which cannot be constructed or operated without the issuance of a plan approval and a permit under section 6.1 of the APCA, 35 P.S. §4006.1. The air contaminants, according to Appellants, will come about through (1) evaporation

of leachate (a back-up measure of leachate management), (2) evaporation of the liquid portion of the residual waste, (3) the future operation of a leachate treatment facility and (4) the generation of dust and odors. Appellants allege that the application documents show that raw leachate will have hazardous constituents, posing potential air contamination threats when it evaporates or atomizes. Appellants also allege that the documents show that the operation will generate dust and odors.

The affidavit of Larry W. Wonders, Regional Air Quality Manager in DER's Meadville office (submitted on behalf of Permittee), asserts that his analysis of the leachate control systems convinces him that only water vapor will be emitted to the atmosphere. Since DER does not consider water vapor to be an air contaminant under the APCA, there is no necessity for Permittee to seek plan approval and a permit for this aspect of the operation. Obviously, there is a factual dispute concerning this point and summary judgment cannot be entered.

Wonder's affidavit also states that facilities otherwise excluded from the plan approval and permitting requirements are not compelled to comply with those requirements with respect to vehicular traffic fugitive dust emissions. Instead, they are subjected to the operational standards in 25 Pa. Code §123.1(c) and, with respect to Permittee's operation, in 25 Pa. Code §75.38 (c)(8)(vi). Wonder's review of Permittee's application satisfies him that these operational standards will be met. Here again, a factual dispute as to the nature of the fugitive dust emissions and the effectiveness of the proposed controls prevents the entry of summary judgment.

Permittee submitted the affidavit of Anthony Talak, Jr., Regional Engineer for the Bureau of Waste Management in DER's Meadville office, who stated that the residual waste proposed in the application is not putrescible.

Thus, another factual dispute exists concerning whether or not there will be odors associated with the operation of the landfill. Summary judgment cannot be entered.

Surface Mining Conservation and Reclamation Act (SMCRA)

The landfill is proposed to be placed in an unreclaimed surface coal mine that was active during the 1950s. Over one million cubic yards of mine spoil is present on the site. Surface water and groundwater in the vicinity are both affected by acid mine drainage. Permittee proposes to use the mine spoil (to the extent it is acceptable) as intermediate and final cover, subbase, soil portion of the composite liners, and part of the highwall isolation.

Appellants argue that entering this abandoned mine, filling it with residual waste, using the mine spoil, and closing the facility by grading and revegetation amount to reclamation of a surface mine. As such, it constitutes "surface mining" under SMCRA (section 3, 52 P.S. §1396.3) requiring a permit (section 4, 52 P.S. §1396.4). DER has not ordered Permittee to seek a permit under SMCRA.

In its Response, Permittee submitted the affidavit of Mark E. Tondra, Senior Vice President - Municipal Group for Permittee, who averred that Permittee never engaged in any kind of mining operations at the site, and never intends to do so in the future. In addition, Permittee submits that its proposed activities do not come within the scope of SMCRA since they will not be associated with the extraction of coal.

"Surface mining" is defined in section 3 of SMCRA, 52 P.S. §1396.3, as "the extraction of minerals...from the surface...and all surface activity connected with surface...mining...." "Surface coal mining activities" is defined in the same section to mean "activities whereby coal is

extracted...from the surface." The term also includes "surface activity connected with surface mining," and "activities in which the land surface has been disturbed as a result of, or incidental to, surface mining operations...." Clearly, extraction of coal (or other minerals) is essential in order for the statutory and regulatory provisions of SMCRA to apply. While some of the activities Permittee proposes to engage in at the site would be governed by SMCRA if done in connection with the extraction of coal, they are otherwise excluded from its coverage.

Appellants make no claim that Permittee is going to engage in the extraction of coal and Tondra's affidavit removes any doubt about the point. While there is no factual dispute, we still cannot enter summary judgment because the moving party, Appellant, is not entitled to it as a matter of law.

Coal Refuse Disposal Act (CRDA)

Appellants contend that Permittee's intention to excavate the mine spoil and use it in the landfill requires a permit under section 4 of CRDA, 52 P.S. §30.54. Subsection (a) of that section makes it unlawful to "establish or operate a coal refuse disposal area or enter upon an inactive coal refuse disposal area or reactivate an inactive operation for the purposes of coal refuse disposal without" a permit from DER. "Coal refuse disposal area" is defined in section 3, 52 P.S. §30.53, as an area "used as a place for disposing, dumping or storage of coal refuse and all land thereby affected...but not including coal refuse deposited within an active mine itself or coal refuse never removed from a mine...." "Coal refuse" is defined in the same section to mean "waste coal, rock, shale, slurry, culm, gob, boney, slate, clay and related materials, associated with or near a coal seam, which are either brought above ground or otherwise removed from a coal mine in the process of mining coal or which are separated from coal during cleaning or

preparation operations." Despite the breadth of this definition, it specifically does not include "overburden from surface mining operations."

Permittee alleges that the mine spoil is primarily, if not entirely, overburden based on the affidavit of John J. Blazosky, P.E. of Blazosky Associates, Inc., engineering consultants who prepared the application. In his affidavit Blazosky states that the material is "believed" to consist of overburden because of the absence of evidence of any coal cleaning or coal preparation activities having taken place on the site. There is an obvious factual dispute over the nature of the mine spoil and whether it constitutes coal refuse under CRDA.

Although the parties do not mention it, there also is uncertainty whether this site can be treated as a coal refuse disposal area. The definition in CRDA excludes coal refuse never removed from a mine. The record before us is not adequate to make a determination on this point.

Solid Waste Management Act (SWMA)

The regulations governing residual waste landfills at the time this permit was issued were set forth at 25 Pa. Code, Chapter 75. The Residual Waste Management regulations added in 1992 at Chapters 287, 288, 289, 291, 293, 295, 297, and 299 are not applicable. 25 Pa. Code §75.38, dealing with industrial and hazardous waste disposal sites, was the controlling provision. Appellants maintain that the design approved by DER when issuing the permit violated portions of this provision.

The liner system is one of the design features attacked by Appellants. 25 Pa. Code §75.38(c)(7) incorporated the standards for liners established in §75.25. One of those standards (§75.25(j)) limited side slopes for manufactured membranes to 33% or the manufacturers recommendation, whichever is the lesser. According to the affidavit of William F. Bruck,

C.P.G., submitted as a supplement to Appellants' Motion, the side slope here is 784%. The steepness occurs because the liner is being used as part of the design to isolate an existing highwall from the residual waste. It will be placed against a 50-foot thick earthen barrier.

Permittee points out that the liner standards of §75.25 were not mandatory. Section 75.38(c)(7) stated that disposal sites required to use leachate collection and treatment "shall comply with §75.25...or shall be as otherwise required" by DER. Clearly, this language authorized DER to accept liner designs that departed from the standards of §75.25 if there was good reason for doing so. Talak, in his affidavit, averred that DER approved the departure from the 33% limitation after being convinced that the proposed design is stable. In the absence of evidence that DER abused its discretion on this point, we cannot grant summary judgment.

Appellants complain, in addition, that Permittee did not fulfill the liner warranty requirements of §75.25(b). Here again, DER's authority to depart from these requirements prohibits the entry of summary judgment unless we can conclude that DER abused its discretion. Talak averred that the liner warranty was dispensed with because a double liner system is being used. Under this system the liner in contact with the waste is not in contact with the soil. In the absence of evidence that this constitutes an abuse of discretion, summary judgment is not available to Appellants.

The final design feature challenged by Appellants is DER's approval of an artificial membrane for daily cover in lieu of the 6-inches of soil mandated by §75.26(1). Permittee's Response relies again on Talak's affidavit. He pointed out that §75.38(c)(3) required the design to include daily cover "if determined applicable" by DER. He also stated that §75.38(c)(8), dealing with operating requirements, called for 6-inches of

daily soil cover to protect "putrescible wastes or wastes that must be protected from excess water infiltrations." Neither of these circumstances is present at this landfill, according to Talak. Appellants do not directly refute this assertion but maintain that, since DER determined that some cover was necessary, the requirements of §75.26(1) are mandatory. Thus, the cover must be 6-inches thick and must be soil meeting the specifications of §75.24(c)(2)(xi).

We interpret these regulatory provisions to mean that daily cover consisting of 6-inches of soil is required when putrescible wastes or wastes that must be protected from excess water infiltration are involved. In all other circumstances daily cover will consist of what DER determines to be appropriate. Here, DER concluded that an artificial membrane would suffice. Appellant has presented no evidence to show that this decision was an abuse of DER's discretion. Accordingly, summary judgment cannot be entered in Appellants' favor.

Dam Safety and Encroachments Act (DSEA)

Appellants' focus on this statute falls on "important wetlands" which are within 300 feet of the permit area, according to the application. Under 25 Pa. Code §105.17, which was applicable at the time, the Permittee had to demonstrate, and DER had to conclude, that the public benefit of the project outweighed the damage to the wetlands and that the project was necessary to realize the public benefits. No attempt was made to fulfill these mandates, Appellants maintain.

The Wetlands Delineation Report included with the application was prepared in July 1989 by Mallory N. Gilbert, a soil scientist. A portion of his conclusions read as follows:

> ...there do not appear to be any "exceptional value" wetlands located on the project site or

> within its access corridor(s). Areas A, B, C, D and E should be considered "Important Wetlands," while areas F through M (and other noted areas) are judged to be wetlands of "Limited Value."

After DER (in its July 2, 1990 letter) requested that wetlands within 1/4 mile of the permit site be identified and placed on the drawings, Mallory did additional field work and supplemented his report by a memorandum dated September 24, 1990. He included the following statement:

> Because virtually all of the identified wetlands are either directly associated with the floodplains of Stony Brook and Spring Run, their tributaries, or are hydrologically linked to this wetland/floodplain system, all would qualify as "important" under the current definition in Chapter [sec] 105.17....

In an affidavit attached to Permittee's Response, Gilbert averred that, in his Wetlands Delineation Report, he used the term "important wetlands" in reference to proposed draft regulations that were anticipated to be adopted in 1990 but that never were adopted. He averred further that there are no "exceptional value wetlands", as that term presently is defined in 25 Pa. Code §105.17, on the permit site or within its access corridors. Gilbert's affidavit does not specifically mention the September 24, 1990 memorandum and the meaning of "important" wetlands as used in that document, referred to by Gilbert as "under the current definition" in §105.17. Nonetheless, there is an apparent factual dispute over the nature of the wetlands, prohibiting the entry of summary judgment.

ORDER

AND NOW, this 26th day of August, 1992, it is ordered that Appellants' Motion for Summary Judgment is denied.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
~~**Administrative Law Judge**~~
Member

DATED: August 26, 1992

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M. DIANE SMITH
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AL HAMILTON CONTRACTING COMPANY	:	
	:	
v.	:	**EHB Docket No. 88-113-W**
	:	**(Consolidated Docket)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** August 27, 1992

OPINION AND ORDER SUR
MOTION TO STRIKE EXPERT TESTIMONY

Maxine Woelfling, Chairman

Synopsis

A motion to strike expert testimony is denied because it was not timely. To be timely, a motion to strike must be raised as soon as the objecting party knows or has reason to know of the grounds for objection. A party that does not timely move to strike expert testimony is deemed to have waived its objections to that testimony.

OPINION

This matter arose on March 24, 1988, with the filing of a notice of appeal by Al Hamilton Contracting Company (Hamilton). Hamilton appealed the Department of Environmental Resources' (Department) February 22, 1988, Compliance Order No. 88-H-008 (Order), which was directed at groundwater discharges from Hamilton's Caledonia Pike Mine Site in Covington Township, Clearfield County. In the Order, the Department alleged that groundwater

discharges from six distinct discharge locations within the Caledonia Pike mine site violated the effluent limitations established at 25 Pa. Code §87.102.[1] The Department also alleged that Hamilton had failed to adequately monitor the groundwater in the permit and adjacent areas, had failed to properly maintain the breastwork on its sedimentation ponds, and had failed to design, construct, and maintain treatment ponds to capture and treat runoff.

The Board held a hearing on the merits of Hamilton's appeals on September 17-19 and October 3, 1990. Among those testifying at the hearing was John Scott Berry (Berry), a Bureau of Mining and Reclamation hydrogeologist called by the Department as an expert witness. On direct examination, Berry testified that acid mine drainage (AMD) emanated from the six discharge areas (DAs) listed in the Order, that the Covington Pike Mine Site had the potential to create such AMD, and that there was a hydrogeologic connection between the mine site and the six DAs.

Following cross examination, re-direct examination, and re-cross examination, Hamilton moved to strike Berry's testimony because it did not have an adequate factual basis and was not rendered to a reasonable degree of scientific certainty. The Board took the matter under consideration and requested the parties to brief the issue.

Hamilton's motion to strike Berry's testimony is denied because its objections were not timely made and were therefore waived. This Board recently held in Al Hamilton Contracting Company v. DER, 1991 EHB 1799, 1802,

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[1] The original Order pertained to operations conducted under Surface Mining Permit No. 1777315. The Department subsequently issued an October 21, 1988, Order to amend the original Order to apply to operations conducted under Mine Drainage Permit No. 4577SM8 as well. Hamilton appealed this second order and both appeals were consolidated at Docket No. 88-113-W.

that a party waives its objections to the admissibility of evidence if it does not timely and specifically object to that evidence. To be timely, if the grounds for an objection are apparent when a question is asked, the objection must be raised at that time. Bell v. City of Philadelphia, 341 Pa. Super. 534, 491 A.2d 1386, 1390 (1985). Once the question is answered, the evidence may be stricken, but only under very limited circumstances.

> Where either party to a proceeding discovers at any time that improper testimony has been inadvertently admitted, he may have the error corrected by applying to the court to have the evidence stricken . . . As a rule, *such motion will be allowed only in cases where the ground of objection was unknown and could not have been known with ordinary diligence at the time the evidence was received . . . . The matter is within the discretion of the trial judge.*
>
> (emphasis in original).

Jones v. Spindle, 446 Pa. 103, 107, 286 A. 2d 366, 368 (1971). Admitted evidence will not be stricken if the grounds for the objection were known or could have been known with due diligence at the time the evidence was received.

Since Hamilton did not meaningfully object to Berry's testimony when it was admitted into evidence,[2] but, instead, waited until after finishing re-cross examination, the issue is whether Hamilton knew or should have known of its grounds for objection when the Department presented Berry's testimony.

---

[2] Hamilton did object at one point prior to Berry answering a question on direct examination. (N.T. 362 and 367). This objection was in no way related to the objection raised in Hamilton's subsequent motion to strike. It was, instead, based on the fact that Exhibits C-12 through C-28, upon which Berry was to render an opinion, were not yet in evidence. This objection was rendered moot by the Board's subsequent admission of these exhibits into evidence. (N.T. 749).

Hamilton first contends that Berry's testimony was based on facts not in evidence. Hamilton points primarily to Berry's reliance on the "Surfer" computer program and the structure contour model produced with the aid of that program, neither of which were in evidence. Berry testified on direct examination that he relied on this structure contour model to determine that there was a hydrologic connection between the mine site and DAs 2 through 6. (N. T. 380, 381-382). At the time of this testimony, Berry had already testified about the computer program and the structure contour model, (N. T. 340-343).

> A. ... To get on the site and actually determine the structure, I relied on the drill hole data submitted with the Caledonia Pike operation.
>
> Q. And what did you do with that data?
>
> A. I digitized that information and produced a structure and contour map on a computer.
>
> A. ... This [digitized] information is then sent to the personal computer and run on a program from Golden Software called "Surfer." Surfer can take this information and produce a topographic map ....
>
> (N. T. 340-341)

Hamilton knew that the structure contour model was itself not in evidence and that it was produced using facts not in evidence. As soon as Berry testified that he relied on this information in rendering an opinion, Hamilton should have moved to strike that testimony. By failing to do so, Hamilton waived this objection.

Hamilton next contends that Berry's testimony was based on guess, conjecture and speculation, and, therefore, lacked a reasonable degree of scientific certainty. Hamilton points again to Berry's reliance on the "Surfer" computer program and its structure contour model. As stated above,

this objection was not timely and was, therefore, waived. Hamilton also points to Berry's reliance on water samples that Berry admitted were not totally representative of the discharges emanating from any of the discharge areas. On direct examination, Berry testified "to collect what I would consider a representative sample, you would have to collect a whole suite of samples to pick up each individual point." (N. T. 325). Berry then testified that he relied on these samples to determine that AMD was emanating from the six DAs. (N. T. 368-374). Hamilton knew at this time that Berry was relying on water samples that were not totally representative and should have moved to strike. By failing to do so, Hamilton waived this objection.[3]

Some of Hamilton's grounds for objection did not become apparent until Berry's testimony during cross examination. Hamilton contends that its cross examination revealed that Berry, in rendering his opinions, relied upon reports and statements that were not in evidence, and Berry's testimony is therefore inadmissible.

> Q. The geologic survey maps, did you review in your deliberations or your investigation on this site? ....
>
> A. Yes, to a degree.
>
> (N. T. 585)
>
> Q. All right, so you did look at things that haven't been used as evidence in this proceeding to come to your conclusions?
>
> A. Yes.
>
> (N. T. 618)

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[3] As stated above, Hamilton did object at this point because the water samples were not yet in evidence. However, since Hamilton specified its grounds for objection, it is deemed to have waived all other grounds. See Commonwealth v. Raymond, 412 Pa. 194, 194 A.2d 150 (1963), cert. denied 377 U. S. 999, __S.Ct. __, __ L.Ed. __.

Hamilton is deemed to have waived these objections because it did not move to strike the objectionable portions of Berry's testimony as soon as the grounds appeared. "[A]fter the evidence is received, a ground of objection to the evidence may be stated as soon as the ground appears." §52, McCormick on Evidence, 4th Ed. (1992). McCormick makes it clear that rules regarding timeliness apply to objections discovered during cross examination as well. Such objections must be raised as soon as the grounds for the objection become known.

Hamilton's motion to strike Berry's expert testimony must be denied. Hamilton did not object to Berry's testimony or move to strike Berry's testimony until Berry had testified on direct examination, cross examination, re-direct and re-cross. Because Hamilton's objections are not timely, they are deemed to be waived. Hamilton's motion to strike must, therefore, fail.

O R D E R

AND NOW, this 27th day of August 1992, it is ordered that Al Hamilton Contracting Company's motion to strike the expert testimony of John Scott Berry is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: August 27, 1992

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M. DIANE SMITH
SECRETARY TO THE BOARD

POWER OPERATING CO., INC.	:	
	:	
v.	:	**EHB Docket No. 91-222-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** August 28, 1992

OPINION AND ORDER SUR
PETITION FOR RECONSIDERATION

By Terrance J. Fitzpatrick, Member

Synopsis

A petition for reconsideration is denied where the petitioner raises certain arguments which should have been raised previously, but were not, and where the petitioner's other arguments were adequately addressed in the previous decision.

OPINION

This is an appeal by Power Operating Company, Inc. (Power) from a compliance order issued by the Department of Environmental Resources (DER) on April 25, 1991. In this compliance order, DER ordered Power to submit a proposal to treat an acid mine discharge allegedly emanating from Power's surface mine site - know as the "Vought Operation" - in Decatur Township, Clearfield County. The fundamental objection raised in Power's notice of appeal is that it was improper for DER to issue the compliance order because DER and Power had agreed, on January 22, 1991, that Power would submit a proposal to abate this discharge by reinstituting mining of the Lower

Kittaning coal seam[1] in order to remove the potential sources of the acid mine drainage.

Power submitted a petition for supersedeas and a motion for expedited discovery along with its appeal. On June 5, 1991, DER filed a "motion to dismiss and response to Appellant's petition for supersedeas and motion for expedited discovery." Power submitted a reply to DER's motion on June 7, 1991. On June 20, 1991, the Board issued an Opinion and Order (since published at 1991 EHB 1015) dismissing the appeal of Power for failure to state a claim upon which relief can be based. We determined that we could not grant effective relief to Power because Power had submitted its remining proposal to DER in response to the compliance order, and DER had not yet acted upon that proposal.

Power timely filed a petition for reconsideration on July 9, 1991. DER filed its objections to this petition on July 31, 1991. This opinion and order addresses Power's petition.

The Board's Rules of Practice and Procedure at 25 Pa. Code §21.122(a) provide that reconsideration may be granted "only for compelling and persuasive reasons" and will generally be limited to the following instances:

> (1) The decision rests on a legal ground not considered by any party to the proceeding and that the parties in good faith should have had an opportunity to brief such questions.
>
> (2) The crucial facts set forth in the application are not as stated in the decision and would justify a reversal of the decision. In such a case reconsideration would only be granted if the evidence sought to be offered

---

[1] Power originally had authority to mine this seam, but it relinquished this right in a consent order and agreement dated October, 1989. (Exhibit B to notice of appeal.) In the consent order, Power admitted that it did not have sufficient equipment on the site to complete reclamation (para. J.).

> by the party requesting the reconsideration could not with due diligence have offered the evidence at the time of the hearing.

J. C. Brush v. DER, et al., 1991 EHB 258, and see Mustang Coal & Contracting Corp. v. DER, 1991 EHB 1999. Applying this standard to the present case, we will deny Power's petition for reconsideration.

First, Power requests that the Board reconsider its decision in light of Al Hamilton Contracting Company v. DER, 90 Pa. Cmwlth. 228, 494 A.2d 516 (1985) (holding that an appeal from a DER compliance order is not moot when a coal mine operator has complied with the order, because DER could consider the order in evaluating the operator's compliance history in a later civil penalty proceeding). Ample opportunity existed for Power to raise this argument in its response to DER's motion to dismiss; however, Power did not do so. Therefore, Power has waived the right to raise this argument and it will not be considered now. See T.C. Inman, Inc. v. DER, 1988 EHB 707; Elmer R. Baumgardner v. DER, 1989 EHB 172.

Second, Power complains that although it "has complied with part of the DER Compliance Order, it does not agree with the facts upon which the order was based." (Appellant's Memorandum of Law, p.4). If this is so, Power should have raised this point in its reply to DER's motion to dismiss. Having failed to do so, Power may not raise the argument now.[2]

---

[2] Power raises at least two other arguments in its petition which were not raised in its reply to DER's motion to dismiss. First, Power contends in paragraph eight that it has been denied its right to challenge DER's modification of Power's abatement plan. (DER's order had required Power to submit and implement such a plan after approval by DER.) Second, Power argues in paragraph ten that it has been deprived of its right to show that DER's action gave inadequate notice of what provision of law Power allegedly violated. As with the arguments discussed above, Power has waived its right to raise both of these arguments.

Third, Power argues that it has been denied its right to show that DER's action violated the due process and equal protection clauses of the Pennsylvania and United States Constitutions in that DER discriminated against Power on the basis that Power is a foreign corporation. We recognized Power's constitutional arguments in our prior Opinion and Order and we stated that:

> Finally, we note that Power has raised various constitutional arguments in its notice of appeal (Paragraphs 25, 27-29, 32). These arguments were not addressed in either DER's motion to dismiss or in Power's reply. However, our reasoning stated above - that we lack the ability to grant effective relief to Power - also disposes of these arguments.

1991 EHB 1015, 1018. We had no obligation to address Power's constitutional claims because Power failed to raise them in its response to DER's motion to dismiss. Nonetheless, we did consider these claims and we concluded that they did not preclude us from dismissing the appeal on the basis that we were unable to grant effective relief to Power. Power's petition for reconsideration does not state any grounds to cause us to question our reasoning stated above.

In summary, Power has not demonstrated that "compelling and persuasive reasons" exist for reconsideration of the Board's June 20, 1991 Opinion and Order. Accordingly, we will deny Power's petition.

ORDER

AND NOW, this 28th day of August, 1992, it is ordered that Power Operating Co., Inc.'s petition for reconsideration is denied.

ENVIRONMENTAL HEARING BOARD*

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 28, 1992

cc: **Bureau of Litigation, DER:**
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Central Region
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James D. Morris, Esq.
John Wilmer, Esq.
STRADLEY, RONON, STEVENS & YOUNG
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jm

***Board Chairman Maxine Woelfling did not participate in this decision.**

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M. DIANE SMITH
SECRETARY TO THE BOARD

HAPCHUK, INC.	:	
	:	
v.	:	EHB Docket No. 92-235-MJ
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: September 1, 1992

OPINION AND ORDER SUR MOTION TO DISMISS

By Joseph N. Mack, Member

Synopsis

A motion to dismiss filed by the Department of Environmental Resources is granted. An inspection report from the Department to the appellant which refers to stipulated penalties that were included in a previously executed Consent Order and Agreement between the Department and the appellant does not constitute an appealable action.

OPINION

This matter involves an appeal by Hapchuck, Inc. a/k/a Hapchuk Sanitary ("Hapchuk") from an National Pollutant Discharge Elimination System ("NPDES") compliance inspection report of the Department of Environmental Resources ("DER") dated April 6, 1992 and received by Hapchuk on June 6, 1992. Hapchuk filed a notice of appeal on July 6, 1992 seeking review of the aforesaid NPDES compliance inspection report. The notice of appeal was

accompanied by a petition for supersedeas.[1] This opinion addresses DER's motion to dismiss filed July 27, 1992.

As background information it is necessary to understand that the parties herein, Hapchuk and the Department, entered into a consent order and agreement ("COA") dated November 27, 1991 which dealt with discharges contrary to the terms and conditions of the NPDES Permit No. PA0090867 previously issued to Hapchuk.[2] The COA provided, *inter alia*, for a redesign and reconstruction of portions of the Hapchuk plant. Civil penalties for future violations were stipulated in the event Hapchuk failed to timely remedy certain problems which were set out in the COA. Specifically, Hapchuk agreed that it would pay stipulated penalties for exceedances of the effluent limitations set out in the NPDES permit, and pursuant to the terms of the COA, the penalties were due automatically and without notice and were to be paid monthly on or before the 15th day of each succeeding month. The penalties were to be forwarded directly to the Department.

DER in its motion to dismiss argues that the April 6, 1992 NPDES inspection report is not appealable, contending that the report itself is not an action affecting the appellant's personal or property rights, immunities, duties, liabilities or obligations nor does it impose any new liabilities or obligations upon the recipient. DER argues that the report merely seeks to remind the recipient of its obligations under a preexisting agreement (the COA), and the jurisdiction of the Board will not lie in an appeal which is not based upon a DER action or adjudication.

---

[1] Because we are dismissing this action we will not rule on Hapchuk's petition for a supersedeas nor the Department of Environmental Resources' alternative motion to deny petition for supersedeas.

[2] A copy of the COA was attached to the notice of appeal.

Hapchuk filed a response on August 6, 1992 arguing that automatic penalties do in fact have an impact upon the personal and property rights of Hapchuk. The argument advanced by Hapchuk goes primarily to the merits of whether or not the COA has been followed by the Department and/or Hapchuk and deals largely with the contractual basis of the COA. Hapchuk's response also deals with matters in the COA which had to do with a timetable for construction of additional facilities at the Hapchuk location.

To be appealable to this Board, a DER decision must constitute an "action" affecting the appellant's "personal or property rights, immunities, duties, liabilities or obligations". 25 Pa. Code §21.2(a). "Action" is defined as "any order, decree, decision, determination or ruling by the Department of Environmental Resources affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any person including but not limited to denials, modifications, suspensions and revocations of permits". 25 Pa. Code §21.2(a). If we apply these principles in the case at bar it is clear that an inspection report which merely recites the terms of a previous COA does not constitute an appealable action. Louis Costanza t/d/b/a Elephant Septic Tank Service v. DER, 1991 EHB 1132. For the report itself to constitute an appealable action there would have to be new obligations imposed upon the recipient and the mere recital of the obligations contained in the COA do not constitute a new obligation nor an action under the law. Westtown Sewer Company, et al. v. DER, EHB Docket No. 91-269-E (Opinion and Order Sur Appealability of Department of Environmental Resources' Letter, issued February 4, 1992.) The mere recitation of requirements of the law or of obligations under the COA does not transform the letter into an appealable action. See Chambers Development Company v. DER, 1988 EHB 198.

We hold that the April 6th inspection report did not constitute an appealable action and we, therefore, grant DER's motion to dismiss.

O R D E R

AND NOW, this 1st day of September, 1992, it is ordered that DER's motion to dismiss is granted, and this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

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RICHARD S. EHMANN
Administrative Law Judge
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Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: September 1, 1992

cc: Bureau of Litigation
Library: Brenda Houck

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M. DIANE SMIT
SECRETARY TO THE E

TRI-COUNTY INDUSTRIES, INC.	:	
	:	
v.	:	EHB Docket No. 92-063-E
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES NORTHWEST SANITARY LANDFILL, INC., Intervenor WASTE MANAGEMENT OF PENNSYLVANIA, Intervenor and THE COUNTY OF MERCER	: : : : :	Issued: September 2, 1992

OPINION AND ORDER
SUR DER'S MOTION TO DISMISS
AND APPELLANT'S MOTION TO SUBSTITUTE A PARTY

By: Richard S. Ehmann, Member

Synopsis

Where a waste hauler fails to timely appeal the Department of Environmental Resources'("DER") initial approval of Mercer County's Municipal Solid Waste Management Plan but timely appeals a revision of this plan, the waste hauler is barred from undertaking an appeal of the entire revised plan but may challenge the revision itself. Where the waste hauler makes no allegations of impact on it as a waste hauler from the plan's revision, does not currently operate a landfill and has no application pending with DER for a permit for such a facility but avers the plan revision will adversely impact on a landfill for which a sister corporation has applied to permit, the waste hauler fails to show it, as opposed to the sister corporation, has a sufficiently substantial interest in the revision to give it standing to appeal DER's approval thereof.

The Board also denies appellant's motion to substitute the sister corporation as the appellant in this matter. Although we have previously permitted substitution of successors in interest for parties to an appeal, substitution would be inappropriate in this matter since the sister corporation is not a successor in interest to appellant and appellant lacks the requisite standing to bring an appeal.

OPINION

DER's Motion To Dismiss

On February 14, 1992, Tri-County Industries, Inc. ("Industries") filed an appeal with this Board from a January 18, 1992 notice in the Pennsylvania Bulletin (22 Pa. Bull. 314) of DER's approval of a revision of the Mercer County Municipal Solid Waste Management Plan ("Plan"). DER's approval was pursuant to its duties under the Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, P.L. 556, No. 101, 53 P.S. §4000.101 *et seq.* ("Act 101"), which statute also mandated the County's preparation of this plan. Subsequently, Northwest Sanitary Landfill, Inc. ("NSL") and Waste Management of Pennsylvania, Inc. ("WMP") successfully sought intervention in this matter.

Thereafter, by Order dated June 16, 1992, we ordered the parties to file Briefs addressing Industries' standing to file this appeal; the timeliness of Industries' Appeal, if more than the Plan's revision is challenged; and whether, if a portion of the appeal is untimely, untimeliness restricts the relief, if any, we might grant to Industries if it prevails on the merits. On July 1, 1992, despite the pendency of our order already raising this issue, DER filed a Motion To Dismiss the instant appeal due to Industries' alleged lack of standing.

To avoid needless duplication, the parties were ordered to respond to DER's Motion at the same time they submitted their Briefs pursuant to our June 16, 1992 Order. We have received Briefs from DER, NSL, WMP and Industries. The County of Mercer has filed nothing.

Within the concept of the jurisdiction of this Board over appeals filed with it are both the concept of timeliness of the filing of an appeal as a prerequisite to jurisdiction over the appeal and the concept that an appellant must have standing to raise the issues set forth in the appeal. To get to a Board hearing on the merits of an appeal both hurdles must be cleared by an appellant. Both concepts are before us presently in the instant appeal because of our order and DER's Motion. Because as a general rule an untimely appeal must be dismissed in its entirety, whereas a party's standing may change on an issue-by-issue basis, we will address timeliness first in this opinion.

A timeliness issue arises because even a cursory reading of Industries' Notice of Appeal makes it clear that Industries is not challenging solely the January 16, 1992 revision of Mercer County's ("Mercer") Plan. That revision left Mercer's Plan unchanged except that NSL's landfill was substituted for WMP's Lake View landfill as the primary municipal waste disposal site (WMP's landfill became the backup disposal site).[1] The Notice of Appeal under the heading "IV Basis For The Appeal" attacks not the revision but the plan's alleged violation of Sections 102(6), 102(16), 102(23), 102(b), 303(c), 502(c), 502(f) and 502(g) of Act 101. It charges Mercer with failing to use a competitive bid process in awarding WMP the contract and says DER

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[1] Both the NSL landfill and the WMP landfill are owned by WMP in that WMP owns NSL.

abused its discretion, exceeded its authority, acted unconstitutionally, without substantial evidence and acted in violation of Act 101 when it approved Mercer's Plan. Indeed, the only point at which the revision to this plan is mentioned is at the beginning of the Notice of Appeal, where Industries states it is challenging the plan as revised. Elsewhere, all of the references are to "the Plan".

The reason untimeliness as a bar to our jurisdiction over this appeal arises stems from the fact that Mercer's unrevised Plan was approved by DER on March 6, 1991 (Industries' responses to DER's Request For Admissions which are Exhibit B to DER's Motion).[2] For a timely appeal to have been taken from that approval, an appeal by Industries had to be filed with us within thirty days of notice thereof being published in the Pennsylvania Bulletin. See 25 Pa. Code §21.52(a). As DER has pointed out (see Exhibit E to DER's Motion), no such appeal was ever filed by Industries. When an untimely appeal is filed, we lack the jurisdiction to hear it. Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976).

As to the question of the timeliness of its appeal, Industries' Memorandum of Law admits that Industries did not file a timely appeal from DER's approval of the initial and unrevised plan and does not now seek leave to appeal *nunc pro tunc*. Rather, Industries asserts that the issue is "not whether the entire appeal *nunc pro tunc* should be quashed but whether the

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[2] In response to DER's Motion, which is supported by Industries' Responses to DER's Request For Admissions, two affidavits, and certain other filings, Industries filed only a Memorandum of Law, which, while it asserts certain facts, is unverified and unsupported by affidavits or other similar factual materials. In the past, we have tried to warn parties appearing before us of the hazards involved with this approach. See note 2 in Estate of Charles Peters, et al. v. DER, et al., EHB Docket No. 90-421-W (Opinion issued March 25, 1992).

entire Mercer County Plan should be reviewed". Industries, citing Del-Aware Unlimited v. Commonwealth, DER, 121 Pa. Cmwlth. 582, 551 A.2d 1117 (1988) ("Del-Aware"), for the proposition that this Board can reach the merits of the initial plan approval, also asserts that in approval of the switching of landfills, DER put the entire plan at issue. Indeed, Industries claims DER admits this by saying in its brief that it was necessary to review information in the initial plan when DER considered the proposed revision. Finally, Industries cites Arthur Richards, Jr., V.M.D. v. DER, et al., 1990 EHB 382 ("Richards"), contending that it stands for the proposition that issues which were relevant when the initial plan was reviewed are still relevant and were re-raised when DER approved the revision, which was timely appealed, so Industries should be allowed to argue them.

The portion of Del-Aware cited by Industries dealt with a motion to dismiss appeals of permit extensions as moot because the extension period had expired. In that decision, the Commonwealth Court refused to dismiss the appeals as moot because it concluded that material permit variations might otherwise be excluded from review. Here, we are dealing with untimeliness of an appeal, which divests us of jurisdiction, and, had the appeals in Del-Aware been untimely filed, the issue of mootness would never have had a forum in which to be heard. Moreover, there is no assertion here that we are dealing with a complex problem of long duration, with numerous technical, legal and political changes surrounding it, or with a plan which is involved in even half the litigation surrounding the permits at issue in Del-Aware, supra.[3] Indeed, in reading the motion and Industries' Memorandum of Law, there is no

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3 As recited at length in Del-Aware, *supra*, at note 1.

allegation of any change in the overall Mercer Plan other than the change from one landfill for disposal to another apparently closer landfill.[4] Under the circumstances, we reject Industries' suggestion that the Commonwealth Court's Del-Aware approach should be applied here.

Industries also asserts Richards allows a party who files an appeal which is untimely as to certain DER actions but timely as to others to have all relevant issues adjudicated in the timely portion of the appeal if they are re-raised therein. Richards does not stand for this point. The opinion in Richards arose in response to a Motion For Summary Judgment based on the appellants' failure to appeal issuance of a surface mining permit but challenging the merits of the same permit when DER approved its renewal. In denying this motion, we held that appellants in Richards could only raise issues relating to the renewal and to circumstances which had changed since the initial permit's issuance. In that appeal we went on to say, in response to a DER companion Motion to Limit Evidence, that in challenging renewal, appellants could not use evidence available to them at the time of the initial permit's issuance, except for legitimate purposes, such as showing baseline data against which current conditions could be measured, and that evidence relating to an argument that the permit should never have been issued in the first ~~place was barred.~~ ~~Accordingly,~~ ~~Richards~~ means that Industries could challenge the revision to this plan changing the primary landfill but may not attack Mercer's underlying decision to award this contract to WMP. Thus, under Richards, Industries cannot challenge the Plan as initially approved by

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4 NWS's landfill is located in adjacent Butler County, while WMP's Lake View landfill is located in Erie County, which is separated from Mercer County by Crawford County.

DER, but might attack the approved revision and could use data available at the time the initial plan was approved as baseline evidence to show why present circumstances make DER's approval of the revision improper. In sum, then, we must conclude that under Rostosky v. Commonwealth DER, supra, Industries is barred from attacking the unrevised plan as initially approved by DER.

Having addressed untimeliness, we now turn to the question of whether Industries has standing to raise issues with regard to this revision. As movant, it is DER's burden to convince us that Industries' interest in the outcome of this appeal is not substantial, immediate and direct. William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). DER argues Industries lacks a substantial interest because it is no longer a landfill operator and does not even have an application for a landfill permit pending with DER. DER cites our opinion on this issue involving Industries, reported as "Opinion and Order Sur Tri-County Industries, Inc.'s Motion For Intervention And Consolidation" and issued in Browning-Ferris Industries of Ohio, Inc. v. DER, EHB Docket No. 90-030-E (Opinion issued June 24, 1992).[5] There, Industries as movant failed to convince us it should be allowed to intervene in support of the appellant.

Mere recitation of that opinion is insufficient, however. Before us presently is DER's Motion where DER is movant, not Industries. Moreover, we previously considered standing in regard to intervention in that appeal,

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5 This appeal by Browning-Ferris Industries of Ohio, Inc., clearly challenges solely the plan revision and not the Plan. As a result, it does not suffer from the same timeliness problems as the instant appeal. See Browning-Ferris Industries of Ohio, Inc. v. DER, et al., EHB Docket No. 92-030-E (Opinion issued August 21, 1992).

not in connection with dismissal of Industries' own appeal. Clearly, as to the instant motion we must construe this motion in a light favorable to Industries. New Hanover Corporation v. DER, et al., EHB Docket No. 90-225-W (Opinion issued May 11, 1992), with all doubts being resolved against DER. Harlan J. Snyder, et al. v. DER, et al., 1988 EHB 1084.

According to the parties' allegations and the attachments to DER's Motion, it appears that Industries' former landfill was closed by agreement between it and DER, though Industries still monitors water quality in the area near the site of the closed landfill. It also appears that Tri-County Landfill, Inc. ("Landfill"), has submitted to DER an application for a permit to operate a landfill, which landfill would be located adjacent to Industries' former landfill site. Further, it also appears Industries and Landfill are separate corporations wholly owned by Vogel, Inc., which is controlled by Edward Vogel.

With these facts before us, we turn to Industries' allegations as to why it has standing. Industries says it has standing because its landfill was not included in the Plan. It is true that Industries' landfill was not included, but its landfill is a former landfill which is closed and can no longer accept waste and the existence of Landfill's application for a landfill permit does not cause Industries to have a permitted landfill but causes Landfill to have a potentially permitted facility and possible standing. The fact that the corporations are owned by the same parent, however, does not allow us to ignore the fact that Landfill took no appeal from the revision and is a separate legal entity from Industries. We cannot ignore their separate corporate status just because doing so would suit either of them. Accordingly, we also ignore Industries' allegations that it has standing

because it "will lose the benefit of having its own landfill receive its waste at much less cost..." and that if its landfill cannot receive Mercer County wastes it may not receive enough waste to justify keeping it operational. Clearly, these arguments are valid, if at all, only in an appeal by Landfill, as opposed to Industries. They are insufficient to find standing for Industries.

In response to DER's Motion, Industries fails to make any assertions as to standing based upon its being a waste hauler. In its Pre-Hearing Memorandum, Industries does aver it is a hauler and states it will have to be licensed under the revised plan. It also states unlicensed haulers can be fined and licensed haulers must haul in accordance with the Plan's mandates, i.e., to the disposal facilities designated in the Plan, but its Notice of Appeal does not challenge these requirements and directs its energy to the exclusive landfill issues and the errors in the Plan as to landfill selection (i.e., WMP's sites vs. Industries' site or WMP vs. Industries, WMP and other landfills). Industries asserts it will incur much greater costs than if Mercer's Plan is non-exclusive and allows other facilities to accept wastes so that price competition occurs. To achieve this result, Industries must overturn not a revision changing which WMP landfill accepts Mercer's waste but a plan specifying a WMP landfill for disposal. That attack is barred as untimely.

As DER points out, we have said as to standing that a "substantial interest" is one beyond that common interest of all citizens in procuring obedience to the law. S.T.O.P., Inc. v. DER, et al., EHB Docket No. 91-382-W

(Opinion issued March 5, 1992). Thus, Industries' allegations alone show no substantial interest sufficient to create standing in Industries to allow this appeal.[6] Accordingly, we must enter an order dismissing this appeal.

Appellant's Motion to Substitute a Party

In addition to Industries' Response to DER's Motion to Dismiss, we also received from Industries a Motion to Substitute a Party along with a supporting memorandum of law and an excerpt from the deposition of Ed Vogel which Industries describes as a statement of material facts. In this motion, Industries asserts as the basis for its motion that Landfill has an application pending before DER for a permit for the Tri-County Landfill and that Industries does not currently have an application pending before DER. It urges that Landfill is the "successor operator" of the Tri-County Landfill, and, as "successor in interest" to Industries, Landfill has the right to be substituted for Industries in this appeal. Industries' motion further claims Landfill has "a direct, substantial, and sufficient interest in the outcome of this appeal in that it has an application pending before the DER" and for all of the reasons set forth in Industries' notice of appeal.

DER has filed its Response in Opposition to Tri-County Industries, Inc.'s Motion to Substitute a Party and an accompanying memorandum of law in which it contends Landfill is neither a "successor" of TCI nor is it an

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6 Industries seeks to challenge the exclusivity of the WMP contract; this is the type of argument which had to have been advanced by someone with standing to do so at the time when the initial plan was approved. Even if Industries could overcome the timeliness issues, we would still be faced with the question of whether Industries has the requisite standing to challenge DER's action. Here, it is clear that Industries does not have such standing, whereas in our decision in Browning-Ferris Industries of Ohio, Inc. v. DER, et al., supra, we determined Browning-Ferris Industries of Ohio, Inc., which was a permitted landfill operator, had standing to appeal because of the type of challenge it was asserting in that matter.

"operator" of the Tri-County Landfill since Landfill is a corporate entity separate and distinct from Industries. Additionally, DER argues that this Board is not authorized to substitute a party, citing New Hanover Township v. Commonwealth, DER, et al., 1988 EHB 812, and urges us to treat the instant motion as one for joinder of Landfill as an appellant and deny it.

The intervenors, NSL and WMP, have also filed a Response and memorandum of law in opposition to the instant motion in which they concur with DER's memorandum of law and further assert that Industries cannot make this motion on Landfill's behalf. In this regard, we note that there is no indication in Industries' Motion that Landfill consents thereto.

Addressing DER's contention that we are without authority to permit substitution of a party, we must reject this argument. This Board has permitted substitution of parties in the past in numerous appeals where we have dealt with substitution by means of an Order rather than by a reported Opinion. In one reported opinion, Robert C. Penoyer, t/a D.C. Penoyer & Co. (formerly SRP Coal Co.), 1984 EHB 919, we permitted substitution of Robert C. Penoyer for SRP Coal Co. because the permits which were the subject of the challenged DER compliance orders had been transferred to Penoyer by SRP Coal Co. Thus, the Board's decision in New Hanover, supra, in which a motion to substitute/join as an appellee the prospective purchaser of stock in a landfill was treated as a motion for joinder under Pa.R.C.P. 2229(b) and denied for lack of Board authority to join appellees, is not dispositive of the instant motion.[7]

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[7] DER is correct that insofar as Industries' motion is seeking joinder of Landfill as a party appellant, we have previously ruled that this Board lacks (footnote continues)

While we have the authority to permit a substitution of appellants, a substitution of Landfill for Industries would not be appropriate.

A successor may become a party to a pending action by filing of record a statement of the material facts upon which the right to substitution is based. See Pa.R.C.P. 2352(a); Murtha v. Crozer-Chester Medical Center, 394 Pa. Super. 538, 576 A.2d 979 (1990). A successor is anyone who by operation of law, election or appointment has succeeded to the interest or office of a party to an action. See Pa.R.C.P. 2351; Murtha, supra. Such successors include "personal representatives, successor fiduciaries, successors in office, successors in interest of every kind". Goodrich Amram 2d §2352(a):1.

There is nothing before us which shows Landfill to be a successor to Industries' interest in the Tri-County Landfill. As we discussed in considering DER's Motion to Dismiss, *supra*, Industries has stated in the documents it has filed in this appeal that Industries and Landfill are separate corporations which both have Vogel, Inc. (which is controlled by Ed Vogel) as their parent corporation. See Industries' Response to DER's Motion to Dismiss and excerpt of Ed Vogel Deposition appended thereto. It has also asserted Landfill is a sister corporation. According to the Ed Vogel deposition excerpt, Industries holds a permit for a municipal waste landfill, but disposal of waste at the site has ceased and its only activity under this permit is to conduct water monitoring. Mr. Vogel's deposition further states that Landfill has filed an application for a permit to reopen Industries' landfill site and that this permit will be issued in Landfill's name. Although it is not totally clear from the documents of record before us, it

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(continued footnote)
the authority to permit joinder of parties. See New Hanover Township, *supra*. Parker Township Board of Supervisors v. DER, 1991 EHB 1724.

would appear that Industries' landfill and that which Landfill is seeking to permit will be contiguous and located on a tract or tracts of land owned by Edward L. Vogel and Margaret J. Vogel as individuals. See Exhibit B to DER's Motion to Dismiss (Admissions of Industries) at ¶53 and Exhibit C to DER's Motion to Dismiss (Affidavit of A. Patrick Boyle). Landfill is not a "successor corporation" to Industries, as there is no showing that it has been invested with the rights and assumed the burdens of Industries, for instance, by charter amendment, merger, consolidation or duly authorized succession. See Centennial Bank v. Germantown-Stevens Academy, 277 Pa. Super. 134, 419 A.2d 698 (1980); Bankers Allied Material Insurance Company v. Lincoln Plan Corporation, 8 Adams L.J. 111, 42 D. & C.2d 241 (1966). Thus, Landfill is not a "successor in interest" for whom substitution for Industries would be appropriate.

Even had we concluded that Landfill is a successor in interest to Industries, we have determined that Industries lacks standing to bring this appeal, and, as such, Industries is not a party for whom a successor can be substituted. See Murtha, supra (person for whom substitution is sought must be a party).[8]

We accordingly deny Industries' Motion to Substitute a Party and grant DER's Motion to Dismiss Industries' appeal, entering the following order.

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8 Because we have concluded Landfill is not a successor in interest and that Industries' lack of standing prevents it from being a party for whom substitution would be appropriate, we do not reach the question of whether it is proper for the Motion to Substitute to have been brought by Industries, as opposed to Landfill, as the entity seeking substitution.

O R D E R

AND NOW, this 2nd day of September, 1992, it is ordered that Industries' Motion to Substitute a Party is denied. It is further ordered that DER's Motion To Dismiss is granted and Industries's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

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TERRANCE J. FITZPATRICK
Administrative Law Judge
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Richard S. Ehmann

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Joseph N. Mack

JOSEPH N. MACK
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DATED: September 2, 1992

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M. DIANE SMITH
SECRETARY TO THE BOARD

THE HELEN MINING COMPANY	:	
	:	
v.	:	EHB Docket No. 92-259-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: September 9, 1992

OPINION AND ORDER
SUR HELEN MINING COMPANY'S
PETITION FOR SUPERSEDEAS

By: Richard S. Ehmann, Member

Synopsis

Where a mine operator seeking supersedeas of a portion of an administrative order issued by the Department of Environmental Resources ("DER") fails to show any increased cost to it from compliance with that order and shows only an opinion that, if the order is interpreted differently from DER's interpretation of its own order, there will be more lost production to the operator, the petitioner fails to show irreparable harm.

Where petitioner asserts two arguments as to why it is likely to prevail on the merits, but DER asserts reasonable counter-arguments thereto, the Petitioner has not shown a likelihood of success on the merits. DER's interpretation of Section 221(d) of the Pennsylvania Bituminous Coal Mine Act is at least as reasonable as that asserted by Petitioner and, under this act, DER's order is not unlawful administrative rule making which is contrary to Sections 201 and 202 of the Commonwealth Documents Law, as asserted by petitioner.

OPINION

On July 23, 1992, The Helen Mining Company ("Helen") filed an appeal with this Board from Compliance Order No. SI-01 issued by Paul F. Echenrode, a Mine Inspector with DER. Accompanying Helen's Notice Of Appeal was its Petition For Supersedeas regarding DER's administrative order which dealt with ventilation of Helen's underground bituminous coal mine. This mine is called the Homer City Mine and is located in Homer City, Indiana County, Pennsylvania.

Three fans currently provide ventilation for the Homer City Mine. One of them -- the Number 7 ventilation fan ("No. 7 fan") -- is located in the line room of the LW-9 section of the mine. Using the long wall method for mining this area, Helen had begun mining this area in the three months prior to the fan's April, 1992 installation. The No. 7 fan's main job was to exhaust methane escaping from the gob generated from that mining operation.

The Homer City Mine is a gassy mine, so ventilation to eliminate methane gas is critical there. A fan outage in 1983 led to the death of a mine foreman in the mine when a spark from his battery-powered jeep exploded a concentration of methane.

Operation of the No. 7 fan and Helen's other two fans is monitored by a computer located at the Home City Mine's No. 6 Portal Building. The computer is connected to the No. 7 fan by telephone line. Its software is designed to monitor various functions of these fans, including, but not limited to, the bristol recorder (records fan operation), the water gauge (operating pressure of the fan), the amount of power going to the fan, the temperature of the fan bearings, fan vibration, the continued operation of the connecting phone line--all in addition to the continued operation of the fan

itself. When a problem is detected by the computer as to any of one of these fan functions, it is supposed to sound an alarm signal ("internal alarm") to alert the mine's managers; an internal alarm signal could thus be sounded even though the fan itself is running properly. Again, assuming proper operation, in order to determine whether the fan is running after the computer sounds the internal alarm Helen's management needs only to look at the computer's screen to see which monitoring function at which of the three fans caused the sounding of the internal alarm.

Prior to issuance of DER's Order, Helen's computer was also programed to shut off power to the mine within ten minutes of the computer's detection of fan stoppage. This was because it was management's practice at the Homer City Mine not to rely solely on the computer's remote sensing system and internal alarm but rather to send a person to visually confirm any report of a fan not operating ("fan outage") before shutting off electricity to the mine.[1] Since the No. 4 and No. 7 fans are in such remote locations that Helen's management staff travels by car to check the fans, management selected this ten minute period to give its personnel sufficient time to take a car to the No. 7 fan (or the No. 4 fan) from the No. 6 Portal Building.

Prior to the incident of July 11, 1992 which prompted DER to issue the order challenged in this appeal, Helen had prepared a "fan outage plan" for submission to the federal Mine Safety and Health Administration ("MSHA"). That plan called for a fifteen minute delay before power to the mine was automatically cut off. MSHA approved that plan but the plan had not been submitted to DER for approval because it was not required.

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[1]Electricity is shut off to the mine to prevent the ignition of methane gas which accumulates when the ventilation system is shut down.

On July 11, 1992 at 3:45 a.m., electric power from the local public utility company to the No. 7 fan was cut during a storm and the fan stopped. About forty-five minutes later, one of Helen's non-management employees observed that the fan was not running and so informed Helen's management. Helen's management was unaware that the fan had ceased operation until that time because its computer had "crashed" and was inoperative. Prior to the incident, Helen had installed an alarm on its computer ("external alarm") which was to sound when the computer ceased operation, but Helen had also installed a bypass switch on this alarm, allowing it to be shut off. On July 11, 1992, the external alarm did not sound because it was switched off. (No evidence was offered as to how this occurred.) After Helen's management was informed of the fan outage by its employee, the management staff mistakenly read the computer screen as showing that the fan was still running. The computer's screen was apparently continuing to display fan conditions at the instant the computer crashed. Approximately eleven minutes later, after securing visual confirmation by management personnel that the fan indeed was not in operation, Helen began evacuating miners, but did so using battery-powered equipment. Power to the mine was not cut off entirely until approximately 5:05 a.m., over 35 minutes after the first report that the fan had shut down.[2] This time gap from the instant of fan shut down to cutting off the power to the mine was also a violation of Helen's MSHA approved fan outage plan.

After DER's same day investigation of this incident, Echenrode issued an administrative order reciting this situation to be a violation of Section

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[2]By a separate and unappealed order, DER directed that the bypass on the computer alarm be immediately removed.

221(d) of the Pennsylvania Bituminous Coal Mine Act, Act of July 17, 1961, P.L. 659, as amended, 52 P.S. §701.221(d). This Order directed that all of Helen's personnel undergo retraining on correct mine evacuation procedures and that a new fan outage plan (which Helen must then implement), providing for only a five minute fan outage before the mine is electrically de-energized, be submitted by Helen to DER for approval.

While Helen is contesting this entire order in its appeal, it is only seeking supersedeas of that portion of DER's Order which addresses Helen's submission of a fan outage plan to DER and the need to implement it. Accordingly, we limit this opinion to the issues raised in Helen's Petition.

Helen's Petition alleges it will be irreparably harmed by: (a) being forced to unnecessarily de-energize and re-energize the mine's electrical power system because the computer's internal alarm signals do not necessarily represent fan stoppage; (b) increased switching on and off of the electric power under the new plan cumulatively increasing the risk of electrical system malfunction; (c) lost production from the malfunctions occurring because of the de-energizing of the mine; and (d) additional lost production because of the idle time of the approximately 1.5 hours necessary to re-energize the mine after each unnecessary de-energization. Helen's petition then says DER's Order is not supported by Section 221(d) and DER is engaging in unlawful administrative rule making by trying to compel it to adhere to standardized DER fan outage procedures. Finally, the petition concludes that supersedeas would not harm the miners or the public.

In ruling on this Petition, we must keep in mind that even though DER bears the burden of proof at the hearing on the merits pursuant to 25 Pa. Code §21.101(b)(3), it is the petitioner which bears the burden of proof at

this point in this proceeding. The elements of Helen's burden are set forth in 25 Pa. Code §21.78. McDonald Land & Mining Company, Inc. v. DER, 1991 EHB 129. It must show us the irreparable harm it will suffer, the likelihood it will prevail on the merits and the lack of any likelihood of injury to the public or other parties. Such a showing is not absolute, however, as we do conduct a balancing amongst these factors. Pennsylvania Fish Commission, et al. v. DER, et al., 1989 EHB 619.

Irreparable Harm

This Board has developed ~~two lines of cases~~ addressing irreparable harm. The older line takes the position that monetary loss is not in itself irreparable harm. See, e.g., William Fiore v. DER, 1983 EHB 528. The more recent line of cases allows financial loss to the petitioner to be considered as irreparable harm in the appropriate proceeding, see e.g., Neville Chemical Company v. DER, EHB Docket No. 92-225-E (Opinion issued July 21, 1992), and McDonald Land & Mining Company v. DER, *supra*; however, none of the decisions in this newer line of cases goes so far as to say any increased costs, no matter how asserted or how slight, constitute irreparable harm. Here, costs to Helen of compliance with DER's Order during the pendency of this appeal were not shown by Helen. Helen proved that in the last two years the internal alarm for the fan system sensors sounded 200 times, and, of all of those alarms, there were seven times in which there were actual fan outages (at one of the three fans). Obviously, this last incident is the eighth such occurrence. Helen asserts that since it cannot reach the No. 7 for visual verification in five minutes, it must shut down the mine's electric system each time the internal alarm sounds. This evidence does not show any irreparable harm to Helen because it does not show any dollar figure

associated therewith or any increase over previous operating costs. (Did Helen shut down those other seven times, for example? There was no evidence on this point.) Moreover, at the hearing DER indicated de-energizing the mine pursuant to the fan outage plan submitted in response to the order need not occur when the internal alarm sounds if a proper reading of the computer shows the fan is continuing to function (and the internal alarm was set off by some other monitoring function) or in the event the computer is out of service or is malfunctioning but the "box"[3] shows the fan is still operating. Thus, de-energizing the mine need only occur when there is a fan outage or at least when the signals from Helen's own monitors show this is the case. We are sure Helen incurs some cost when it must cease production or de-energize and re-energize a mine, but what that cost is was not shown nor was there any evidence that the frequency of de-energizing and re-energizing would increase frequent in the period following the Order's issuance. Because we cannot say there will be more costs to Helen based on the evidence offered us, irreparable harm was not shown from this standpoint. Since there is no evidence that there will be more de-energizing events subsequent to the order's issuance when it is interpreted as set forth above, there is also no showing of more idle time (lost production) necessitated by re-energizing the

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[3]The "box" is located next to the computer's display screen according to DER's Joseph A. Sbaffoni. He described it as a separate monitoring system which apparently consists of an electric circuit wired into the No. 7 fan, which circuit displays different light patterns on the box when the fan is running and when it is not. The "box" apparently monitors more than the No. 7 fan but has separate circuits and warning lights for each circuit. According to the testimony, its only connection to the computer is a connection to the computer's internal alarm which sounds when the box shows a fan outage (augmenting the visual light signal). The box does not monitor other fan functions, as does the computer, and backs up the computer. Apparently during the July 11, 1992 fan outage, Helen's management did not check the box to determine whether it showed fan operation or not.

mine. Because a mine's electric system must be turned on and off repeatedly in routine mine operations, in light of DER's interpretation of when its own order and the fan outage plan require de-energizing, we would need evidence of increased members of electrical malfunctions from increased de-energizing and additional down time resulting therefrom to have any showings of irreparable harm in these regards by Helen. Though Helen's witness said he thought there would be more de-energizing events, this was apparently based on his assumption that under Helen's new fan outage plan Helen had to de-energize within five minutes of the internal alarm's sounding. As this is not what DER's order means, according to DER's own testimony, in order to find irreparable harm we would need evidence as to increased malfunctions based on DER's interpretation of its order and Helen's new fan outage plan prepared in response thereto. We were not offered such evidence.

Likelihood Of Success On The Merits

Because DER interprets its order and the need to implement the fan outage plan in the way it does based on the monitoring systems at the Helen mine, we do not believe Helen has shown us a likelihood it will succeed on the merits as to the portions of the order for which it seeks supersedeas.

In reviewing Helen's allegations as to Section 221(d), it is necessary that we read this Section in conjunction with the other sections of the Pennsylvania Bituminous Coal Mine Act, particularly Section 249, which provides in relevant part:

> The ventilation of mines which extend more than two hundred feet underground, and which are opened after the effective date of this act, shall be produced by a mechanically operated fan or mechanically operated fans. Ventilation by means of a furnace is prohibited in any mine. The fan or fans shall be kept in continuous operation, unless written permission to do otherwise be granted by the mine inspector in the district. ....

> Approved facilities shall be provided at point or points under observation while men are in the mine, which shall give warning of an interruption to a fan. Where such facilities are not provided, an attendant shall be constantly kept on duty while men are in the mine. (emphasis supplied)

52 P.S. §701-249.

Clearly, this section requires that Helen's fans be kept in continuous operation and that Helen must either provide a man at the fan to assure this or, alternatively, a functioning warning system to warn of any fan outage, as counsel for DER suggests.

Section 221(d) provides in relevant part:

> In case of accident to a ventilating fan or its machinery, or if the fan stoppage is a planned interruption whereby the ventilation of the mine is interrupted, the mine foreman shall order the power to be disconnected from the affected portions and withdraw the men immediately from the face areas.... If the fan has been stopped for a period of time in excess of fifteen minutes in a gassy mine, and thirty minutes in a non-gassy mine, the mine foreman shall order the men withdrawn from the mine.... He shall not allow the men to return to their work until the ventilation has been restored, and the mine has been thoroughly examined by certified personnel and reported safe.

52 P.S. §701-221 (d).

DER read this section as saying that in the event of a fan outage at Helen's mine, the mine foreman must disconnect the electric power to the affected portions of this mine, immediately withdraw the men from the coal faces (where most methane is found), and, after fifteen minutes, if the fan is not operating again, withdraw all of the miners from the mine. Helen offered evidence that ten minutes for verification before de-energizing suits its operation better in its opinion than DER's five minutes of fan outage, but Section 221(d) does not say anything about some amount of time allowed to Helen for verification prior to de-energizing. The section says

the foreman will order disconnection when the continuously operating fan stops operating and immediately withdraw the men from the area where methane is liberated most frequently. DER says this disconnection must also be immediate. Here, DER also contends the entire mine is the affected area of the mine because with the other fans running and No. 7 fan out of operation, the ventilation pattern can change and the methane in the No. 7 fan's area could either be drawn into those areas ventilated by the other two fans or left to accumulate with potentially deadly results. According to the testimony, there are no studies ~~by Helen or~~ DER to show Helen's other fans provide the required ventilation of this mine when No. 7 is out of operation. We received no factual evidence contrary to DER's position that the entire mine is the affected area as to this mine. Moreover, if this is DER's interpretation of Section 221(d), it is entitled to certain deference by this Board unless plainly erroneous. Baumgardner et al. v. DER, 1988 EHB 786; Dear v. Holly Jon Equipment Co., 283 Pa.Super. 74, 423 A.2d 721 (1980). Thus, at this preliminary stage of this proceeding, it appears that DER's interpretation of this statute is at least sound enough to avoid supersedeas.

Helen's Petition also asserts that DER's order is an attempt to make it comply with standard DER fan outage procedures and thus violates sections 201 and 202 of the Commonwealth Documents Law, 45 P.S. §§1201 and 1202. Section 221(d) requires the mine foreman to disconnect power to the affected areas of the mine on a fan's outage. This must be done immediately under DER's reading of the statute. This requirement is thus not a regulation or unlawful administrative rule making by DER. The evidence shows that DER did give Helen some guidelines on what might be an acceptable plan after Helen requested same, but the testimony also showed that the time for de-energizing

each mine varies from mine to mine depending on circumstances at the particular mine. The evidence in the record does not yet show any uniform or standard procedures mandated by DER which are not also required by the statute. While Helen may be able to show this at the merits hearing, it has not shown us at this time that is likely to prevail on this basis.

Accordingly, we must conclude that at present Helen has not demonstrated a likelihood it will succeed on the merits of its appeal as to this portion of its appeal. In turn, this means we need not weigh the existence of harm to the public (the miners included) because even if we begin conducting a balancing of these three factors, Helen has shown neither irreparable harm to it nor a likelihood of its success on the merits, and, thus, the balance cannot be in its favor. Since we cannot grant Helen the relief it seeks, we must enter the following order.

ORDER

AND NOW, this 9th day of September, 1992, we affirm our Order of July 31, 1992 denying Helen's Petition For Supersedeas.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: September 9, 1992

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
L. Jane Charlton, Esq.
Western Region

For Appellant:
J. Michael Klutch, Esq.
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M. DIANE SMITH
SECRETARY TO THE BO

BELLEFONTE BOROUGH	:	
	:	
V.	:	**EHB Docket No. 91-244-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** September 10, 1992

OPINION AND ORDER SUR
MOTION TO DISMISS

By Terrance J. Fitzpatrick, Member

Synopsis

A motion to dismiss is granted where an appeal is filed more than thirty (30) days after the permittee received notice of the action taken by the Department of Environmental Resources (DER), and where the requirements for allowance of an appeal *nunc pro tunc* have not been met.

OPINION

On June 20, 1991, the Borough of Bellefonte (Borough), Centre County, filed its Notice of Appeal from the May 13, 1991 letter issued by DER denying the Borough's request for an extension of time to comply with Condition 5 (regarding installation of customer meters) of Water Allocation Permit WA-23A. The denial of the extension was issued pursuant to the Act of June 24, 1939, P.L. 842, as amended, 32 P.S. §631 *et seq.* (Water Rights Act). The facility to which the permit pertains is the water distribution system of the Borough. The appeal enumerates ten (10) specific objections to DER's denial of the

extension request, alleging that the action of DER was improper and unreasonable, arbitrary and capricious, and was not based on the facts.

This Opinion and Order addresses DER's motion to dismiss filed on July 10, 1991. DER requests that the Board dismiss the appeal of the Borough for lack of jurisdiction, contending that the appeal was not timely filed.

DER's argument that the Borough's appeal was untimely runs as follows. The Borough stated in the Notice of Appeal that DER's letter was received on or about May 16, 1991. DER's Bureau of Litigation received the Borough's Notice of Appeal on June 13, 1991. On June 20, 1991, the Borough filed its Notice of Appeal with the Board. DER contends that since the Board did not receive the Notice of Appeal until thirty-five days after the Borough received notice of DER's order, the appeal is untimely and contrary to the requirements of 25 Pa. Code §§21.11(b), 21.52(a). DER requests that the Board dismiss the Borough's appeal with prejudice.

On July 19, 1991, the Borough filed an Answer And New Matter to DER's motion to dismiss, averring as follows. On June 10, 1991, a telephone call was placed to the Secretary of the Environmental Hearing Board to determine if any change had been made to form EHB-1: Rev 9/80 (Notice of Appeal Form) or to the regulations relating to appeals. The Borough submitted a copy of the telephone bill as proof of the phone call. The caller was the Solicitor for the Borough who was informed that the Secretary of the Board was not available but "Jackie", who answered the telephone, inquired if she could be of

assistance.[1] She was asked if there had been any change to EHB-1: Rev 9/80 or to the rules relating to appeals. Her answer was "no." The solicitor then forwarded via United States Certified Mail the Notice of Appeal to our former address which was 221 North Second Street, Third Floor, Harrisburg, PA 17101 - listed on form EHB-1 Rev 9/80. Form EHB-1: Rev 9/80 states:

> Any party desiring to appeal any action of the Department of Environmental Resources must file its appeal *with this Board* at *the above address* within 30 days of receipt of notification of the action.

(emphasis in original)

The Borough contends that the above form specifically states that appeals are to be filed at the address listed on the form. The Borough provided a copy of the original mailing envelope dated June 11, 1991, containing the Borough's appeal, which was returned on June 18, 1991, for an incorrect address. The Borough avers that the Borough Solicitor then placed another phone call to the Board, received the correct address of the Board and again sent the appeal form. The Borough now alleges that but for the misleading and incorrect information given the Borough Solicitor on June 10, 1991, the appeal would have been filed with the Board in sufficient time to meet the thirty-day deadline. The Borough contends that the action of the Board constitutes wrongful and negligent action equivalent to fraud or breakdown in the tribunal's operation which has resulted in injury to the Borough.

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[1] Jacqueline Potts is a clerk-typist employed by the Board.

DER avers in its reply to the Borough's New Matter that the Solicitor for the Borough knew the proper address of the Board as evidenced by his previous correspondence with the Board in cases docketed at 88-458-F and 89-219-F. Both cases commenced after the Board moved to its current address in May 1988. DER submits that on at least three prior occasions the Solicitor, or his associate, sent correspondence addressed to the Board at its current address. As further proof, DER points out that our letterhead reflects the new address on each piece of correspondence to the Solicitor. DER requests that we take judicial notice of the fact that Form EHB-1: Rev 5/88 indicates the address on it and has been in use for at least three years prior to the Appellant's filing. (The current form in use is EHB-1; Rev 5/91.) DER insists that if there had been any doubt or discrepancy with the Board's address, then the burden lay on the Solicitor to resolve the inconsistency. DER cites the language of Bass v. Commonwealth of Pennsylvania, 485 Pa. 256, 401 A.2d 1133, 1135 (1979), "[t]he negligence of an appellant, or an appellant's counsel, or agent of appellant's counsel, has not been considered a sufficient excuse for the failure to file a timely appeal." DER contends that appellant's counsel is attempting to attribute his own negligence to the Environmental Hearing Board. DER insists that the Borough made no assertion that he or anyone else was instructed to mail the appeals to the 221 North Second Street address. DER asserts that the Solicitor for the Borough should have asked a more specific question when inquiring as to the Board's correct address, rather than asking "an extremely general question as to 'whether there had been any change to Form EHB-1: Rev 9/80 or to the rules relating to appeals.'"

The Borough filed a response to Commonwealth's New Matter on August 22, 1991, reiterating many of the arguments raised in its answer.[2]

The Board's Rules of Practice and Procedure require appellants to file notices of appeal with the Board within thirty (30) days of receiving notice of the contested final action of DER. 25 Pa. Code §21.52(c). The Borough did not file its notice of appeal with this Board within thirty days of receiving the letter of denial of an extension of time under Water Allocation Permit No. WA-23A; therefore, even though the Borough's response does not state it is in the nature of a Petition for Leave to Appeal *nunc pro tunc*, we will treat it as such since it is clearly untimely. Unless the requirements for an appeal *nunc pro tunc* are met, the Board lacks jurisdiction over untimely appeals. Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. Ct. 478, 364 A.2d 761 (1976); see also American States Insurance Co. v. Commonwealth, DER, 1990 EHB 338. The general rule is that an appeal *nunc pro tunc* will only be permitted in extraordinary circumstances, namely, when there is fraud or a breakdown in the processes of the court or agency receiving the appeal. West Penn Power Co. v. Goddard, 460 Pa. 551, 333 A.2d 909 (1975). Neglect or a mistake by the appellant or his counsel will not excuse the failure to file a timely appeal. State Farm Mutual Automobile Insurance Co. v. Schultz, 281 Pa. Super. Ct. 212, 421 A.2d 1224, 1227 (N.7) (1980). In Bass supra, the Supreme

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[2] DER filed a Motion to Strike Appellant's Response to Commonwealth's New Matter alleging that since DER did not include any new matter in its reply filed on August 7, 1991, the Borough is not permitted to file a response to a reply to new matter under 231 Pa. Code Rule 1017(a) unless there is new matter contained in the reply to new matter. We will deny DER's Motion. Rule 1017 is inapplicable here, because that Rule governs the pleadings used to initiate civil proceedings, not the filings which are allowed in response to motions.

Court held that non-negligent failure of counsel to file a timely appeal constituted grounds for granting leave to appeal *nunc pro tunc* when the error was quickly discovered and leave to appeal *nunc pro tunc* was promptly sought. As discussed at length in American States Insurance Company, *supra*, however, this approach is now limited to cases involving non-negligent happenstance where unique and compelling facts are present. See Petromax, Ltd. v. DER, EHB Docket No. 92-083-E (Op. Issued April 23, 1992).

In the instant case, the Borough has failed to allege sufficient facts to support an appeal *nunc pro tunc*. Of the cases cited by the Borough in its response to DER's motion to dismiss, the one which comes closest to supporting the Borough's position is Tarlo v. University of Pittsburgh, 66 Pa. Commw. 149, 443 A.2d 879 (1982). In Tarlo, the appellant relied upon the written statement of the Director of the Pittsburgh Commission on Human Relations that an appeal was to be filed within thirty days of appellant's receipt of the letter, when such an appeal was actually due, under the applicable statute, within thirty days of entry of the order appealed. In these circumstances, the Court found that the appellant was entitled to rely upon the written statement of the public official, even though the appellant was represented by counsel.

The facts in the instant case, as alleged by the Borough, are substantially different from those in Tarlo. Here, the alleged statement was oral, not written, and it was made in response to an ambiguous, general question as to whether there had been any changes to form EHB-1 Rev. 9/80. In addition, the statement was made by a clerk-typist, not by the Secretary of

the Board, a law clerk with the Board, or one of the Board Members.[3] Finally, and perhaps most importantly, the Borough admitted in its "Response to Commonwealth's New Matter" that it had sent documents to the Board's correct address in conjunction with other appeals to the Board:

> 10. It is admitted that the Solicitor's Office on previous occasions mailed correspondence subsequent to the filing of appeals to the Environmental Hearing Board at 101 South Second Street, Suites 3-5, Harrisburg, PA 17101. However, form EHB-1, Rev. 9/80 is mandatory in that it provides all appeals should be filed with the Environmental Hearing Board at 221 North Second Street, Third Floor, Harrisburg, Pennsylvania 17101. The Appellant has no way of knowing, based on this form, whether this address is for the filing of appeals only with other correspondence being handled at other addresses. The Department of Environmental Resources appears to maintain a number of offices and bureaus throughout the City of Harrisburg.

(Response, para. 10.)

If the Borough's counsel truly believed that the Board might have one address for filing notices of appeal and another for filing other documents, then common sense should have led him to inquire about this, specifically, when he placed his telephone call to the Board. Moreover, the last sentence of the above-quoted language, stating that DER maintains many offices in Harrisburg, is irrelevant. As we pointed out in denying a previous request for leave to

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[3] The position occupied by the person who supplied the information should be relevant in determining whether reliance on that information is justifiable.

appeal *nunc pro tunc* by the Borough, DER and the Board are separate entities. Borough of Bellefonte v. DER, 1989 EHB 599, 604 (note 4), affirmed, 131 Pa. Commw. 312, 570 A.2d 129 (1990), allocatur denied, 577 A.2d 891 (1990).[4]

It is clear from the above that the Borough has not met the requirements for allowance of an appeal *nunc pro tunc*. Accordingly, we must dismiss (actually, quash) the Borough's untimely appeal for lack of jurisdiction. Rostosky, *supra*.

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[4] We would also point out that the Board's current address is listed in our regulations at 25 Pa. Code §§21.32(c) and 21.120(b), and that notice of the Board's change of address was provided in the Pennsylvania Bulletin on April 23, 1988, 18 Pa. Bull. 1964.

ORDER

AND NOW, this 10th day of September, 1992, it is ordered that:

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

2) The motion to strike Appellant's Response to Commonwealth New Matter is denied.

3) This appeal is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATE: September 10, 1992

cc: **Bureau of Litigation, DER:**
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Central Region
For Appellant:
David A. Flood, Esq.
Bellefonte, PA

jm