COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

ADJUDICATIONS

VOLUME II

1985

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

DURING THE PERIOD OF THE
ADJUDICATIONS

1985

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Environmental Hearing Board Reporter

Thus: 1985 EHB 1

FORWARD

In this volume are contained all of the final adjudications of the Environmental Hearing Board issued during the calendar year 1985.

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

> "§1921-A Environmental Hearing Board
>
> (a) The Environmental Hearing Board shall have the power and its duties shall be to hold hearings and issue adjudications under the provisions of the act of June 4, 1945 (P.L. 1388), known as the "Administrative Agency Law," or any order, permit, license or decision of the Department of Environmental Resources.
>
> (b) The Environmental Hearing Board shall continue to exercise any power to hold hearings and issue adjudications heretofore vested in the several persons, departments, boards and commissions set forth in section 1901-A of this act.
>
> (c) Anything in any law to the contrary notwithstanding, any action of the Department of Environmental Resources may be taken initially without regard to the Administrative Agency Law, but no such action of the department adversely affecting any person shall be final as to such person until such person has had the opportunity to appeal such action to the Environmental Hearing Board; provided, however, that any such action shall be final as to any person who has not perfected his appeal in the manner hereinafter specified.
>
> (d) An appeal taken to the Environmental Hearing Board from a decision of the Department of Environmental Resources shall not act as a supersedeas, but, upon cause shown and where the circumstances require it, the department and/or the board shall have the power to grant a supersedeas.

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

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

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

In addition, the Board hears civil penalties cases pursuant to the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4009.1; the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605(a); the Dam Safety and Encroachment Act, Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.21; and the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, 58 P.S. §601.506. Also, the Board reviews the Department's assessment of civil penalties under the Bituminous Mine Subsidence and Land Conservation Act, Act of April 27, 1966, P.L. 31, as amended, 52 P.S. §1406.17(f); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605(b); the Coal Refuse Disposal Act, Act of September 24, 1968, P.L. 1040, as amended, 52 P.S. §30.61; the Safe Drinking Water Act, Act of May 1, 1984, P.L. 206, 35 P.S. §721.13(g); the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, §6018.605; and the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.22.

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

The department is always a party before the Board. Other parties include recipients of DER orders, penalties assessments, permit denials and modifications and other DER actions. Third party appeals from permit issuances are also common in which cases the permittees are also parties. In third party appeals from permit issuances, the department often does not actively participate in the appeal, but lets the permittee defend the permit issuance.

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1 Section 472 of the Administrative Code, 71 P.S. §180-2.

2 Section 709 of the Administrative Code, 71 P.S. §249(m).

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1985 OPINIONS AND ORDERS

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

DEL-AWARE UNLIMITED, INC. :

:

: Docket No. 84-361-G
: Issued: May 13, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and PHILADELPHIA ELECTRIC COMPANY, Permittee

OPINION AND ORDER
SUR MOTION TO DISMISS

SYNOPSIS

The permittee's Motion to Dismiss is granted in part and denied in part. Issues relating to the effects upon the Delaware River are irrelevant in this appeal of an NPDES permit authorizing discharges to the Schuylkill River. Moreover, many of the issues which appellant seeks to raise in this action concerning the alleged effects upon the Delaware River are established by principles of collateral estoppel.

Standing is provisionally granted subject to the presentation of evidence by appellant at the preliminary hearing substantiating the allegations contained in appellant's pre-hearing memorandum and response to permittee's Motion. The Board is bound to follow state doctrines of standing, regardless of the fact that DER's issuance of an NPDES permit is subject, in part, to federal requirements. Appellant citizens' group may base its standing upon a

showing that it or any one of its members has an interest sufficiently substantial, immediate and direct to confer standing. Riparian property owners have an interest which is sufficiently substantial, immediate and direct. Persons who use the Schuylkill River for recreational purposes may have such an interest; however, whether the interest is sufficiently substantial, immediate and direct depends upon the particular facts of the case. These facts are not yet developed; the Board must exercise caution to avoid prejudging the merits of the appeal. At the preliminary hearing on standing appellant must establish that it is reasonably probable that when all the evidence is in, after a full hearing on the merits, appellant will be shown to have a substantial, immediate and direct interest in the challenged DER action.

The Board rejects permittee's contention that appellant has failed to state a legal basis for this appeal. Appellant has alleged that DER incorrectly applied certain regulations in determining certain parameters contained in the instant permit. This claim states a valid legal basis for the appeal.

INTRODUCTION

This appeal concerns the issuance of a National Pollutant Discharge Elimination System permit (NPDES permit) to the Philadelphia Electric Company (PECO) by the Pennsylvania Department of Environmental Resources (DER), DER issued the permit on September 19, 1984, pursuant to section 402 of the federal Clean Water Act, 33 U.S.C. 1342 and the Pennsylvania Clean Streams Law, 35 P.S. 691.1 et seq. The permit authorizes discharges from PECO's Limerick nuclear generating facility to the Schuylkill River and Possum Hollow Run in accordance with effluent limitations, monitoring requirements and other conditions set forth in the permit.

The appellant herein is Del-Aware, Unlimited, Inc., a local citizens' group with a history of involvement in affairs concerning the operation of the Limerick facility, including specifically an appeal previously adjudicated by this Board addressing several DER actions authorizing the construction and operation of various components of the Point Pleasant Diversion Project. Del-Aware, Unlimited, Inc. v. DER, NWRA and Philadelphia Electric Company, 1984 EHB 178. The Point Pleasant project is a large scale water reallocation plan involving the withdrawal of water from the Delaware River for use, among other things, as cooling water for the Limerick reactor.

PECO has moved to dismiss this appeal on several grounds. Del-Aware has responded to the motion, and various reply memoranda and supplements have been received. DER has advised the Board that it supports the position adopted by PECO. Among the bases asserted for dismissal is the argument that many of the issues which Del-Aware wishes to raise herein are barred by principles of res judicata as a result of the previous appeal. In addition, PECO contends that many of the issues raised are irrelevant in the present matter, that Del-Aware lacks standing to bring this appeal, and that Del-Aware has failed to state a legal basis for its appeal. Since the standing of the group depends upon an assessment of the relation between the issues involved in the appeal and the interests of the group and its members, we will address the relevance and res judicata issues first, so as to clarify the scope of the subject we are called upon to address in this matter.

Relevance and Res Judicata

Del-Aware sets forth in its pre-hearing memorandum several bases for this appeal, among which are certain alleged adverse effects upon the Delaware

River resulting from the intake structure serving the Point Pleasant Project. Specifically, Del-Aware alleges that the instant NPDES permit does not reflect the best available technology regarding the location of the intake, that the intake is located in a spawning and nursery area for American Shad and that it is located in an area of the river which is used for recreational purposes such as fishing and tubing.

The purpose of an NPDES permit is to establish certain conditions and limitations with which a discharge must comply so as to assure that the possible adverse effects of the discharge can be monitored and controlled or prevented. 25 Pa.Code §95.1. Thus, our concerns must focus on determinations involved in the assessment of the possible adverse effects upon the waters receiving the discharge, which in the present case means the possible effects upon the Schuylkill. We are in no way concerned with the possible effects upon the Delaware River as a consequence of another, separate DER action.

Del-Aware attached to its Notice of Appeal a copy of the NPDES permit at issue in this matter. Del-Aware avers that it is a "true and correct copy" of the permit. We have closely examined the same; absolutely no reference is made anywhere therein to the Delaware River with the exception of a label designating the river on a schematic representation as the original source of the water to be used at the Limerick facility and ultimately discharged to the Schuylkill. This diagram states that it "does not limit the discharge in any manner." It is merely a diagram.

We conclude from the foregoing that any and all issues relating to the possible effects upon the Delaware River resulting from the Point Pleasant Diversion Project are irrelevant to this appeal. Del-ware has provided no legal authority

for its contention that DER was required to consider such effects in issuing the NPDES permit for discharge of the Del-Aware River water to the Schuylkill, and we are not aware of any such requirement. We in no way imply that the effects upon the Schuylkill resulting from the discharge of the Delaware River water are irrelevant. As we have emphasized, it is the effects upon the Schuylkill with which we are here concerned.

PECO has argued that even if the issues regarding the possible effects upon the Delaware River were not irrelevant in the present context, principles of res judicata would bar Del-Aware from raising here the issues which it set forth in its pre-hearing memorandum (and which are summarized above).

In order for res judicata to apply there must be the concurrence of four elements: 1) identity of the thing sued for, 2) identity of the cause of action, 3) identity of the persons or parties, and 4) identity in the quality of the parties for or against whom the claim is made. Bethlehem Steel Corp. v. DER, 37 Pa.Cmwlth 479, 390 A.2d 1383 (1978). The parties here are identical to those involved in the earlier proceeding (with the exception of Neshaminy Water Resources Authority, which was a party to the earlier action but is not a party here). Thus, items three and four clearly are met.

Under this formulation, however, we cannot find that all four elements are met, because, as Del-Aware itself admits, this appeal involves "some of the same water, but a different discharge, and a different legal issue" than the earlier appeal. It is, of course, for this reason that we have concluded that effects upon the Delaware resulting from the intake structure are irrelevant. For the same reason, res judicata technically does not apply here. This is not the same cause of action as that presented in the earlier appeal.

Nevertheless, issues actually presented and litigated in the earlier matter cannot be relitigated here under simple principles of issue preclusion or collateral estoppel. Section 27 of the Restatement (2d) of Judgments provides that:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties whether on the same or a different claim. (Emphasis added)

Moreover, contrary to Del-Aware's assertions that the preclusive effects of prior administrative determinations are not equal to those of prior judicial determinations, it is clear that the principle articulated in section 27, supra, applies with the same force in the administrative context as it does elsewhere. Section 83 of the Restatement (2d) provides that "a valid and final administrative determination has the same effect under the rules of res judicata, . . . as a judgment of a court." (The Restatement uses the term "res judicata" to refer to issue preclusion (collateral estoppel) as well as to claim preclusion. See generally sections 17 and 27.) This Board consistently has refused to relitigate issues which had been litigated and decided in previous appeals before the Board. Allegheny County Sanitary Authority v. DER, 1984 EHB 777. Consequently, those issues actually presented and decided in the earlier Del-Aware appeal cannot be relitigated here.

In its prior adjudication, the Board exhaustively discussed the issue of the effects upon the Delaware River resulting from the intake for the Point Pleasant project. The Board specifically examined the possible effects upon the American Shad population and concluded that "the intake's operation will not adversely impact the aquatic community of the Delaware River at Point Pleasant." Although the Board did not specifically discuss the possible adverse effects upon

"tubing" (the terminology of Del-Aware's pre-hearing memorandum) in the vicinity of the intake, the Board did conclude that Del-Aware had presented no evidence to demonstrate that the intake itself presented any danger to persons in the immediate vicinity because the structure will be located at least four feet below the surface of the river and will have a very low intake velocity. 1984 EHB at 298. Thus, we conclude that the very issues which Del-Aware seeks to raise here were resolved in the earlier appeal.

Del-Aware argues that it was not furnished an adequate opportunity in its earlier appeal to address the issues it now seeks to raise and therefore it should not be precluded from presenting them now. It states that this is one of the issues it has raised in its appeal of our earlier decision, which is now pending in the Commonwealth Court. The response to this argument is readily apparent; if Commonwealth Court agrees with Del-Aware's assertion, it will grant the appropriate relief--most likely remand of the case for further consideration of Del-Aware's claims. The fact that in a previous appeal an appellant believes it was adversely affected in the presentation of its case does not mean that it may attempt to assert the claims it allegedly was precluded from presenting earlier in a subsequent, unrelated proceeding. In addition, we would reject any contention that such claims should not be treated as "actually litigated", and thus established, because an appeal is pending. Under the law of this Commonwealth, a valid judgment is conclusive until such time as it is reversed by a higher court. Philadelphia Electric Co. v. Borough of Lansdale, 283 Pa.Super. 378, 424 A.2d 514 (1981).

In sum, we concur with PECO's contentions in its Motion to Dismiss that issues concerning adverse effects upon the Del-Aware River resulting from the Point Pleasant Project are irrelevant in this present appeal of a permit regulating

discharges to the Schuylkill River. Moreover, these issues are conclusively established by principles of collateral estoppel.

Standing

We turn now to the issue of Del-Aware's standing. We emphasize that our rulings here are provisional. For the purposes of this opinion we have accepted as true--subject to later substantiation--Del-Aware's allegations concerning its members' interests in the water quality of the Schuylkill River. An evidentiary hearing has been scheduled for the purpose of permitting Del-Aware to place on the record evidence in support of these allegations.

Del-Aware argues that we should apply the federal law of standing in this appeal to determine whether it has standing to bring this appeal. We do not beleve we are free to do so. In issuing the instant permit to PECO, DER applied state law, albeit state law which is, in part, an adoption of federal minimum requirements. As an administrative tribunal of this Commonwealth, until we are advised by higher authority to do otherwise, we consider ourselves bound to apply state law, including the state's doctrine of standing.

As a citizens' group Del-Aware will be found to have standing if "its members, or any one of them, are suffering immediate or threatened injury resulting from the challenged action sufficient to satisfy the William Penn Parking Garage standard." American Bookseller's Association, Inc. v. Rendell, Pa.Super. 481 A.2d 919, 927 (1984). This concept of representational standing had been adopted by Commonwealth Court prior to the American Bookseller's decision, in Tripps Park Civic Association v. Pennsylvania PUC, 42 Pa.Cmwlth 317, 415 A.2d 967 (1980), and is now firmly established in the Pennsylvania case law. In our earlier Del-Aware appeal we applied the concept as well. Del-Aware v. DER, et al., 1984 EHB at 265.

The William Penn standard to which the American Bookseller's court referred is that set forth in William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). The court there held that in order to have standing a party must be "aggrieved", and that to be aggrieved, the party must have a "substantial", "immediate" and "direct" interest in the subject matter of the appeal. We will address each of these elements in turn, noting by way of preface that we are confining ourselves to a discussion of effects upon the interests of Del-Aware's members relating to the Schuylkill, and not the Delaware River, in light of our ruling, supra, that effects upon the Delaware River are irrelevant in this proceeding.

There is little question that if Del-Aware can substantiate its allegations concerning riparian ownership interests, it will be granted standing. Standing based upon ownership of land adjacent to an area affected by the challenged administrative action (e.g., the Schuylkill) has been repeatedly recognized. See, e.g., Community College of Delaware County v. Fox, 20 Pa.Cmwlth. 335, 342 A.2d 468 (1975); Concerned Citizens of Rural Ridge v. DER, 1982 EHB 522; Concerned Citizens of Breakneck Valley v. DER, 1979 EHB 201. In addition, it is clear that riparian owners have an interest in administrative actions which affect the quality of the stream or river along which their property is located sufficient to confer standing. Committee to Preserve Mill Creek v. Secretary of Health, 3 Pa.Cmwlth. 200, 281 A.2d 468 (1971). Indeed, this was the basis for our finding of standing on the previous Del-Aware appeal. 1984 EHB at 264.

With the exception of our previous Del-Aware decision, however, the cited precedents concerned DER actions affecting privately held land. Where the challenged DER action affects a public natural resource such as the Schuylkill, such cases may provide a starting point for analysis, but they cannot be construed as

entirely applicable. The interests affected by the DER action simply are not the same, and the DER decision-making process resulting in the challenged action must take additional factors into consideration. (See, e.g., Payne v. Kassab, 468 Pa.226, 361 A.2d 263 (1976), discussing the duty imposed upon DER by Article 1, section 27 of the Pennsylvania Constitution.) Thus, it is unrealistic to expect that standing to challenge actions such as the instant one will easily fit the mold of decisions such as Fox, supra.

In order to be substantial, the interest of Del-Aware (i.e., that of one or more of its members) must be distinguishable from the interest of the general public in having others comply with the law. Del-Aware has alleged that some of its members use the Schuylkill for a variety of recreational purposes such as fishing, water-skiing and boating. PECO claims that "recreational use of a public waterway is . . . precisely the kind of interest shared by the general public which Pennsylvania courts have found insufficient as a basis for standing."

PECO incorrectly construes the meaning of the substantiality requirement under Penn. Users of a particular public facility or resource can have a substantial interest under Pennsylvania law. (Whether the interest is also direct and immediate, and thus sufficient to confer standing, is another matter.) William Penn itself demonstrates this principle. There the court granted standing to the users of public parking garages who would be affected by the challenged city ordinance imposing a tax upon the use of such parking places. In discussing the element of substantiality the court made reference to two United Stated Supreme Court decisions upholding standing of citizens' groups on the basis of their use of public resources. Citing United States v. SCRAP, 412 U.S. 669 (1973) and Sierra Club v. Morton, 405 U.S. 727 (1972) the court stated that "it is clear

that some interests will suffice to confer standing even though they are neither pecuniary nor readily translatable into pecuniary terms." 346 A.2d at 281. In both SCRAP and Sierra Club, use of public natural resources by members of the group was the basis for the conclusions reached regarding standing. We construe this portion of the Penn decision to mean that a citizens' group can establish the necessary substantial interest under Penn by demonstrating that its members do make substantial use of the public resource which allegedly is threatened by the challenged action. Whether the nature and extent of the use will establish the necessary substantial use must depend on the specific facts, however. Moreover, we see no "bright line" formula for deciding whether any individual set of facts constitutes "substantial" use of the public resource; a judicious common sense evaluation of the specific facts cannot be avoided. In particular, we stress that although in Concerned Citizens Against Sludge, Docket Nos. 82-220-G and 82-221-G (Opinion and Order, May 4, 1983), allegations of hunting and fishing in an area were insufficient to confer standing to appeal sludge deposition nearby, we certainly did not intend in Sludge that hunting or fishing never could be a use satisfying the "substantial" portion of the Penn test.

We believe the foregoing is a correct statement of Pennsylvania law despite its apparent inconsistency with Western Pennsylvania Conservancy v. DER, 28 Pa.Cmwlth. 204, 367 A.2d 1147 (1977), cited by PECO. In Western Pennsylvania Conservancy, the Commonwealth Court noted that "it would have some difficulty embracing" a concept of standing which would permit an appeal by an environmental organization "whose members use and enjoy state parks . . . where it appears that (the challenged action) may result in harm to the state parks in question." 367 A.2d at 1150. First, we note that this statement is purely dicta. The appeal was dismissed as moot and, therefore, the quoted statement has no precedential effect. Moreover, its persuasive effect appears to be somewhat undermined in that it rested not upon Penn (unmentioned in Western Pennsylvania Conservancy) but upon

three pre-Penn decisions, one of which was specifically disavowed in Penn.

Under Penn, the directness element requires a showing of a causal connection between the action challenged and the harm alleged. The element that the interest be immediate concerns the nature of that causal connection, i.e., whether the alleged harm would be a remote consequence of the challenged action. 346 A.2d at 282-84. In the present circumstances we must be careful to avoid prejudging the merits of Del-Aware's appeal. Without specific evidence concerning the allegedly detrimental effects upon the Schuylkill resulting from the Limerick discharge it is impossible for us to fully assess the "remoteness" of Del-Aware's claimed injury. It would be entirely improper for us to engage in such an analysis in the context of this standing inquiry. Standing is a preliminary legal issue, which of necessity must be determined without the benefit of a full evidentiary record.

The prior Del-Aware appeal established that certain levels of "heavy metals, phosphorus, nitrate and fecal coliform" are present in the Delaware River water withdrawn at Point Pleasant for use, among other things, at Limerick. 1984 EHB at 276. Consistent with our ruling, supra, concerning the collateral estoppel effects of that previous adjudication, the quoted finding is established for our purposes here. (The prior decision did not reach the issue of whether these substances were present in such amounts as to require treatment. The case was remanded for review of this very issue, inter alia.) Given the fact that the Delaware River water contains these substances and the apparently undisputed fact that at least some of the water discharged to the Schuylkill under the terms of the instant permit has its origin in the Delaware, we cannot now say that there is no possibility of a causal connection between the harm alleged by Del-Aware and the challenged action. Nor can we say that the alleged harm is too remote to satisfy the immediate portion of the Penn test.

In sum, at the presently scheduled hearing concerning Del-Aware's allegations regarding standing, we will be willing to consider evidence going to the recreational uses made of the Schuylkill by Del-Aware members. Del-Aware, at this preliminary hearing on standing, must convince us it is reasonably probable that--when all the evidence is in, after a full hearing on the merits--all facets of the Penn test for standing will be satisfied.

Failure to State a Legal Basis for Appeal

The final argument raised by PECO in its Motion to Dismiss is that Del-Aware has failed to state a legal basis for its appeal. PECO makes specific reference to Del-Aware's allegation that the increases in water temperature allegedly allowed by the instant permit are inconsistent with prior administrative determinations regarding the effect of temperature variations upon the Schuylkill.

We note preliminarily that even if we were to hold that this allegation failed to state a valid legal claim, we could not dismiss this appeal in its entirety since there are other issues raised by Del-Aware whose legal sufficiency has not been challenged by PECO.

We conclude that we cannot grant PECO's Motion on this point. PECO has argued that DER correctly applied these guidelines to the permit evaluation and that Del-Aware has not challenged the "applicability or correctness" of those criteria. Thus, PECO would have us conclude that Del-Aware has stated no legal basis for its claim.

We agree that in its pre-hearing memorandum Del-Aware did not expressly raise the issue of the proper application of the Chapter 93 criteria. (Del-Aware concedes it is not challenging the correctness of the criteria set forth in the regulations themselves.) We consider, however, that paragraphs 5, 6 and 7 of Appellant's pre-hearing memorandum impliedly contain this assertion and, in any

event, in its Reply Memorandum, Del-Aware has expressly stated that it is specifically challenging the application of the Chapter 93 criteria to the instant permit. Our rules, 25 Pa.Code §21.51(e) make explicit the Board's policy that an appellant is not restricted to issues raised in its notice of appeal. John F. Culp v. DER, 1984 EHB 505. Consequently, Del-Aware has stated a valid legal basis for the aspect of its appeal addressing the thermal limitations contained in the permit.

O R D E R

AND NOW, this 13th day of May, 1985, PECO's Motion to Dismiss is sustained in part and rejected in part, consistent with the rulings contained in the foregoing Opinion. The hearing presently scheduled for May 17, 1985 in Philadelphia will be limited to the taking of testimony and the introduction of other evidence pertinent to the issue of Del-Aware's standing in this matter.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: May 13, 1985

cc: Bureau of Litigation
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COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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SPRINGETTSBURY TOWNSHIP SEWER AUTHORITY : Docket No. 84-287-M

Appellant : (June 3, 1985).

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Appellee

OPINION AND ORDER
SUR DER'S MOTION TO DISMISS

Synopsis

DER's motion to dismiss the appeal of appellant Springettsbury Township Sewer Authority (STSA) from DER's denial of STSA's National Pollution Discharge Elimination System (NPDES) interim permit and pending permanent permit application modification requests is denied. DER's denial, following its determination that an increased assimilative capacity exists in a section of the receiving stream of STSA's sewage treatment plant, constituted an appealable final action affecting STSA's obligations under the Sewage Facilities Act, 35 P.S. §750.5 (and DER Rules and Regulations promulgated thereunder) to provide sewage services to its constituents. 2 Pa.C.S.A. §101; 25 Pa. Code §21.2(a).

OPINION

Appellee Commonwealth of Pennsylvania, Department of Environmental Resources (DER) has moved the Board to dismiss the appeal of appellant Springettsbury Township Sewer Authority (STSA) from DER's denial of STSA's request for modification of both its existing interim National Pollution Discharge Elimination System (NPDES) permit for STSA's sewage treatment plant as well as STSA's pending application for a permanent NPDES permit.

In support of its motion to dismiss, DER argues that its denial was merely a deferral of STSA's modification request and therefore its decision did not constitute an appealable final action. In addition, DER argues that its denial did not alter STSA's legal rights or obligations and was therefore unappealable. Before addressing these issues, a recounting of the appeal's factual history is warranted.

By letter dated July 3, 1984, STSA requested a modification of both its existing interim NPDES permit (No. Pa.-0026808) and its pending application for a permanent NPDES permit for discharges from STSA's sewage treatment plant into a section of Codorus Creek. STSA's modification request for an increase in average daily flow from 12.3 million gallons per day (MGD) to 15.3 MGD, and its request for an increase in the effluent limits for ammonia nitrogen, was based upon, according to STSA, DER's new estimate of an increased assimilative capacity for a section of Codorus Creek at a location approximately sixteen hundred (1600) feet upstream of STSA's only discharge point. In STSA's words, its modification request was based upon the fact that:

> ...since the issuance of Springettsbury's interim permit, the Commonwealth has determined that the characteristics of the receiving stream [Codorus Creek] at the Springettsbury outfall [no.] 001 would allow effluent limits of ammonia nitrogen (as N) of a monthly average of 6, a weekly average of 9, and an instantaneous maximum of 12, from May 1st to October 31st, with a requirement only for monitoring from November 1st through April 30th. This new estimate of assimilative capacity of the Codorus Creek contrasts with previous estimates which led to the present porposed requirement of 1.75, 1.75, and 3.5 during the summer, respectively, and 5.25, 5.25 and 10.5 during the winter. A copy of a letter from G. Roger Musselman, [of DER's] Chief Planning Section, Harrisburg Regional Office, to Mr. Thomas Henry, U.S. Environmental Protection Agency, dated February 14, 1984, documenting the Department's conclusion, is enclosed herewith.

Letter dated July 3, 1984, from STSA to Leon Oberdick, DER Regional Water Quality Manager.

The February 14th letter, referenced in STSA's modification request, sought Environmental Protection Agency (EPA) approval of DER's request on behalf of the City of York for relocation of one of York's two outfalls to a point approximately sixteen hundred (1600) feet upstream of STSA's only existing outfall on Codorus Creek. DER's request was based upon new modeling studies conducted by a consultant hired by York which indicated that a section of Codorus Creek could accommodate increased effluent limits. In DER's words, its request to EPA was based upon the fact that:

> ...[t]he additional modeling effort presented another scenario (which York City had not considered) and for which we felt obliged to investigate in terms of effluent limits. This scenario entailed the discharge of [outfall no.] 002 (8 MGD) at the present location and the discharge of [outfall no.] 001 (18 MGD) at a downstream location where the characteristics of the stream are more condusive [sic] for wastewater assimilation....

Letter dated February 14, 1984, from G. Roger Musselman, DER's Chief Planning Section, to Thomas Henry, Technical Assistance and Special Programs, EPA (emphasis added).

In addition, DER listed the effluent limits associated with the present location of York's two outfalls and STSA's outfall, as well as the effluent limits associated with the proposed relocation of York's outfall no. 001. Because DER argues that its denial of STSA's NPDES permit modification request was merely a deferral pending EPA action, a point we will discuss more thoroughly anon, and because DER also denies that it determined that an increased assimilative capacity exists at a section of Codorus Creek, it is necessary to reproduce the various effluent limits set forth in DER's proposal to EPA. However, we will not reproduce DER's tables in their entirety, but we will focus only upon those parameters which were effected by DER's calculations, namely, average daily flow (in MGD), and the effluent limits for ammonia nitrogen and 5-day BOD. The effluent limits are as follows:

CURRENT EFFLUENT LIMITS

	Monthly Average	Weekly Average	Instantaneous Maximum
York outfalls nos. 001 & 002 (26 MGD)			
5-day BOD			
(5/1 to 10/31)	10	15	20
(11/1 to 4/30)	15	22.5	30
Ammonia Nitrogen			
(6/1 to 10/31)	1.75	1.75	3.5
(11/1 to 5/31)	5.25	5.25	10.5
Springettsbury outfall no. 001 (12.3 MGD)			
5-day BOD			
(5/1 to 10/31)	15	22.5	30
(11/1 to 4/30)	20	30	40
Ammonia Nitrogen			
(6/1 to 10/31)	1.75	1.75	3.5
(11/1 to 5/31)	5.25	5.25	10.5

PROPOSED EFFLUENT LIMITS

	Monthly Average	Weekly Average	Instantaneous Maximum
York outfall no. 002 (8 MGD) (present location)			
5-day BOD			
(5/1 to 10/31)	20	30	40
(11/1 to 4/30)	25	37.5	50
Ammonia Nitrogen			
(5/1 to 10/31)	2	3	4
(11/1 to 4/30)	6	9	12
York outfall no. 001 (18 MGD) (proposed relocation)			
5-day BOD			
(5/1 to 10/31)	15	22.5	30
(11/1 to 4/30)	20	30	40
Ammonia Nitrogen			
(5/1 to 10/31)	6	9	12
(11/1 to 4/30)	Monitor		
Springettsbury outfall no. 001 (12.3 MGD)			
5-day BOD			
(5/1 to 10/31)	15	22.5	30
(11/1 to 4/30)	20	30	40
Ammonia Nitrogen			
(5/1 to 10/31)	6	9	12
(11/1 to 4/30)	Monitor		

Even a cursory review of the preceding tables (and of DER's letter to EPA) indicates that, contrary to DER's assertion, DER has in fact determined that an increased assimilative capacity exists at a section of Codorus Creek located approximately sixteen hundred (1600) feet upstream of STSA's outfall. A review of the current and proposed effluent limits indicates that the permissable ammonia nitrogen concentration for STSA's outfall increases from a monthly average of 1.75, a weekly average of 1.75, and an instantaneous maximum of 3.5, to a monthly average of 6, a weekly average of 9, and an instantaneous maximum of 12 for the period from May 1st to October 31st. Moreover, the proposed relocation of

York's outfall no. 001 would entail an increase in the effluent limits for ammonia nitrogen to a monthly average of 6, a weekly average of 9, and an instantaneous maximum of 12 for the period from May 1st to October 31st. In addition, for the period from November 1st to April 30th, both York and STSA would only be required to monitor ammonia nitrogen discharges. Finally, the proposed relocation of York's outfall no. 001, while maintaining at current levels the effluent limits for 5-day BOD from STSA's sewage treatment plant, would nonetheless increase York's effluent limits for 5-day BOD discharged at the proposed relocation point during the period from May 1st to October 31st from a monthly average of 10, a weekly average of 15, and an instantaneous maximum of 20 to a monthly average of 15, a weekly average of 22.5, and an instantaneous maximum of 30.

However, despite these obvious conclusions, DER argues that the recalculation of assimilative capacity referred to by STSA in its NPDES permit modification request is only the assimilative capacity that may exist if EPA approves the proposed relocation of York's outfall no. 001 and if and when York's outfall no. 001 is in fact relocated. DER said as much in its appealed-from denial letter of July 16, 1984, wherein it stated:

> ...[DER] is not in a position at this time to grant the permit modification as described in your letter. The proposed effluent limits for the City of York sewage plant upgrade has not been approved by EPA. Until such time as the effluent limits are approved and York finalizes their [sic] plan for an extended outfall line, we cannot entertain your request.
>
> In addition, the change in the ammonia nitrogen concentration for Springettsbury are also dependent on the EPA approval and the final location for York's discharge. The relaxation of effluent limits is possible because of the increased assimilative capacity in Codorus Creek in the area of Springettsbury['s] discharge as opposed to the Creek's condition around the York sewage plant.

DER letter dated July 16, 1984, from Leon Oberdick, Regional Water Quality Manager, to Robert J. Sugarman, Esquire, Special Solicitor (and counsel herein) for STSA.

However, STSA correctly notes that DER has in fact determined that an increased assimilative capacity exists in a section of Codorus Creek; after all, DER's proposal to relocate York's outfall no. 001 is based solely upon this determination, which is reflected in the higher 5-day BOD and ammonia nitrogen effluent limits summarized in the preceding tables. In addition, as STSA also notes, DER has determined that York should get the first opportunity to utilize this increased assimilative capacity by DER's deferral (i.e. denial) of STSA's NPDES permit modification request until such time as EPA approves the proposed relocation of York's outfall no. 001. In a time and area of increased residential and commercial development, and because of the finite design capacities of both York's and STSA's sewage treatment plants, STSA is justifiably concerned that it will be foreclosed from attempting to utilize the increased effluent limits and average daily flow should STSA be forced to wait until EPA acts upon York's relocation request, which could conceivably result in York's receipt of the entire benefit of the increased assimilative capacity DER has determined exists in a section of Codorus Creek.

Therefore, STSA argues that, however labeled by DER, its "deferral" of STSA's NPDES permit modification request is indeed a denial which constitutes an appealable final action. We agree that STSA is entitled to a DER determination and allocation of the increased assimilative capacity based upon the following legal principles.

DER's denial of STSA's NPDES permit modification request is an appealable final action which affects STSA's legal rights or obligations and upon which the Board can exercise its jurisdiction. 2 Pa.C.S.A. §101; 71 P.S. §510-21(a); 25 Pa. Code §21.2(a) (definition of "action").

First, the Board's jurisdictional grant permitting review of DER decisions is set forth in Section 510-21(a) of the Administrative Code, which provides, in pertinent part:

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

71 P.S. §510-21(a) (footnote omitted).

While the word "decision" is not defined in either the Administrative Code, the Administrative Agency Law or the Board's Rules and Regulations, Section 510-21(c) of the Administrative Code provides that:

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

71 P.S. §510-21(c).

An "action" by DER, from which an appeal shall commence with the filing of a written notice of appeal with the Board, 25 Pa. Code §21.51, is defined in the Board's Rules and Regulations in the following manner:

> (a) The following words and terms, when used in this chapter, [25 Pa. Code §21.1 et seq.,] shall have the following meanings, unless the context clearly indicates otherwise:
> Action- 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, licenses and registrations; orders to cease the operation of an establishment or facility; orders to correct conditions endangering waters of the Commonwealth; orders to construct sewers or treatment facilities; orders to abate air pollution; and appeals from and complaints for the assessment of civil penalties.

25 Pa. Code §21.2(a).

Similarly, the Administrative Agency Law (AAL) provides that an "adjudication" is defined as:

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

2 Pa.C.S.A. §101.

The requirements of appealability that can be gleamed from a reading of the above-cited statutory and code provisions can be summarized as follows: for a DER decision to be appealable per se,[1] it must constitute a final agency action affecting personal or property rights, privileges, immunities, duties, liabilities, or obligations of the complaining party. 2 Pa.C.S.A. §101; 25 Pa. Code §21.2(a); Guthrie v. Borough of Wilkinsburg, ___ Pa. ___, ___, 478 A.2d 1279,1281 (1984); Allegheny Ludlum Steel Corp. v. Pennsylvania Public Utility Commission, 501 Pa. 71, ___, 459 A.2d 1218,1220-21 (1983); Gateway Coal Company

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1 A DER action is appealable per se if it can be classified as an adjudication under the AAL. However, because the Board's jurisdiction may also be exercised over DER decisions, a term left undefined in the AAL and Administrative Code, separate yet similar criteria govern the appealability of DER decisions. These criteria are as follows:

> 1) the decision-making power and the manner in which it functions indicates judicial characteristics;
> 2) public policy requires that the decision in question be deemed appealable; and,
> 3) the agency's action substantially affects property rights.

Bethlehem Steel Corp. v. DER, 37 Pa.Cmwlth. 479,489, 390 A.2d 1383,1388 (1978) (citing Man O'War Racing Association v. State Horse Racing Commission, 433 Pa. 432, 250 A.2d 179 (1969)).

The Board's disposition of the issue of the "per se appealability" of DER's action makes it unnecessary for us to consider its appealability under the above-cited cases. However, even if we were so inclined to engage in such a discussion, which would most certainly constitute dictum, we could not in good faith, upon the state of the parties' memorandums of law now before us, determine whether any of appellant STSA's property rights are substantially affected by DER's action.

v. DER, 41 Pa.Cmwlth. 442,446-47, 399 A.2d 802,804-5 (1979); Kerr v. Commonwealth of Pennsylvania, Department of State, 35 Pa.Cmwlth. 330,333-34, 385 A.2d 1038,1039-40 (1978); DER v. New Enterprise Stone and Lime Co., 25 Pa.Cmwlth. 389,392-94, 359 A.2d 845,847 (1976); Sunbeam Coal Corp. v. DER, 8 Pa.Cmwlth. 622,625-26, 304 A.2d 169, 171 (1973); Standard Lime and Refractories Co. v. DER, 2 Pa.Cmwlth. 434,438-39, 279 A.2d 383,385-86 (1971).

The issue of whether or not any particular DER decision constituted an appealable final action has been increasingly litigated before the Board over the years. Board opinions which have found no appealable final action on DER's part include the following: Snyder Township Residents for Adequate Water Supplies v. DER, EHB Docket No. 84-355-G (O&O, January 8, 1985) (DER's denial of request for public hearing in connection with a mining permit application); Michael G. Sabia and the Warehouse 81 Limited Partnership v. DER, EHB Docket No. 83-275-M (O&O, November 1, 1984) (DER's issuance of a letter expressing concern over appellants' proposal to inject air stripped groundwater back into the water table and suggesting that appellants should submit a more detailed proposal); Snyder Township Residents for Adequate Water Supplies v. DER, EHB Docket No. 84-316-G (O&O, October 30, 1984) (DER's issuance of a letter quoting staff opinion and stating that a mine drainage permit application was still pending and under review); Reitz Coal Company v. DER, EHB Docket No. 84-195-G (O&O, September 19, 1984) (DER's issuance of a letter informing appellant that DER had issued a notice of violation to another company and informing appellant that, since appellant's corporate officials were also corporate officials of the other corporation that had received DER's violation notice, the violations would result in DER's refusal to issue any permits to appellant until the other corporation's violations were corrected to the satisfaction of DER); Fred Erickson v. DER, EHB Docket No. 84-079-G (O&O, June 20, 1984) (DER's issuance of a notice of violation requiring remedial action by appellant and stating that failure to comply could lead to the institution of legal action against appellant by DER); Donnelly Printing Company v. DER, EHB Docket No.

83-048-M (O&O, July 12, 1983)(DER's issuance of notice of violation); Consolidation Coal Company v. DER and J & D Mining, Inc., EHB Docket No. 82-265-H (O&O, March 9, 1983) (DER's refusal to add conditions to previously issued permit); Howard W. Minnich v. DER and Northern York County Regional Joint Sewage Authority, EHB Docket No. 82-047-H, 1982 EHB 397,398 (DER's publication in the Pennsylvania Bulletin of an inventory of state municipal discharge sewage construction needs); Perry Brothers Coal Company v. DER, EHB Docket No. 82-122-H, 1982 EHB 501,502 (DER's issuance of notice of violations which informed appellant of the possibility of legal sanctions should appellant fail to submit a corrective plan within a stated time period and which also stated that no new permits would be issued to appellant until all violations were corrected); Perry Brothers Coal Company v. DER, EHB Docket No. 81-137-H, 1981 EHB 583,584 (DER's issuance of a notice of violation which proposed that appellant make a penalty payment or create an escrow fund to avoid the filing by DER of a civil penalty assessment); Thomas E. Siegel v. DER, EHB Docket No. 79-152-B, 1980 EHB 364,366 (DER's denial of mine drainage permit modification request); Annville Township Sewer Authority v. DER, EHB Docket No. 80-064-W, 1980 EHB 425,426-27 (DER's denial of water quality management permit modification request); Township of Salisbury v. DER, EHB Docket No. 80-115-W, 1980 EHB 444,445 (DER's issuance of a letter requiring appellant to submit additional information in connection with its pending planning module submission and determining that appellant's submission constituted a plan revision rather that a plan supplement); Andre Greenhouses, Inc. v. DER, EHB Docket No. 78-177-W, 1979 EHB 311,312-14 (DER's issuance of a letter responding to an inquiry concerning the applicability of Environmental Quality Board regulations and stating that the regulations would be applied evenly without exception); Upper Moreland Township, et al. v. DER, et al., EHB Docket Nos. 77-198,199,200-D, 78-050,051-D, 1978 EHB 104,107-13 (DER's publication of a study which concluded that regional spray irrigation was the most cost effective method of sewage treatment for the region that encompassed appellants' municipalities; DER's listing of the Central Pennypack area in the 1978 project priority list); Scott Paper Company v. DER, EHB Docket No.

78-107-D, 1978 EHB 237,243 (Environmental Quality Board's promulgation of regulations); Bethlehem Steel Corporation v. DER, EHB Docket Nos. 75-017,134-W, 1977 EHB 23,28-29; reversed 37 Pa.Cmwlth. 479, 390 A.2d 1383 (1978)(DER's denial of a request for an extension or withdrawl of a DER variance order; DER's issuance of a letter setting forth a clarification of an Environmental Quality Board regulation); George Eremic v. DER and Chambers Development Company, Inc., EHB Docket No. 75-283-C, 1976 EHB 249,256; adjudication upon reconsideration, 1976 EHB 324,328-29 (DER's refusal to revoke a previously issued solid waste disposal permit and DER's refusal to bring an enforcement action); Hooversville Water Company v. DER, EHB Docket No. 75-067-D, 1975 EHB 145,146-48 (DER's issuance of a notice of violation requiring appellant to submit a compliance proposal by a DER-specified date); and, Anthony Toma and Alice Toma v. DER, EHB Docket No. 73-406-C, 1974 EHB 288,291 (DER's issuance of a letter to township setting forth conditions that should accompany the grant of a solid waste disposal permit).

However, Board opinions which have found an appealable final action on DER's part include the following: James E. Martin t/d/b/a James E. Martin Coal Company v. DER, EHB Docket No. 83-120-G (O&O, August 20, 1984)(DER's refusal to grant appellant's request for modification of his mining permit for purpose of allowing terrace backfilling rather than the originally permitted approximate original contour backfilling); Allegheny County Sanitary Authority v. DER, EHB Docket No. 82-269-G (O&O, July 22, 1984)(DER's exclusion of appellant's proposed sludge disposal project from the 1983 project priority list); Del-a-ware Unlimited, et al. v. DER, EHB Docket No. 82-177-H (O&O, January 19, 1983)(DER's decision to permit the diversion of water from the Delaware River to the North Branch of Neshaminy Creek and stating that no National Pollution Discharge Elimination System permit would be required for such diversion); Hatfield Township Municipal Authority v. DER, EHB Docket No. 82-081-M, 1982 EHB 331, 332 (DER's issuance of a letter to municipal sewer authority limiting new connections to its sewage plant); Merit Metals Products Corporation v. DER, EHB Docket No. 81-024-M, 1982 EHB 508,509 (DER's issuance of a letter denying a compliance

timetable submitted by appellant and ordering appellant to formulate another compliance plan); Cambria Coal Company v. DER, EHB Docket No. 82-109-H, 1982 EHB 517,518 (DER's issuance of a letter ordering appellant to submit an acceptable agreement or document the availability of a replacement water supply of equal or better quality and quantity); Borough of Downingtown v. DER, EHB Docket No. 80-075-H, 1980 EHB 410,411-13 (DER's issuance of a letter ordering appellant not to accept for treatment leachate from a landfill operator with which appellant had contracted, pending completion of a DER evaluation); K & J Coal Company, Inc. and Aquitane Penn, Inc. v. DER, EHB Docket No. 80-097-M, 1980 EHB 418,420-21 (DER's verbally conveyed opinion that appellants' mine drainage permit had become null and void due to non-production at the permitted mine); Snyder, et al. v. DER, EHB Docket Nos. 79-201-B, 80-001,041-B, 1980 EHB 437,439-40 (DER's bond forfeiture appealable by principal's surety); Newlin Township v. DER and Strasburg Associates, EHB Docket No. 78-127-D, 1979 EHB 33,54-58 (DER's approval of environmentall significant revisions to previously approved landfill construction plans); Borough of Mercer and Mercer Borough Sewage Treatment Authority v. DER and County of Mercer, EHB Docket No. 79-070-S, 1979 EHB 340,342-44 (DER's issuance of a letter stating that appellants were not prohibited from permitting the construction of an addition to their sewage collection system); Upper Moreland Township, et al. v. DER, et al., EHB Docket Nos. 77-198,199,200-D, 78-050,051-D, 1978 EHB 104,107-13 (DER's return of outdated permit and federal funding grant applications); Abington Township v. DER, EHB Docket No. 78-012-D, 1978 EHB 323,325-26 (DER's refusal to certify appellant's sewage collection system as a "treatment works segment" for purpose of availability of federal funding); Porter, et al. v. DER, et al., EHB Docket No. 74-205-W, 1975 EHB 230,232-34 (DER's grant of permission to municipal authority for operation of a landfill); Latrobe Municipal Authority, et al. v. DER, EHB Docket No. 75-111-C, 1975 EHB 422,426-29 (DER's assignment of priority points to a municipality's proposed sewage treatment facility upgrading under the Federal Water Pollution

Control Act is appealable if appellant presents a "creditable showing" of the invalidity of the state's implementing regulations under state or federal law or the misapplication of the state agency's own rules); Consolidation Coal Company, et al. v. DER, EHB Docket No. 72-297-D, 1975 EHB 446,447 (DER's consolidation of appellants' mine drainage permits into one permit); and, Monongahelia and Ohio Dredging Company v. DER, EHB Docket No. 72-388-B, 1974 EHB 489,490 (DER's issuance of an order requiring appellant to cease certain activities and ordering compliance with the law).

Of the above-cited Board opinions, the one most clearly and directly applicable to the issues presented herein is the Board's recent opinion in James E. Martin, supra (hereinafter Martin). Because Martin evidences a significant shift in the Board's treatment of both Commonwealth Court and Board precedents concerning the issue of the appealability of DER actions, a discussion of the Martin opinion and its antecedents is warranted.

In Martin, the Board granted DER's motion to dismiss appellant's appeal from DER's denial of his mining permit modification request for terrace backfilling instead of the originally permitted and required more burdensome backfilling to approximate original contour (AOC). However, the Board's grant of DER's motion to dismiss was based upon appellant's failure to appeal in a timely fashion DER's imposition of the AOC requirement, because appellant's modification request occurred many years after DER's issuance of appellant's mining permit; the Board held that the public's interest in the finality of administrative agency actions required that, absent a showing of "truly exceptional circumstances," collateral attacks upon the validity of unappealed-from and hence final DER actions could not be maintained.

More importantly for our purposes, however, in addressing the issue of the appealability per se (see footnote one, supra) of DER's denial of a permit modification request, the Board questioned the wisdom of its decision in Annville, supra (and, by implication, the Commonwealth Court precedents upon which Annville

relied), which, in construing the definition of "adjudication" as set forth in Section 101 of the AAL, supra, held that DER's refusal to change a previously issued permit's wastewater treatment requirements was not appealable because DER'S refusal to change the status quo did not alter the rights or obligations of the appellant permittee. Martin, supra, slip opinion at 4 (citing Gateway Coal Company v. DER, supra; DER v. New Enterprise Stone and Lime, supra; and, Annville, supra). Accordingly, the Board in Martin conceded that its Annville decision was directly applicable to the facts presented in Martin, wherein the appealed-from DER action was also a refusal to grant a permit modification request.

However, in stating its dissatisfaction with the Annville holding, the Board in Martin opined that DER's refusal to change the status quo can affect personal or property rights or obligations. Martin, supra, slip opinion at 7 (citing 25 Pa. Code §21.2(a)(definition of "action"). For example, the Board noted that appellant Martin's "property rights and obligations under allowance of terrace backfill would be substantially different from his present property rights and obligations binding him to AOC backfilling." Martin, supra, slip opinion at 7. Thus, the Board held that DER's denial of Martin's mining permit modification request was an action affecting rights and obligations under the definition of "action" as set forth in both 2 Pa.C.S.A. §101 and 25 Pa. Code §21.2(a), and it was therefore appealable. Martin, supra, slip opinion at 9.

Similarly, DER's denial of appellant STSA's NPDES permit modification request (and its pending NPDES permit application modification request) was an action affecting STSA's obligations. 2 Pa.C.S.A. §101; 25 Pa. Code §21.2(a). While we have already declined to determine whether or not STSA's property rights were (and are) affected by DER's denial, (see footnote one, supra), we nonetheless hold that, at the very least, STSA's obligations were (and are) affected by DER's denial of STSA's requests. Id. That is, as the duly constituted sewer authority for Springettsbury Township, STSA has the obligation to provide sewage services for areas within its jurisdiction. Sewage Facilities Act, 35 P.S. §750.5(a); 25

Pa. Code §§93.1 et seq., 94.1 et seq., 95.1 et seq. One aspect of STSA's obligation surely requires STSA to utilize, or attempt to utilize, the maximum design capacity of its sewage treatment plant and any increased assimilative capacity and relaxed effluent limits of its sewage treatment plant's receiving stream, for the purpose of adequately serving the sewage needs of its constituents. Therefore, since by its denial of STSA's requests DER has hindered STSA's attempts to faithfully undertake its obligations at the present time, such action on DER's part is appealable. 2 Pa.C.S.A §101; 25 Pa. Code §21.2(a); James E. Martin, supra. Accordingly, DER's motion to dismiss is denied.

ORDER

AND NOW, this 3rd day of June, 1985, DER's motion to dismiss the appeal of appellant Springettsbury Township Sewer Authority from DER's denial of appellant's National Pollution Discharge Elimination System interim permit and pending permanent permit application modification requests, docketed at EHB Docket No. 84-287-M, is hereby denied.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Dated: June 3, 1985.

cc: Bureau of Litigation
For DER:
John C. Dernbach, Esq.
Assistant Counsel
Harrisburg, Pa.
For Springettsbury Township Sewer Authority:
Joanne R. Denworth, Esq.
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COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

MARLIN L. SNYDER :

:

: Docket No. 84-400-G
: Issued: June 3, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

SYNOPSIS

Sanctions are imposed against Appellant preventing the presentation of his case in chief. Appellant has failed to file a pre-hearing memorandum despite repeated warnings by the Board that such failure would result in the imposition of sanctions. 25 Pa.Code §21.124.

OPINION

This appeal of a DER compliance order was filed with the Board on December 3, 1984. Pursuant to its usual practice, the Board issued Pre-hearing Order No. 1 shortly thereafter, requiring that Appellant file a pre-hearing memorandum by February 19, 1985. The memorandum was to set forth the factual and legal bases for the appeal. When no such memorandum had been filed by March 4, 1985, the Board sent a default notice to Appellant, via certified mail, notifying him that failure to file the memorandum by March 18, 1985 could result in the imposition of sanctions. Although it is not the Board's usual practice,

a second default notice was sent on April 2, 1985 permitting Appellant to file the memorandum within ten days of that date. The returned receipts from both notices show that Appellant received the same.

On April 15, 1985--after the expiration of this ten-day period--the Board received a letter from Appellant indicating that he believed that his engineer had filed the memorandum on his behalf. In light of the fact that Appellant was not represented by counsel, the Board withheld the imposition of sanctions but sent a letter--again via certified mail--to Appellant directing him to file his pre-hearing memorandum by May 9, 1985. The letter explicitly warned that "failure to file the memorandum by May 9, 1985 will result in the imposition of sanctions against you." The returned receipt shows that Appellant received this letter. Nevertheless, no pre-hearing memorandum has been filed nor has there been a request of an extension of time within which to file the same. Appellant did respond to the Board's letter but did not explain his failure to comply with the Board's order.

The Board has unsuccessfully attempted to contact Appellant by phone on several occasions and has twice requested by letter that Appellant contact the office of the hearing examiner handling this appeal so that this matter could be discussed. No such call has been received.

DER bears the burden of proof in this appeal pursuant to 25 Pa.Code §21.101(b)(3). Therefore, in light of the foregoing history, the following sanctions are imposed, pursuant to 25 Pa.Code §21.124. At the hearing on the merits of this appeal, if and when held, Appellant will be precluded from presenting his case in chief. Appellant will be allowed only to offer evidence in rebuttal, to cross-examine DER witnesses, and to file a post-hearing brief. See Armond Wazelle v. DER, EHB Docket No. 83-063-G (Opinion and Order dated September 13, 1983).

O R D E R

WHEREFORE, sanctions as set forth in the foregoing Opinion are imposed upon Appellant.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: June 3, 1985

cc: Bureau of Litigation
Joseph K. Reinhart, Esquire
Marlin L. Snyder (Certified Mail No. 392562052)

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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CLAIR D. AND VICKI HARDY, et al.

Appellants

Docket No. 83-127-M
Issued: June 4, 1985

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Appellee

OPINION AND ORDER

Synopsis

Appellants have applied for an award of attorney's fees pursuant to the Act of December 13, 1982, P.L. 1127, No. 257, 71 P.S. §§2031 - 2035 ("The Costs Act"). Appellants' application for attorney's fees is denied.

This matter originated in an appeal from the failure of the Department of Environmental Resources (DER) to order a municipality to revise it official sewage facilities plan as requested by appellants pursuant to 35 P.S. §750.5(b), and 25 Pa. Code §71.17. The Costs Act expressly requires that there be an adversary adjudication initiated by a Commonwealth agency before attorney's fees can be awarded against that agency. The Board construes the use of the word "initiates," in §2033(a) of the Costs Act, as limiting the application of the Costs Act to those cases in which an agency takes, upon its

initiative, some positive action against a party. Thus, the Costs Act does not apply to cases, such as this, where a party requests an agency to take an action, and the agency refuses to do so.

OPINION

This matter originated in an appeal, filed with this Board by Clair D. and Vicky Hardy, et al., on June 23, 1983, from a failure by the Department of Environmental Resources (DER) to order Carroll Township, York County to revise its official sewage facilities plan as requested by appellants pursuant to §5(b) of the Pennsylvania Sewage Facilities Act, 35 P.S. §750.5(b), and §71.17 of DER's regulations, 25 Pa. Code §71.17. On June 8, 1984, however, DER ordered Carroll Township to revise its official sewage facilities plan to address various sewage problems in the township, including those of appellants. Because DER's order rendered most of the issues in appellants' appeal before this Board moot, on August 8, 1984, appellants withdrew their appeal. By order dated August 20, 1984, this Board marked the docket in the appeal closed and discontinued.

Then, on September 10, 1984, appellants filed with this Board an application for an award of attorney's fees pursuant to the Act of December 13, 1982, P.L. 1127, No. 257, 71 P.S.§§2031 - 2035 ("The Costs Act"). The Board held a hearing on appellants' application for attorney's fees on October 18, 1984, and the Board received the final briefs in this matter by January 25, 1985.

The effective date of the Costs Act was July 1, 1983, and this is the first occasion that this Board has had to review an application for attorney's fees under the Costs Act. Section 2031(c) of the Costs Act sets forth the purpose of the Costs Act as follows:

(c) It is therefore the intent of the Assembly to:

(1) Diminish the deterrent effect of seeking review of or defending against administrative agency action by providing in specified situations an award of attorney's fees, expert witness fees and other costs against the Commonwealth.

(2) Deter the administrative agencies of this Commonwealth from initiating substantially unwarranted actions against individuals, partnerships, corporations, associations and other nonpublic entities.

71 P.S. §2031(c).

Section 2033(a) of the Costs Act sets forth the following circumstances under which a Commonwealth agency shall award fees and expenses:

(a) Except as otherwise provided or prohibited by law, a Commonwealth agency that initiates an adversary adjudication shall award to a prevailing party, other than the Commonwealth, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer finds that the position of the agency, as a party to the proceeding, was substantially justified or that special circumstances made an award unjust.

71 P.S. §2033(a).

Thus, the Costs Act expressly requires that there be an adversary adjudication initiated by a Commonwealth agency before attorney's fees can be awarded against that agency. In this case, the action of DER from which this appeal was taken was a denial of a private request; made by appellants pursuant to §5(b) of the Sewage Facilities Act, 35 P.S. §750.5(b), and §71.17 of DER's regulations, 25 Pa. Code §71.17; for DER to order Carroll Township to revise its official sewage facilities plan. Therefore, a preliminary issue in this case is whether a denial by DER of a private request for an order to revise an official sewage facilities plan constitutes an adversary adjudication initiated by DER. Appellants argue that any appealable action by DER would meet the requirement of the Costs Act for an adversary adjudication initiated by a Commonwealth agency. This Board does not believe, however, that the Costs Act was intended to have such a broad application.

Adversary adjudication is defined in the Costs Act as, "an adjudication as defined in 2 Pa. C.S. §101," 71 P.S. §2032. An adjudication is defined in 2 Pa. C.S. §101 as, "Any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liablilities or obligations of any or all of the parties to the proceeding in which the adjudication was made." Section 1921-A(a)-(c) of the Administrative Code, 71 P.S. §510-21(a)-(c), authorizes this Board to hold hearings and issue adjudications on DER actions that constitute adjudications as defined in 2 Pa. C.S. §101. Eremic v. DER, 1976 EHB 249. Thus, any DER action that is appealable to this Board is also an "adversary adjudication," as defined in the Costs Act. It is well established that a DER denial of a private request for an order to revise an official sewage facilities plan is an appealable action. 25 Pa. Code §71.17(d); Betz v. DER, 1980 EHB 107; Longwell v. DER, 1980 EHB 514. Therefore, if the Costs Act applied to all adversary adjudications by DER, the Costs Act would apply to a DER denial of a private request for an order to revise an official sewage facilities plan. The Costs Act, however, does not apply to all adversary adjudications by DER, but only to those adversary adjudications initiated by DER. 71 P.S. §2033(a).

The purpose of the requirement that the adversary adjudication be initiated by the agency is to narrow the application of the Costs Act. This Board construes the use of the word "initiates" in 71 P.S. §2033(a) as limiting the application of the Costs Act to those cases in which an agency takes, upon its own initiative, some action against a party. The Costs Act does not apply to cases in which a party requests an agency to take an action and the agency refuses to do so. Therefore, the Costs Act does not apply to a DER denial of a private request for an order to revise an official sewage facilities plan.

O R D E R

AND NOW, this 4th day of June, 1985, the application for attorney's fees of Clair D. and Vicki Hardy, et al., at EHB Docket No. 83-127-M, is denied.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR., MEMBER

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation

Eugene E. Dice, Esq.
Paul Simon, Esq./Central

DATED: June 4, 1985

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

SANDY CREEK FOREST, INC.

Appellant

: Docket No. 84-111-M
: Issued: June 4, 1985

v. : Aff'd No.1900 C.D.1985
Pa.Cmwlth Ct. February 4, 1986

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Appellee

OPINION AND ORDER

Synopsis

Sandy Creek Forest, Inc. appealed from a letter from the Department of Environmental Resources (DER). DER's Motion to Dismiss is granted because the letter was not an appealable action.

The DER letter was written in response to appellant's request that DER determine that no revision to a municipality's official sewage facilities plan would be necessary before appellant could subdivide land in that municipality. In the absence of a request for planning approval, DER is under no legal obligation to examine a municipality's official plan and determine whether a proposed subdivision would constitute a revision to that plan. The DER letter merely recited the regulations pertaining to revisions and supplements to official sewage facilities plans, 25 Pa. Code §71.15, and did not affect the personal or property rights, privileges, immunities, duties, liabilities, or obligations of the appellant.

OPINION

Sandy Creek Forest, Inc. (Sandy Creek) filed an appeal with this Board on March 19, 1984, from a letter from the Department of Environmental Resources (DER), dated February 24, 1984. The DER letter was written in response to a request by Sandy Creek that DER determine that no revision to the official sewage facilities plan of Covington Township, Clearfield County would be necessary before Sandy Creek could subdivide land that it owned in the township. DER informed Sandy Creek that DER could not determine whether Sandy Creek's proposed subdivision would require a revision to Covington Township's sewage facilities plan unless Sandy Creek submitted information required by 25 Pa. Code §71.15 of DER's sewage facilities regulations. On May 16, 1984, DER filed a Motion to Dismiss Sandy Creek's appeal on the grounds that the DER letter from which Sandy Creek appealed was not an appealable action of DER.

As a prerequisite to subdividing property, 25 Pa. Code §71.15 requires planning approval from DER to determine whether a proposed subdivision is in conformity with the official sewage facilities plan of the municipality within which the proposed subdivision is to be located. If the official plan of the municipality does not adequately provide for the sewage disposal needs of the proposed subdivision, then the official plan must be revised to accomodate the proposed subdivision. 25 Pa. Code §71.15(b). If, however, the official plan does adequately provide for the sewage disposal needs of the proposed subdivision, the regulations do not require a revison to the official plan, but, rather, only require a supplement to the plan. 25 Pa. Code §71.15(c).

In this case, the record contains no evidence that Sandy Creek attempted to obtain the required planning approval for its proposed subdivision. Instead, Sandy Creek merely requested DER to declare that no revision to Covington Township's official plan would be necessary to accomodate Sandy

Creek's proposed subdivision. DER responded to this request by setting forth the requirements of the regulations concerning the information that must be submitted to DER with requests for planning approvals for new subdivisions.

In the absence of a request for planning approval, DER is under no legal obligation to examine a municipality's official plan and determine whether a proposed subdivision would constitute a revision to that plan. The DER letter from which Sandy Creek appealed merely recited the regulations pertaining to revisions and supplements to official sewage facilities plans. DER did not deny a revision or a supplement to Covington Township's official sewage facilities plan, but, rather, DER informed Sandy Creek of the procedures required to obtain planning approval for a proposed subdivision. Thus, the DER letter from which Sandy Creek appealed is not a final action of DER, and does not affect the personal or property rights, privileges, immunities, duties, liabilities, or obligations of the appellant. As such, the DER letter does not constitute an action that is appealable to this Board. 2 Pa.C.S. §101; 25 Pa. Code §21.2(a); Standard Lime and Refractories Company v. DER, 2 Pa. Cmwlth. 424, 279 A.2d 383 (1971); DER v. New Enterprises Stone and Lime Company, Inc., 25 Pa. Cmwlth. 389, 359 A.2d 845 (1976).

O R D E R

AND, NOW, this 4th day of June, 1985, DER's Motion to Dismiss is granted, and the appeal of Sandy Creek Forest, Inc., at EHB Docket No. 84-111-M is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR., MEMBER

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation

John A. Mihalik, Esq.
Lynn Wright, Esq./Central

DATED: June 4, 1985

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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NEMACOLIN MINES CORPORATION, and
THE BUCKEYE COAL COMPANY :

Appellants :

: Docket No. 76-170-B
: Issued: June 4, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Appellee

OPINION AND ORDER

Synopsis

This is an appeal from a DER letter notifying appellants that an investigation had disclosed that their mining operations had caused subsidence damage to private property, and directing appellants to deposit a sum of money in escrow until the claim is settled. 52 P.S. §1406.6(a). The appeal is dismissed as having been taken from an unappealable action. The DER letter was simply a violation notice.

OPINION

Nemacolin Mines Corporation and the Buckeye Coal Company filed an appeal with this Board on December 27, 1976, from a letter from the Department of Environmental Resources (DER), dated November 24, 1976, informing appellants that an investigation had disclosed that appellants' mining operation had caused damage to the residence of John Reposky, Jr., and direct-

ing appellants, pursuant to section 6(a) of the Bituminous Mine Subsidence and Land Conservation Act of 1966, 52 P.S. §1406.6(a), to deposit $2000.00 in escrow until this claim is settled. On March 11, 1977, DER filed a Motion to Dismiss this appeal on the basis that the DER letter from which appellants appealed did not constitute an appealable DER action. Then, by order dated April 22, 1977, the proceedings in this matter were stayed indefinitely, pending the outcome of negotiations between the parties. On October 29, 1984, the Board requested the parties to this appeal for a status report, and by letter dated November 7, 1984, appellants informed the Board that DER's Motion to Dismiss was still pending, and that appellants did not wish to withdraw this appeal. Thus, this Board will now rule on DER's Motion to Dismiss.

The DER letter that is the subject of this appeal read as follows:

> We have been advised by Mr. S.E. Cortis, Chief of our Division of Mine Subsidence Regulation, that an investigation has disclosed that damage to the residence of John Reposky, Jr., 118 Schroyers Lane, Carmichaels, was caused by mining operations of the Nemacolin Mine, Buckeye Coal Company.
>
> Section 6(a) of the Bituminous Mine Subsidence and Land Conservation Act of 1966 provides that when a claim has not been satisfied within six months, the permit holder shall deposit with the Secretary of Environmental Resources, as security, a sum of money in an amount equal to said damage or the reasonable cost of repair. It is, therefore, necessary that you deposit in escrow the amount of $2000.00 until this claim is settled.

In its Motion to Dismiss, DER argued that this letter was solely a Notice of Violation, and purported neither to suspend or revoke the appellants' permit, nor to require cessation of appellants' mining operation. In support of this argument, DER cited Sunbeam Coal Corporation v. DER, 8 Pa. Cmwlth. 622, 304 A.2d 169 (1973), which held that absent a suspension or revocation of a permit, or the issuance of a cease and desist order, a Notice of Violation does not constitute an appealable action.

In response to DER's Motion to Dismiss, appellants argued that the DER letter was not a Notice of Violation because the letter did not cite section 9 of the Bituminous Mine Subsidence and Land Conservation Act (BMSLCA), 52 P.S. §1406.9, the provision of the Act pertaining to violation notices, and the letter alleged no violation of the Act. Moreover, appellants argued that the letter was appealable because the letter required appellants to deposit $2000.00 in escrow for a claim for which they denied liablility, and had they not deposited the $2000.00 in escrow, they would have lost their permit. Thus, appellants argued, the letter affects their personal property rights, privileges, immunities or obligations, and is therefore an appealable action. 2 Pa. C.S. §101; 25 Pa. Code §21.2(a); Eremic v. DER, 1976 EHB 249.

This Board has had previous occasion to rule upon the appealablility of a DER letter informing a mine operator that it has been found to have caused subsidence damage to private property, and directing the mine operator, pursuant to the BMSLCA, to either place in escrow an amount equivalent to the cost of repair of the damage, or demonstrate to DER that the claim has otherwise been satisfied. In Mathies Coal Company v. DER, EHB Docket No. 84-015-G (Opinion and Order, November 30, 1984), this Board held that a letter, such as the one that is the subject of this appeal was not an appealable DER action.

Although section 6 of the BMSLCA would have required that appellants' permit be suspended or revoked if appellants had not deposited the $2,000.00 in escrow, the placement of this money in escrow does not amount to an admission of liability for the claim of subsidence damage. 52 P.S. §1406.6. In Mathies, the Board stated that a DER letter directing the placement of money in escrow pursuant to section 6 of the BMSLCA is analogous to the facts of Perry Brothers Coal Company v. DER, 1982 EHB 501. In Perry Brothers, DER notified the appellant by letter that it was in violation of several permit conditions, and that DER would issue no new permits to Perry Brothers until all violations

were corrected. This Board, relying on the authority of Sunbeam Coal Corporation v. DER, 8 Pa. Cmwlth. 622, 304 A.2d 169 (1973), held in Perry Brothers that the DER letter was solely a Notice of Violation, and as such was not appealable.

In Mathies, however, the Board expressed the following concerns regarding the nonappealability of DER letters directing mine operators to place money in escrow for subsidence damage claims pursuant to section 6 of the BMSLCA:

> Where DER can decide on its own that a damage claim against a permittee is justified, and where the statute then mandates suspension or revocation of the permit unless the permittee(no matter how unjustified the permittee thinks the claim is) either repairs the damage or places the estimated repair costs in escrow, it borders on an abuse of discretion for DER to issue an unappeable notice of violation instead of -- as so easily could have been issued -- an order requiring the permittee to repair or escrow; such an order would have been appealable, and therefore would have allowed the permittee to challenge the underlying damage claim before the mandated permit suspension or revocation became imminent.

But, DER informed the Board during the Mathies appeal that it was establishing policies that will ensure that permittees in Mathies' position, and the position of appellants in this case, will receive an appealable order to repair or escrow before permit suspension or revocation is ordered. Thus, the Board held in Mathies, and reaffirms here, that a DER letter informing a mine operator that it has been found to have caused subsidence damage to a private property owner, and directing the mine operator, pursuant to §6 of the BMSLCA, to either place in escrow an amount equivalent to the cost of repair of the damage, or demonstrate to DER that the claim has otherwise been satisfied, is not an appealable action of DER.

O R D E R

AND NOW, this 4th day of June, 1985, DER's Motion to Dismiss is granted, and the appeal of Nemacolin Mines Corporation and the Buckeye Coal Company, at EHB Docket No. 76-170-B, is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR., MEMBER

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation

Henry Ingram, Esq.
Dennis W. Strain, Esq./Western

DATED: June 4, 1985

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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HARRISBURG, PENNSYLVANIA 17101
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GOLDEN FLAME FUEL COMPANY :

:

: Docket No. 84-353-G
: Issued: June 6, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

SYNOPSIS

Sanctions were imposed against Appellant for failure to file a pre-hearing memorandum as ordered by the Board. Pursuant to the authority granted by 25 Pa.Code §21.124, Appellant is precluded from presenting its case in chief.

OPINION

On October 16, 1984, the Board issued Pre-Hearing Order No. 1, requiring that Appellant file a pre-hearing memorandum on or before January 3, 1985. The purpose of the memorandum is to outline the factual and legal bases of the appeal. When no memorandum had been filed by January 21, 1985, the Board sent a notice to counsel for Appellant warning that failure to file the memorandum within fifteen days might result in the imposition of sanctions. On January 30, 1985 the Board received from Appellant a motion for extension of time to file said memorandum. Said motion was granted; Appellant was to file the memorandum by April 26, 1985. When the memorandum still had not been filed by May 15, the Board sent a notice to counsel for Appellant via certified mail warning that failure to file the same by

May 28, 1985 would result in the imposition of sanctions. To date no such memorandum has been filed with the Board. This is an appeal of a DER compliance order. Consequently, DER at least as an initial matter bears the burden of proof. 25 Pa.Code §21.101(b)(3). Therefore, dismissal of the appeal is not an appropriate sanction. See Armond Wazelle v. DER, EHB Docket No. 83-063-G. (Opinion and Order dated September 13, 1983). However, the Board will not tolerate continued disregard of its orders.

O R D E R

WHEREFORE, in light of the foregoing, it is ordered that at the hearing on the merits of this appeal, if and when held, Appellant will be precluded from presenting its case in chief. Appellant will be limited to the presentation of evidence such as would normally be offered in rebuttal, rather than in its case in chief, cross-examination of DER's witnesses, and the filing of a post-hearing brief. DER's pre-hearing memorandum is due within fifteen (15) days of receipt of this Opinion.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: June 6, 1985

cc: Bureau of Litigation
Gregg M. Rosen, Esquire
Joseph K. Reinhart, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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WILLIAM FIORE :

:

: Docket No. 85-020-G
: Issued: June 7, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION FOR SUMMARY JUDGMENT

SYNOPSIS

Summary judgment is granted in favor of the Department of Environmental Resources. Previous court decisions have established that Appellant has violated the Solid Waste Management Act. 35 P.S. §6018.101 et seq. These established violations clearly indicate that Appellant lacks the intention or the ability to comply with the Act. Therefore, DER was fully justified in denying Appellant's application for a hazardous waste permit pursuant to section 503(c) of the Act, 35 P.S. §6018.503(c).

OPINION

This is an appeal from the denial of Appellant's application for a permit to operate a hazardous waste disposal facility. The Department of Environmental Resources ("DER") denied the permit for several reasons, including its finding that Appellant had demonstrated an inability and unwillingness to comply

with the Pennsylvania Solid Waste Management Act, 35 P.S. §6018.101 et seq. ("SWMA"). DER has moved for summary judgment and filed a supporting brief. Appellant has responded to the DER Motion.

Pursuant to Pennsylvania Rule of Civil Procedure 1035, summary judgment shall be rendered if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The applicable law in this appeal is the Solid Waste Management Act, particularly section 503(c), 35 P.S. §6018.503(c), which provides in relevant part:

> In carrying out the provisions of this act, the department may deny . . . any permit . . . if it finds that the applicant . . . has failed or continues to fail to comply with any provision of this act . . . or if the department finds that the applicant . . . has shown a lack of ability or intention to comply with any provision of this act . . . as indicated by past or continuing violations.

This Board recently has been presented with a case involving these same parties and virtually identical factual and legal issues. In Fiore v. Commonwealth Department of Environmental Resources (EHB Docket No. 84-292-G, Opinion and Order Sur Motion for Summary Judgment dated February 13, 1985) we ruled that DER was justified in denying Appellant's application for a hazardous waste transporter's license under section 503(c). There we held that DER was fully entitled to rely upon certain established violations of law in deciding to deny Appellant's permit application. We stated that the established violations "provide an ample basis for determining that Appellant has shown a lack of ability or intention to comply with the requirements of the Solid Waste Management Act." (Opinion at p. 8). That conclusion is no less applicable here.

The DER denial letter from which this appeal was taken cites, inter alia,

section 503(c) as the basis upon which the permit application was denied,[1] and makes reference to Appellant's failure to comply with the terms of a consent order and agreement (CO&A) signed by Appellant with DER on January 25, 1983. In our Opinion of February 13 (discussed supra) we relied upon a Commonwealth Court decision which found that Appellant had violated the terms of that CO&A, holding that the court's finding was res judicata for the purposes of the appeal before the Board. Commonwealth Department of Environmental Resources v. Wm. Fiore, d/b/a Municipal and Industrial Disposal Company, Inc. No. 2083 C.D. 1983 (Opinion and Order entered October 28, 1983). On the date that we issued the aforesaid opinion, the Pennsylvania Supreme Court entered an order affirming the Commonwealth Court's finding that Appellant had violated the terms of the CO&A and therefore was guilty of criminal contempt. Commonwealth Department of Environmental Resources v. William Fiore, d/b/a Municipal and Industrial Disposal Company, Inc., ____ Pa. ____ 486 A.2d 950 (1985). Suffice it to say that Appellant cannot successfully argue that he did not violate the terms of the CO&A, and hence, the SWMA.[2] We hold that these violations of the SWMA are res judicata for the purposes of this appeal. Bethlehem Steel Corp. v. Commonwealth Department of Environmental Resources, 37 Pa. Cmwlth. 479, 390 A.2d 1383 (1978).

The violations which are established by the Commonwealth Court and Supreme Court rulings are of the following paragraphs of the CO&A:

> 4. By June 15, 1983, M & I shall remove all solid waste material that has been and is presently stored on the area identified as the temporary

---

1. Although the denial letter also relied upon section 503(d) of the Act, and although DER puts forward an extensive argument in support of denial on this basis, we need not rule upon the propriety of basing the denial upon that section since we have determined that DER's action can be fully supported under section 503(c) alone.

2. Paragraph 12 of the CO&A provides that certain paragraphs of the agreement constitute an order of DER. Under section 603 of the SWMA, 35 P.S. 6018.603, failure to comply with a DER order issued pursuant to the SWMA is a violation of the SWMA itself.

storage pits on drawing 167-01-01, (Revised January, 1979), the temporary storage pits, all contaminated soil, below and surrounding the excavated waste and the storage pits, and said waste, pits, and contaminated soil ("Waste Material") shall by June 15, 1983, be either disposed of in the Phase I Pit, or remove the Waste Material to a storage or disposal location off-site authorized to accept such Waste Material (hereinafter referred to as the "Off-Site Waste Facility"), it being understood that M & I shall notify DER in writing of the identity of the Off-Site Waste Facility and obtain all required authorization for storage or disposal prior to the transportation of any Waste Material thereto.

5. Within fifteen (15) days of the date of the execution of this Consent Order and Agreement, M & I shall submit to the DER Bureau of Solid Waste Management, 851 Kossman Building, Pittsburgh, Pennsylvania 15222, a revised closure plan in accordance with the applicable provisions of the 25 Pa.Code §75.265(o) (Sept. 4, 1982 Pa. Bulletin Pa. 3063) to reflect the removal of the Waste Material as required by Paragraph 4, above.

7. M & I shall not expand the above-referenced hazardous waste facility; the Phase I Industrial Waste Pit, and shall not utilize or construct any off-site or on-site hazardous waste disposal facility which is not permitted by the Pennsylvania DER Bureau of Solid Waste Management or does not qualify for interim status as a hazardous waste disposal facility.

9. Commencing February 1, 1983, and by the fifth day of each succeeding month until M & I has received a permit from the Department pursuant to Paragraph 1(a) above, M & I shall pay a civil penalty of $500.00 per month to the Department's Clean Water Fund, payable to the Commonwealth of Pennsylvania, Department of Environmental Resources, at the address set forth in Paragraph 1(a) above.

In reaching the conclusion that Appellant had violated the foregoing provisions of the CO&A, Judge Barry made certain other findings regarding Appellant's management of his waste disposal facility, including the following:

> As a result of (Appellant's actions at his solid waste disposal facility) industrial wastes have been discharged into an unnamed tributary of the Youghiogheny River at the site. The discharges constitute "hazardous waste" within the meaning of the Solid Waste Management Act. 35 P.S. §6018.103.
>
> * * *
>
> Testimony introduced at the hearing in this case indicated that the chemical constituents (which find their way to the unnamed tributary) contain polyaromatic hydrocarbons and other organic chemicals which are constituents of coal tar decanter sludge. Some of the chemicals present in the discharge are either known or suspected carcinogens. It was also established that the McKeesport Water Authority intake for its public water supply system is located on the Youghiogheny River approximately 8.5 miles downstream from the point at which the unnamed tributary enters the Youghigheny River.

As we have previously stated, these violations unquestionably demonstrate a lack of ability or intention to comply with the provisions of the SWMA. Appellant argues that DER must prove that these violations continue to exist; however, Appellant is clearly in error. Section 503(c) provides that DER may deny a permit for a demonstrated lack of ability or intention to comply with the SWMA "as indicated by past or continuing violations" (emphasis supplied). Unlike section 503(d) of the SWMA, which states that DER shall deny a permit unless the permit application demonstrates to the satisfaction of the Department that unlawful conduct has been corrected, 503(c) does not require that DER consider the present status of the applicant's violations.

In short, there are no disputed issues of material fact presented in this appeal. Since we have found that the established violations unquestionably demonstrate a lack of ability or intention to comply with the SWMA, it necessarily follows that, under section 503(c), DER was fully entitled to deny Appellant's application for a hazardous waste permit. The following order is consistent with this conclusion.

O R D E R

WHEREFORE, this 7th day of June, 1985, it is ordered that this appeal is dismissed. DER is entitled to judgment herein as a matter of law.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: June 7, 1985

cc: Bureau of Litigation
Robert P. Ging, Jr., Esquire, Pittsburgh, for Appellant
Dennis W. Strain, Esquire, Pittsburgh, for Commonwealth of Pennsylvania, DER

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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SECHAN LIMESTONE INDUSTRIES, INC. :

:

: Docket No. 85-162-G
: Issued: June 18, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and SLIPPERY ROCK CREEK CLEAN WATER, INC. Intervenor
and ARMCO, INC., Intervenor

OPINION AND ORDER

SYNOPSIS

Appellant bears both the burden of production and the burden of persuasion on the issues of whether pollution existing at its hazardous waste disposal facility is being abated and whether the cause of this pollution has been eliminated. These issues are raised by Appellant as affirmative defenses to the DER actions appealed herein. Appellant must meet its burden on these issues by clear and convincing evidence, in conformity with the policy evidenced by section 611 of the Solid Waste Management Act, 35 P.S. §6018.611.

DER retains the ultimate burden of demonstrating that its actions, i.e., permit revocation, termination of interim status, and issuance of a cessation order, were not an abuse of discretion or an otherwise arbitrary exercise of its duties and functions, given the facts as they eventually are established concerning the existence, cause, and abatement of the pollution existing at the facility. Neither §6018.611 nor 25 Pa.Code §21.101(d) shifts the burden to Appellant on this issue.

OPINION

Appellant, Sechan Limestone Industries ("Sechan") has appealed several actions taken by the Pennsylvania Department of Environmental Resources ("DER") which affect Sechan's hazardous waste disposal facility in Butler and Lawrence counties, Pennsylvania. In response to the existence of groundwater contamination in the vicinity of the facility and after several months of action by DER and Sechan directed toward abating the same, DER suspended Sechan's Solid Waste Permit No. 300705 and terminated Sechan's interim status to operate the facility. In addition, DER issued a separate order requiring the cessation of all waste disposal in one of two disposal pits located on the site, the "C-1 pit." The DER actions were to take effect nearly immediately, thereby effectively precluding Sechan from continuing its waste disposal operations at the site.

Appellant appealed each of these actions, which appeals have been consolidated under the above-captioned docket number. Petitions for supersedeas were filed by Sechan and a hearing on these petitions was held on May 3 and 6, 1985. Following the hearing, the presiding Board member denied the petitions. It is anticipated that the record developed at the supersedeas hearing will become part of the record at the hearing on the merits of this appeal.

In preparation for the up-coming hearing on the merits, DER has filed a Motion for determination of the burden of proof. DER urges that the Board impose the burden of production and of persuasion upon Sechan regarding the issues of whether Sechan contributed to the pollution which is admitted to exist at the site, whether this pollution has been eliminated, and whether the cause of the pollution no longer exists. In support of its Motion, DER relies upon section 611 of the Pennsylvania Solid Waste Management Act, 35 P.S. §6018.611, and 25 Pa.Code §21.101(d), the provision of the Board's rules which permits

shifting the burden of proof under certain circumstances.

35 P.S. §6018.611 provides:

> § 6018.611. Presumption of law for civil and administrative proceedings
>
> It shall be presumed as a rebuttable presumption of law that a person or municipality which stores, treats, or disposes of hazardous waste 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 area where hazardous waste activities have been carried out. Such presumption may be overcome by clear and convincing evidence that the person or municipality so charged did not contribute to the damage, contamination, or pollution.
>
> 1980, July 7, P.S. 380, No. 97, §611, effective in 60 days.

25 Pa.Code §21.101(d) states:

> When the Department issues an order requiring abatement of alleged environmental damage, the private party shall nonetheless bear the burden of proof and the burden of proceeding when it appears that the Department has initially established:
> (1) that some degree of pollution or environmental damage is taking place, or is likely to take place, even if it is not established to the degree that a prima facie case is made that a law or regulation is being violated; and
> (2) that the party alleged to be responsible for the environmental damage is in possession of the facts relating to such environmental damage or should be in possession of them.

The Order Directing Cessation of Disposal Operations

The central issues underlying a determination of the propriety of DER's order directing Sechan to cease its disposal activities at the C-1 pit are: 1) whether pollution exists at the site, and 2) whether that pollution is Sechan's responsibility. See 35 P.S. §6018.602. Normally, DER would bear the burden of proof on issues supporting the validity of its order, pursuant to 25 Pa.Code §21.101(b). In the instant case, however, Sechan does not contest the fact that pollution is present at the site. In addition, Sechan has admitted that this

pollution is somehow the result of Sechan's operations. Thus, in effect, these issues have been removed from contention. (A discussion of the burden of proof regarding Sechan's claim that it is abating the pollution is reserved for the discussion concerning permit revocation infra.) It is important, however, to note the possible operation of section 611 of the Solid Waste Management Act in this context, since the public policy considerations it reflects are relevant to other issues raised by DER's motion.[1]

Under section 611, where there has been an initial showing that pollution exists within 2500 feet of the perimeter of a hazardous waste facility, it is presumed that the operator of that facility bears legal responsibility for the pollution, without regard to cause, fault, or negligence. This presumption can be overcome only by clear and convincing evidence. We read section 611 as evidencing a very strong legislative policy in favor of holding an operator of a hazardous waste facility liable for harm which reasonably may be presumed to result from its operation. Section 611 clearly places the burden of production upon the operator, and, in light of its emphasis upon strict liability and its elevated standard of proof, it likewise places the burden of persuasion upon the operator with regard to the operator's responsibility for the existing pollution.

The Suspension of Solid Waste Permit No. 300705

The suspension of Sechan's Solid Waste Permit was based upon section 503 of the Solid Waste Management Act, 35 P.S. §6018.503, which provides in pertinent part:

---

1. In light of the fact that this issue has been removed from contention, we need not address DER's claim that 25 Pa.Code §21.101(d) would shift the burden of proof to Sechan with regard to the instant order.

* * *

(c) . . . (T)he department may deny, suspend, modify or revoke any permit . . . if it finds that the . . . permittee has failed or continues to fail to comply with any provision of this act . . . the Clean Streams Law . . . 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 . . . permittee 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.

* * *

(e) Any permit . . . granted by the department, as provided in this act, shall be revocable or subject to modification or suspension at any time the department determines that the solid waste . . . disposal facility or area . . . :

(1) is, or has been, conducted in violation of this act or the rules, regulations adopted pursuant to this act;
(2) is creating a public nuisance;
(3) is creating a potential hazard to the public health, safety and welfare;
(4) adversely affects the environment;
(5) is being operated in violation of any terms or conditions of the permit; or
(6) was operated pursuant to a permit or license that was not granted in accordance with law.

It is readily apparent that the central factual issue when DER suspends a permit under section 503 is whether the facility has been operated and is being operated in conformity with all applicable legal requirements. Discharge of contaminants to the groundwater without a permit is a violation of these legal requirements, including, inter alia, section 610 of the Solid Waste Management Act, 35 P.S. §6018.610, and section 307 of the Clean Streams Law, 35 P.S. §691.307.

As noted above, Sechan does not dispute that contaminants have entered the groundwater in the vicinity of the site and that it does not have a permit authorizing their discharge. Rather, Sechan has argued that it is effectively dealing with those contaminants and that therefore the DER actions at issue were too harsh in light of the alleged abatement that is taking place.

Sechan's argument regarding abatement of the conditions at the site is an affirmative defense. Sechan admits the central factual bases for the DER action, i.e., that pollution is present and is the result of its operations, but contends that, even given these facts, the DER action is unjustified because of other relevant factors which Sechan seeks to prove, i.e., that the actions it is taking are effectively controlling the contamination. (See definition of "affirmative defense", Black's Law Dictionary, 5th ed.) Moreover, Sechan is the party in possession of the facts necessary to support this defense; it relies upon its own actions as the basis for its argument that DER acted improperly. Consequently, we have little difficulty concluding that with regard to the issues necessary to support this affirmative defense Sechan bears the burden of proof, i.e., both the burden of production and the burden of persuasion.

In this context, section 611 of the Solid Waste Management Act is again relevant. The legislative policy evidenced by section 611 (as well as other portions of the Act) is clear: hazardous waste management is a dangerous business and persons who intend to engage in that business must bear the sizable risks involved. Improper solid waste practices create "irreparable harm to the public", 35 P.S. §6018.102, and this harm is significantly increased where the solid waste in question is designated "hazardous".[2] Thus, the heavy burden of proof placed

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2. Hazardous waste is defined as material which may "cause or significantly contribute to an increase in mortality or an increase in morbidity in either an individual or the total population; or pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed." 35 P.S. §6018.103.

upon the operator by section 611 is consistent with the extreme caution that is warranted whenever hazardous waste disposal is concerned. As we stated in Coolspring Township v. Commonwealth, DER, 1983 EHB 151, the determination of the degree of proof required to meet the burden varies depending upon the magnitude of the potential harm. We there stated: "If the effects, once they have occurred are sufficiently calamitous, then even a small probability of occurrence may be intolerable." The party contending that the harm will not occur bears a heavier burden where the potential harm is great. Section 611 reflects this same policy.

We see no reason to distinguish between the burden placed upon the operator under section 611 to prove that the pollution was not caused by its operations and the burden which is placed upon the operator who attempts to show that that same pollution is not continuing. Indeed, the public policy considerations in favor of requiring a clear and convincing showing are even more compelling where the operator claims it is abating the pollution. The abatement defense would not be relevant unless it were already established that the operator is legally responsible for the pollution. Since section 611 permits the imposition of an elevated degree of proof to overcome a presumption of responsibility for the pollution, a fortiori an elevated degree of proof should be required where the operator has admitted that it in fact caused the polluton. Thus, we conclude that it is Sechan's responsibility to demonstrate by clear and convincing evidence that it is eliminating the pollution and that the cause of the pollution no longer exists. This showing is relevant in the context of the cessation order as well as the permit suspension, and therefore this standard applies in both circumstances.

Our conclusion, supra, does not alter the ultimate burden of persuasion on the issue of whether the DER actions in question, i.e., suspension of the permit and issuance of the cessation order, represent an abuse of discretion or an otherwise arbitrary exercise of DER's duties or functions, however. Factors other than the existence of a pollutional condition and an operator's responsibility therefor may be involved in the decision on these issues. Section 611 addresses only the operator's responsibility for the polluting condition. It does not establish any presumptions concerning the propriety of DER actions given the established responsibility of the operator, and thus it cannot shift the burden of proof regarding that issue.

In addition, we cannot accept DER's suggestion that 25 Pa.Code §21.101(d) shifts the burden of proof to Sechan to show that the permit revocation was improper.[3] By its own terms, §21.101(d) applies only to "orders requiring abatement of alleged environmental damage." We cannot stretch this language to permit suspensions and analogous actions such as the termination of interim status. Although the ultimate purpose of a permit suspension may be to prevent further pollution, the issues underlying the issuance of an abatement order and those underlying a permit suspension are not identical. Therefore, §21.101(d) does not apply.

The considerations such as those set forth supra concerning the burden of proof with regard to the permit suspension apply as well to the termination of interim status, to the extent they are relevant. If the cause and continued existence of the groundwater contamination is relevant to a determination of the propriety of the interim status termination, then it will be Sechan's burden to demonstrate by clear and convincing evidence that the problem has been remedied.

---

3. See footnote 1, supra, concerning the relevance of §21.101(d) in the context of the cessation order appealed herein.

DER, however, retains the ultimate burden of demonstrating that its action was proper, given whatever facts are eventually established concerning the existence, cause and abatement of the pollution.

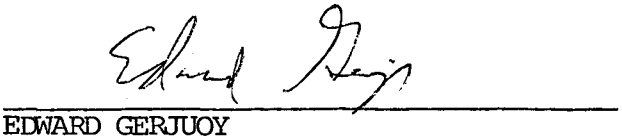
O R D E R

WHEREFORE, it is ordered that:

1. Appellant bears the burden of proving by clear and convincing evidence that the pollution existing in the vicinity of its hazardous waste disposal facility has been abated and that the source of that pollution no longer is present. This burden includes both the burden of production and the burden of persuasion and must be met by clear and convincing evidence.

2. DER retains the ultimate burden of proof, i.e., production and persuasion, with regard to the issue of whether its actions were an abuse of discretion or an otherwise arbitrary exercise of its duties and functions, to the extent that this issue remains in dispute after resolution of the factual issue described in paragraph 1, supra.

ENVIRONMENTAL HEARING BOARD



EDWARD GERJUOY
Member

DATED: June 18, 1985

cc: Bureau of Litigation
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KEYSTONE MINING COMPANY, INC. :

:

Docket No. 83-241-G

:

Issued: June 19, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION FOR SUMMARY JUDGMENT

SYNOPSIS

Summary judgment is granted for DER in this appeal of a surface mining license denial. The appeal is not moot although the year for which the license was requested has passed. The operator intends to continue to conduct coal mining operations within the Commonwealth; therefore, this DER action is of the type which is capable of repetition yet would evade review if the normal principles of mootness were applied to the appeal.

DER properly exercised its duties and functions when it denied the mining license. Pursuant to section 3.1 of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.3a, DER must deny the license if it finds that the applicant has demonstrated a lack of ability or intention to comply with the Act as indicated by past or continuing violations. The appellant herein admitted that it had previously mined a site, as a subcontractor, which it subsequently agreed to reclaim. It also admitted that the site has not been reclaimed to date. Consequently, DER did not

abuse its discretion in determining that Appellant has shown a lack of ability or intention to comply with the Act. Having previously mined the site, Appellant was under an obligation to reclaim the same. The failure to do so constitutes a violation of the Act itself, as well as a breach of the agreement which it entered into with DER. Therefore, there remains no disputed issue of material fact and DER is entitled to judgment as a matter of law. The appeal is dismissed.

OPINION

History

Keystone has appealed DER's denial of Keystone's application for a 1983 surface mining operator's license. Although this denial now is technically moot, since surface mining license applications must be renewed yearly [25 Pa.Code §87.18], we nevertheless shall rule on this appeal because Keystone continues to express its intention to engage in surface mining operations [see Keystone's Reply to DER's Motion for Summary Judgment, filed July 23, 1984]. Thus Keystone may be expected to re-apply for a surface mining operator's license if we now were to dismiss this appeal as moot. In other words, this appeal falls squarely into the exception to the usual doctrine that a case becomes moot when the court cannot grant relief; under this exception "a case that is technically moot may be decided on its merits if it involves a question that is capable of repetition but is likely to evade review if the normal rules on mootness are applied." Al Hamilton Contracting Company v. DER, Docket No. 83-248-G (Opinion and Order, February 23, 1984). We note that Keystone's continued desire to engage in surface mining is the distinguishing fact between the instant appeal and the appeal of Paul C. Harman v. DER, Docket No. 82-121-M (Opinion and Order, October 26, 1984), which was dismissed for mootness.

DER's letter denying the license application, dated September 21, 1983, read (in pertinent part) as follows:

> The reasons upon which this license denial are based were discussed at your informal hearing. They include, but are not limited to, the following:
>
> 1. There are currently outstanding violations of the Surface Mining Act and Clean Streams Law at the Cal Smith site covered by MDP 38A77SM37 and MP 1494-6(c) and Amendments, which violations were created by Keystone Mining Company, Inc. ("Keystone") when it mined the site as a subcontractor for Cal Smith. The specific violations were identified in inspection reports, notices of violation or abatement orders and at the informal conference.
>
> 2. Joan Becker, who is an officer of Keystone, was an officer of Becker Coal Company, Inc. This association precludes the Department from issuing a surface mining license to Keystone, because there are outstanding violations against Blake Becker, Jr. and his wholly owned subsidiary - Becker Coal Co., Inc.
>
> 3. Keystone has failed to comply with the provisions of a letter agreement dated October 5, 1981, which it entered into with the Department concerning violations at the aforementioned Cal Smith site.
>
> 4. Keystone is the alter ego of Blake Becker and there are outstanding violations of law charged to Mr. Becker.
>
> 5. The combination of all the foregoing indicates to the Department that Keystone is either unable or unwilling to comply with the provisions of the Surface Mining Act and the Clean Streams Law.

The Surface Mining Conservation and Reclamation Act (the "Act"), 52 P.S. §1396.3a(b) states:

> (b) The department shall not issue any surface mining operator's license or permit or renew or amend any license or permit if it finds, after investigation, and an opportunity for an informal hearing that (1) the applicant has failed and continues to fail to comply with any provision of this act or of any of the acts repealed or amended hereby or (2) the applicant has

> shown a lack of ability or intention to comply with any provision of this act or of any of the acts repealed or amended hereby as indicated by past or continuing violations. Any person, partnership, association or corporation which has engaged in unlawful conduct as defined in section 18.6 or which has a partner, associate, officer, parent corporation, subsidiary corporation, contractor or subcontractor which has engaged in such unlawful conduct shall be denied any license or permit required by this act unless the license or permit application demonstrates that the unlawful conduct is being corrected to the satisfaction of the department.

On this basis, together with the reasons for license denial listed supra, DER filed a motion for summary judgment on May 23, 1984. Keystone's response to this motion "denied that any alleged violations are properly chargeable to Keystone under the facts of this case." DER's motion did not point to any admissions by Keystone that might contradict its denial of "alleged violation properly chargeable to Keystone." Indeed DER's motion was not accompanied by any evidence in support of the motion, other than an affidavit by a DER District Compliance Specialist, to the effect that the averments of the motion were true and correct "to the best of the affiant's knowledge, information and belief." Keystone's Reply to DER's motion denied most of the allegations in DER's motion, and was accompanied by an affidavit by one Wayne Dougherty, affirming that the averments in Keystone's Reply were "true and correct or satisfactorily proven to the best of his knowledge and belief." Therefore the Board denied the motion, on November 2, 1984.

Thereafter DER has served requests for admissions on Keystone, and Keystone's answers thereto have been filed. With these admissions in hand, DER on March 8, 1985 has renewed its motion for summary judgment. As of this writing, April 24, 1985, Keystone has not responded to this renewed motion, although our

Pre-Hearing Orders Nos. 1 and 2 clearly require that responses to motions be filed within twenty days of receipt. In fact, Pre-Hearing Order No. 2 states:

> 3. Any party desiring to respond to a petition or motion filed by another party must do so within 20 days of receipt of the petition or motion being responded to. 1 Pa.Code §35.179. THE BOARD WILL NOT NOTIFY THE PARTIES THAT A RESPONSE MAY BE DUE. (Upper case in the original)

In view of the circumstances just recounted, we deem waived Keystone's opportunity to respond to DER's renewed motion for summary judgment. Consequently we proceed to rule on DER's motion. However, we will give due consideration to Keystone's reply to DER's original motion for summary judgment, where such reply is not inconsistent with Keystone's later-filed answers to DER's requests for admissions.

Keystone's Admissions

DER's renewed motion for summary judgment rests primarily on its claim that Keystone failed to comply with the provisions of an October 5, 1981 letter agreement between Keystone and DER (see paragraph 3 of DER's originally offered reasons for the license denial, quoted supra). This agreement was incorporated in a letter from DER's Compliance Specialist John Matviya to "Frederick V. Hudach, President Mine Reclamation and Land Development Corporation and Keystone Mining Co., Inc." The letter, in substantial entirety, reads as follows:

> Dear Mr. Hudach:
>
> I have received a letter dated September 29, 1981, from your attorney, William L. Henry. In it, Mr. Henry stated that you were making a commitment to a certain schedule for reclaiming the Calvin Smith mining sites and for correcting the violations cited against Calvin Smith. In order that there be no misunderstanding as to your commitments I am restating them below. I have exchanged dates for seasons of the year so that the deadline is clear and also complies with the regulations.

Keystone Mining Company, Inc. and/or Mine Reclamation and Land Development Corporation will undertake the following by the dates specified:

1. By November 15, 1981, install and maintain adequate erosion and sedimentation controls, in accordance with Chapter 102 of the Rules and Regulations, 25 PA Code Chapter 102, on the north, west and south sides of Mining Permit #1494-3 & 1494-3(A), (the Lawrence Smith property).

2. By June 1, 1982, install and maintain adequate erosion and sedimentation controls, in accordance with Chapter 102 of the Rules and Regulations, 25 PA Code Chapter 102, on the east side of Mining Permit #1494-3 and 1494-3(A).

3. By June 1, 1982, commence backfilling and reclamation of Mining Permit #1494-3 and 1494-3(A).

4. By September 15, 1982, complete reclamation, including backfilling, grading, restoration and revegetation, with drainage controlled, on Mining Permit #1494-3 and 1494-3(A).

5. By May 15, 1982, complete the revegetation of the Vivian L. & Robert M. Scott and Marlin Mohney properties on Mining Permit #1494-6.

6. By May 15, 1982, complete reclamation, including backfilling, grading, restoration and revegetation, with drainage controlled, on the Vivian L. & Robert M. Scott and Marlin Mohney properties on Mining Permit #1494-6.

7. By September 15, 1982, complete reclamation, including backfilling, grading, restoration and revegetation, with drainage controlled, on the Eugene Reed property on Mining Permit #1494-6.

8. By September 15, 1982, complete reclamation, including backfilling, grading, restoration, and revegetation, with drainage controlled, on the Ralph Smith property on Mining Permit #1494-38A77SM37-01-5.

9. During the time covered by this letter agreement, all laws, rules and regulation of this Department, and all conditions of the above referenced Mine Drainage Permits, will be complied with except as specifically extended by the above compliance deadlines.

> I would like your signature and that of your attorney, concurring with the above commitments. Upon the signing of this letter, and the receipt of the $50.00 per acre reclamation fee, Mining Permit #1494-38A77SM37-01-5 will be issued to Calvin-Smith. Please remember that all erosion controls and treatment facilities must be installed and approved by the Mine Conservation Inspector before mining commences.
>
> If the above is acceptable to you, please sign below. If not, notify me immediately.

The letter was signed, underneath Mr. Matviya's signature, by Joan Becker, Secretary, for the Keystone Mining Company and for the Mine Reclamation and Land Development Corporation. The letter also was "Approved as to form and legality" by William L. Henry, identified as "Attorney for Keystone Mining Company, Inc. and Mine Reclamation and Land Development Corporation."

DER's Request for Admissions No. 1 reads "Will the Appellant admit that it executed a Letter-Agreement with the Department, attached hereto as Appendix A?" Appendix A is the above-quoted letter from Matviya to Hudach. Keystone's reply to this requested admission reads:

> 1. Appellant Keystone Mining Company admits that it executed agreements with the Department. The document attached as Appendix "A" does not represent the entire agreement, referring on its face to a letter dated September 29, 1981 from Attorney William L. Henry, who represented Keystone Mining Company, Inc. and Mine Reclamation and Land Development Corporation. Said letter of September 29, 1981 is attached as Appendix A-1, and itself refers to other agreements the terms of which have been previously set forth in Appellant's Pre-Hearing Memorandum.
>
> The signature of Joan Becker, signing as Secretary, and of William L. Henry, Attorney, for both Keystone and MRLDC, are admitted to be genuine, and Appendix "A" is a true and correct copy of the original which Appellants are willing to have admitted into evidence, along with Appendix A-1 and related correspondence without necessity for further proof.

> Appellant does not hereby intend to waive objection as to the legality of the agreement, the mutual mistake of fact and/or law under which it was executed, the failure or lack of consideration for the agreement, or any claim of antecedent breach or anticipatory repudiation by the Department with respect to the agreement of the parties as set forth elsewhere in these proceedings and related proceedings.

The letter of September 29, 1981, referred to in the above quote, was written by William L. Henry to Mr. Matviya. This letter sets forth a somewhat less detailed reclamation schedule than does Mr. Matviya's October 5, 1981 letter in response, quoted supra; our reading of the September 29, 1981 letter discerns no references to "other agreements". The contents and construction of the September 29, 1981 letter are irrelevant however. The October 5, 1981 letter clearly is an integrated agreement on its face. Mr. Matviya carefully wrote, "In order that there be no misunderstanding as to your commitments I am restating them below." Keystone has admitted that the October 5, 1981 letter agreement was signed by a responsible Keystone officer and by Keystone's attorney. The letter was signed without any written reservations. Mr. Matviya's letter is quite free from ambiguities which the September 29, 1981 letter might be called upon to resolve; indeed, Keystone's Admission No. 1 does not claim the October 5, 1981 letter agreement is ambiguous in any way. In short, under standard contract law principles the prior September 29, 1981 letter has no bearing whatsoever on the nature of the agreement between the parties memorialized by the later October 5, 1981 letter.

DER's remaining requests for admissions mainly are concerned with Keystone's performance of the scheduled tasks set forth in the October 5, 1981 agreement. In particular Keystone has admitted that it has not met the requirements 4-7 of that agreement, quoted supra. Indeed, Keystone admits that "Mining

Permit Nos. 1494-3 and 1491-3(A) remain unreclaimed, in that the site has not been completely backfilled, graded and revegetated." Similarly, Keystone admits that "complete reclamation of the Eugene Reed property, Mining Permit No. 1494-6, has not been accomplished to date [February 25, 1985, when Keystone's admissions were filed]."

The License Refusal

Paragraph 1 of DER's September 21, 1983 letter to Keystone, denying the license renewal, alleges "There are currently outstanding violations of the Surface Mining Act and Clean Streams Law at the Cal Smith site . . . , which violations were created by Keystone . . . when it mined the site as a subcontractor for Cal Smith."

There is no doubt that under the Surface Mining Act any person who engages in surface mining is in violation if he fails to properly reclaim land he has affected by such mining. 52 P.S. §§1396.4(a)(2) and 1396.24; 25 Pa.Code §86.13. The record before us establishes that Keystone fits this description.

In paragraph 2 of its pre-hearing memorandum Keystone admits that:

> Keystone Mining Company . . . previously conducted mining operations as a subcontractor to Calvin Smith Coal Company on a single site in Jefferson County, Pennsylvania, Mining Permit No. 1494-6 and 1494-6A known as the Scott, Mohney and Reed properties.

Since all documents filed with the Board are subject to the execution and verification requirements of 1 Pa.Code §§33.11 and 33.12, it is appropriate for us to consider the statement just quoted in evaluating whether there remains any "genuine issue of material fact" here. Pa.R.C.P. 1035(b). See also Lewis Alderfer v. DER, EHB Docket No. 82-038-M (Opinion and Order issued January 20, 1984).

Keystone admits it mined the property covered by Mining Permit 1494-6; therefore, it has the obligation to reclaim the same by virtue of the Surface Mining Act itself. In addition, Keystone agreed, in paragraphs 5, 6 and 7 of the agreement of October 3, 1981 to assume the obligation of reclaiming that property. As noted above, Keystone admits that the area covered by Permit No. 1494-6, known as the Eugene Reed property, remains unreclaimed to date. Thus, it is clear that Keystone has failed and continues to fail to comply with the Surface Mining Act as well as with the terms of the agreement. Consequently, there remains no material factual dispute here.

This matter is therefore reduced to a single legal issue, i.e., whether, given the established lack of compliance, DER properly exercised its duties and functions in denying Keystone its 1983 surface mining license. Paragraph 5 of the denial letter appealed herein, quoted supra, states that DER has concluded that Keystone is either unable or unwilling to comply with the Surface Mining Act. This conclusion is based in part upon the finding that Keystone has failed to complete reclamation in accordance with the terms of the October 3, 1981 agreement. Under §1396.3a(b), the lack of ability or intention to comply must be established by "past or continuing violations."

It is established that Keystone in fact mined the site covered by Permit No. 1494-6 and failed to reclaim the same; therefore, there is no question that Keystone is in violation of the Act. The fact that such mining was conducted in the capacity of a subcontractor is immaterial. A subcontractor is jointly and severally liable with its principal for violations of the Surface Mining Act. Black Fox Mining and Development Corporation v. DER, EHB Docket No. 84-114-G (Adjudication issued April 29, 1985). As we noted in that decision, section 3 of the Surface Mining Act, 52 P.S. §1396.3, indicates a clear legislative

intention to hold all parties who have engaged in surface mining operations liable for any violations which occur as a result of those operations. Section 3 provides in pertinent part that "where more than one person is engaged in surface mining activities in a single operation, they shall be deemed jointly and severally liable for compliance with the provisions of this Act." Section 3 defines a "person" as, inter alia, "any natural person, partnership, association or corporation", a definition within which Keystone clearly falls. Keystone's continued failure to reclaim lands which it itself has mined is sufficient cause for DER to determine that it has demonstrated a lack of ability or intention to comply with the Surface Mining Act. (Indeed, this failure now has persisted for two and one half years.) Therefore, DER is entitled to judgment herein as a matter of law.

Having determined that Keystone's failure to complete reclamation of land which it previously had mined constitutes a violation of the Surface Mining Act for which DER may properly deny a surface mining license, we need not decide whether Keystone's admitted failure to comply with the terms of the agreement of October 3, 1981 concerning reclamation of those same lands likewise would amount to a violation of the Act, on the basis of which DER could rest a license denial.

O R D E R

WHEREFORE, this 19th day of June, 1985, it is ordered that DER's Motion for Summary Judgment is granted and this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo Jr.

ANTHONY J. MAZULLO, JR., Member

Edward Gerjuoy

EDWARD GERJUOY, Member

DATED: June 19, 1985

cc: Bureau of Litigation
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Allan E. MacLeod, Esquire, Coraopolis, for Appellant

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PENNSYLVANIA MINES CORPORATION :

:

: Docket No. 84-282-G
: Issued: June 20, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

SYNOPSIS

25 Pa.Code §21.101(d) does not shift the burden of proof, i.e. the burden of persuasion, to the Appellant in this appeal of a DER order. The order at issue concerns safety practices in Appellant's deep mine. It is not an order "requiring abatement of alleged environmental damage," such as would be required to trigger the operation of §21.101(d). Appellant bears the burden of persuasion on any affirmative defenses which it raises.

OPINION

Pennsylvania Mines (hereinafter "PaM") has timely appealed a DER order concerning PaM's mining and ventilation practices in its Greenwich Nos. 1 and 2 mines. The pertinent terms of this order are:

> 1. Effective immediately you will put into effect and enforce the following system of mining: The return side of all working sections will be advanced first, driving two entries and making the air connection (cut thro) between them, you will be

> permitted in case of bolting problems to mine 20 feet out of the third entry while numbers 1 and 2 are being bolted, this system will be strictly enforced at all times.
>
> 2. Starting at once you will establish and put into effect a ventilationg (sic) plan for existing and future development of mains, sub-mains and butt entries with two splits of air in each, using the outside entries as returns.
>
> 3. Starting at once you will provide a minimum quantity of air of 20,000 CFM for all longwall face ventilation panels.
>
> 4. Stoppings between intake and return entries shall be erected of solid concrete blocks set in cement, in addition, serious consideration shall be given to spraying these overcasts and stoppings to reduce leakage.
>
> 5. Cavities along track entries, belt entries and supply roads shall be ventilated by installing pipe up into the cavity and be vented directly into the return air course.

The order was issued after an investigation by DER; according to DER, the order was necessitated by the failure of PaM's present mining practices to control methane accumulation.

This Opinion addresses the question: Who has the burden of proof in this appeal? Under the Board's rules, 25 Pa.Code §21.101(b)(3), DER has the burden of proof:

> where it orders a party to take affirmative action to abate air or water pollution; or any other condition or nuisance, except as otherwise provided in this rule.

PaM has been ordered to take affirmative action, in this case to abate allegedly hazardous methane accumulations. Therefore the Board, on December 20, 1984, issued an Order stating (in pertinent part): "In this appeal, DER will have the burden of proof and the burden of going forward, unless DER can convince the

Board to rule otherwise." DER has attempted to convince the Board to rule otherwise, via a brief to which PaM has responded. Therefore this burden of proof question now is ready for decision.

DER advances the following reasons for assigning the burden of proof to PaM: (a) in this appeal, 25 Pa.Code §21.101(d), which provides an exception to §21.101(b)(3) quoted supra, is applicable, especially in view of 25 Pa.Code §21.101(a); (b) the presumption of validity which attaches to actions of DER and the presumption that the Legislature favors the public interest against private interests imply PaM should be assigned the burden of proof. We are not convinced by these arguments, however, as elaborated below.

The text of 25 Pa.Code §21.101(d) is:

> (d) Where the Department issues an order requiring abatement of alleged environmental damage, the private party shall nonetheless bear the burden of proof and the burden of proceeding when it appears that the Department has initially established:
>
> (1) that some degree of pollution or environmental damage is taking place, or is likely to take place, even if it is not established to the degree that a prima facie case is made that a law or regulation is being violated; and
>
> (2) that the party alleged to be responsible for the environmental damage is in possession of the facts relating to such environmental damage or should be in possession of them.

The language of §21.101(d) clearly limits its application to appeals "Where the Department issues an order requiring abatement of alleged environmental damage." The instant appealed-from DER order is intended to abate a work-place hazard, not environmental damage. Thus §21.101(d) is inapplicable on its face. Moreover, in Leon E. Kocher v. DER, 1972 EHB 161, the Board assigned the burden of proof to DER where DER had issued an order to repair water impoundments found to be hazardous. Although Kocher admittedly is one of the Board's earliest adjudications, its

reasoning about the burden of proof when DER seeks to abate a hazardous condition seems sound and was accepted by the Commonwealth Court [9 Pa.Cmwlth. 110, 305 A.2d 784 (1973)].

As for 25 Pa.Code §21.101(a), it reads as follows:

> (a) In proceedings before the Board the burden of proceeding and the burden of proof shall be the same as at common law in that such burden shall normally rest with the party asserting the affirmative of any issue. It shall generally be the burden of the party asserting the affirmative of the issue to establish it by a preponderance of the evidence. In cases where a party has the burden of proof to establish his case by a preponderance of the evidence, the Board may nonetheless require the other party to assume the burden of going forward with the evidence in whole or in part if that party is in possession of facts or should have knowledge of facts relevant to the issue.

Thus, as PaM argues, §21.101(a) cannot justify more than shifting the burden of going forward to PaM; under §21.101(a) the burden of persuasion--which is the burden DER wants shifted to PaM--remains with DER, "the party asserting the affirmative" order in this appeal. Nor can the presumptions DER cites, namely of validity and of favoring the public over private interests, shift the burden of persuasion, for reasons amply discussed in W. P. Stahlman Coal Co. v. DER, Docket No. 83-301-G (Opinion and Order, April 29, 1985).

DER also argues as follows:

> In the alternative, if §21.101(d) were not found to be applicable, under 25 P.S. §21.101(b)(3), the Department would have the burden of proof in the instant appeal, to show (1) that Pennsylvania Mines' mining and ventilation practices and procedures were in violation of the Act, or were unsafe practices, and (2) the required mining and ventilation practices and procedures were safe. Bethlehem Mines Corporation v. DER, EHB No. 82-067-G, Opinion and Order Sur Motion for Summary Judgment at pages 8-9, February 16, 1983. Once these were

> established the burden would shift to Pennsylvania Mines to show that the mining and ventilation practices and procedures required by the Department would not promote the health, safety, and welfare of the workers or would be unreasonable.

However, this statement, though in large measure a correct statement of legal principles governing this appeal, does not imply (as DER apparently feels is implied) that the burden of persuasion in this appeal shifts to PaM once DER has met the initial burdens (1) and (2) listed in the quotation. Under 25 Pa. Code §21.101(b)(3) and under established precedent, DER has the burden of showing that the order it issued was within DER's discretion. Warren Sand and Gravel Company, Inc. v. DER, 20 Pa.Cmwlth. 186, 341 A.2d 556 (1975). To meet this burden, DER certainly must show the items (1) and (2) listed in the above quotation, although we would have preferred to write: (2) the order's required mining and ventilation practices will provide safe operation. Bethlehem Mines Corporation v. DER, Docket No. 82-067-G, 1983 EHB 296 at 304 (Opinion and Order, February 16, 1983). PaM may try to counter DER's showing of the aforesaid items (1) and (2) with various affirmative defenses, wherein PaM bears the burden of persuasion. However, the fact that PaM bears the burden in its affirmative defenses does not shift the ultimate burden of proof in this appeal. It still is DER's burden to show it did not abuse its discretion; it is not PaM's burden to show DER did abuse its discretion. However, the burden we have placed on DER does not mean that DER must show its order quoted supra is the only or best means of ensuring safe mine operations. Bethlehem Mines, supra; see also Coolspring Township v. DER, Docket No. 81-134-G, 1983 EHB 151 at 173 (Adjudication, August 8, 1983).

O R D E R

WHEREFORE, the Board's December 20, 1984 Order, that DER will have the burden of proof and the burden of going forward in this appeal, is affirmed.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: June 20, 1985

cc: Bureau of Litigation
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MARTIN L. BEARER, d/b/a
NORTH CAMBRIA FUEL COMPANY :

:

: Docket No. 83-091-G
: Issued: July 18, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and THOMAS AND TAMMY RIETSCHA, Intervenors

OPINION AND ORDER

SYNOPSIS

Res judicata and collateral estoppel do not apply to preclude litigation of issues concerning an order of the Department of Environmental Resources (DER) requiring Appellants to take certain actions concerning their alleged degradation of water supplies. An adjudication by the federal Office of Hearings and Appeals on a civil penalty assessment issued by the federal Office of Surface Mining (OSM) regarding a portion of the alleged water supply degradation problem has no preclusive effect here since OSM and DER are not in privity with one another.

A prior, unappealed DER order is final and therefore not subject to challenge in this subsequent proceeding. The findings of said order are considered established for the purposes of this matter.

OPINION

Appellant (hereinafter "NCF") has appealed a DER order requiring NCF to restore the water supplies of a number of residents in the vicinity of NCF's surface mining operation in Pine Township, Indiana County. DER's order found that the wells serving these residents had been "contaminated and degraded" by NCF's surface mining operations. Extensive hearings on the merits of this appeal have been held, and are scheduled to resume (on September 23, 1985). Therefore this matter normally would not yet be considered ripe for adjudication. NCF has raised a purely legal issue which can be decided now, however, and which could be dispositive of this appeal. In particular, NCF argues that an adjudication filed on August 13, 1982 by the Office of Surface Mining ("OSM") requires this Board to adjudicate this appeal in favor of NCF, on grounds of issue preclusion. This issue preclusion claim is the main subject of this Opinion. But we also examine DER's claim that an unappealed DER order to NCF, dated June 25, 1981, precludes NCF from challenging some of DER's contentions in the instant appeal.

Preclusive Effect of OSM Adjudication

The adjudication was issued by Administrative Law Judge Sheldon L. Shepherd, of the Interior Department's Office of Hearings and Appeals (OHA), after a full hearing on the merits of NCF's appeal of an OSM civil penalty assessment. OSM had assessed the civil penalty because NCF had not replaced the water supply of Mr. and Mrs. Douglas Watterson; after an inspection by OSM's Mr. Yacovone, the OSM had found that NCF's surface mining operations had deleteriously affected the Wattersons' well during 1980 and 1981. According to Judge Shepherd's summary of the testimony, Mrs. Watterson testified that, beginning

in November 1980, the water in her well had diminished in quantity and quality. Other residents in the area, notably Mary Simo and Judy Yarnell, testified that their wells had been adversely affected as well. Nevertheless, Judge Shepherd sustained NCF's appeal of the OSM civil penalty assessment. His findings and rulings, in toto, were as follows:

> In a penalty assessment case such as this the respondent has the burden of going forward to establish a prima facie case and the ultimate burden of persuasion as to the fact of violation and the amount of the penalty (43 CFR 4.1155). In the instant case a prima facie case was established by the respondent by the testimony of Mrs. Watterson, Mrs. Yarnell and Mrs. Simo along with OSM Exhibit 5 and the testimony of Mr. Yacavone.
>
> However, upon examining the documentary evidence in this case and considering the testimony of the witnesses, I feel compelled to conclude that the respondent did not carry the ultimate burden of persuasion as to the fact of violation. The respondent did not overcome the evidence of the petitioner which included the extensive investigation conducted under the supervision of Mr. Noll along with the evidence by the petitioner's witnesses of the shortcomings in the water analysis by the respondent and the persuasive testimony of Mr. Wilson who had three decades of experience drilling and servicing wells who testified that the iron encountered in the Watterson well and the other wells was not unusual and that most wells need servicing.
>
> Furthermore, it would seem to me that, if there was a significant amount of water movement from the regional aquifer through the aquitard, there would not have been the kind of failure complained of in late 1980 and early 1981 in the Watterson well. In substance I find that the evidence of the respondent establishes mere possibilities or "could bes" rather than overcoming the burden placed upon the respondent by the evidence of the petitioner.

Under recent precedent, an adjudication by one administrative tribunal (in this case OHA) can have binding effect on adjudications by a second administrative tribunal (here the EHB). Restatement Judgments 2d, §83. However, for reasons explained infra, we cannot agree with NCF that the above-quoted language suffices to

preclude DER from issuing the order presently appealed-from, i.e., suffices to require that we sustain the instant appeal. In the first place, DER was not a party in the OHA hearing which led to Judge Shepherd's adjudication. Therefore, as NCF recognizes, in order for Judge Shepherd's adjudication to have a binding res judicata effect in the instant appeal, DER and OSM must be regarded as being "in privity". Thompson v. Karastan Rug Mills, 228 Pa.Super. 260, 323 A.2d 341 (1974). The standard tests for privity for res judicata purposes require some mutual or successive relationship to a right of property, title or estate. Central Pennsylvania Lumber Co. v. Carter, 348 Pa. 429, 35 A.2d 282 (1944); Estate of William Flinn, 479 Pa. 312, 388 A.2d 672 (1978). Obviously there is no such relationship between OSM and DER.

NCF argues, however, that under recent federal court holdings there is privity for purposes of res judicata if there is "a sufficiently close relationship between parties to the first proceeding and parties to the second proceeding." NCF further argues that the necessary "close relationship" between DER and OSM does exist because under the Federal Surface Mining Control and Reclamation Act ("FSMCRA"), 30 USC §§1201 et seq., OSM has primary jurisdiction over surface mining regulation; consequently, according to NCF, DER's authority to regulate surface mining, and therefore to issue its appealed-from order to NCF under state statutes,--namely the Pa. Surface Mining Conservation and Reclamation Act ("SMA"), 52 P.S. §§1396.1 et seq., and the Clean Streams Law, 35 P.S. §§691.1 et seq.--stems solely from the federal government's delegation to Pennsylvania of the aforesaid primary jurisdiction to regulate surface mining.

We are not convinced by these arguments. Not one of NCF's numerous cited cases holds that a state agency like DER can be in privity with a federal agency like OSM. Under our federal system of government, the United States and the Commonwealth of Pennsylvania are independently sovereign entities. NCF points to no

statutory provision or memorandum of understanding which implies that OSM (in its prior civil penalty action) was acting on behalf of DER and could bind DER by its results. As DER argues, in the instant appeal DER is attempting to enforce Pennsylvania Law, not federal law [see Ralph Bloom v. DER, EHB Docket No. 84-145-G (Adjudication, February 20, 1985)]; this basic fact is not vitiated by the additional fact that OSM is willing to defer its enforcement of the FSMCRA provided DER properly enforces the SMA.

We conclude that DER and OSM are not in privity for res judicata purposes. For the same reason, namely lack of privity, issues litigated in the OSM hearing before Judge Shepherd are not precluded from relitigation in this appeal by NCF of a DER action.[1] Moreover, even if DER and OSM were in privity, application of res judicata and/or collateral estoppel principles still would be unjustified because the issues in the instant appeal are not identical with the issues litigated in the previous OHA appeal.

The OHA action was concerned solely with the propriety of OSM's civil penalty assessment against NCF for degradation of the Watterson well during 1980 and 1981. The instant appealed-from DER order requires NCF to replace seven residential water supplies; these seven wells allegedly affected by NCF's mining activities include the Watterson well, but also include the wells serving the residences of Thomas Rietscha, Michael Bugal, Edward Beilchick, Dwight Yarnell,

---

1. It is true that for purposes of collateral estoppel it is not absolutely necessary that there be privity between the parties in the first and second actions. Thus if NCF had been found responsible for the Watterson well's degradation in the original OHA hearing, it is possible that collateral estoppel would preclude NCF's arguing in the instant appeal that it is not responsible for the same well's degradation. However, the actual holding in the OHA adjudication does not permit "offensive" use of collateral estoppel against NCF, and the lack of privity between OSM and DER prevents NCF from using against DER the favorable holdings NCF obtained against OSM. See Restatement Judgments, 2d, §29.

Richard Simo and Merle Lydic. Judge Shepherd's findings and rulings (quoted supra) that NCF had not been proven responsible for degradation of the Watterson well are far too indefinite for extrapolation to NCF's responsibility for the degradation (alleged by DER) of the other six residential wells in the area.

Furthermore, even for the Watterson well the issues involved in the OHA action and the instant appeal are not obviously the same. The appealed-from DER order finds that NCF's mining operations contaminated and degraded the Watterson well (along with the other six residential wells) "on or about March 1983." Because our hearings are de novo [Warren Sand and Gravel Co. v. DER, 20 Pa.Cmwlth. 186, 341 A.2d 556 (1975)], and because DER obviously could renew its order at any time so as to make the order's findings more current, we take our obligation in this appeal to be that we must decide whether--on all the evidence before us, including evidence developed after March 1983--DER's requirement that NCF replace the Watterson well (and the other six water supplies) is an abuse of discretion. DER already has placed in evidence analyses of water samples taken from the Watterson well as late as October 24, 1984 [DER Exhibit 14-3]; NCF has done the same [NCF Exhibit 36(a)]. Whether NCF has caused degradation of the Watterson well in late 1984 is not the same question as whether NCF had degraded the Watterson well by 1981. In addition, NCF's own witness testified at the hearings in this appeal that the Watterson well was deepened in June-July of 1981, and that an aquifer presumably discharging into the Watterson well was plugged in February-March 1984 (N.T. 1418). Thus the basic geologic circumstances determining the water supply to the Watterson well are very different now than they were for most of the period 1980-81 that Judge Shepherd was examining.

In sum, use of the OHA adjudication for res judicata or collateral estoppel purposes cannot be justified, for any of the seven water supplies named in the appealed-from DER order which is the subject of this appeal.

Preclusive Effect of DER's June 25, 1981 Order

DER asserts, and NCF does not deny, that on June 25, 1981 DER issued an order to NCF containing the following findings:

> (a) Commencing on or about August 6, 1979, and continuing to the present, North Cambria Fuel Company ("North Cambria") has conducted a surface mining operation in Pine Township, Indiana County;
>
> (b) The mining operation is authorized by Mine Drainage Permit No. 39A78SM1 and Mining Permit No. 10-49, and Mining License No. 10.
>
> (c) As of January, 1981, the above-referenced mining operation diminished the rate of recharge of domestic water wells, causing a water loss at the residences of Mr. and Mrs. Douglas Watterson, Mr. and Mrs. Michael Bugal, Mr. and Mrs. Richard Simo, and Mr. and Mrs. Dwight Yarnell located in Pine Township, Indiana County, Pennsylvania.
>
> (d) The loss of these water supplies violates Section 4.2(f) of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, 52 P.S. §1396.1 et seq. ("Surface Mining Act") and constitutes unlawful conduct.

DER also asserts, and again NCF does not deny, that NCF never appealed this order. DER therefore maintains that the above findings are established for the purposes of the instant appeal, and cannot now be challeneged by NCF. NCF argues that because the foregoing findings were determined by DER without a hearing, and were never actually litigated between NCF and DER, those findings should be subject to challenge in the hearing on the merits of this appeal.

It is true that under the general rules for issue preclusion, the litigation of findings such as those just quoted should not be precluded in the instant

appeal unless they previously actually had been litigated. Restatement Judgments 2d, §27. Section 27 of the Restatement Judgments 2d also states quite unequivocally:

> In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. Therefore, the rule of this Section does not apply with respect to any issue in a subsequent action.

NCF's failure to appeal DER's June 25, 1981 order within the 30-day period allowed by our rules [25 Pa.Code §21.52(a)]--thereby permitting the order to become final under the holding of Rostosky v. DER, 26 Pa.Cmwlth. 478, 364 A.2d 761 (1976)--is quite analogous to permitting a default judgment.

On the other hand, this Board regularly has held that the findings in an unappealed order to a party are final and no longer challengeable in a timely appeal of a later order to the same party. Municipality of Bethel Park v. DER, Docket No. 83-067-G, 1984 EHB 716 (Opinion and Order, August 8, 1984); Armond Wazelle v. DER, Docket No. 83-063-G, 1984 EHB 748 (Opinion and Order, August 21, 1984). We see no reason to depart from such holdings at this time. Consequently we rule that the above-quoted findings in DER's June 25, 1981 order are established for the purposes of the instant appeal. We stress that this ruling says nothing about the validity of NCF's argument that DER should be estopped from putting these June 25, 1981 findings on the record. Estoppel defenses against DER are possible, but we are in no position to decide whether the estoppel NCF urges is warranted without additional testimony about the circumstances surrounding NCF's failure to appeal the June 25, 1981 order. Bear Creek Watershed Authority v. DER, Docket No. 84-242-G, 1984 EHB 837 (Opinion and Order, October 29, 1984). In this connection we add, for the parties' guidance, that (for reasons discussed earlier in this Opinion) the import to this appeal of findings "as of January, 1981" is unlikely to be more than minor.

O R D E R

WHEREFORE, this 18th day of July, 1985, it is ordered that:

1. Judge Shepherd's OHA adjudication of August 13, 1982 has no binding effect whatsoever on the issues or findings of this appeal.

2. The findings in DER's June 25, 1981 order to NCF are established for the purposes of this appeal; challenges to those findings will not be allowed.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: July 18, 1985

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SECHAN LIMESTONE INDUSTRIES, INC. :

:

Docket No. 85-162-G

:

Issued July 24, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and SLIPPERY ROCK CREEK CLEAN WATER, INC.,
Intervenor
and ARMCO, INC., Intervenor

OPINION AND ORDER
SUR MOTION FOR SUMMARY JUDGMENT

SYNOPSIS

The 1984 amendments to the federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6901 et seq., do not preempt the authority of the Commonwealth of Pennsylvania to require the submission of a Part B application for a hazardous waste permit under the Pennsylvania Solid Waste Management Act, 35 P.S. §6018.101 et seq., as implemented via 25 Pa.Code §75.265(z). The federal provisions apply only to RCRA permit requirements. The requirements of §75.265(z) are prerequisites to obtaining a permit under state law. However, summary judgment is not granted at this time; the parties have not had an opportunity to address the issue of whether §75.265(z) requires DER to terminate interim status once it has been determined that an operator of a hazardous waste management facility has failed to submit the Part B application required by §75.265(z).

OPINION

This appeal concerns three actions taken by the Pennsylvania Department of Environmental Resources ("DER") affecting a hazardous waste landfill operated by Appellant, Sechan Limestone Industries ("Sechan"). By a letter dated April 24, 1985 and an order of April 29, 1985, DER suspended Sechan's Solid Waste Permit, terminated Sechan's "interim status", and ordered the cessation of waste disposal activities in a particular area of the landfill known as the C-1 cell. This opinion discusses DER's authority to terminate Sechan's interim status. Interim status is granted to allow an existing hazardous waste management facility to continue to operate while its application for a permit is being considered. Provisions allowing a grant of interim status exist under both the state and the federal regulatory programs dealing with hazardous waste management. DER has filed a motion for summary judgment seeking a ruling that it had the authority as a matter of law to terminate Sechan's interim status. Sechan has argued that DER's authority to terminate interim status has been preempted by certain amendments to the federal Resource Conservation and Recovery Act, 42 U.S.C. §6901 et seq., the Hazardous and Solid Waste Amendments of 1984. Before proceeding to the merits of the parties' contentions, the relevant legal background must be set forth.

A. The Federal Regulatory Program

In 1976, Congress enacted the Resource Conservation and Recovery Act ("RCRA"). 42 U.S.C. §6901 et seq. Sections 6921 through 6929 of RCRA, as amended, deal exclusively with hazardous waste and establish nationally applicable minimum standards for its management. Under §6926 of the Act, a state may apply to the Environmental Protection Agency (EPA) for authorization to administer the state's own hazardous waste program in lieu of the federal program established by RCRA.

In order to receive authorization under §6926, the state program must be at least equivalent to the minimum federal requirements, not inconsistent with those requirements, and not inconsistent with hazardous waste management programs in other states. 42 U.S.C. §6926(b). Once EPA determines that these prerequisites have been met, the state will be granted "final authorization" to administer its program in the place of the RCRA program and EPA, in effect, will step out of the picture[1] 40 CFR, Part 271, Subpart A.

Interim Authorization

If at the time the RCRA requirements take effect, the state already has in effect a hazardous waste management program but the program cannot immediately qualify for final authorization, §6926(c) provides the state with an option whereby it may be granted temporary authority ("interim authorization") to carry out portions of its own program in lieu of the RCRA requirements if the evidence submitted by the state demonstrates the existing state program to be "substantially equivalent" to the federal requirements. Under the regulations promulgated pursuant to §6926 [40 CFR Part 271, see esp. §271.121(b)], interim authorization may be granted in two phases, Phase I and Phase II. Phase I allows the state to implement those portions of the federal program which establish preliminary, i.e., "interim", standards for hazardous waste treatment, storage, and disposal. (40 CFR, Part 265). Phase II allows the state to administer the permit program for hazardous waste treatment, storage and disposal facilities in lieu of the federal program. (40 CFR Parts 124, 264, and 270). Once a state has been granted interim authorization, either Phase I or Phase II, the state, rather than EPA, has the primary authority for enforcing the associated program requirements.

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[1] EPA retains oversight authority to ascertain that the state program continues to comply with the federal requirements. See 40 CFR §271.8.

It is important to understand what the two phases of interim authorization entail. With the enactment of RCRA, operators of hazardous waste facilities must obtain hazardous waste management permits which assure compliance with the RCRA requirements. Operation without a RCRA permit is prohibited. 42 U.S.C. §6925(a). Since this permit requirement meant that, in theory, hazardous waste facilities in existence on the effective date of RCRA would be without the necessary permit, and thus required to cease operations, §6925(e) of RCRA allows for continued operation, despite the lack of a permit, if the operator has filed a permit application and complied with the RCRA notification provisions (requiring notice to EPA of the nature of the facility's hazardous waste activities; 42 U.S.C. §6930). Compliance with the requirements of §6925(e) results in a grant of "interim status" until a final decision is made on the RCRA permit application. During the period of interim status, standards other than the final RCRA operational and design standards are imposed. These "interim status standards" are contained in 40 CFR, Part 265 and are the standards which a state granted Phase I interim authorization is empowered to administer. 40 CFR §271.121(b).

Once a state has been granted Phase II authorization it actually carries out the RCRA permit program in lieu of EPA, and the final RCRA operation and design standards are applicable. 40 CFR §271.121(b). These standards are found in 40 CFR, Part 264.

Interim Status

Under the regulations promulgated pursuant to RCRA, the RCRA permit application consists of two parts, Part A and Part B. 40 CFR §270.1(b). Part A consists of general information concerning the location, scope, and nature of the hazardous waste operation. Part B is considerably more detailed and requires information demonstrating how the facility will comply with the RCRA operational

and design standards contained in 40 CFR, Part 264. See, 40 CFR §§270.13 and 270.14. Operators of existing hazardous waste facilities may satisfy the requirement of 42 U.S.C. §6925(e) that a permit application be submitted, by submitting only Part A until such time as EPA requires the submission of Part B. Timely submission of Part A and compliance with the notification provisions of 42 U.S.C. §6930 result in a grant of interim status by EPA. 40 CFR §270.1(b).

B. The Pennsylvania Regulatory Program

The course of Pennsylvania's legislative actions concerning the management of hazardous waste parallels that of the federal law in many particulars. Prior to 1980, the management of solid waste within the Commonwealth was governed by the Solid Waste Management Act, the Act of July 31, 1968, P.L. 788, No. 241. This Act did not contain specific provisions for hazardous waste. In 1980, the Pennsylvania legislature repealed the 1968 Solid Waste Management Act and replaced it with a much more elaborate statute, the Solid Waste Management Act of 1980 ("SWMA"), 35 P.S. §6018.101 - §6018.1003. The 1980 Act required, for the first time, a hazardous waste permit for the operation of any hazardous waste management facility within the Commonwealth and made operation without such a permit unlawful. 35 P.S. §6018.401(a).

Interim Status

Since the imposition of the new permit requirement theoretically would have meant the cessation of all hazardous waste management activities within Pennsylvania until the new permits could be issued, a transition scheme similar to that set up under §6925(e) of RCRA was implemented. The provisions of this scheme are set forth at 25 Pa.Code §75.265(z). Pursuant to §75.265(z)(3), an existing hazardous waste disposal facility will be regarded as having "interim

status" if it 1) has a current solid waste permit,[2] 2) has complied with the SWMA notification requirements (requiring that DER be notified of the nature of the hazardous waste activities of the facility), 3) has submitted a Part A application for a hazardous waste permit, and 4) is in compliance with the operational and design standards of 25 Pa.Code §75.265 (the "interim status" standards). A facility which has been granted interim status may continue to operate although a permit under the 1980 SWMA has not yet been received. Eventually, however, a hazardous waste permit under the 1980 SWMA must be obtained. Interim status is designed simply to allow continued operation through the permit review period. 25 Pa.Code §75.265(z)(5).

Submittal of the Part A permit application, one of the prerequisites to obtaining interim status, is only an initial step in the permitting process. A Part B application also must be submitted. The purpose of the Part B application is to enable DER to compare the facility's design and operational standards with the requirements imposed under state law for such facilities, i.e. Pa.Code §75.264. See 25 Pa.Code § 75.265(z)(18) and (20), and §75.264(a)(1) and (2).

C. The Relationship between the State and Federal Programs

RCRA contemplates joint state and federal authority for the administration of the minimum requirements for hazardous waste management imposed by RCRA and its associated regulations. Emphasis is placed upon the transfer of the administrative function to the states. 42 U.S.C. §6902(a)(1); §6902(a)(7); §6926. Once EPA has granted the state authority to administer a portion of the RCRA program, EPA essentially steps out of the picture with respect to that particular

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[2] Under §6018.1001 of SWMA, all permits issued under the prior act "remain in full force and effect unless and until modified, amended, suspended or revoked." This savings clause, of course, does not obviate the need for a hazardous waste permit pursuant to §6018.401(a) of the Act. In the case of a hazardous waste disposal facility, it simply serves the purpose of enabling the facility to meet the first of the four prerequisites for interim status.

portion of the program. Thus, for example, once a state is granted Phase II interim authorization, and is allowed to administer the RCRA permit program, EPA will suspend the issuance of federal permits for those activities subject to the approved state program. 40 C.F.R. §271.121(f). Until the state is granted final authorization pursuant to §6926(b), however, there may be dual state and federal authority over the management of hazardous wastes within the state.

The possibility for dual state and federal regulation derives from the fact the RCRA does not preclude states from regulating the management of hazardous waste within their borders. It simply establishes minimum standards. Section 6929 of the Act expressly provides that:

> Upon the effective date of regulations under this subchapter [Subchapter C dealing with hazardous waste] no State or political subdivision may impose any requirements less stringent than those authorized under this subchapter respecting the same matter as governed by such regulations . . . Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements . . . which are more stringent than those imposed by such regulations.
> 42 U.S.C. §6929 (emphasis added).

In addition, 40 C.F.R. §271.1(i) provides in pertinent part:

> Nothing in this subpart [Subpart A dealing with Requirements for Final Authorization] precludes a state from:
>
> 1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this subpart;
>
> 2) Operating a program with a greater scope than that required under this subpart. Where an approved state program has a greater scope of coverage than required by federal law, the additional coverage is not part of the Federally approved program.

Given this possibility of simultaneous state and federal regulation, the operator of a hazardous waste management facility may have to comply with two sets of statutes and regulations, at least until such time as the state is granted

final authorization by EPA to carry out the RCRA program.[3] The obligation to comply with the state law is distinct from the obligation to comply with the requirements established under RCRA.

D. Pennsylvania's Authorization to Administer the Federal Program

The Pennsylvania hazardous waste management program under SWMA has been granted Phase I interim authorization by EPA. 46 Fed.Reg. 28161 (May 26, 1981). The practical effect of this action is that DER, rather than EPA, is responsible for carrying out certain portions of the RCRA regulatory program, most notably monitoring compliance with the interim status standards for existing hazardous waste management facilities established by 40 CFR, Part 265. See 40 CFR §271.121(b). The state standards which must be met by operators of existing hazardous waste management facilities granted interim status under state law pending DER action on a SWMA hazardous waste permit are contained in 25 Pa.Code §75.265. As the very numbering suggests, the state standards in 25 Pa.Code §75.265 reflect the federal standards contained in 40 CFR, Part 265. Thus, to this extent, i.e. the standards applied to interim status facilities under SWMA and under RCRA, the Pennsylvania and federal programs have been unified.[4]

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[3] The state provisions must be "consistent" with the federal requirements, however. 40 C.F.R. §271.4. In other words, the State cannot impose a requirement which can be satisfied only by violating federal requirements. Michigan Canners and Freezers Association, Inc. v. Agricultural Marketing and Bargaining Board, _____ U.S. _____, 104 S.Ct. 2518, 81 L.Ed.2d 399 (1984).

[4] Of course, Pennsylvania is free to impose additional, not inconsistent requirements upon hazardous waste facilitites operating under interim status. The federal program requirements do not relieve the facility from the obligation of complying with these additional state requirements. 40 CFR §270.1(b). Pennsylvania has in fact taken the opportunity to impose requirements which go further than those required by EPA. For example, under 25 Pa.Code §75.265(n), dealing with groundwater monitoring, DER makes no provision for waivers. The federal regulations do allow waivers under certain circumstances. See, e.g., 40 CFR §265.90(e).

Pennsylvania has not been granted Phase II interim authorization, or final authorization, and therefore cannot administer the RCRA permit program itself.[5] RCRA permits in Pennsylvania are still issued by EPA. Pennsylvania issues its own hazardous waste permits under SWMA. In other words, the state and federal permit programs have not been unified; two permits are required. When the state receives final authorization from EPA it is possible that only a single permit will be necessary--one which assures that the operation will comply with both the federal and the state requirements. Until that time, however, both EPA and DER regulate the management of hazardous waste within Pennsylvania.

E. DER's Authority to Terminate Sechan's Interim Status

Sechan was issued Solid Waste Permit #300705 in 1979 by DER pursuant to the Solid Waste Management Act of 1968. With the passage of the new Act in 1980, Sechan was required to obtain a hazardous waste permit under 35 P.S. §6018.401(a). Sechan complied with the provisions of 25 Pa.Code §75.265(z)(3) and was granted interim status; that is, Sechan was treated as if it had a SWMA hazardous waste permit during the permit application review period.[6]

In order for DER to complete review of a hazardous waste permit application, a Part B application must be submitted. Pursuant to 25 Pa.Code §75.265(z)(6), on March 17, 1983 DER issued a letter to Sechan requiring the submission of a Part B application to DER. It admits that its landfill cannot meet the design

---

[5]Pennsylvania is applying for authorization to administer the Phase II portions of the federal program as part of its application for final authorization under 42 U.S.C. §6926(b). It is anticipated that Pennsylvania will submit its application for final authorization by the end of July, 1985, and that final authorization will be granted by the end of the year. EPA has extended Pennsylvania's interim authorization period until January 31, 1986, in light of this schedule. 50 Fed.Reg.3347 (January 24, 1985).

[6]Apparently, EPA also granted Sechan's facility interim status pursuant to 42 U.S.C. §6925(e).

requirements set forth in 25 Pa.Code §75.264, which a facility must meet in order to be issued a SWMA hazardous waste permit.

25 Pa.Code §75.265(z)(7) provides that:

> Failure to furnish a requested Part A or Part B application on time, or to furnish in full the information required by the Part A or Part B application, shall be grounds for termination of interim status.

The issue presented here is whether, given Sechan's failure to submit a Part B application, DER had the authority to terminate Sechan's interim status pursuant to §75.265(z)(7). Sechan claims that DER lacks such authority.[7]

1. Construction of 1984 Federal Amendments to RCRA

Sechan's argument is premised upon the doctrine of federal preemption under the supremacy clause of the United States Constitution, Art.VI, §2. Sechan contends that by enacting certain amendments to RCRA in 1984 Congress intended to preempt state authority to terminate interim status for failure to submit a Part B application (such as the Part B application which DER required Sechan to submit) if the termination would occur prior to November 8, 1985. In support of this argument Sechan directs us to the following language of the 1984 amendments:

> (e) Interim status
> * * *
> (2) In the case of each land disposal facility which has been granted interim status under this subsection before November 8, 1984, interim status shall terminate on the date twelve months after November 8, 1984 unless the owner or operator of such facility--
>
> (A) applies for a final determination regarding the issuance of a permit under subsection (c) of this section for such facility before the date twelve months after November 8, 1984; and

---

[7]We remark that DER's March 17, 1983 action, requiring submission of a Part B application within six months, was appealable but was not appealed by Sechan. Therefore DER's discretion in imposing this requirement on Sechan is not subject to challenge in the instant proceedings.

(B) certifies that such facility is in compliance with all applicable groundwater monitoring and financial responsibility requirements.

42 U.S.C. §6925(e)(2).

Sechan would have us construe this language as a grant of an extension of time to hazardous waste facility operators for the submittal of their Part B applications. In other words, Sechan contends that the 1984 amendments to §6925(e)(2) create a "grace period" during which states are powerless to terminate interim status for failure to submit the Part B application. Sechan also relies upon the 1984 amendment to §6926(g) of RCRA which provides:

(g) Amendments made by 1984 act.

(1) Any requirement or prohibition which is applicable to the generation, transportation, treatment, storage or disposal of hazardous waste and which is imposed under this subchapter pursuant to the amendments made by the Hazardous and Solid Waste Amendments of 1984 shall take effect in each State having an interim or finally authorized state program on the same date as such requirement takes effect in other States. The Administrator shall carry out such requirement directly in such State unless the State program is finally authorized (or is granted interim authorization as provided in paragraph (2)) with respect to such requirement.

(2) Any State which, before November 8, 1984 has an existing hazardous waste program which has been granted interim or final authorization under this section may submit to the Administrator evidence that such existing program contains (or has been amended to include) any requirement which is substantially equivalent to a requirement referred to in paragraph (1) and may request interim authorization to carry out that requirement under this subchapter. The Administrator shall, if the evidence submitted shows the State requirement to be substantially equivalent to the requirement referred to in paragraph (1), grant an interim authorization to the State to carry out such requirement in lieu of direct administration in the State by the Administrator of such requirement.

42 U.S.C. §6926(g).

This provision, Sechan argues, indicates that Congress intended the changes in RCRA resulting from the 1984 amendments to be enforced by EPA, rather than by the state, until such time as the state receives authorization from the EPA administrator to put those changes into effect. Since the claimed "grace period" for submittal of Part B applications is a result of the 1984 amendments, Sechan contends that Pennsylvania cannot now require the submittal of a Part B application because it allegedly has not yet received authorization from EPA to implement the 1984 amendments to RCRA.

We find these arguments unconvincing. First, the plain language of §6925(e)(2) indicates that the provision should be construed as providing a date for the conclusion of interim status, i.e., a date by which existing hazardous waste management facilities must have obtained a RCRA permit or else cease operations. The section refers to the termination of interim status. No portions of the provision connote an extension of the period of time within which operators are to complete the permit application process. The sense conveyed is the creation of an end point, not of a grace period. Certainly §6925(e)(2) does not say--as it easily could have said had Congress had the intention Sechan postulates--that interim status cannot be terminated before November 8, 1985.

Our construction of §6925(e)(2) is consistent with the legislative intent underlying the 1984 amendments, particularly with regard to the interim status provisions of §6925 as they are applied to land disposal facilities. The 1984 amendments derive largely from H.R. 2867. The report of the House Committee on Energy and Commerce which accompanied the bill to the floor contains several references to the need for expediting the permit review process to assure that RCRA permits are in effect at the earliest date possible. Commenting upon the 1984 revisions affecting interim status, the Committee stated:

> The primary purposes . . . are . . . to expedite the final permit review of major land disposal and incineration facilities and close those facilities that cannot or will not meet the final standards at the earliest possible date. The Committee is dissatisfied with the pace projected by EPA to complete the permit review process for hazardous waste facilities. (emphasis added.)
>
> H.R.Rep. No. 198, 98th Cong., 2nd Sess. 44-45 reprinted in 1984 U.S.Code Cong. & Ad. News 5603-04.

The Committee repeatedly made clear its concern with the problems associated with land disposal methods. Indeed, the 1984 amendments added the following "Congressional findings":

> Certain classes of land disposal facilities are not capable of assuring long-term containment of certain hazardous wastes, and to avoid substantial risk to human health and the environment, reliance on land disposal should be minimized or eliminated, and land disposal, particularly landfill and surface impoundment, should be the least favored method for managing hazardous wastes . . .
>
> 42 U.S.C. §6901(b)(7)

Not until permit applications are complete can the facility be measured against the standards established under RCRA in 40 CFR, Part 264 to determine its ability to effectively and safely handle hazardous substances. The Committee noted that "a large number of hazardous waste management facilities currently operating under interim status standards can present significant human health and environmental problems" and concluded by stating that it "intends to convey a clear and unambiguous message to the regulated community and the Environmental Protection Agency: reliance on land disposal of hazardous waste has resulted in an unacceptable risk to human health and the environment. Consequently, the

Committee intends that through the vigorous implementation of the objectives of this act land disposal will be minimized . . ." H.R.Rep. No.198, 98th Cong., 2nd Sess., 55-56, reprinted in 1984 U.S.Code Cong. & Ad. News 5613-14.

Given these statements of legislative intent, we find it inconceivable that section 6925(e)(2) was meant to grant operators an additional period of time within which to submit the information necessary to determine whether their hazardous waste facility complies with the final design and operational standards imposed under RCRA, particularly where the facility uses disposal methods which have resulted in groundwater contamination (as is the case for Sechan's landfill). The 1984 amendments to §6926(e) clearly were intended to provide a final deadline by which such information must be submitted or the facility forced to close.

Since we have rejected Sechan's argument that §6925(e)(2) creates a grace period for the submission of Part B applications, we need not address the contention that §6926(g) requires that the state receive authorization from EPA before applying the RCRA time limits. No argument has been raised that Pennsylvania is imposing any other requirement of the 1984 RCRA amendments against Sechan in contravention of the provisions of § 6926(g).

2. Preemption of State Authority

Moreover, and equally importantly, even if we were to accept Sechan's interpretation of §6925(e)(2), we could not conclude that this statutory provision preempts Pennsylvania's authority to require a Part B permit application pursuant to 25 Pa.Code §75.265(z)(6). RCRA--even as amended--does not completely preempt state suthority.

State regulatory authority may be preempted by a federal statute in three ways: 1) if Congress indicates its intention to occupy an entire field of regulation, precluding the states from engaging in any activity in that area, 2)

the federal statute expressly states that Congress intends to preempt state law, or 3) if the state law conflicts with the federal statute. Michigan Canners and Freezers Association, Inc. v. Agricultural Marketing and Bargaining Board, ____ U.S. ____ 104 S.Ct. 2518, 81 L.Ed.2d 399 (1984).

This case clearly is not one which falls within the first of these categories. Relatively few areas have been found to be "occupied" by the federal government. Typical examples are foreign affairs and national security. See, Zschernig v. Miller, 389 U.S. 429, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968); DeGregory v. Attorney General of New Hampshire, 383 U.S. 825, 86 S.Ct. 1148, 16 L.Ed.2d 292 (1966). Moreover, §6929 ("Retention of state authority") and §6926 ("Authorized State hazardous waste programs") of RCRA make plain Congress' intent that the states can and should play a role in the regulation of hazardous waste management.

To a certain extent, the operation of RCRA falls within the second of the three preemption categories. RCRA establishes minimum federal standards for hazardous waste management. 42 U.S.C. §6929. States may not impose less stringent requirements than those imposed under RCRA, and to this extent state authority is preempted. However, there has been no contention here that Pennsylvania's standards are not as stringent as the federal; thus, this area of federal preemption is not at issue. For this reason the recent case cited by Sechan, New Jersey State Chamber of Commerce v. Hughey, 600 F.Supp.606 (D.N.J.1985), is inapplicable. There the controlling federal statute, The Occupational Safety and Health Act, 29 U.S.C. §651 et seq., expressly precluded the states from establishing their own regulatory program. Section 667(a) precludes a state from "asserting jurisdiction under state law" over any occupational safety or health issue with respect

to which a standard has been imposed by the Act.[8] In the present circumstance, RCRA explicitly permits the states to impose more stringent or additional requirements in the very areas of concern addressed by RCRA. 42 U.S.C. §6929. As noted above, under RCRA both the federal government and the state may simultaneously exercise regulatory authority over a given hazardous waste facility.

Dual state and federal regulation creates the possibility that the third type of federal preemption will arise, i.e., a conflict between the state and federal provisions, requiring that the federal law prevail. "Conflict" is defined in Michigan Canners, supra, as follows: [C]onflict arises when compliance with both state and federal law is impossible, . . . or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

It is this type of preemption which Sechan argues applies in the present context. It contends that by requiring the Part B application before the RCRA deadline of November 8, 1985, Pennsylvania is imposing a requirement which is inconsistent with the federal program.

We reject this argument, however. Even if we were to agree that the 1984 amendments to §6925(e)(2) were intended to provide an extension of the period within which hazardous waste facility operators could submit their Part B applications under RCRA, we would be constrained to hold that §6925(e)(2) has no effect upon Pennsylvania's authority to require a Part B application pursuant to 25 Pa.Code §75.265(z)(6). The Part B application which Pennsylvania is requiring from Sechan is for a state permit, one issued under §6018.401(a) of SWMA, rather than a RCRA permit issued pursuant to 42 U.S.C. §6925. Sechan does not contend

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[8] 29 U.S.C. §667(b) permits a state to submit a plan for state implementation of the federal Act; however, concurrent state/federal regulation of matters addressed by OSHA is not permitted.

that an application for a state permit would make it impossible for Sechan to comply with federal law. Sechan has not convinced us that DER's authority to require a Part B application from Sechan "is an obstacle to the accomplishment and execution" of RCRA's objectives.

In other words, it is our view that the state program DER is attempting to enforce does not conflict with the requirements established under RCRA. Therefore, the state may freely exercise its police power to regulate the management of hazardous waste within its borders; §6929 of RCRA expressly so states. Sechan argues that Congress, in amending §6925(e)(2), intended to preclude the states from requiring a Part B application prior to November 8, 1985. Congress certainly has the authority to prescribe the time period for submission of Part B applications for RCRA permits, but in light of §6929 of that Act, we cannot conclude that Congress intended to regulate the time periods for submission of applications for state hazardous waste permits. RCRA's provisions apply only to RCRA programs. Pennsylvania's hazardous waste permit program has not yet been granted authorization by EPA to operate in lieu of the federal permit program; it is not yet a RCRA program. The Pennsylvania permit requirement derives from an independent body of law, the Pennsylvania Solid Waste Management Act and its associated regulations.

The fact that many, if not most, of the operational and design standards which Sechan would have to meet under state law are identical to the RCRA requirements does not affect our conclusion herein. In order to obtain authorization to administer the RCRA program, Pennsylvania must conform its regulations to reflect the minimum standards established under RCRA. However, until such time as EPA has granted such authorization, the state and federal regulatory programs remain separate. Sechan must comply with both. After Pennsylvania receives

authorization to administer the RCRA program, Sechan will have to comply only with the specific requirements Pennsylvania imposes, which will be consistent with RCRA requirements. At no point during the transition from joint federal/ state authority to solely state authority does RCRA permit an operator to ignore state law requirements.

Thus, since Sechan admits it never has submitted its Part B application as required by DER, and since we have concluded DER is not preempted, DER may justifiably rely upon this failure as grounds for termination of interim status pursuant to 25 Pa.Code §75.265(z)(7), even if the intent of Congress in amending §6925(e)(2) of RCRA was to grant operators additional time to meet operational standards imposed under RCRA, as Sechan has argued.

CONCLUSION

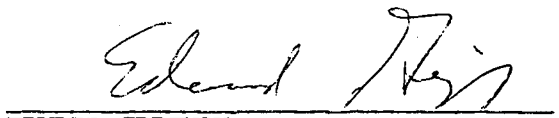
Despite the immediately preceding paragraph, at this time we are not willing to grant DER's request for summary judgment. The language of 25 Pa.Code §75.265(z)(7), quoted supra, is to the effect that failure to timely furnish the Part B application "shall be grounds for termination of interim status." The language does not state unequivocally, as it might have, that "DER shall terminate interim status upon a finding that a requested Part B application has not been timely furnished." Because of the speed with which these proceedings have advanced (the motion for summary judgment was filed by DER on May 8, 1985, only eight days after the appeal was filed), we are not convinced the parties have had ample time to address the crucial issue now remaining, namely: Since the Board has ruled herein that DER had the authority to request a Part B application and to terminate interim status before November 1, 1985 if sufficient grounds were shown, does section 75.265(z)(7) require DER to terminate interim status because of Sechan's failure to submit a Part B application?

The parties will have the opportunity to brief this question in due course. In the meantime, the accelerated hearing on the merits of this matter will take place as scheduled.

O R D E R

WHEREFORE, this 24th day of July, 1985, it is ordered that a ruling on DER's Motion for Summary Judgment is deferred pending the hearing on the merits of this matter and receipt of post-hearing briefs addressing, inter alia, the issue set forth in the final paragraph of the foregoing opinion.

ENVIRONMENTAL HEARING BOARD



EDWARD GERJUOY
Member

DATED: July 24, 1985

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JOHN P. NIEBAUER, JR., et al. : Docket No. 85-212-M

Appellants : Issued: July 25, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
Appellee

and FRANKLIN TOWNSHIP BOARD OF SUPERVISORS

Intervenor

OPINION AND ORDER
SUR PETITION FOR SUPERSEDEAS

Synopsis

Appellants' petition for supersedeas from DER's order of April 25, 1985, which, inter alia, required appellants to sample and analyze containerized wastes stored (at DER's direction) at appellants' landfill site in Franklin Township, Huntingdon County, Pennsylvania, following leakage of said wastes onto the ground and into a lagoon from a floor drain in a maintenance building located on appellants' site, is denied without a hearing due to the petition's lack of specificity. 25 Pa. Code, §21.77. In addition, the Board lacked the power to grant the equitable relief requested by appellants— namely, permission to dispose of the containerized wastes at a sewage treatment plant chosen by appellants. Also, a supersedeas could not issue because such issuance would result in an alteration of the status quo.

OPINION

Appellants, John E. Niebauer, Jr., Delta Excavating and Trucking Company, Inc., Delta Quarries and Disposal, Inc., and, Earthmovers Unlimited, Inc., petition the Board for supersedeas in appellants' appeal of an order of appellee, Commonwealth of Pennsylvania, Department of Environmental Resources (DER), dated April 25, 1985, which, inter alia, required appellants to sample and analyze containerized wastes stored at appellants' landfill site located in Franklin Township, Huntingdon County, Pennsylvania. DER moves the Board to dismiss appellants' petition for supersedeas. Appellants collected and containerized the aforementioned wastes in compliance with DER's appealed-from order, which alleges that the wastes were generated by appellants and discharged onto the ground and into a lagoon on appellants' landfill site through a floor drain in appellants' maintenance building. DER's appealed-from order also directed appellants to store the containerized wastes at appellants' landfill site until appellants completed the sampling and analysis (in a manner approved and supervised by DER) to determine whether the wastes should be classified as residual or hazardous wastes pursuant to the Solid Waste Management Act. 35 P.S. §6018.101 et seq. Such classification will apparently determine the appropriate method and location for storage or disposal of the aforementioned wastes. Appellants have complied with that portion of DER's appealed-from order which requires storage of the containerized wastes on-site until the completion of sampling and analysis, but appellants seek the Board's grant of a supersedeas allowing appellants to dispose of the wastes in a sewage treatment plant of their own choosing.

Appellants also argue that being required to sample the wastes and to provide DER with the analytical results would violate appellants' privilege against self-incrimination, in view of the fact that the discharge of the wastes allegedly constitutes a violation of the Solid Waste Management Act (SWMA) and the Clean

Streams Law (CSL) and because these two statutes provide for criminal prosecution of violators of these statutes. CSL, 35 P.S. §691.602; SWMA, 35 P.S. §6018.606. However, since the self-incrimination issue is more properly addressed following hearing or argument on the merits, we will not address it at this time in considering appellants' petition for supersedeas, especially in view of the fact that appellants are not entitled to a supersedeas for more fundamental reasons which are set forth below.

First, appellants have failed to comply with the requirements of Section 21.77 of the Board's Rules and Regulations, which provides:

> [a] petition for supersedeas shall state with particularity the facts and citations of legal authority upon the basis of which the petitioner believes the petition should be granted. A petition for supersedeas may be denied without hearing for lack of such specificity, or for failure to state grounds sufficient for the granting thereof.

25 Pa. Code, §21.77 (emphasis added]. We note that appellants' petition for supersedeas, filed with appellants' notice of appeal on May 24, 1985, consisted entirely of the following paragraph:

> John P. Niebauer, Jr., Delta Excavating & Trucking Company, Inc., Delta Quarries and Disposal, Inc., and Earthmovers Unlimited, Inc., Appellants in the above captioned appeal, for the reasons set forth in their Notice of Appeal[,] hereby petition the Environmental Hearing Board for supersedeas allowing Appellants to dispose of the containerized waste referred to in DER's Order of April 25, 1985, in a sewage treatment plant of Appellants' choosing.

Section 21.77 is explicit and unambiguous concerning the specificity requirements of a petition for supersedeas, especially when Section 21.77 is read in conjunction with Section 21.78, which sets forth the circumstances affecting the grant or denial of a petition for supersedeas. Appellants' petition for supersedeas, notwithstanding its reference to their notice of appeal, is wholly deficient and does not comply with the specificity requirements of Section 21.77. Our reprobation of such deficient petitions has been stated in the past, see, e.g., Oak Tree Coal Company v. DER, 1983 EHB 255, and we unhesitatingly reaffirm our condemnation of the practice of filing such petitions. In addition, appellants' attempt to refer the Board to

appellants' notice appeal for grounds for granting supersedeas is likewise denounced, especially where, as is true here, the notice of appeal only sets forth arguments concerning the merits of the appeal and does not contain arguments addressing the circumstances affecting grant or denial of a petition for supersedeas pursuant to 25 Pa. Code, §21.78.

Moreover, after the filing by appellants on May 30, 1985 of a self-labeled supplemental petition for supersedeas,[1] and the filing by appellants on June 24, 1985 of a response to DER's motion to dismiss appellants' petition for supersedeas, appellants to date have yet to argue in more than perfunctory, boilerplate fashion the specific circumstances affecting the grant or denial of a petition for supersedeas. Although we do not mean to exalt form over substance in considering appellants' petition for supersedeas and supplemental petition for supersedeas, we do not believe that appellants have complied with the express and unambiguous requirements of Sections 21.77 and 21.78 of the Board's Rules and Regulations. 25 Pa. Code, §§21.77, 21.78.[2] In the absence of such compliance, we will not grant supersedeas.

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1 Although the Board's Rules and Regulations do not expressly provide for the filing of a so-called supplemental petition for supersedeas, Section 21.76, which states that a petition for supersedeas may be filed at any time during the proceeding, provides support for the filing of such a petition. 25 Pa. Code, §21.76.

2 We also note that appellants' response to DER's motion to dismiss appellants' petition for supersedeas-- the first filing by appellant which contains citation to case law-- also contains factual allegations followed by citation to legal authority allegedly in support thereof. However, appellants merely cite supposedly applicable case law without even including or discussing, even parenthetically, the holdings of those cases, let alone argument showing how those holdings support appellants' factual allegations. We do not look favorably upon such bare citation to legal authority-- a practice which fails to comport with the spirit and language of 25 Pa. Code, §21.77 (concerning the specificity requirement of a petition for supersedeas) and which unnecessarily consumes the Board's time and resources.

Second, two additional grounds exist to support denial of appellants' petition for supersedeas without hearing. In their petition, appellants ask the Board to grant supersedeas "allowing appellants to dispose of the containerized waste...in a sewage treatment plant of appellants' choosing." However, as DER correctly notes in its motion to dismiss appellants' petition for supersedeas, the Board does not possess the power to grant such equitable relief. Elias v. Environmental Hearing Board, 10 Pa.Cmwlth. 489,495-96, 312 A.2d 486, 488-89 (1973). In addition, a supersedeas granting the relief requested by appellants would impermissibly alter the status quo. See, e.g., William Fiore t/d/b/a Municipal and Industrial Disposal Company v. DER, EHB Docket No. 85-020-G (O&O, February 12, 1985) (citing Parker Sand and Gravel v. DER, 1983 EHB 557). The status quo which exists herein is that the containerized wastes are stored at appellants' landfill site pending resolution of the merits of appellants' appeal. Prior to a hearing and/or argument on the merits, the Board cannot and will not alter the status quo; it must be maintained by continued storage of the containerized wastes at appellants' landfill site.

Accordingly, for the foregoing reasons, we enter the following order.

ORDER

WHEREFORE, this 25th day of July, 1985, the petition for supersedeas filed by appellants in the appeal of John P. Niebauer, Jr., et al. v. DER and Franklin Township Board of Supervisors, EHB Docket No. 85-212-M, is denied.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Dated: July 25, 1985

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COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

TOWNSHIP OF WASHINGTON
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
Appellee
and S.R. DAILEY AND SONS
Permittee

Docket No. 83-190-M

Issued: July 25, 1985

OPINION AND ORDER
SUR PERMITTEE'S MOTION TO DISMISS

Synopsis

Permittee's motion to dismiss the appeal of appellant Township of Washington of DER's issuance of a solid waste management permit (no. 602341) allowing the agricultural utilization of sewage sludge by permittee S.R. Dailey and Sons on land located in Washington Township, Franklin County, Pennsylvania, is denied. Appellant has a substantial, direct and immediate interest in the establishment of an agricultural utilization operation within its borders so as to confer standing to challenge DER's issuance of a permit for such an operation. Bedminster Township, et al. v. DER, et al., ___ Pa.Cmwlth. ___, 486 A.2d 570 (1985).

OPINION

The Township of Washington, appellant herein, filed on August 29, 1983, an appeal from the issuance by appellee, the Commonwealth of Pennsylvania, Department of Environmental Resources (DER), to permittee, S.R. Dailey and Sons, of two solid waste management permits allowing the agricultural utilization of sewage sludge on land located in Washington Township, Franklin County, Pennsylvania (permit no. 602341), and on land located in Antrim Township, Franklin County, Pennsylvania (permit no. 602340). Following the filing by permittee of two motions to dismiss, one for each permit issued by DER, the Board on January 19, 1984, granted permittee's motion to dismiss that portion of appellant's appeal concerning permit no. 602340— on the basis that Washington Township did not possess standing to challenge a permit issued for the agricultural utilization of sewage sludge on land located outside its borders.

Following a period of inactivity, and in response to a Board status report request dated July 7, 1985, both the appellant and permittee responded with a request for action on the remaining portion of permittee's motion to dismiss, concerning permit no. 602341 for the agricultural utilization of sewage sludge on land located in Washington Township. We have considered the motions and briefs filed by the parties in late 1983 and early 1984; although there may have been some doubt concerning the issue of appellant's standing at that time, a recent Commonwealth Court decision has resolved any such doubt. It is now beyond dispute that the Township of Washington has a substantial, direct and immediate interest in the establishment of an agricultural utilization operation within its borders so as to confer standing to challenge DER's issuance of a permit for that operation. Bedminster Township, et al. v. DER, et al., ___ Pa.Cmwlth. ___, 486 A.2d 570 (1985) (township has standing to appeal the grant by DER of a permit which allows the

application of sewage sludge to land located within the township's borders); Susquehanna County v. DER, 500 Pa. 512, 458 A.2d 929 (1983); Franklin Township v. DER, 499 Pa. 162, 452 A.2d 718 (1982); William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975).

Second, DER's argument that appellant has waived any issues on appeal which were not raised in the comments appellant submitted to DER pursuant to Section 504 of the Solid Waste Management Act (SWMA), 35 P.S. §6018.504, is rejected. Section 504 states, in its entirety:

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

35 P.S. §6018.504. Section 504 states that only a county shall be deemed to waive its right to review if it does not file comments within the sixty (60) day period. Appellant herein, not a county but a township, cannot be subject to the reach of the waiver provision of Section 504. Moreover, it is not altogether clear to us whether the legislature's use of the term "review" in section 504 refers to review by DER or review by the Board on appeal. We are inclined to believe that the former situation is within the purview of the waiver provision of Section 504 and that the latter situation is not. This construction of Section 504 is clearly more reasonable, especially in view of the fact that when the legislature provides for waiver of issues on appeal, they do so in explicit terms. See, e.g., 2 Pa.C.S.A. §703(a); Pa.R.A.P., Rule 302, 42 Pa.C.S.A.

Accordingly, for the foregoing reasons, we enter the following order.

ORDER

WHEREFORE, this 25th day of July, 1985, the permittee's motion to dismiss the appeal of appellant Township of Washington (of DER's issuance of permit no. 602341), EHB Docket No. 83-190-M, is denied.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Dated: July 25, 1985

cc: Bureau of Litigation
For Appellant:
Stephen E. Patterson, Esq.
Patterson, Kaminski, Keller and Kiersz
Waynesboro, Pa.
For Appellee:
Michele Straube, Esq. (withdrawn)
Assistant Counsel
Central Region
Harrisburg, Pa.
For Permittee:
E. Franklin Martin, Esq.
Martin and Kornfield
Waynesboro, Pa.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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HARRISBURG, PENNSYLVANIA 17101
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SONNIE AND BETTY LEHMAN, et al.
Appellants

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
Appellee

and S. and M. WASTE OIL, INC.,
Permittee

Docket No. 85-117-M
Issued: July 25, 1985

OPINION AND ORDER
SUR PERMITTEE'S MOTION TO DISMISS

Synopsis

Permittee's motion to dismiss the appeal of appellants Sonnie and Betty Lehman, et al. from the issuance by appellee Commonwealth of Pennsylvania, Department of Environmental Resources (DER) of a permit for the operation of an oil separation facility located in Milford Township, Pike County, Pennsylvania, is denied. Appellants filed their notice of appeal within the requisite thirty (30) day appeal period. 25 Pa. Code, §§21.11, 21.52(a). Also, service upon counsel for the permittee of a copy of appellants' notice of appeal complied with the requirement that appellant serve such a copy upon the permittee. 25 Pa. Code, §21.51(f)(3).

OPINION

Permittee S. and M. Waste Oil, Inc. moves the Board to dismiss the appeal of appellants Sonnie and Betty Lehman, et al. from the issuance by appellee Commonwealth of Pennsylvania, Department of Environmental Resources (DER) of a permit for the operation of an oil separation facility located in Milford Township, Pike County, Pennsylvania. Permittee's motion to dismiss is denied for the reasons stated in our Opinion and Order in Milford Township Board of Supervisors v. DER and S. and M. Waste Oil, Inc., dated July 25, 1985, EHB Docket No. 85-107-M, and in view of the fact that the record indicates that appellants' appeal was docketed on April 12, 1985, within the requisite thirty (30) day appeal period. 25 Pa. Code, §§21.11, 21.52(a).

It should be noted that the permittee has raised no allegation herein concerning the standing of appellants to challenge DER's permit issuance.

ORDER

Permittee's motion to dismiss the appeal of appellants, Sonnie and Betty Lehman, et al., EHB Docket No. 85-117-M, is denied.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

DATED: July 25, 1985

cc: Bureau of Litigation
For Appellant:
Joseph F. Kameen, Esq.

For Appellee:
John Wilmer, Esq./Eastern

For Permittee:
John T. Stieh, Esq.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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MILFORD TOWNSHIP BOARD OF SUPERVISORS :

Appellant :

: Docket No. 85-107-M
: Issued: July 25, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Appellee

and S. and M. WASTE OIL, INC.

Permittee

OPINION AND ORDER
SUR PERMITTEE'S MOTION TO DISMISS

Synopsis

Permittee's motion to dismiss the appeal of appellant Milford Township Board of Supervisors from the issuance by appellee Commonwealth of Pennsylvania, Department of Environmental Resources (DER) of a solid waste management permit for the operation by permittee S. and M. Waste Oil, Inc., of an oil separation facility located in Milford Township, Pike County, Pennsylvania, is denied. Appellant's appeal was filed in a timely fashion pursuant to the Board's Rules and Regulations. 25 Pa. Code, §§21.11, 21.52. In addition, appellant's failure to serve a copy of its notice of appeal upon the permittee, as required by 25 Pa. Code, §21.51(f)(3), did not constitute sufficient grounds

for dismissal where appellant instead served a copy of its notice of appeal upon counsel for permittee, thereby perfecting its appeal pursuant to 25 Pa. Code, §21.52(b).

OPINION

Permittee S. and M. Waste Oil, Inc. moves the Board to dismiss the appeal of appellant Milford Township Board of Supervisors from the issuance by appellee Commonwealth of Pennsylvania, Department of Environmental Resources (DER) of a solid waste management permit for the operation of an oil separation facility located in Milford Township, Pike County, Pennsylvania. Permittee argues three grounds for dismissal--untimely filing, lack of perfection, and absence of standing--all of which are discussed and rejected below.

First, permittee alleges that appellant's appeal was not filed in a timely fashion. In support of this allegation, permittee states that DER's permit issuance occurred on March 1, 1985 and that appellant's appeal was filed on April 12, 1985. If these allegations were correct, we would grant permittee's motion to dismiss pursuant to 25 Pa. Code, §§21.11, 21.52, which require the filing of an appeal within thirty (30) days after appellant's receipt of notice of DER's action. However, both of permittee's allegations are incorrect.

The record indicates that, although the permit at issue herein is dated March 1, 1985, the cover letter (enclosing the permit) which DER sent to permittee is dated March 10, 1985. Appellant indicates in its answer to permittee's motion to dismiss that DER's cover letter of March 10, 1985 was received by appellant on March 12, 1985. Although appellant should have included this date of receipt in its notice of appeal, as required by

25 Pa. Code, §21.51(d), and while we do not condone such a practice, the inclusion of the date of receipt in appellant's answer cures appellant's noncompliance with Section 21.51(d). Thus, it is apparent that the thirty (30) day appeal period began following appellant's receipt on March 12, 1985 of DER's cover letter.

Also, it is equally apparent that appellant's appeal was filed within the requisite thirty (30) day appeal period. Contrary to permittee's unsupported allegation that appellant's appeal was filed on April 12, 1985, which would constitute timely filing following appellant's receipt of notice of DER's action on March 12, 1985, the record indicates that appellant's appeal was docketed on April 8, 1985, clearly within the thirty (30) day appeal period.

Second, permittee seeks dismissal based upon appellant's failure to serve a copy of its notice of appeal upon the permittee, as required by 25 Pa. Code, §21.51(f)(3). Permittee bases its argument on Section 21.52, which states in pertinent part:

> §21.52. Timeliness and perfection.
>
> (a) Except as specifically provided in §21.53 of this title (relating to appeal "nunc pro tunc"), jurisdiction of the Board shall not attach to an appeal from an action of the Department unless the appeal is in writing and if filed with the Board within 30 days after the party appellant has received written notice of such action or within 30 days after notice of such action has been published in the "Pennsylvania Bulletin" unless a different time is provided by statute, and is perfected in accordance with subsection (b) of this section.
>
> (b) No appeal from the granting of a permit, license, approval or certification shall be deemed to be perfected unless and until the recipient of the permit, license, approval or certification is served with a notice of appeal in accordance with §21.51 of this title (relating to commencement, form and content of appeals).

> (c) An appeal which is perfected in accordance with the provisions of this section but does not otherwise comply with the form and content requirements of §21.51 of this title will be docketed by the Board as a skeleton appeal. The appellant shall, upon request from the Board, file the required information or suffer dismissal of the appeal.

25 Pa. Code, §21.52. However, appellant states in its answer to permittee's motion to dismiss that a copy of appellant's notice of appeal was served upon counsel for permittee. This was sufficient for the purpose of perfection of appellant's appeal pursuant to Section 21.52--especially since permittee has not alleged that prejudice to permittee's case has occurred as a result of appellant's action. See, e.g., Ferri Contracting Company, Inc. v. DER, 1984 EHB 675, 677.

Third, permittee alleges that appellant lacks standing to challenge DER's issuance of a permit for an oil separation facility located in Milford Township. Permittee cites no legal authority in support of its allegation and we doubt permittee could do so, in view of the fact that applicable case law unquestionably supports the proposition that a municipality has a substantial, direct and immediate interest in the establishment of an oil separation facility within its borders so as to confer standing to challenge DER's issuance of a permit for such a facility. See Bedminster Township, et al. v. DER, et al., ____Pa. Cmwlth. _____, 486 A.2d 570 (1985) (township has standing to challenge the grant by DER of a permit for the application of sewage sludge to land located within the township's borders).

Accordingly, for the foregoing reasons, we enter the following order.

ORDER

WHEREFORE, this 25th day of July, 1985, the motion to dismiss of permittee S. and M. Waste Oil, Inc. in the appeal of Milford Township Board of Supervisors v. DER and S. and M. Waste Oil, Inc., EHB Docket No. 85-107-M, is denied.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

DATED: July 25, 1985

cc: Bureau of Litigation

For Appellant:
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For Appellee:
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For Permittee:
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Milford, PA

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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KING COAL COMPANY :

:

: Docket No. 83-112-G

: Issued: July 25, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR PETITION FOR RECONSIDERATION

Synopsis

Reconsideration of the Board's partial adjudication is granted. The Board erred in ordering DER to return forthwith certain bonds to Appellant. Appellant must comply with the provisions of 25 Pa.Code §86.171 concerning bond release. Therefore, the portions of the order accompanying the partial adjudication directing immediate return of the bonds is vacated.

The criterion established in the prior adjudication governing bond forfeiture where a site has been substantially though not completely reclaimed, is contrary to law, 52 P.S. §1396.4(h), and therefore is vacated. Section 1396.4(h) does require the exercise of discretion by DER insofar as a determination must be made whether the operator has failed or refused to comply with the requirements of the act. DER would be in error if it were to forfeit a bond for a de minimis violation. However, the violation at issue here is not de minimis. Therefore, bond forfeiture was appropriate. Any portions of the previously issued partial adjudication inconsistent with this opinion are vacated. The appeal is dismissed.

OPINION

DER has timely petitioned the Board for reconsideration of our Partial Adjudication in this matter, issued March 18, 1985. 25 Pa.Code §21.122. The Board granted reconsideration on April 12, 1985, within the 30-day period prescribed by Rules of Appellate Procedure 1512(a)(1) and 1701(b)(3). A hearing on the petition was held June 13, 1985, and the parties have been given the opportunity to file briefs. We now proceed to rule on the petition.

DER has petitioned for reconsideration on the following grounds.

> 1. Our March 18, 1985 Adjudication, after sustaining DER's bond forfeitures in some respects but reversing DER in other respects, ordered DER to return certain portions of the forfeited bonds forthwith. DER argues that such return would be unlawful because King has not complied with the statutory and regulatory requirements for bond release.
>
> 2. In connection with Certificate of Deposit No. 10544, a collateral bond on the area covered by Mining Permit No. 1566-3, the Board set forth the criterion: "[W]here, but only where, a site has been substantially though not completely reclaimed and where no violations beyond the failure to wholly reclaim are alleged, it is an arbitrary exercise of DER's duties or functions to forfeit the bond covering the site unless it can be said with a substantial degree of certainty that the mine operator has no intention or no ability to wholly complete the reclamation." DER argues that this criterion is contrary to law.
>
> 3. In connection with this same Certificate of Deposit No. 10544, the Board deferred adjudication of DER's forfeiture of this bond for six months, during which time King would have the opportunity to reclaim the mere 1000 sq. ft. which remain unreclaimed on this mining site, out of ten acres originally affected. DER argues that there was no need to defer adjudication for six months, and that in giving King this additional six months the Board overstepped its authority.

We will examine each of these contentions.

1. Order that DER Forthwith Return Some Forfeited Sums

At the reconsideration hearing King and the Board agreed with DER that the Board had erred in ordering DER to return forthwith certain portions of King's bonds. (Tr. 14). The Board had overlooked the fact that the record had not established King's entitlement to any bond releases, e.g., had not established King's compliance with the requirements of 25 Pa.Code §86.171. The Order accompanying this Opinion appropriately corrects our Order of March 18, 1985 in this regard.

2. Criterion For Forfeiture When Site Has Been Substantially Reclaimed

DER's petition for reconsideration, and its brief in support of the petition, argue that the Board's criterion for forfeiture when a site has been substantially though not wholly reclaimed is contrary to the explicit language of Section 4(h) of the Surface Mining Conservation and Reclamation Act ("SMCRA"), 52 P.S. §1396.4(h), which reads:

> (h) If the operator fails or refuses to comply with the requirements of the act in any respect for which liability has been charged on the bond, the department shall declare such portion of the bond forfeited . . . [emphasis provided]

DER contends, citing Morcoal Company v. Commonwealth, 459 A.2d 1303 (Pa.Cmwlth. 1983), that under this language DER had a mandatory duty to forfeit Certificate of Deposit No. 10544 once DER had determined that King had failed or refused to comply with its reclamation obligations in any respect. Therefore, DER's brief concludes, the Board's criterion--which puts a condition on forfeiture when a site has been substantially but admittedly not wholly reclaimed--is inconsistent with the SMCRA and Morcoal.

On reconsideration, we agree with DER that our criterion is contrary to law; the criterion herewith is vacated. In so doing, however, we do not necessarily agree with DER's seemingly rigid construction of the statutory language. In the first place, DER's own arguments, in its brief and during the reconsideration

hearing, make it evident that DER's enforcement of Section 4(h) does involve considerable discretion, despite DER's insistence that the language of Section 4(h) leaves DER no room for discretion. For example, DER's brief explains that although the area bonded by Certificate of Deposit No. 10544 has been in its present condition since approximately October 1981 (Finding of Fact 62), DER did not send King a Notice of Intent to forfeit the bond "if the violations were not corrected" until October 1982; then DER waited another seven months before forfeiting the bond.

Moreover, we believe these exercises of enforcement discretion by DER in connection with Certificate of Deposit No. 10544 are consistent with the language of Section 4(h) and with Morcoal, supra. Under Section 4(h), DER must declare a bond forfeited whenever DER determines the operator has failed or has refused to comply with the requirements of the SMCRA. But the Legislature surely did not expect that the crucial prerequisite determination to forfeiture, namely the determination that the operator actually has failed or has refused to comply with the requirements of the SMCRA, would be made completely rigidly without any consideration of relevant circumstances, e.g. (when as in the instant appeal the alleged violation of the SMCRA is failure to properly reclaim), the size of the unreclaimed area and the amount of time the non-reclamation has persisted.

In particular, the Board believes, and DER apparently agrees, that the phrase "in any respect" in Section 4(h) does not require DER to declare bond forfeitures for de minimis violations of the SMCRA, i.e., for violations which are too insubstantial to be legally significant. De minimis non curat lex. It is not possible to give a bright line formula for de minimis failures to reclaim, but DER apparently is willing to agree that, e.g., a failure to reclaim just one square foot out of many affected acres, or a failure to meet a reclamation deadline by a few hours, must be regarded as de minimis from the standpoint of bond forfeiture requisites. (Tr. 34).

In sum, it evidently would be an error were DER to declare a bond forfeiture for a de minimis violation of the SMCRA. Our now vacated criterion was an attempt to set some guideline for deciding when declaring a bond forfeiture for a violation which was somewhat more than de minimis might be such an error. On reflecting, we have found this criterion to be ill conceived. Indeed we now are inclined to think that if the violation really is more than de minimis, then under Section 4(h) DER's determination that the operator has failed to comply with the requirements of the SMCRA cannot be an abuse of discretion, assuming of course that the mine operator cannot establish some affirmative defense (e.g., estoppel) to the determination. We stress, however, that any determination by DER that a mine operator has failed or has refused to comply with the requirements of the SMCRA is a discretionary action the Board is entitled to review. Warren Sand and Gravel Company v. DER, 20 Pa.Cmwlth. 186, 341 A.2d 556 (1975). Morcoal's supra, discussion of DER's obligations under Section 4(h) is consistent with the assertion just made.

3. Forfeiture of Certificate of Deposit No. 10544

In our March 18, 1985 Adjudication, we concluded that King's failure to reclaim the 1000 sq. ft. unreclaimed area which led to the forfeiture of C.D. No. 10544 was not necessarily a de minimis violation. In view of the foregoing discussion, we now must decide whether, on all the facts before us, the aforesaid violation should be considered de minimis. We believe it should not be. As we wrote on March 18, 1985, King should be required to repair the erosion and complete reclamation of the 1000 sq. ft. Moreover, by the time of our hearing on reconsideration, when King's counsel admitted the reclamation had not yet been completed (Tr. 53), the 1000 sq. ft. had been unreclaimed for nearly four years (October 26, 1981 to June 13, 1985, see Finding of Fact 62). After a delay this long, a failure

to reclaim even a mere 1000 sq. ft. area out of 10 acres affected cannot be termed de minimis.

Therefore, we now believe DER's forfeiture of C.D. No. 10544 must be sustained in the absence of an established affirmative defense to DER's determination that King failed to reclaim the affected area. Mr. Woods' claim (Findings of Fact 59 and 60) that his inability to secure bond releases hindered his ability to hire subcontractors to perform the necessary reclamation appears to have been an attempt to establish such an affirmative defense, although the legal theory underlying the defense is not altogether clear. However, our March 18, 1985 conclusion that there is "some truth" to this claim of Mr. Woods hardly is sufficient to meet King's burden of proof for any affirmative defense the Board can envisage, e.g., for the affirmative defense that DER now is estopped from determining there was a reclamation failure.

The Order which follows is consistent with the foregoing.

O R D E R

WHEREFORE, this 25th day of July , 1985 it is ordered as follows:

1. Our Order of March 18, 1985 is vacated, and is now replaced by the following paragraphs of the present Order.

2. For the bonds listed in the immediately following Table, DER's forfeitures are sustained for the amounts shown in the third column of the Table; DER's forfeitures are vacated for the amounts shown in the fourth column of the Table.

Bond Number	Amount Originally Forfeited	Forfeiture Amount Sustained	Forfeiture Amount Vacated
BD 1435	$21,620	$20,000	$1,620
BD 1631	32,235	32,235	---
BD 1666	32,890	32,890	---
BD 1830	8,300	8,300	---
BD 1965	22,800	22,800	---
BD 20240	22,300	22,300	---
Cashier's check 265244	8,015	8,015	---
13751	15,570	13,000	2,570
13358	24,360	23,380	980
BD 1428	5,980	5,980	---

3. The appeal of the forfeiture of Surety Bond 13366 is sustained, and the bond forfeiture is vacated.

4. DER's forfeiture of Certificate of Deposit No. 10544 is sustained for an amount of $5,750; DER's forfeiture of this bond is vacated for an amount of $1,799.75.

5. Conclusion of Law No. 11 in our March 18, 1985 Adjudication is vacated.

6. Any portion of our March 18, 1985 Adjudication which is inconsistent with this Opinion and Order is vacated.

7. The Board no longer retains jurisdiction over any of the bond forfeitures appealed under the above Docket Number; this Adjudication now is final and complete, not partial.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: July 25, 1985

cc: Bureau of Litigation
For the Commonwealth:
Alan S. Miller, Esquire, Pittsburgh
For the Appellant:
Bruno A. Muscatello, Esquire, Stepanian and Muscatello, Butler

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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SPRINGETTSBURY TOWNSHIP SEWER AUTHORITY :

Appellant : Docket No. 84-287-M
July 29, 1985.

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Appellee

OPINION AND ORDER
SUR DER'S PETITION FOR RECONSIDERATION

Synopsis

DER's petition for reconsideration of the Board's June 3, 1985 Opinion and Order, which denied DER's motion to dismiss the appeal of appellant Springettsbury Township Sewer Authority, is denied. The Board's Rules and Regulations and precedents state that an interlocutory decision is not the proper subject of a petition for reconsideration in the absence of exceptional circumstances. 25 Pa. Code, §21.122.

OPINION

Appellee Commonwealth of Pennsylvania, Department of Environmental Resources (DER) filed on June 24, 1985 a petition for reconsideration of the Board's June 3, 1985 Opinion and Order which denied DER's motion to dismiss the appeal of appellant Springettsbury Township Sewer Authority (STSA) of DER's denial of STSA's National Pollution Discharge Elimination System (NPDES) interim permit and pending permanent permit application modification requests. STSA filed a reply to DER's petition for reconsideration on July 22, 1985; however, since the filing deadline for such a reply, as appellant was informed by the Board, was July 17, 1985, we will not consider appellant's reply to DER's petition.

Fortunately for STSA, however, no reply was needed as DER merely cites 25 Pa. Code, §21.122 as the authority for its petition, without supporting argument to convince the Board to deviate from its customary practice of denying petitions for reconsideration of our interlocutory rulings. Although the language of Section 21.122 raises some doubt, because it refers to a "decision" of the Board as being the proper subject of a petition for reconsideration, Board precedents resolve any such doubt-- only a final decision is subject to reconsideration. Envirosafe Services of Pennsylvania, Inc. v. DER, 1984 EHB 609; Magnum Minerals v. DER, 1983 EHB 589. DER neither cited nor addressed the holdings of these Board decisions.

In addition, although Magnum Minerals, supra, states that the Board possesses inherent authority to reconsider its rulings at any time prior to final adjudication, Magnum Minerals also states that the Board's limited resources do not permit reconsideration of interlocutory rulings in other than exceptional circumstances. Magnum Minerals, supra, 1983 EHB at 589 (citing Old Home Manor, Inc. and W.C. Leasure v. DER, 1983 EHB 463). DER has not presented any exceptional circumstances in its petition.

Finally, we note that DER argues that the Board's June 3, 1985 Opinion and Order was based inter alia upon a Board decision which DER allegedly did not have the opportunity to brief. However, in view of the fact that the decision DER refers to, James Martin v. DER, 1984 EHB 736, was issued August 20, 1985-- forty-four (44) days prior to the filing of DER's motion to dismiss and one hundred and eight (108) days prior to the filing of DER's supplemental memorandum of law in support of its motion to dismiss-- DER's allegation of any irregularity in Board procedure is not well taken. Rather, the responsibility for DER's failure to brief the decision rests squarely upon counsel for DER. We will not speculate as to the cause of DER's failure, whether it was faulty research, oversight or deliberate (or unintentional) disregard of a decision which was unfavorable to DER's legal position.

Accordingly, for the foregoing reasons, we enter the following order.

ORDER

AND NOW, this 29th day of July, 1985, DER's Petition for Reconsideration of the Board's June 3, 1985 Opinion and Order Sur DER's Motion to Dismiss the appeal of appellant Springettsbury Township Sewer Authority, EHB docket no. 84-287-M, is denied.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazzullo, Jr.

ANTHONY J. MAZZULLO, JR.
Member

Dated: July 29, 1985.

cc: Bureau of Litigation
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COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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J.T.C. INDUSTRIES, INC. :

:

: Docket No. 84-154-G

: Issued: July 29, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION FOR SUMMARY JUDGMENT

SYNOPSIS

DER's Motion for summary judgment is denied. The appeal concerns DER's denial of Appellant's permit application for a coal processing plant. DER denied the application on the basis that it was deficient, i.e., that insufficient information had been submitted to allow DER to complete its review of the application. In its amended statement of facts, Appellant stated that it had replied in detail to the "deficiencies" identified by DER. Despite DER's contention that the use of the term "deficiencies" amounts to an admission that the permit application was incomplete, summary judgment cannot be granted. It is apparent that Appellant continues to maintain that the permit application was full and complete when submitted to DER.

OPINION

This is an appeal of a denial of Appellant's permit application for a coal processing facility. The Department of Environmental Resources ("DER") denied the permit on the basis that Appellant had failed to provide sufficient information to enable DER to proceed with review of the application. DER has now moved for summary judgment. Appellant has not responded to the DER motion, despite the fact that the twenty-day period for filing such a response has long since elapsed.

The DER denial letter, dated April 19, 1984, reads in pertinent part:

> By this letter, the Department of Environmental Resources is denying the permit application which your company submitted for its coal preparation plant located in Bruin Borough, Butler County. The Department had notified your company of the deficiencies in the application by letters dated August 24, 1983, December 9, 1983, and February 21, 1984. Without the requested information, the Department is unable to proceed with its review of the application.

The second paragraph of this letter informed the Appellant of the steps it now was required to take concerning the coal processing plant, in light of the permit denial. These steps were required by a previous DER order, which also had directed Appellant to file the instant permit application. The critical issue before the Board in this matter is whether the permit application as submitted to DER was sufficient under the applicable statutes, rules, and regulations to enable DER to complete its review. Appellant has maintained that it fully complied with all lawful requirements concerning the permit application. DER contends that Appellant not only did not submit a complete application but that Appellant has admitted that the application was deficient. It is upon the latter basis, i.e., the claimed admission, that DER has rested its Motion for Summary Judgment.

Pennsylvania Rule of Civil Procedure 1035 provides that summary judgment may be rendered where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In ruling upon a motion, the Board is entitled to examine the pleadings, answers to interrogatories, and admissions of the parties, inter alia. In the instant matter we cannot grant summary judgment in favor of DER, because the alleged admission of deficiencies by Appellant has not removed all genuine issues of material fact.

DER points to the following language of Appellant's amended Statement of Facts to its pre-hearing memorandum:

> 10. On November 1, 1984, Scott forwarded to the DER a revised geology report of Giddings (October 26, 1984). This letter replied in detail to all deficiencies not previously answered by the Scott letters of September 22, 1983 and December 29, 1983.
> (emphasis added)

We do not agree with DER's contention that the underscored language in the quote above amounts to an admission that the permit application as originally submitted was indeed deficient. The quoted statement from Appellant's amended statement of facts is responding to the specific contentions of DER contained in its letter of April 19, 1984 and the three letters to which that April 19th letter makes reference. These letters spell out in considerable detail the information which DER considered to be lacking and necessary to complete review of the permit application. Appellant's amended statement of facts is merely responding to the items identified in DER's letters. Indeed, in so responding Appellant was merely complying with the Board's order of April 30, 1985 which directed Appellant to:

> . . . file a statement listing the facts JTC intends to establish in support of its claim that JTC's permit application complies with all applicable rules and regulations; insofar as possible, this statement shall respond specifically to the allegations

concerning deficiencies in JTC's permit applications made by DER in its April 19, 1984 permit denial letter (via reference to DER's letters of August 24, 1983, December 9, 1983 and February 21, 1984). (emphasis added).

In light of this directive to respond to the allegations concerning "deficiencies", we are unwilling to grant summary judgment in favor of DER. Appellant's use of the term "deficiencies" was appropriate, although perhaps somewhat careless. However, we will not dismiss this appeal on a technicality stemming from Appellant's failure to insert the term "alleged" in front of the word "deficiencies". It is clear that Appellant continues to maintain that its permit application was full and complete when submitted to DER. This, of course, is the central factual issue herein. Since it remains a disputed matter, summary judgment is inappropriate.

O R D E R

WHEREFORE, this 29th day of July , 1985, it is ordered that DER's Motion for Summary Judgment is denied.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: July 29, 1985

cc: Bureau of Litigation
For the Appellant:
Sanford M. Lampl, Esquire, Pittsburgh
Robert O. Lampl, Esquire, Pittsburgh
Janice L. Morison, Esquire, Pittsburgh
For the Commonwealth:
Richard S. Ehmann, Esquire, Pittsburgh

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

J.T.C. INDUSTRIES, INC. :

:

Docket No. 84-155-G

:

Issued: July 30, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION FOR SUMMARY JUDGMENT

SYNOPSIS

Appellant's motion for summary judgment is denied. Pursuant to Pa.R.C.P. 1035, summary judgment may be granted where no material facts are in dispute and the moving party is entitled to judgment as a matter of law. All material facts are in dispute in the present proceeding. Appellant's motion does not dispose of any factual issues.

OPINION

This is an appeal of a DER order dated May 10, 1984 directing Appellant, J.T.C. Industries, Inc., to submit to DER a preparedness, prevention and contingency plan ("P.P.C. plan") pursuant to 25 Pa.Code §101.3. Appellant has moved for summary judgment; DER has filed a response to Appellant's motion.

25 Pa.Code §101.3 provides:

> Activities utilizing polluting substances.
>
> (a) All persons . . . engaged in an activity which includes the impoundment, production, processing, transportation, storage, use, application, or disposal of polluting substances shall take all necessary measures to prevent such substances from reaching the waters of the Commonwealth, directly or indirectly, through accident, carelessness, maliciousness, hazards of weather, or from any other cause.
>
> (b) Upon notice from the Department and within the time specified in the notice, such person . . . shall submit to the Department a report or plan setting forth the nature of the activity, the nature of the preventative measures taken to comply with subsection (a) of this section and such other information as the Department may require.

25 Pa.Code §101.3 is promulgated under the authority of 35 P.S. §691.5, the provision of the Pennsylvania Clean Streams Law which delegates certain powers to DER. Appellant has not challenged the authority of DER to issue the instant order; rather, Appellant claims it has submitted an acceptable P.P.C. plan to DER in conjunction with a permit application for a coal processing plant and, therefore, DER's order is arbitrary and capricious.

Appellant has provided no affidavits or other evidence in support of its motion, nor has it provided the Board with a copy of the P.P.C. plan which it claims was submitted to DER. DER has furnished a copy of a "Pollution Incident Prevention Plan" which apparently accompanied an industrial waste permit application submitted by J.T.C. Industries for a coal preparation plant. At this time the Board has no way of determining whether this Pollution Incident Prevention Plan is the plan which Appellant claims to have submitted to DER and which it contends should suffice to satisfy the obligations of the order appealed herein. In its response to Appellant's motion, DER argues that a Pollution Incident

Prevention Plan is not equivalent to a P.P.C. plan and that no acceptable P.P.C. plan has been submitted by Appellant for this particular site. Consequently, the central factual issue in this matter, whether an acceptable P.P.C. plan has been submitted to DER, remains in dispute. Summary judgment cannot be granted.

O R D E R

AND NOW, this 30th day of July, 1985, it is ordered that:

1. Appellant's Motion for Summary Judgment is denied.

2. Within thirty (30) days of this date Appellant shall furnish the Board an affidavit addressing the issue of whether the Pollution Incident Prevention Plan attached to DER's letter to this Board of March 18, 1985 is the so-called P.P.C. plan which Appellant alleges it submitted to DER in connection with its Coal Processing Plant Application (Paragraph 3 of Appellant's Motion for Summary Judgment). If there have been additional documents submitted to DER by Appellant which constitute the P.P.C. plan to which Appellant makes reference in Paragraph 3 of its Motion for Summary Judgment, Appellant shall attach copies of these additional documents to the aforesaid affidavit. Appellant will be precluded from introducing other documents allegedly constituting this P.P.C. plan at the hearing on the merits unless Appellant can supply good cause why said documents were not submitted in response to this order.

3. Appellant is reminded that its inadequate pre-hearing memorandum also may cause the Appellant to be sanctioned at the hearing on the merits of this matter (see our Order of January 28, 1985 in this matter).

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: July 30, 1985

cc: Bureau of Litigation
Sanford M. Lampl, Esquire
Robert O. Lampl, Esquire
Janice L. Morison, Esquire
Richard S. Ehmann, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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J. L. HARTMAN COMPANY
Appellant :

: Docket No. 85-129-M

: (Issued: August 5, 1985)

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
Appellee

OPINION AND ORDER
SUR DER'S MOTION TO DISMISS

Synopsis

The motion to dismiss filed by appellee, Commonwealth of Pennsylvania, Department of Environmental Resources (DER), in the appeal of appellant, J. L. Hartman Company, is granted. Appellant failed to file its appeal with the Board within the requisite thirty (30) day appeal period. 25 Pa. Code, §§21.11, 21.52(a). Consequently, the Board lacked jurisdiction to hear appellant's appeal. 25 Pa. Code, §21.52(a); Joseph Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976).

OPINION

Appellee, Commonwealth of Pennsylvania, Department of Environmental Resources (DER), moves the Board to dismiss the appeal of appellant J. L. Hartman Company from DER's order of March 4, 1985, which required appellant to submit operations and progress reports for 1983 and 1984 and to complete by May 30, 1985, reclamation and revegetation of appellant's quartzite surface mine, located in Greenfield Township, Blair County, Pennsylvania. DER's motion to dismiss, based on appellant's failure to file its appeal within the requisite thirty (30) day appeal period, is granted.

Appellant, in its answer to DER's motion to dismiss, admits receipt of DER's appealed-from order on March 14, 1985. Our docket shows that appellant's appeal was filed on April 18, 1985. This is beyond the thirty (30) day appeal period provided for in 25 Pa. Code, §21.52(a). Consequently, we lack jurisdiction herein. Joseph Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). Thus, we enter the following order.

ORDER

DER's motion to dismiss the appeal of appellant J. L. Hartman Company, EHB Docket No. 85-129-M, is granted.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR., MEMBER

EDWARD GERJUOY, MEMBER

DATED: August 5, 1985

cc: Bureau of Litigation

For Appellant:
John Woodcock, Jr., Esq.

For Appellee:
Joseph K. Reinhart, Esq.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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JOHN E. KAITES, et al. :

:

: Docket No. 84-104-G

: (Issued: August 7, 1985)

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTIONS FOR SUMMARY JUDGMENT

SYNOPSIS

Partial summary judgment is granted in favor of DER regarding the issues directed toward Appellants' responsibility for remedying the pollutional conditions existing at their mining complex. The order was issued under the authority of the Clean Streams Law, 35 P.S. §691.1 et seq., the Coal Refuse Disposal Act, 52 P.S. §30.51 et seq., and the Administrative Code, 71 P.S. §510-1 et seq.

Section 315(a) of the Clean Streams Law, 35 P.S. §691.315(a), imposes upon an operator the responsibility for treating all unpermitted discharges on its mining site particularly where, as here, those discharges were caused or affected by the operator's mining activities. The Mine Sealing Act, 52 P.S. §28.1 et seq., does not relieve Appellants of this obligation. The Statutory Construction Act, 1 Pa.C.S.A. §1936, requires that later statutory enactments

prevail over possibly inconsistent previous enactments. Section 315(a) controls.

Appellants' allegation that they no longer own or lease portions of the site does not diminish DER's authority to issue the instant compliance order. Section 1917-A of the Administrative Code, 71 P.S. §510-17, grants DER express, unconditional authority to issue orders for the abatement of nuisances. Under Section 315(a) of the Clean Streams Law the discharges presently existing at the site are deemed a nuisance. Furthermore, Section 610 of the Clean Streams Law, 35 P.S. §691.610, and Section 9 of the Coal Refuse Disposal Act, 52 P.S. §30.59, grant DER the authority to issue the instant order.

To the extent that the violations existing at the site may be the result of the actions of Appellants' subcontractors, Appellants nevertheless remain liable. The existence of a subcontractual relationship cannot shield an operator from liability for violations of the Commonwealth's mining laws, where the subcontractor operated under the authority of the operator's permit. Appellant is responsible for assuring that operations conducted under its permit are carried out in accordance with engineering and mining practices which will not result in violations of the applicable law.

The president, chief executive officer and sole shareholder of Appellant corporation is individually responsible for complying with the terms of the instant order. Being the sole individual responsible for the decisions necessary to guarantee that DER requirements were followed, he undertook, explicitly or implicitly, a duty to assure that his corporation would comply with these legal requirements. The corporation's admitted failure to do so can be directly attributed to him.

That portion of the appealed compliance order which suspends Appellants' permits was not addressed in the motions for summary judgment and therefore has not been discussed herein.

OPINION

This appeal concerns a compliance order issued by the Department of Environmental Resources (DER) to Appellants, Johnstown Coal and Coke and John E. Kaites. The order suspends Johnstown's coal refuse disposal and industrial waste permits and directs Appellants to take certain remedial actions to remedy alleged violations of statutes, regulations and permit conditions at a site located in Indiana County, Pennsylvania. A stipulation of facts has been submitted and both parties have moved for summary judgment. DER has responded to Appellant's motion; Appellants, however, have failed to respond to the DER motion.

The following facts are undisputed unless otherwise noted. The site in question is known as the Bear Run mining complex. The complex consists of the Bear Run No. 1 mine, the Bear Run No. 2 mine,[1] a coal processing plant, a coal refuse disposal area and a coal storage area (which is designated the "old coal storage area" to distinguish it from another coal storage area located within the vicinity of the coal processing plant). Portions of the site had been affected by mining activities prior to Appellants' operations on the site. With the exception of the Bear Run No. 2 mine, the facilities described have been the subject of two consent orders and agreements entered into by Johnstown with DER in 1975 and 1976.

Johnstown bought the Bear Run No. 1 mine in 1966 or 1967 and operated it until approximately 1972, at which time it sealed the mine. Oral approval of the seals was given by a DER official. A box cut at the mine portal entry was not filled in at the time of sealing. Sometime between the fall of 1972 and

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[1]The Bear Run No. 2 mine is not a subject of the order at issue and is not discussed further herein.

the spring of 1973, the Benjamin Coal Company backfilled the box cut, pursuant to an agreement with Johnstown and under the authority of Johnstown's permit. In order to fill the box cut, Benjamin conducted blasting over the approximate location of the mine seals. Benjamin also conducted surface mining activities in the same general area. Before Benjamin took the aforementioned actions there had existed a discharge from the mine portal of approximately two gallons per minute. Thereafter, the discharge increased significantly. Appellants contend that the discharge is the result of Benjamin's actions; DER disputes this contention.

In the past, in accordance with the terms of the 1975 and 1976 consent orders and agreements, Johnstown unsuccessfully attempted to reseal the Bear Run No. 1 mine. The discharge continues, however, and is inadequately treated. It is flowing into the South Branch of Bear Run. Appellants have stipulated this condition is the result of the mining activities which have occureed on the site.

Johnstown is the lessee of the surface land upon which the coal processing plant is located. The plant was originally constructed in the 1960's and was operated by Johnstown from 1969 until 1982. The plant consists of several facilities: a coal washery and tipple, an acid mine drainage treatment plant, several ponds, a coal storage stockpile area, and a weighing station. From September 1983 to January 1984 the coal processing plant was operated by Mears Enterprises under an agreement with Johnstown and under the authority of Johnstown's permits.

The processing plant was designed to use a closed hydrologic system; therefore, the permit for the plant does not authorize any discharges to the waters of the Commonwealth. Nevertheless, there are presently existing discharges from the plant to the South Branch of Bear Run and unnamed tributaries. These discharges are caused or affected by the mining activities which have taken place at the site.

Until January 1984, Johnstown was the lessee of the land upon which the coal refuse disposal area is located. Johnstown established the disposal area in 1976 and operated it until 1982. The permit authorizing operation of the disposal area does not allow any discharges from the area to the waters of the Commonwealth. Nevertheless, there are acid discharges from the disposal area which are entering the waters of the Commonwealth in either an untreated or an inadequately treated condition. Appellants have stipulated that this condition is the result of the activities conducted by Johnstown at the mining complex.

Johnstown bought the old coal storage area in 1966 or 1967. During the course of its mining activities at the Bear Run mining complex, Johnstown deposited coal and coal refuse material on the old coal storage area. Under both the 1975 and 1976 consent orders and agreements, Johnstown agreed to reclaim this area; however, large piles of coal refuse remain on the storage area. Pursuant to the 1976 agreement, Johnstown constructed an acid mine drainage treatment plant at the coal preparation plant and a gravity collection channel for conveying the discharge from the Bear Run No. 1 mine and the storage area itself to the preparation plant for treatment. The treatment plant is no longer in operation, resulting in inadequate treatment of the acid drainage from the Bear Run No. 1 mine and the storage area. Water collected for treatment at the coal preparation plant is being discharged in an inadequately treated or untreated condition to the South Branch of Bear Run and to certain of its unnamed tributaries. This discharge is the result of the mining activities conducted at the site.

Since 1972, John E. Kaites has been chief executive officer and president of Johnstown Coal and Coke, which is a Delaware corporation authorized to conduct business in Pennsylvania. Kaites is the 100 percent shareholder of the corporation,

having purchased all the stock in 1972. Although Johnstown has a board of directors, it acts simply in an advisory capacity to Kaites and has not met in the past five years. Kaites is responsible for making all management decisions for Johnstown concerning the disposition and operation of the Bear Run mining complex. These decisions include dealing with DER and the resolution of compliance orders. Kaites negotiated the 1976 consent order and agreement and was the signatory thereto. We stress that these facts concerning Mr. Kaites have been stipulated by the parties.

Appellants have moved for partial summary judgment in their favor on the issue of their responsibility for the discharge from the Bear Run No. 1 mine. Appellants contend that once DER approves mine seals it becomes responsible for treating any discharge that occurs at the sealed portion of the mine thereafter. Appellants rely upon the Pennsylvania Coal Mine Sealing Act of 1947, 52 P.S. §28.1 et seq., in support of this argument. DER contends that the Clean Streams Law, 35 P.S. §691.1 et seq., controls here, regardless of the provisions of the Mine Sealing Act, and requires that Appellants be held responsible for treating the acid discharge from the Bear Run No. 1 mine.

Section 5 of the Mine Sealing Act, 52 P.S. §28.5, provides that the maintenance of mine seals shall be the duty of the Commonwealth, acting through the department,[2] where the mine has been sealed to the satisfaction of the department. It is, however, the operator's responsibility to seal the mine in the first instance, 52 P.S. §28.3. Appellant contends that since DER did in fact approve the seals in the Bear Run No. 1 mine, DER is now responsible for treating the discharge that emanates from the mine.

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[2] The "department" as originally defined in the Act was the Department of Mines. DER now administers the functions previously carried out by the Department of Mines. 71 P.S. §510-1.

We find Appellant's argument untenable. The cases and statutory provisions which DER has cited are controlling. Section 315(a) of the Clean Streams Law, 35 P.S. §691.315(a), provides that:

> No person . . . shall operate a mine or allow a discharge from a mine into the waters of the Commonwealth unless such operation or discharge is authorized by the rules and regulations of the department or such person . . . has first obtained a permit from the department . . . A discharge from a mine shall include a discharge which occurs after mining operations have ceased. . . . The operation of any mine or the allowing of any discharge without a permit or contrary to the terms or conditions of a permit or contrary to the rules and regulations of the department is hereby declared to be a nuisance.

Similarly Section 316 of the Clean Streams Law, 35 P.S. §691.316 authorizes DER to order a landowner or occupier of land to correct the condition "Whenever the department finds that pollution or a danger of pollution is resulting from a condition which exists on land [emphasis added]." Neither §315(a) nor §316 makes any exception for a discharge resulting from a mine seal which DER formerly had approved.

The Board previously has had occasion to construe Section 315(a) in the context of an appeal which presented factual circumstances very similar to those present in the case at hand. In Adam Greece d/b/a Cherry Run Fuel Co. v. DER, 1980 EHB 135, a central legal issue was a mine operator's responsibility for treating a discharge from a mine which he previously had operated and then sealed. The operator testified that the seals had been approved by an employee of the Department of Mines. When the seals began to leak, DER ordered the operator to take remedial action. Construing the import of the statutory provision quoted supra, the Board stated:

> Section 315 of the Clean Streams Law places upon the mine operator the responsibility for abating discharges from his mine, either during or after the completion of the operation of the mine, regardless of the reason for the discharge.
> 1980 EHB 141.

The Board upheld the DER order requiring the operator to treat the discharge.

The Adam Greece holding is fully consistent with the statements of the Pennsylvania Supreme Court in Commonwealth, DER v. Barnes and Tucker Co. (Barnes and Tucker II), 472 Pa. 115, 371 A.2d 461 (1977), appeal dismissed, 434 U.S. 807 (1977). Like Appellants here, and the operator in Adam Greece, Barnes and Tucker had sealed their mine after ceasing coal removal activities. They were held responsible for treating the discharge which subsequently resulted, despite the fact that it was in large part the result of mining which had taken place in adjacent underground mines. Construing the authority of DER to require treatment of the discharge under the Clean Streams Law, the court stated:

> The conduct of (the operator) in its mining activity remains the dominant and relevant fact without which the public nuisance would not have resulted where and under the circumstances it did.
> 371 A.2d at 476.

This statement is equally applicable here. Appellants do not dispute that they operated the mine for several years. Thus, under Barnes and Tucker, they are the principal force responsible for the creation of the polluting discharge, and therefore, they are liable for its treatment and abatement.

Our holding that the Mine Sealing Act does not absolve Appellants from liability for the discharge from the Bear Run No. 1 mine does not necessarily do violence to that Act. The Mine Sealing Act does not address responsibility for discharges. The Clean Streams Law, on the other hand, clearly does--placing the responsibility on the shoulders of the mine operator.

In any event, to the extent that the two statues are viewed as inconsistent, we are constrained to follow the later of the two enactments. Section 1936 of the Statutory Construction Act provides that "whenever the provisions of two or more statutes enacted by different General Assemblies are irreconcilable, the statute latest in date of final enactment shall prevail." 1 Pa.C.S.A. §1936. The Mine Sealing Act was enacted in 1947. The relevant provisions of Section 315 of the Clean Streams Law were enacted in 1970, some twenty three years later, in conjunction with a substantial tightening of the Commonwealth's mining laws. [See discussion of the legislative history of the Clean Streams Law in Commonwealth, DER v. Barnes and Tucker Company (Barnes and Tucker I), 455 Pa. 392 319 A.2d 871, 873-76].[3]

Any lingering doubts concerning the possibility that the Mine Sealing Act requires DER--rather than the operator--to treat acid mine discharges are resolved by the Supreme Court's interpretation of the statement of legislative intent contained in Section 4 of the Clean Streams Law which reads, in pertinent part:

> (3) It is the objective of the Clean Streams Law not only to prevent further pollution of the waters of the Commonwealth, but also to reclaim and restore to a clean, unpolluted condition every stream in Pennsylvania that is presently polluted.
> 35 P.S. §691.4

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[3]The chronologic relation of the two statutes, however, does prevent us from accepting DER's argument that Section 801 of the Clean Streams Law explicitly repeals the provisions of the Mine Sealing Act. Section 801 was part of the original Clean Streams Law enactment of 1937. It repealed all inconsistent statutory provisions. However, it cannot be construed to repeal the provisions of an Act, i.e., the Mine Sealing Act, which were enacted ten years later. It has not been updated or amended since 1937.

The Pennsylvania Supreme Court, commenting upon this statement, has indicated that the public is not to bear the cost of abating pollutional conditions created by the coal mining industry. In Commonwealth, DER v. Harmar Coal Company, 452 Pa. 77, 306 A.2d 308, 321 (1973) the court observed:

> If the operator of a mine need not treat these discharges, pollution will not end and the general public will be subjected to either the continued degradation of its surface waters or be forced to subsidize the coal industry by paying for treatment through its taxes . . . The public interest is not served if the public, rather than the mine operator, has to bear the expense of abating pollution caused as a direct result of the profit-making, resource-depleting business of mining coal.

The Harmar decision relied upon the authority granted DER by Section 315 of the Clean Streams Law.

In sum, it is clear that the Clean Streams Law, specifically Section 315(a), requires that Appellants be held responsible for the discharge from the Bear Run No. 1 mine.

This conclusion holds true regardless of whether a third party's actions may have contributed to the discharge. Appellants argue that the activities of Benjamin Coal contributed to the discharge from the Bear Run No. 1 mine. (It is undisputed that the discharge existed to a lesser degree prior to Benjamin's actions.) As we stated in Adam Greece, supra, Section 315(a) of the Clean Streams Law places the obligation for abating discharges from a mine upon the mine operator, no matter what the reason for the discharge. We emphasized that "the actions of a third party can't diminish that obligation." 1980 EHB 142. As we noted there, the operator may have an independent cause of action against the third party. Such issues, however, are not for this Board to decide.

The case law construing the Clean Streams Law repeatedly has emphasized that where a party has operated a facility in the past, discharges from that facility are the party's responsibility. It is the location of the discharge that is dispositive; the fact that the actions of another may have contributed to the discharge is of very little import. National Wood Preservers, Inc. v. Commonwealth, DER, 489 Pa. 221, 414 A.2d 37, 45 (1980); Commonwealth, DER v. Barnes and Tucker Co., 472 Pa. 115, 371 A.2d 461, 466 (1977), appeal dismissed 434 U.S. 807 (1977); Commonwealth, DER v. Barnes and Tucker, 455 Pa. 392, 319 A.2d 871 (1974); Commonwealth, DER v. Harmar Coal Company, 452 Pa. 77, 306 A.2d 308, 318 (1973).

Although there is no dispute that the pollutional discharges at issue here are all located at the Bear Run Mining Complex, which was previously operated by Appellants, Appellants have argued that DER lacked the authority to issue the instant order because they no longer own or lease the property. (This issue was raised in Appellant's pre-hearing memorandum. In the subsequently formulated stipulation, Appellants agreed that Johnstown remains the lessee of the land upon which the coal processing plant is located.) Even assuming that Appellants' allegations are true--as we are required to do in ruling upon DER's motion for summary judgment--we cannot conclude that DER lacked the power to order Appellants to remedy the conditions at the site.

DER's order is based upon Section 1917-A of the Administrative Code of 1929, 71 P.S. 510-17 (among other statutory provisions). Section 1917-A grants DER "express, unconditional authority" to issue orders directing the abatement of nuisances. Ryan v. Commonwealth, DER, 30 Pa.Cmwlth. 180, 373 A.2d 475 (1977). Pursuant to Section 315(a) of the Clean Streams Law, quoted supra, the operation of a mine or the allowing of a discharge in violation of the terms or conditions

of a permit or DER rules or regulations is deemed to be a nuisance. Appellants do not dispute that the conditions existing at the coal processing plant and the coal refuse disposal area amount to violations of DER rules and regulations, the terms and conditions of the applicable permits, as well as of the Clean Streams Law and the Coal Refuse Disposal Act, 52 P.S. §30.51 et seq. Inasmuch as Appellants agree that there are presently existing, unpermitted discharges from the Bear Run No. 1 mine and the old coal storage area to the waters of the Commonwealth, it is clear that those discharges also constitute a nuisance within the meaning of Section 315(a).

Under the Ryan holding, supra, the fact that the party responsible for the creation of the nuisance is no longer in possession of the land is not a bar to a DER order directing the abatement of the nuisance. The court there stated (quoting prior case law):

> The owner of the soil where the nuisance is must not be allowed to control the public right to have it abated; and what the law commands to be done for the benefit of the public an individual may not resist.
>
> 373 A.2d at 478.

In Ryan, as in the present matter, DER's action was taken under the authority of the Clean Streams Law. The site in question there was a sanitary landfill; the order requiring abatement of the nuisance was upheld.

Moreover, in addition to Section 1917-A, DER premised the issuance of the instant order upon Section 610 of the Clean Streams Law, 35 P.S. §691.610, and Section 9 of the Coal Refuse Disposal Act, 52 P.S. §30.59, both of which grant DER the authority to issue "such orders as are necessary to aid in the enforcement of the provisions of this act." Neither of these provisions requires that the recipient of the order be in possession of the property with which the unlawful condition or conduct is concerned.

In sum, Appellants are responsible for remedying the violations existing at the Bear Run Mining complex regardless of their allegations that some of these problems are the result of the actions of another mining company and regardless of their claim that they no longer own or lease portions of the site. Appellants admit that the mining activities which took place on the site resulted in many of these violations (specifically, those existing at the coal processing plant and the coal refuse disposal area) and that from the late 1960's through 1984, those activities were conducted by Appellants or their subcontractors. To the extent that the violations may be the consequence of the actions of their subcontractors, Appellants remain liable, nevertheless. Black Fox Mining and Development Corporation v. DER, EHB Docket No. 84-114-G (Adjudication dated April 29, 1985) (the existence of a subcontractor relationship will not shield the party from liability for violations of the Commonwealth's mining laws). Moreover, given the fact that Benjamin was operating under the terms of Appellants' Permit No. MD32703303 when it conducted the blasting in the vicinity of the seal, Appellants' argument that DER is somehow responsible for whatever consequences allegedly resulted lacks merit. Appellants' permit was approved by DER based upon the representations Appellants made in their permit application. DER approval of a mining practice does not discharge the permittee's obligation to do its own careful engineering so as to assure that operations conducted under the authority of its permit will not result in a violation of the applicable legal requirements.

To the extent that Appellants have not expressly admitted that their mining activities resulted in the violations present, i.e., on those portions of the site other than the coal processing plant and the refuse disposal area, the stipulation formulated by the parties establishes that the violations existing there are a consequence of the activities conducted by Appellants on those areas

of the site. In light of the long-term, diverse nature of Appellants' activities at the Bear Run mining complex, we have little difficulty concluding that they are responsible for remedying the violations which are presently existing there.

Individual Liability of Corporate Officer

The final issue which we are called upon to address is the individual liability of John E. Kaites under the terms of the order at issue here. The directory portion of the order names both Johnstown Coal and Coke and Kaites as the parties who are charged with carrying out the obligations set forth therein. Appellants have contended that the facts of this case will not support individual liability of Mr. Kaites, i.e. liability apart from that imposed upon the corporation itself by the terms of the order.

Both parties have cited this Board's previous decision discussing this legal issue, W. C. Leasure v. DER, 1982 EHB 355, wherein we held that in order to hold a corporate officer responsible for carrying out the obligations imposed upon a corporation by a DER order, an explicit or implicit duty to take those remedial measures must be established. We rejected the argument that this duty arises simply by virtue of the officer's position within the corporation. The officer's duty must be otherwise established, e.g., by his own acts or by virtue of public policy.

The Pennsylvania courts have permitted piercing of the "corporate veil" in order to "prevent the perpetration of wrong, to prevent its use as a shield for illegal or wrongful conduct; or where its use, as a technical device, brings about injustice or an inequitable situation so that justice and public policy demand it be ignored." McKenna v. Art Pearl Works, Inc., 225 Pa.Super. 362, 310 A.2d 677, 679 (1973). A director or officer of a corporation may be held personally liable where he actually participates in a wrongful act. Amabile v. Auto-Kleen Car Wash, Inc.,

249 Pa.Super. 240, 376 A.2d 247 (1977); Chester-Cambridge Bank and Trust Co. v. Rhodes, 346 Pa. 427, 31 A.2d 128 (1943).

We have little difficulty finding that the prerequisites for reaching beyond the corporate veil are present here. As the president and chief executive officer of Johnstown, Mr. Kaites made all decisions regarding the operation of the Bear Run mining complex, including most notably those dealing with the resolution of DER requirements as set forth in compliance orders. Mr. Kaites negotiated the 1976 consent order and agreement on behalf of Johnstown Coal and Coke, thus assuming an unquestionably active role in determining the obligations which the corporation would agree to assume. The record established here indicates large scale problems which have persisted over a long period of time at the Bear Run mining complex. The person admittedly responsible for making the decisions necessary to assure that these problems would be resolved is Mr. Kaites. He, and no other, assumed the responsibility of assuring that Johnstown Coal and Coke would operate in conformity with the requirements of the Commonwealth's environmental laws. It is apparent that the numerous violations presently existing at the site must be attributed to whatever choices and decisions he has elected to make over the years that he has been in control of Johnstown Coal and Coke. The board of directors of the corporation apparently had little or no real influence over the affairs of the corporation, since it acted only as an advisory body to Mr. Kaites. Indeed, the existence of this board as a viable, legal entity is subject to serious doubt, given the admitted fact that it has not met since sometime in the late 1970's.

Mr. Kaites assumed the duty of assuring that the Bear Run mining complex be operated in conformity with the terms and conditions of its permits, and the applicable statutes, rules and regulations. This duty clearly was not fulfilled.

Under these circumstances, public policy requires that the corporate entity be ignored or, put another way, that for our purposes here, Mr. Kaites be treated as one and the same legal entity as Johnstown Coal and Coke. DER's issuance of the order to Mr. Kaites was not an abuse of discretion.

In conclusion, summary judgment is rendered in favor of DER on the issues of Appellants' responsibility for abating the violations which presently exist at the Bear Run mining complex. The stipulation signed by Appellants establishes all material facts relevant to this determination. Under these established facts, i.e., operation of the mine complex with consequent, numerous violations of the applicable environmental statutes, rules, regulations and permit conditions, Appellants are liable for remedying the violations. In addition, summary judgment is rendered for DER on the issue of Mr. Kaites' personal liability for carrying out the terms of the order appealed herein.

The order, in addition to directing Appellants to take remedial action to abate the pollutional conditions existing at the site also suspended Appellants' Industrial Waste Permit No. 3274207 and Permit No. 500147 for Appellants' coal refuse disposal site. DER's Motion for Summary Judgment does not address the factual and legal bases for this portion of the order. Consequently, we cannot grant summary judgment on all issues relevant to the disposition of this appeal, as DER requests that we do.

O R D E R

WHEREFORE, this 7th day of August, 1985 it is ordered that partial summary judgment is granted in favor of DER on the issues of John E. Kaites' individual liability for complying with the directives of the order appealed herein

and the issue of Appellants' responsibility for correcting violations existing at the Bear Run Mining Complex. Issues concerning the validity of the suspension of Appellants' permits have not been addressed herein. The Board will arrange a conference call among the parties within a short time to discuss further actions to be taken concerning the final disposition of this appeal.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: August 7, 1985

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HUNLOCK SAND AND GRAVEL COMPANY : Docket No. 84-411-M

Appellant : Issued: August 7, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Appellee

OPINION AND ORDER
SUR DER'S MOTION TO DISMISS

Synopsis

DER's motion to dismiss the appeal of appellant Hunlock Sand and Gravel Company from DER's assessment of a civil penalty in the amount of two thousand five hundred dollars ($2,500.00) is granted. Appellant failed to pre-pay the amount of the civil penalty assessment within the requisite thirty (30) day appeal period pursuant to the Clean Streams Law, 35 P.S. §691.605(b)(1); appellant's submission of a so-called "Public Office Money Certificate," deemed not to be legally negotiable by the comptroller, failed to satisfy the pre-payment provision of the Clean Streams Law. Therefore, the Board lacked jurisdiction to hear the matter.

OPINION

Appellee Commonwealth of Pennsylvania, Department of Environmental Resources (DER) has moved the Board to dismiss the appeal of appellant Hunlock Sand and Gravel Company (Hunlock) from DER's assessment on November 29, 1984 of a civil penalty against Hunlock in the amount of two thousand five hundred dollars ($2,500.00). DER assessed a civil penalty because of Hunlock's alleged violations of the Clean Streams Law, 35 P.S. §691.1 et seq. which allegedly occurred as a result of Hunlock's non-coal surface mining operations in Hunlock Township, Luzerne County, Pennsylvania.

In support of its motion to dismiss, DER avers that the Board lacks jurisdiction to hear this appeal due to Hunlock's failure to perfect its appeal within the statutorily mandated thirty (30) days by pre-payment of cash or bond in the amount of the appealed-from civil penalty assessment. 35 P.S. §691.605(b)(1). Hunlock avers that its submission of a so-called "Public Office Money Certificate" purporting to be in the amount of DER's civil penalty assessment was sufficient to satisfy the pre-payment requirements of the Clean Streams Law-- despite the fact that the so-called "Public Office Money Certificate" was rejected by the comptroller's office because it was deemed not to be legally negotiable. We disagree with Hunlock's contention and therefore have no choice but to grant DER's motion to dismiss based upon the following reasoning.

Section 605(b)(1) of the Clean Streams Law provides in pertinent part:

> ...[t]he person or municipality charged with the violation shall then have thirty days to pay the proposed penalty in full, or if the person or municipality wishes to contest either the amount or the fact of the violation, to forward the proposed amount to the department for placement in an escrow account with the State Treasurer or any Pennsylvania bank, or post an appeal bond in the amount of the proposed penalty, such bond shall be executed by a surety licensed to do business in the Commonwealth and be satisfactory to the department, and thereafter to file an appeal to the Environmental Hearing Board within the same thirty day period. The initial assessment shall become final if the amount of the appeal bond is not forwarded to the department or if no appeal is filed with the Environmental Hearing Board within thirty days of the written notice to the person or municipality of the initial assessment and thereafter the person or municipality charged with the violation and suffering the assessment shall be considered to have waived all legal rights to contest the fact of the violation or the amount of the penalty.

35 P.S. §691.605(b)(1).

Because Hunlock submitted a so-called "Public Office Money Certificate" (POMC) instead of the requisite appeal bond or cash, and because the POMC's lack of negotiability prevented the deposit of the amount of the civil penalty assessment into an escrow account, Hunlock failed to comply with the requirements of Section 605(b)(1). That is, pre-payment of the civil penalty assessment was not acheived within the requisite thirty (30) day period. In fact, Hunlock submitted the POMC twice, on both December 17, 1984 and January 28, 1985. Hunlock's second submission occurred despite being informed by Board letter, dated January 8, 1985, that the POMC was not acceptable.

In addition, by certified letter dated June 4, 1985, the Board afforded Hunlock a third and final opportunity to comply with the statute and pre-pay the amount of the appealed-from civil penalty assessment with cash or a bond. In that letter, the Board directed Hunlock, through its representative, Mr. Helmut Rampp, apparently the President of Hunlock, to file within ten days an affadavit from Hunlock's bank

stating that the POMC is a negotiable instrument. (The Board's June 4th letter also informed Mr. Rampp that failure to file the requested affadavit would result in the rendering of a decision without further notice to Mr. Rampp). The filing of the requested affadavit would have resulted in DER's acceptance of the POMC to satisfy the pre-payment requirement of Section 605(b)(1).

However, in response to the Board's June 4th letter, Mr. Rampp submitted a vexatious and confusing "Affadavit and Statement of Facts" and "Affadavit of Poverty," neither of which contained the requested affadavit from Hunlock's bank guaranteeing the negotiability of the POMC. It should be noted that Mr. Rampp's "Affadavit of Poverty" contained no facts in support of his affadavit. To date, Hunlock has not complied with the pre-payment requirement of Section 605(b)(1) of the Clean Streams Law.

We note that Hunlock received the appealed-from civil penalty assessment on December 4, 1984 the thirty (30) day appeal period has long since expired. Despite our concern for the protection of Hunlock's legal rights due to its failure to proceed herein with legal counsel, and as evidenced by our January 8th and June 4th letters to Hunlock's apparent President, Mr. Rampp, we cannot extend the statutorily mandated thirty (30) day appeal period to permit Hunlock any further opportunty to comply with the pre-payment requirement of Section 605(b)(1). Nor can we extend the thirty (30) day appeal period by docketing Hunlock's appeal as a "skeleton appeal." 25 Pa. Code, §21.52; ORCT Corporation v. DER, EHB Docket no. 84-009-M (O&O, February 11, 1985). Consequently, Hunlock's failure to perfect its appeal by pre-payment of the amount of the appealed-from civil penalty assessment within the statutorily mandated thirty (30) day appeal period deprives the Board of jurisdiction to hear this matter. Rostosky v. DER, 26 Pa.Cmwlth. 478, 364 A.2d 761 (1976). Accordingly, we enter the following order.

ORDER

AND NOW, this 7th day of August 1985, DER's Motion to Dismiss the appeal of Hunlock Sand and Gravel Company, EHB docket no. 84-411-M, is granted and the appeal is dismissed with prejudice. DER's assessment of a civil penalty against Hunlock in the amount of two thousand five hundred dollars ($2,500.00) is affirmed. The amount of the civil penalty is due and payable into "The Clean Water Fund" pursuant to 35 P.S. §691.8 upon receipt of this order.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazzullo, Jr.

ANTHONY J. MAZZULLO, JR.
Member

Edward Gerjuoy

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Member

Dated: August 7, 1985

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M. DIANE SMITH
SECRETARY TO THE BOARD

In the Matter of:

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, Plaintiff	:	
v.	:	DOCKET NO. 84-159-CP-G
K. INTERNATIONAL, INC. and FRANK R. KOWALSKI, SR., Defendants	:	(Issued August 7, 1985)

OPINION AND ORDER

SYNOPSIS

Pursuant to an earlier Board order in this matter, DER submitted a memorandum of law delineating which facts it considered had been established for the purposes of this appeal as a result of defendants' failure to respond to DER's interrogatories. The Board herein rules that the failure to answer the DER interrogatories results in the establishment of facts sufficient to constitute deemed violations of 25 Pa.Code §102.31, §102.4, §102.12(b), §102.12(d), §102.12(e), §102.12(g), and §102.11. Facts amounting to a violation of 25 Pa. Code §102.13(d) and §102.12(f) are not established via defendants' failure to respond to the DER interrogatories. Likewise, no violation of 35 P.S. §691.401 is established at this stage of this proceeding. The Board cannot rule upon the amount of a civil penalty imposed under the authority of 35 P.S. §691.605 without considering factors including, but not limited to, the willfulness of the

violation, damage or injury to the waters of the Commonwealth or their uses, and the cost of restoration. The DER interrogatories did not inquire into any of these factors. Therefore, the Board cannot deem any facts concerning the same established for present purposes and cannot proceed to assess a civil penalty for the established violations outlined herein at the present time.

OPINION

This matter stems from a complaint filed by the plaintiff, the Pennsylvania Department of Environmental Resources ("DER") against the defendants, K International, Inc. and Frank Kowalski, Sr. The complaint seeks an assessment of civil penalties against defendants for several alleged violations existing on a site owned by them, located in Venango Township, Butler County, Pennsylvania.

In August of 1984, DER served the defendants with a set of interrogatories which were to be answered within thirty days of service, pursuant to Pa. Rule of Civil Procedure 4006. When no answer to these interrogatories had been made by February, 1985, counsel for DER moved for the imposition of sanctions against defendants. Defendants did not respond to the DER motion and have never answered the interrogatories. By an order dated April 5, 1985, the Board imposed sanctions against the defendants, holding that all facts regarding which DER's interrogatories had inquired were deemed to be established for the purposes of DER in this proceeding. The order also provided that all allegations in defendants' answer to the DER complaint and in the new matter were stricken to the extent they were inconsistent with the facts established by the order. DER was ordered to file a statement of the specific facts which it considered established by the sanctions imposed, a list of the penalties which DER recommended in light of the established facts, and a memorandum of law. DER has done so; defendants have not responded to DER's

filings. The Board's order of April 5, 1985 provided that a failure to respond might result in the Board's accepting DER's recommendations in full.

Count I

Count I of the Complaint alleges a violation of 25 Pa.Code §102.31 which reads in relevant part:

> §102.31. Permit requirements.
>
> (a) Any person or municipality who engages in an earthmoving activity within this Commonwealth shall obtain a permit prior to commencement of the activity; except a permit shall not be required under the following circumstances:
>
> (1) If the earthmoving activity involves plowing or tilling for agricultural purposes.
>
> (2) If an activity is required to obtain a permit pursuant to the Clean Streams Law (35 P.S. §§691.1 - 691.1001), the Surface Mining Conservation and Reclamation Act (52 P.S. §§1396.1 - 1396.21), the Water Obstruction Act (32 P.S. §§681 - 691) or the provisions of Chapters 91 - 101 (relating to water resources).
>
> (3) If an earth-moving activity disturbs less than 25 acres.
>
> (4) If an activity involving more than 25 acres is subdivided into parcels of less than 25 acres and earthmoving is undertaken on non-contiguous parcels and the parcels are stabilized before contiguous parcels are disturbed.

DER alleges that defendants engaged in earthmoving activities without a permit between June 1982 and March 1983. These activities allegedly were conducted on approximately seventy acres of the defendants' site. Defendants admitted in their answer that they had indeed engaged in earthmoving activities on the site, but paragraph 8 of their answer asserts that the activities took place on several sections of land, each section being less than 25 acres. Thus, defendants would have us conclude that no permit was required under §102.31,

since the activities would fall within the exception delineated by §102.31(a)(4). Defendants have not specifically alleged, however, that the 25-acre parcels were non-contiguous or that the parcels were stabilized before contiguous parcels were disturbed.

The DER interrogatory which is directed at the alleged violation of 25 Pa.Code §102.31 reads:

> 3. DESCRIBE the earthmoving activity referred to in Paragraph 8 of the Answer, including:
>
> (a) the total number of acres on which earthmoving occurred,
>
> (b) the size of each section,
>
> (c) the location of each section,
>
> (d) the dates earthmoving began and ended on each section,
>
> (e) the nature of erosion and sedimentation control measures implemented at each section and the date each was implemented,
>
> (f) the date each section was seeded,
>
> (g) the type and amount of seed and mulch used on each section,
>
> (h) the germination rate of seed planted on each section.

In its memorandum of law, DER contends that defendants' failure to respond to this interrogatory has established that: 1) defendants affected an area in excess of 25 acres, i.e., approximately 70 acres, 2) that these 70 acres were contiguous, 3) that the earthmoving occurred between June 1982 and March 1983, and 4) that this earthmoving activity was not authorized by a permit. Given the fact that DER's interrogatory referred specifically to paragraph 8 of defendants' answer, and that defendants nonetheless did not respond to the interrogatory, we consider it reasonable and appropriate to deem the aforesaid DER

contentions established for the purpose of this civil penalty complaint. Taken together, contentions 1) through 4) amount to a violation of 25 Pa.Code §102.31.

Count II

Count II of the complaint alleges a violation of 25 Pa.Code §102.4, which provides in pertinent part:

> §102.4. General.
>
> (a) All earthmoving activities within this Commonwealth shall be conducted in such a way as to prevent accelerated erosion and the resulting sedimentation. To accomplish this, except as provided in subsection (b) of this section, any landowner, person, or municipality engaged in earth-moving activities shall develop, implement, and maintain erosion and sedimentation control measures which effectively minimize accelerated erosion and sedimentation. These erosion and sedimentation measures shall be set forth in a plan as set forth in §102.5 of this title (relating to erosion and sedimentation control plan) and be available at all times at the site of the activity. The Department or its designee may, at its discretion, require this plan to be filed with the Department or its designee.

In particular, paragraph 12 of the complaint alleges that since June 1982 and continuing to at least the time the complaint was filed, defendants had not prepared or had available on the site an adequate erosion and sedimentation control plan. Defendants' Answer alleges that they had an erosion and sedimentation control plan which was prepared at the direction of DER.

The DER interrogatories directed to this issue are Nos. 4-7. No. 4 is directed at establishing the facts necessary to make out a violation under §102.4. The remaining interrogatories are directed more toward discovery of the facts which defendants would establish in support of their contention that there was an erosion and sedimentation control plan which had been prepared at

the direction of DER personnel. We need focus only on No. 4 here, since if the facts necessary to make out a violation of §102.4 have been established, contrary allegations raised by defendants are deemed stricken (see our order of April 5, 1985).

Interrogatory No. 4 provides:

> 4. DESCRIBE the erosion and sedimentation control plan referred to in Paragraph 12 of the Answer and Paragraph 35 of the New matter, including:
>
> (a) when the plan was prepared,
> (b) the IDENTITY of the person(s) who prepared the plan or assisted in its preparation,
> (c) the control measures to be implemented at the K. International Site,
> (d) when the plan was submitted to the Department,
> (e) when the plan was rejected,
> (f) the reasons stated for the rejection.

In order to establish a violation under §102.4, there must be shown a failure to develop, implement, and maintain an erosion and sedimentation control plan. This plan is to be available on the site of the earthmoving activity at all times. DER contends that defendants' failure to answer the interrogatories directed to §102.4 establishes that no erosion and sedimentation plan has been submitted to DER for this site since at least June, 1982 and that none has been available on the site. (Pursuant to our ruling supra, regarding Count I, it already is established that the earthmoving activities in question took place between June, 1982 and March, 1983.) We concur with this contention, for reasons of the sort given supra in connection with Count I and Interrogatory No. 3. Interrogatory No. 4 inquires into the specific steps which would have been taken in the development and implementation of an acceptable erosion and sedimentation control plan. Defendants' failure to answer the interrogatory and their subsequent failure to

respond to DER's memorandum of law, despite the threat of sanctions explicitly stated in our April 5, 1985 order, now justifies a ruling that no erosion and sedimentation plan was formulated by defendants. Defendants are deemed to have violated 25 Pa.Code §102.4.

Count III

Count III of the complaint alleges violations of 25 Pa.Code §§102.4, 102.11, 102.12, and 102.13. Section 102.4 is set forth above. Sections 102.12 and 102.13 are made applicable to defendants' earthmoving activities by virtue of §102.11 which reads:

> §102.11. General requirements.
>
> The erosion and sedimentation control facilities set forth in §§102.12 - 102.13 of this title (relating to control measures and control facilities) shall be appropriately incorporated into all earth-moving activities unless the designer of the erosion and sedimentation control plan shows that alteration of these measures and facilities or inclusion of other measures and facilities shall prevent accelerated erosion and sedimentation.

DER alleges that defendants have violated this regulatory provision in that they have failed to comply with several of the requirements set forth in §§102.12 and 102.13. Interrogatories 7 - 19 are directed toward establishing violations of various subsections of §§102.12 and 102.13. We see no need to reproduce these interrogatories here. For reasons of the sort explained in connection with Counts I and II, at this stage of these proceedings we cannot but conclude that the defendants' failure to answer interrogatories 7 - 19 has established the facts into which these interrogatories inquired. More specifically, we herewith deem established violations of §§102.12(b), 102.12(d), 102.12(e) and 102.12(g).

On the other hand, for reasons which follow, we cannot accept DER's claim that defendants' failure to answer interrogatories has established violations

of §102.12(f) and 102.13(d). DER's Interrogatory No. 14 reads:

> 14. DESCRIBE the ditches referred to in Paragraph 20 of the Answer, including:
>
> (a) the IDENTITY of the person(s) who constructed them,
> (b) when they were constructed,
> (c) their dimensions,
> (d) their locations,
> (e) the cost to Defendants for their construction.

Section 102.12(f) merely provides that all runoff must be collected and diverted to treatment facilities. It does not specifically require that there be ditches employed for this purpose. Thus, taken alone, Interrogatory 14 does not suffice to delineate all relevant facts concerning a violation of §102.12(f). Defendants' answer to DER's complaint denied a violation of §102.12(f) only insofar as they claimed to have in place ditches satisfying the requirements of §102.12(f). Thus, since Interrogatory No. 14 is directed solely at facts concerning those ditches, we cannot hold that facts concerning the absence of collection and diversion facilities have been established by virtue of defendants' failure to respond to this interrogatory. A violation of §102.12(f) has not been established at this stage of this proceeding.

In support of its contention that it should be deemed established that defendants have violated §102.13(d), supra, DER relies upon its Interrogatory 17 which provides:

> 17. State the facts that support Defendants' legal conclusion in Paragraph 22 of the Answer that 25 Pa. Code §102.13(d) did not apply to the K. International Site prior to the waiver alleged in that paragraph.

25 Pa. Code §102.13 reads:

> §102.13. Control facilities.
>
> * * *
>
> (d) Sedimentation basins. The following shall apply to sedimentation basins:

(1) A sedimentation basin shall have a capacity of 7,000 cubic feet for each acre of project area tributary to it and shall be provided with a 24-inch freeboard.

(2) The basin shall be cleaned when the storage capacity of the basin is reduced to 5,000 cubic feet per acre of project area tributary to it.

(3) Outlet structures shall be designed to pass a minimum flow of two cubic feet per second for each acre of project area tributary to the basin.

(4) The discharge from a sedimentation basin shall be to a natural waterway.

(5) Sedimentation basins shall be structurally sound and protected from unauthorized acts of third parties.

Defendants' Answer, paragraph 22, contends that "sedimentation basins in this project were not required and, in fact, specifically were waived as a means of erosion and sedimentation control by personnel of the plaintiff . . ." DER's Interrogatory 17 is directed at this allegation by the defendants; the interrogatory does not request information bearing upon those facts necessary to establish a violation of §102.13(d). Therefore, we cannot conclude that such a violation is established by virtue of defendants' failure to respond to this interrogatory.

Count V[1]

Count V of the complaint alleges a violation of §401 of the Clean Streams Law, 35 P.S. §691.401, which states:

§691.401. Prohibition against other pollutions

It shall be unlawful for any person or municipality to put or place into any of the waters of the Commonwealth, or allow or permit to be discharged from property owned or occupied by such person or municipality into any of the waters of the Commonwealth, any substance of any kind or character

[1] The complaint does not contain a Count IV.

> resulting in pollution as herein defined. Any such discharge is hereby declared to be a nuisance.
>
> 1937, June 22, P.L. 1987, art. IV, §401. As amended 1970, July 31, P.L. 653, No. 222, §14.

DER argues that defendants' failure to respond to Interrogatories 18 and 19 should result in a determination that the facts necessary to establish a violation of this provision have been established. In order to establish a violation of §401, there must be some basis upon which to rest a finding that a pollutional discharge to waters of the Commonwealth has occurred. We already have quoted Interrogatory 19. Interrogatory 18, like Interrogatory 19, does not inquire about discharges, but rather is directed at obtaining information concerning construction and design of treatment facilities and the manner of removal of sediment from runoff. We cannot conclude that failure to answer Interrogatories 18 and 19 results in a determination that defendants allowed or permitted a pollutional discharge to the waters of the Commonwealth. Consequently, such a violation has not been established at this stage of this proceeding.

ASSESSMENT OF PENALTIES

DER's complaint for civil penalties is based upon the authority granted the Department under Section 605 of the Clean Streams Law, 35 P.S. §691.605. Section 691.605(a) requires that the following factors be considered in determining the amount of a civil penalty assessed pursuant to that statutory provision: willfulness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and "other relevant factors".

The Board cannot find anything in DER's interrogatories which inquires into facts which might be taken to establish any of the additional factors delineated in §691.605(a). The established facts are sufficient to determine that certain violations have occurred, but the fact of violation is only the first step in

determining how large a civil penalty properly may be assessed. We are constrained by §691.605 to give consideration to other "relevant factors" in determining the amount of the penalty. Since we cannot determine from the present record of this matter whether any or all of these factors are present here, we cannot at this time assess civil penalties for the violations which we consider established under the terms of this opinion and the order of April 5, 1985.

O R D E R

WHEREFORE, this 7th day of August, 1985, it is ordered that in further proceedings in this matter, including final adjudication, the defendants will be deemed to have violated 25 Pa.Code §102.31, 25 Pa.Code §102.4, 25 Pa.Code §102.12(b), §102.12(d), §102.12(e), §102.12(g), and (as a consequence of the violations of §102.12) 25 Pa.Code §102.11.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: August 7, 1985

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(717) 787-3483

GLENN COAL COMPANY :

:

: Docket Nos. 84-389-G
: 84-390-G

(Issued August 9, 1985)

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR MOTION TO DISMISS
AND MOTION FOR SANCTIONS

SYNOPSIS

Action upon DER's Motion for Sanctions is deferred for the present. The Motion may be renewed at a future date. DER's Motion to Dismiss is granted in part and denied in part. These appeals were filed in the name of Glenn Coal Company. It subsequently having been revealed that Glenn Coal Company may not have authorized the filing of these appeals, the Board was required to determine who the proper Appellants herein would be. Despite doubts concerning Glenn Coal Company's intention of appealing the bond forfeitures at issue herein, the Board will not at this time dismiss the appeals as to the company. Counsel is directed to file affidavits and supporting documents concerning his authorization to represent the company, and concerning the company's receipt of notice of these bond forfeitures. The appeal is dismissed as to one of two individuals who counsel claims to be representing herein. This individual did not sign a Notice of Appeal and his identity and relationship to this matter

was not made clear until several months after the filing of the Notice of Appeal. Consequently, this individual's appeal of the instant bond forfeitures is untimely and must be dismissed pursuant to 25 Pa.Code §21.52. The other individual whom counsel claims to be representing signed the initial Notices of Appeal; therefore, the Board deems this individual to be a proper Appellant herein. Henceforth, pending receipt of the aforementioned affidavits and documents from counsel, the Board deems this individual and Glenn Coal Company to be the Appellants in this matter. In addition, counsel is directed to provide the Board with documentation of the grounds upon which this individual Appellant bases his standing.

OPINION

These appeals of several DER bond forfeitures were filed in November of 1984. Each appeal was filed on the standard form furnished by the Board. In paragraph 1 of the appeal form, headed "Complete Name, Address and Telephone Number of Appellant," each appeal listed "Glenn Coal Company, Division of Champion Coal Co., Inc. c/o Robert M. Hanak," with an address and telephone number. Under the affirmation, "The information submitted is true and correct to the best of my information and belief," each appeal was signed by Francis D. Marrazo, Jr., who was otherwise unidentified. In response to the form's statement: "If you have authorized an attorney to represent you in this proceeding before the Board," please supply the attorney's name, address and telephone number, each appeal once again listed Mr. Hanak, Esq., with the same address and telephone number as previously.

Shortly thereafter the Department of Environmental Resources ("DER") served its first set of interrogatories in each appeal upon Glenn Coal Company, c/o Mr. Hanak. Having received no response to said interrogatories within the

thirty-day period prescribed by Pennsylvania Rule of Civil Procedure 4006, DER moved for the imposition of sanctions, in accordance with Pa.R.C.P. 4019. In response to this motion Mr. Hanak stated that the Appellant in these appeals was not, in fact, Glenn Coal Company, as had been stated in each Notice of Appeal filed by Mr. Hanak; rather, Mr. Hanak now stated, the Appellants were two individuals, Francis Marrazzo and Robert Fleming, former stockholders and owners of Glenn Coal. Mr. Hanak further stated that these individuals no longer had any right, title, or interest in Glenn Coal Company, and therefore that Mr. Hanak was unable to respond to DER's discovery requests because the aforesaid individuals did not possess the corporate records necessary to provide the information requested. In addition, Mr. Hanak stated that "there has been no direct appearance on behalf of Glenn Coal Company by any counsel."

Having received this response from Mr. Hanak, DER moved to dismiss these appeals on the basis that the purported Appellant, Glenn Coal Company, apparently does not intend to proceed with these appeals, whereas the two individuals identified in the response to DER's Motion for Sanctions had not appealed in their own right within the thirty-day time period prescribed by 25 Pa.Code §21.52(a). Mr. Hanak has responded to the DER motion. His response is identified as "Glenn Coal Company's Response to Commonwealth of Pennsylvania Motion To Dismiss Appeal." The essence of his response is that Fleming and Marrazzo have standing to appeal because they are "endorsed sureties" or "indemnifying parties" on the bonds whose forfeitures are the subject of these appeals.

The first issue we are called upon to address is whether there are any appellants before the Board. If we were to accept at face value Mr. Hanak's claim that he was "at all times . . . acting as the attorney for Fleming and Mazzarro in pursuing this appeal," we would have to infer that Glenn Coal Company is not the proper Appellant herein. Despite the fact that Mr. Hanak signed

several documents filed with the Board as "counsel for Appellant" and simultaneously identified the Appellant as Glenn Coal Company, he now is asserting that he acted without the consent of Glenn Coal Company in so doing. Consequently, we cannot deem these appeals to have been taken on behalf of Glenn Coal Company. On the other hand, we are hesitant to wholly dismiss Glenn Coal Company as an Appellant on the sole word of Mr. Hanak, whose past statements to the Board scarcely have been accurate, to put it mildly. For the present, therefore, we will retain Glenn Coal as an appellant in these appeals, pending our receipt of the information called for in the accompanying Order.

As for Mr. Fleming and Mr. Marrazzo, these appeals were filed in November of 1984. The Notice of Appeal forms filed with the Board at that time bear the signature of Mr. Marrazzo and only Mr. Marrazzo. Mr. Fleming's relationship to this bond forfeiture proceeding was first made apparent more than seven months after the appeals were filed, long after Mr. Hanak claims to have begun acting for Mr. Fleming in this matter. Appeals from DER actions must be filed with the Board within thirty days of the date of notice of the DER action. Consequently, the Board is without jurisdiction to hear an appeal brought on behalf of Mr. Fleming. However, the Board is willing to waive the technical deficiency that Mr. Marrazzo's name appeared in the signature blank but not in the first portion of the appeal form. Therefore we do deem these appeals to have been taken by Mr. Marrazzo, a ruling we believe to be consistent with the precepts of 1 Pa.Code §31.2. Henceforth these appeals will be captioned as follows:

Glenn Coal Company
and Francis D. Marrazzo, Jr.,
Appellants

v.

Commonwealth of Pennsylvania
Department of Environmental Resources,
Appellee

Of course, our present acceptance of this caption carries no implications whatsoever as to Glenn Coal's ultimate status as an appellant in these appeals, after the Board has had the opportunity to review the information the accompanying Order requests. Moreover, in accepting Mr. Marrozzo as an appellant for the present, the Board reserves the right to dismiss Mr. Marrozzo's appeal if Mr. Marrazzo cannot establish his standing to appeal these bond forfeitures.

Finally, DER's Motion for the Imposition of Sanctions remains to be addressed. Mr. Hanak failed to respond in any manner to the DER interrogatories other than via his response to DER's Motion for Sanctions in which it was stated that "Marrazzo and Fleming question whether they are legally obligated" to respond to DER's interrogatories. It is now clear that since Mr. Fleming is not a party to this appeal, he is under no obligation to respond to said interrogatories. Mr. Marrazzo, however, having been accepted as a party, does indeed have an obligation to respond to interrogatories directed to him. Given the substantial confusion surrounding the status of this appeal during the past few months, however, the Board will not at this time impose sanctions against Glenn Coal or Mr. Marrazzo for failure to respond to the DER interrogatories in any satisfactory way. The Board will deem DER's interrogatories--previously served upon Glenn Coal--to have been served upon Mr. Marrazzo as well. Mr. Marrazzo shall respond to said interrogatories in full compliance with the Pennsylvania Rules of Civil Procedure within thirty days of the date of the accompanying Order. The Board emphasizes that under these Rules Mr. Marrozzo must answer or object to each interrogatory propounded by DER. Pa.R.C.P. Rule 4006(a)(2).

WHEREFORE, this 9th day of August, 1985, it is ordered that:

1. DER's Motions to dismiss these appeals and for sanctions are rejected for the present, but may be renewed at some future time upon good cause shown.

2. Francis D. Marrazzo, Jr. is accepted as an appellant in these appeals, which henceforth are to be recaptioned as indicated in the accompanying Opinion.

3. Robert Fleming is not an appellant in either of the above-captioned appeals.

4. Within thirty days of the date of this Order, Mr. Marrazzo is to respond to the interrogatories previously served upon Glenn Coal c/o Mr. Hanak.

5. Within twenty days of the date of this Order, Mr. Hanak is to file affidavits with the Board, accompanied by suitable supporting documents, which will respond to the following questions:

a. Has Mr. Hanak ever represented Glenn Coal?

b. To Mr. Hanak's best knowledge and belief, did Glenn Coal have any reason to believe that Mr. Hanak's filing of these appeals was done in Glenn Coal's name, and satisfied the thirty-day requirement for Glenn Coal's filing of such appeals?

c. How and when did these forfeitures of Glenn Coal's bonds first come to Mr. Hanak's attention?

d. Does Mr. Hanak have any reason to believe that Glenn Coal received notice of these bond forfeitures, and if so when?

e. Why does Mr. Marrazzo have standing to appeal these bond forfeitures? This question must be answered very precisely, with reference to

the language of bonds or other instruments, and including legal citations that would establish standing under the facts of these appeals.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: August 9, 1985

cc: Bureau of Litigation
Robert M. Hanak, Esquire
Joseph K. Reinhart, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

RUSSELL W. JOKI :

:

: Docket Nos. 85-137-G
: 85-138-G

Issued August 12, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION FOR SANCTIONS

SYNOPSIS

Appellant has failed to respond to a request for production of documents served upon him by the Department pursuant to Pennsylvania Rule of Civil Procedure 4009. Appellant also has not responded to the DER motion for sanctions. Therefore, Appellant is ordered to permit the inspection of said documents within twenty days. Failure to comply with this order will result in Appellant's being precluded from introducing any evidence relating to the content of said documents at the hearing on the merits of this appeal, if and when held.

OPINION

The Department of Environmental Resources ("DER") has moved this Board to impose sanctions against Appellant for failure to respond to DER's discovery requests. The motion was filed in June of 1985. Subsequent to the filing of

the motion, during the period allocated for the Appellant's response thereto, Appellant partially complied with the DER discovery request. Specifically, Appellant filed answers to DER's first set of interrogatories. Accordingly, DER withdrew that portion of its motion which sought sanctions on the basis that Appellant had not responded to the first set of interrogatories within the thirty-day period prescribed by Pa.R.C.P. 4006. DER, however, has continued to press for the imposition of sanctions against Appellant for Appellant's failure to permit the inspection of documents, as requested by DER at the time it served its first set of interrogatories upon Appellant. DER maintains that no response to its request has been made. Appellant has not responded to the DER motion.

DER's request for production of documents in toto consists of the following:

> The Commonwealth of Pennsylvania, Department of Environmental Resources ("DER") by its attorney, hereby requests the right to inspect and copy documents identified below pursuant to Pa.R.C.P. 4009 and 25 Pa.Code §21.111 at a time and place mutually satisfactory to the parties.
>
> 1. All documents identified in the answers to the attached DER interrogatories.
> 2. All documents used to prepare Russell W. Joki's Notice of Appeal.
> 3. All documents used to prepare Russell W. Joki's Application for Special Reclamation Project No. 689, Mine Drainage Permit No. 63800106 and Mining Permits Nos. 102102-63800106-01-0 and 102102-63800101-01-1.

Pennsylvania Rule of Civil Procedure 4009 authorizes any party to serve a request for production of documents on any other party at any time, without leave of court, after commencement of the action. Rule 4009(b)(2) provides:

> The party upon whom the request is served shall serve a written response within thirty days after the service of the request. . . The response shall

> state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated.

Appellant has neither responded to the DER request nor objected to its content. In connection with his answers to DER's first set of interrogatories, Appellant provided copies of certain documents identified in the answers to the interrogatories. Thus, the first paragraph of DER's request for production of documents in fact may be moot. However, without more on the record the Board will not so rule. It is Appellant's responsibility to explain to the Board why sanctions should not be imposed against him by, e.g., filing a response to the DER motion. Moreover, at this late date, the Board no longer will permit the Appellant to file objections.

O R D E R

WHEREFORE, this 12th day of August, 1985, it is ordered that Appellant shall provide DER with an opportunity to inspect the documents identified in DER's request for production of documents within twenty (20) days of this date. Failure to comply with this order will preclude Appellant from presenting any evidence relating to the content of said documents at the hearing on the merits if and when held.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: August 12, 1985

cc: Bureau of Litigation
Robert O. Lampl, Esquire
David Fleming Taylor, Esquire
Richard S. Ehmann, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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HARRISBURG, PENNSYLVANIA 17101
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KISKI AREA SCHOOL DISTRICT :

:

: Docket No. 85-074-G

: Issued: August 15, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

SYNOPSIS

This appeal of a denial of an application for funding under Act 339, 35 P.S. §701, is dismissed. The application was not submitted by the January 31 deadline set forth in Section 3 of the Act, 35 P.S. §703, and 25 Pa.Code §103.123(a). Failure to timely submit the Act 339 application is a valid basis for denial of the application.

OPINION

This appeal concerns a denial by the Pennsylvania Department of Environmental Resources ("DER") of an application submitted by the Washington Township School Building Authority ("Authority") for "Act 339" funding. DER denied the application in a letter dated February 12, 1985, on the basis that the application had not been timely submitted. DER has now filed a motion to dismiss this appeal, on the basis that the untimely filing was per se a valid reason for DER to deny

the application. Appellant has not responded to the DER motion. The essential facts here are not disputed, however.

"Act 339", 35 P.S. §§701 et seq., authorizes the Commonwealth to reimburse municipalities, municipal authorities, and school districts for certain costs incurred in the construction, operation and maintenance of sewage treatment facilities. 35 P.S. §701. Section 3 of the Act, 35 P.S. §703, provides that application for funding must be filed by the thirty-first day of January of the year following that in which the covered expenditures were made. 25 Pa.Code §103.123(a) provides that "no application received by the Department or postmarked later than January 31 will be accepted for processing by the Department."

The application submitted by the Authority was received by DER on February 7, 1985. As a consequence of this untimely filing, DER determined that the Authority was ineligible for Act 339 funding for 1984. We have little difficulty holding that this denial was proper. As we stated in Sanitary Authority of the City of Duquesne v. DER, 1984 EHB 635 (EHB Docket No. 83-055-G), "it cannot be an abuse of discretion for DER to enforce the literal terms of a statute or regulation." We there rejected the argument that "substantial compliance" with the deadline would suffice. Act 339 applications must be filed by January 31 of the year following the expenditures. Failure to comply with this deadline results in ineligibility for funding.

Appellant's argument that it was not responsible for filing of the application but nevertheless will incur the harm resulting from the denial carries no weight. Appellant has not identified the relationship between itself and the Authority. Thus, there may be some question whether Appellant actually has standing to bring this appeal. Nevertheless, we need not address this issue here.

We assume for the purpose of argument that the Authority and Appellant are both involved in the construction, operation and maintenance of the sewage facilities for which the Act 339 funds are sought, given Appellant's statement that it would be the recipient of the funds for which the Authority submitted the application. If this is, in fact, the case, it seems reasonable to expect that Appellant would undertake the responsibility for ascertaining whether the Authority would be submitting the Act 339 application prior to the January 31 deadline. Appellant should be capable of monitoring affairs which have a direct impact upon its financial operations. Moreover, although DER is under no legal obligation to remind parties of the Act 339 deadline, the Appellant has filed with the Board a letter from DER to the Authority, dated January 14, 1985, reminding the Authority that the Act 339 filing was due. DER hardly could have done more; DER had absolutely no reason to send such a reminder to the Appellant, who never previously had submitted an application for Act 339 funds.

O R D E R

WHEREFORE, this 15th day of August , 1985, it is ordered that this appeal is dismissed. DER is entitled to judgment as a matter of law.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR., Member

Edward Gerjuoy

EDWARD GERJUOY, Member

DATED: August 15, 1985

cc: Bureau of Litigation
For the Appellant: Dr. Stephen M. Vak, Superintendent
Kiski Area School District, Vandergrift, Pa.
For the Commonwealth: Michael E. Arch, Esquire, Pittsburgh, Pa.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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MARLIN L. SNYDER :

:

: Docket No. 84-400-G
: Issued: August 15, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION FOR SUMMARY JUDGMENT

SYNOPSIS

DER's Motion for summary judgment is granted. Appellant failed to respond to DER's requests for admission, thereby requiring the Board to treat as admitted the material facts herein. The appeal concerned a compliance order issued under the authority of 25 Pa.Code §§87.141 and 87.106. Appellant admitted that backfilling had not been accomplished in a manner so as to assure that it was concurrent with mining and also admitted that no sedimentation control measures had been established as required by an earlier DER order. Consequently, DER is entitled to judgment herein as a matter of law.

OPINION

This is an appeal of a compliance order dated October 30, 1984 issued to Appellant by the Pennsylvania Department of Environmental Resources ("DER"). The order cites Appellant for having failed to comply with an earlier DER order, dated July 20, 1983, in two respects: 1) failure to bring the site to a state where backfilling is concurrent with mining and 2) failure to install temporary sedimentation controls on the site to control runoff.

Appellant is appearing pro se. DER has moved for summary judgment on the basis of its requests for admissions, served upon Appellant on or about April 29, 1985. Appellant never has responded to these requests. Pennsylvania Rule of Civil Procedure (PA.R.C.P.) 4014 governs requests for admissions, and reads in pertinent part:

> (b) Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty days after service of the request . . . the party to whom the request is directed serves upon the party requesting an admission a verified answer or an objection addressed to the matter, signed by the party or by his attorney.
>
> * * *
>
> (d) Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission.

Appellant has directed no correspondence whatsoever to the Board concerning either DER's request for admissions or DER's motion for summary judgment. Pa.R.C.P. 1035, governing disposition of motions for summary judgment, provides that:

> After the pleadings are closed, but within such time as not to delay trial, any party may move for summary judgment on the pleadings, and any depositions, answers to interrogatories, admissions on file and supporting affidavits.

> The judgment sought shall be rendered 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.
>
> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading but his response, by affidavits or as otherwise provided in his rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

The regulation applicable to the first portion of the instant compliance order is the following:

> 25 Pa.Code §87.141: Backfilling and Grading; General Requirements.
>
> (c) Timing of backfilling and grading shall be concurrent with mining and ccmply with the following:
>
> (1) rough backfilling and grading shall follow coal removal by not more than 60 days unless an extension of time is granted by the Department based upon the applicant's ability to demonstrate through a detailed written analysis under Section 87.68(3) (relating to reclamation information) that additional time is necessary.

DER's request for admission No. 1 requested that Appellant admit that backfilling on the instant site followed coal removal by more than sixty days. Appellant failed to respond to this request; consequently, Appellant is deemed to have admitted that he did not backfill within sixty days of coal removal as required by §87.141.

DER's request for admission No. 2 asked Appellant to admit that he did not submit a detailed written analysis per §87.68(3) demonstrating a need for

additional time to backfill. Appellant's failure to respond to this request for admission requires us to deem it established that no such written analysis was submitted. Consequently, Appellant has admitted the relevant facts giving rise to the first portion of the instant compliance order. Appellant has raised no specific defenses to the DER order; he simply has denied the factual findings underlying the same. Given the admissions, there are no material facts in dispute; DER did not arbitrarily exercise its duties or functions in issuing the first portion of the appealed compliance order, i.e., the portion directing Appellant to bring the backfilling of the site to a state where it was concurrent with mining.

The regulation applicable to the second portion of the compliance order, i.e., the portion dealing with the construction of sediment controls, provides in relevant part:

> 25 Pa.Code §87.106 Hydrologic Balance: sediment control measures
>
> Appropriate sediment control measures shall be designed, constructed, and maintained using the best technology currently available to:
>
> 1) Prevent to the maximum extent possible contributions of sediment to streamflow or to runoff outside the affected area.

DER's request for admission No. 3 asked Appellant to admit that the sediment controls on the instant site had not been approved in writing by DER. Request for admission No. 4 asked Appellant to admit that he did not install temporary sediment controls on the site, as required by the earlier DER compliance order of July 20, 1983. Appellant's failure to respond to either of these requests for admission results in his having admitted that no temporary sediment controls were constructed and that no sediment controls on the site have been approved by DER. Consequently, in light of the fact that Appellant has raised no defenses

to the compliance order, and given that all material facts are conclusively established, we must uphold the second portion of the appealed compliance order as well.

The Board normally grants pro se appellants great latitude. In this appeal, however, the Board already has sanctioned the Appellant for failing to file his pre-hearing memorandum despite repeated reminders (Opinion and Order of June 3, 1985 at the above docket number). The Appellant's failure to respond to DER's requests for admissions and to its motion for summary judgment merely continues the pattern of unresponsiveness which led to the sanctions detailed in our June 3, 1985 Order. Even a pro se appellant must pay some attention to the Board's rules and the requirements of the Pennsylvania Rules of Civil Procedure. The Appellant has put forth no explanation of his repeated failure to obey the rules. DER is entitled to judgment herein as a matter of law.

O R D E R

WHEREFORE, this 15th day of August, 1985, DER's Motion for Summary Judgment is granted. This appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo Jr.

ANTHONY J. MAZULLO, JR., Member

Edward Gerjuoy

EDWARD GERJUOY, Member

DATED: August 15, 1985

cc: Bureau of Litigation
Marlin L. Snyder, pro se Appellant, Timblin, Pa.
Joseph K. Reinhart, Esq., Pittsburgh, for DER

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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NESHAMINY WATER RESOURCES AUTHORITY :

: Docket No. 85-013-M
: Issued: August 16, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

DER's Motion for Reconsideration of a Board order staying proceedings in this matter is denied. The Board order of which DER moves for reconsideration is interlocutory and the Board's rule providing for reconsideration, 25 Pa. Code §21.122, applies to final Board decisions. Although the Board has the power to reconsider any of its rulings prior to final adjudication, the Board will only reconsider interlocutory decisions under extraordinary circumstances, and no extraordinary circumstances have arisen in this case.

OPINION

On January 17, 1985, this Board received a Notice of Appeal from Neshaminy Water Resources Authority (appellant), which stated that appellant was appealing the adoption by the Environmental Quality Board (EQB) of amendments to 25 Pa. Code Chapters 93 and 95. On January 24, 1985, the Board received a copy of a Petition for Review in the Nature of an Appeal and in the Nature of a Request for Injunctive and Declaratory Relief, filed by appellant in the Commonwealth Court (No. 222 C.D. 1985), in which appellant is appealing the adoption of the same amendments that appellant is appealing in this matter.

Then, on May 9, 1985, the Department of Environmental Resources (DER) filed a Motion to Quash this appeal on the basis that this Board has no jurisdiction to review the EQB's adoption of amendments to the regulations at 25 Pa. Code, Chapters 93 and 95. Appellant filed an answer to DER's Motion to Quash on May 30, 1985.

After review of DER's Motion to Quash and appellant's Answer to Motion to Quash, the Board issued an order dated June 5, 1985 that continued generally and stayed the proceedings in this matter pending a decision by the Commonwealth Court in appellant's appeal No. 222 C.D. 1985. Then, on June 25, 1985, DER filed a Petition for Reconsideration, pursuant to 25 Pa. Code §21.122(a), asking the Board to reconsider, en banc, the order issued June 5, 1985. Appellant filed an Answer to Petition for Reconsideration on July 18, 1985, and DER filed a response to appellant's Answer to Petition for Reconsideration on July 25, 1985.

The Board's rules provide for rehearing or reconsideration at 25 Pa. Code §21.122:

> (a) The Board may on its own motion or upon application of 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.

The Board has interpreted 25 Pa. Code §21.122 as only providing for reconsideration following final decisions of the Board because the key to obtaining a rehearing or reconsideration under §21.122 is the lack of opportunity to brief a legal issue or to introduce relevant facts. See Chemical Waste Management, Inc. v. DER, 1982 EHB 482. Since the Board's order dated June 5, 1985 was not a final decision, reconsideration under §21.122 would be inappropriate.

Although the Board has consistently held that §21.122 only applies to reconsideration of final orders, the Board has held that its general powers to conduct its proceedings permit the Board to reconsider any of its rulings at any time prior to final adjudication, but that the Board will only expend its overtaxed resources on reconsideration of interlocutory decisions under "extraordinary circumstances." See Culp v. DER, 1984 EHB 611; Old Home Manor, Inc. v. DER, 1983 EHB 463; Magnum Minerals, Inc. v. DER, 1983 EHB 589. DER's Petition for Reconsideration does not present the Board with any "extraordinary circumstances" that would warrant the Board's deviating from its established practice of not reconsidering its interlocutory orders.

ORDER

AND NOW, this 16th day of August, DER's Petition for Reconsideration of the Board Order dated June 5, 1985 at EHB Docket No. 85-013-M is denied. The Board does not reach the merits of DER's Motion to Quash.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR., MEMBER

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation

For the Commonwealth, DER:
Vincent M. Pompo, Esq.

For the Appellant:
Lois Reznick, Esq.
Dechert Price & Rhoads, Philadelphia, PA

DATED: August 16, 1985

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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THEODORE PRICE :

: Docket No. 85-307-M

: Issued: August 16, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

This appeal from a DER compliance order is dismissed for lack of jurisdiction because it was not filed with the Board within thirty days after appellant received notice of DER's action, as required by 25 Pa. Code §21.52(a).

OPINION

This is an appeal from a compliance order of the Department of Environmental Resources (DER) that appellant received on June 6, 1985. On June 25, 1985, appellant mistakenly filed his Notice of Appeal at DER's Bureau of Litigation rather than with this Board. After realizing his mistake, appellant filed a Notice of Appeal with the Board on July 25, 1985. DER has moved to dismiss this appeal for lack of jurisdiction. DER's motion to dismiss is granted because this appeal was not filed with this Board

within thirty days after appellant received notice of DER's action, as required by 25 Pa. Code §21.52(a). This Board has no jurisdiction over untimely filed appeals, Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976), and appellant has not averred any circumstances that would warrant the granting of an appeal nunc pro tunc.

ORDER

AND NOW, this 16th day of August, 1985, the Commonwealth's Motion to Dismiss is granted, and the appeal of Theodore Price at EHB Docket No. 85-307-M is dismissed.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR., MEMBER

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation

For the Commonwealth, DER:
Bernard A. Labuskes, Jr., Esq.

For the Appellant:
Robert T. Panowicz, Esq.
Wilkes-Barre, PA

DATED: August 16, 1985

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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HARRISBURG, PENNSYLVANIA 17101
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BRADFORD COAL COMPANY, INC. :

:

: Docket No. 85-163-G
: (Now consolidated at 83-061-G)

v. : Issued August 16, 1985

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR MOTION
FOR PROTECTIVE ORDER

SYNOPSIS

A ruling on DER's Motion for Protective Order is deferred for the present. The materials regarding which discovery is sought apparently are limited to communications or instructions from the DER attorney to his client. Such communications are not covered by the attorney-client privilege, as embodied in 42 Pa.C.S.A. §5928, since they are not statements made by the client to counsel. However, the materials sought may constitute attorney work product and therefore be protected against disclosure on that basis. The parties are ordered to brief this issue.

OPINION

The Department of Environmental Resources ("DER") has moved for the issuance of a protective order prohibiting Appellant from obtaining discovery of certain information regarding communications between counsel for DER and a DER employee, a mining conservation inspector. The Motion originally covered

a large number of requests for discovery served upon DER by Appellant. The parties, however, have been able to satisfactorily resolve all of these disputes with the exception of that addressed herein, namely DER's duty to disclose, in response to a discovery request, written instructions or documents furnished by DER's counsel to a DER inspector concerning a cessation order which is one of the DER actions at issue in this consolidated appeal.

DER argues that such information is protected against disclosure by the attorney-client privilege. Appellant counters that the privilege is not applicable here because of the circumstances under which these communications took place. Appellant's contention is founded upon the fact that the inspector's report accompanying the cessation order at issue states that "this report was written under the instructions of Department attorney Tim Bergere." Appellant claims that this statement constitutes a waiver of the privilege, if one exists.

We first consider Appellant's argument of waiver. Waiver implies an intentional relinquishment of a known right. Black's Law Dictionary, (5th Ed. 1979). We cannot conclude that the DER inspector intended to relinquish the privilege against disclosure of communications between herself and counsel by inserting the above-quoted sentence in the inspection report, particularly in light of the fact that no request for the discovery of such communications had been made at that point in time. When such a request was made, DER responded with a Motion for a Protective Order explicitly invoking the privilege. Therefore, we hold that there has been no waiver of the attorney-client privilege.

There is considerable question, however, whether the attorney-client privilege is applicable in this circumstance. We do not believe that the mere fact that a DER attorney may have been consulted in connection with possible enforcement actions has any bearing on whether the privilege is applicable here,

as Appellant seems to imply. Certainly it is to be expected that DER counsel will have a role in enforcement of the Commonwealth's environmental statutes and regulations. However, the information requested by Appellant includes only communications from counsel to the client, and not communications from the client to counsel. This is a significant distinction where the attorney-client privilege is invoked.

Application of the attorney-client privilege within this Commonwealth is governed by statute. 42 Pa.C.S.A. §5928 provides:

> In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial of the client.

The purpose behind this privilege is to foster a trusting and open relationship between the client and the attorney. Estate of Kofsky, 487 Pa. 473, 409 A.2d 1358 (1980). However, it has been repeatedly held that this statutory provision applies only to communications from the client to the attorney; in other words, it is a one-way street. Nelson v. Himes, 62 D & C 2d 748 (1973); Eisenman v. Hornberger, 44 D & C 2d 128 (1967). See also Union Carbide Corporation v. Traveler's Indemnity Company, 61 F.R.D. 411 (W.D.Pa.1973) and LaRocca v. State Farm Mutual Auto Insurance Company, 47 F.R.D. 278 (W.D.Pa.1969) (construing this statutory provision). This interpretation is consistent with the plain language of the statute. Of course, if the attorney's statements encompass or reiterate communications to him from the client, the statements are to that extent privileged against disclosure. Eisenman v. Hornberger, supra; In re Westinghouse Electric Corp. Uranium Contracts Litigation, 76 F.R.D. 47 (W.D.Pa.1977). However, DER is not arguing that its counsel's communication to the inspector is privileged

for this special reason.

Limiting the privilege to the client's communications to his attorney conforms to the purpose underlying the existence of the privilege. In order to be an effective advocate, the attorney must be made aware of all relevant facts and circumstances of his client's case. On occasion this may require the client to reveal potential damaging information; such necessary communications from the client to his attorney would be severely hampered if counsel could be forced to divulge these admissions in court, over the client's objection. This reasoning, however, does not apply to statements made from the attorney to the client.

On the other hand, an attorney does not necessarily have to reveal the substance of his conversations with his client. Communications which include the attorney's mental impressions of the client's case, or his conclusions and opinions regarding legal theories and the like, need not be disclosed since they constitute the attorney's work product. Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). Pa.R.C.P. 4003.3. Although neither party has raised this point, it seems possible that at least some of the information requested by Appellant from DER in connection with communications form counsel to the DER inspector may be protected against disclosure by the work product doctrine. Therefore, we withhold a final ruling upon DER's Motion for a Protective Order until the parties have had an opportunity to address this issue.

O R D E R

WHEREFORE, this 16th day of August, 1985, it is ordered that within thirty (30) days of this date each party shall submit a brief addressing the issue of the applicability of the work product doctrine, as stated in Pa.R.C.P. 4003.3, to the issue addressed herein, namely DER's duty to disclose documents and written instructions furnished to DER's Mining Conservation Inspector by counsel for DER in connection with the cessation order of March 29, 1985.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: August 16, 1985

cc: Bureau of Litigation
Dwight L. Koerber, Jr., Esquire, Kriner & Koerber, Clearfield, for Appellant
Timothy J. Bergere, Esquire, Harrisburg, for the Commonwealth

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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MAGNUM MINERALS, INC.

:

: Docket No. 82-230-G

: Issued August 21, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

SYNOPSIS

DER's Motion for Production of Documents is granted. Appellant shall provide DER with copies of a report prepared by Appellant's expert witness after a previously furnished report on the same subject, with the expert's field notes concerning certain tests and samplings taken from the subject stream, and with an updated resume and list of publications for the expert. Appellant's objections are insufficient to preclude the discovery of this information. A party is entitled to discovery of the substance and general grounds for the opinions and facts to which an expert witness is expected to testify. An expert witness's qualifications are discoverable; moreover, discovery of the witness's qualifications is particularly appropriate since such discovery can eliminate unnecessary testimony at the hearing. A party also is entitled to discover an expert's reports and data which bear directly on previously furnished reports giving the substance of the expert's intended testimony at trial.

OPINION

This matter concerns a longstanding discovery dispute. At issue is Appellant's duty to disclose certain information relating to the experts which it expects to call at a hearing on the merits of this appeal.

DER first requested information concerning Appellant's experts in its first set of interrogatories to Appellant, which were filed in late 1982. In January of 1983, Appellant filed its answers to DER's interrogatories. DER subsequently filed a Motion for Sanctions with the Board, alleging, inter alia, that Appellant had failed to adequately respond to Interrogatory 46, dealing with expert testimony. The interrogatory had requested that Appellant identify the experts which it intended to call as witnesses at the hearing and set forth their qualifications, including areas of expertise, publications, membership in professional societies, etc. In addition, Appellant was requested to state the subject matter of the experts' testimony and the substance of the facts and opinions to which they were expected to testify, including a summary of the grounds for each opinion.

In an Opinion and Order dated February 28, 1983, the Board held that Appellant indeed had failed to adequately respond to Interrogatory 46. In particular, the Board held that Appellant had failed to provide a statement of the subject matter of the experts' testimony and had not stated the substance of the facts and opinions to which they were expected to testify. The Board ordered Appellant to provide a supplementary answer to Interrogatory 46.

Appellant's supplementary answer to Interrogatory 46 identified for the first time an additional expert, Dr. Fred Brenner. The complete response given to the interrogatory by the additional witness was as follows:

> I will provide testimony on the aquatic life within the McMurray Run Watershed and the impact of the proposed mining activity on aquatic life. The substance of and facts of this testimony will be based on data obtained from DER surveys as well as those yet to be obtained by myself and the Environmental Labs.

Attached to the response to the interrogatory was a copy of Dr. Brenner's vita, current as of 1982.

DER subsequently noticed the deposition of Dr. Brenner. During the deposition (held August 31, 1984) the existence of a report by Dr. Brenner was revealed. The report concerned his studies of a stream within the subject watershed, dated April 5, 1983. Having had no opportunity to prepare questions for Dr. Brenner concerning this report prior to the deposition, DER sought leave from the Board to continue the deposition at a later date so as to question Dr. Brenner about the content of the report. In an order dated October 12, 1984, the Board granted DER's request, limiting the deposition to "matters contained in Dr. Brenner's report of April 5, 1983 which were not inquired into during the deposition" of August 31, 1984.

DER now has brought to the Board's attention the fact that another report authored by Dr. Brenner concerning the subject watershed was first identified during the second deposition, conducted July 25, 1985. This second report, dated September 24, 1983, allegedly contains the results of samplings done by Dr. Brenner during his study of the watershed. Appellant has argued that this report was made for Appellant and will not be used at trial; therefore, Appellant contends, DER is not entitled to the same. In addition, Appellant states that the conclusions reached in the report "merely support the Department's conclusions as to the stream survey and thus the report has no probative relevant effect."

Appellant's bases for failing to provide DER with a copy of the report of September 24, 1983 are inapposite. It is clear that under the Pennsylvania Rules of Civil Procedure, the opposing party has a right to discovery of "the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." Pa. R.C.P. 4003.5(a)(1)(b). In addition, as we noted in our opinion of February 28, 1983, this rule implies that something more is expected than a mere statement of the subject matter of expected testimony, since the rule goes on to state that:

> The party answering the interrogatories may file as his answer a report of the expert or have the interrogatories answered by his expert.

Inasmuch as DER has argued that the report of September 24, 1983 bears upon Dr. Brenner's opinions concerning the effect of mining upon the streams in the area, and Appellant has not disputed this contention, the report is discoverable since it relates to "the substance of the facts and opinions to which the expert is expected to testify." Pa.R.C.P. 4003.5. Where an expert has conducted studies of an area which is central to the issues raised in the appeal, and has memorialized those findings in a report, it is not sufficient to argue that the report was prepared for the Appellant or that it will not be used for trial, where the expert is expected to be called at trial and will offer opinions based on an earlier previously furnished report covering the same watershed as is studied in the presently disputed report. In fact, the September 24, 1983 report appears to be precisely the kind of expert report to which DER would be entitled as a normal supplement to the earlier previously furnished April 5, 1983 report. Rule 4007.4. Rule 4007.4 does not impose a duty on Appellant to furnish the September 24, 1983 report even if unasked, unless the second report is inconsistent with the first.

However, the Explanatory Note to that Rule clearly contemplates that supplements to previously furnished reports will be furnished if requested, whether or not there is inconsistency; DER has so requested, now and in the Instructions to its previously answered interrogatories.

The conclusion that the disputed report is discoverable under Rules 4003.5 and 4003.7 is consistent with the general implications of the discovery rules. Rule 4003.3, addressing the permissible scope of discovery, states that

> A party may obtain discovery of any matter discoverable under Rule 4003.1 even though prepared in anticipation of litigation or trial by or for another party or for that other party's representative. . .

Rule 4003.1 sets forth the general rule concerning whether material is discoverable, providing that discovery may be had as to any information which is relevant to the subject matter of the pending action and is not privileged. Appellant has raised no claim of privilege. A report which deals with the same subject matter as another report on which the expert intends to testify is relevant almost by definition. This relevance is not removed by Appellant's claim that the contents of the disputed report merely coincide with conclusions already reached by DER; this claim tends to confirm, not detract from, a determination of relevance.

DER also has requested that the Board order Appellant to provide DER with a copy of Dr. Brenner's field notes concerning "electro-fishing" of the subject stream and with a copy of Dr. Brenner's results from sampling of the stream for dissolved oxygen and temperature. Appellant argues that DER is not entitled to this information because the same information is found in DER's own reports and because the studies were only superficial. This argument does not suffice to deny DER this information, for reasons just explained; certainly the contention that the electro-fishing was only preliminary has no bearing upon whether it is discoverable. The basic question is whether the information requested bears sufficiently

directly on the testimony the expert expects to give, so that such information can be regarded as a normal supplement to interrogatory answers and documents the expert previously had furnished. The substance of Dr. Brenner's testimony, as stated in Appellant's answer to Interrogatory 46, has been quoted supra; apparently he will be testifying on aquatic life in the stream. Dr. Brenner's April 5, 1983 report makes many qualitative and quantitative assertions about the aquatic life in the stream, both vertebrate and invertebrate. Data obtained by Dr. Brenner via electro-fishing, even if only tentative, clearly are germane to the foregoing April 5, 1983 assertions; the same holds for sampling data on dissolved oxygen and temperature. Therefore, Appellant must provide DER with a copy of Dr. Brenner's field notes concerning the electro-fishing as well as the results of his samplings for dissolved oxygen and temperature. If Dr. Brenner feels these data are only preliminary and/or unreliable, he will have a chance to so explain at the hearing on the merits.

The final item requested by DER is an updated version of Dr. Brenner's vita. When the vita was first supplied to DER in 1983, it was current as of 1982. Appellant argues that it has no obligation to provide the requested information since such information is not required to be furnished under the Pennsylvania Rules of Civil Procedure and the additional discovery permitted by the Board's order of October 12, 1984 did not include this information.

These objections of Appellant are frivolous. In the first place, our order of October 12, 1984 did not purport to limit discovery as a general matter. Being addressed only to DER's request to conduct an additional deposition, the order was limited to the testimony expected to be sought at that deposition. The Board has not stated that additional discovery is precluded, and construes DER's Motion for Production of Documents to include a request to extend the discovery period, which request we grant.

Secondly, our Opinion and Order of February 28, 1983 already has held, over Appellant's objections, that Appellant was required to furnish DER with a resume and list of publications for each of its experts, as requested by DER's Interrogatory 46. Had we not believed this information is discoverable, we would not have so ruled. We are not pleased by the prospect of having to reiterate a quite comprehensible earlier ruling. Although Pa.R.C.P. 4003.5 does not explicitly refer to biographical information, we hold that it is implicit within the rule that a party is entitled to discovery of the qualifications of an opposing party's expert witness, as part of the witness "identity" the Rule explicitly makes discoverable. Such discovery may reduce the need for extensive voir dire at the time of the hearing and the Board sees no reason why it should not be produced. Indeed, as a general rule any information which would be admissible at the hearing on the merits must be discoverable under the last sentence of Rule 4003.1. Therefore, we hold that Appellant shall provide DER with an updated resume and publications list for Dr. Brenner, as DER requests. We reiterate our statement in our earlier opinion (of February 28, 1983) that it is not necessary for Appellant to provide a summary of Dr. Brenner's publications; a simple list of the same will suffice.

O R D E R

WHEREFORE, this 21st day of August, 1985 it is ordered that Appellant shall furnish DER with copies of Dr. Brenner's report of September 24, 1983, Dr. Brenner's field notes concerning electro-fishing, the results of his sampling

for dissolved oxygen and temperature, and an updated resume and list of publications. These documents shall be provided to DER within thirty (30) days of the date of this order.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: August 21, 1985

cc: Bureau of Litigation
Leo M. Stepanian, Esquire
Alan S. Miller, Esquire

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DONALD W. DEITZ :

: Docket No. 82-178-M

v. : Issued August 22, 1985

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
MOTION FOR PARTIAL SUMMARY JUDGMENT

Synopsis

This is an appeal of a forfeiture by the Department of Environmental Resources (DER) of surety bonds provided by appellant for surface mining operations. DER moves for partial summary judgment as to the existence of violations cited in two unappealed orders issued by DER to appellant, and cited in two Commonwealth Court orders. Although the Board does not now enter any judgment with regard to the bond forfeitures from which this appeal was taken, the Board holds that the existence of the violations cited in these four orders cannot be relitigated in this proceeding.

DER orders that are not timely appealed become final, 71 P.S. §510-21(c), and finality precludes any attack on the validity or content of the order. Further, the existence of the violations cited in these orders was litigated and reduced to a final judgment in the Commonwealth Court, and thus, the doctrine of collateral estoppel prevents the relitigation before this Board of the existence of these violations.

OPINION

By letter dated July 9, 1982, the Department of Environmental Resources (DER) notified Donald W. Deitz, appellant, that because of Deitz's failure to correct violations at his surface mining operations, DER was forfeiting ten surety bonds provided by Deitz for the subject surface mining operations. The Board received Deitz's notice of appeal in this matter on August 5, 1982. The Board held hearings in this matter on October 22, 23, and 24, 1984. The Board was to hold further hearings, but on January 10, 1985, DER filed a Motion for Partial Summary Judgment, and the Board continued the remaining hearings pending the disposition of this motion.

On September 22, 1977, Deitz and DER executed a Consent Order and Agreement; on August 17, 1982, DER issued to Deitz an Administrative Order, which Deitz never appealed; on January 30, 1984, the Commonwealth Court entered a Consent Decree between Deitz and DER; and on June 20, 1984, the Commonwealth Court adjudged Deitz guilty of civil contempt for violation of the January 30, 1984 Consent Decree. In its Motion for Partial Summary Judgment, DER contends that because the violations cited in these four orders have already been litigated and reduced to a final judgment, and because these violations are part of the factual basis of this bond forfeiture proceeding, DER is entitled, in this proceeding, to summary judgment as to the existence of the violations cited in these orders. Although the Board is not now entering any judgment with regard to the bond forfeitures from which this appeal was taken, the Board agrees with DER that the existence of the violations cited in these four orders cannot be relitigated in this proceeding.

The September 22, 1977 Consent Order and Agreement cited numerous violations of the Surface Mining Conservation and Reclamation Act, 52 P.S. §§1396.1 - 1396.31, and the Clean Streams Law, 35 P.S. §§691.1 - 691.1001, at various sites on which Deitz conducted surface mining operations. In Paragraph 27 of this Consent Order and Agreement, Deitz expressly admitted the truth of all of the findings contained in the order. Also, in this Consent Order and Agreement, Deitz expressly waived his right to appeal or challenge the order.

On August 17, 1982, DER issued an Administrative Order to Deitz, finding Deitz in violation of the September 22, 1977 Consent Order and Agreement, which DER incorporated by reference into the August 17, 1982 order. In addition to the violations of the 1977 order, the 1982 order cited numerous other violations, on Deitz's mining sites, of the Surface Mining Conservation and Reclamation Act and the Clean Streams Law. Although the August 17, 1982 order informed Deitz that this order "may be appealable" to the Environmental Hearing Board, pursuant to 71 P.S. §510-21, and that appeals must be filed with the Environmental Hearing Board within thirty days of receipt of written notice of the action, Deitz never appealed this order.

DER filed with the Commonwealth Court a Complaint in Equity seeking injunctive relief to compel Deitz to comply with the August 17, 1982 order (DER v. Deitz, Docket No. 1189 C.D. 1983), and on January 30, 1984, Deitz and DER executed a Commonwealth Court Consent Decree, in which Deitz agreed to comply with the August 17, 1982 order. On June 20, 1984, after a hearing on DER's Petition for Contempt, the Commonwealth Court entered an order adjudging Deitz guilty of civil contempt of the Commonwealth Court for violation of the January 30, 1984 Commonwealth Court Consent Decree.

DER orders that are not timely appealed become final. 71 P.S. §510-21(c).[1] Finality precludes any attack on the validity of the order, or the content of the order, including the findings of fact underlying the order. DER v. Derry Township, 466 Pa. 31, 351 A.2d 606 (1976); DER v. Williams, 57 Pa. Cmwlth. 8, 425 A. 2d 871 (1981). Thus, since Deitz expressly admitted to the findings of fact in the September 22, 1977 Consent Order and Agreement, and expressly waived his right to appeal or challenge this order, Deitz is precluded, in this bond forfeiture proceeding, from challenging the factual findings contained in the 1977 order. Similarly, since Deitz failed to appeal the August 17, 1982 Administrative Order, he is also precluded from challenging, in this proceeding, the factual findings contained in the 1982 order.

Furthermore, the existence of the violations cited in the August 17, 1982 order was incorporated by reference into the January 30, 1984 Consent Decree, and then litigated and reduced to a final judgment in the June 20, 1984 Commonwealth Court order, entered as a result of DER's contempt of court action against Deitz. Therefore, the doctrine of collateral estoppel is applicable because collateral estoppel is a doctrine that seeks to prevent the relitigation of a finally litigated issue in a subsequent proceeding between the same parties. Commonwealth v. Hude, 492 Pa. 600, 617, 425 A.2d 313, 322 (1980).

In the application of the doctrine of collateral estoppel, Pennsylvania courts have applied the following test:

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[1] 71 P.S. §510-21(c) reads in pertinent part as follows:

> Any action of the Department of Environmental Resources may be taken initially without regard to the Administrative Agency Law, but no such action of the department adversely affecting any person shall be final as to such person until such person has had the opportunity to appeal such action to the Environmental Hearing Board.

> A plea of collateral estoppel is valid if,
> (1) the issue decided in the prior adjudication was identical with the one presented in the later action,
> (2) there was a final judgment on the merits,
> (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication, and
> (4) the party against whom it is asserted has had a full and fair opportunity to litigate the issue in question in a prior action.

Safeguard Mutual Insurance Co. v. Williams, 463 Pa. 567, 574, 345 A.2d 664, 668 (1975); Baker v. Commonwealth of Pennsylvania Human Relations Commission, 75 Pa. Cmwlth. 296, 462 A.2d 881 (1983).

All of the requirements for the application of the doctrine of collateral estoppel are met in this case. DER's basis for the bond forfeitures, which are the subject of this appeal, included the same violations that resulted in DER's orders dated September 22, 1977 and August 17, 1982, and the Commonwealth Court's orders dated January 30, 1984 and June 20, 1984. The existence of these violations was litigated and reduced to a final judgment in the June 20, 1984 Commonwealth Court order, entered as a result of DER's contempt of court action. Deitz, the party against whom DER asserts the plea of collateral estoppel, was the same party against whom DER brought enforcement and contempt of court proceedings in Commonwealth Court, and Deitz had a full and fair opportunity in the Commonwealth Court proceedings to litigate the issues for which DER now asserts the plea of collateral estoppel. Therefore, the doctrine of collateral estoppel prevents the relitigation before this Board, of the existence of the violations cited in the June 20, 1984 Commonwealth Court Order.[2]

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[2] This order incorporates the violations cited in the January 30, 1984 Commonwealth Court Order, and DER's orders dated September 22, 1977 and August 17, 1982.

ORDER

AND NOW, this 22nd day of August, 1985, the Board orders that the factual issues in this bond forfeiture proceeding, at EHB Docket No. 82-178-M, are limited to the extent that the following facts cited in the Consent Order and Agreement that DER and Deitz executed on September 22, 1977; the Administrative Order that DER issued to Deitz on August 17, 1982; the Commonwealth Court Consent Decree entered on January 30, 1984 between Deitz and DER; and the Commonwealth Court Civil Contempt Order issued to Deitz on June 20, 1984 are established and cannot be relitigated in this proceeding:

1. The Musser Site - Mine Drainage Permit No. 3674SM51 and Mining Permit No. 1270-2

a. From July 6, 1977 to August 12, 1977, acid-bearing material was not properly disposed of at the 1270-2 operation in violation of Standard Condition No. 29 of M.D. 3674SM51, §77.92(f)(3) of DER's rules and regulations, §4(2)K of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1, et seq., and §402 of the Clean Streams Law, Act of June 22, 1937, P.L. 1187, as amended, 35 P.S. §691.1, et seq.

b. From July 6, 1977 to August 12, 1977, there was a water accumulation in the pit at the 1270-2 operation in violation of §77.92(d)(1) of DER's rules and regulations, §4(2)K of the Surface Mining Conservation and Reclamation Act (S.M.C.R.A.), and §§301 and 307 of the Clean Streams Law.

c. From July 6, 1977 to September 22, 1977 more than one continuous pit was opened at the 1270-2 operation, in violation of Additional Special Condition No. 2 of M.D. 3674SM51, §77.92(a)(3) of DER's rules and regulations, §4(2)K of the S.M.C.R.A., and §402 of the Clean Streams Law.

d. From July 6, 1977 to September 22, 1977, backfilling was not concurrent with mining at the 1270-2 operation, in violation of Standard Condition No. 15 of M.D. 3674SM51, §77.92(f)(1) of DER's rules and regulations, §4(2)K of the S.M.C.R.A. and §402 of the Clean Streams Law.

e. On August 12, 1977, the 1270-2 operation had a discharge that contained 7.2 mg/l of iron, in violation of Standard Condition No. 11 of M.D. 3674SM51, §§77.92(c)(3) and 99.33(b) of DER's rules and regulations, §4(2)K of the S.M.C.R.A., and §§301 and 307 of the Clean Streams Law.

f. As of August 17, 1982, the following conditions existed at the site covered by Mine Drainage Permit No. 3674SM51 and Mining Permit No. 1270-2:

(1) Failure to construct and maintain adequate erosion and sedimentation controls at the site.

(2) The site has not been reclaimed in accordance with the reclamation plan in the mining permit.

(3) Backfilling equipment has been removed from the site prior to completion of reclamation at the site.

(4) The reclamation bonds for the mining operation are no longer valid, as the surety company from which they were secured is no longer authorized to do business in Pennsylvania.

(5) Failure to save and replace adequate topsoil to the mining site.

(6) Failure to install erosion and sedimentation controls and to complete backfilling and planting at the site by September 15, 1980, as required by an agreement with the Department dated August 21, 1980.

2. The Martz Site - Mine Drainage Permit No. 1270-3675SM5-01-1 and Mining Permits Nos. 1270-3, 1270-3(A), and 1270-6.*

a. From July 6, 1977 to August 9, 1977, acid-bearing material was not properly disposed of at the 1270-3 and 3(A) operation in violation of Standard Condition No. 29 of M.D. 3675SM5, §77.92(f)(3) of DER's rules and regulations, §4(2)K of the S.M.C.R.A., and §402 of the Clean Streams Law.

b. From July 6, 1977 to August 9, 1977, there was a water accumulation in the pit at the 1270-3 and 3(A) operation in violation of §77.92(d)(1) of DER's rules and regulations, §4(2)K of the S.M.C.R.A., and §§301 and 307 of the Clean Streams Law.

c. From July 6, 1977 to August 9, 1977, there were four separate pits at the 1270-3 and 3(A) operation in violation of Additional Special Condition No. 2 of M.D. 3675SM5, §§77.92(a)(3) of DER's rules and regulations, §4(2)K of the S.M.C.R.A., and §402 of the Clean Streams Law.

d. From August 9, 1977 to September 22, 1977, there were three separate pits at the 1270-3 and 3(A) operation in violation of Additional Special Condition No. 2 of M.D. 3675SM5, §§77.92(a)(3) of DER's rules and regulations, §4(2)K of the S.M.C.R.A., and §402 of the Clean Streams Law.

e. From July 6, 1977 to September 22, 1977, backfilling was not concurrent with mining at 1270-3 and 3(A) operation, in violation of Standard Condition No. 15 of M.D. 3675SM5, §77.92(f)(1) of DER's rules and regulations, §4(2)K of the S.M.C.R.A., and §402 of the Clean Streams Law.

f. On August 9, 1977, the 1270-3 and 3(A) operation had a settling pond discharge which had a pH of 4.0 and an acidity of 40, in violation of Standard Condition Nos. 10 and 12 of M.D. 3675SM5, §§77.92(c)(2), 77.92(c)(4), 99.33(c), and 99.33(a) of DER's rules and regulations, §4(2)k of the S.M.C.R.A., and §§301 and 307 of the Clean Streams Law.

*At the hearing before this Board held October 22, 1984, DER withdrew without prejudice, its notice of forfeiture for the bonds covering Mine Drainage Permit No. 1270-3675SM5-01-1, and Mining Permit NO. 1270-6. (N.T. pp 4-5)

g. From September 2 to September 5, 1977, Deitz conducted surface mining operations at the 1270-3 and 3(A) operation contrary to a valid and effective DER order suspending Deitz's surface mining permit no. 1270-3 and 3(A) dated August 2, 1977, in violation of term no. 2 of Deitz's Surface Mining License No. 1270-77, §77.86(a)(2) of DER's rules and regulations, §4.3 of the S.M.C.R.A., and §§602, 605, and 610 of the Clean Streams Law.

h. As of August 17, 1982, the following conditions existed at the site covered by Mine Drainage Permit No. 3675SM5 and Mining Permit Nos. 1270-3, 1270-3(A), 1270-6, and 1270-3675SM5-01-1:

(1) Failure to install and maintain adequate erosion and sedimentation controls.

(2) There was no highwall diversion ditch to prevent water from running into the pits on the mining site.

(3) Water was allowed to accumulate in the pits on the mining site.

(4) Backfilling on the mining site had not been progressed along with the mining to the highest degree possible.

(5) During the progress of mining this site, the area within one hundred feet (100') of a stream had been affected by mining, notwithstanding that no variance had been obtained from the Department nor was said area covered by a mining permit or bond.

(6) The surety bonds for this site were no longer valid.

(7) Affecting within one hundred twenty-five feet (125') of a gas well without first obtaining the necessary variances and approvals from the Department and without the necessary permits and a reclamation bond.

(8) In addition to the stream barrier and gas well barriers referenced in subparagraphs 5 and 7, affecting additional areas which were not covered by a mining permit or reclamation bond.

(9) Failure to maintain an identification sign at the site.

(10) Failure to promptly complete reclamation of the site.

(11) Failure to collect and treat or abate discharges of mine drainage emanating from the mining site, which discharges didnot meet the applicable effluent limitations.

(12) Failure to install erosion and sedimentation controls and to complete backfilling and planting at the site on or before November 1, 1980, as required by an Agreement with the Department dated August 21, 1980.

(13) Allowing the discharge of surface water exceeding the discharge limits for total suspended solids.

(14) The untreated and uncontrolled mine drainage and surface water leaving the site resulted in the degradation and pollution of the unnamed tributary of Leatherwood Creek.

3. The Lerch Site - Mine Drainage Permit No. 3675SM6 and Mining Permit 1270-4. As of August 17, 1982, the following conditions existed at the Lerch site:

a. Erosion and sedimentation controls at the site were inadequate.

b. Revegetation of the site was inadequate to comply with the requirements of the reclamation plan and the Department's regulations.

c. The site was not backfilled to approximate original contour.

d. The surety bonds for the mining site were no longer valid.

e. Affecting areas were not covered by a mining permit and reclamation bond.

f. Failure to promptly reclaim the site according to the reclamation schedule in the permits for the site.

g. Failure to save and replace sufficient topsoil to the mining site.

h. Failure to construct and maintain adequate erosion and sedimentation controls at the site.

i. Failure to collect and treat or abate discharges of mine drainage emanating from the site which discharges do not meet the applicable discharge limitations.

j. Allowing the discharge of surface water exceeding the discharge limits for total suspended solids.

4. The Mechanicsville Site - Mine Drainage Permit No. 2768BSM25 and Mining Permits Nos. 1270-8*, 1270-8A, and 1270-8(A2). As of August 17, 1982, the following conditions existed at the Mechanicsville site:

a. Failure to maintain adequate erosion and sedimentation controls at the site.

b. Revegetation of the site was inadequate to comply with the reclamation plan for the site and the requirements of the Department's regulations.

c. Failure to collect and treat or abate discharges of mine drainage that were emanating from the site and that did not meet the applicable discharge limits.

d. Affecting areas not covered by a mining permit and reclamation bond.

e. Failure to perform backfilling concurrent with mining to the highest degree possible.

f. Failure to maintain and operate the mine drainage and surface water treatment facilities for the site.

g. Failure to construct and maintain a diversion ditch above the highwall on the site.

*Since the commencement of this action, Deitz transferred Mining Permit No. 1270-8 to another coal company, and the bond for that permit is not a subject of this proceeding.

h. Failure to save and replace sufficient topsoil to the site.

i. Maintaining a safety hazard by leaving a dragline on the site with the boom raised.

5. The Deitz Site - Mine Drainage Permit No. 3675SM25 and Mining Permit No. 1270-10. As of August 17, 1982, the following conditions existed at the Deitz site:

a. Failure to maintain adequate erosion and sedimentation controls at the site.

b. Revegetation of the site was inadequate to comply with the requirements of the reclamation plan in the permit and the Department's regulations concerning revegetation.

c. Failure to promptly reclaim the site according to the reclamation plan in the permit and the Department's regulations concerning revegetation.

d. Mining was conducted within one hundred twenty-five feet (125') of a gas well, without a variance.

e. Failure to update Mine Drainage Permit No. 3675SM24 as required by Standard Condition 5 of Mining Permit No. 1270-10.

6. As of June 20, 1984, Deitz had still not complied with the August 17, 1982 Administrative Order, or the January 30, 1984 Commonwealth Court Consent Decree.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo Jr.

ANTHONY J. MAZULLO, JR., MEMBER

cc: Bureau of Litigation

For the Commonwealth:
Richard Ehmann, Esq.

For the Appellant:
Robert M. Hanak, Esq./Reynoldsville, PA

DATED: August 22, 1985

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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ELBE CONTRACTING COMPANY :

:

: Docket Nos. 85-109-G
: 85-110-G

Issued August 29, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

SYNOPSIS

The appeals are dismissed pursuant to 25 Pa.Code §21.124 for Appellant's failure to comply with orders of the Board.

OPINION

These appeals of bond forfeitures were filed April 11, 1985. Thereafter the Board issued its customary Pre-Hearing Order No. 1, informing Elbe that its pre-hearing memorandum in each of these appeals was due June 29, 1985. On or about May 8, 1985, DER filed Interrogatories and Requests for Production of Documents in each of these appeals, in accordance with 25 Pa.Code §21.111 and the Pennsylvania Rules of Civil Procedure. On June 17, 1985, DER filed a motion for sanctions in each of these appeals, claiming that there had been no response to its interrogatories or its request for document production.

Under our Pre-Hearing Order No. 2, issued April 15, 1985 in these appeals, "a party desiring to respond to a petition or motion filed by another party must do so within 20 days of the petition or motion being responded to."

This 20 day period exceeds the period which otherwise is set by 1 Pa.Code §35.179. Nevertheless, by July 26, 1985 there had been no response by Elbe to DER's motions in these appeals, nor had Elbe yet responded to DER's aforementioned discovery requests. Therefore, on July 26, 1985 the Board ordered Elbe to respond to DER's discovery requests within 15 days under pain of sanctions. The sanctions were spelled out as preclusion of Elbe from introducing any evidence at the hearing on the merits concerning those matters into which the discovery requests inquired. Pa. Rule of Civil Procedure 4019(c)(1). In addition Elbe was warned, in our July 26, 1985 Order, that failure to file its already long overdue pre-hearing memorandum within 15 days might result in further sanctions, including dismissal of its appeals. Our July 26, 1985 Order was sent to Elbe's counsel by certified mail, and the receipt signed by Elbe's counsel on July 30, 1985 has been returned to the Board.

As of this date, Elbe has not yet responded to DER's discovery requests. Also, Elbe has not filed its pre-hearing memorandum in either of these appeals, nor has Elbe requested any extension of time to do so. In fact, since the date the appeals were filed the Board has heard nothing from Elbe or its counsel in either of these appeals. Although this Board traditionally has been reluctant to dismiss an appeal for failure to obey the Board's orders, especially when DER bears the burden of proof as it does in these bond forfeiture appeals, we cannot indefinitely ignore total disregard of our orders. Such disregard has warranted, and does warrant, dismissal even when DER bears the burden of proof. W. A. Cotterman v. DER, 1984 EHB 577; Franklin Lyons v. DER, 1984 EHB 859; Augusta A. Zito v. DER, 1984 EHB 615; Robert J. Johnston v. DER, 1982 EHB 405.

O R D E R

WHEREFORE, this 29th day of August, 1985, the above captioned appeals are dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: August 29, 1985

cc: Bureau of Litigation
For the Appellant:
Robert M. Hanak, Esquire,
Reynoldsville, PA
For the Commonwealth, DER:
Richard S. Ehmann, Esquire,
Pittsburgh, PA

COMMONWEALTH OF PENNSYLVANIA

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COLTRANE, INC. :

:

Docket No. 85-134-G

:

Issued August 29, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

SYNOPSIS

Sanctions are imposed against the Appellant pursuant to 25 Pa.Code §21.124 for failure to comply with a Board order directing Appellant to file a pre-hearing memorandum. At the hearing on the merits of the appeal, if and when held, Appellant will be precluded from presenting its case in chief.

OPINION

On March 20, 1985, DER forfeited a $13,800 bond which had been posted by Coltrane, for various alleged violations on the site of Mining Permit No. 102378-26810201(T)-01-0 in South Union Township, Fayette County, including an alleged failure to reclaim the mine site. The forfeiture was timely appealed by Coltrane, acting through its President David J. Klimek, who filed the appeal pro se. The Notice of Appeal form filed by Mr. Klimek offered no reasons for appealing the bond forfeiture other than the following letter to the Board, which is reproduced in full:

> On 7 July 1982 an explosion took place at the wash plant on this job site. The nature of the explosion was pre-meditated and totally destroyed the workings. The insurance carrier (Flat Top Insurance, Charleston, W. Va.) along with my efforts have not been able to identify the perpetrators. We have also been unable to come to terms on the insurance settlement.
>
> The present status of this case lies in the hands of the U.S. Federal Court, Western District of Pennsylvania. I have taken another job to make ends meet until my case is called, that being the nature of my funds to re-open the job. I stand wholly unable to react to this action (or any of my creditors) until the Federal Court system calls and tries the case. A copy of the trial schedule is enclosed.
>
> The intent of this appeal is for a continuance on this action until such time as the Federal Court can hear the case and make a ruling. I will then be in a position to abate my violations and further satisfy all of the state's requirements.

On April 26, 1985 the Board sent Coltrane its customary Pre-Hearing Order No. 1, informing Mr. Klimek that Coltrane's pre-hearing memorandum was due July 10, 1985. On May 6, 1985, in view of the somewhat unusual facts Mr. Klimek had recounted, and recognizing that Coltrane was not represented by counsel, the Board member in charge of this appeal wrote Mr. Klimek as follows:

> As you should by now be aware, your appeal of DER's bond forfeiture has been assigned to me for handling. I have noted that your intent in filing the appeal is "for a continuance" until such time as the federal court rules on the case you have pending there. Please be advised that this Board will not automatically grant a continuance of your appeal. If, after the case has been heard and decided the Board determines that DER wrongly decided to forfeit your bonds, an order would be entered to that effect. At the present time, however, we must simply let this appeal take its normal course. You will be expected to file a pre-hearing memorandum, as required by the Board's pre-hearing Order No. 1, on or before July 10, 1985, unless an extension of time for filing the same is requested and granted.

Mr. Klimek did not respond to this letter although it encouraged him to do so if he had any questions. On July 24, 1985, Coltrane's pre-hearing memorandum having not been received, the Board sent Mr. Klimek a certified letter warning that Coltrane might suffer sanctions, including possible default of its appeal, unless the pre-hearing memorandum was filed. 25 Pa.Code §21.124. The form acknowledging receipt of this certified mail has been returned to the Board, signed by Mr. Klimek. As of this date, however, neither Coltrane's pre-hearing memorandum nor a request for an extension of time has been received. In fact, nothing has been heard from Coltrane or Mr. Klimek since the appeal was filed.

The facts which have been described could justify dismissal of this appeal even though DER bears the burden of proof; Mr. Klimek's notice of appeal, and his accompanying letter (quoted supra) offer no reasons to believe Coltrane has a defense to DER's bond forfeiture action. W. A. Cotterman v. DER, 1984 EHB 577; Franklin Lyons v. DER, 1984 EHB 859; Augusta A. Zito v. DER, 1984 EHB 615. Nevertheless, in large part because Coltrane is not represented by counsel, we shall impose a lesser sanction than dismissal. DER still must meet its burden of proof in justification of its forfeiture action, but Coltrane's participation at the hearing on the merits, when and if held, will be limited to cross examination of DER's witnesses and the presentation of evidence in rebuttal, with the understanding that rebuttal testimony is testimony which, though responding to an opponent's case, normally would not have been part of a party's case-in-chief. Benjamin Coal Co. v. DER, 1984 EHB 723; Armond Wazelle v. DER, 1983 EHB 576.

Before a hearing on the merits can be held, DER must file its pre-hearing memorandum; DER is given the usual two weeks specified in our Pre-Hearing Order No. 1 to do so. However, should DER prefer to delay prosecution of this appeal accordingly and to request a continuance, the Board anticipates the continuance

will be granted, because Mr. Klimek's letter supra clearly indicates that Mr. Klimek desires, rather than opposes, a continuance.

In the alternative, DER may wish to file a motion for summary judgment, which can avoid the necessity for a hearing on the merits. For this purpose, the period for discovery without leave of the Board, which now has ended [Pre-Hearing Order No. 2, 25 Pa.Code §21.111(a)] is extended to allow DER to serve requests for admissions on Mr. Klimek. No other discovery is authorized, however; in view of the sanctions we are imposing, which will severely limit Mr. Klimek's ability to defend against the bond forfeiture, we do not believe DER needs to serve, e.g., interrogatories or requests for documents on Coltrane. Moreover, Mr. Klimek's track record so far in this appeal suggests that the only result of discovery requests on him will be DER motions for additional sanctions, for failure to respond to those discovery requests. On the other hand, the requests for admissions we have authorized are legitimately required if DER seeks summary judgment. Mr. Klimek, because he is unrepresented by counsel, herewith is warned that such requests must be answered carefully under oath, and that an unanswered request for admission may be deemed admitted. Pa. Rules of Civil Procedure 4014 and 4019(c)(1).

O R D E R

WHEREFORE, this 29th day of August, 1985, it is ordered that:

1. At the hearing on the merits of this appeal, when and if held, Coltrane's participation will be limited to cross examination of DER's witnesses, to presentation of such evidence as normally would be offered in rebuttal (rather than in Coltrane's case-in-chief) and to filing post-hearing briefs.

2. DER's pre-hearing memorandum is due within fifteen (15) days of the date of this Order, unless DER files a request for a continuance before that due date.

3. The continuance, if requested, will be granted unless Coltrane, before the same due date 15 days hence, files an objection to any continuance requested by DER.

4. The period for discovery in this appeal without further leave of the Board is extended indefinitely, for the sole purpose of allowing DER, at any time, to file requests for admissions on Coltrane, pursuant to Rule 4014 of the Pennsylvania Rules of Civil Procedure.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: August 29, 1985

cc: Bureau of Litigation
David J. Klimek, President,
Coltrane, Inc.
Joseph K. Reinhart, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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HEPBURNIA COAL COMPANY :

:

: Docket Nos. 85-309-G
: 85-343-G

: Issued September 6, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

SYNOPSIS

Appellant's Petition for Supersedeas is rejected; the undisputed facts indicate that more than de minimis pollution is occurring. Consequently, 25 Pa.Code §21.78(b) precludes the issuance of a supersedeas. Moreover, the Board cannot grant a supersedeas which would in effect amount to an order directing DER to take affirmative action on a permit application; such an order is equivalent to a mandatory injunction and does not fall within the definition of the writ of supersedeas.

DER's Motion to Dismiss is rejected; DER's refusal to act upon a permit application is an appealable action under §1396.4(c) of the Surface Mining Act, 52 P.S. §1396.4(c). In ruling upon such a motion, the Board must treat the allegations of the opposing party's complaint as presumptively true, which in this case means that the Board must assume for the purposes of ruling upon the motion that DER has ceased acting upon the applications. Such a failure is an appealable action.

DER's Cross Motion for Summary Judgment is denied. The motion does nothing more than counter the arguments raised in Appellant's motion for summary judgment and fails to address one of these arguments, that alleging a violation of due process requirements. Since the Board considers this due process argument to have merit, summary judgment cannot be granted in favor of DER, since its motion does not dispose of all issues in the appeal.

Appellant's Motion for Summary Judgment is granted with regard to the issue of whether it would be an abuse of discretion for DER to cease processing permit applications upon which a "permit block" has been imposed, pursuant to 52 P.S. §1396.3a(d). DER argues that it has not failed to process the applications, despite the existence of the permit block and that it is its policy to continue to process the applications.

Appellant's Motion for Summary Judgment is denied with regard to the issue of estoppel. Appellant has not demonstrated that there was any detrimental reliance upon statements made by DER employees and therefore, estoppel will not lie.

For the reasons set forth above concerning the denial of the supersedeas, the Board considers Appellant's due process arguments to be irrelevant to the supersedeas petition. However, the Board considers the due process argument may have significant merit. The delay between the filing of the supersedeas petition and the hearing on the petition does not amount to a denial of due process. It is possible, however, that DER's use of an alleged, unadjudicated outstanding violation as the basis for a permit block could result in a denial of due process where there exists a significant period of time between the implementation of the permit block and an adjudication on the issue of the existence of the violation. It is clear that the legislature intended that alleged unadjudicated outstanding violations could be relied upon as the basis for a permit block. 52 P.S. §1396.3a(d). However,

this provision, as applied here, may result in a denial of due process. The Board is willing to consider certification of this issue to Commonwealth Court.

OPINION

On July 26, 1985, Hepburnia appealed a DER compliance order dated July 16, 1985, requiring Hepburnia to abate or permanently treat three discharges on or in the vicinity of Hepburnia's surface mining permit MDP 4574SM5 located in Brady Township, Clearfield County. Simultaneously with this appeal, which was docketed at 85-309-G, Hepburnia filed a petition for supersedeas of the July 16, 1985 order. Hepburnia's petition alleged that Hepburnia assuredly was not responsible for one of the discharges it had been ordered to abate or treat. Hepburnia's brief in support of its supersedeas petition not only requested a stay of DER's order, but also asked the Board to order DER to resume processing various previously filed permit applications of Hepburnia; according to Hepburnia, DER had stopped processing those permit applications when the compliance order was issued.

A. Supersedeas Rulings

For some unknown reason, the file on this appeal was lost in the mail and did not reach the undersigned Board member in Pittsburgh who had been assigned the appeal until August 5, 1985, when Hepburnia's counsel hand delivered the aforesaid notice of appeal and petition for supersedeas. Immediately thereafter the Board conducted a conference call with the parties, and scheduled a hearing on the supersedeas petition for August 15, 1985, which hearing was held. In the meantime, on August 14, 1985 Hepburnia filed another appeal accompanied by another petition for supersedeas; this second appeal was docketed at 85-343-G. The later

appeal in many respects recapitulated the allegations of the earlier appeal, but more explicitly (than previously) objected to DER's alleged halt in processing Hepburnia's permit applications. However, Hepburnia formally requested the Board to consolidate the two appeals. The appeal at 85-343-G also renewed an earlier allegation that DER had violated Hepburnia's due process rights.

Although the Board did not formally consolidate the two appeals as Hepburnia had requested, the Board decided that the previously scheduled August 15, 1985 supersedeas hearing also would be a hearing on the newly received August 14, 1985 supersedeas petition, since the appeals were so closely related. However, the supersedeas hearing was not an evidentiary hearing. Based on the parties' representations at the aforesaid conference call the Board had decided and had communicated to the parties that the evidence the Board probably would need to hear--in order to decide whether Hepburnia was responsible for the discharge it believed it should not be required to abate, or even merely to decide the likelihood of Hepburnia ultimately prevailing on this issue of responsibility after a full hearing on the merits--could not and should not be condensed into the one (or at most two) day supersedeas hearing the Board's presently very crowded hearing schedule could accommodate "expeditiously." 25 Pa.Code §21.76(b), by which the Board is guided for the purpose of scheduling supersedeas hearings, reads:

> (b) A hearing on a supersedeas, if necessary, shall be held as expeditiously as possible (where feasible within a week of the filing of the petition), taking into account the available time of a Board member or hearing examiner, and taking into account the urgency and seriousness of the environmental or other problem to which the order or action of the Department applies.

The parties had advised the Board that a full evidentiary hearing on the responsibility issue probably would take no less than four full days. At the present time, except for unexpected openings consequent to cancellations of already scheduled hearings, the undersigned Board member is unable to schedule a hearing of that length earlier than September 1986.

Therefore the Board had advised the parties that at the supersedeas hearing the parties should not plan to question witnesses. Instead, the parties were to describe the testimony they would present if given the time to do so; the parties also were to fully explain the legal bases of their respective contentions that a supersedeas should be granted (Hepburnia) or denied (DER). The supersedeas hearing was conducted as has just been described, and the parties' explanations of the testimony they intended to present confirmed the Board's original decision that a one or two day evidentiary supersedeas hearing would not have been useful. Moreover, the Board felt that the parties' presentations had given the Board a sufficient basis for denying the two supersedeas petitions, even though no actual testimony had been taken.

Thus on August 21, 1985, the Board issued an Order denying the supersedeas petitions at the above docket numbers. This Order is attached to this Opinion, as Exhibit A. On or about August 26, 1985, Hepburnia filed a Petition for Review and/or Complaint for Mandamus with Commonwealth Court, asking the Court, inter alia, to reverse our supersedeas denials. In view of this Petition, we now will elaborate somewhat on the bald statements of Exhibit A, although our August 21, 1985 Order states that an opinion explaining that Order would not be issued unless the parties so requested, and although no such request has been received.

The Board's rule prescribing the circumstances under which a supersedeas may be granted, 25 Pa.Code §21.78, states:

> (b) A supersedeas shall not issue in cases where nuisance or significant (more than de minimis) pollution or hazard to health or safety either exists or is threatened during the period when the supersedeas would be in effect.

The Clean Streams Law, 35 P.S. §691.1, defines "pollution" as follows:

> "Pollution" shall be construed to mean contamination of any waters of the Commonwealth such as will create or is likely to create a nuisance or to render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, municipal, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life, including but not limited to such contamination by alteration of the physical, chemical or biological properties of such waters, or change in temperature, taste, color or odor thereof, or the discharge of any liquid, gaseous, radioactive, solid or other substances into such waters.

The parties agreed that granting the supersedeas, even if only a supersedeas of just the one discharge for which Hepburnia is convinced it is not responsible, would permit the existence of an untreated discharge of between 10 and 15 gal/min during the period when the supersedeas would be in effect. On this undisputed fact, we cannot see how the foregoing quotation from 35 P.S. §691.1 permits us to regard the discharge as anything less than significant pollution. Therefore, under 25 Pa.Code §21.78(b) we cannot grant a supersedeas. This explains paragraph 3 of Exhibit A. Paragraph 2 of that Order supports, and on its own could justify, our refusal to stay the July 16, 1985 compliance order. However, paragraph 2, which normally should have been backed up by at least some testimony, is not necessary to our refusal to stay the compliance order; paragraph 3 alone suffices for and indeed requires that refusal, as explained supra.

At the supersedeas hearing, counsel for Hepburnia repeated the allegation that after issuance of the compliance order DER had ceased to process Hepburnia's permit applications. Hepburnia's counsel argued that the Board should grant a supersedeas of this alleged processing interruption. The Board at the hearing, and now, does not believe that a "supersedeas" of this alleged DER action would be a proper use of this writ. In effect Hepburnia is asking us to order DER to continue processing Hepburnia's applications. Such an order would be more akin to a mandatory injunction to DER than to a "stay of proceedings", the common definition of a supersedeas. Black's Law Dictionary, 4th Edition, Revised. According to C.J.S. Supersedeas §1:

> The remedy [of supersedeas] is usually regarded as injunctive or prohibitive in character, and not corrective; and it will not function as a writ of . . . mandamus.

Moreover, in the past the Board consistently has taken the view that a supersedeas should not disturb the status quo. Jack Sable v. DER, EHB Docket No. 77-125-W (Opinion and Order, December 29, 1977); Parker Sand and Gravel v. DER, 1983 EHB 557. It is true that in Parker we granted a supersedeas of DER's refusal to renew Parker's license, which supersedeas (we declared) preserved the status quo (ante the license renewal refusal), wherein DER had been allowing Parker to operate past the expiration date of his 1982 license. However, this ruling in Parker, which stayed a DER action that amounted to a revocation of Parker's de facto extended 1982 license, is very different from the ruling Hepburnia now requests. Instead of having us freeze the status of Hepburnia's permit applications as of the moment before DER issued its compliance order, Hepburnia would have us require DER to modify the status of those permit applications. This hardly would be a stay of DER's proceedings, Hepburnia's arguments to the contrary notwithstanding.

B. Summary Judgment Motions

The immediately foregoing elaborates on the reason offered in paragraph 5 of Appendix A for refusing the supersedeas petition docketed at 85-343-G. However, as we stated in paragraph 5 of Appendix A, we believed that Hepburnia's allegations at the hearing, if provable beyond dispute, might be sufficient to warrant a motion for summary judgment in favor of Hepburnia on the question of DER's alleged failure to process Hepburnia's permit applications, and on the claim--vigorously advanced by Hepburnia's counsel at the hearing--that DER had refused to issue a Hepburnia surface mining permit for the so-called Snyder site although before the compliance order was issued DER allegedly approved the permit and had informed Hepburnia of the approval.

On August 21, 1985, Hepburnia did file a motion for summary judgment in the above-captioned appeals, together with a brief in support of its motion.[1] The motion was accompanied by an affidavit from Roger Thurston, a Hepburnia employee, attesting to various facts alleged in the motion. In response DER has filed a cross motion for summary judgment and its brief in support thereof, both docketed at 85-343-G. DER simultaneously filed a motion to dismiss the appeal at 85-343-G. We now proceed to rule on this gaggle of motions.

DER's motion to dismiss argues that the DER action mainly complained of in the appeal at 85-343-G, namely DER's alleged halt in processing Hepburnia's permit applications, was not an appealable action of DER's under the Administrative Agency Law, the Board's rules and regulations, and applicable precedent. 2 Pa.C.S. §101; 25 Pa.Code §21.2(a). We disagree with this argument. The Surface Mining

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[1] Actually, Hepburnia captioned the appeal under Docket No. 85-309-G only. However, the motion pertains more directly to the appeal at Docket No. 85-343-G than to the earlier appeal. Therefore we have docketed the motion under both appeals. The dubiety, if any, of this procedure of ours now is moot because we have decided to consolidate the two appeals (see our Order, infra).

Conservation and Reclamation Act ("SMCRA"), 52 P.S. §1396.4(c) states:

> (c) Upon receipt of an application, the department shall review the same and shall make such further inquiries, inspections or examinations as may be necessary or desirable for a proper evaluation thereof. Should the department object to any part of the proposal, it shall promptly notify the applicant in writing of its objections, setting forth its reasons therefor, and shall afford the applicant a reasonable opportunity to make such amendments or take such other actions as may be required to remove the objections. Should any person having an interest which is or may be adversely affected by any action of the department under this subsection, or by the failure of the department to act upon an application for a permit, he may proceed to lodge an appeal with the Environmental Hearing Board in the manner provided by law, and from the adjudication of said board he may further appeal as provided by Title 2 of the Pennsylvania Consolidated Statutes (relating to administrative law and procedure). (emphasis added)

The SMCRA makes DER's "failure to act upon an application for a permit" appealable. Hepburnia is alleging that DER has stopped acting on Hepburnia's permit applications. DER's denial, in this motion, that it has stopped acting on Hepburnia's permit applications is inconsequential to its motion to dismiss, which in essence is a motion for judgment on the pleadings or perhaps even a demurrer; when ruling on such a motion, the well-pleaded allegations of the party who opposes the motion must be viewed as true. Gallo v. J. C. Penney Casualty Insurance Co., 476 A.2d 1322 (Pa.Super. 1984). DER's motion to dismiss is rejected.

As for DER's cross motion for summary judgment, it is not accompanied by any affidavit, and is based entirely on the arguments in the brief accompanying this motion. These arguments, in turn, are essentially entirely directed at rebutting Hepburnia's arguments (in its motion for summary judgment) that DER should be estopped from using the appealed-from July 16, 1985 compliance order as a basis for refusing to issue the Snyder permit. The arguments just listed

are insufficient to warrant summary judgment in favor of DER. Insofar as the Snyder permit is concerned, Hepburnia's notice of appeal at Docket No. 85-343-G alleges that DER's refusal to issue that permit was a violation of Hepburnia's due process rights. DER's cross motion for summary judgment has not addressed this due process issue. Therefore, even if we agreed with all of DER's arguments (and we do not), DER's cross motion for summary judgment must be rejected, since the Board believes Hepburnia's due process argument may have some merit.

Hepburnia's motion for summary judgment makes two requests: (1) that DER be directed to continue processing all pending Hepburnia permit applications (presumably to the point where they would be ready for issuance if the appealed-from compliance order were to be overturned), and (2) that DER be directed to immediately issue the Snyder permit. In response to the first request, DER states that DER has been processing Hepburnia's pending permit applications, short of actual issuance; a letter to this effect from DER to Hepburnia, dated August 21, 1985, was attached to DER's brief in support of its cross motion for summary judgment. This brief explicitly states: "In conformance with its general policy, the Department is committed to continue normal processing of Hepburnia's permit applications during the pendency of the permit block."

We conclude that DER has conceded that Hepburnia is entitled to summary judgment as a matter of law on the continued processing of Hepburnia's permit applications issue. Moreover, we agree this concession is warranted under applicable law; we see no statutory or regulatory basis for suspending the processing of permit applications when a compliance order is issued. It is quite possible that--as DER claims--this issue actually is moot because DER has not ceased processing those permit applications. Nevertheless, we herewith grant Hepburnia summary judgment on this issue; even if summary judgment is not needed to guarantee continued processing

of Hepburnia's presently pending permit applications, our judgment will put on the record the Board's opinion of DER's responsibilities concerning the processing of permit applications after issuance of a compliance order.

Hepburnia bases its second request, that DER be ordered to issue the Snyder permit, on estoppel grounds. Hepburnia's brief in support of its motion alleges as follows.

> As a result of the issuance of a Compliance Order the Department . . . refused to issue a permit which the appellant refers to as the Snyder permit and which carries Permit No. 17840128 even though the appellant had been continuously advised that the Snyder permit application had been completely reviewed and approved and would be issued. The appellant was repeatedly advised by employees of the Department that the permit would be issued momentarily and in reliance on these assurances the appellant moved equipment to Snyder site, made preparations for the commencement of mining, and made plans to utilize the coal mined from the Snyder site to blend with other low quality coal presently being mined at other sites in order to meet certain contract specifications of customers.

Hepburnia argues that these allegations suffice to estop DER from denying the Snyder permit on the sole basis (of DER) that the appealed-from compliance order was issued before the allegedly already approved Snyder permit actually was ready for mailing to Hepburnia. DER argues that estoppel cannot run against the Commonwealth under the circumstances of this appeal. DER also appears to dispute Hepburnia's allegations about the statements made by DER employees to Hepburnia. Specifically, DER's brief states:

> One of Hepburnia's permits, the Snyder permit, was almost ready to be issued when the permit block went into effect. In response to its inquiries, Hepburnia was informed of this fact by Department officials. Hepburnia was also informed on numerous occasions and was otherwise aware that, if it refused to treat the discharge in question and a compliance order was issued before the permit review was completed a permit block would go into effect and issuance of the permit would be stayed.

It is not clear how much credence the Board should give to these just quoted allegations by DER, which were not supported by affidavit as previously explained. Rule 1035(d) of the Pa. Rules of Civil Procedure, if read literally, seems to imply that the Board should not consider such unsupported allegations. We need not and do not reach this possible dispute about the exact statements made by DER to Hepburnia, however, nor need we reach the issue of whether estoppel can run against the Commonwealth in this appeal, because the affidavit by Mr. Thurston accompanying the motion simply does not state facts sufficient to establish detrimental reliance; without detrimental reliance by Hepburnia on DER's alleged assurances the permit had been granted, there can be no estoppel of DER's Snyder permit denial. Melvin D. Reiner v. DER, 1982 EHB 183; Ohio Farmer's Insurance Co. v. DER, 1981 EHB 384; 14 P.L.E. Estoppel, §§23-25. Therefore Hepburnia's motion for summary judgment on its request that DER be ordered to issue the Snyder permit is rejected.

C. Due Process

As stated earlier, Hepburnia's Notice of Appeal at Docket No. 85-343-G alleges that DER's actions in this matter have violated Hepburnia's due process rights. This claim was vigorously espoused by Hepburnia during the supersedeas hearing, and has been repeated in Hepburnia's aforementioned Petition to Commonwealth Court. We herewith affirm our previous refusal to grant a supersedeas on the basis of Hepburnia's due process arguments; those arguments were irrelevant to a supersedeas of the compliance order and we do not believe a supersedeas of DER's "permit block" would have been a proper application of this writ, for reasons already explained.

It is possible, however, that in these appeals Hepburnia is entitled to judgment in its favor for due process violations, although we would not put

the due process violation case for Hepburnia in quite the terms that Hepburnia has chosen. Paragraphs a - c in Exhibit A were written with this due process violation possibility in mind, to put on the record some relevant facts concerning the Board's present abilities to process appeals. Of course, because Hepburnia has not renewed its due process claims in its motion for summary judgment, we certainly do not intend to render judgment on those claims in this Opinion, without the benefit of the parties' briefs and possibly further oral argument. But in view of the fact that Hepburnia's Petition to Commonwealth Court has renewed Hepburnia's due process violation allegations, and now even includes the specific allegation that the Board's actions are to be included among the due process violations Hepburnia has suffered, we will take this opportunity to set forth our present appraisal of Hepburnia's due process claims.

Our supersedeas hearing on August 15, 1985 was held ten days after the cognizant Board member received the petition for supersedeas at Docket No. 85-309-G, and only one day after receipt of the supersedeas petition at Docket No. 85-343-G. The ten-day delay between the actual filing of Hepburnia's appeal and its arrival at the office of the undersigned Board member was unique in our experience and totally unpredictable. Therefore, especially in view of the Board's crowded schedule, we consider the time of the supersedeas hearing to be within the requirements of 25 Pa.Code §21.76(b), quoted supra. Admittedly, the hearing was not an evidentiary hearing. However, 21 Pa.Code §21.77 reads:

> A petition for supersedeas shall state with particularity the facts and citations of legal authority upon the basis of which the petitioner believes the petition should be granted. A petition for supersedeas may be denied without hearing for lack of such specificity, or for failure to state grounds sufficient for the granting thereof.

§21.77 clearly gives the Board the discretion to deny a supersedeas without any hearing at all. Hence our rules certainly must permit us to deny a supersedeas

after a hearing of the sort we have described, wherein the parties argued their respective cases and described the evidence they expected to present at a hearing on the merits.

This view of our powers is supported by the language of the new Board supersedeas rules which have been approved by the Independent Regulatory Review Commission ("IRRC") in an Order dated April 18, 1985. Although we recognize these new rules have no legal effect until formally promulgated by the Environmental Quality Board ("EQB"), we believe it is relevant to note that the IRRC-approved new rule 25 Pa.Code §21.77(e) reads:

> (e) At the discretion of the Board, where necessary to ensure prompt disposition, supersedeas hearings may be limited in time and format, with each party given a fixed amount of time to present its entire case, and with restricted rights of discovery or of cross-examination.

Moreover, as we have explained, our denials of Hepburnia's supersedeas petitions were based entirely on our understanding of the relevant law and on undisputed facts set forth at the supersedeas hearing. Therefore, although as stated above we are not now rendering judgment on any due process issues, we find it difficult to see how our conduct of the supersedeas hearing could have constituted a violation of Hepburnia due process rights.

We take the gravamen of Hepburnia's due process complaint about DER's unwillingness to grant the Snyder permit to be the fact that DER is relying on a compliance order which alleges a violation Hepburnia contests and has formally appealed. Whether DER is entitled to withhold surface mining permits on the basis of uncomplied-with abatement orders which have been appealed to this Board but not adjudicated appears to be a matter of statutory construction. The governing statutory language is the Surface Mining Conservation and Reclamation Act ("SMCRA"), 52 P.S. §1396.3a(d), which reads:

> (d) The department shall not issue any surface mining permit or renew or amend any permit if it finds, after investigation and an opportunity for an informal hearing, that (1) the applicant has failed and continues to fail to comply with any provisions of this act or of any of the acts repealed or amended hereby or (2) the applicant has shown a lack of ability or intention to comply with any provision of this act or of any of the acts repealed or amended hereby as indicated by past or continuing violations. . . .

The language just quoted is from the October 12, 1984 amendments to 52 P.S. §1396.3a of the SMCRA, subsection (b) of which (before amendment) read:

> (b) The department shall not issue any surface mining operator's license or permit or renew or amend any license or permit if it finds, after investigation, and an opportunity for an informal hearing that (1) the applicant has failed and continues to fail to comply with any of the provisions of this act, or of any of the acts repealed or amended hereby or (2) the applicant has shown a lack of ability or intention to comply with any provision of this act or of any of the acts repealed or amended hereby as indicated by past or continuing violations. . . .

The reader will note that §1396.3a(d) of the newly amended SMCRA differs from the former §1396.3a(b) solely in the absence of any reference to licenses in the new §1396.3a(d). The provisions governing licenses under the new amendments are retained in the new §1396.3a(b), whose language now is:

> (b) The department shall not issue any surface mining operator's license or renew or amend any license if it finds, after investigation, and an opportunity for an informal hearing that a person, partner, associate officer, parent corporation or subsidiary corporation has failed and continues to fail to comply or has shown a lack of ability or intention to comply with an adjudicated proceeding, cessation order, consent order and agreement or decree, or as indicated by a written notice from the department of a declaration of forfeiture of a person's bonds. . . (emphasis added)

Therefore it appears that the Legislature recently has determined that a refusal to issue a surface mining operator's license should not be based on a failure to comply with an unadjudicated proceeding; in this connection the definition in 1 Pa.Code §31.3 also should be noted:

> Matter or proceeding. The elucidation of the relevant facts and applicable law, consideration thereof, and action thereupon by the agency with respect to a particular subject within the jurisdiction of the agency, initiated by a filing or submittal or an agency notice or order (emphasis added)

On the other hand, the Legislature apparently has deliberately refused to require that refusals to issue surface mining permits be based on adjudicated proceedings only; the reference to adjudicated proceedings seemingly was advisedly omitted from the new §1396.3a(d). Consequently, were we to be ruling at this juncture, we would state that DER's interpretation of the currently effective 52 P.S. §1396.3a(d)--as permitting DER to withhold Hepburnia's surface mining permit on the sole basis of the appealed-from but as yet unadjudicated July 16, 1985 compliance order--is consistent with the statutory language. This statement then would imply we would not be able to rule that DER's refusal to grant the Snyder permit on the basis of an unadjudicated appealed-from compliance order is an unconstitutional violation of Hepburnia's rights, because such a ruling would amount to asserting that the new §1396.3a(d) itself is unconstitutional; we are forbidden to find that a statute passed by the Legislature is unconstitutional. St. Joe Minerals v. Goddard, 14 Pa.Cmwlth. 624, 324 A.2d 800 (1974); Latimer Brothers v. DER, 1982 EHB 305; Chemclene Corporation v. DER, 1982 EHB 485. We are permitted to rule that a statute is being unconstitutionally applied by DER. More specifically, we can rule, and we think we could be convinced to rule, that under the circumstances surrounding Hepburnia's appeal DER's refusal to grant

the permit is an unconstitutional violation of Hepburnia's due process rights, though we will not so rule at this time because, as explained supra, Hepburnia's summary judgment motion has not renewed its due process claim. The circumstances we have in mind are the facts listed in paragraphs a - c of Exhibit A together with:

d. The Board's budget and allocation of its resources, e.g., the Board's ability to hire hearing examiners to hold hearings which the present Board members otherwise must put off for a considerable time, are processed, and must be approved, by DER, wherein the Board is lodged for administrative and budgetary purposes.

e. The number of appeals filed with the Board largely is a function of the intensity of DER's enforcement activities.

The foregoing circumstances become especially meaningful in the light of the additional fact, discussed supra, that 25 Pa.Code §21.78(b) prevents us from granting a supersedeas of any order, such as the presently appealed-from compliance order, requiring the abatement of significant pollution. This proscription applies irrespective of the Board's considerations under 25 Pa.Code §21.78(a), which reads:

> (a) The circumstances under which a supersedeas shall be granted, as well as the criteria for the grant or denial of a supersedeas, are matters of substantive common law. As a general matter, the Board will interpret said substantive common law as requiring consideration of the following factors:
>
> (1) irreparable harm to the petitioner;
> (2) the likelihood of the petitioner's prevailing on the merits; and
> (3) the likelihood of injury to the public.

As stated in paragraph 1 of Exhibit A, we believe the criteria for grant of a supersedeas in this §21.78(a) are essentially equivalent to the criteria enunciated by the Pennsylvania Supreme Court in Pennsylvania Public Utility Commission v. Process Gas Consumer Group, 467 A.2d 805 (Pa. 1983); The Process Gas criteria

appear to be inconsistent with any absolute proscription of a supersedeas grant, as required by §21.78(b).

We recognize that Process Gas need not be directly applicable to the supersedeases Hepburnia requested, in that the petitioner in Process Gas sought a supersedeas from a Public Utility Commission order which apparently had been issued after a hearing; in the instant appeal Hepburnia alleged that it has not had any previous opportunity to question DER's compliance order in a hearing of any sort, not even the informal hearing mentioned in 52 P.S. §1396.3a(d) (Tr. of supersedeas hearing, 77-79). If anything, however, this distinction (if really borne out by the instant facts) would argue that the criteria for a supersedeas of DER's compliance order to Hepburnia should be less, not more, rigorous than stated in Process Gas. We also recognize, however, that the EOB is presumed to have promulgated 25 Pa.Code §21.78(b) after due balancing of relevant factors, such as the problems faced by recipients of compliance orders and the Commonwealth's need to ensure prompt abatement of significant pollution. In any event, we consider ourselves bound by the proscription of 25 Pa.Code §21.78(b), until ordered to do otherwise by a higher court; in other words the desirability of §21.78(b) is not the issue before us.

Rather, as we see it, the issue is whether when, as in the present appeal:

(i) DER has issued a compliance order requiring the abatement of significant pollution, which has been appealed; and

(ii) DER, apparently within its statutory authority, has used or threatens to use, the fact of non-compliance with said order as a reason for refusing a permit; and

(iii) §21.78(b) absolutely forbids us to grant a supersedeas of the compliance order; and

(iv) because of the complicated technical facts involved, without an evidentiary hearing amounting to a full hearing on the merits we cannot assuredly say the petitioner does not deserve a supersedeas under the criteria of 25 Pa.Code §21.78(a) standing alone (because without such a hearing we cannot properly judge the likelihood of the petitioner's prevailing on the merits, as Process Gas and §21.78(a) require us to do),

due process requires that this Board have the resources to give Hepburnia its prompt hearing on the merits of the compliance order much more promptly than we presently are able to do. We feel this due process issue is sufficiently important and sufficiently complex that--were Hepburnia to raise it in a formal motion and we then were to rule against Hepburnia--we probably would be willing to certify the issue to Commonwealth Court under 42 Pa.C.S. §702(b) and Rule 1311 of the Pennsylvania Rules of Appellate Procedure.

O R D E R

WHEREFORE, this 6th day of September, 1985, for reasons stated in the accompanying Opinion, it is ordered as follows.

1. DER's Motion to Dismiss and Cross Motion for Summary Judgment are rejected.

2. Hepburnia's Motion for Summary Judgment is rejected insofar as it requests that DER be ordered to issue the Snyder permit.

3. Hepburnia's Motion for Summary Judgment is granted insofar as it requests the Board to rule that it would be unlawful for DER not to continue processing presently pending Hepburnia's permit applications up to but not including issuance (assuming those permit applications would be approved for issuance if DER had not set up a permit block based on the appealed-from July 16, 1985 compliance order); it is so ruled.

4. The appeals presently docketed at Nos. 85-309-G and 85-343-G are consolidated, under the single 85-309-G Docket Number.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: September 6, 1985

cc: Bureau of Litigation
For Appellant:
Anthony P. Picadio, Esquire,
Tucker Arensberg, P.C.
Pittsburgh, PA
For the Commonwealth, DER:
Bernard Labuskes, Jr., Esquire,
Harrisburg, PA

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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HEPBURNIA COAL COMPANY :

:

Docket No. 85-309-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

O R D E R

AND NOW, this 21st day of August, 1985, after a hearing on the petition for supersedeas filed by Hepburnia in this matter, in which the parties did not present testimony but described the evidence they expected to present at the hearing on the merits of this appeal, said petition is denied, for reasons set forth below.

A. Insofar as Hepburnia is asking the Board to stay the appealed-from compliance order dated July 16, 1985, which requires Hepburnia to treat certain discharges in the vicinity of its Laurel Branch No. 1 mine in Brady Township, Clearfield County, operated under Mine Drainage Permit MDP 4574SM5, the Board holds:

1. The requirements for grant of a supersedeas stated in 25 Pa.Code §21.78(a) are essentially equivalent to, and therefore must be interpreted in accordance with, the criteria announced by the Pennsylvania Supreme Court in Pennsylvania Public Utility Commission v. Process Gas Consumer Group, 467 A.2d 805 (Pa. 1983).

EXHIBIT A

2. Although the evidence Hepburnia intends to present, if unopposed would make a prima facie case satisfying the requirements of 25 Pa.Code §21.78(a), the Board--after hearing DER's version of the facts--does not believe Hepburnia has made the sufficiently strong showing of likelihood of prevailing on the merits required under the criteria of Process Gas, supra.

3. Furthermore, the parties agree that an untreated discharge exists, which the Board believes amounts to significant pollution; on this belief, the Board is not permitted to grant a supersedeas under 25 Pa.Code §21.78(b).

B. Insofar as Hepburnia is asking the Board to "stay" DER's alleged refusal to process Hepburnia's pending permit applications, including the so-called Snyder Permit which Hepburnia alleges had been approved before issuance of the appealed-from July 16, 1985 compliance order, the Board holds:

4. These requests are irrelevant to the instant appeal, but are relevant to the later Hepburnia appeal docketed at 85-343-G, which challenges DER's alleged failures to issue the Snyder permit and to process Hepburnia's other pending permit applications.

5. Although a petition for supersedeas was filed in the appeal at 85-343-G, and although the aforesaid hearing did cover the facts relevant to the merits of the 85-343-G appeal, the Board is not convinced the aforementiond requests to "stay" DER's actions are the proper subjects of a supersedeas petition, although they might be legitimate subjects of a motion for summary judgment in the 85-343-G appeal.

The Board believes that the aforesaid rulings are consistent with, and are equivalent to, the oral rulings made at the aforesaid hearing. Until the transcript of the hearing is received, the Board stands by the above holdings. Any party believing the above rulings are inconsistent with the transcript, or

EXHIBIT A

deserve an opinion setting forth the Board's reasons for denying the supersedeas in greater detail, must so request within ten (10) days of receipt of the transcript. In the absence of such requests, the Board will neither modify this Order nor issue a fuller opinion in explanation of this supersedeas denial. The Board does intend to issue a full opinion on Hepburnia's just-filed motion for summary judgment, as soon as DER's previously scheduled response to the motion is received.

In fairness to Hepburnia, the Board wishes to state here, as also was stated on the record at the hearing, that:

a. The Board believes there is no way to resolve the parties' factual disputes short of a full hearing on the merits, which the parties estimate will take a minimum of four (4) full days.

b. At the present time, the undersigned Board member is unable to schedule hearings of the aforementioned length before about September 1986.

c. This inability has resulted from the facts:

(i) The Board has been functioning with two rather than its normal complement of three members ever since May 16, 1983, when former Board Chairman Dennis Harnish resigned from the Board;

(ii) From the 1982 calendar year to the present, the number of appeals filed with the Board has increased from about 300 per year to about 500 per year;

(iii) The Board has been unable to secure the services of any competent hearing examiners who could help alleviate its aforementioned scheduling problems.

EXHIBIT A

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: August 21, 1985
cc: Anthony P. Picadio, Esquire
Bernard Labuskes, Jr., Esquire
Bureau of Litigation

EXHIBIT A

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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THE NATURE CONSERVANCY :

: Docket No. 85-113-M

: Issued: September 9, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

This is an appeal by the owner of a bog, which is an "important wetland" for purposes of 25 Pa. Code §105.17, from a determination by the Department of Environmental Resources (DER) that the owner of a parcel of land adjacent to the bog was not required to obtain a permit under the Dam Safety and Encroachment Act, 32 P.S. §693.1 et seq., before subdividing his land. DER's Motion to Dismiss for Lack of Jurisdiction is dismissed because DER's decision not to require a permit was an action pursuant to 71 P.S. §510.21(c) that affected someone's rights.

On April 12, 1985, The Nature Conservancy (Conservancy) filed an appeal with this Board from a letter dated March 15, 1985 from Khervin D. Smith, Chief of Advisory Services Section, Division of Waterways Management, Department of Environmental Resources (DER) and addressed to Mr. Ralph T. Cook, Director of The Nature Conservancy wherein Smith stated his reasons for deciding that an encroachment permit for a subdivision proposed by one Arthur S. Haney, Jr. for a parcel of ground adjacent to an area known as Cranberry Bog (Bog) was not required.

On June 13, 1985 DER filed a Motion to Dismiss the Conservancy's appeal for lack of jurisdiction, asserting that DER has taken no final action in this matter and, therefore, the Board lacks jurisdiction to hear the appeal.

The Conservancy filed a Memorandum in opposition to DER's Motion to Dismiss, asserting that DER had rendered a decision which is appealable in that DER determined that a permit was not required for such subdivision under the provisions of the Dam Safety and Encroachments Act, 32 P.S. §693.1 et seq., "Act" or the regulations promulgated pursuant thereto, namely, 25 Pa. Code §105.

The facts underlying this appeal are not in controversy. Both parties agree that the Bog is an "important wetland" for purposes of 25 Pa. Code §105.17. Approximately one-half of the lot in question lies within the designated bog area and the remainder of the lot is within three hundred (300) feet of the bog area.

Chapter 105.17(b) provides:

> "No permit shall be granted for work in or within 300 feet of any important wetlands or otherwise affecting any important wetlands unless the applicant demonstrates and the Department (DER) concludes, that the public benefits of the project outweigh the damage to the wetlands resources and that the project is necessary to realize public benefits."

25 Pa. Code §105.17(b).

DER posits its motion upon the premise that no final action was taken by DER which affected anyone's property rights, etc. It appears to us that DER is engaging in what may be charitably described as a "creative definition" of the term "final action" or "decision." By his own admission, Khervin Smith, the DER official herein involved, advised the Conservancy by letter dated March 15, 1985 that the proposed subdivision by Haney of his lot did not require an encroachment permit.

At this stage of the proceedings the burden rests upon DER to establish that the Board lacks jurisdiction to hear this appeal because DER took no final action in this matter.

DER rightly asserts that the Board has jurisdiction only over final actions of DER, pursuant to the provisions of 71 P.S. §510-21(c). The term action is therein defined as:

> Any order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any person, . . .

71 P.S. §510-21(c).

The obvious tests, or inquiries, to be satisfied, therefore, are:

(1) Did DER make a decision with regard to the Haney request?

(2) If a decision was made, did the decision affect anyone's rights, etc.?

DER admits that Smith advised Haney that no encroachment permit was required for a proposal to subdivide his parcel of ground. In so doing, Smith relieved Haney of the requirement to submit a permit application to DER pursuant to the provisions of 25 Pa. Code §105.1 et seq. Haney requested DER to determine if a permit was required for a subdivision proposal under consideration by the local political entity. DER did not refuse to act

upon the request. DER's response was that no permit was required, and as such was a decision by DER. Therefore, DER is found to have engaged in an action pursuant to the provisions of 71 P.S. §510-21(c).

Having thus concluded that an action was taken by DER, we now must determine if the action affected anyone's rights, etc.

Initially, we observe that Haney was not required to file an application for any permit. Further, the area about which Haney inquired is now available for development, whereas it was not previously available for development as a separate and distinct parcel of realty. Clearly, Haney's property rights in the subdivided area have been affected, at least to the extent that it may now be subdivided. The ability to develop, as a separate parcel, a parcel of ground not otherwise developable, could also have consequences to the public pursuant to Article, Section 27 of the Pennsylvania Constitution, which consequences, if any, are now unknown to the Board.

In any event, someone's rights were affected by DER's decision, and the appeal lies.

This is not to say that we have made any decision on the merits of the Conservancy's appeal. Such a decision must await hearings on whether or not DER's action was proper.

Having failed to sustain its burden at this stage of the proceedings, the DER Motion to Dismiss for Lack of Jurisdiction is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR., MEMBER

cc: Bureau of Litigation
For DER: Melinda Holland, Esq.
For Appellant: Thomas Scott, Esq.,KILLIAN & GEPHART, Hbg.
For Intervenor: James Swetz, Esq.,CRAMER & SWETZ, Stroudsburg

DATED: September 9, 1985

nb

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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ROBERT A. AND FLORENCE PORTER :

:

: Docket No. 84-240-G
: Issued September 13, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and CONSOLIDATION COAL COMPANY, Permittee

OPINION AND ORDER

SYNOPSIS

Appellants are granted standing. Inasmuch as their land lies above the mine for which the appealed permits have been issued, they clearly have a substantial, immediate and direct interest in the issuance of those permits. However, Appellants will not be permitted to present evidence on issues which are not related to the injuries which they have alleged in order to establish standing. The Board does not believe that the Pennsylvania legislature intended to permit citizens--even those possibly adversely affected by DER actions--to act as private attorneys general. In addition, the Board rejects Appellants' argument that the Board should apply federal standards to establish standing because the statutes applicable to this appeal were enacted in conjunction with the attainment of primary jurisdiction over the enforcement of mining within the Commonwealth pursuant to the federal Surface Mining Control and Reclamation Act, 30 U.S.C. §1201 et seq.

OPINION

The parties have appealed DER's issuance of Subsidence Control Permit No. 3084301 and Coal Mining Activity Permit No. 3084301 to Consolidation Coal Company ("Consol"). During the progress of this appeal toward a hearing on the merits, there have been several discovery disputes. One of these disputes occasioned an Order of the Board, dated March 25, 1985, wherein we wrote:

> 5. With respect to Interrogatories 15, 65-71, 75 and 76:
>
> a. The Board observes that the Appellants' Notice of Appeal involves 28 wide-ranging counts.
>
> b. The Board doubts that the Appellants have standing to raise all the issues implicit in the aforementioned 28 counts.
>
> c. The Board cannot decide what matters lie within the scope of discovery prescribed by Pa.R.C.P. Rule 4003.1 until the issues which Appellants have standing to raise are delineated.
>
> . . .
>
> 8. Within 20 days from the date of this Order, the Appellants shall file a supplement to their Notice of Appeal, containing:
>
> a. A list of the injuries Appellants allege in support of their standing to prosecute this appeal under the standard of William Penn Parking Garage, Inc. v. City of Pittsburgh, 346 A.2d 269 (Pa. 1975).
>
> b. A list of the counts and issues (explicit or implicit) raised in Appellants' Notice of Appeal which--Appellants believe--they have standing to raise; these asserted beliefs must be accompanied by brief explanations referring to the injuries listed in paragraph 8a.

The supplement to their Notice of Appeal filed by the Porters in response to this Order alleged as follows.

> The interests Appellants have in prosecuting this appeal are multiple. Appellants own more than 180 acres of real property, a home, wells

> and springs in the permit area. Appellants use the permit area and adjacent areas for hiking, nature observation and similar outdoor recreational pursuits. Their interests, use and concern about the land obviously do not end at their property lines. They drive to and from their land across the permit and adjacent areas. The value of their real property may be diminished by surface and ground water diminution or pollution both on their land and in the surrounding permit and adjacent areas. Their ability to enjoy the recreational opportunities provided both on and off their property can be affected by subsidence, ground and surface water diminution and/or pollution. Moreover, Appellants may be subject to emotional distress and/or personal injuries because of subsidence damage and water loss or pollution both on and off their land.

The Porters went on to claim that therefore they had standing to pursue each and every one of the 28 counts listed in their Notice of Appeal. They bolstered this claim with quotations from N.R.D.C. v. O.S.M., IBSMA 81-83 (February 24, 1982), an opinion issued by the United States Department of Interior Office of Hearings and Appeals ("OHA") concerning the standing of citizens to pursue administrative appeals under the Federal Surface Mining Control and Reclamation Act, 30 U.S.C. §§1251 et seq. ("FSMCRA"). This OHA opinion sets forth very liberal standards for citizen appeals. The Porters argue that in accepting primary jurisdiction to enforce the FSMCRA, the Commonwealth implicitly accepted the liberal federal standards for standing to appeal DER actions taken under Commonwealth statutes regulating mining activities, such as the statutes under which the presently appealed-from permit was issued.

Neither DER nor Consol has responded directly to the aforementioned standing claims made by the Porters. By now, however, all the parties have filed their pre-hearing memoranda, describing the evidence they intend to present at the hearing on the merits of this matter, which has been scheduled for the week

of March 23-27, 1986. The parties continue to wrangle about discovery matters. Therefore, although the parties have not specifically asked the Board to do so, we rule now on the issue of the Porters' standing to appeal, in the belief that our ruling will help the parties to anticipate the Board's future rulings in this appeal on discovery and evidentiary questions.

Initially we remark that the record before the Board in this appeal does not yet include Consol's permit application or the appealed-from permits. Therefore, we do not really know whether those permits were granted under Commonwealth statutes which have any relation to the Commonwealth's primacy jurisdiction to enforce the FSMCRA. However, the Porters counts involve many allegations of DER failures to comply with requirements set forth in the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. §§1406.1 et seq. ("BMSLCA"), and in 25 Pa.Code Chapters 86 and 89. Neither DER nor Consol have argued that the subject matters of the BMSCLA, or of 25 Pa.Code Chapters 86 and 89, are outside the scope of this appeal. The titles of the appealed-from permits, namely Subsidence Control Permit and Coal Mining Activity Permit, certainly suggest that the BMSLCA and 25 Pa.Code Chapters 86 and 89 are germane. Thus, for the purposes of this Opinion, we will assume that the appealed-from permits have been granted under the authority of the BMSLCA and of 25 Pa.Code Chapters 86 and 89. Those Chapters, in turn, have been issued under the authority, inter alia, of the BMSLCA, the Pennsylvania Surface Mining Conservation and Reclamation Act, 52 P.S. §§1396.1 et seq. ("SMA") and the Pennsylvania Coal Refuse Disposal Control Act, 52 P.S. §§30.51 et seq. ("CRDCA").

The purposes of the BMSLCA do include the maintenance of primary jurisdiction over surface coal mining in Pennsylvania. 52 P.S. §1406.2 The same purpose is stated to be an objective of the SMA (§§15-17 of the Act of October 10, 1980,

P.L. 835, No. 155) and of the CRDCA (52 P.S. §30.51, October 10, 1980 Amendments, P.L. 807, No. 154, Section 8). But we are unable to follow the Porters' argument that this stated purpose of the Legislature in enacting the BMSLCA, SMA and CRDCA implies that the standards for Porters' standing to appeal the instant mining permits before this Board must be governed by the federal standards for standing to appeal the actions of federal administrative agencies regulating mining activities.[1] Certainly neither the BMSLCA, SMA or CRDCA, nor any of the regulations in 25 Pa.Code Chapters 86 and 89 instruct the Board to adopt federal standards for standing. The Porters have not cited a single federal or Pennsylvania case which advocates this thesis.

Therefore we will decide the Porters' standing to appeal solely on the basis of William Penn, supra (cited by us in our Order of March 25, 1985, quoted above) and applicable interpretations thereof. On this basis, we have no hesitation in ruling that the Porters have standing. Certainly a "substantial, immediate and direct" injury to the Porters is made out by their allegations, quoted supra, that they own real property in the permit area, including a home with wells and springs, together with the further allegations: (i) that the permit applications do not provide for adequate surface and groundwater monitoring (Notice of Appeal, Count 5), and (ii) that they anticipate pollution of ground and surface water on this property (Supplement to Notice of Appeal). Similarly, under the recent ruling in John F. Culp, III v. Consol Pennsylvania Coal Co., 492 A.2d 1184 (Pa.Cmwlth. 1985), the Porters' allegation--that Consol's mining operations under the permits will cause subsidence of the Porters' coal seams overlying Consol's seam (Notice of Appeal, Count 27)--of itself suffices for standing to appeal. Other Porters'

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[1] For the purposes of our present discussion we need not and do not concern ourselves with the question whether the OHA opinion cited by the Porters, supra, correctly states the federal standards.

allegations, which we will not detail here, also combine to imply Porters' injuries sufficient for standing under William Penn. Of course, ultimately the Porters can sustain their appeal only by proving facts supporting the aforementioned allegations, along with whatever other facts are needed to show DER's grant of the appealed-from permits was an abuse of DER's discretion. Warren Sand and Gravel Company, Inc. v. DER, 20 Pa.Cmwlth. 186, 341 A.2d 556 (1975). For the purpose of the instant Opinion, however, we are only concerned with the question of the Porters' standing to pursue their appeal through their desired hearing on the merits. On the present record, they appear to have such standing.

Having passed this hurdle, however, a deeper, less obviously answered question confronts the parties and the Board: Granted the Porters have alleged some injuries sufficient to confer standing on the Porters, do they now have the right to pursue--via discovery and the presentation of evidence--matters which are totally unrelated to the injuries the Porters allege, though possibly related to injuries of other persons who have not chosen to appeal? In the past, the Board has taken the view that an appellant who has standing to appeal a permit grant because of alleged injuries satisfying the William Penn standard does not thereby gain the right to present evidence on matters which--though possibly related to actual deficiencies in the permit process--are totally unrelated to the injuries that have conferred standing on the appellant. In other words, the Board has taken the view that an appellant who has standing to raise an issue X cannot raise an issue Y irrelevant to X unless he would have standing to raise issue Y even if he did not have standing to raise issue X.

For example, in Commonwealth of Pennsylvania Game Commission v. DER, 1984 EHB 558, which involved a Game Commission appeal of a DER permit to a third party for construction of a residual waste landfill, the Board agreed the Game

Commission had standing to appeal the permit grant on grounds of threats to the wildlife in the wetlands adjacent to the proposed landfill site, but the Board refused to allow the Game Commission to introduce evidence on alleged DER violations of the Dam Safety and Encroachments Act, 32 P.S. §693.1 et seq. ("DSEA"). The Board's logic was that DER violations of the DSEA, even if proved, had no bearing on the threatened injuries to wildlife which had gained the Game Commission its standing. The Board's precise language in Game Commission, supra, was:

> On the other hand we agree with Ganzer that the Commission cannot be allowed to "act as a private or Commonwealth attorney general, looking over DER's shoulders" as DER administers the Solid Waste Management Act ("SWMA"), 35 P.S. §§6018.101 et seq., or the Dam Safety and Encroachments Act ("DSEA"), 32 P.S. §§693.1 et seq. Every allowable Commission claim of procedural or substantive error by DER in granting Ganzer its permit must be related to the Commission's alleged injuries under the William Penn standard. Furthermore, if the Commission intends to argue that the existing regulatory scheme relied on by DER is insufficient to protect the wildlife and wildlife habitats for which the Commission is responsible, the Commission will have to overcome the presumption that the existing regulatory scheme meets the objectives of the Legislature. Coolspring Township v. DER, Docket No. 81-134-G (Adjudication, August 8, 1983), at section IIA.
>
> At present the Board concurs with DER's view that the existing regulatory scheme consists of regulations promulgated under the SWMA, and does not include regulations promulgated under the DSEA (unless such DSEA regulations are specifically called for by SWMA regulations). At the hearing on the merits of this matter, we will permit the Commission to argue to the contrary. However, unless we are convinced that regulations promulgated under the DSEA are germane to this appeal under the criteria enunciated in the preceding paragraph, evidence that such regulations have been ignored will not be admissible in the instant proceedings.

The Porters contend that they are entitled to act as a "private attorney general"; in fact this is one of the explicit contentions of law in their pre-hearing memorandum. However, the Porters have not offered the Board any Pennsylvania authority for their contention; for reasons already explained, we do not feel that federal precedent re this "private attorney general" issue is binding on us, absent any argument that allowing the Porters to act as a private attorney general in this appeal is a matter of federal constitutional right. Our readings of William Penn, supra, and its progeny do not discern any intention by the Pennsylvania courts that this Board's grant of standing to the Porters shall permit them to act as a private attorney general, inquiring into every facet of DER's processing of the appealed-from permits, whether or not those facets relate in any way to the allegations of injury which gained the Porters standing. Nor do we discern any such intention by the Legislature in the language, e.g., of the BMSLCA, the SMA or the CRDCA. In each of these statutes the right of appeal to this Board is clearly limited to persons who are aggrieved or affected by DER actions. 52 P.S. §1406.16; 52 P.S. §1396.4(c); 52 P.S. §30.53c; 2 Pa.C.S.A. §101. Nowhere in these statutes, not even in the sections of these statutes authorizing citizen suits, do we find an explicit legislative intent that a citizen may act as a private attorney general, empowered to compel this Board's review of DER actions which do not affect that citizen's "personal or property rights, privileges, immunities or obligations" (language of 2 Pa.C.S.A. §101). 52 P.S. §1406.13; 52 P.S. §1396.21; 52 P.S. §30.63. Nowhere in these statutes do we see any explicit indication that the legislature was willing to have a citizen act as a private attorney general in an appeal to this Board on the sole basis of his ability to allege an injury meriting standing to appeal under the William Penn standard.

On the other hand, admittedly neither the Pennsylvania courts nor the Legislature have explicitily registered their unwillingness to allow the Porters to act as a private attorney general in this appeal. Moreover, the texts of the aforementioned citizen suit provisions of the BMSLCA, SMA and CRDCA [52 P.S. §§1406.13, 1396.21, 30.63] very closely parallel the language in the citizen suit section of the FSMCRA, 30 U.S.C. §1270. For example, 52 P.S. §30.63(a) reads:

> Except as provided in subsection (c) of this section, any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this act or any rule, regulation, order or permit issued pursuant to this act against the department where there is alleged a failure of the department to perform any act which is not discretionary with the department or against any person who is alleged to be in violation of any provision of this act or any rule, regulation, order or permit issued pursuant to this act. Any other provision of law to the contrary notwithstanding, the courts of common pleas shall have jurisdiction of such actions, and venue in such actions shall be as set forth in the Rules of Civil Procedure concerning actions in assumpsit. (emphasis added)

The emphasized language just quoted parallels the language in 30 U.S.C. §1270 permitting citizen suits against U. S. agencies, the Secretary of the Interior and appropriate State regulatory authorities (which in this appeal would be DER) for alleged failure to properly enforce the FSMCRA. Thus it is arguable, as the Porters would have us believe, that the Pennsylvania Legislature--when it adopted the language of 52 P.S. §30.63(a)-- also endorsed the Congressional intent when the Congress authorized citizen suits in the FSMCRA; according to the Porters, on the authority, e.g., of the OHA N.R.D.C. v. O.S.M. opinion cited supra, Congress did intend that citizens be able to act as private attorneys general.

Nevertheless, 52 P.S. §30.63(a) quoted above, and the corresponding citizen suit provisions of the BMSLCA and SMA, grant jurisdiction of such citizen suits to the Pennsylvania courts of common pleas, not to this Board. Nowhere in these citizen suit sections, or in other sections of the BMSLCA, SMA and CRDCA, is this Board instructed to interpret its charge to hear appeals from DER actions [71 P.S. §510-21] so that any citizen who gains standing (under William Penn) to appeal a DER permit grant before this Board then can go on to conduct a private attorney general inquiry into all aspects of DER's permit review process. 52 P.S. §§1406.16, 30.53c.

To sum up this discussion, we have reconsidered our view, stated in Game Commission and quoted supra--that appellants like the Porters should not be allowed to act as a private attorney general in proceedings before this Board merely because they have standing to appeal--and believe that in the absence of explicit instructions on this question from the Pennsylvania courts and Legislature our view represents the better public policy for the handling of appeals by this Board, despite the Porters' arguments to the contrary. Until the merits of the Porters' appeal can be reached, presumably in an evidentiary hearing, we have no way of knowing whether the Porters' allegations of injury really can be supported by evidence. We do not believe it is in the public interest to allow the Porters to tie up DER, Consol and this Board in an all-intrusive examination of all aspects of DER's processing of the appealed-from permits (very likely including burdensome discovery requests and disputes) only to have this Board ascertain at the close of the evidentiary hearing--after possibly very costly expenditures of time and money by the parties and the Board--that the Porters' originally complained-of injuries which earned them standing actually had little or no basis in fact.

The crucial point to be recognized is that--granting the Porters' alleged injuries fall into the environmental class DER is charged to prevent, as at least some of those alleged injuries, e.g., pollution of surface and ground water on their property, do fall--then the Board almost assuredly[2] will agree that DER has abused its discretion in granting the permits if (i) the Porters can demonstrate that injuries in the aforementioned class will or are likely to occur, or even if (ii) the Porters merely can show that DER failed to comply with any DER statutory or regulatory provision which is intended to ensure such injuries will not occur. Conversely, if the Porters cannot demonstrate their alleged injuries, or cannot at the very least demonstrate that DER violated statutory and regulatory requirements designed to protect the Porters from their alleged injuries, we see no basis for any complaint by the Porters that they have been denied a fair hearing on their appeal merely because we have prevented them from raising issues that in no way relate to their injuries. In any event, our limitation on the issues the Porters may raise in their appeal before this Board does not preclude the Porters from filing a citizen suit as private attorneys general under the provisions of 30 U.S.C. §1270, or--if the citizen suit sections of the BMSLCA, SMA and CRDCA really are intended to allow the Porters to act as private attorneys general--in common pleas court under one or all of 52 P.S. §§1406.13, 1396.21 and 30.63. In view of these recourses available to the Porters and the fact that the Legislature advisedly has not given the Board the jurisdiction to hear citizen suits, we do not believe that an appeal to this Board wherein the Porters have alleged injuries sufficient for standing

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[2]We hesitate to say "assuredly" without qualification for the same reason that President Reagan says "A President should never say never." We have very little doubt that the "almost" qualification is unnecessary under the facts of this appeal, but hardly can be utterly certain about this assertion until we have heard those facts.

automatically entitles the Porters to prosecute before this Board what in effect is a private attorney general investigation of DER practices unrelated to any alleged Porters' injuries.

Therefore we hold that our future rulings on discovery and evidentiary questions arising in this appeal will be guided by the principle that the Porters may not raise factual or legal issues which are not at least arguably relevant to allegations of injury which have earned, or could have earned, the Porters standing to appeal. For the parties' instruction, we will illustrate our anticipated application of this principle for Counts 3, 4 and 18 of the Porters' Notice of Appeal, which read:

Count 3

> The permit applications did not contain the names and addresses of the owners of record of all subsurface areas contiguous to any part of the proposed permit area as required by 25 Pa. Code §86.62(a)(2).

Count 4

> The permit applications fail to provide current, clearly presented, concise description supported by appropriate references of the areal and structural geology in the permit and adjacent area in violation of 25 Pa.Code §89.33 and §86.15(c).

Count 18

> The applicant has failed to send adequate notices as required by 25 Pa.Code §89.144 in that such notices did not contain adequate dates of mining activities that could cause subsidence and affect specific structures; adequate identification of specific areas in which mining will take place; or a description of the measures to be taken to prevent or control adverse surface effects.

Although we agree that DER is bound to obey its own regulations, nevertheless in this appeal we will not allow the Porters to attempt a showing there was not full compliance with the requirements of 25 Pa.Code §86.62(a)(2) [Count 3 supra],

provided the permit applications did list the Porters [assuming they were required to be listed under §86.62(a)(2)]; if those other surface owners who should have been listed did not feel this deficiency warranted an appeal to this Board, we fail to see why it is in the public interest to let the Porters present testimony (in their appeal to this Board) on this alleged deficiency of the permit application. As for Count 4, the Porters certainly are entitled to present testimony tending to show that the description of the areal and structural geology in the permit application did not meet the requirements of applicable regulations, provided there is some reason to think that the description deficiencies might have prevented DER from properly evaluating the injuries that Consol's proposed mining activities might cause to the Porters' property or their enjoyment thereof; however, we shall not allow testimony, e.g., about inaccurate descriptions of the geology in areas of the permit remote from the Porters' property, which could not possibly be relevant to any injury to the Porters. Provided the Porters received the notice required by 25 Pa.Code §89.144, we shall not allow the Porters to present evidence bearing on their Count 18, unless they can show that failure to appropriately notify each owner of property overlying Consol's mining activities (the notice requirement of §89.144) might have affected DER's ability to properly evaluate the effects of Consol's mining activities on the Porters.

Finally, we state that although we stand by this Opinion as written, and intend to rule on future discovery and evidentiary questions as we have described and illustrated, we recognize that the point of view we have taken is not free from doubt and will greatly affect the conduct of the hearing on the merits of this appeal. Therefore, should the Porters so petition us, we probably would be willing to certify to Commonwealth Court--under 42 Pa.C.S. §702(b) and Rule 1311 of the Pennsylvania Rules of Appellate Procedure--the issue of the Porters' right to act as a private attorney general in the instant appeal.

O R D E R

WHEREFORE, this 13th day of September, 1985, for reasons explained in the accompanying Opinion, the Porters will not be permitted to act as a private attorney general in the instant appeal; our future rulings on discovery and evidentiary questions will be guided by the principle that the Porters may not raise factual or legal issues which are not at least arguably relevant to allegations of injury which have earned, or could have earned, the Porters standing to appeal.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: September 13, 1985

cc: Bureau of Litigation
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For Appellant:
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COMMONWEALTH OF PENNSYLVANIA

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NORTH CAMBRIA FUEL COMPANY :

:

: Docket No. 85-297-G
: Issued: September 13, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR PETITION FOR SUPERSEDEAS

SYNOPSIS

Appellant's petition for supersedeas is denied. There is no dispute that pollutional discharges, as defined in the Clean Streams Law, 35 P.S. §691.1, are occurring. The Board finds that these discharges cannot be characterized as de minimis. Consequently, 25 Pa.Code §21.78(b) requires that the petition be denied.

OPINION

North Cambria Fuel ("NCF") has appealed a DER Order dated June 28, 1985, ordering NCF, no later than July 15, 1985, to begin treating a number of discharges allegedly emanating from locations identified as Sample Points E, G and H in NCF's Mine Drainage Permit No. 32810135 for operation of its Dietrich surface coal mine in West Wheatfield Township, Indiana County. The appealed-from DER order also requires NCF, on or before August 1, 1985, to submit a written plan providing for

permanent treatment or abatement of the aforesaid discharges. Along with its appeal, NCF has petitioned for supersedeas of the appealed-from order.

An evidentiary hearing on the supersedeas petition was held August 28, 1985. At the opening of that hearing NCF filed a memorandum of law in support of its petition, to which DER now has replied. Therefore, although the transcript of the hearing has not yet been received, we will rule on the petition at this time, because the Board is in no doubt about the facts on which our ruling is based.

The Board's criteria for granting or denying a supersedeas are stated in 25 Pa.Code §21.78, which reads:

> (a) The circumstances under which a supersedeas shall be granted, as well as the criteria for the grant or denial of a supersedeas, are matters of substantive common law. As a general matter, the Board will interpret said substantive common law as requiring consideration of the following factors:
>
> (1) irreparable harm to the petitioner
> (2) the likelihood of the petitioner's prevailing on the merits; and
> (3) the likelihood of injury to the public.
>
> (b) A supersedeas shall not issue in cases where nuisance or significant (more than de minimis) pollution or hazard to health or safety either exists or is threatened during the period when the supersedeas would be in effect.

NCF makes a variety of arguments, all of which DER disputes, concerning the factors (1)-(3) the Board is supposed to take into consideration under §21.78(a). We shall ignore those arguments here, however, because we believe we have no choice but to deny the supersedeas under the strict precept of §21.78(b).

NCF does not contest the existence of the discharges which are the subject of DER's order, nor does NCF seriously contest DER's claim that the pH levels and concentrations of some heavy metals in the discharges fall under the

definition of "pollution" in the Clean Streams Law, 35 P.S. §691.1 ("CSL"). We agree that these discharges constitute "pollution" under the CSL. Therefore, under §21.78(b), a supersedeas must be withheld unless this pollution can be termed "de minimis".

The decision as to when a discharge is "de minimis" probably has to be made on a case-to-case basis; certainly the Board has not established any clear criteria for characterizing a polluting discharge as de minimis. Recently, in a hearing on a supersedeas petition involving facts much like those in the instant petition, the Board refused to regard an untreated discharge of between 10 and 15 gal/min as de minimis. Hepburnia Coal Company v. DER, Docket Nos. 85-309-G and 85-343-G (Opinion and Order, September 6, 1985). In the instant petition, although there was testimony by NCF's witness Mr. Henigin that the total combined flow from all three discharges E, G and H recently has been only about three gal/min, there also was general agreement that the flow increases in wet weather. DER points out that NCF's Exhibit C lists a combined flow of 19 gal/min from discharges E and G on February 26, 1985. Although this 19 gal/min figure probably was estimated rather than measured, it strongly suggests that the total flow on February 26, 1985 must have been unmistakably higher than the three gal/min figure measured by Mr. Henigin in August 1985. DER's Exhibit 2 also lists (apparently estimated, not measured) discharge flows at sample points E, G and H which--though highly variable--often greatly exceed three gal/min. More telling on this de minimis issue is the testimony of Mr. Henigin that treating the discharge presently was costing NCF $300 per week just for soda ash; if manpower costs are included, the treatment costs rise to $1,000 per week. As we observed at the hearing, and as we affirm here, we find it difficult to term a discharge de minimis when its treatment costs--for soda ash alone--are $300 per week.

The Board invariably has held that the party requesting a supersedeas bears the burden of proof. William Fiore v. DER, 1983 EHB 528; Armond Wazelle v. DER, 1984 EHB 865. In the instant petition, where NCF in effect concedes that a polluting discharge exists, to avoid application of 25 Pa.Code §21.78(b) it is NCF's burden to show that the discharge is de minimis. On the basis of the evidence presented at the supersedeas hearing and reviewed in the preceding paragraph, we have little hesitancy in concluding that NCF did not meet this burden.

Therefore, the supersedeas must be denied. Of course, this ruling carries no implications whatsoever concerning the merits of NCF's appeal. The Board also takes no position whatsoever at this time as to the applicability, to the instant appeal, of due process issues raised in the Board's Opinion, cited supra, denying a petition in the seemingly analogous Hepburnia appeal.

O R D E R

WHEREFORE, this 13th day of September, 1985, NCF's Petition for Supersedeas is denied.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: September 13, 1985

cc: Bureau of Litigation
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For the Commonwealth:
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ENVIRONMENTAL HEARING BOARD

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BETTY SIMPSON :

:

: Docket No. 85-214-G

: Issued September 17, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and C & K COAL COMPANY, Permittee
and BROWNING-FERRIS INDUSTRIES OF PA., INC.,
Intervenor

OPINION AND ORDER

SYNOPSIS

The permittee's Motion to dismiss this appeal as untimely is rejected; there is nothing on the record here to indicate that the appeal was not timely filed. 25 Pa.Code §21.52(a). The permittee's Motion to dismiss for lack of standing is likewise rejected. Appellant has standing to pursue this appeal. However, the Board does not intend to allow Appellant to act as a private attorney general. She is limited to raising those issues which are at least arguably related to the allegations which have given rise to her standing. The Board provisionally rules that the only allegations raised by Appellant at this stage of this proceeding which suffice to grant her standing are those related to noxious odors resulting from the application of the sewage sludge under the terms of the appealed permit. Appellant is granted a final opportunity to set forth more specific allegations concerning the harm to her interests as a result of the permit issuance. Appellant's petition for supersedeas is reinstated. A hearing may be scheduled on the petition if warranted.

OPINION

Betty Simpson ("Simpson") has appealed DER's grant of a permit to the C & K Coal Company ("C & K"), for application of sewage sludge to an unreclaimed strip mine site in Piney Township, Clarion County. The sewage sludge comes from the City of Philadelphia ("City"). Browning-Ferris Industries ("BFI"), which has contracts with the City and with C & K to spread the sludge under the appealed-from permit, has been granted permission to intervene. On June 10, 1985, the Board ordered Simpson to file a memorandum explaining why she deserves standing to appeal this permit grant under the standard of William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). This memorandum has been filed. In the meantime C & K has filed a motion to dismiss this appeal, on the grounds that Simpson lacks standing and that in any event the appeal was untimely filed. Simpson has responded to C & K's motion. We now rule on C & K's motion to dismiss and issues related thereto.

Insofar as C & K's claim the appeal was untimely filed is concerned, C & K offers no facts whatsoever to support this claim. Simpson's Notice of Appeal, filed May 28, 1985, alleges that Simpson received notice of the permit grant on May 1, 1985. Attached to the Notice of Appeal was a letter to Simpson's counsel dated April 30, 1985, notifying Simpson that the appealed-from permit had been granted. In view of these facts, and in the absence of any contravening facts, C & K's request to dismiss this appeal on grounds of untimeliness can only be described as frivolous; this request is rejected.

We next turn to the issue of Simpson's standing to appeal, which does raise substantial questions, as the Board recognized when the aforementioned June 10, 1985 order was issued. After review of the pleadings, including C & K's motion to dismiss and Simpson's memorandum in support of standing, we have decided that Simpson does have standing, but that she cannot--at the hearing on the merits

of this appeal--be allowed to raise all the issues she sets forth in her Notice of Appeal and Pre-Hearing Memorandum; therefore this appeal will not be dismissed at this stage. Our reasons for so deciding follow.

Simpson's memorandum in support of standing specifically complains about "the foul stench and putrescent odors" emanating from the disposal site, where (Simpson alleges) disposal of the sludge already has begun. Paragraph 3 of her Notice of Appeal points out that 25 Pa.Code §75.32(e)(1)(ii) states:

> The sludge shall not be applied in such quantities so as to allow run-off to occur or to cause spreading, vector or odor problems.

Being forced to endure noxious odors is an injury which is sufficient to satisfy the "substantial" portion of the William Penn "substantial, immediate and direct" test. Whether in fact this threatened injury really is sufficiently "immediate and direct" for "a resident 1/2 to 1.7 miles" from the disposal site (language of Simpson's memorandum in support of standing) might be questioned if Simpson had no actual experience with sludge disposal at the site. Where, however, Simpson alleges that she has experienced very unpleasant odors since sludge disposal has begun, the fact that the sludge disposal can be immediately and directly connected with Simpson's odor problems cannot be gainsaid, granting the correctness of this allegation (as we must grant at this stage of these proceedings). Moreover, §75.32(e)(1)(ii) quoted supra shows that the odors Simpson complains about represent an injury within the "zone of interests" DER is charged to prevent. Therefore, we must conclude that Simpson has standing to appeal.

However, the mere fact that Simpson has standing does not entitle her to challenge all facets of DER's practices in granting the appealed-from permit. Simpson's standing to appeal the permit because of the injury she alleges to herself does not enable her to act as a "private attorney general", seeking to protect other citizens and the general public from alleged injuries which in no

way threaten Simpson herself. In sum, in this appeal we will not allow Simpson to raise factual or legal issues which are not at least arguably relevant to allegations of injury which have earned, or could have earned, Simpson standing to appeal. This ruling is compelled by our analysis in Robert A. and Florence Porter v. DER, Docket No. 84-240-G (Opinion and Order, September 13, 1985), to which the readers of this Opinion are referred. There is no utility in rehashing the Porter opinion here.

Simpson's memorandum in support of standing states:

> Mrs. Simpson has genuine concerns over the quality of the water she drinks, the food she eats, and the air she breathes.

Nevertheless, Simpson has not alleged--in that memorandum, her Notice of Appeal, or her pre-hearing memorandum--any facts which conceivably could amount to an injury satisfying the William Penn standard associated with "the water she drinks, the food she eats, and the air she breathes," excluding the odor issue which Simpson already has received standing to raise. Paragraph 5 of our June 10, 1985 Order, which asked Simpson to file a memorandum explaining why she deserves standing, stated unequivocally:

> [T]his memorandum must refer explicitly to the various paragraphs in Simpson's Notice of Appeal, and must connect those paragraphs with Simpson's alleged injuries.

Simpson's memorandum in support of standing did not comply with this stated requirement. However, Simpson's pre-hearing memorandum, filed after her memorandum in support of standing, asserts:

> In sum, Appellant's expert witness shall testify to the pathogenic and mutagenic possibilities of the activities allowed by the permit in question. He will testify to the dangers of heavy metal, viral, and bacterial contamination as it effects the food chain and water supply of

> Appellant. He will testify that the aforementioned effects to the land spreading of sewage sludge are especially hazardous when done in a strip mining reclamation program, and exceptionally so when done at the rates allowed by this permit.

Hence, because as always [see concerned Citizens Against Sludge, 1983 EHB 282, 442, 512 and 580] we wish to give an appellant every opportunity to raise genuine injuries or threats of injury, we will give Simpson--despite her failure to comply with the unequivocal requirements of paragraph 5 of our June 10, 1985 Order--one last chance to explain how the above-quoted anticipated testimony of Simpson's expert witness will relate to alleged injuries to Simpson satisfying the William Penn standard. Unless a satisfactory explanation to this effect is timely received (see the Order accompanying this Opinion) we will not allow Simpson's expert to waste the Board's time by presenting, very likely over several days, the (irrelevant if not related to injuries satisfying the William Penn standard) testimony summarized in the above quotation from Simpson's pre-hearing memorandum.

In the meantime, it may be helpful to the parties for us to indicate how we expect to rule on the numerous issues raised in Simpson's Notice of Appeal if, as we provisionally are ruling (subject to revision if Simpson provides the explanation called for in the preceding paragraph) being subjected to noxious odors is Simpson's only alleged injury meeting the William Penn standard. In Simpson's Notice of Appeal, paragraphs 1, 2 and 8 of Simpson's reasons for appealing are stated to be:

> 1. Condition #3 of the permits allow the sewage sludge to be "spread" on the reclamation site. This is in direct contravention of Department requirements for land reclamation utilization [25 Pa.Code §75.32(e)(5)] limiting application to "spraying" and "injection" methods.

2. Conditions #1 and #2 of the permits allow an application rate of sixty (60) dry tons to the acre. This is in direct contravention of Department requirements for land reclamation utilization [25 Pa.Code §75.32(e)(1)(i)] mandating the sludge "shall not be applied in such quantities so as to cause ground or surface water pollution or adversely affect the food chain."

8. Condition #30 of the permits allows on site storage of the sludge. This is in direct contravention of Department requirements for land reclamation utilization [25 Pa.Code §75.32(e)(3)] mandating that the operator "shall provide temporary storage facilities in a manner that will not degrade the environment."

The portions of 25 Pa.Code §75.32(e) in Simpson's just-quoted reasons for appealing read as follows:

> (1) Applications shall be governed by the following:
> (i) The sludge shall not be applied in such quantities as to cause ground or surface water pollution or adversely affect the food chain.
>
> . . .
>
> (3) No sludge shall be applied when the ground is saturated, snow covered, frozen, or during periods of rain. The operator shall provide temporary storage facilities in a manner that will not degrade the environment.
>
> . . .
>
> (5) Sewage sludges shall be applied to the soil surface by spraying or injection to prevent ponding or standing accumulations of liquids or sludge.

Thus, although we recognize that DER is bound to obey its own regulations, nevertheless [following Porter, supra], if the aforementioned provisional ruling is not modified we will not permit Simpson to introduce testimony tending to show that the permit violates §75.32(e)(1)(i). On the other hand, it is arguable that the intent of §§75.32(e)(3) and (e)(5) is to prevent sludge accumulations causing the odors of which Simpson complains. Therefore testimony that the permit is in

violation of §§75.32(e)(3) and (e)(5) will be admissible even if Simpson's standing rests solely on her complaints about odors.

Finally, we wish to point out that a distinction must be drawn between DER's grant of a permit which is inconsistent with its regulations (as Simpson is alleging) and DER's failure to enforce its regulations or permit conditions, as may be the cause of the alleged actually experienced odors of which Simpson complains. If the permit is consistent with DER's regulations, then the presence of odors caused by DER's failure to enforce those regulations and the permit conditions does not imply DER's grant of the permit was an abuse of discretion, unless there is a showing that the regulations and permit conditions in essence are unenforceable. On the other hand the instant permit can be an abuse of discretion, despite consistency with DER regulations, if it can be shown that the regulations and permit conditions--even if enforced--would not prevent the odors DER is charged to prevent. See Coolspring Township v. DER, 1983 EHB 151 at 173-177; Township of Indiana and Concerned Citizens of Rural Ridge v. DER, 1984 EHB 1 at 15-31. The immediately foregoing does not imply, and is not intended to imply, that Simpson or this Board should countenance DER's failure to enforce regulations and permit conditions relevant to Simpson's alleged injury. However, DER's alleged failure to enforce, even if demonstrable, is outside the scope of the instant appeal unless the enforcement failure falls under the unenforceability exception stated supra. On the other hand, assuming arguendo Simpson's allegations are true, we do not intend to defer any hearing on this matter for so long a time that BFI will be able to complete or nearly complete its sludge deposition, all the while subjecting Simpson to the odors she alleges.

O R D E R

WHEREFORE, this 17th day of September, 1985, it is ordered that:

1. The Permittee's motion to dismiss is rejected.

2. Simpson has standing to pursue this appeal.

3. Simpson will not be allowed to raise factual or legal issues which are not at least arguably related to allegations of injury to Simpson which have earned, or could have earned, Simpson standing to appeal.

4. Provisionally, the only allegation of injury falling under the category allowed by paragraph 3 supra is Simpson's allegation that operation of the permit will subject her to noxious odors.

5. Within sixty (60) days of the date of this Order, Simpson is to file an amended pre-hearing memorandum, whose clearly stated factual allegations and contentions of law can imply injuries to Simpson, through her food and water supplies, sufficient to satisfy the test for standing enunciated in William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975); this is Simpson's last chance to show injuries deserving standing beyond the odors she complains of.

6. The Board will make final, or modify as required, the provisional ruling in paragraph 4 supra after receiving the amended pre-hearing memorandum called for in paragraph 5.

7. Simpson's petition for supersedeas, which was denied without a hearing in our Order of June 10, 1985 in this matter, is deemed renewed, as was allowed by paragraph 4 of that Order; Simpson's allegations of noxious odors, if proved, would suffice to constitute irreparable harm under 25 Pa.Code §21.78(a)(1).

8. As soon as possible after receipt of this Order, Simpson's counsel is to arrange a conference call with all parties and the Board, to discuss whether a hearing on Simpson's supersedeas petition now should be granted.

9. Because the Opinion and Order in Robert A. and Florence Porter v. DER, Docket No. 84-240-G (September 13, 1985), referred to in the Opinion accompanying this Order, has been issued so recently, a copy of Porter is enclosed with the instant Opinion and Order.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: September 17, 1985

cc: Bureau of Litigation
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CONSOLIDATION COAL COMPANY : Docket No. 85-220-G
Issued September 18, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

SYNOPSIS:

DER's petition to quash this appeal is denied. The action appealed herein, a DER letter notifying Appellant that DER had decided that a third party's permits had not lapsed by operation of law, is an appealable action under 71 P.S. §510-21(c). The DER letter was written in response to a request by Appellant that DER notify the third party that the permits had lapsed. If Appellant had simply been requesting that DER exercise its prosecutorial discretion to revoke a permit for a violation of law, the DER letter would not be an appealable action. The Board should not review DER's decisions of whether to exercise its prosecutorial authority. However, in the present appeal, DER's decision simply represents its construction of the operation of a recent statutory enactment. Moreover, DER's decision could have a very significant effect upon Appellant's property rights, inasmuch as the permits in

question are for gas wells which are projected to penetrate a coal seam which Appellant plans to mine. Consequently, if the permittee were to drill the wells as authorized by the permits, there would be a significant effect upon Appellant's ability to mine the coal. Public policy does not weigh against determining that DER's letter is an appealable action; it would be poor public policy to deny a party the opportunity to appeal a determination by DER not to order cessation of operations by a permittee whose permits may have expired by operation of law, whose operation under those permits may directly adversely affect the party's rights.

OPINION

This appeal has evolved from the still unadjudicated appeal before this Board of Consolidation Coal Company ("Consol") v. DER and George Enterprises ("George"), docketed at No. 84-243-G. The appeal at 84-243-G involved four permits granted by DER to George, allowing George to drill gas wells through coal seams being mined, or about to be mined, by Consol. Consol appealed these permits and a full hearing on the merits was held, concluding on March 7, 1985. With the agreement of the parties, the briefing schedule on this legally very complex appeal was extended beyond the Board's normal practice; the parties' post-hearing briefs were not all filed until July 12, 1985. The adjudication of the appeal at 84-243 now is in preparation.

In the meantime, after the hearing on the appeal at 84-243-G was concluded, but before all post-hearing briefs were filed, the law governing DER's issuance of permits for the drilling of gas wells through coal seams has been modified by passage of the Oil and Gas Act of December 15, 1984,

P.L. 1140, Act 223 (the "Act"). Under its terms, the Act became effective on April 18, 1985.

On April 30, 1985, Consol wrote DER, stating that as Consol understood the Act three of the permits which are the subject of the appeal at 84-243-G (for the wells identified therein as wells nos. 1, 2 and 4) had expired and would require repermitting under the Act. Consol requested DER "to formally notify George" of those permit expirations, and "to take whatever action is necessary to prevent the unauthorized drilling of any gas wells and the resultant harm to Consol." In response, on May 2, 1985, DER wrote to Consol as follows:

> We have considered your request. Based on the information available to us and our interpretation of the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, Act 223, we believe these three permits are sufficient permits under the Oil and Gas Act.

DER's letter included its reasons for reaching the conclusion just quoted, but those reasons are inconsequential to this Opinion, whether or not they logically compel DER's conclusion.

This Opinion concerns Consol's timely appeal of DER's May 2, 1985 letter. On August 6, 1985 DER petitioned to quash the appeal on the grounds that the appealed-from DER letter of May 2, 1985 was not an appealable action under the Administrative Agency Law and the Board's rules and regulations. 2 Pa. C.S. §101; 25 Pa. Code §21.2. Consol has responded to DER's petition; George has not responded. The 20-day deadline for responding to DER's petition, set by the Board's Pre-Hearing Order No. 2, mailed to the parties on June 5, 1985, has been reached. Therefore we now will rule on DER's petition.

How to decide whether or not a particular DER action should be regarded as appealable frequently has been a vexing question for this Board and for the Pennsylvania courts. Because rulings on this appealability issue tend to be fact-dependent, and because the explanations of these rulings often use broader language than absolutely necessary, DER and Consol each are able to support their respective positions on this issue by numerous citations, e.g., Standard Lime and Refractories Co. v. DER, 2 Pa.Cmwlth 434, 279 A.2d 383 (1973); Sandy Creek Forest, Inc. v. DER, EHB Docket No. 84-111-M (June 4, 1985); Snyder Tp. Residents for Adequate Water Supplies v. DER, 1984 EHB 842; Man O'War Racing Association v. State Horse Racing Commission, 433 Pa. 432, 250 A.2d 172 (1969); Bethlehem Steel Corp. v. DER, 37 Pa.Cmwlth. 479, 390 A.2d 1383 (1978). Therefore our resolution of the instant controversy requires a careful analysis of the applicable precedents.

As we see it, the first issue to be resolved in this dispute is whether DER's letter to Consol merely expressed its legal opinion about the status of the permits for wells 1, 2 and 4, or amounted to a refusal of Consol's request that DER require repermitting of wells 1, 2 and 4 before drilling activity on those wells could be initiated or resumed. DER argues that its letter was a mere expression of opinion. However, we find this argument to be disingenuous. Consol had bitterly opposed the drilling of those wells in the 84-243-G appeal, on the grounds that those wells would severely deleteriously affect Consol's mining operations. Consol's April 30, 1985 letter made a specific request of DER, namely that George be forbidden to do any additional drilling until new permits had been obtained. DER's responding letter did not explicitly refuse this request, but its language--giving DER's opinion that the previously granted permits had remained valid despite passage of the Act--unmistakably implied that DER was not going to

interfere in any way with George's drilling plans for wells 1, 2 and 4.

Therefore we conclude that DER's May 2, 1985 letter was more than a mere expression of opinion; rather, it was a final denial of Consol's request. We now must inquire whether this denial was an appealable action. The most relevant Board precedents on this issue appeal to be George Emeric v. DER, 1976 EHB 249, affirmed on reconsideration, 1976 EHB 324, and Delaware Unlimited v. DER, 1983 EHB 259. In Emeric DER refused Mr. Emeric's request that DER revoke the permits for a solid waste disposal facility operated by Chambers Development Company. Emeric appealed this refusal to the Board. The Board held that the refusal to revoke was not an adjudication under 2 Pa. C.S. §101, from which an appeal can lie, because the refusal to revoke the Chambers Company's permits did not affect Mr. Emeric's personal or property rights; the Board also held that DER's action was not "final," because at any time DER could change its mind and decide to revoke the permits. In Delaware, supra, however, the Board allowed a citizens association to appeal DER's refusal to require a water authority to obtain a National Pollution Discharge Elimination System ("NPDES") permit before diverting water from the Delaware River to the North Branch of Neshaminy Creek. The Board distinguished Emeric on two grounds. First, the Board felt that the diversion of Delaware water would modify the status quo, whereas in Emeric the Board's refusal to revoke the permit maintained the status quo. Secondly, the Board thought that the Emeric argument about lack of finality was not germane, because once the Delaware's waters had been diverted, it would be too late for the Board to change its mind about the need for an NPDES permit.

The instant appeal is analogous to Emeric in that DER's refusal of Consol's request amounted to a refusal to revoke George's previously issued permits. On the other hand, the drilling through Consol's coal seams, once performed, will be undoable (if at all) only after much effort and expense. In the instant appeal, as in Delaware, supra, the appellant cannot afford to wait for DER to change its mind about its refusal to grant the appellant's request. We also remark that the Board's logic in Emeric--for ruling that DER's refusal to revoke the Chambers' permits did not affect personal and property rights--was strongly criticized in a dissent by Board Member Denworth, 1976 EHB 257, although at 1976 EHB 330 Denworth eventually did concur reluctantly with the Emeric decision, on the basis of her understanding of some Commonwealth Court holdings, notably DER v. New Enterprise Stone and Lime Co., 25 Pa.Cmwlth. 389, 359 A.2d 845 (1976). These criticisms of Emeric's logic were renewed by us recently in James E. Martin v. DER, 1984 EHB 736. In Martin we pointed out that New Enterprise, supra, appears to have been greatly vitiated (though it was not explicitly overruled) by Bethlehem Steel v. DER, 37 Pa.Cmwlth 479, 390 A.2d 1383 (1978); in Bethlehem the Commonwealth Court held that DER's refusal to withdraw or modify a previously issued and unappealed (therefore final) variance order was an appealable action. Therefore, in Martin we ruled that a refusal to revoke or modify a previously granted permit can affect personal or property rights, and therefore can be appealable. Indeed, in Martin, we held that DER's denial of Mr. Martin's request--that his mining permit be modified to provide for terracing rather than grading to approximate original contour--was an appealable action.

On the other hand, although--consistent with Martin--we now rule that DER's refusal to require George to repermit affected Consol's property rights, this ruling does not automatically imply that this act of DER's must

be considered a DER action, appealable under 71 P.S. §510-21(c) and 25 Pa. Code §21.2(a). 71 P.S. §510-21(c) makes all DER actions appealable, but does not define "action." This definition is left to 25 Pa. Code §21.2(a), which reads:

> (a) The following words and terms, when used in this chapter, [25 Pa. Code §21.1 et seq.], shall have the following meanings, unless the context clearly indicates otherwise:
>
> Action- 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, licenses and registrations; orders to cease the operation of an establishment or facility; orders to correct conditions endangering waters of the Commonwealth; orders to construct sewers or treatment facilities; orders to abate air pollution; and appeals from and complaints for the assessment of civil penalties.

The terms "decree", "decision", "determination" and "ruling" are defined neither in the Administrative Agency Law, 2 Pa.C.S.A. §101, nor the General Rules of Administrative Practice and Procedure, 1 Pa. Code §31.3, nor the Board's own rules and regulations, 25 Pa. Code §21.2. DER's May 2, 1985 letter obviously is not an "order," nor do its contents fall under any of the other examples of "actions" given in 25 Pa. Code §21.2(a) quoted supra. In other words, even though we have ruled that DER's refusal to require George to repermit affected Consol's property rights, and although this refusal was a DER "decision" of some sort, §21.2(a) does not provide us with unmistakable criteria to decide whether DER's May 2, 1985 letter--which we have deemed equivalent to a refusal of Consol's request that George be required to repermit--is an appealable action under the language of 25 Pa. Code §21.2(a) and 71 P.S. §510-21(c).

Under such circumstances, as Bethlehem, supra, stresses, and as we have discussed in Martin, whether or not to hold that a specific DER act

(e.g., a DER refusal to revoke or modify a permit) is an appealable action largely depends on public policy considerations. That the complained-of DER action affects "personal or property rights, privileges, immunities, liabilities or obligations of any person" [language of 25 Pa. Code §21.2(a)] is a necessary but not a sufficient condition for appealability. Martin involved an attempt by a permittee to secure modification of his own permit. In the instant appeal, Consol--like the appellant in Emeric, supra--is asking DER to revoke another permittee's permits. The policy considerations in favor of allowing a permittee to question the terms of his own permit seem very different from those pertaining to the allowance of a third-party appeal from a refusal to revoke another person's permit.

In fact, we are very chary of any blanket holding that a DER refusal of a third-party request to modify another person's permit must be appealable, even when DER's refusal can affect the third party's personal and property rights under the logic of Martin, supra. Whether or not a permittee has violated environmental laws and regulations to an extent warranting permit revocation is a decision that the Legislature has delegated to the discretion of a specific Commonwealth agency, DER, which presumably has the specialized expertise required to reach such a decision intelligently. We do not believe that the Legislature and the Environmental Quality Board, in enacting 2 Pa. C.S. §101 and 25 Pa. Code §21.2(a), intended that this Board have the power to review every DER determination, after an investigation by DER, that a permittee's environmental violations are not sufficiently egregious to warrant permit revocation. We do not believe it would be good public policy to allow the Board to review so intensively DER's discretionary exercises of its enforcement powers.

In short, we agree with the result reached in Emeric, supra, although we disagree with the logic of the Emeric opinion. Therefore, returning now to the instant appeal, we would not hold DER's refusal of Consol's request to revoke George's permits appealable if Consol's request were based on allegations that George egregiously had violated environmental statutes and regulations. Consol's request is not of this nature, however; Consol is not challenging DER's discretionary use of its enforcement powers. Rather, Consol is claiming that George's permits have lapsed as a result of new legislative enactments. This is a purely legal issue, and Consol should be entitled to appeal DER's refusal to agree that George's permits have lapsed, especially where George's exercise of its allegedly invalid permits so obviously and so adversely would affect Consol's property rights. We see no public policy reasons against our holding the instant DER action appealable. We do not think it would be good public policy to allow no appeals by affected third parties of DER refusals to order cessation of operations by permittees whose permits allegedly have expired by operation of law.

ORDER

WHEREFORE, this 18th day of September, 1985, for reasons stated in the accompanying Opinion, DER's August 6, 1985 petition to quash this appeal is rejected; DER's May 2, 1985 letter to Consol is appealable.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: September 18, 1985

cc: Bureau of Litigation

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EMERALD MINES CORPORATION :

:

: Docket No. 85-006-G

: Issued: September 20, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR PETITION FOR RECONSIDERATION

SYNOPSIS

DER's Petition for Reconsideration is denied; no exceptional circumstances have been shown which would justify the Board's reconsideration of its interlocutory order granting Appellant's petition for supersedeas.

The parties are given an opportunity to address the issue of whether disposition of this appeal is entirely governed by this Board's adjudication in an earlier appeal, which presented very similar factual and legal issues. Although it is clear that the earlier decision precludes DER's reliance upon §306 of the Bituminous Coal Mine Act, 52 P.S. §701-306, for the issuance of the appealed order, it is possible that DER possesses independent legal authority for the order. In addition, it is possible that some or all of the factual issues presented here could be resolved by reference to the factual record developed in the earlier appeal.

OPINION

On December 11, 1984 DER's Bituminous Mine Inspector Jesse Bolen issued an order to Emerald Mines Corporation ("Emerald") concerning Emerald's No. 1 Mine, an underground bituminous coal mine located in Greene County, Pennsylvania. This order was issued in the form of a letter, which is reproduced here in full:

> It is my understanding that when the elevator is operated on inspection mode certain functions and circuits are not in use, these include the door operation circuit and the leveling circuit. Although these circuits may seem to be for the convenience of people riding the elevator, they also perform a certain safety function. This safety feature is especially true in the leveling circuit. Section 306 of the Bituminous Mining Laws of Pennsylvania also does not permit the use of any electrical equipment when any portion of such equipment is not operable because of damage or breakdown.
>
> Therefore, there will not be any person hoisted out of or into the mine while the elevator is on inspection mode.
>
> If you have any questions or comments, please feel free to contact me.

On December 17, 1984, Emerald requested that a commission be appointed, pursuant to Section 123 (52 P.S. §701-123) of the Pennsylvania Bituminous Coal Mines Act, 52 P.S. §701-101 et seq. ("the Act"), to examine and report on Mr. Bolen's order. The reference in Mr. Bolen's letter to "Section 306 of the Bituminous Mining Laws of Pennsylvania" was to Section 306 of the Act, 52 P.S. §701-306. Emerald also asked DER to stay Mr. Bolen's order pending receipt of the commission report.

In the meantime, while awaiting the commission report, Emerald on January 10, 1985 timely appealed Mr. Bolen's order to this Board. On January 17, 1985 DER's Walter J. Vicinelly, Commissioner, Bureau of Deep Mine Safety, denied Emerald's

request for a stay, in a letter reading as follows.

> I am writing in response to your request for a supersedeas of Mr. Bolen's letter of December 11, 1984 setting forth that the operation of the elevator at the Emerald Mine on inspection mode would violate Section 306 of the Pennsylvania Bituminous Coal Mine Act (Act).
>
> Mr. Bolen's letter was in response to an incident at the Emerald Mine in which the elevator stopped approximately seventy-five feet from the bottom of the shaft for an approximate twenty minute period while transporting workers into the mine. In order to free the elevator, it was operated on the inspection mode to bypass the automatic mode. The elevator was then used several times later that day to transport workers to and from the mine.
>
> Section 306 of the Act provides in part,
>
> > In the event of a breakdown or damage or injury to any portion of the electrical equipment in a mine . . . the equipment shall be disconnected from its source of power, the occurrence shall be promptly reported to a mine official, and the equipment shall not be used again until necessary repairs are made.
>
> Thus, where an elevator or any other piece of electrical equipment breaks down the equipment shall be taken out of service until it has been repaired.
>
> It was permissible for the elevator to be operated on the inspection mode to complete the trip into the mine; however, it was not permissible for the elevator to be subsequently operated without taking it out of service and repairing the defect in the automatic mode which caused it to stop in the shaft.
>
> Therefore, since Section 306 of the Act does not permit the use of electrical equipment in a defective condition in an underground mine, I deny your request for a supersedeas of Mr. Bolen's letter of December 11, 1984 based upon the factual

> situation involved. It should be noted that neither the Department nor myself is bound by any decision of, or practice permitted by, the federal Mine Safety and Health Administration.
>
> Thus, Mr. Bolen's letter of December 11, 1984 will remain in effect pending the appointment of and review by, the Section 123 commission that you requested.
>
> If you have any questions, please contact me.

Mr. Vicinelly's January 17, 1985 letter also was timely appealed by Emerald, in an appeal initially docketed at No. 85-054-G. On February 20, 1985, however, with the agreement of the parties, the two appeals were consolidated under Docket No. 85-006-G. Then, on February 26, 1985, Emerald petitioned this Board for a supersedeas of Mr. Bolen's order. DER responded to this petition on March 6, 1985. In its response DER reiterated Mr. Vicinelly's assertion that Mr. Bolen's order was required under Section 306 of the Act. DER offered no other justification of Mr. Bolen's order. On April 1, 1985, however, after Emerald had filed a Memorandum in Support of its Petition for Supersedeas, DER elaborated on its claimed justification for Mr. Bolen's order, in a Memorandum in Opposition to Petition for Supersedeas. In its April 1, 1985 Memorandum DER, while again reiterating that Section 306 provided sufficient justification for Mr. Bolen's order, also wrote:

> The subject of the Petition for Supersedeas is the Department's requirement that Emerald not transport workers in the elevator on the inspection mode after the automatic mode becomes defective, as set forth in Inspector Bolen's letter of December 11, 1984 and Commissioner Vicinelly's letter of January 17, 1985. In these letters, the Department determined that operation of the elevator on the inspection mode to transport workers, after the automatic mode becomes defective, is unsafe and prohibited by Section 306 of

> the Act. As a result, in this appeal, the burden is on Emerald to establish that operation of the elevator on the inspection mode to transport workers, after the automatic mode becomes defective, is not an unsafe practice. . . .
>
> [P]ursuant to Sections 121 and 123 of the Act, Mine Inspector Bolen is vested with the authority, in the exercise of sound discretion, to determine whether the operation of the elevator at the Emerald Mine on the inspection mode to transport workers, when the automatic mode becomes defective, is a safe practice.
>
> . . . [P]ursuant to the language of Sections 117, 121 and 123 of the Act, Mine Inspector Bolen had the authority to require Emerald to correct a practice which he deemed not to be safe.[1]

---

[1]Inspector Bolen would also have the authority to require the correction of any condition or practice that constituted an unsafe practice pursuant to Section 1917-A of the Administrative Code, 71 P.S. §510-17. Butler County Mushroom Farm v. Commonwealth of Pennsylvania, EHB Docket No. 78-132-B, dated December 10, 1981.

The facts in the instant consolidated appeal closely resemble those in a 1984 appeal by the Pennsylvania Mines Corporation ("PMC"), which had been docketed at 84-152-G. As of April 1, 1985, the PMC appeal, though not yet adjudicated, was considerably closer to final resolution than was the instant appeal. It appeared to the Board that the PMC adjudication, once reached, was likely to dispose of the issues in the Emerald appeal. Therefore, on April 12, 1985, with the agreement of the parties, the Board deferred its ruling on Emerald's petition for supersedeas, pending adjudication of the appeal at 84-152-G. This adjudication now has been issued. Pennsylvania Mines Corporation v. DER, Docket No. 84-152-G (Adjudication, August 14, 1985). A key conclusion

of law in that adjudication was:

> 7. An elevator used to transport workmen into and out of a mine is not "electrical equipment" within the meaning of 52 P.S. §701-306.

Largely on the basis of this conclusion, Pennsylvania Mines, supra, sustained PMC's appeal of a DER order which on the authority of 52 P.S. §701-306--like the order appealed-from in the instant appeal--ordered that the elevator not be used in inspection mode after a failure of the so-called "automatic mode" (the operating mode normally used for hoisting men into and out of the mine).

On August 14, 1985, therefore, the Board issued the following Order in the instant appeal:

> 1. Insofar as the appealed-from DER order flatly forbids Appellant from operating the elevator in inspection mode after failure of the automatic mode without first repairing the automatic mode, Appellant's petition [for supersedeas] is granted; this blanket prohibition against inspection mode operation is stayed.
>
> 2. However, the Appellant may not operate the elevator in inspection mode after an automatic mode failure until the inspection mode has been carefully checked, as detailed in paragraph 2 of the Order in our Adjudication at 84-152-G. . . .
>
> 3. Paragraph 2 supra is not intended to apply when there is a mine emergency or when the automatic mode failure occurs between landings and there is good reason to bring the elevator promptly to a nearby landing (e.g., to let mine workers trapped inside the elevator get out).
>
> 4. Within twenty (20) days of the date of this Order, each party is to inform the Board whether it has any objection to the Board's ruling that adjudication of this appeal is wholly governed by the Board's Adjudication at 84-152-G; if there is no objection, the Board will so adjudicate this appeal.

5. Paragraphs 1-3 supra do not preclude DER from issuing an appealable order to Appellant which, presumably consistent with the holdings of the Adjudication at 84-152-G, specifies the circumstances and time durations (which may depend on the circumstances) for permissible use of the elevator to transport mine workers past nearby landings in inspection mode after an as yet unrepaired automatic mode failure.

The parties now have responded to paragraph 4 of the Order quoted immediately supra. Emerald agrees that adjudication of the instant appeal is governed by the Pennsylvania Mines, supra, adjudication. DER disagrees with this thesis, however. Indeed, DER has filed a Petition for Reconsideration of the above-quoted August 14, 1985 Order, which not only argues that Pennsylvania Mines, supra, is not controlling in the instant appeal, but also asks the Board to vacate its grant of Emerald's supersedeas petition. It is this Petition for Reconsideration on which we now rule.

We note first of all, as we have noted more than once in the past, that the Board's rules allow for reconsideration of final adjudications only [25 Pa. Code §21.122]; unless the circumstances are truly exceptional, we cannot be expected to reconsider every interlocutory order we issue, recognizing that almost every such order will not be to the liking of at least one of the parties to an appeal. Magnum Minerals, Inc. v. DER, 1983 EHB 589; Old Home Manor, Inc. and W. C. Leasure, 1983 EHB 463; Springettsbury Township Sewer Authority v. DER, Docket No. 84-287-M (Opinion and Order, July 29, 1985). No exceptional circumstances have been alleged by DER in its petition for reconsideration. Therefore, we see no reason to vacate our August 14, 1985 grant of supersedeas in this matter.

However, pursuant to paragraph 4 of our August 14, 1985 Order, DER is entitled to challenge a ruling by us that adjudication of the instant appeal is wholly governed by the adjudication in Pennsylvania Mines, supra. We proceed to address this contention. DER argues that Pennsylvania Mines, supra, while holding

that Section 306 of the Act would not justify the instant order appealed-from, does not preclude an order which, on general safety grounds, forbids operation of the elevator in inspection mode after failure of the automatic mode. We agree with this contention. But we observe that DER's claim that Mr. Bolen's appealed-from order was supportable on general safety grounds first was raised in DER's April 1, 1985 Memorandum in Support of its Petition for Supersedeas, quoted supra. Moreover, this Memorandum does not accurately characterize the contents of Inspector Bolen's and Commissioner Vicinelly's letters. We do not agree with DER that in those letters, DER "determined that operation of the elevator on the inspection mode to transport workers, after the automatic mode becomes defective, is unsafe." Commissioner Vicinelly's letter quoted in full, supra, does not say a word about safety; his letter justifies the order solely on the basis of Section 306 of the Act. Mr. Bolen's letter does mention safety, but it is difficult to read into his words the aforesaid determination DER ascribes to him.

We conclude that on the record before us Mr. Vicinelly certainly, and Mr. Bolen very probably, were relying primarily on Section 306 as authority for Mr. Bolen's December 11, 1984 order. Of course, neither Mr. Bolen nor Mr. Vicinelly are lawyers; it is quite conceivable, and not necessarily an indication of any DER deficiency, for non-lawyer DER enforcement personnel to be mistaken about the legal authority for an order which can be justified easily on other grounds. However, we normally would expect any such error of legal authority to be corrected promptly and formally, e.g., by issuance of a modified order, as soon as the error is recognized, so that the recipient of the order surely is fully appraised of DER's reasons for issuing the order, as due process requires. Melvin D. Reiner v. DER, 1982 EHB 183. DER has not corrected its order, nor—on the record before us--

has the commission issued any report modifying or elaborating on Mr. Bolen's order. But, as we explained in Reiner, supra, provided Emerald has not been prejudiced by DER's late decision to rest the order on general safety grounds rather than on Section 306 above, e.g., provided this late notice to Emerald of DER's revised reasons for the order have not hindered Emerald's ability to prosecute its appeal of the order, we feel no due process compulsion to sustain Emerald's appeal before reaching the merits. There is no reason whatsoever to think Emerald has been so prejudiced, especially since we have granted Emerald its requested supersedeas.

Actually, in Pennsylvania Mines, supra, we heard considerable testimony on the alleged safety hazards of operating the elevator in inspection mode after an automatic mode failure, and decided that such safety hazards had not been demonstrated; in fact, we opined in Pennsylvania Mines that immediate shutdown and repair of the inspection mode after automatic mode failure, irrespective of the particular circumstances, sometimes may increase the hazards to men working in the mine. But this is a conclusion which had to rest on the facts presented to us in Pennsylvania Mines, supra; The Pennsylvania Mines facts cannot extrapolate to the Emerald No. 1 mine which is the subject of the instant appeal unless the parties agree that such extrapolation is justified.

O R D E R

WHEREFORE, this 20th day of September, 1985, it is ordered that:

1. DER's Petition for Reconsideration is rejected.

2. Paragraphs 1, 2, 3 and 5 of our Order of August 14, 1985 are affirmed, at least until the Board issues its final adjudication of the instant appeal.

3. Within thirty (30) days of the date of this Order DER's counsel, who was in charge of DER's case in the aforesaid Pennsylvania Mines appeal at Docket No. 84-152-G, shall supplement DER's pre-hearing memorandum in the instant appeal, so as to clarify for the Board:

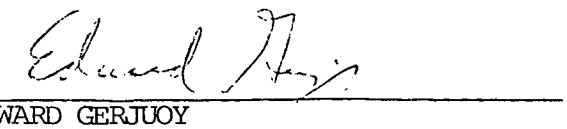
a. what testimony DER expects to present on the hazards of elevator operation in inspection mode which will be different from the testimony the Board heard in the appeal at 84-152-G.

b. what testimony on the hazards or lack of hazard of elevator operation in inspection mode, presented in the appeal at 84-152-G, can be made part of the record in the instant appeal without misleading the Board.

4. Emerald shall reply to DER's filing in response to paragraph 3 supra within fifteen (15) days of receipt.

5. As soon as possible after receipt of the parties' responses pursuant to paragraphs 3 and 4, supra, the Board will schedule a hearing on the merits of the instant appeal, if those responses indicate an evidentiary hearing will be necessary before this appeal can be adjudicated.

ENVIRONMENTAL HEARING BOARD



EDWARD GERJUOY
Member

DATED: September 20, 1985

cc: Bureau of Litigation
For the Commonwealth, DER:
William F. Larkin, Esquire, DER Western Region, Pittsburgh
For the Appellant:
R. Henry Moore, Esquire
Rose, Schmidt, Chapman, Duff & Hasley
Pittsburgh, PA

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

R. D. BAUGHMAN COAL COMPANY, INC.

Docket No. 85-351-M

Issued: September 25, 1985

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

SYNOPSIS

This is an appeal of a forfeiture by the Department of Environmental Resources (DER) of bonds posted by appellant for surface mining operations. DER's Petition to Quash the appeal is granted because the appeal was not timely filed pursuant to 25 Pa. Code §21.51(a).

By notice dated June 21, 1985, the Department of Environmental Resources (DER) advised the Appellant, R. D. Baughman Coal Company, Inc., that certain bonds posted by Appellant on mining operations conducted by Appellant in Madison Township, Armstrong County, PA, were declared forfeit by reason of the failure of Appellant to comply with Section 4(h) of the Surface Mining Conservation and Reclamation Act (Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. 1396.4(h) and 25 Pa.Code §86F(5).

The said notice was sent to Appellant by certified mail, return receipt requested, and was received by Appellant on June 28, 1985.

Appellant filed an appeal of the action of DER with this Board on August 19, 1985.

On August 27, 1985 DER filed a Petition To Quash Appeal with the Board, and by notice dated August 28, 1985, the Board advised Appellant that objections to DER's Petition "must" be filed with the Board "on or before September 17, 1985. As of the date of the preparation of this Opinion, Appellant has failed to file any objections to DER's Petition.

Pursuant to the provisions of 25 Pa. Code §21.51(a) appeals commence "...with the filing of a written notice of appeal with the Board."

Pursuant to the provisions of 25 Pa. Code §21.52(a) jurisdiction of the Board to hear an appeal attaches if the written notice of appeal is filed with the Board within thirty (30) days of receipt by the appellant of notice of such final action by DER.

Contrary to the provisions of the above-cited regulations, Appellant herein did not file its written notice of appeal with this Board until August 19, 1985, which date of filing was more than thirty (30) days from

its receipt of notice of bond forfeiture by DER; the final action herein complained of.

The failure of Appellant to perfect its appeal in accordance with pertinent regulations deprives the Board of jurisdiction to hear this appeal. Joseph Rostosky Coal Company v. Commonwealth of Pennsylvania, DER, 1976 EHB 12, aff'd 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976).

Being without jurisdiction, the Board need not consider the effect of the failure of Appellant to respond to the Petition To Quash Appeal filed by DER.

ORDER

AND NOW, this 25th day of September, 1985, upon Petition of DER to quash appeal, the Petition is GRANTED, and the appeal of R. D. Baughman Coal Company, Inc., Appellant, at EHB Docket No. 85-351-M is dismissed with prejudice.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR., MEMBER

EDWARD GERJUOY, MEMBER

MAXINE WOELFLING, MEMBER

cc: Bureau of Litigation

For DER: Richard Ehmann, Esq./Western Region
For Appellant: R. M. Baughman, President
R. D. Baughman Coal Co., Inc.

DATED: September 25, 1985

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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VERNON R. PAUL

Docket No. 84-290-G
Issued October 1, 1985

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION FOR SUMMARY JUDGMENT

SYNOPSIS:

DER's Motion for summary judgment is denied. Appellant will be given an opportunity for a hearing to determine whether he lacks the ability or intention to comply with the mining laws of Pennsylvania. Although it is clear that as of the date of an earlier bond forfeiture Appellant lacked the ability or intention to comply, the issue is whether he presently lacks the ability or intention. Section 30.54 of the Coal Refuse Disposal Control Act, 52 P.S. §30.54, provides for an exercise of DER discretion in making this determination. Appellant has raised one or more disputed issues of material fact concerning his present ability to comply. It is his burden to demonstrate that he presently has the ability and intention to comply. However, the Board cannot relitigate the content or validity of the bond forfeiture, which has been established by principles of administrative finality.

OPINION

This is an appeal of a denial by the Department of Environmental Resources ("DER") of Appellant's application for a coal refuse disposal permit. The permit application was filed under the authority of the Coal Refuse Disposal Control Act ("CRDCA"), 52 P.S. §30.51 et seq.

DER has moved for summary judgment. Appellant, in response, has filed two memoranda of law and an affidavit executed by Appellant. In addition, oral argument on the motion was held on February 21, 1985 and DER has filed responding memoranda of its own. In ruling upon a motion for summary judgment we are governed by the provisions of Pennsylvania Rule of Civil Procedure 1035, which provides that summary judgment shall be rendered where the pleadings, depositions, answers to interrogatories, admissions or affidavits on file show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

The facts of this appeal are not in dispute. During the period from 1970 through 1972, Appellant was the president of a corporation known as Paul Coal Sales. On June 26, 1970, by a letter to the Department of Mines and Mineral Industries (a predecessor agency of DER) Appellant submitted an application to bond an area of one and four tenths acres which previously had been strip mined by another operator. Appellant apparently intended to put in a deep mine at the site. Included with the June, 1970 application was a document signed by Appellant assuming "full and complete responsibility" for the backfilling and drainage of the site. On August 7, 1970, the department granted Appellant's application and shortly thereafter accepted a bond from him, guaranteeing restoration and planting of the site. Appellant, however, never carried out his obligations under this reclamation agreement. As a consequence,

the bond which had been posted for the site was forfeited. The forfeiture took place in 1972; Appellant did not appeal this action. Several years later an unrelated operator reclaimed the site. Appellant has not engaged in mining activities since the forfeiture occurred.

DER's denial of Appellant's coal refuse disposal permit application took place in July of 1984. The denial was based upon §30.54(b) of CRDCA which provides:

> §30.54 PERMITS
>
> * * *
>
> (b) The department shall not issue any coal refuse disposal permit or renew or amend any permit if it finds, after investigation and an opportunity for informal hearing, that:
>
> (1) the applicant has failed and continues to fail to comply with any of the provisions of this act or of any of the acts repealed or amended hereby; or
>
> (2) the applicant has shown a lack of ability or intention to comply with such laws as indicated by past or continuing violations. . .

DER premised its denial specifically upon §30.54(b)(2), finding that the 1972 bond forfeiture demonstrated Appellant's "lack of ability or intention to comply" with the Commonwealth's mining laws. During the course of this appeal DER also has argued that §30.54(b)(1) provides a basis for denial of the CRDCA permit since Appellant never reclaimed the site, thus giving rise to a continuing violation of the mining laws. It is these contentions which we are called upon to address herein.

STANDARD OF REVIEW

The Board's duty is to determine whether DER's action can be sustained on the basis of the record presented. If DER acts pursuant to a mandatory duty,

then the Board is limited to sustaining or vacating the action. If, however, DER acts pursuant to discretionary authority, the Board may substitute its discretion for that of DER if it finds that DER has abused its own. Warren Sand and Gravel Company, Inc. v. DER, 20 Pa.Cmwlth.186, 341 A.2d 556, 565 (1975).

Section 30.54(b) of CRDCA contains both mandatory and discretionary provisions. The first clause provides that DER "shall not issue any . . . permit if it finds." This statement clearly implies an exercise of non-discretionary power. On the other hand, the findings, to be made only "after investigation and an opportunity for informal hearing," obviously are intended to involve a weighing of evidence, i.e., an exercise of discretion. The degree of discretion, however, is considerably greater for §30.54(b)(2) than for §30.54(b)(1). Unlike §30.54(b)(1), which simply requires DER to determine whether there are continuing violations, §30.54(b)(2) mandates that an assessment of the applicant's violation history be made and a conclusion drawn from it based upon what the history indicates. It clearly was not the legislature's intention to require permit denial wherever an applicant had a violation history. Section 30.54(b)(1) mandates denial where DER has determined the violations making up the history are still present. By implication, however, if the violations are not "continuing", permit denial is not automatic. Only if the violations were serious enough for DER to justifiably find that the applicant lacks the ability or intention to comply, is permit denial mandated. Thus, our scope of review under §30.54(b)(2) is to determine whether DER has abused its discretion in finding that the applicant lacks the ability or intention to comply; under §30.54(b)(1), our scope of review is to determine whether DER abused its discretion in finding that the applicant has failed and continues to fail to comply. Whether it is clause (b)(1) or (b)(2) that is applicable, if

we determine that DER has not abused its discretion, then we must uphold its permit denial, since denial is mandatory where DER's finding is justifiable.

THE OPERATION OF SECTION 30.54(b)

DER argues that §30.54(b)(1) applies to this appeal and requires a determination that the permit denial was appropriate because Appellant never corrected the violations underlying the bond forfeiture. Thus, DER contends, those violations are "continuing" within the meaning of (b)(1), and permit denial was mandated.

We cannot accept this reasoning. While it may be true that Appellant never fulfilled his obligation to reclaim the site for which the forfeited bond was posted, it strains logic to conclude that this fact means those violations are "continuing." As noted above, the site was reclaimed by another operator several years after the forfeiture took place. Thus, the violations no longer exist in the normal sense of the word. Although we might agree that the obligation to the Commonwealth which Appellant undertook by agreeing to accept "full and complete responsibility" for reclamation of the site has not been fulfilled, we are unwilling to hold that this unfulfilled obligation is equivalent to a continuing violation within the meaning of §30.54(b)(1). Therefore, we reject DER's claim that §30.54(b)(1) is applicable and mandates denial of the Appellant's permit application.

Consequently, the disposition of this appeal turns upon the interpretation of §30.54(b)(2). There is no question that Appellant has a violation history. The issue is simply whether this violation history is sufficient to determine that he lacks the ability or intention to comply with the Commonwealth's mining laws.

As an initial matter it is worth noting that this standard, "lack of ability or intention to comply," is the basic test for permit denial under several of the Commonwealth's mining laws. See, e.g., §1396.3a of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 et seq.; §1406.5 of the Bituminous Mine Subsidence Act, 52 P.S. §1406.1 et seq.; §691.609 of the Clean Streams Law, 35 P.S. §691.1 et seq. These acts, along with CRDCA, underwent substantial amendment in 1980 in conjunction with Pennsylvania's attainment of primary jurisdiction over regulation of mining within its boundaries pursuant to the federal Surface Mining Control and Reclamation Act, 30 U.S.C. §1201 et seq. Under the federal Act a state's mining laws must meet a minimum federal standard in order for the state to maintain jusisdiction. States, however, may impose more stringent requirements upon mine operators than those imposed by the federal law. 30 U.S.C. §1255. In the context of its permit denial requirements, Pennsylvania has done just that; the "lack of ability or intention" standard goes beyond that required by federal law. The federal provision conditions permit denial upon a determination that the applicant "controls or has controlled mining operations with a demonstrated pattern of willful violations of this Act of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply with the provisions of this Act." 30 U.S.C. §1260(c). The Pennsylvania standard is considerably more stringent. Whereas the federal Act requires a showing of intentional noncompliance, CRDCA (and the other statutes cited above) allow a permit to be denied on the basis of lack of ability alone. Even if the operator's violations were not willful (e.g., if he lacked the funds to reclaim a site), his lack of ability to comply with the legal requirements will bar him from receiving a permit to conduct further mining operations.

Thus, it is apparent that the Pennsylvania legislature has allowed DER, and by implication this Board, to find an inability to comply even though there is no demonstrated willful disregard of the law. Moreover, the language of CRDCA, taken together with the language in the other mining statutes mentioned supra, indicates a legislative intent to place the risk of noncompliance squarely on the shoulders of the operator; the public is not expected to undertake the risk that the operator again will be unable to fulfill his obligations. As the Pennsylvania Supreme Court has noted, the public is not to bear the costs associated with the "profit-making, resource-depleting business of mining coal." DER v. Harmar Coal Company, 452 Pa. 77, 306 A.2d 308, 321 (1973). In other words, it is the operator's responsibility to satisfactorily demonstrate through his actions that he is able and willing to comply. This analysis is consistent with our rules and regulations, wherein 25 Pa. Code §21.101(c)(1) places the burden of proof on the appellant when the appeal is from a DER permit denial.

FINALITY OF BOND FORFEITURE

Bearing these considerations in mind, we turn to Appellant's arguments in opposition to summary judgment. Appellant urges us to consider the reasons why the bond forfeiture took place, suggesting that these reasons will demonstrate that he had the ability and intention to comply with the Commonwealth's mining laws at the time of the bond forfeiture because he allegedly was then in the process of reclaiming the site. Unfortunately, we cannot give consideration to this argument. Appellant would have us reexamine the violation history underlying the forfeiture action. Well established principles of administrative finality preclude us from reexamining here DER actions and decisions made

several years ago. The Pennsylvania courts have repeatedly held that a party waives his right to challenge an administrative action by failing to appeal that action within the prescribed appeal period. See 71 P.S. §510-21(c). Commonwealth v. Derry Township, 466 Pa. 31, 351 A.2d 606 (1976); DER v. Williams, 57 Pa.Cmwlth 8, 425 A.2d 871 (1981); DER v. Wheeling-Pittsburgh Steel Corporation, 22 Pa.Cmwlth 280, 348 A.2d 765 (1975), affirmed, 473 Pa. 432, 375 A.2d 320 (1977).

Appellant's failure to appeal the forfeiture rendered the underlying violations final, and thus not subject to review in this proceeding. DER cannot be expected to defend its actions concerning such violations several years after they occurred. As the Commonwealth Court stated in Wheeling-Pittsburgh Steel, supra:

> We agree that an aggrieved party has no duty to appeal but disagree that upon failure to do so the party so aggrieved preserves to some indefinite future time in some indefinite future proceedings the right to contest an unappealed order. To conclude otherwise would postpone indefinitely the vitality of administrative orders and frustrate the orderly operation of administrative law. 348 A.2d at 767.

See also, Amarraca, Inc. v. DER, 1984 EHB 899 (Docket No. 84-306-G); Armond Wazelle v. DER, 1984 EHB 748 (Docket No. 83-063-G); William Fiore v. DER, 1983 EHB 528 (Docket No. 83-160-G). We simply must treat the violations and the associated bond forfeiture as established fact.

APPELLANT'S ABILITY AND INTENTION TO COMPLY

Given the foregoing, the issue now becomes whether the just mentioned facts (the violations and the bond forfeiture) are sufficient to support DER's determination that Appellant now lacks the intention or ability to comply with

the Commonwealth's mining laws.[1] We begin with an examination of what the forfeiture indicated in this regard as of the date that it occurred.

Bond forfeiture is one of the harshest sanctions which DER is empowered to impose against an operator with respect to a particular site. It is, in a very real sense, the last resort. After forfeiture the Commonwealth's direct influence over the operator's activities is considerably reduced. The bond is designed to guarantee compliance with the Commonwealth's environmental laws. Forfeiture can take place only if there has been a failure to comply with those laws and/or with the other obligations upon which the bond is conditioned.

In Appellant's case, the bond was conditioned upon restoration and planting of the site. This obligation was consistent with that imposed upon any person engaged in mining activities within Pennsylvania at the time. The statute then in effect, the Bituminous Coal Open Pit Mining Conservation Act (Act of May 31, 1945, P.L. 1198), required backfilling and planting. See §10 of the Act, as amended (previously codified at 52 P.S. §1396.10 and repealed by the Act of November 30, 1971, P.L. 554, No. 147, §9). It is difficult to see how we could not conclude that Appellant's established failure to carry out this obligation indicates that he either lacked the ability or the intention to comply with the laws as they stood at that time. Indeed, the conclusion seems inescapable. Either he could not comply, i.e., he was unable to, or he

---

[1] DER contends, citing Morcoal Company v. DER, 1981 EHB 359, that the Appellant's past noncompliance with the mining laws (as evidenced by the bond forfeiture) is conclusive proof that he now lacks the intention or ability to comply with the mining laws, unless the Appellant has redeemed himself by means DER suggests (see below). Our reading of Morcoal, supra, and of its affirmance [459 A.2d 1303 (Pa.Cmwlth.1983)] discloses no basis for this DER contention.

would not. There is no other logical conclusion to be drawn. We need not determine which possibility was in fact the case. §30.54(b)(2) requires a finding of lack of ability or lack of intention.

This is not to say that a single bond forfeiture at a point in the distant past precludes an operator from ever again receiving a permit to conduct mining-related activities (in this case refuse disposal activities) within the Commonwealth. Indeed, if DER were to administer the law in such a fashion as to entirely preclude an operator from ever redeeming itself, we would be likely to hold that such a policy borders on a violation of due process requirements under the 14th amendment. Circumstances change, and DER must be prepared to take this into account. If an operator can meet his burden of showing that he now has the ability and intention to comply with the law, despite a history of violations, DER should be willing to grant the operator its permit.

DER does not assert that an operator whose bond has been forfeited in the past never can redeem itself. However, DER apparently takes the view that this Appellant can redeem himself in only one way, namely by undertaking to reclaim one or more of the many abandoned unreclaimed mine sites within the Commonwealth. Upon successful completion of such an undertaking, a determination that the Appellant had redeemed himself and had become eligible for his desired permit likely would be made (N.T. 13, 49-50). However, DER offers no statutory or regulatory authority for this limited view of redemption possibilities; it is not even clear that DER has a well-formulated policy in this regard (N.T. 13, 49-51). We do not see any rational basis for believing that reclaiming a presently unreclaimed site is the only reliable way for the Appellant to show that--despite his acknowledged past bond forfeiture--he now

has the ability and intention to comply with the mining laws. Therefore we reject the aforementioned view of DER's. Although the Appellant has not reclaimed, or offered to reclaim, any abandoned unreclaimed mine sites, he is entitled to try to show that he nevertheless has an ability and intention to comply with the mining laws meriting receipt of his applied-for permit.

APPELLANT'S AFFIDAVIT

Consistent with the ruling immediately supra, on June 3, 1985, after the oral argument on DER's motion for summary judgment, the Board issued the following Order:

> A ruling on DER's Motion for Summary Judgment, argued February 21, 1985, is deferred pending the Appellant's response to this Order. After reviewing the transcript, the Board is uncertain whether there are material facts in dispute. Although the Appellant had his opportunity to delineate the material facts at issue by means of affidavits in opposition to DER's Motion, nevertheless the Board is reluctant to render final judgment on this appeal until the existence or lack of existence of material facts in dispute is clarified. Therefore, in the spirit of Rules of Civil Procedure Rule 1035(e) the Appellant is ordered, within twenty (20) days, to file affidavits in support of his claim that he deserves the permit whose refusal is the subject of this appeal. Such affidavits may be concerned with:
>
> 1. The reasons Appellant failed to comply with the terms of his 1970 mining and reclamation permit.
>
> 2. Appellant's business and financial history since the bond forfeiture on his 1970 permit.
>
> The Appellant is expected to accompany his affidavit with a memorandum of law explaining why the facts attested-to are germane to the present appeal. The alleged environmental merits of the Appellant's intended project are not germane. The Appellant is reminded that under 25 Pa.Code §21.101(c)(1) it is his burden to show the permit should be issued.

The Appellant's affidavit, filed in response to the above Order, reads in full as follows:

NOW, comes the Appellant, Vernon R. Paul, and sets forth the following:

1. I, Vernon R. Paul, Appellant, am an individual who is 67 years old and who has resided in Quemahoning Township, Somerset County, Pennsylvania, all of my life.

2. I operated a deep mine in said Quemahoning Township from approximately 1947 until 1959 trading and doing business as V. R. Paul Coal Company employing 30 to 40 men. During that time I had never had any environmental or water related violations, fines or citations.

3. In 1969, I bought my first truck and began building the trucking business for the hauling of coal in which I am now engaged as Paul Trucking Company with my office located at PO Box 312, Stoystown, Somerset County, Pennsylvania.

4. On June 26, 1970, Paul Coal Sales, Inc., a corporation of which I was President and Stockholder, applied for a Permit to open a deep mine on a previous stripped mined area containing 1.4 Acres in Quemahoning and Stonycreek Townships, Somerset County, Pennsylvania. I was the owner of the property which had been previously strip mined by M. F. Fetterolf Coal Company. I planned to open a deep mine or lease the mine to others to open a deep mine.

5. Although my Permit required me to mine within six months, I obtained extensions, however, the coal market had declined and it was not feasible for me to commence mining.

6. Prior to June 30, 1972, I had moved heavy equipment on the 1.4 Acre area and had commenced reclamation. This was done prior to the expiration of my latest extension and prior to receiving notice of the forfeiture of my bond. Although I felt that forfeiture was unwarranted and illegal, business had been bad and I did not have the funds to challenge the decision. Therefore, I did not challenge the forfeiture and trusted the $5,000.00 would be used to reclaim the area.

7. I later leased the 1.4 Acres to Berwind Coal Company and then to Yellow Run Coal Company who eventually reclaimed the area.

8. I have recently obtained a copy of letter attached hereto from W. E. Guckert, Director, Bureau of Surface Mine Reclamation to R. W. Maloy, President of Berwind Corporation, indicating that as early as December of 1973, Berwind Corporation had requested that the area be left open for their company. I cooperated with the leasing of the area at all times and was concerned with obtaining a Lessee who would not only mine but reclaim the area.

9. I was under the belief that Berwind Corporation had submitted a bond of $10,000.00 with respect to the area in question and on July 10, 1974, I wrote a letter to Mr. W. E. Guckert, Director, Bureau of Surface Mine Reclamation, a copy of which is attached hereto. In this letter I requested the release of the $5,000.00 savings certificate which had been posted as bond by me on this area. I believed that the assumption of the project by Berwind Corporation entitled me to the return of my bond. It was never returned to me.

10. The entire 1.4 Acres have been reclaimed and no violations exist thereon as far as I know.

11. On August 2, 1978, I deeded a tract of ground containing the 1.4 Acre area to Fred S. Shaulis and Barry M. Alberter.

12. I have never had any other citations or forfeitures from DER other than the above.

13. Between 1969 and the present time, my trucking business has grown until in 1976 I own 14 trucks. Presently, I own 9 trucks, a K-36 Linkbelt Shovel, a Michigan High Lift and a Catepillar High Lift.

14. Approximately 8 years ago I built a 60 feet by 80 feet brick garage and office building which still houses my business along Route 30, near Stoystown, Somerset County, Pennsylvania.

15. For the past nine years the gross income from Paul Trucking has been as follows:

1976	$313,402.31
1977	524,806.85
1978	449,666.37
1979	442,880.15
1980	514,601.00
1981	714,287.16
1982	566,621.31
1983	393,855.60
1984	607,175.42

16. I am a reputable and well established businessman in Quemahoning Township, Somerset County, Pennsylvania, and I have the equipment, finances, adequate experience and knowledge and full intention of complying with all laws relating to the proposed project.

The memorandum of law Appellant filed with this affidavit did not--as our June 3, 1985 Order requested--explain why the asserted facts in the just-quoted affidavit are germane to the present appeal. Mainly this memorandum merely argued that the Appellant is entitled to a hearing on the merits before any finding that the Appellant "has shown a lack of intention or ability to comply" can be made. DER's memoranda in response to Appellant's memorandum of law argue that the facts asserted in the affidavit, even if true, are irrelevant and immaterial to the issues in this appeal; thus, DER maintains, despite the affidavit DER is entitled to summary judgment as a matter of law.

Our reading of Appellant's affidavit is largely (but not entirely) in agreement with DER's contention that the affidavit's asserted facts are irrelevant to this appeal. Certainly, for reasons explained earlier, we will not now relitigate the merits of DER's bond forfeiture action. It is established that at the time of the bond forfeiture Appellant either was unwilling or unable to comply with his commitment to reclaim the 1.4 acres he intended to deep mine. On the other hand, we cannot agree with DER that the affidavit is wholly irrelevant to DER's finding, required under §30.52(b)(2), that the Appellant remains unwilling or unable to comply with the mining law. The facts asserted in paragraphs 2, 12 and 15 are germane to the question of whether one should regard the 1972 bond forfeiture as conclusive evidence of Appellant's present unfitness for a permit. We also think it relevant, despite DER's arguments to the contrary, that (paragraph 5 of Appellant's affidavit, which DER has not challenged) the Appellant never affected the 1.4 acre area whose bond was forfeited for failure to reclaim. Thus Appellant should not be equated to the permit applicant in Keystone Mining Co. v. DER, Docket No. 83-241-G (Opinion and Order, June 19, 1985), as DER would have us do.

In evaluating present fitness for a permit grant it is unreasonable not to distinguish between the Appellant (who left the land no worse than he found it) and Keystone Mining Company (which failed to reclaim areas it had itself mined.)

Nevertheless, on the facts which we have been discussing, and on other facts in the record--notably Appellant's admissions that his 1970 permit application caused DER to allow Fetterolf Coal Company to leave open (i.e., unreclaimed) the 1.4 acres Fetterolf otherwise would have been responsible for reclaiming--we hardly can conclude that DER's finding that the Appellant does not have the ability and intention to comply with the mining laws was an abuse of discretion. Paragraphs 5 and 6 of the affidavit show that the Appellant, because of his financial difficulties, made a conscious decision not to complete reclamation of an area that would have been reclaimed by Fetterolf if Appellant had not misjudged his business prospects. Therefore we cannot term "unjustified" DER's implicit concern that Appellant, were he to receive his presently desired permit, once again might decide not to complete reclamation--despite e.g., the attendant likelihood of pollution to the waters of the Commonwealth--if his financial difficulties should recur.

In other words, the Appellant--although he already has been given every opportunity to do so--has not met his burden of showing that he has the ability and intention to comply with the mining laws. Nonetheless, we are unable to render summary judgement in DER's favor. The courts have stressed that summary judgment should be entered only where the right to summary judgment is clear and free from doubt. Moreover, to determine the absence of genuine issue of fact, we must take the view of the evidence most favorable to the non-moving party (here the Appellant), giving to that party the benefit of all favorable inferences that might reasonably be drawn from the evidence;

any doubts must be resolved against the entry of the judgment. It is the moving party (here DER) who bears the burden of demonstrating that there is no genuine issue of material fact and that it is entitled to summary judgment as a matter of law. Harvey v. Hansen, 445 A.2d 1228 (Pa.Super. 1982). Simpson v. Commonwealth Board of Probation and Parole, 473 A.2d 753 (Pa.Cmwlth. 1984). Fitzpatrick v. Shay, 461 A.2d 243 (Pa.Super. 1983). Giving the Appellant the benefit of all favorable inferences from the affidavit he has submitted, we are unable to conclude that without doubt DER has shown this Appellant does not have the ability and intention to comply with the mining laws, even though we are prepared to state that on the record before us the Appellant has not met the burden he will have to meet at the hearing on the merits, namely of showing that he does have the ability and intention to comply.

O R D E R

WHEREFORE, this 1st day of October , 1985, DER's motion for summary judgment is rejected; as soon as possible after receipt of this Order, the Appellant is to arrange a conference call with DER and the Board, to schedule a hearing on the merits of this appeal.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy, Member

DATED: October 1, 1985

cc: Bureau of Litigation
For the Commonwealth, DER:
Timothy J. Bergere, Esquire
DER Central Region
For the Appellant:
Sandra W. Upor, Esquire
Somerset, PA

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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D & M CONSTRUCTION :

:

: Docket No. 85-153-G
: Issued October 2, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

SYNOPSIS

Sanctions are imposed against Appellant precluding the presentation of its case in chief due to Appellant's failure to file a pre-hearing memorandum as required by Board order. In addition, Appellant is ordered to provide the Board with a complete copy of the order appealed and with documentation of the dates upon which it received the two DER actions appealed herein.

OPINION

This is an appeal of two actions of the Pennsylvania Department of Environmental Resources (DER). The first action, set forth in a letter dated March 22, 1985, is a denial of Appellant's repermitting application for a surface mining permit. The second action is an order dated April 10, 1985 which cites Appellant for violations of 25 Pa.Code §§87.102(a)(3) and (5) as well as the conditions of its mining permit.

1. Perfection of this Appeal

The Notice of Appeal in this matter was filed with the Board on April 26, 1985. It was not accompanied by copies of the DER letter of March 22, 1985 and the DER order of April 10, 1985 as required by 25 Pa.Code §21.51(d). The Board therefore docketed the appeal as a "skeleton appeal", pursuant to 25 Pa.Code §21.52(c), and requested that Appellant provide the necessary documents. Shortly thereafter Appellant did provide a copy of the permit denial letter and portions of the order. The two pages of the compliance order which the Board has received indicate that a third page exists. However, this third page has not been provided. Appellant must provide the same.

In addition, there may be some confusion regarding the dates upon which Appellant received the permit denial letters and the order. Paragraph 2 of the Notice of Appeal, where such date is to be indicated, reads:

> Review is sought from an action refusing to repermit MDP #3678SM2 and review is further sought from an order prohibiting further mining of coal and requiring immediate backfilling activities. Subject order was received on March 26, 1985. Re: MDB3678SM2, Madison Township, Clarion County, MDP #3678SM2 (order dated March 22, 1985).

Although the appeal is of two DER actions, only one date of receipt is stated, that of the "subject order." However, we note that the order bears a date of service of April 10, 1985, thus making it unlikely that it was received two weeks earlier. Perhaps Appellant intended to indicate that the permit denial letter of March 22, 1985 was received on March 26, 1985. In any event documentation of the actual date of receipt of the permit denial letter as well as the order will have to be provided before the Board can ascertain whether the appeals of

the two actions have been timely taken. See 25 Pa.Code §21.52(a). The Board notes that April 26 (the date of filing) is thirty-one days after March 26.

2. Failure to File Pre-Hearing Memorandum

Shortly after this appeal was filed the Board, pursuant to its usual practice, issued Pre-Hearing Order No. 1, requiring Appellant to file a pre-hearing memorandum on or before July 22, 1985. The pre-hearing memorandum is to set forth the factual and legal bases for the appeal. When no memorandum had been filed by August 5, 1985, the Board sent Appellant a default notice via certified mail warning that sanctions might be applied if the memorandum were not filed by August 20, 1985. To date, no memorandum has been received nor has any request for extension of time to file the same been received. The certified mail returned receipt shows that the default notice was received by the office of Appellant's counsel.

In light of this failure to file a pre-hearing memorandum as ordered by the Board, the following sanctions are imposed pursuant to 25 Pa.Code §21.124. At the hearing on the merits of this appeal, if and when held, Appellant will be precluded from presenting its case in chief, with regard to either of the two actions appealed herein. Appellant will be limited to the presentation of rebuttal testimony, cross examination of DER witnesses, and the filing of a post-hearing brief. See Armond Wazelle v. DER, 1983 EHB 576 (Docket No. 83-063-G).

O R D E R

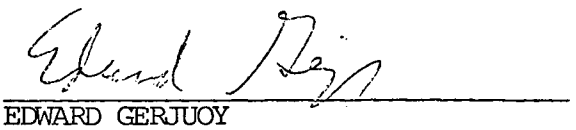
WHEREFORE, this 2nd day of October, 1985, it is ordered that:

1. Within fifteen (15) days of this date Appellant shall provide the Board with a complete copy of the compliance order appealed herein and

with documentation of the dates of receipt of the two actions appealed. DER is encouraged to provide independent documentation if possible.

2. Sanctions as set forth in the foregoing opinion are imposed against Appellant for failure to file its pre-hearing memorandum.

ENVIRONMENTAL HEARING BOARD



EDWARD GERJUOY
Member

DATED: October 2, 1985

cc: Bureau of Litigation
For the Appellant:
Robert M. Hanak, Esquire
Reynoldsville, PA
For the Commonwealth:
Joseph K. Reinhart, Esquire
DER/Western Region
Pittsburgh, PA

COMMONWEALTH OF PENNSYLVANIA

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GERALD OLGIN and MARILYN E. OLGIN :

:

: Docket No. 85-069-G
: Issued October 9, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR PETITION FOR SUPERSEDEAS

SYNOPSIS

Appellants' petition for supersedeas is granted. The DER order at issue directs appellants to undertake remedial measures with regard to a landfill site which has been shown to be releasing pollutants to the waters of the Commonwealth. Appellants' connection with the site stems from a four-month lease which authorized landfilling activities on a portion of the entire landfill site at issue here. The evidence presented at the supersedeas hearing strongly suggests that the presence of contaminants on portions of the site other than the portion leased by appellants cannot be causally related to the conditions existing on the portion of the site which the appellants leased. Therefore, the Board holds that appellants have made a strong showing of likelihood of success on the merits inasmuch as the DER order at issue imposed obligations upon appellants concerning conditions which apparently are unrelated to their conduct or responsibilities.

* * *

OPINION

This appeal concerns an order issued by the Department of Environmental Resources ("DER"), to the appellants, Gerald and Marilyn Olgin, ("the Olgins"). The order directs the Olgins, among others, to take certain remedial actions in connection with a site which previously had been used as a landfill. A portion of the site had been leased by the Olgins for a short time during the period that the property was used as a landfill. The Olgins filed a petition for supersedeas simultaneously with the filing of this appeal. A hearing on the petition was conducted on May 14 and 15, 1985. During the hearing the presiding Board member granted the petition for supersedeas. Shortly thereafter, the grant of a supersedeas was embodied in a formal order. This opinion explains the basis for the decision to grant the supersedeas.

The Board's rules governing the issuance of a supersedeas require consideration of the following factors:

1) irreparable harm to the petitioner;

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

3) the likelihood of injury to the public.

25 Pa.Code §21.78(a). The Board has interpreted these standards in light of the existing case law of this Commonwealth. In Pennsylvania Public Utility Commission v. Process Gas Consumers Group, 502 Pa. 545, 467 A.2d 805 (1983), the Pennsylvania Supreme Court set forth standards which guide the Board's application of the above-quoted rules. While the Process Gas Consumers case does not address the issuance of a supersedeas, the guidelines it provides for the grant of a stay are applicable to, and consistent with, the Board's rules. These guidelines are as follows:

> [T]he grant of a stay is warranted if:
>
> 1. The petitioner makes a strong showing that he is likely to prevail on the merits.
>
> 2. The petitioner has shown that without the requested relief, he will suffer irreparable injury.

3. The issuance of a stay will not substantially harm other interested parties in the proceedings.

4. The issuance of a stay will not adversely affect the public interest.

467 A.2d at 809.

The first of these criteria, that there be a strong showing of likelihood of success on the merits, often becomes the primary consideration in ruling upon a petition for supersedeas. Where, as here, the alleged irreparable harm is the cost of compliance with the appealed order, the likelihood of success on the merits must be determined first, since the cost of compliance with a lawful order, by definition, cannot constitute irreparable harm.

The facts of this appeal, as developed to date, are as follows. In 1970 the Olgins entered into a lease agreement with the Tenth Street Building Corporation covering a portion of the landfill site which is the subject of the order at issue herein. The lease agreement expressly contemplated that the property would be used as a landfill. The Olgins, however, were not the parties who actually engaged in the operation of the landfill. Rather, the landfill was operated by Mr. Pasquale Pontillo, who also was a signatory to the lease, as a lessee. The testimony presented at the supersedeas hearing suggests that the lessor required the Olgins to sign the lease as a sort of surety arrangement, the lessor being reluctant to lease the property to Mr. Pontillo without some additional party against whom it could seek indemnification. The lease agreement was for a period of four months, beginning on February 15, 1970 and continuing until June 15, 1970, and was not renewed. The consideration for the agreement was $4000 which was paid in a single lump sum at or about the time that the lease was signed. This amount apparently was paid by Mr. Pontillo, not by the Olgins.

The landfill site which is the subject of the order at issue encompasses a substantially greater area than that which was the subject of the Olgins' lease. Landfilling activities were conducted by Mr. Pontillo on the portion of the site covered by this lease as well as on the remaining portions of the site and approximately the same types of materials which were placed in other areas of the landfill site were placed in the area covered by the Olgins' lease. No other connection between the landfill site as a whole and the Olgins has been demonstrated.

Testimony presented during the supersedeas hearing demonstrated that there are contaminants present in the water in a drainage swale constructed by PennDOT. This swale abuts the northern boundary of the portion of the site leased by the Olgins. The contaminants constitute "pollution" within the meaning of the Clean Streams Law, 35 P.S. §691.1. The water containing these contaminants is discharging from the landfill site and is reaching the waters of the Commonwealth. Thus, it is clear that DER possesses the authority to direct abatement of this condition. 35 P.S. §691.401; 71 P.S. §1917A. Ryan v. Commonwealth, DER, 30 Pa.Cmwlth. 180; 373 A.2d 475 (1977).

The critical issue here, however, is whether some or all of the pollution present at the landfill site can be connected with the conditions present on the area which was covered by the Olgins' lease. The DER order at issue here directs the Olgins to participate in remedial activities with regard to the entire landfill site, not just that portion which was covered by their lease. Such an order would be appropriate if, for example, a connection between the Olgins' portion and the contamination present on other portions of the entire site could be established.

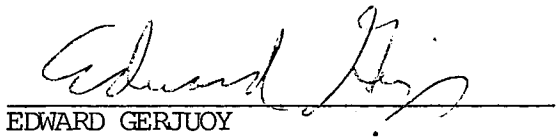
Such a connection has not been shown to be present here, however. There is no dispute that the direction of groundwater flow is to the north. Thus, the evidence strongly suggests that the direction of groundwater movement under the

entire landfill site is such that any contaminants deriving from the waste placed in the portion which had been leased by the Olgins would be moving to the north, away from the rest of the site, rather than to the south or southwest, the directions in which the remainder of the site lies. Given this finding, it is not reasonable for DER to require the Olgins to expend substantial sums to initiate the clean-up of the entire site. The contaminated groundwater which presumably is discharging from the portion of the site which they leased may represent, in part, water which previously was present under other portions of the entire landfill site; this fact alone would not absolve them from liability for such a discharge. National Wood Preservers, Inc. v. Commonwealth, DER, 489 Pa. 221, 414 A.2d 37 (1980). However, the Olgins cannot be held responsible for contaminants present at other points within the entire site without (at least) a showing that the presence of those pollutants is somehow causally connected with the activities which took place on the land they leased. Since no such connection has been established here, and since, furthermore, it appears extremely unlikely that such a connection can be established given the direction of groundwater flow, we conclude that the Olgins have met their burden of demonstrating a strong likelihood of success on the merits of this appeal, in that the DER order imposes liability upon the Olgins for the entire landfill site without regard to any established connection between the problems present on the entire site and the portion leased by them.

O R D E R

WHEREFORE, this 9th day of October, 1985, it is ordered that the appellants' petition for supersedeas is granted.

ENVIRONMENTAL HEARING BOARD



EDWARD GERJUOY
Member

DATED: October 9, 1985

cc: Bureau of Litigation
For the Commonwealth:
Howard J. Wein, Esquire, DER Western Region
Lisette M. McCormick, Esquire, DER Western Region
For the Appellants:
Carl N. Moore, Esquire, Erie, PA

COMMONWEALTH OF PENNSYLVANIA

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CENTRAL WESTERN PENNSYLVANIA MINING CORP. :

: Docket No. 85-352-M
: Issued: October 18, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Synopsis

This appeal is dismissed because appellant failed to comply with §21.51 of the board's rules of practice and procedure. 25 Pa. Code §21.51. Appellant filed a skeletal appeal, which the board docketed pursuant to 25 Pa. Code §21.52(c). Appellant, however, failed to perfect its appeal, although the board twice requested appellant to submit the information required by 25 Pa. Code §21.51.

OPINION AND ORDER

On August 19, 1985, this Board received a letter from Central Western Pennsylvania Mining Corporation (Appellant) dated August 14, 1985 and directed to "Commonwealth of Pennsylvania, Department of Environmental Resources, White Memorial Building, P. O. Box 669, Knox, PA 16232." On August 20, 1985, the Board received from Appellant a notice dated August 14, 1985 requesting that the Board send to Appellant "the papers and forms needed to appeal an action of the Department of Environmental Resources."

On August 20, 1985 the Board forwarded to Appellant a form entitled "Acknowledgement Of Appeal And Request For Additional Information" wherein Appellant was advised that its appeal failed "to comply with Section 21.51 of the rules of practice and procedure" and that Appellant was required to furnish additional information to the Board within ten (10) days of date of receipt of the notice as specified in said form. Also, the Board furnished Appellant with a copy of the Board's rules of practice and procedure.

Upon Appellant's failure to forward the requested information as required, the Board sent a second request for additional information to Appellant on September 4, 1985, and the second request was received by Appellant on September 6, 1985. The Appellant has also failed to respond to the Board's second request for additional information.

The two notices sent to Appellant requested the following to be supplied by the Appellant to the Board within ten (10) days of Appellant's receipt thereof:

1. "Name, address and telephone number of appellant.
2. Copy of letter/order appealed from.
3. Date notice of action was received.
4. Specification of objections setting forth manner in which appellant is aggrieved by the action of the department.
5. Have you notified those persons listed in paragraph number 4 of the enclosed Notice of Appeal form?"

By reason of the lack of information contained in the documents on file with the Board, it is impossible for the Board to begin the process of proceeding further with this matter. At this stage of the proceedings, with the information so far supplied, it is not possible to determine whether Appellant has complied with any of the legal requirements for proper filing of an appeal.

The provisions of 25 Pa. Code §21.52(c) provide that where a person does not comply with the provisions of 25 Pa. Code §21.51 as to form and content of an appeal, the Board shall docket the appeal as a skeleton appeal. This the Board has done.

When a skeleton appeal is received and docketed by the Board, Board practice requires that a notice be sent to the party requesting that the required information be sent to the Board within ten (10) days of receipt of said notice. This practice was followed in this appeal as evidenced by the first notice sent to Appellant on August 20, 1985.

Upon failure of a party to respond to a notice to perfect its appeal by supplying additional information to the Board within the required period of time, Board practice is to forward a second notice to the party by certified mail, return receipt requested, so as to determine that the notice was in fact received by the party and the date of receipt. This practice was followed in this appeal as evidenced by the second notice sent on September 4, 1985, and the return receipt therefor indicating that Appellant received the notice on September 6, 1985.

Under the provisions of 25 Pa. Code §21.52(c), "(T)he appellant shall, upon request from the Board, file the required information or suffer dismissal of the appeal."

The Board has requested that the Appellant herein supply the information required of an appellant pursuant to the form and content provisions of 25 Pa. Code §21.51. The Appellant herein has failed to respond to the request from the Board.

Pursuant to the provisions of 25 Pa. Code §21.52(c), the failure of the Appellant to supply the necessary information requested by the Board renders this appeal not perfected and subject to dismissal.

ORDER

AND NOW, this 18th day of October, 1985, after review of the record in this appeal, and upon failure of Appellant to perfect its appeal as required, the appeal of Central Western Pennsylvania Mining Corporation, at EHB Docket No. 85-352-M is dismissed with prejudice.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

Anthony J. Mazullo, Jr.
ANTHONY J. MAZULLO, JR., MEMBER

Edward Gerjuoy
EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation

Western Region/DER
For Appellant: Glenn Christy, President
Central Western Pennsylvania
Mining Corporation

DATED: October 18, 1985

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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ALTERNATE ENERGY STORE, INC. :
:
V. : DOCKET NO. 85-188-M
:
COMMONWEALTH OF PENNSYLVANIA : Issued: October 23, 1985
DEPARTMENT OF ENVIRONMENTAL RESOURCES :

Synopsis

This is an appeal from a letter in which the Department of Environmental Resources (DER) informed appellant that its mining permit had expired by automatic operation of 25 Pa. Code §77.102(a)(6). Appellant argues that this letter constitutes DER's written notice of DER's denial of appellant's request for an extension of its permit nunc pro tunc. In the alternative, appellant argues that the board should allow it to appeal nunc pro tunc, pursuant to 25 Pa. Code §21.53, the actual expiration of the permit. DER's Motion to Dismiss is granted because the letter informing appellant that its permit had expired by automatic operation of 25 Pa. Code §77.102(a)(6) was simply an explanation of the legal status of the permit and involved no appealable action of DER. Further, appellant alleged no circumstances that would justify the allowance of an appeal nunc pro tunc from the expiration of the permit.

OPINION AND ORDER SUR
MOTION TO DISMISS

The Department of Environmental Resources (DER) issued to Alternate Energy Store, Inc. (A.E.S.), appellant, Mine Drainage Permit No. 46800301 on May 4, 1981, and Mining Permit No. 302093-46800301-01-0 on May 20, 1981 for noncoal surface mining in Lower Providence Township, Montgomery County, Pennsylvania. Lower Providence Township appealed DER's issuance of these permits at E.H.B. Docket No. 81-078-M on June 3, 1981. That appeal is still pending.

On April 4, 1985, counsel for DER in the appeal at E.H.B. Docket No. 81-078-M wrote counsel for A.E.S. the following letter:

> I am writing in response to your letter of April 1, 1985.
>
> You have advised me, and I have confirmed that Alternate Energy Store ("AES") was issued Mining Permit No. 302093-46800301-01-0 ("Mining Permit") on May 4, 1981.[1] You have also advised us, and we have confirmed that mining had not commenced at this site. You have also advised us and we have confirmed that a request for an extension of the mining permit was not made prior to the expiration date.
>
> 25 Pa. Code 77.102(a)(6) specifies that mining permits expire automatically within two years of issuance unless an extension of time has been granted by the Department. By automatic operation of 25 Pa. Code 77.102(a)(6), the mining permit expired on or about May 4, 1983.

It is from this letter that A.E.S. took this appeal, which A.E.S. filed with the board on May 6, 1985. In the Notice of Appeal, A.E.S. said that it was appealing the April 4, 1985 letter because it constitutes written notice of a denial of a request that A.E.S.

---

[1] DER used the wrong issuance date in this letter and in its Motion to Dismiss, in referring to Mining Permit No. 302093-46800301-01-0. As DER noted in its Amended Motion to Dismiss, Mining Permit No. 302093-46800301-01-0 was issued on May 20, 1981. It was Mine Drainage Permit No. 46800301 that was issued on May 4, 1981.

alleged that it made to DER on December 14, 1984, to extend the permit nunc pro tunc; and DER abused its discretion and erred as a matter of law in refusing to extend the permit nunc pro tunc. In the alternative, A.E.S. requested the board to allow A.E.S., pursuant to 25 Pa. Code §21.53, to file an appeal nunc pro tunc from the actual expiration of the permit.

DER filed a Motion to Dismiss this appeal on July 24, 1985. In its Motion to Dismiss, DER argued that the April 4, 1985 letter was not an appealable action of DER because the permit expired by operation of law, and the April 4, 1985 letter was written notice of the expiration and not an action or decision of DER. Further, DER argued that the board should not allow A.E.S. to appeal the expiration of the permit nunc pro tunc because A.E.S. has not alleged any facts that would justify the allowance of an appeal nunc pro tunc pursuant to 25 Pa. Code § 21.53. The board agrees with DER that the April 4, 1985 letter is not an appealable action of DER, and that the facts of this case do not justify the allowance of an appeal nunc pro tunc from the expiration of the permit more than two years ago. Therefore, the board grants DER's Motion to Dismiss.

DER issued A.E.S. a mine drainage permit and a mining permit for a noncoal surface mining operation. The DER regulations pertaining to surface noncoal mining operations are contained at 25 Pa. Code, Chapter 77, Subchapter E. In particular, 25 Pa. Code § 77.102(a)(6) provides as follows:

> (6) The permit issued shall expire two years from the date of permit issuance unless mining has been started or an extension of time has been granted by the Department.

In this case, A.E.S. neither started mining nor requested an extension of the mining permit within two years of its issuance, and therefore, by automatic operation of 25 Pa. Code §77.102(a)(6), A.E.S.'s mining permit expired on or about May 20, 1983. Because A.E.S. did not request an extension of the permit prior to its expiration, no DER action was taken with regard to the permit's expiration, but rather, it expired automatically. Had A.E.S. requested an extension of the permit prior to its expiration, and DER refused to extend the permit, A.E.S. could possibly have appealed that refusal. But, A.E.S. allowed the permit to expire without making any attempt to have the life of the permit extended. A.E.S. now argues that it was unable to commence mining because of protracted litigation with Lower Providence Township before this board and before the Zoning Hearing Board of Lower Providence Township. The inability of A.E.S. to commence mining, however, does not excuse A.E.S.'s failure to request an extension of the permit prior to its expiration. In fact, since A.E.S. knew that it could not have commenced mining because of the pending litigation, A.E.S. certainly should have requested an extension of the permit if it wished to commence mining at some time in the future.

A.E.S. further argues that DER somehow waived the mandate of 25 Pa. Code §77.102(a)(6) because DER participated, after the expiration of the permit, in Lower Providence's appeal of the permit issuance, and DER did not raise the issue of expiration of one of the two interrelated mining permits. In the first place, parties dealing with the government are charged with knowledge of and are bound by lawfully

promulgated regulations. See Brown v. Richardson, 395 F. Supp. 185 (W.D. Pa. 1975). DER's failure to inform A.E.S. of the automatic expiration of its permit cannot obligate DER to reinstate the permit, since DER was under no obligation to inform A.E.S. that the permit would expire. Second, Lower Providence Township is the appellant in the appeal of the permits' issuance at E.H.B. Docket No. 81-078-M, and Lower Providence has the burden of proof in that appeal. In fact, although DER is a party to that appeal, DER has not actively participated in that appeal, and DER informed A.E.S. that DER's policy is not to defend third party appeals of permit issuances. Therefore, DER's failure to raise the issue of permit expiration in the appeal at E.H.B. Docket No. 81-078-M is irrelevant to the issues raised in this appeal.

A.E.S. also argues that 25 Pa. Code §77.102(a)(6) is not enforceable because it was promulgated pursuant to a statute that has been repealed. Specifically, A.E.S. argues that 25 Pa. Code 77.102(a)(6) was promulgated pursuant to the Surface Mining Conservation and Reclamation Act, 52 P.S. § 1396.1, et seq., and as it relates to noncoal mining, this Act was repealed by Section 27 of the Noncoal Surface Mining Conservation and Reclamation Act, the Act of December 19, 1984, P.L.1093, No. 219. Section 24 of the Noncoal Surface Mining Conservation and Reclamation Act, 52 P.S. §3324, however, specifically preserved the regulations pertaining to noncoal operations promulgated under the Surface Mining Conservation and Reclamation Act until, "modified, repealed, suspended, superseded, or otherwise changed under the terms of this act and the regulations promulgated under this act." But, in any event, these regulations were

in effect in May, 1983, when A.E.S.'s permit expired.

As of May 20, 1983, A.E.S.'s mining permit ceased to exist, and neither DER's failure to notify A.E.S. that the permit expired, nor subsequent changes in the law pertaining to noncoal surface mining can bring the permit back into existence, or obligate DER to consider reinstating the permit. A.E.S. requested DER to extend the life of a nonexistent permit "nunc pro tunc." DER responded to this request by informing A.E.S. that pursuant to 25 Pa. Code §77.102(a)(6), the permit had automatically expired after two years. This letter simply informed A.E.S. of the legal status of its mining permit. Thus, this letter was not a final action of DER that affected A.E.S.'s personal or property rights, privileges, immunities, duties, liabilities, or obligations. As such, the April 4, 1985 letter is not a DER action that is appealable to this board. See 2 Pa. C.S. §101; 25 Pa. Code 21.2(a); Standard Lime and Refractories Company v. DER, 2 Pa. Cmwlth. 424, 279 A.2d 383 (1971); DER v. New Enterprise Stone and Lime Company, Inc., 25 Pa. Cmwlth. 389, 359 A.2d 845 (1976).

A.E.S.'s alternative argument in this case is that the board should allow A.E.S. to appeal nunc pro tunc the expiration of the permit, if the board does not allow the appeal of the April 4, 1985 letter. The permit expired on or about May 20, 1983, and A.E.S. filed this appeal nearly two years later on May 6, 1985. A.E.S. argues that the board should allow an appeal nunc pro tunc from the permit expiration because the board held hearings in the appeal from the permit issuance after the permit had expired, and neither DER nor Lower Providence Township raised the issue of expiration of the permit. Further, A.E.S. argues that it was impossible for it to have commenced mining

prior to May 20, 1983 because of the pending appeal with this board from the permit issuance, and proceedings before the Zoning Hearing Board of Lower Providence Township. Finally, A.E.S. argues that the board should allow an appeal nunc pro tunc from the permit expiration because DER did not notify A.E.S. in writing of the permit's expiration until April 4, 1985, DER did not publish the permit's expiration in the Pennsylvania Bulletin, and DER has a duty to notify the operator in writing of the impending expiration of issued permits, particularly while DER is actively participating in litigation challenging the issuance of the permits.

The board's regulation pertaining to appeals nunc pro tunc is 25 Pa. Code §21.53, which provides in pertinent part as follows:

> (a) The Board upon written request and for good cause shown may grant leave for the filing of an appeal nunc pro tunc; the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in Courts of Common Pleas in the Commonwealth.

The board has interpreted this rule as only allowing appeals nunc pro tunc when fraud or some breakdown in the operations of the board has caused the delay in the filing of the appeal. Petricca v. DER, 1984 EHB 519; Soberdash Coal Company v. DER, 1983 EHB 323; East Side Landfill Authority v. DER, 1982 EHB 299. See also Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976).

A.E.S.'s mining permit expired by automatic operation of 25 Pa. Code §77.102(a)(6), and the board questions whether this automatic expiration would have been appealable even if A.E.S. had timely appealed it. But, A.E.S. certainly has not alleged any circumstances that would justify the board's allowing A.E.S. to appeal this

automatic expiration nearly two years later. DER has no duty to inform permittees about the pending automatic expiration of their permits. Parties are charged with knowledge of the law, and DER's failure to inform A.E.S. of the applicability of 25 Pa. Code §77.102(a)(6) does not constitute fraud or a breakdown in the system. A.E.S. had the responsibility of knowing the terms of its permit, including its expiration date. Therefore, DER did not have an obligation to notify A.E.S. that the permit expired or to publish this expiration in the Pennsylvania Bulletin, since the expiration occurred by automatic operation of 25 Pa. Code §77.102(a)(6) and not by DER action.

ORDER

AND NOW, this 23rd day of October, 1985, the appeal of Alternate Energy Store, Inc., at EHB Docket No. 85-188-M, is dismissed.

ENVIRONMENTAL HEARING BOARD

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EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation

For DER: John Wilmer, Esq., Philadelphia, PA

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DATED: October 23, 1985

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

TENTH STREET BUILDING CORPORATION :

:

: Docket No. 85-068-G
: Issued November 1, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR PETITION FOR SUPERSEDEAS

SYNOPSIS

Appellant's petition for supersedeas is denied. Appellant has failed to demonstrate a strong likelihood of prevailing on the merits of this appeal. The order at issue directs appellant to take remedial actions concerning a landfill site previously owned by it. Authority for the order may be derived from §1917A of the Administrative Code, 71 P.S. §510-17, which grants DER the power to abate nuisances, statutory and otherwise. §401 of the Clean Streams Law, 35 P.S. §691.401, declares the discharge of pollution to the waters of the Commonwealth to be a nuisance. The record as established to date indicates that pollution is discharging from the site. Therefore, it is likely that DER possesses the legal authority for the issuance of the order appealed herein.

The fact that Tenth Street did not actually operate the landfill which was located on its property does not mean that it cannot be held responsible for a nuisance condition which was created on its land. Tenth Street had knowledge

of the existence of the conditions existing at the site which have given rise to the nuisance and, in fact, accepted responsibility for these conditions prior to the time that it transferred the property to another person. Therefore, it can be held responsible for the nuisance. The fact that it has transferred the property does not affect this conclusion. DER's authority under §1917A is unconditional; it is not limited by the fact that the party responsible for the nuisance is no longer in possession of the property. The Board also rejects Tenth Street's arguments that DER has exercised its authority in a discriminatory fashion and that DER erred by allegedly failing to give consideration to the economic impact of its actions. Neither of these arguments is supported by the record developed to date.

OPINION

This appeal concerns an order issued by the Department of Environmental Resources ("DER") to the appellant, Tenth Street Building Corporation ("Tenth Street"). The order directs Tenth Street (as well as others) to undertake remedial measures in connection with property previously owned by Tenth Street and used as a solid waste disposal site (the "site"). Tenth Street filed a petition for supersedeas with this Board on March 27, 1985. A supersedeas hearing was held on May 14 and 15, 1985. At the close of the hearing the presiding Board member advised Tenth Street that its petition very likely would be denied. No order denying a supersedeas was issued however, and the parties were given the opportunity to brief the issues raised by the petition. This opinion sets forth the rationale underlying our decision to deny the supersedeas.

The Board's rules governing the issuance of a supersedeas require consideration of the following factors:

1) irreparable harm to the petitioner;
2) the likelihood of the petitioner's prevailing on the merits; and
3) the likelihood of injury to the public.

25 Pa.Code §21.78(a). In addition, §21.78(b) provides that:

> A supersedeas shall not issue in cases where nuisance or significant (more than de minimis) pollution or hazard to health or safety either exists or is threatened during the period when the supersedeas would be in effect.

The Board has interpreted these standards in light of the existing case law of this Commonwealth. In Pennsylvania Public Utility Commission v. Process Gas Consumers Group, 502 Pa. 545, 467 A.2d 805 (1983), the Pennsylvania Supreme Court set forth standards which guide the Board's application of the above-quoted rules. While the Process Gas Consumers case does not address the grant of a supersedeas, the guidelines it provides for the grant of a stay are applicable to and consistent with the Board's rules. These guidelines are as follows:

> [T]he grant of a stay is warranted if:
>
> 1. The petitioner makes a strong showing that he is likely to prevail on the merits.
>
> 2. The petitioner has shown that without the requested relief, he will suffer irreparable injury.
>
> 3. The issuance of a stay will not substantially harm other interested parties in the proceedings.
>
> 4. The issuance of a stay will not adversely affect the public interest.
>
> 467 A.2d at 809.

We note that the first of these criteria requires a strong showing of likelihood of success on the merits. While this requirement should not be applied as an inflexible rule, Process Gas Consumers, supra, at 809 n.8, in many circumstances it becomes the primary concern. Particularly where, as here, the claimed

cause of the irreparable harm is the cost of complying with the order at issue, it is imperative that the likelihood of Tenth Street's succeeding on the merits be reviewed first since, by definition, the cost of compliance with a lawful order never can constitute irreparable harm. William Fiore v. DER, 1983 EHB 528 (Opinion and Order, August 24, 1983).

The facts of this matter, as developed to date, are as follows. Tenth Street bought the property which is the subject of the DER order in December of 1965. Use of the land as a landfill began in 1966 and continued until 1970. During this period a wide variety of waste was buried at the site, including municipal and industrial wastes. The testimony indicated that Tenth Street agreed to permit the use of its property for a landfill at the urging of the city of Erie, particularly the mayor's office, which was concerned with finding a suitable site for disposal of waste within the city limits. Tenth Street apparently agreed to lease the property for use as a landfill subject to assurances that the Erie County Health Department would monitor the site for compliance with public health requirements.

Consideration for the lease during most of this period was the nominal rent of ten dollars per month. For a four-month period just prior to termination of the lease arrangement, the rent was one thousand dollars per month, which was paid in one lump sum at the beginning of this four-month period. The property was leased to Mr. Pasquale Pontillo during the period that landfilling operations were taking place. The four-month lease executed in 1970 also named Gerald and Marilyn Olgin as lessees. These individuals are named, along with Mr. Pontillo, in the instant DER order as parties responsible for abatement at the site. Mr. Pontillo was the party responsible for operation of the landfill, however.

On several occasions from 1966 through 1970, the Health Department notified Tenth Street that Mr. Pontillo was operating the landfill in violation of public health requirements. Upon receiving notice of this fact, Tenth Street would advise Mr. Pontillo that it intended to terminate the lease. On each occasion prior to 1970, however, Tenth Street agreed to continuation of the lease after urging by the city of Erie. In 1970 Tenth Street finally did terminate the lease, and landfill operations at the site ceased.

In the spring of 1983, Tenth Street was informed by DER that there were problems existing at the landfill site, which were manifesting themselves as certain chemical compounds present in the water in the vicinity of the site. During May and June of 1983, DER and the representatives of Tenth Street communicated at some length concerning these problems. In a letter dated June 24, 1983, Tenth Street's representative, Mr. Baldwin, advised DER that "it is our intention to properly close the site and have the necessary studies completed so that this can be accomplished properly." On November 9, 1984, Tenth Street sold the site to Mr. Pontillo for $1000.

In its post-hearing brief in support of the petition for supersedeas Tenth Street raises the argument that DER lacks the authority to issue the order with which this appeal is concerned and that, therefore, the order represents an abuse of DER's discretion. Thus, Tenth Street would have us conclude that it is likely to succeed on the merits of this appeal. Tenth Street discusses several statutory provisions; however, since we conclude that DER assuredly does have the power to issue the order, we need not discuss each of Tenth Street's contentions. It is sufficient if the order can be based upon a single grant of authority to DER, e.g., section 1917A of the Administrative Code, 71 P.S. §510-17, which provides in pertinent part:

> The Department of Environmental Resources shall have the power and its duty shall be:
>
> (1) To protect the people of this Commonwealth from unsanitary conditions and other nuisances, including any condition which is declared to be a nuisance by any law administered by the department;
>
> * * *
>
> (3) To order such nuisances including those detrimental to the public health to be abated and removed. (Emphasis added)

Tenth Street argues that this provision was not intended to apply to sites such as the subject landfill site since it claims that there has been no evidence that the Pontillo site either presents "unsanitary conditions" or is "detrimental to the public health." Putting aside for the moment Tenth Street's contention that the record does not demonstrate a threat to the public health, we note that DER could derive authority for issuance of the order from the emphasized portion of the quoted provision alone.

Section 401 of the Clean Streams Law, 35 P.S. §691.401 ("CSL"), upon which the order in part is based,[1] provides that:

> It shall be unlawful for any person or municipality to put or place into any waters of the Commonwealth, or allow or permit to be discharged from property owned or occupied by such person or municipality into any waters of the Commonwealth, any substance of any kind or character resulting in pollution as herein defined. Any such discharge is hereby declared to be a nuisance. (Emphasis added)

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[1] The order finds that §401 of the CSL was violated, but does not specifically cite §401 as authority for issuing the order. This omission is inconsequential. There is no requirement that the order specifically cite the definition of a nuisance in §401 in order for DER to rely upon that definition as authority for the order. §1917-A, supra, incorporates all laws administered by DER which declare certain conditions to be nuisances. See Ryan v. Commonwealth, DER, 30 Pa.Cmwlth. 180, 373 A.2d 475, n.6. The order at issue did cite §1917-A.

"Pollution", as defined in the CSL, 35 P.S. §691.1, includes:

> [C]ontamination of any waters of the Commonwealth such as will create or is likely to create a nuisance or to render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, municipal, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life . . .

Thus, any condition which threatens to or does create contamination such as that outlined in §691.1, supra, constitutes pollution and the discharge of such pollution to the waters of the Commonwealth is a nuisance within the meaning of §691.401. Where a nuisance exists, DER has the authority to order its abatement.

Given the foregoing, we must begin our analysis with an examination of whether pollution is being discharged from the site previously owned by Tenth Street. There is no dispute that the water present in the drainage swale which lies to the north of the site represents groundwater which has discharged from the site. Analyses of samples taken from the swale[2] reveal the presence of vinyl chloride, benzene and various other chemical compounds. The level of vinyl chloride on occasion has exceeded the National Academy of Sciences drinking water standard, as identified by DER's expert toxicologist, Dr. Sivarajah, during the hearing. In addition, the level has exceeded that which Tenth Street's expert toxicologist, Dr. Marshall, stated is recommended by the federal Occupational Safety and Health Administration, i.e., one part per million. Dr. Marshall noted that this limit is for exposure in an occupational setting and that it would be appropriate to apply lower permissible limits when dealing with the general public,

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[2] The fact that creation of the drainage swale by PennDOT may have revealed the presence of pollutants in the groundwater is irrelevant here. There is no indication that PennDOT did anything more than reveal the presence of a preexisting pollutional condition.

e.g., perhaps as much as one hundred times more stringent. (We, of course, are not bound by OSHA's standards).

Both vinyl chloride and benzene are known human carcinogens. There is no established threshold level for carcinogenicity for these two substances; theoretically, any amount can produce carcinogenic effects. In addition, some of the substances present in the water are teratogenic, that is, they are capable of causing birth defects. Dr. Sivarajah concluded that chronic exposure to the levels of substances present in the water in the drainage swale would create adverse health effects.

We have little difficulty concluding, based upon the facts stated above, that the water in the drainage swale is being contaminated with substances which "will create or [are] likely to create a nuisance or to render such waters harmful, detrimental or injurious to public health, safety or welfare," i.e., that there is "pollution" present, as defined in the CSL, 35 P.S. §691.1. Since this pollution is being discharged to the waters of the Commonwealth, i.e., Cascade Creek, a nuisance condition is present. 35 P.S. §691.401. DER therefore possesses the authority to order its abatement.

The issue now becomes whether, despite its statutory authority for the order, we would be likely to find that DER has abused its discretion by directing the order to Tenth Street. Tenth Street first argues that the facts will not support the order. It contends that the pollution present in the drainage swale is not derived from the Tenth Street site but, rather, from neighboring property known as the Currie site, which also had been used as a landfill, and with which Tenth Street apparently is not associated.

Tenth Street contends that the direction of groundwater flow in the vicinity of the two sites is such that much of the groundwater beneath the Currie

site flows beneath the Tenth Street site and eventually is discharged at the drainage swale. Thus, Tenth Street would have us conclude, the pollution present in the drainage swale derives from the Currie site and not from the Tenth Street site. Tenth Street bases this thesis upon its contention that the creation of the drainage swale by PennDOT altered the direction of groundwater flow in the area of the two sites.

Under the facts of this case, as developed so far, it is not reasonable to conclude that the Currie site is the sole, or even the primary, source of the pollutants present in the swale. The water in the swale is discharging from the Tenth Street site. Irrespective of the merits of Tenth Street's contention that creation of the swale altered the direction of groundwater flow, we may suppose, if only arguendo, that a portion of the groundwater beneath the Currie site flows beneath the Tenth Street site and is discharged at the swale, given the fact that the general direction of groundwater flow is to the north. (The testimony concerning the barrier effect of Pittsburgh Avenue is inconclusive.) The record reveals, however, that substantial amounts of precipitation can be expected to penetrate the Tenth Street site in a given year and be manifested in part as the discharge at the swale. Since the materials buried in the Tenth Street site are essentially the same as those buried within the Currie site (as far as has been determined to date) and since in both cases the disposal activities occurred over a long period of time and involved substantial amounts of waste, it is reasonable to conclude that at least part of the pollution present in the swale derives from the Tenth Street site.

Tenth Street's remaining arguments are legal. Its primary contention is that it is unfair for DER to direct the order to Tenth Street because Tenth Street did not operate the landfill and therefore cannot be said to have been at fault.

Given the existence of a nuisance as defined by §401 of the CSL, the issue which confronts us here is whether the former owner of the property upon which that nuisance exists can be held responsible for its abatement, despite the fact that it is not the party who actually created the nuisance. In deciding this issue, it first must be determined whether the former landowner could be held responsible if it had not transferred the land, since if there would be no liability absent the transfer we need not address the effect which the transfer would have. In this context we must examine the case law on the issue of liability for nuisance conditions.

The Pennsylvania Supreme Court has recognized that "a thing may be a public nuisance because it is so declared by statute . . . [or] it may be declared a nuisance as a matter of common law if, though not prohibited by statute, it unreasonably interferes with the rights of the public." Commonwealth v. MacDonald, 464 Pa. 435, 347 A.2d 290 (1975), cert.denied, 429 U.S. 816 (1976)(citing Commonwealth v. Barnes and Tucker Company, 455 Pa. 392, 319 A.2d 871 (1974) for the latter proposition). This statement is consistent with the rule of the Restatement (2d) of Torts, §821B which provides:

> Public Nuisance
>
> 1) A public nuisance is an unreasonable interference with a right common to the general public.
>
> 2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by statute, ordinance or administrative regulation
>
> * * *

The Pennsylvania courts have construed the CSL as embodying common law concepts of public nuisance and on occasion have determined a party's liability under that statute by relying upon the common law doctrine. Commonwealth v. Barnes and Tucker Company, 455 Pa. 392, 319 A.2d 871 (1974)(Barnes and Tucker I); Philadelphia Chewing Gum Corp. v. Commonwealth, DER, 35 Pa.Cmwlth. 443, 387 A.2d 142,149-50 (1978) (aff'd in part, dismissed in part sub nom. National Wood Preservers v. Commonwealth, DER, 489 Pa. 221, 414 A.2d 37 (1980) appeal dismissed, 449 U.S. 803). See also, Philadelphia Electric Company v. Hercules, Inc., 587 F.Supp. 144 (E.D.Pa. 1984) (rev'd on other grounds, No. 84-1159, slip op. (3rd Cir., May 28, 1985)).

In Philadelphia Chewing Gum, supra, the court concluded that §316 of the CSL, 35 P.S. §691.316, constituted an "implicit" declaration that the type of condition with which the court was there concerned, i.e., groundwater contamination, was a public nuisance. Accordingly, the court felt it appropriate to apply common law public nuisance doctrine to determine liability.[3] 387 A.2d 149-150. In the present matter, we are dealing with an explicit, rather than implicit, declaration that certain conditions are public nuisances, i.e., §401 of the CSL. Thus, it is not only useful but appropriate for us to refer to the common law to examine whether responsibility for the conditions at the site properly could be attributed to Tenth Street.

The liability of a landowner for a nuisance existing on its land which it did not create is, of course, precisely the issue which the court addressed in Philadelphia Chewing Gum. The court held that in such circumstances a landowner could be held liable if it either permitted or authorized the creation of the

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[3] On appeal, the Pennsylvania Supreme Court did not reach the issue of the application of common law theories to liability under §316, since it was simply addressing the constitutionality of §316 and not the analysis that the lower court had adopted.

condition on its land or knew or should have known of the existence of the condition, and associated itself with it in some positive aspect, beyond mere ownership or occupancy, after its creation. 387 A.2d 150.

Where the landowner had leased the property to the person responsible for the creation of the condition, the court required relatively little to meet this test. Liability was based upon the finding that the lessor should have known of the condition since it was existing on his land and upon the finding that he had positively associated himself with it by virtue of the leasehold agreement with the tenant and the tenant's successor in interest.

The facts of the present appeal are much more conducive to a finding of liability under this theory than the facts presented in Philadelphia Chewing Gum itself. Tenth Street certainly had ample reason to know that conditions on its property were potentially detrimental to the public health. It admits that it was informed on several occasions by the Erie County Health Department that Mr. Pontillo was not conforming his operation to public health requirements. Tenth Street also admits that on each of these occasions it gave serious consideration to terminating Mr. Pontillo's lease but that, until 1970, it decided to permit continued operation, after discussions with the city. There is no indication that the decisions by Tenth Street to allow continued operation were anything other than voluntary.

Thus, we conclude that Tenth Street may be held responsible for the creation of the nuisance under the authority of Philadelphia Chewing Gum. Tenth Street's association with the conditions created by Mr. Pontillo clearly went beyond those of the landowner in Philadelphia Chewing Gum, and, in any event, under the holding of that case, it appears that the existence of the leasehold

relationship alone would be sufficient.[4]

This conclusion is consistent with the statement of the court in Barnes and Tucker I, supra, that "the absence of facts supporting concepts of negligence, foreseeability or unlawful conduct is not the least fatal to the existence of a common law public nuisance." 319 A.2d at 883. The court also has stated, in what it termed an "analagous context", i.e., that presented to it on appeal from the Philadelphia Chewing Gum decision, that "the notion of fault is least functional . . . when balancing the interests of a property owner against the interests of a state in the exercise of its police power, because the beneficiary is not an individual but the community." National Wood Preservers, 414 A.2d at 46,n.18.

We now reach the issue of whether Tenth Street's transfer in 1984 of the property upon which the nuisance exists eliminates its responsibility for that condition. We conclude that Tenth Street retains responsibility. It has been held that DER has express, unconditional authority to order the abatement of nuisances and that this authority is not limited by the fact that the party responsible for the nuisance is no longer in possession of the property upon which the condition exists. Ryan v. Commonwealth, DER, 30 Pa.Cmwlth. 180, 373 A.2d 475 (1977). The authority exercised by DER in Ryan was §1917-A of the Administrative Code, and §401 of the Clean Streams Law, both of which are quoted supra. The court there stated that "[w]here there is statutory authority to order abatement of a nuisance, the fact that the nuisance is on the land of a stranger is no reason for not abating it." 373 A.2d at 478.

---

[4] Moreover, although it is not critical to our determination, we note that Tenth Street has expressed an indication that it intended to accept some degree of responsibility for the site prior to the transfer of the property to Mr. Pontillo. In a letter dated June 24, 1983 addressed to DER, Tenth Street's representative, Mr. Baldwin, stated that "it is our intention to properly close the site and have the necessary studies completed so that this can be accomplished properly."

A recent federal decision interpreting the CSL has construed the Ryan and National Wood Preservers decisions, supra, as indicating that the Pennsylvania Supreme Court, if given the opportunity, would adopt the rule of Section 840A of the Restatement (2d) of Torts which provides:

> A vendor or lessor of land upon which there is a condition involving a nuisance for which he would be subject to liability if he continued in possession remains subject to liability for the continuation of the nuisance after he transfers the land.

Philadelphia Electric Company v. Hercules, Inc., 587 F.Supp. 144 (E.D.Pa.1984) (rev'd on other grounds, No. 84-1159, slip op.(3rd Cir., May 28, 1985). We find this reasoning persuasive. It would be absurd to hold that Tenth Street, after being informed by DER in 1983 that there was a pollutional discharge from the site, could relieve itself of any responsibility for the discharge by selling the property in 1984 to Mr. Pontillo.

In addition, we reject Tenth Street's argument that it is likely to succeed on the merits of this appeal because DER acted unfairly in issuing the order; the unfairness, according to Tenth Street, stems from the allegation that there are more parties responsible for creation of the conditions existing on the site than those named in the order. At this stage of this proceeding, no case has been made out sufficient to demonstrate discriminatory enforcement of the law on the part of DER. Putting aside the substantial issue of whether this Board possesses the authority to order DER to exercise its discretion to prosecute certain individuals, we note that "mere laxity of enforcement by the authorities is not sufficient to establish an impermissible exercise of discrimination in the enforcement of the law." Kroger Co. v. O'Hara Township, 243 Pa.Super. 479, 366 A.2d 254,256 (1976); Philadelphia Chewing Gum Corp. v. Commonwealth, DER, 35 Pa.Cmwlth. 443, 387 A.2d 142,152 (1978).

Finally, we reject Tenth Street's contention that it is likely to succeed on the merits because DER failed to consider the economic impact of its action. The record reveals very little about economic considerations one way or another. At a supersedeas hearing, it would be Tenth Street's burden to demonstrate that there is a strong probability that DER indeed failed to consider such consequences. Nothing resembling such a showing has been made, even assuming DER had the duty to consider economic consequences of its order, which Tenth Street also has not shown.

O R D E R

WHEREFORE, this 1st day of November, 1985, it is ordered that Tenth Street's Petition for Supersedeas is denied.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: November 1, 1985

cc: Bureau of Litigation

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DER Western Region

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

J & W COAL COMPANY :

: Docket No. 85-242-M

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Snyopsis

This appeal of a compliance order issued by the Department of Environmental Resources (DER) is dismissed because it was not timely filed pursuant to 25 Pa. Code §21.52. The thirty day appeal period in 25 Pa. Code §21.52 began to run upon appellant's receipt of the compliance order, but this date is not in the record of this appeal. Appellant, however, is deemed to have admitted, pursuant to 25 Pa. Code §21.64(d), the allegation in DER's Motion to Dismiss that the appeal was filed more than thirty days from appellant's receipt of the compliance order because appellant failed to respond to DER's Motion to Dismiss and failed to respond to a Board order directing it to submit to the Board an affidavit specifying the date that it received DER's compliance order.

OPINION AND
ORDER
SUR MOTION TO DISMISS

On April 26, 1985, the Commonwealth of Pennsylvania, Department of Environmental Resources (DER) issued a compliance order to the J & W Coal Company (Appellant), and the same was mailed to Appellant by first class mail, postage prepaid on that date.

On May 15, 1985, Appellant requested an administrative conference to discuss the said compliance order.

On June 14, 1985, Appellant filed its notice of appeal with the Board.

On July 2, 1985 DER filed a Motion To Dismiss with the Board, alleging that Appellant's notice of appeal was filed more than thirty (30) days after receipt of the compliance order from DER.

Upon review of the notice of appeal filed with the Board, it was determined that Appellant had failed to include in its notice of appeal the date on which Appellant had received the compliance order from DER.

By notice dated October 15, 1985 the Board directed Appellant's counsel to provide to the Board within ten (10) days of receipt of the notice, by affidavit of Appellant, the date of receipt by Appellant of DER's compliance order.

On October 31, 1985, DER filed with the Board an amendment to Paragraph 3 of its Motion To Dismiss, which amendment conformed to the filing date of Appellant's notice of appeal with the Board, i.e., June 17, 1985.

Appellant has failed to respond to the Motion To Dismiss, the Amendment thereto, and the Board's notice.

Appellant has likewise failed to request an extension of time within which to file a response to DER's motion, or the Board's notice.

Under the provisions of 25 Pa. Code §21.64(d) the failure to respond to a properly filed motion renders the nonresponding party in default, and the Board may impose sanctions in accordance with the provisions of 25 Pa. Code §21.124, and "may include treating all relevant facts stated in such pleading or motion as admitted."[1]

Although the Board is empowered to dismiss this appeal pursuant to the provisions of 25 Pa. Code §21.124[2], we choose not to do so in this matter.

Rather, we choose the sanction of treating the relevant facts stated in the Motion to Dismiss filed by DER as admitted.

The relevant facts are as follows:

1. On April 26, 1985 DER issued the compliance order which is the subject of this appeal, and the said order was mailed to Appellant herein on the same date of April 26, 1985.

2. On May 15, 1985 Appellant requested an administrative conference with DER to discuss the DER order of April 26, 1985.

3. The instant notice of appeal was filed with this Board on June 14, 1985.

4. The filing date of June 14, 1985 was more than thirty (30) days after Appellant received the order.

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[1] 25 Pa. Code §21.64(d) Pleadings: generally.
"(d) Any party failing to respond to a complaint, new matter, petition or motion shall be deemed in default and at the Board's discretion sanctions may be imposed in accordance with §21.124 of this title relating to sanctions; such sanctions may include treating all relevant facts stated in such pleading or motion as admitted."

[2] The pertinent provisions of 25 Pa. Code §21.124 are:
"The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. Such sanctions may include the dismissal of any appeal. . . "

As can be noted, DER has not alleged the actual date of receipt of the contested order by Appellant.

In its notice of appeal Appellant admits receipt of the said compliance order, but the specific date of receipt is not provided by Appellant in the notice of appeal. Such information is required to be submitted to the Board in notices of appeal filed with the Board.[3] However, we need not, and do not, rule upon this deficiency in Appellant's notice of appeal for the reasons specified hereinafter.

Under the admitted facts, the Appellant had received DER's compliance order by May 15, 1985 since that date is when Appellant requested an administrative conference with DER to discuss the compliance order upon appeal. The record before the Board at this time does not contain sufficient information to allow the Board to establish a date of receipt prior to May 15, 1985 by Appellant of the compliance order of DER dated April 26, 1985. However, on May 15, 1985, Appellant did request an administrative hearing to discuss the said compliance order. (See Exhibit B, Notice of Appeal).

Since DER has alleged that the compliance order of April 26, 1985, was mailed to Appellant on April 26, 1985, and that the filing date of this appeal, on June 14, 1985, was more than thirty (30) days after Appellant had received the order, which allegations this Board may treat as admitted, we find that Appellant received the compliance order at some undetermined date prior to May 15, 1985, which date of receipt was in excess of thirty days prior to the date of filing of the notice of appeal with the Board.

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[3] 25 Pa. Code §21.51(d) provides:

"(d) Where the appellant has received written notification of an action of the Department, such notification shall be attached to the appeal.

In addition, under the provisions of 25 Pa. Code §21.52, the jurisdiction of the Board shall not attach unless the appeal "is filed with the Board within 30 days after the party appellant has received written notice" of the action of DER.

Having concluded that the notice of appeal was filed more than thirty (30) days after receipt of the order by Appellant, this Board is without jurisdiction to hear this appeal.

Under the provisions of 25 Pa. Code §21.52(a) the Board has no jurisdiction over appeals filed beyond thirty (30) days from receipt by Appellant of written notice of the action of DER. This provision has been adjudged a jurisdictional requirement by the Commonwealth Court so as to deprive the Board in such instance of jurisdiction to hear appeals which are filed untimely. Rostosky v. Commonwealth of Pennsylvania, Department of Environmental Resources, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976).

ORDER

AND, NOW, this 6th day of November, 1985, the Motion To Dismiss filed by DER is granted, and the appeal of J & W Coal Company at EHB Docket No. 85-242-M is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Anthony J. Mazullo Jr.

ANTHONY J. MAZULLO, JR., MEMBER

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation

For DER: Bernard A. Labuskes, Jr., Esq.
Central Region

For Appellant: Edward Kopko, Esq.
Pottsville, PA

DATED: November 6, 1985

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

GERALD W. WYANT :

:

: Docket No. 84-422-M

: Issued: November 6, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Synopsis

This is an appeal of an approval by the Department of Environmental Resources of a revision to a municipality's official sewage facilities plan. The appeal is dismissed because it was not timely filed pursuant to 25 Pa. Code §21.52, and because appellant has not alleged sufficient reasons for the allowance of an appeal nunc pro tunc.

OPINION
AND
ORDER

Pursuant to regulation, the Department of Environmental Resources (DER) caused to be published in the Pennsylvania Bulletin on January 14, 1984, its approval of a revision to the Official Sewage Facilities Plan of the Borough of Newry.

On December 17, 1984, Gerald W. Wyant (Appellant) filed a notice of appeal with the Board.

On September 20, 1985, the Borough of Newry (Permittee/Appellee) filed with the Board its Motion To Dismiss Appeal (Motion), and on October 15, 1985, Appellant filed its Appellant's Reply To Permittee's Motion To Dismiss (Reply).

In its Motion, Permittee alleges that the Board lacks jurisdiction to hear this appeal since the appeal was not filed within thirty (30) days of the date of publication of DER's action in the Pennsylvania Bulletin, pursuant to the provisions of 25 Pa. Code §21.52.

Under the provisions of 25 Pa. Code §21.52(a) "jurisdiction of the Board" does not attach unless the appeal is filed within thirty (30) days after publication in the Pennsylvania Bulletin.

In his reply, Appellant urges the Board to accept his appeal nunc pro tunc, or to dismiss the motion as untimely filed.

Other than a recitation of the various merits of his appeal, Appellant cites no legal reasons why the appeal should be allowed nunc pro tunc. The Board has issued numerous decisions wherein the standards for grant of an appeal nunc pro tunc have been established and, unfortunately for Appellant, those standards have not been alleged or met in this appeal.

As we stated in East Side Landfill Authority d/b/a East Side Sanitary Landfill v. DER, 1982 EHB 292:

> "To allow an appeal nunc pro tunc, the allowance must be based on extraordinary conditions and must involve fraud or some breakdown in the courts' operation through . . . default of its officers, whereby the party has been impaired."

1982 EHB 292, at 301, citing Township of Franklin, 2 Pa. Cmwlth, 496, 276 A.2d 549 (1971). We see no such conditions present in this appeal.

Appellant also alleges that the Motion is untimely pursuant to the provisions of 25 Pa. Code §21.64 and the Board's Pre-Hearing Order No. 1 issued December 31, 1984. The allegation is not specific and does not specify wherein and in what respects the Motion is untimely, and is therefore dismissed as being without merit.

The allegation of late filing by Appellant is of a jurisdictional nature, and the record reveals that the appeal was indeed filed after more than thirty (30) days had elapsed from the date of publication in the Pennsylvania Bulletin. It is well established that this Board is without jurisdiction to hear an appeal which has been filed untimely. Rostosky v. Commonwealth of Pennsylvania, Department of Environmental Resources, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976).

Accordingly, the appeal cannot be sustained.

ORDER

AND, NOW, this 6th day of November, 1985, upon consideration of the Motion To Dismiss this appeal filed by Permittee/Appellee herein, and the Reply filed by Appellant, the appeal of Gerald W. Wyant, at EHB Docket No. 84-422-M is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Anthony J. Mazullo Jr.

ANTHONY J. MAZULLO, JR., MEMBER

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation

For DER: George Jugovic, Jr., Esq.
Central Region

For Appellant: J. Randall Miller, Esq.
Altoona, PA

For Permittee: Terry R. Bossert, Esq.
McNees, Wallace & Nurick
Harrisburg, PA

DATED: November 6, 1985

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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FRANKLIN TOWNSHIP BOARD OF SUPERVISORS, et al. : Docket No. 84-403-M

Issued: November 12, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR PETITION TO INTERVENE

Synopsis

Petitioner's motion to intervene in the appeal of a DER denial of a landfill operator's application for the reissuance of a solid waste permit is denied. Here DER denied the permit under the Solid Waste Management Act, 35 P.S. §6018.503(c) and (d). Petitioners have failed to meet their burden of proof as outlined in the EHB Rules of Practice and Procedure, 25 Pa. Code §21.62, and the General Rules of Administrative Practice and Procedure, 1 Pa. Code §35.28. There has been no showing by Petitioners that their interests are both relevant and inadequately represented by the present parties. Petitioner's intervention here would not be in the public's interest and would only lead to unnecessary proliferation and confusion of issues.

OPINION

Delta Excavating and Trucking Company, Inc. (Delta) has appealed from a denial by the Department of Environmental Resources (DER) of Delta's application for the reissuance of solid waste permit number 1101105 (Landfill Acres Permit). The Landfill Acres Permit was denied by DER under the Solid Waste Management Act, 35 P.S. §6018.503(c) and (d). Under §6018.503(d), DER found that Delta was in violation of an earlier consent Order. Under §6018.503(c), DER found that Delta had an unsatisfactory record of compliance with environmental laws and regulations. DER also based its denial on the grounds that the physical conditions of the site were inappropriate for a landfill. On September 20, 1985, Jerome Green, Thomas Matko, Richard Hoover, John Shade, Donald E. Kimberling, and Blair County Independent Haulers Association (Petitioners) filed a Petition to Intervene in the above-captioned matter. Petitioners seek to present evidence in this matter that the denial of the Landfill Acres Permit will (a) have an adverse economic impact upon independent haulers in the Blair and Huntingdon County areas, (b) have an adverse impact upon the general health and welfare of the Blair and Huntingdon County areas, and (c) impair existing contracts between certain of the Petitioners and Delta. DER has motioned to dismiss the Petition to Intervene. Delta has responded stating its wish that the Petition to Intervene be granted. Having fully considered the facts and issues as alleged by Petitioner, we hereby deny the Petition to Intervene in the above-captioned matter.

The question of intervention in a case before the Environmental Hearing Board (EHB) is primarily governed by the EHB Rules of Practice and

Procedure, specifically 25 Pa. Code §21.62[1], and the General Rules of Administrative Practice and Procedure, specifically 1 Pa. Code §35.28[2], and the case law interpreting these statutes. Intervention is discretionary

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[1] 25 Pa. Code §21.62 (in pertinent part)

(a) Petitions for leave to intervene in any proceeding before the Board shall be filed prior to the initial presentation of evidence in such proceeding and shall set forth the specific grounds for the proposed intervention, the position and interest of the petitioner in the proceeding and a statement of the reasons why said interest is or may be inadequately represented in such proceeding.

(b) Intervention is discretionary with the Board and shall be subject to such terms and conditions as the Board may prescribe.

(c) The Board shall not deny the right to intervene on the basis that the proposed intervenor does not have a proprietary interest affected by the action appealed.

[2] 1 Pa. Code §35.28

(a) Persons. A petition to intervene may be filed by any person claiming a right to intervene or any interest of such nature that intervention is necessary or appropriate to the administration of the statute under which the proceeding is brought. Such right or interest may be any one of the following:

(1) A right conferred by statute of the United States or of this Commonwealth.

(2) An interest which may be directly affected and which is not adequately represented by existing parties, and as to which petitioners may be bound by the action of the agency in the proceeding. The following may have such an interest: consumers, customers, or other patrons served by the applicant or respondent; holders of securities of the applicant or respondent; employes [sic] of the applicant or respondent; competitors of the applicant or respondent.

(3) Any other interest of such nature that participation of the petitioner may be in the public interest.

(b) Commonwealth. The Commonwealth or any officer or agency thereof may intervene as of right in any proceeding subject to the provisions of this part.

with the EHB and is subject to such terms and conditions as the Board may prescribe. 25 Pa. Code §21.62(b). Although not exclusive, the EBH considers these factors in ruling upon a petition for intervention: (1) the prospective intervenor's precise interest, Campbell et al. v. DER, 1980 EHB 338; (2) the adequacy of representation provided by the existing parties to the proceeding, Township of Middle Paxton v. DER, 1980 EHB 483; (3) the nature of the issues before the Board, Campbell et al v. DER, 1980 EHB 338; (4) the ability of the prospective intervenor to present relevant evidence, Campbell et al. v. DER, 1980 EHB 521; and (5) the effect of intervention on the administration of the statute(s) under which the original proceeding is brought, DER v. U. S. Steel, 1975 EHB 449. See also Charles H. Koch, Jr., Administrative Law and Practice, §5.16 (1985).

Intervention is a matter completely within the discretion of the Board. 25 Pa. Code §21.62(b), See also U. S. Steel v. DER, 1975 EHB 451. The standing necessary to initiate an administrative action and the standing necessary for intervention are not the same. George Campbell et al. v. DER, 1980 EHB 521. The standards which must be met for the purpose of intervention are less substantial than those required for standing to appeal. Campbell et al., supra. A party seeking leave to intervene need not show that it would have had the standing to file the original appeal. Middle Paxton Township v. DER, 1980 EHB 483; see also Campbell et al., supra. However, the prospective intervenor must show that its interests are relevant and will not be adequately represented by another who is already a party to the case. Middle Paxton, supra. This burden is on the prospective intervenor. Sunny Farms LTD v. DER, 1982 EHB 442. The Board's policy is to liberally grant intervention to parties having substantial, immediate, and direct interests in the outcome of a matter before the Board. Al Hamilton Contracting Co. v. DER, 1982 EHB 387. Also, per 1 Pa. Code §35.28(a)(3), the Board will grant

intervention where it would be in the public interest. However, the corollary to 1 Pa. Code §35.28(a)(3) is that the Board will not grant intervention where it will not be in the public interest, such as where intervention would overly broaden the scope of the original appeal.

The EHB here finds that Petitioners have not met their burden of proving that their interests are relevant and would be inadequately represented before the Board. The economic impact of the Landfill Acres Permit denial upon Petitioners as outlined in their petition is not directly nor substantially relevant to the above-captioned matter. Petitioner's contractual interests and obligations as to Delta are not cognizable before the Board. To the extent that Petitioners do have an interest in having a landfill provided to them through the approval of the Landfill Acres Permit, that interest is more than adequately represented by Delta. The particular issues raised here by DER's denial of the Landfill Acres Permit are primarily related to the particular site involved and Delta's abilities and qualifications to operate a landfill on that site. The Board sees no reason to believe that Petitioners have any greater ability to present relevant evidence on these issues than Delta. Intervention in this matter would not benefit the EHB as the trier of fact. See, Sunny Farms LTD, supra. Intervention here would merely lead to a proliferation and confusion of issues through the introduction of irrelevant evidence and testimony which would impede the Board's hearings and deliberations.

ORDER

AND NOW, this 12th day of November , 1985, it is hereby ORDERED that the Petition to Intervene of Jerome Green, Thomas Matko, Richard Hoover, John Shade, Donald Kimberling, and the Blair County Independent Haulers Association is denied.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo Jr.

ANTHONY J. MAZULLO, JR., MEMBER

DATED: November 12, 1985

cc: Bureau of Litigation

For the Commonwealth, DER:
James Morris, Esquire
Eastern Region

For Franklin Township:
Robert B. McKinstry, Jr., Esq.
David G. Mandelbaum, Esq.

For Delta:
John F. Stoviak, Esq.
Michael Krancer, Esq.

For Petitioning Intervenors:
Jack M. Stover, Esq.

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COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

FUEL TRANSPORTATION CO., INC.

Docket No. 85-360-M

Issued: November 13, 1985

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Synopsis

This appeal is dismissed because it was not timely filed pursuant to 25 Pa. Code §21.52, and the appellant's failure to mail the Notice of the Appeal to the proper address does not warrant the Board's allowing an appeal Nunc pro tunc.

OPINION AND ORDER

This is an appeal from an order of the Department of Environmental Resources (DER) issued under the Clean Streams Law, 35 P.S. §§691.1 et seq., which appellant admits it received on July 24, 1985. On August 14, 1985, appellant mistakenly filed its Notice of Appeal with DER's Bureau of Litigation rather than with this board. After realizing its mistake, appellant filed a Notice of Appeal with the board on August 29, 1985. DER has moved to dismiss this appeal for lack of jurisdiction. DER's motion to dismiss is granted because this appeal was not filed with this board within thirty days after appellant received notice of DER's action, as required by 25 Pa. Code §21.52(a). This board has no jurisdiction over untimely appeals. Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976).

Appellant has requested that the board grant it an appeal nunc pro tunc, although appellant has not averred any circumstances that would warrant the granting of an appeal nunc pro tunc. The appeal was untimely because appellant filed it at the wrong address, even though the board's correct address was on both the order from which the appeal was taken and the appeal form itself. The board only allows appeals nunc pro tunc when fraud or some breakdown in the operations of the board has caused the delay in filing the appeal, Petricca v. DER, 1984 EHB 519, East Side Landfill Authority v. DER, 1982 EHB 299. Appellant's failure to mail the Notice of Appeal to the proper address in light of the order's inclusion of the correct address cannot justify an appeal nunc pro tunc.

ORDER

AND NOW, this 13th day of November, 1985, the appeal of Fuel Transportation Co., Inc., at EHB Docket No. 85-360-M, is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR., MEMBER

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation

Kenneth A. Gelburd, Esq./DER Eastern

Alfred Francis Shea, Esq./For Appellant

DATED: November 13, 1985

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

BRADFORD COAL COMPANY, INC. :

: Docket No. 85-278-M
: Issued: November 13, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Synopsis

This appeal is dismissed because it was not timely filed pursuant to 25 Pa. Code §21.52.

OPINION AND ORDER

The Department of Environmental Resources (DER) hand delivered a Compliance Order to Bradford Coal Company, Inc. on June 3, 1985. Bradford filed an appeal with this board from this Compliance Order. The board received Bradford's Notice of Appeal on July 5, 1985, thirty-two days after Bradford received the Compliance Order. DER filed a Motion to Quash this appeal for untimeliness. In response to DER's motion, Bradford argued that it mailed the Notice of Appeal from Clearfield on July 2, 1985, that mail from Clearfield consistently takes only one day to arrive in Harrisburg, and that the reason it took longer in this case was that mail service was probably disrupted by the July 4th holiday.

The board's rule, 25 Pa. Code §21.52(a), requires that parties file appeals with the board within thirty days after they receive notice of DER's action. This requirement is mandatory, and the board simply has no jurisdiction over untimely filed appeals. Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). Furthermore, 25 Pa. Code §21.11(a) and Rostosky make it clear that the date of receipt by the board is determinative of timeliness, and not the claimed date of mailing. Petricca v. DER, 1984 EHB 519. Therefore, the board grants DER's Motion to Quash.

ORDER

AND NOW, this 13th day of November, 1985, the appeal of Bradford Coal Company at EHB Docket No. 85-278-M is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Anthony J. Mazullo Jr.

ANTHONY J. MAZULLO, JR., MEMBER

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation

Timothy J. Bergere, Esq./DER Central
Dwight L. Koerber, Jr., Esq./For Appellant

DATED: November 13, 1985

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

BETTY SIMPSON :

:

: Docket No. 85-214-G

: Issued November 21, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and C & K COAL COMPANY, Permittee
and BROWNING-FERRIS INDUSTRIES OF PA., INC.,
Intervenor
and CITY OF PHILADELPHIA, Intervenor

OPINION AND ORDER

SYNOPSIS

Although Simpson's pre-hearing memorandum, even after amendment, is not wholly satisfactory, the Board does not believe it would be useful to require Simpson to file yet another amended pre-hearing memorandum at this time. Rather, the other parties are ordered to file their pre-hearing memoranda, accompanied by suitable motions to limit the issues. Because Simpson definitely has standing to pursue her complaint that application of sewage sludge under the appealed-from permit will subject her to noxious odors, and because a hearing on the merits of this complaint probably will be necessary, the Board's choice of procedure should facilitate--not delay--ultimate resolution of this matter.

OPINION

On September 17, 1985, this Board issued an Opinion and Order in this matter, granting Simpson standing to pursue her allegation that operation of the appealed-from permit for application of sewage sludge will subject her to noxious odors. Our September 17 Order also offered Simpson the opportunity--via filing of an amended pre-hearing memorandum--to justify her pursuit of complaints other than her aforesaid complaint about noxious odors.

Simpson now has filed this amended (titled "Final") pre-hearing memorandum. In addition to her odor complaint, she mainly complains that application of the sludge will affect her water supply and threaten her food supply. However, her allegations in these regards remain largely conclusory and in many respects vague. The Board is uncertain whether Simpson is complaining that DER has violated applicable regulations, or is alleging that the applicable regulations--though complied with by DER--are insufficient to adequately protect her water and food supplies. Where Simpson does allege specific violations of regulations, e.g., violations of regulations in 25 Pa.Code Chapter 75, Simpson typically has not explained why those regulations are applicable to the instant appeal.

Nevertheless, the Board does not feel that forward progress on this appeal will be advanced by requiring Simpson to file yet another pre-hearing memorandum (we have had three all told, including a memorandum clarifying Simpson's standing to appeal). Simpson does have standing to raise her odor complaint; on this issue, at least, a hearing on the merits probably will be needed.

Therefore, the other parties, including the Intervenors, are ordered to file their pre-hearing memoranda in compliance with our Pre-Hearing Order No. 1, as best they can. These pre-hearing memoranda may be accompanied by motions to limit the issues in this appeal because, e.g., the regulations allegedly violated

by DER are not applicable, or under paragraph 4 of Pre-Hearing Order No. 1, which reads:

> 4. A party may be deemed to have abandoned all contentions of law and fact not set forth in its pre-hearing memorandum. . .

All such motions must be justified specifically, of course. The time for Simpson's reply to such motions is specified in paragraph 4 of our Pre-Hearing Order No. 2; under the precept of 1 Pa.Code §31.2, the Board reserves the right to allow Simpson to once again amend its pre-hearing memorandum before ruling on those motions.

The Board will specify the precise restrictions on the Intervenors' participation in the hearing on the merits of this matter after the Board has received the pre-hearing memoranda called for above, and has ruled on the accompanying motions, if any. In the meantime the Board believes the time has come to reexamine Simpson's petition for supersedeas, for reasons explained in the last paragraph of our September 17, 1985 Opinion.

O R D E R

WHEREFORE, this 21st day of November, 1985, it is ordered as follows:

1. Within twenty (20) days of the date of this Order, all parties and Intervenors (other than Simpson) are to file their pre-hearing memoranda, and accompanying motions if any, consistent with the discussion in the accompanying Opinion.

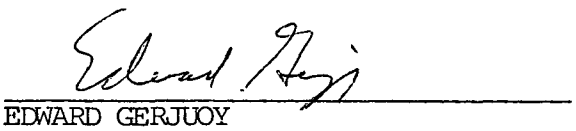
2. About five days after receipt of this Order, Simpson is to contact the Board for the purpose of arranging a telephone conference call to discuss:

a. Scheduling the hearing on the merits.

b. Whether a hearing on the supersedeas petition should be scheduled.

c. Any needed clarification of this Opinion.

ENVIRONMENTAL HEARING BOARD



EDWARD GERJUOY
Member

DATED: November 21, 1985

cc: Bureau of Litigation
David R. Crowley, Esquire
Joseph K. Reinhart, Esquire
Howard J. Wein, Esquire
Henry Ray Pope III, Esquire
Lois Reznick, Esquire
Deborah A. G. Golden, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

DEL-AWARE UNLIMITED, INC. : Docket No. 84-361-G

: Issued November 21, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

and PHILADELPHIA ELECTRIC COMPANY, Permittee

OPINION AND ORDER

SYNOPSIS

The Board defers its final ruling upon the permittee's Motion to Dismiss this appeal pending review of amended allegations made by Appellant in response to the accompanying Order. The Appellant has a substantial interest in the subject matter of this appeal, i.e., the issuance of an NPDES permit to the permittee. The Appellant, however, must also demonstrate that its interest is immediate and direct, i.e., a causal connection between its interests and the challenged action. In order to make a final determination concerning the Appellant's standing, the Board must know whether the Appellant is asserting that the statutory or regulatory scheme applied by DER was violated or if it is claiming that such scheme is simply inadequate to protect the Appellant's interests, despite being applied as it was intended

to be. If the Appellant is claiming that there have been statutory or regulatory violations and it can establish that its interests are among those which this statutory or regulatory scheme was designed to protect, then it need not set forth specific allegations tending to show a causal connection between the challenged action (the permit issuance) and the alleged harm which will result to the Appellant's interests since a violation of the statute or regulation would be equivalent to harm to the Appellant's interests. If, however, the Appellant intends to assert that the statutory or regulatory scheme is inadequate to protect its interests, then it must set forth specific allegations tending to establish a causal connection between the inadequate regulation or statute and the harm which the Appellant believes will result to its interests.

* * *

I. INTRODUCTION

This appeal concerns the issuance of a National Pollutant Discharge Elimination System (NPDES) permit to the Philadelphia Electric Company by the Pennsylvania Department of Environmental Resources ("DER"). The permit authorizes discharge of water from the Limerick nuclear power generating facility, operated by the permittee, to the Schuylkill River. The appeal has been filed by a citizens' group, Del-Aware Unlimited.

A Motion to Dismiss for lack of standing has been filed by the permittee. In an Opinion dated May 13, 1985, entered at this docket number, the Board provisionally granted Del-Aware standing, subject to the presentation of evidence substantiating Del-Aware's allegations concerning standing. A hearing for the purpose of taking such evidence was held on May 17, 1985, at

which time several of Del-Aware's members testified to their interests in and use of the Schuylkill River. At the close of the hearing the Board gave the parties opportunity to file memoranda of law addressing the issue of Del-Aware's standing. For reasons which need not be detailed here, these memoranda have not been filed. The Board has determined that it would be in the interests of all concerned for the Board to set forth in detail the requirements it expects Del-Aware to meet in order to establish its standing given the factual circumstances of this appeal. To the extent that our rulings herein appear to differ from those of our Opinion of May 13, 1985, or from statements we made at the May 17, 1985 hearing, this Opinion controls; any apparent inconsistencies may be attributed to the Board's previous failure to clarify the significance the Board assigns to the types of legal allegations which Del-Aware may be intending to assert in this appeal.

II. GENERAL REQUIREMENTS FOR STANDING

In our Opinion of May 13, 1985 we held that the doctrine of representational standing applies in Pennsylvania, permitting an organization or association to bring an action in its own name if it or any one of its members is suffering or likely to suffer "immediate or threatened injury resulting from the challenged action sufficient to satisfy the William Penn Parking Garage standard." American Bookseller's Association, Inc. v. Rendell, 481 A.2d 919, 927 (Pa.Super.1984). See also, Tripps Park Civic Association v. Pennsylvania PUC, 42 Pa.Cmwlth.317, 415 A.2d 967 (1980).

The William Penn standard to which the Rendell Court made reference is, of course, that set forth in William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). Under the Penn standard a litigant must have a "substantial, immediate and direct interest" in the subject matter of the litigation. Thus, in order to establish standing in

this matter, Del-Aware must demonstrate either that it, as an organization, has an interest meriting standing, or that some one or more of its members has such an interest.

The case law of this Commonwealth permits a party to base its standing upon ownership of property adjacent to the parcel of land or body of water which allegedly will be affected by the challenged action. Community College of Delaware County v. Fox, 20 Pa.Cmwlth.335, 342 A.2d 468 (1975). In particular, where the action at issue has the potential for affecting a stream or river, a person who owns land on the banks of the waterway has the requisite interest to establish standing. Committee to Preserve Mill Creek v. Secretary of Health, 3 Pa.Cmwlth. 200, 281 A.2d 468 (1971).

Where there is no ownership interest in adjacent land, however, standing may be considerably more difficult to establish. In our earlier opinion we recognized that recreational use of a public natural resource may be sufficient to satisfy the William Penn standard. Indeed, the Penn Court itself recognized that "some interests will suffice to confer standing even though they are neither pecuniary nor readily translatable into pecuniary terms." 346 A.2d at 281. In light of this statement, we concluded that a citizens' group can establish a "substantial" interest under Penn, i.e., one which is distinct from that of the general public, if, for example, it demonstrates that its members make substantial use of the public resource which allegedly is threatened by the challenged action.

Even if the citizens' group can establish a substantial interest, however, it still must demonstrate that the interest is both "direct" and "immediate" under the Penn test. These latter two requirements concern the causal connection between the actions challenged and the alleged harm. In our May 13, 1985 Opinion, we explained that this would require a showing of a

not-too-remote causal connection between the discharge allowed by the NPDES permit and the detrimental effects upon the Schuylkill which Del-Aware alleges.

III. THE ESTABLISHED FACTS CONCERNING APPELLANT'S INTERESTS

The facts put on the record at the evidentiary hearing of May 17, 1985 are as follows. No member of Del-Aware was shown to be the owner of property along the banks of the Schuylkill River. Although one member of Del-Aware, Mr. Simone, is the president of a boat club which owns property along the river, it is not he who holds the ownership interest and the boat club is not a member of Del-Aware. Thus, we conclude that no riparian interest has been demonstrated.

Several members of Del-Aware use the river for a variety of recreational purposes. Mr. Simone uses the river on nearly a daily basis for rowing. As a consequence of this use he often finds himself exposed to the water of the river directly, as when he must enter the river to retrieve lost equipment or simply by being splashed with the water as he rows. This individual is concerned that he will suffer adverse health effects from the contacts with the river, because of the harmful substances which allegedly will be introduced into the river at the permittee's facility; he also fears that these harmful substances will degrade his equipment. In addition, he is concerned that eutrophication (low levels of dissolved oxygen) may result from temperature increases caused by the discharge from the permittee's facility. [The boat club and the area of the river utilized by this individual for his recreational rowing are approximately fifty miles downstream from the point of the contested discharge (N.T. 48). The NPDES permit sets temperature restrictions for the discharge.]

Another member of Del-Aware picnics along the banks of the river approximately four times per year, walks along the banks perhaps more frequently, and generally derives aesthetic enjoyment from the view of the river as she drives alongside it several times a month.

A third member of Del-Aware frequently fishes in the river, i.e., once or twice per week. She also sails the river occasionally and in this process is splashed with the river water. She believes that the water she receives from the municipal water authority is taken from the Schuylkill River. This is the water she consumes in her home.

Del-Aware's president frequently walks along the river. She testified that many members of the organization make recreational use of the Schuylkill for fishing, swimming, water-skiing and boating on a regular basis, and that Del-Aware itself, as a representative of its members, has an interest in the effect upon the river caused by the contested discharge. She also testified that several members drink Schuylkill water.

Finally, a member of Del-Aware has made a documentary film concerning wildlife, including the wildlife which exists in and around the Schuylkill. She expressed concern that degradation of the water quality as a result of the contested discharge would adversely affect this wildlife. In addition, this individual bicycles along the river three or four times per year.

IV. HAS APPELLANT DEMONSTRATED A SUBSTANTIAL, IMMEDIATE AND DIRECT INTEREST?

A. Substantial Interest

The first question to be addressed is whether Del-Aware has satisfied the "substantial" interest prong of the William Penn test, i.e., whether its interest has been shown to be distinct from the abstract interest of the general public in securing compliance with the law relevant to this appeal.

Unless the interest is substantial there is no need to inquire whether it is immediate and direct. It is quite clear that at least one member of Del-Aware, Mr. Simone, has an interest distinct from that of the general public. In addition, the Board has concluded that members who drink Schuylkill water or who frequently fish in the river, or who enjoy occasional (but not rare) walks along the river have demonstrated a substantial interest in maintenance of the river as a natural resource. The fact that they share this interest with a very large body of persons does not detract from this finding. The Pennsylvania Supreme Court has stated that the requirement that the litigant's interest be substantial "is not intended to bar from relief persons injured by breach of a public duty merely because many others have incurred similar injuries as a consequence of that breach." Carlino v. Whitpain Investors, 499 Pa. 498, 453 A.2d 1385, 1387 (1982).

B. Immediate and Direct Interest

Thus, the issue before us is whether Del-Aware's alleged injuries to its aforementioned substantial interests also meet the "immediate" and "direct" prongs of the William Penn test, i.e., whether there is a sufficient causal connection between these interests and the challenged DER action. On our review of the pleadings filed to date, and of the arguments made during the evidentiary hearing, we still are uncertain whether Del-Aware is able to meet these "immediate" and "direct" prongs. In this appeal, our evaluation of Del-Aware's attempts to meet these prongs cannot ignore the existence of a comprehensive statutory and regulatory scheme designed to protect the waters of the Commonwealth from degradation, enacted by the Legislature and duly promulgated by the Environmental Quality Board ("EQB"), the Clean Streams Law ("CSL"), 35 P.S. §691.1 et seq., and regulations in, e.g., 25 Pa. Code Chapters 92 and 93. We have been unable to decide whether Del-Aware is

claiming that DER failed to comply with the regulations in this regulatory scheme, or is claiming (explicitly or implicitly) that its substantial interests in the Schuylkill will be injured even though DER has complied fully with applicable regulations, or is making both these claims. This question about the nature of Del-Aware's claims must be more fully elucidated before we can make a definitive ruling on Del-Aware's standing, since its answer bears significantly upon the type of showing necessary in order to demonstrate a "direct" and "immediate" interest.

In determining the type of showing which an appellant must make in order to demonstrate an immediate and direct interest, it is helpful to examine the burden of proof the appellant would have to meet to prevail on the merits of its appeal once standing has been gained. Where the appellant maintains that there has been a violation of an applicable regulation, its burden differs significantly from that which would have to be met where the claim is that the regulatory scheme is inadequate. If the appellant is attempting to show that the regulatory scheme is inadequate, it must prove that it will suffer some type of injury despite error-free application of all pertinent regulations. Where, however, an appellant is maintaining that a regulation has been violated by, e.g., DER, its burden is considerably less. It need only show that the standard set forth in the regulation has not been met. It need not go further and demonstrate that the failure to

meet the standard will result in harm to itself.[1]

The reason for this difference is clear: when the EQB promulgates a regulation it does so only after considerable study and analysis. The presumption exists that regulations which have been properly promulgated by the EQB, especially regulations which are part of a comprehensive regulatory scheme, are necessary and sufficient to protect the environmental resource to which they are addressed. It is implicit, therefore, that a violation of any such regulation will result in harm to that resource; there is no need for the appellant to recapitulate the analysis which led the EQB to that conclusion. Commonwealth, DER v. Locust Point Quarries,

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[1] The Pennsylvania courts have on numerous occasions held that DER is obliged to comply with the regulations which the EQB has established. Issuance of the instant NPDES permit would be an abuse of discretion if it is shown that the permit did not comport with EQB regulations, whether or not Del-Aware is able to prove that this failure to comply with the regulations would result in degradation of the Schuylkill. U.S. Steel Corp. v. DER, 65 Pa.Cmwlth.103, 442 A.2d 7 (1982); East Pennsboro Township Authority v. DER, 18 Pa.Cmwlth.58, 334 A.2d 798 (1975); U.S. Steel v. DER, 1980 EHB 1 (Adjudication dated January 4, 1980).

This general rule is not inconsistent with a ruling that easily correctable, environmentally inconsequential violations of regulations should simply be corrected as an alternative to overturning the permit issuance. In addition, it is not inconsistent with rulings that: i) an appellant lacks standing to raise the alleged violation; ii) that the regulation is inapplicable; or iii) that the appellant has waived its opportunity to raise the issue of the alleged violation. Coolspring Township v. DER, 1983 EHB 151 (Adjudication dated August 8, 1983); Robert and Florence Porter v. DER, Docket No. 84-240 (Opinion and Order dated September 13, 1985).

483 Pa. 350, 396 A.2d 1205 (1979); Coolspring Township v. DER, 1983 EHB 151 (Adjudication dated August 8, 1983).[2] In short, causation of harm can be presumed once it is established that a regulation has been violated. On the other hand, an appellant who wishes to establish that a comprehensive regulatory scheme is inadequate does not have the advantage of such a presumption, and thus bears the much heavier burden of proving that harm will result despite the regulatory scheme's application in the fashion of EQB intended.

C. Standing to Allege a Regulatory Violation

Returning now to the requirements for standing, evidently it would be illogical, as well as fundamentally unfair, to make an appellant's burden of demonstrating standing to raise a regulatory violation heavier than its burden of proving the regulatory violation; moreover, any such requirement often would more severely limit standing than the William Penn or Carlino courts, supra, seem to have intended. In particular, Del-Aware should be able to gain standing to pursue a claim that an (already established) substantial interest will be harmed merely by alleging that DER has violated a

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[2] We are aware that any regulatory violations Del-Aware alleges actually may produce only very small effects on, e.g., pollutant concentrations in the Schuylkill at the location -- fifty miles downstream from the discharge--where Mr. Simone does his rowing. Nevertheless, the general rule stated supra (see note 1) must be faithfully adhered to, and with good reason. As argued by Del-Aware during the May 17, 1985 hearing, if the instant discharge were to be allowed despite regulatory violations because the adverse effects on the Schuylkill seem small, and if the next appealed-from discharge were to be allowed for the same reason, soon enough the Schuylkill will have accumulated far from small adverse effects, possibly even at points far downstream from all allowed discharges. The EQB did not intend, and neither the Pennsylvania courts nor this Board can allow, any proved violation of a regulation intended to protect the environment on the excuse that in the case at hand the adverse environmental consequences of the violation seem unimportant.

regulation designed to protect this substantial interest. The William Penn "immediate" and "direct" causation requirements are satisfied by the aforementioned presumption that violation of an environmental regulation will cause harm to the environmental interest the regulation was designed to protect. Requiring Del-Aware, in order to gain standing, to make any sort of showing that there is a not-too-remote causal connection between the alleged regulatory violation and harm to Del-Aware's substantial interests would be illogical and fundamentally unfair if, at the hearing on the merits of its appeal, Del-Aware would not be required to make any showing that such harm will be caused.

Under federal precedent, a plaintiff who has alleged an "injury in fact" will have standing if it can show that "the interest the plaintiff seeks to protect is arguably within the zone of interests sought to be protected by the statute or constitutional guarantee in question." Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 153 (1970). In the instant appeal, therefore, the foregoing statement of Del-Aware's burden of demonstrating standing to raise an alleged regulatory violation is equivalent to the assertion that Del-Aware can gain standing to raise the alleged violation if it can convince the Board that--for Del-Aware's established substantial interests--the regulation in question meets the "zone of interests" test. Moreover, expressing Del-Aware's burden of gaining standing to raise an alleged regulatory violation in terms of the "zone of interests" test is consistent with recent Pennsylvania Supreme Court decisions, which have used the "zone of interests" test to decide various complainants' standing to allege statutory and regulatory violations. Upper Bucks County Vocational-Technical School Education Association v. Upper Bucks County Vocational Technical School Joint Committee, 504 Pa. 418, 474 A.2d 1120, 1122 (1984). In Re El Rancho Grande, 496 Pa. 496, 437 A.2d 1150, 1154 (1981).

In other words, the conclusion to which our discussion, supra, has led us--namely that once Del-Aware has shown it has substantial interests which allegedly will be harmed by DER's alleged regulatory violation, meeting the zone of interests test for standing to raise the regulatory violation is equivalent to meeting the "immediate" and "direct" prongs of the William Penn test--appears to be good Pennsylvania law.

D. Standing to Allege Inadequacy of the Regulations

We already have explained that an appellant who claims a comprehensive regulatory scheme is inadequate to protect its substantial interests bears the burden of proving (at the hearing on the merits) that harm will result even though the regulatory scheme has been correctly applied. Correspondingly, there is no logical reason, nor any basis in fundamental fairness, to relieve such an appellant of its normal burden of meeting the William Penn "immediate" and "direct" prongs in order to gain standing. Before we can follow up on this conclusion, however, we must decide whether Pennsylvania precedents[3] like Upper Bucks County and El Rancho Grande, supra, require us to employ the zone of interests test when an appellant is alleging that a comprehensive regulatory scheme is inadequate to protect its substantial interests; under the zone of interests standard an appellant seeking standing does not have to set forth specific factual allegations which could support a not-too-remote causal connection between the challenged action and the alleged harm to the appellant's substantial interests.

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[3] As explained in our May 13, 1985 Opinion and Order at this docket number, we are bound by Pennsylvania standing law, not federal. See also Porter, supra.

We do not believe that Pennsylvania standing law requires us to employ the zone of interests test when an appellant such as Del-Aware is alleging that its substantial interests (in, e.g., the Schuylkill) will be injured even though there has been full compliance with applicable regulations in a comprehensive regulatory scheme. William Penn, supra, in its discussion of the "immediate" prong of its three-pronged standing test, stated:

> It is also clear that standing will be found more readily where protection of the type of interest asserted is among the policies underlying the legal rule relied on by the person claiming to be "aggrieved."

For the William Penn court, therefore, the "zone of interest" test was not under all circumstances unqualifiedly equivalent to the "immediate" and "direct" prongs of the William Penn test; rather, for the William Penn court, a showing that the zone of interests test was satisfied could strongly suggest, but by no means necessarily would demonstrate, that the not-too-remote causation requirement of the William Penn test had been met. The later Upper Bucks County and El Rancho Grande opinions, which are the progeny of William Penn but which apparently did take the "zone of interests" test to be unqualifiedly equivalent to the William Penn "immediate" and "direct" prongs, were concerned only with alleged statutory and regulatory violations that unquestionably were capable of causing harm to the complainants' substantial interests; though discussed under the rubric of causation requirements for standing, the real issue in each of Upper Bucks County and El Rancho Grande was whether the harm the complainants were alleging was of the type the allegedly violated statutes and regulations were intended to prevent. Assuredly the Upper Bucks County and El Rancho Grande courts were not concerned

with fact situations anything like the instant appeal, where Del-Aware's Mr. Simone--apparently without any explicit claim that regulations designed to prevent degradation of the Schuylkill have been violated--is alleging that his substantial interest in rowing on the Schuylkill will be harmed by the permitted discharge some fifty miles upstream.

Furthermore, it is easy to see that in the circumstances of the instant appeal, where there exists a comprehensive regulatory scheme designed to protect the Schuylkill, regarding the zone of interests test as equivalent to the immediate and direct prongs of the William Penn test--for any allegations that the regulatory scheme is inadequate--can lead to absurd results. For instance, let us postulate, purely arguendo, the existence of another timely appellant, not Del-Aware or a member of Del-Aware, who--like Mr. Simone--has a substantial interest in rowing on the Schuylkill. This appellant's substantial interest obviously lies within the zone of interests of the comprehensive regulatory scheme designed to protect the Schuylkill. Therefore, if we grant that the zone of interest test is equivalent to the William Penn immediate and direct prongs, a bald allegation from this postulated appellant--to the effect that the regulations governing the appealed-from NPDES permit are inadequate to prevent harm to his substantial interest in rowing on the Schuylkill--would suffice to gain him standing to pursue this appeal, without the need to make any showing whatsoever that the discharge as permitted could cause his rowing interest to be adversely affected. However, it is conceivable (still purely arguendo) that this appellant expects to contend that his rowing will be adversely affected because the regulations allow discharges into the Schuylkill during periods of full moon, which he believes to be dangerously unlucky. Surely the Pennsylvania Supreme Court did not intend that the zone of interests test

would be used so as to require this Board to process (to the summary judgment stage at least) an appeal like the one just postulated, which has utterly no likelihood of meeting the William Penn causation requirements.

E. Conclusion

We hasten to state that we certainly are not implying that Del-Aware's appeal is as irrational, or as little deserving of standing, as the appeal postulated supra. However, the conceptual possibility of such appeals illustrates our thesis that where Del-Aware is claiming (explicitly or implicitly) that its substantial interests in the Schuylkill will be injured even though DER has complied fully with applicable regulations, the reasonably inferred intent of the Pennsylvania Supreme Court along with considerations of good public policy require that Del-Aware meet the William Penn immediate and direct prongs for those claims, without recourse to the zone of interests test. Of course, the possibility of such irrational appeals does not arise, and the zone of interests test leads to no absurdities, when an appellant is alleging that the harm to its substantial interests stems from DER's failure to comply with applicable regulations.

The implications for Del-Aware of our discussions to this point can be summed up as follows. In order to demonstrate its standing here, Del-Aware first must clarify whether it is asserting that DER failed to comply with specific EQB regulations, or whether it is arguing that those regulations themselves are inadequate to protect Del-Aware's (already established) substantial interests. Once this much is clarified, we may determine whether the "zone of interests" analysis should be applied, avoiding the need for Del-Aware to make an affirmative showing of causation of harm to its interests, or whether--if Del-Aware is alleging that the regulations are inadequate--Del-Aware also affirmatively has alleged a sufficient causal

connection between its "substantial" interest in the Schuylkill and the issuance of the NPDES permit to warrant a finding of standing.

We stress, furthermore, that Del-Aware cannot be allowed to meet the William Penn "immediate" and "direct" causation prongs via purely conclusory allegations that the aforementioned required sufficient causal connection exists; Del-Aware must include some factual allegations making it reasonable to believe that the claimed causal connection could be proved. For example, returning now to Mr. Simone's substantial interest in rowing on the Schuylkill, if Del-Aware is not alleging that regulatory violations will harm his rowing interest, then to gain standing to pursue this alleged harm Del-Aware must produce factual allegations--about, e.g., the expected concentrations of pollutants in the Schuylkill where Mr. Simone will be rowing and the likely effects of these pollutants on Mr. Simone should he fall into the river--making it reasonable to believe that these alleged pollutant concentrations will adversely interfere with Mr. Simone's rowing pleasures. In this connection we point out that--consistent with our rules and regulations, 25 Pa. Code §21.51(e)--this Board normally does not insist that an appellant's original notice of appeal fully state the appellant's alleged grounds for appeal. Concerned Citizens Against Sludge, 1983 EHB 282, 442 and 512 (Opinions and Orders, February 9, May 4 and August 19, 1983). However, the instant appeal was filed on October 22, 1984, almost a year ago. Del-Aware has filed its pre-hearing memorandum as well as a supplemental pre-hearing memorandum; the period for discovery permitted by our rules and by our Pre-Hearing Order No. 1 has long since passed without any request by Del-Aware for additional time to complete discovery. 25 Pa. Code §21.111. Surely it now is time for Del-Aware to justify its standing to appeal with more than purely conclusory allegations that the William Penn causation prongs will be met.

The Order which follows is consistent with the foregoing discussion. We recognize, however, that there is no unmistakable Pennsylvania precedent for our analysis of William Penn's requirements when an appellant who has established a substantial interest alleges violations of regulations intended to protect that interest or claims that the regulations are inadequate to protect that interest; precisely how to decide whether standing is deserved under such circumstances appears to be a question of first impression. Therefore, all parties to this appeal will be given the opportunity to register their views concerning our analysis before we issue any final ruling concerning Del-Aware's standing.

O R D E R

WHEREFORE, this 21st day of November, 1985, it is ordered that:

1. A final ruling on Philadelphia Electric Company's Motion to Dismiss is deferred for the present.

2. Del-Aware's interest in preventing any degradation of the Schuylkill River which could adversely affect Del-Aware's members' uses of the Schuylkill for rowing, sailing, fishing, drinking, etc., meets the "substantial interest" prong of the William Penn test.

3. Within thirty days of the date of this Order, Del-Aware is to state, with particularity:

a. The regulations--intended to protect the Schuylkill from the degradation Del-Aware fears--which Del-Aware alleges DER violated in issuing the appealed-from permit.

b. The allegations which (Del-Aware believes) will meet the William Penn "immediate" and "direct" causation prongs for standing to appeal, even if DEl-Aware ultimately is unable to prove any DER failure to comply with regulations intended to protect the Schuylkill from the degradation Del-Aware fears.

4. The Board will deem Del-Aware's failure to file the statement called for in paragraph 3 supra as an admission that Del-Aware is unable to make the

allegations called for therein; if Del-Aware does file, the Board will deem waived for the purposes of standing to appeal, any issues which Del-Aware does not raise in its statement.

5. If Del-Aware does not file the statement called for in paragraph 3, Philadelphia Electric Company's Motion to Dismiss will be granted.

6. The Board recognizes that the parties already have filed memoranda of law on the subject of Del-Aware's standing to appeal, but believes that the parties may wish to supplement their previous arguments in light of the accompanying Opinion. Therefore:

a. Del-Aware may accompany the filing called for in paragraph 3 supra with a memorandum of law in support of its claimed standing.

b. If Del-Aware files the statement called for in paragraph 3, then within thirty days of receipt the other parties may file memoranda of law in opposition to Del-Aware's standing.

7. If Del-Aware does file the statement called for in paragraph 3 supra, the Board will rule on whether Del-Aware has standing to pursue this appeal as soon as possible after reviewing all the parties' filings in response to paragraphs 3 and 6 supra.

8. Even if the Board does decide to grant standing to Del-Aware, the hearing on the merits of this appeal will be limited to testimony arguably relevant to those allegations which earned, or could have earned, Del-Aware its standing.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY, Member

DATED: November 21, 1985

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GLENN COAL COMPANY :

:

: Docket Nos. 84-389-G
: 84-390-G

Issued November 22, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR RENEWED MOTION FOR SANCTIONS
AND MOTION TO DISMISS

SYNOPSIS

A final decision on this Department's Motion to Dismiss is deferred; Appellant is given a final opportunity to clarify his interest in this matter. Sanctions are imposed against Appellant in the appeal docketed at 84-389-G for failure to respond to the Department's discovery requests. The Department's Motion for Sanctions in 84-390-G is denied.

OPINION

These two appeals concern several bond forfeitures initiated by the Pennsylvania Department of Environmental Resources under the authority of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 et seq. Several months after this appeal was filed it became apparent, through the course of discovery, that the named party appellant may in fact not be the real party in

interest in this matter. Accordingly, the Board directed the attorney who had filed the appeal to provide an affidavit clarifying his intentions concerning representation in the two appeals. The affidavit has been supplied and the Department has filed a renewed Motion for Sanctions and Motion to Dismiss. (An earlier motion was the subject of our Opinion and Order entered at the above docket numbers on August 9, 1985.)

In his affidavit, counsel states that he has not represented Glenn Coal Company since July 23, 1982 and that the appeals were actually filed on behalf of Mssrs. Mazzarro and Fleming, the former owners of Glenn Coal Company. The first issue which we must address here is who actually is the proper appellant in this matter.

As we held in our earlier opinion, Mr. Marrazzo is the proper appellant herein. Although the Notice of Appeal form designated Glenn Coal Company as the appellant, the Notice of Appeal in each case was signed by Mr. Marrazzo. His signature is sufficient evidence that the purpose of filing the appeals was to protect his interests. Since neither Mr. Marrazzo nor his attorney had authority to act for Glenn Coal at the time the appeals were filed, the appeals were not taken on behalf of Glenn Coal. Therefore, we affirm our earlier ruling that Mr. Marrazzo timely appealed the bond forfeitures contained in the Department's letters of October 17, 1984 and November 7, 1984.

Mr. Fleming's relationship to this matter did not become apparent until several months after these appeals were filed. Consequently, since he neither signed the notice of appeal nor provided any other indication of his intention to appeal the bond forfeitures within thirty days of receipt of notice of the Department's actions, no timely appeal can be said to have been filed on his behalf. 25 Pa.Code §21.52. Finally, since no one with authority to act on behalf

of Glenn Coal has filed an appeal of the bond forfeitures, we conclude that Glenn Coal is not a party appellant herein. Accordingly the caption of these matters will be changed to reflect the true appellant. (See accompanying order.)

Although the determination that Mr. Marrazzo is the actual appellant herein clarifies the confusion generated by these appeals to some extent, there remain several issues to be resolved before these appeals can proceed. The Department has raised the issue of Mr. Marrazzo's standing. We agree that his relationship to the bonds at issue herein requires substantial clarification. Mr. Marrazzo's counsel has not responded to the Department's renewed motion to dismiss and for sanctions. Although, under the Board's rules, this failure would permit us to rule in the Department's favor on the issues raised in the motion, we decline to do so. See 25 Pa.Code §21.64(d). Appellant will be given a final opportunity to clarify his interests in the Department's action of forfeiting the bonds at issue herein by filing a response to the Department's motion within twenty (20) days of receipt of the accompanying order.

The issues which still require elucidation in this matter are the following. Mr. Marrazzo claims that his interests will be adversely affected by the bond forfeiture in that he has entered into indemnification agreements with the surety who put up some (or perhaps all) of the bonds at issue. In addition, he claims that his interests will be affected in that he is now the proper owner of the permits under which the bonds were posted, by virtue of an order of the bankruptcy court which allegedly returned the assets and permits of Glenn Coal Company to him. The Department has argued that the bankruptcy court's order transferring the permits to Mr. Marrazzo has no legal effect because the Department must approve any such transfer, and no such approval was given in this case. In addition, we note that the relationship between the mining permits and the bonds may require

clarification since it does not appear to us intuitively obvious that a transfer of permits necessarily implies a transfer of the associated bonds.

Thus, in short, before Mr. Marrazzo's standing can be determined, the Board must decide how the sale of the assets of Glenn Coal, the purported return of the assets (and permits) to Mr. Marrazzo, and the alleged indemnification agreements bear upon Mr. Marrazzo's interest in this matter. Without giving Mr. Marrazzo one final opportunity to present his arguments on these issues, we hesitate to dismiss these appeals.

Finally, we address the Department's request that sanctions be imposed for failure to respond to the Department's discovery requests. In January of 1985 the Department served its first set of interrogatories upon counsel for Mr. Marrazzo. Despite the Board's order accompanying its earlier opinion in these appeals directing that the responses be filed by September 9, 1985 at the latest, no such responses were filed by that date. In the appeal docketed at 84-389-G there still have been no responses filed. In the appeal docketed at 84-390-G, however, responses were filed on September 20, 1985. Therefore, with regard to the latter appeal, the motion for sanctions is denied. The Department is free to renew the motion if the responses are unsatisfactory. In the appeal at 84-389-G, however, sanctions are appropriate. Appellant will be precluded from presenting any evidence bearing upon the information requested by the interrogatories filed by the Department at a hearing on the merits of that appeal, if and when held. All such matters will be deemed established in favor of the Department for the purpose of that hearing. See Pa.R.C.P. 4019.

O R D E R

WHEREFORE, in light of the foregoing, it is ordered as follows:

1. Henceforth these appeals shall be captioned:

FRANCIS D. MARRAZZO, JR.)
)
v.) 84-389-G
) 84-390-G
COMMONWEALTH OF PENNSYLVANIA)
DEPARTMENT OF ENVIRONMENTAL RESOURCES)

2. A final decision on the Department's Renewed Motion to Dismiss is deferred. Appellant is granted an additional twenty (20) days, beginning with the date of receipt of this order, within which to respond to the Department's renewed Motion to Dismiss. Failure to respond will result in dismissal of the appeals. Appellant shall address the issues outlined in the foregoing opinion in his response. The Department may request the opportunity to respond to the appellant's response, if any.

3. The Department's Renewed Motion for Sanctions is granted with regard to the appeal docketed at 84-389-G. Sanctions are applied against Appellant for failure to respond to the Department's interrogatories in said appeal as outlined in the foregoing opinion.

4. The Department's motion for sanctions in the appeal docketed at 84-390-G is denied, but may be renewed at a later date if the responses filed by the appellant to the Department's interrogatories are believed inadequate.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: November 22, 1985

cc: Bureau of Litigation
Robert M. Hanak, Esq., for Appellant (Certified Mail No.047365363)(Reynoldsville)
Joseph K. Reinhart, Esq. for DER (Pittsburgh)

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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EVA E. VAROS and JOSEPH VAROS,
t/d/b/a BUFFALO TOWNSHIP LANDFILL,
a/k/a VAROS LANDFILL

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Docket No. 85-105-W

Issued: November 27, 1985

OPINION AND ORDER
SUR PETITION FOR
DECLARATORY JUDGMENT

Synopsis

Appellants petitioned the Board for a declaratory order, pursuant to the Pennsylvania Declaratory Judgments Act, 42 Pa. C.S.A. §§7531-7541, directing that a DER order is not final until the Board decides the appeal from the order. Appellants' petition for declaratory order is denied because neither the Declaratory Judgments Act nor any other statute authorizes the Board to grant declaratory relief, and the Board cannot exercise any power not specifically conferred upon it by statute.

OPINION

Appellants, Eva E. Varos and Joseph Varos, t/d/b/a Buffalo Township Landfill, a/k/a Varos Landfill (Varos) are appealing an order of the Department of Environmental Resources (DER), dated March 8, 1985, relating to the operation of their landfill. The DER order, issued under the Solid Waste Management Act, 35 P.S. §§6018.101-6018.1003, and the Clean Streams Law, 35 P.S. §§691.1-691.1001, requires, among other things, that Varos commence closure of the landfill on November 1, 1985.[1]

On October 15, 1985, Varos filed with the Board a Petition for Declaratory Order, requesting the Board to issue a declaratory order, pursuant to the Pennsylvania Declaratory Judgments Act, 42 Pa. C.S.A. §§7531-7541, directing that the DER order of March 8, 1985 is not final as to Varos until the Board decides the appeal from the order. DER filed a response to Varos's Petition for Declaratory Order on October 23, 1985, arguing that the Board does not have jurisdiction to issue declaratory orders. The Board agrees with DER that it does not have the power to issue declaratory orders and, therefore, denies Varos's petition for declaratory relief.

The Environmental Hearing Board, an administrative agency, cannot exercise any power not specifically conferred upon it by statute. DER v. Butler County Mushroom Farm, 499 Pa. 507, 454 A.2d 1 (1982). Neither the Board's enabling legislation, 71 P.S. §510-21, nor any other legislation confers upon the Board the power to grant declaratory relief.

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[1] By order dated November 15, 1985, the Board granted the Varos's Petition for Supersedeas and stayed the Department's March 8, 1985 order until a decision on the merits of the appeal or further order of the Board, whichever is first.

The Declaratory Judgments Act confers the power to grant declaratory relief upon courts, not upon administrative agencies. 42 Pa. C.S.A. §7532 provides as follows:

> Courts of record, within their respective jurisdictions, shall have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree. (emphasis added)

Section 301 of the Judicial Code, 42 Pa. C.S.A. §301, sets forth the courts of the Commonwealth:

> §301. Unified judicial system
>
> The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the:
>
> (1) Supreme Court.
> (2) Superior Court.
> (3) Commonwealth Court.
> (4) Courts of common pleas.
> (5) Community courts.
> (6) Philadelphia Municipal Court.
> (7) Pittsburgh Magistrates Court.
> (8) Traffic Court of Philadelphia.
> (9) District justices.
>
> All courts and district justices and their jurisdiction shall be in this unified judicial system.

Section 321 of the Judicial Code, 42 Pa. C.S.A. §321, defines court of record:

> §321. Court of Record
>
> Except as otherwise provided in this subpart every court of this Commonwealth shall be a court of record with all the qualities and incidents of a court of record at common law.

The Board interprets "courts of record" in §7531 of the Declaratory Judgments Act as comprising the courts that §301 of the Judicial Code enumerates, and not

including administrative agencies.[2] Because it lists courts and government units performing quasi-judicial functions as separate entities, the definition of "tribunal" in §102 of the Judicial Code, 42 Pa. C.S.A. §102, lends support to the interpretation of courts of record as not including administrative agencies:

> "Tribunal." A court, district justice or other judicial officer vested with the power to enter an order in a matter. The term includes a government unit other than the General Assembly and its officers and agencies, when performing quasi-judicial functions.

The Declaratory Judgments Act, itself, lends further support to this interpretation, because, while 42 Pa. C.S.A. §7532 confers the power to grant declaratory relief upon courts of record, 42 Pa. C.S.A. §7541(c)(2) provides that declaratory relief is unavailable in any proceeding within the exclusive jurisdiction of a tribunal other than a court. In fact, the Commonwealth Court has held that, pursuant to 42 Pa. C.S.A. §7541(c)(2), declaratory relief is unavailable when the proceeding is within the exclusive jurisdiction of the Environmental Hearing Board. Burnham Coal Co. v. PBS Coals, Inc., 65 Pa. Cmwlth. 86, 442 A.2d 3, affirmed 499 Pa. 59, 451 A.2d 443 (1982).

The cases in which the Commonwealth Court has refused to grant declaratory relief because the proceeding was within the exclusive jurisdiction of a tribunal other than a court involved appeals from actions of administrative agencies, and implied that not only was declaratory relief unavailable in the Commonwealth Court, but it was also unavailable in the administrative proceeding because that relief was simply unavailable under

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[2] Cf. Chemclene Corporation v. DER, 1983 EHB 65, 70 (stating that, "Only courts, not executive tribunals, have the authority to decide constitutional issues. There is no doubt that this Board is an executive tribunal, despite the fact that it exercises quasi-judicial functions."), affirmed, No. 1476 C.D. 1983 (Commonwealth Court, August 22, 1985).

the Declaratory Judgments Act when the proceeding was within the exclusive jurisdiction of a tribunal other than a court.[3] See Com., Department of General Services v. Frank Briscoe Co., Inc., 74 Pa. Cmwlth. 147, 460 A.2d 367; modified 502 Pa. 499, 466 A.2d 1336 (1983); Myers v. Com., Department of Revenue, 55 Pa. Cmwlth. 509, 423 A.2d 1101 (1980); Parker v. Com., Department of Public Welfare, 49 Pa. Cmwlth. 619, 411 A.2d 897 (1980). In fact, in Briscoe, supra, the Commonwealth Court, in holding that it could not grant declaratory relief because the proceeding was in the exclusive jurisdiction of an administrative agency, held that the agency's inability to grant declaratory relief did not alter this conclusion:

> The fact that declaratory judgment, equitable or other extraordinary relief could not be granted by the Board of Claims as an ancillary feature of its determination of a claim against the Commonwealth does not militate against its exclusive jurisdiction of such claims or create jurisdiction in the Commonwealth Court solely by reason of that deficiency of remedy. (citations omitted).

Briscoe, 460 A.2d at 372.

Varos also argues that a provision in the General Rules of Adminis-

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[3] In cases to which the Commonwealth is a party, and in which there is a statutory appeal procedure before an administrative agency, it seems that relief is available under the Declaratory Judgments Act only in limited circumstances when the remedy before the administrative tribunal is inadequate. See Arsenal Coal Co. v. DER, 505 Pa. 198, 477 A.2d 1333 (1984); Neshaminy Water Resources Authority v. DER, No. 222 C.D. 1985 (Commonwealth Court, September 26, 1985); Myers v. Com., Department of Revenue, 55 Pa. Cmwlth. 509, 423 A.2d 1101 (1980). Under these circumstances, the Commonwealth Court has original exclusive jurisdiction pursuant to §761 of the Judicial Code, 42 Pa. C.S.A. §761. See Com., Dept. of Transportation v. Lakeview Motel, 81 Pa. Cmwlth. 262, 473 A.2d 262 (1984); Myers v. Com., Dept of Revenue, 55 Pa. Cmwlth. 509, 423 A.2d 1101 (1980); Parker v. Com., Dept. of Public Welfare, 49 Pa. Cmwlth. 619, 411 A.2d 897 (1980); Delaware Valley Apartment House Owner's Ass'n. v. Com., Dept. of Revenue, 36 Pa. Cmwlth. 615, 389 A.2d 234 (1978).

trative Practice and Procedure, 1 Pa. Code §35.19,[4] provides for declaratory orders in administrative proceedings. Although 1 Pa. Code §35.19 does pertain to declaratory orders, this provision, in and of itself, does not confer upon administrative agencies the power to issue declaratory orders. As previously noted, administrative agencies have only those powers which have been specifically conferred upon them by statute. Thus, 1 Pa. Code §35.19, which sets forth the contents of a petition for declaratory order, can only apply to agencies that have the underlying statutory power to grant declaratory relief. For example, the Public Utility Commission has such power pursuant to 66 Pa. C.S. §331(f). There is, however, no statute that grants such power to the Environmental Hearing Board. Inasmuch as the Board holds that it has no power to grant declaratory relief, the Board does not reach the merits of Varos's petition.

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[4] This section provides:

> Petitions for the issuance, in the discretion of an agency, of a declaratory order to terminate a controversy or remove uncertainty which is the subject of the petition, shall cite the statutory provision or other authority involved, shall include a complete statement of the facts and grounds prompting the petition, together with a full disclosure of the interest of the petitioner.

ORDER

AND NOW, this 27th day of November, 1985, the Petition for Declaratory Order at EHB Docket No. 85-105-W is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: November 27, 1985

cc: Bureau of Litigation

For the Commonwealth, DER:
Patti Saunders, Esq.
Western Region

For Appellant:
Harry B. Keck, Esq.
ZURAWSKY & KECK
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Armand R. Cingolani, Jr., Esq.
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bl

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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YORK RESOURCES CORPORATION :

: Docket No. 85-421-M

: Issued: December 2, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Synopsis

This is an appeal from an order of the Department of Environmental Resources (DER) that suspended appellant's surface mining permit. DER filed a motion to dismiss this appeal for untimeliness. DER's motion is denied because the appeal was timely filed.

Appellant, York Resources, a coal surface mine operator, has appealed an order of the Department of Environmental Resources (DER) that suspended its surface mining permit for ninety days because of York's alleged violations of the Clean Streams Law, 35 P.S.§§691.1 - 691.1001, the Surface Mining Conservation and Reclamation Act, 52 P.S.§§1396.1 - 1396.31, and the Coal Refuse Disposal Control Act 52 P.S.§§30.51 - 30.66. DER filed a motion to dismiss this appeal for untimeliness, alleging that York received the suspension order on September 13, 1985, and York did not file its appeal with this board until October 15, 1985, and did not perfect its appeal until October 16, 1985.

First, for purposes of determining the timeliness of an appeal, the board considers the date that the board received the appeal. Even if the notice of appeal does not comply with the form and content requirements of 25 Pa. Code §21.51, the board, pursuant to 25 Pa. Code §21.52(c), will docket the appeal as a skeleton appeal and will order the appellant to comply with 25 Pa. Code §21.51 by a certain date or suffer sanctions of the board. See, e.g., Felton Enterprises, Inc. v. DER, 1984 EHB 665; Kemerer v. DER, 1983 EHB 276.

In this case, the board received York's notice of appeal on October 15, 1985, but the notice of appeal did not comply with 25 Pa. Code §21.51 because it did not include a copy of the DER order that is the subject of the appeal. On October 16, 1985, however, the board did receive from York a copy of the DER order that is the subject of this appeal. Thus, York's notice of appeal did not comply with the form and content requirements of 25 Pa. Code §21.51 until October 16, 1985. Nevertheless, on October 15, 1985, the board docketed York's appeal as a skeleton appeal pursuant to

25 Pa. Code §21.52(c), and for purposes of timeliness, the board deems York's appeal to have been filed as of October 15, 1985.

The board's rule pertaining to timeliness of appeals, 25 Pa. Code §21.52(a), provides as follows:

> (a) Except as specifically provided in §21.53 of this title (relating to appeal nunc pro tunc), jurisdiction of the Board shall not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of such action or within 30 days after notice of such action has been published in the Pennsylvania Bulletin unless a different time is provided by statute, and is perfected in accordance with subsection (b).

The board's rules do not set forth the method for counting the thirty day period, but the general rules of administrative practice and procedure, 1 Pa. Code §§31.1 - 35.251, also apply to this board's proceedings, except when these rules are inconsistent with the board's own rules. 25 Pa. Code §21.1(c). Thus, the rule that applies to this board's computation of time is set forth at 1 Pa. Code §31.12 [1]:

> Except as otherwise provided by law, in computing any period of time prescribed or allowed by this part or by the regulations of the agency or any other provision of law, the day of the act, event, or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is Saturday, Sunday, or a legal holiday in this Commonwealth, in which event the period shall run until the end of the next day which is neither a Saturday, Sunday, nor a holiday. A part-day holiday shall be considered as other days and not as a holiday. Intermediate Saturdays, Sundays, and holidays shall be included in the computation.

York received the suspension order on September 13, 1985, and thus, pursuant to 1 Pa. Code §31.12, the first day of the thirty day appeal period was September 14, 1985. The thirtieth day fell on October 13, 1985, but this

---

[1] See Wisniewski v. DER, 1982 EHB 376.

date was a Sunday. Monday, October 14, was Columbus Day, a legal holiday in the Commonwealth of Pennsylvania. Therefore, the last day of the appeal period from the suspension order, which York received on September 13, 1985, was October 15, 1985, the day the board received York's notice of appeal. Thus, the board denies DER's motion to dismiss because York filed this appeal in a timely fashion.

ORDER

AND NOW, this 2nd day of December, 1985, the Department of Environmental Resources' Motion to Dismiss, at EHB Docket No. 85-421-M, is denied.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR., MEMBER

cc: Bureau of Litigation

For DER: Bernard Labuskes, Esq.

For Appellant: Pamela S. Goodwin, Esq.
WOLF, BLOCK, SCHORR and SOLIS-COHEN
Philadelphia, PA

DATED: December 2, 1985

COMMONWEALTH OF PENNSYLVANIA

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BOROUGH OF LEWISTOWN

Docket No. 84-271-M

Issued December 5, 1985

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

This is an appeal from a refusal by the Department of Environmental Resources (DER) to reconsider the eligibility of three items for participation in a sewage treatment construction grant from the United States Environmental Protection Agency (EPA), pursuant to §201 of the Federal Clean Water Act, 33 U.S.C. §1281. DER's Motion to Dismiss is granted because its refusal to reconsider the eligibility of the three items for grant participation is not an appealable action.

DER certified appellant's project to the EPA for funding in 1979, and this certification sufficiently notified appellant that a final determination had been made that three items were ineligible for grant participation. DER's 1979 certification decision was an action that was appealable to this Board, and if appellant disagreed with DER's refusal to certify the three items in question, appellant should have appealed the 1979 decision. Appellant did not,

however, appeal the 1979 decision, and, therefore, appellant is bound by that decision and cannot challenge it now.

Appellant requested, during the final audit phase of its project, that DER reconsider the eligibility of the three items in question. Neither the federal regulations, 40 C.F.R. Parts 30 and 35, nor the state regulations, 25 Pa. Code, Chapter 103, Subchapter A, pertaining to federal grants for construction of sewage facilities contain any provision for a reconsideration by DER of a grant eligibility determination. DER was under no obligation to reconsider the 1979 decision, and its refusal to do so is not appealable to this Board. Although EPA officials may have asked DER to reconsider the eligibility of the three items in question, EPA has no authority to direct DER how to spend its construction grant money. Allocation of federal sewage treatment construction grant money within a state is primarily a state function. 33 U.S.C. §1296.

Finally, an alleged conversation immediately after DER's 1979 decision between a DER employee and a representative of appellant, in which the DER employee allegedly informed appellant that the eligibility of three items in question could be reconsidered during the final audit phase of the project, cannot estop DER from asserting that the 1979 decision was a final decision that appellant did not appeal. DER regulation, 25 Pa. Code §103.4, prohibits certification of, and EPA regulation, 40 C.F.R. §35.925-18, prohibits grant awards for, projects constructed without prior approval. Therefore, appellant should have known that it was required to resolve all eligibility questions prior to commencing construction. Appellant, however, constructed the three items in question, even though DER did not certify them for grant approval. The government cannot be bound by the acts of its agents and employees if those acts are outside the agent's powers or in violation of positive law.

Thus, as a matter of law, appellant cannot invoke the doctrine of estoppel against DER because doing so would work a result inconsistent with 25 Pa. Code §103.4 and 40 C.F.R. §35.925-18.

OPINION

Appellant, the Borough of Lewistown, filed this appeal on August 1, 1984. In the Notice of Appeal, appellant said that it was appealing the following actions taken by the Department of Environmental Resources (DER) in conjunction with the construction of additions and alterations to the Lewistown Wastewater Treatment Plant under a grant from the United States Environmental Protection Agency (EPA), pursuant to §201 of the Clean Water Act, 33 U.S.C. §1281:

(1) Disallowance for grant participation of $2800 for the construction of the chlorine storage area roof.
(2) Disallowance for grant participation of $76,000 for construction of the utility building.
(3) Disallowance of $20,000 for the cost of preparation of the Operation and Maintenance Manual for the Lewistown Wastewater Treatment Plant.

DER notified appellant by letter dated January 5, 1979 that these three items were ineligible for grant participation. Appellant did not appeal this decision. By letter dated June 28, 1984, the EPA advised appellant that DER had decided not to reverse its previous determination that the three items in question were ineligible for grant participation. Appellant now appeals DER's decision not to reverse or reconsider its previous determination.

The circumstances leading up to this appeal are as follows. On May 12, 1977, DER certified appellant's Step 3 Secondary Sewage Treatment Construction Grant Application to the EPA for approval. On August 10, 1977, EPA approved the grant application. On August 27, 1977, appellant formally accepted

the grant that EPA offered, and executed the concomitant grant agreement, Construction Grants Project No. C-420874-01. On December 7, 1978, appellant submitted its "Part B" or construction contract grant documentation to DER for approval. The Part B documentation included costs for certain changes to the project as it was approved in the grant application. These changes included the addition of a utility building, the addition of roof over a chlorine cylinders shed storage area, and additional costs for the preparation of an Operation and Maintenance Manual. On January 5, 1979, DER sent a letter to the EPA that read as follows:

> Enclosed are two (2) copies of each of the following for the referenced project.
>
> 1. Part B of the offer and acceptance.
> 2. Certificate of project site acquisition.
> 3. Estimated project costs.
> 4. Payment schedule.
> 5. Proof of publication.
> 6. Tabulation of bids.
> 7. Justification of increase in cost of preparation of the Operation and Maintenance Manual.
>
> Part B has been stamped with State approval as required by the Rules and Regulations of the Department of Environmental Resources.
>
> The addition of the utility building and the addition of the roof over the chlorine cylinders shed storage area represent an increase in the scope of the project and as such are not approved for grant participation.
>
> The justification of increase in cost of preparation of the Operation and Maintenance Manual has been reviewed, and we do not feel that the increase is justified, so the increase in cost is not included as an eligible cost.

DER sent a copy of this letter to appellant. On March 8, 1979, EPA gave formal approval to appellant's Part B grant documention, but EPA's approval specifically deleted costs for the three items in question. Appellant began construction of the sewage treatment plant on April 30, 1979.

In connection with EPA's final audit of the project, a meeting was

held on February 27, 1984, with representatives of EPA, DER, and appellant, at which time, DER was asked to reevaluate the eligibility determinations for the three items in question. On March 27, 1984, DER wrote to EPA that it would be inappropriate for DER to reevaluate the eligibility determinations for the three items in question. Then, on June 28, 1984, EPA sent appellant a letter concerning its final audit of the project. This letter set forth the final determination of the amount of the EPA grant award, and informed appellant that DER decided not to reverse its previous eligibility determinations for the three items in question, and that EPA does not have the ability to include any project costs that the state does not certify as within the scope of the project. After receiving the June 28, 1984 letter from EPA, appellant filed this appeal.

On November 23, 1984, DER filed a Motion to Dismiss this appeal, averring that DER's January 5, 1979 letter was a final appealable action of DER that appellant did not appeal, DER is under no obligation to reconsider its January 5, 1979 decision, and its refusal to do so is not appealable. The Board agrees that DER's refusal to reconsider its 1979 determination of ineligibility was not an appealable action, and, therefore, grants DER's Motion to Dismiss.

First, the Board holds that the January 5, 1979 letter was a final, appealable determination by DER that the three items in question were not eligible for federal grant participation. Section 1921-A(a) of the Administrative Code, 71 P.S. §510-21(a), authorizes this Board to hold hearings and issue adjudications on any order, permit, license or decision of DER. This Board has held that for a DER action to be appealable to this Board, it must constitute an adjudication as defined in the Administrative Agency Law. Eremic v. DER, 1976 EHB 249. An adjudication is defined in 2 Pa. C.S. §101 as,

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

DER's January 5, 1979 letter, which certified appellant's Part B grant documentation to the EPA, specifically disapproved for certification for grant participation the cost of the utility building and the roof over the chlorine cylinders shed storage area on the basis that these items represented an increase in the scope of the project, and the increased cost of the preparation of the Operation and Maintenance Manual on the basis that the increase was not justified. This Board has held that a DER refusal to certify an item for federal sewage treatment grant funding is an adjudication as defined at 2 Pa. C.S. §101, and, thus, is an appealable action of DER. Abington Township v. DER, 1978 EHB 323. In Abington Township, DER refused to certify a collector system for federal sewage treatment grant funding because, among other things, the system involved an impermissible change in scope. DER sought dismissal of the appeal from that refusal, arguing that the refusal was not an appealable action. The Board denied DER's motion:

> Upon careful consideration we cannot agree with the department that the action taken here is not a final determination affecting personal or property rights, privileges, immunities or obligations of any or all of the parties to the proceeding in which the adjudication is made. Abington Township has requested that the department certify the collector system for federal funds through one of two routes and the department has refused to do so. In our view this constitutes a final determination on a specific request to classify the project in such a way as to enable it to receive federal money. This is a classification of the project that finally determines whether or not Abington will have any right to federal money for the project, and as such it is an act of discretion reviewable by this board.

1978 EHB 323, at 325 - 326.

In this case, DER gave appellant notice in its January 5, 1979 letter, of a final decision concerning the three items in question. As in Abington, the primary reason for the decision was that the requested items were outside the scope of the project. In both cases, DER's decision was made as part of DER's certification of the entire project to the EPA for federal funding. Thus, based upon the reasoning formulated in Abington, the Board holds that DER's January 5, 1979 letter was an appealable action.

Appellant's arguments in support of its position that the January 5, 1979 letter was not an appealable action of DER demonstrate an incognizance of the statutorily prescribed procedure for appeals from DER actions. Appellant contends that the Administrative Agency Law, 2 Pa. C.S. §101, et seq., prescribes certain standards that must be met before a decision or determination by DER can be deemed a final decision of determination. In particular, appellant argues that the Administrative Agency Law required DER to afford appellant a reasonable notice of a hearing and an opportunity to be heard, and to include as part of its decision, the findings and reasons on which it based the decision. The Administrative Code, however, refutes this contention. 71 P.S. §510-21(c) provides as follows:

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

DER has the authority to make decisions that affect the rights and obligations of parties without holding prior hearings. See DER v. Borough of Carlisle, 16 Pa. Cmwlth. 341, 330 A.2d 293 (1975); DER v. Derry Township, 10 Pa. Cmwlth. 619, 314 A.2d 874 (1973). Such decisions are not final until the aggrieved persons

have had the opportunity to appeal, but any DER decision that is not timely appealed becomes final.[1] DER v. Derry Township, 466 Pa. 31, 351 A.2d 606 (1976); DER v. Wheeling Pittsburgh Steel Corporation, 473 Pa. 432, 375 A.2d 320 (1977). Although the January 5, 1979 letter did not expressly provide that it was a final appealable action and did not contain any language pertaining to appeal procedures, these circumstances standing alone do not obviate the finality of an otherwise final action. DER has no duty to announce that a decision it has made is final and appealable. The Commonwealth Court has held that due process of law does not require an administrative agency to provide a party with notice of the right to appeal the agency's decision when the agency or legislature has provided a duly published procedure for a hearing or appeal after such order. Walker v. Com., Unemployment Compensation Board of Review, 33 Pa. Cmwlth. 438, 381 A.2d 1353 (1978); DER v. Derry Township, 10 Pa. Cmwlth. 619, 314 A.2d 868 (1973). Thus, although DER often does provide parties with notice of their appeal rights, DER is under no legal obligation to do so since the Environmental Quality Board has published a procedure for appeal to this Board from actions of DER. See Sharon Steel v. DER, 1976 EHB 100. This Board has held, in a case involving a municipal authority's request for a change order in a federal grant for the construction of a sewage treatment plant, that a DER letter denying EPA cost participation must be recognizable by the municipal authority as a final denial of their request for EPA cost participation in order to constitute the type of written notice required to start the operation of 25 Pa. Code §21.52. Spring-Benner Joint Authority v. DER, 1983 EHB 264. In this case, the January 5, 1979

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[1] §21.52(a) of the Board's Rules and Regulations, 25 Pa. Code, Ch. 21, provides that jurisdiction of the Board shall not attach to an appeal from an action of DER unless the appeal is filed within 30 days after the party appellant has received written notice of such action.

letter clearly stated that the three items in question were disapproved for grant participation. In fact, appellant concedes that when it received the January 5, 1979 letter, it recognized it as a denial of its request for grant participation for the three items in question. On page four of its Response and Memorandum Brief to Motion to Dismiss and Memorandum, appellant alleges the following:

> Immediately upon receipt of the copy of the letter of January 9, Mr. Haines telephoned Mr. O'Connell (the DER representative who had signed the letter); and questioned Mr. O'Connell as to the specific reasons why the Utility Building, the Roof over the Chlorine Cylinders Storage Platform and the increase in cost of the preparation of the Borough's Operations and Maintenance Manual had been determined by DER to be ineligible for EPA grant participation. (emphasis added)

Therefore, appellant had sufficient notice that a final decision had been rendered by DER regarding the eligibility of the three items in question for federal grant participation. Thus, appellant cannot now appeal a DER decision rendered in 1979, and is therefore bound by the conclusions in that decision, namely, that the addition of the utility building and the roof over the chlorine cylinders shed storage area would be increases in the scope of the project and as such were not approved for grant participation, and the increase in the cost of preparation of the Operation and Maintenance Manual was not justified and as such was not included as an eligible cost.

Appellant maintains, however, that it is appealing DER's refusal to reconsider the January 5, 1979 decision, which refusal was evidenced in the June 28, 1984 letter from EPA. Neither the federal regulations,[2] nor the state regulations,[3] pertaining to federal grants for construction of sewage

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[2] 40 C.F.R. Parts 30 and 35.

[3] 25 Pa. Code, Chapter 103, Subchapter A.

facilities, contain any provision for a reconsideration by DER of a grant eligibility determination. Although appellant argues that EPA regulations 40 C.F.R. §§30.705 and 30.1200 provide for a reconsideration of eligibility determinations during the final audit phase of a project, our reading of these regulations indicates that appellant has misinterpreted them.

40 C.F.R. §30.705 provides as follows:

> §30.705 What changes can I make to my assistance agreement without a formal amendment?
>
> Minor changes in the project work that are consistent with the objective of the project and within the scope of the assistance agreement do not require the execution of a formal amendment before the recipient's implementation of the change. However, such changes do not obligate EPA to provide Federal funds for any costs incurred by you in excess of the assistance amount, unless approved in advance under §30.700.

40 C.F.R. §30.1200 provides as follows:

> §30.1200 What happens if an EPA official and I disagree about an assistance agreement requirement?
>
> (a) Disagreements should be resolved at the lowest level possible.
>
> (b) If you cannot reach an agreement, the EPA disputes decision official will provide you with a written final decision. The EPA disputes decision official is the individual designated by the award official to resolve disputes concerning your assistance agreement.
>
> (c) The disputes decision official decision will constitute final agency action unless you file a request for review by registered mail, return receipt requested, within 30 calendar days of the date of the decision.

Neither §30.705 nor §30.1200 provides for a reconsideration, during the final audit phase, by DER of an eligibility determination. Section 30.705 provides for minor changes within the scope of the project, and §30.1200 applies to disputes with EPA officials. In fact, §30.705 states that the minor changes cannot obligate EPA to provide funds in excess of the assistance amount unless approved in advance. In any event, 40 C.F.R. §§30.705 and 30.1200 were

not in existence in 1979 when DER determined the eligibility of the three items in question and EPA awarded the grant to appellant. These regulations were not promulgated until September 30, 1983. 48 Fed. Reg. 45,062. Federal sewage treatment construction grants are contracts, 33 U.S.C. §1283, and, therefore, the EPA considers the law in existence at the time the parties enter into the grant agreement to be the law that applies to the grant agreement. See Arlington Co., Virginia, Board of Assistance Appeals Docket No. 83-59, November 30, 1984. Since 40 C.F.R. §§30.705 and 30.1200 were not promulgated until September 30, 1983, they do not apply to this case. Thus, at the expiration of the appeal period for the January 5, 1979 decision, appellant's rights became fixed as to the grant eligibility of these three items.

DER's January 5, 1979 determination that the three items in question were ineligible for grant participation was a final appealable action of DER, but DER's refusal to reconsider this decision was not an appealable action. To hold otherwise would mean that DER decisions are never actually 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.

This case is analogous to DER v. New Enterprise Stone & Lime Co., Inc., 25 Pa. Cmwlth. 389, 359 A.2d 845 (1976), in which DER refused to modify an outstanding agreement with a limestone quarry operator. In holding that DER's refusal to modify the agreement did not constitute an appealable decision of DER, the Commonwealth Court stated as follows:

> While we do not doubt that the DER can be said to have reached a decision not to modify its agreement with New Enterprise, we do not believe that such a decision, specifically one which does not result in any action being taken against a party and which does not, therefore, affect property rights, privileges, liabilities and other obligations, is an appealable decision within the concept of the statutory provision here involved. Cf. Standard

> Lime & Refractories Co. v. Department of Environmental Resources, 2 Pa. Cmwlth. 434, 279 A.2d 383 (1971). We note that while the word "decision" is not defined in the Code, administrative agency laws generally refer to the term "decision," as including a determination which can be classified as quasi-judicial in nature and which affects rights or duties. 1 Am. Jur. 2d Administrative Law §138. Here, the refusal by the DER to modify the outstanding agreement with New Enterprise lacks the elements which would suggest that a "decision" had been made in the technical sense of the word because the rights and obligations of New Enterprise have not been altered.

New Enterprise, 25 Pa. Cmwlth. 389 at 393, 359 A.2d 845 at 847. As in New Enterprise, appellant asked DER to modify existing rights and obligations, and DER's decision not to do so lacked the elements of a "decision" made in the technical sense of the word because appellant's rights and obligations have not been altered.

Appellant also argues that DER is obligated to reconsider the January 5, 1979 decision because, during the final audit of the project, the EPA asked DER to do so. Although the Board has no jurisdiction to review EPA actions, and the Board is not now doing so, the Board notes that the EPA does not have the authority to direct a state how to spend its construction grant money. The EPA's role in the federal sewage treatment construction grant program is to determine the amount of funding given to each state. 33 U.S.C. §1285. Once the state allotment is determined, the allocation of the allotment within the state is primarily a state function. 33 U.S.C. §1296. The EPA may not approve a project for funding unless the state has certified the project as entitled to priority over other municipal sewage treatment projects in the state. 33 U.S.C. §1284(a)(3). Once the state certifies that a project is entitled to funding priority, the EPA then determines whether the applicable criteria of 33 U.S.C. §§1281(g) and 1284(a) have been met.

In this case, appellant wants DER to reconsider a previous determination that certain items were not eligible for grant participation. Although

the EPA officials involved with the audit of appellant's project may have requested DER to reconsider its previous determination that the three items in question were not eligible for grant participation, they had no authority for doing so, and the EPA acknowledged in its June 28, 1984 letter that the EPA cannot include project costs that the state has not certified as within the scope of the project. Had DER reconsidered the eligibility of the three items in question and decided to include them in the grant, the EPA would not have allotted additional funds to Pennsylvania. Rather, funding for the three items in question would have to be taken from the already determined state allotment to the detriment of some other municipal sewage treatment project. DER and the municipalities of the Commonwealth have an interest in the finality of DER's certification decisions. Thus, when the EPA officials requested DER to reconsider the eligibility for grant participation of the three items in question, DER justifiably responded that it would be inappropriate for it to do so.

Finally, appellant argues that even if the January 5, 1979 letter did constitute a final, appealable decision of DER, DER is estopped from asserting this because a DER employee informed representatives of appellant that the grant eligibility of the three items in question could be reconsidered during the final audit phase of the project. In particular, appellant alleges that upon receipt of the January 5, 1979 letter, appellant's project engineer telephoned the DER employee who signed the letter and asked him why DER determined the three items to be ineligible for grant participation. According to appellant's allegations, although the DER employee gave no specific reasons in response to appellant's engineer's questions, but merely recited the language contained in the January 5, 1979 letter; the DER employee advised appellant's engineer that appellant could make a formal request,

at the completion of the project, during the audit phase, that these three items be considered for grant participation. Assuming that appellant's allegations regarding this telephone conversation are true, this telephone conversation neither estops DER from asserting that the January 5, 1979 letter was a final decision, nor obligates DER to reconsider the eligibility of the three items for grant participation.

In response to DER's contention that DER notified appellant in the January 5, 1979 letter that the three items were ineligible for grant participation, appellant alleged the following facts with regard to the telephone conversation:

> The copy of DER's letter to EPA dated Friday, January 5, 1979 was not received by Howard P. Haines (the Project Engineer assigned to the Borough by the Borough's Consulting Engineers) until Tuesday, January 9, 1979. Immediately upon receipt of the copy of the letter on January 9, Mr. Haines telephoned Mr. O'Connell (the DER representative who had signed the letter); and, questioned Mr. O'Connell as to the specific reasons why the Utility Building, the Roof over the Chlorine Cylinders Storage Platform, and the increase in cost of the preparation of the Borough's Operations and Maintenance Manual had been determined by DER to be ineligible for EPA Grant Participation. Mr. O'Connell gave no specific reasons in response to Mr. Haines' questions, but merely recited the language contained in his January 5, 1979 letter to EPA. However, Mr. O'Connell did advise Mr. Haines that in order to prevent the Borough's Project from being delayed while these three items were reviewed, the Borough could make a formal request, at the completion of the Project and during the audit phase that these three items be considered for grant eligibility.

Appellant's Response and Memorandum to DER's Motion to Dismiss and Memorandum at p. 4.

Appellant further alleged the following in its Counter-Reply Memorandum:

> What the Borough did was merely what Mr. O'Connell had advised Mr. Haines on January 9, 1979 the Borough had a right to do. Although Mr. O'Donnell cited no regulatory provision for the advice he gave Mr. Haines on January 9, 1979, as it turned out Mr. O'Connell's advice was completely consonant with the EPA regulations which now appear at 40 CFR §§30.705 and 30.1200.

Appellant's Counter-Reply Memorandum at p. 3.

Although under Pennsylvania law, the doctrine of estoppel is applicable to the government, there are exceptions to this precept, and significant among them is the principle that the government cannot be bound by the acts of its agents and employees if those acts are outside the agent's powers, or in violation of positive law. Kellams v. Public School Employes' Retirement Board, (opinion in support of reversal), 486 Pa. 95, 403 A.2d 1315 (1979); Com., Department of Public Welfare v. UEC, Inc., 483 Pa. 503, 397 A.2d 779 (1979); Ervin v. City of Pittsburgh, 339 Pa. 241, 14 A.2d 297 (1940).

In this case, appellant argues that it should now be permitted to challenge a DER decision that became final in 1979 because, according to appellant's allegations, a DER employee informed appellant that it could request a reconsideration of the 1979 decision during the final audit phase of its project. Nevertheless, DER regulation, 25 Pa. Code §103.4,[4] prohibits certification of,

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[4] 25 Pa. Code §103.4. Project eligibility.
Projects shall remain eligible for Commonwealth certification only if the following conditions are met:
(1) The project complies with all grant regulations and other requirements for such grant applications as promulgated by the EPA and the Department.
(2) The project remains eligible for issuance of a Commonwealth permit for construction and operation of the proposed project.
(3) The project is part of or consistent with a Department approved comprehensive program of water quality management and pollution control as described in §91.31 of this title (relating to comprehensive water quality management).
(4) Initiation of the project for which funding is requested has not occurred prior to grant award unless authorized by Federal regulations.

and EPA regulation, 40 C.F.R. §35.925-18,[5] prohibits grant awards for projects that are constructed without preconstruction approval. Appellant began construction of the sewage treatment plant on April 30, 1979, and constructed the three items in question without prior approval. Thus, if an estoppel were invoked against DER to allow appellant to challenge, after construction, the grant eligibility of the three items in question, the estoppel would violate the regulations that prohibit grant awards for projects constructed without prior approval. DER's employee may have informed appellant that it could have the eligibility of the three items reconsidered during the final audit phase, but the state and federal regulations make it clear that the eligibility of an item for grant participation must be determined prior to construction. Since parties are charged with knowledge of the law, appellant could not have reasonably believed that it had a right to have the eligibility of the three items reconsidered after they were constructed. As stated in Brown v. Richardson, 395 F.Supp. 185, 190 (W.D.Pa. 1975):

> By operation of law, parties dealing with the government are charged with knowledge of, and are bound by, statutes and lawfully promulgated regulations, (citation omitted), and reliance upon incorrect information received from a government agent or employee can not alter the terms of a statute regardless of the economic hardship which may result.

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[5] 40 C.F.R. §35.925-18(b), as of January 5, 1979, was as follows:

> Step 3: Except as otherwise provided in this subparagraph, no grant assistance for a Step 3 project may be awarded unless such award precedes initiation of the Step 3 construction. Advance acquisition of major equipment items requiring long lead times, or advance construction of minor portions of treatment works, in emergencies or instances where delay could result in significant cost increases, may be approved by the Regional Administrator, but only (1) if the applicant submits a written and adequately substantiated request for approval, and (2) if written approval by the Regional Administrator is obtained prior to initiation of the advance acquisition or advance construction.

Thus, as a matter of law, the doctrine of estoppel cannot be invoked against the Commonwealth in this case because doing so would work a result inconsistent with 25 Pa. Code §103.4 and 40 C.F.R. §35.925-18.

ORDER

AND NOW, this 5th day of December, 1985, the appeal of the Borough of Lewistown at EHB Docket No. 84-271-M is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Anthony J. Mazullo Jr.

ANTHONY J. MAZULLO, JR., MEMBER

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

DATED: December 5, 1985

cc: Bureau of Litigation

For the Commonwealth, DER:
John C. Dernbach, Esq.
Central Region

For Appellant:
Bruce S. Nielsen, Esq.
SIEGEL & SIEGEL
Lewistown, PA

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COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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HARRISBURG, PENNSYLVANIA 17101
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MID-CONTINENT INSURANCE COMPANY :

:

: Docket No. 85-334-G

: Issued December 11, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

Action on the Department's Motion to Dismiss this appeal as untimely is deferred to give the Appellant the opportunity to request a hearing for the purpose of taking evidence concerning the date it received notice of the action appealed herein. 25 Pa.Code §21.52(a). If no request for a hearing is made, the Board, pursuant to 25 Pa.Code §21.64(d), will deem admitted the Department's allegations regarding the date of receipt of notice and the appeal will be dismissed as untimely.

OPINION

The issue presented to the Board herein concerns the timeliness of the filing of this appeal, which involves the forfeiture of surface mining bonds by the Department of Environmental Resources (DER). DER has issued two letters intended to notify the affected parties of the forfeitures, one dated March 13, 1985 and the other dated April 2, 1985. We must determine whether Appellant received either of these letters, and if so, when.

This appeal was originally docketed by the Board as a skeletal appeal, pursuant to 25 Pa.Code §21.52(c), after the Board received a letter from counsel for Appellant on July 30, 1985. The letter stated that Appellant had not been sent a copy of the notices of forfeiture and that it had not been aware of the forfeitures until an examination of the mining site was conducted with the mine operator, the principal on the bonds. This inspection apparently occurred in late July, 1985. Appellant previously had appealed several other bond forfeitures, which were enumerated in separate DER forfeiture notices. Since these appeals were already on the Board's docket, Appellant requested that the Board permit it to "extend" those earlier appeals to include the forfeitures of which it had only recently become aware. This request was denied. Under 25 Pa.Code §21.52(a), the Board has jurisdiction over an appeal from a DER action only if the appeal is filed within thirty days of receipt of notice of the action. The bond forfeitures with which we are here concerned are DER actions separate and distinct from those which Appellant previously had appealed. Therefore, a formal appeal of those actions must be made within thirty days of receipt of notice. The Board could not simply assume that the thirty-day-period requirement had been satisfied by including the later appeal with the former. Therefore, Appellant's appeal was docketed as having been filed on July 30, 1985.

DER has moved to have this appeal dismissed as having been untimely filed. In support of the motion, DER has attached copies of certified mail return receipt cards which appear to indicate that Appellant indeed did receive copies of the forfeiture notices. Receipt #4891198, associated with the forfeiture notice of March 13, 1985 shows a date of receipt of March 20, 1985. Receipt #448289 shows a date of receipt of April 10, 1985, for the April 2, 1985 forfeiture notice. In the absence of evidence to suggest that the signature on the returned receipt cards is not that of an individual with authority to represent the Appellant or other indications that Appellant did not receive notice until July, 1985, we could conclude that this appeal was not timely filed. 25 Pa.Code §21.64(d). Appellant has not indicated whether it intends to present such evidence. In the interest of affording it every opportunity to establish the timeliness of this appeal, however, Appellant may request a hearing for the purpose of taking evidence on the issue of the timeliness of the filing of the appeal, if it so desires.

O R D E R

WHEREFORE, this 11th day of December, 1985, it is ordered that a ruling on DER's Motion to Dismiss is deferred for a period of twenty days from this date. If Appellant intends to contest the fact of receipt of notice, as set forth in DER's Motion, it may petition the Board for the scheduling of a hearing on the issue. Said petition must be filed with the Board within twenty days of this date. In the absence of such filing, this appeal will be dismissed as untimely filed.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY, Member

cc: Bureau of Litigation
For the Commonwealth, DER:
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For Appellant:
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COMMONWEALTH OF PENNSYLVANIA

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:

:

: Docket No. 85-413-W

U. S. COAL, INC. : Issued: December 13, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION TO DISMISS

Synopsis

A ruling by the Board on a motion by the Department of Environmental Resources to dismiss a petition for allowance of an appeal nunc pro tunc is deferred, and Petitioner is given the opportunity to submit a further statement of the facts.

OPINION

U. S. Coal, Inc. petitioned this Board on October 10, 1985 to allow an appeal nunc pro tunc from a notice from the Department of Environmental Resources (DER) of intention to forfeit certain bonds posted by U. S. Coal for its mining operations. In support of this petition, U. S. Coal avers that it received the notice from DER on June 10, 1985 and mailed a Notice of Appeal on June 20, 1985. If U. S. Coal did mail a Notice of Appeal on June 20, 1985, this Board has no record of receiving it. DER filed a Motion to Dismiss this appeal for untimeliness, alleging that appellant failed to show that its untimely filing of its Notice of Appeal was a result of fraud or any other deficiency in the Board's procedure. U. S. Coal, however, impliedly states that this Board is

responsible for its appeal not having been docketed within the thirty day appeal period. If the Board is, in fact, responsible, then the Board will allow U. S. Coal an appeal nunc pro tunc.

U. S. Coal has raised a factual question as to whether the Board is responsible for its appeal not having been timely docketed, and the Board will not resolve this factual question in a ruling on a motion to dismiss. The burden, however, is on U. S. Coal to show facts sufficient to allow the appeal nunc pro tunc, and the Board will give U. S. Coal the opportunity to do so.

ORDER

AND NOW, this 13th day of December, 1985, U. S. Coal is ordered to submit to the Board on or before January 3, 1986, a further statement of the facts it alleges would be a sufficient basis for the Board to allow U. S. Coal an appeal nunc pro tunc, pursuant to 25 Pa. Code §21.53. A ruling on DER's Motion to Dismiss will be deferred until after timely receipt of such statement.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: December 13, 1985

cc: Bureau of Litigation
Harrisburg, PA

For the Commonwealth, DER:
Joseph K. Reinhart, Esq.
Western Region

For Appellant:
Joseph E. Altomare, Esq.
Titusville, PA

bl

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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HARRISBURG, PENNSYLVANIA 17101
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BIG "B" MINING COMPANY :

:

: Docket No. 83-215-G

: Issued December 18, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and TROUT UNLIMITED, Intervenor

OPINION AND ORDER

Synopsis

25 Pa.Code §95.1(b) requires that a party which proposes to discharge pollutants to high quality waters demonstrate that the operation giving rise to the discharge is justified as a result of a necessary social or economic development which is of significant public value. The Board construes §95.1(b) as requiring a strong showing of justification. First, the development which allegedly will result from the operation must be necessary, i.e., needed by the public. Secondly, the public benefits must not be merely speculative results of the operation; the benefits must be highly likely to result. In addition, the public benefits must be significant, i.e., unquestionably important. In order to determine whether a prospective permittee has met its burden under §95.1(b), the Board must balance the claimed net social or economic benefits against the environmental degradation which will result from the permittee's

operation. It is not sufficient for the permittee to show that the social or economic benefits from the proposed operation will exceed the social or economic loss from the environmental degradation.

OPINION

Big B has appealed DER's denial of Big B's application for mine drainage permit No. 10810124 in Washington Township, Butler County. Big B seeks to conduct surface mining operations on an area in the Silver Creek watershed. One of the reasons given by DER for denying the permit was: "[T]he Department found that Big B Mining Co.'s application had failed to demonstrate social and economic justification for all discharges to the Silver Creek Watershed."

Big B has the burden of proof in this appeal, 25 Pa.Code §21.101(c)(1). Therefore the Board, being uncertain about the precise nature of this burden, ordered Big B to file a memorandum of law addressing the following issues:

> a. In order to establish "social and economic justification," what elements is it the appellant's burden to prove?
>
> b. What testimony, in the context of the present appeal, will be germane to this burden?

Big B has filed its memorandum; DER has not responded. We believe we should not further delay this ruling, however, which the parties require in order to prepare

adequately for the hearing on the merits of this matter, presently scheduled to begin February 24, 1986.

The requirement that Big B demonstrate "social and economic justification" stems from the regulations in 25 Pa.Code Chapters 93 and 95. Drainage List S of 25 Pa.Code §93.9 lists Silver Creek as a High Quality stream in some portions and as having Exceptional Value in other portions. The terms "High Quality Waters" and "Exceptional Value Waters" are defined in 25 Pa.Code §93.3, and are designated as deserving special protection; the definitions make it clear that Exceptional Value Waters deserve even more protection than mere High Quality Waters. The record before us as of this date does not show whether Big B's mining operation would threaten only the High Quality portions of Silver Creek, or whether the Exceptional Value portions of Silver Creek also might be threatened. However, DER's requirement of "social and economic justification" has been taken from 25 Pa.Code §95.1(b), pertaining to High Quality Waters, and not from the more restrictive (from the standpoint of permissible discharges) §95.1(c). Consequently DER's and this Opinion's concentration on §95.1(b) will not prejudice Big B, even though the record has not established that the applicable 25 Pa.Code §95.1 section is §95.1(b) rather than §95.1(c).

25 Pa.Code §95.1(b) reads:

> (b) Waters having a water use designated as "High Quality Waters" in §§93.6 and 93.9 (relating to general water quality criteria and designated water uses and water quality criteria) shall be maintained and protected at their existing quality or enhanced, unless the following are affirmatively demonstrated by a proposed discharger of sewage, industrial wastes, or other pollutants:
>
> (1) The proposed new, additional, or increased discharge or discharges of pollutants is justified as a result of necessary economic or social development which is of significant public value.

We remark that §94.1(b)(1) uses the disjunctive "necessary economic or social development" rather than the conjunctive "failed to demonstrate social and economic justification" used in DER's appealed-from permit denial letter. Neither social nor economic justification is mentioned in other pertinent Pennsylvania regulations, nor are these phrases to be found in the Clean Streams Law, 35 P.S. §§691 et seq. We additionally remark that the regulations implementing the federal Clean Water Act, 33 U.S.C. §§1251 et seq., which DER cannot ignore, also use the disjunctive "economic or social development." Specifically, 40 C.F.R. §131.12 reads:

> §131.12 Antidegradation policy.
>
> (a) The State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart. The antidegradation policy and implementation methods shall, at a minimum, be consistent with the following:
>
> (1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.
>
> (2) Where the quality of the waters exceed levels necessary to support propogation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or, lower water quality, the State shall assure water quality adequate to protect existing uses fully.

Therefore we rule that Big B's burden--with respect to social and economic justifications--is to demonstrate (in the language of 25 Pa.Code §95.1(b)(1)) that "the proposed new additional, or increased discharge or discharges of pollutants"

into the Silver Creek watershed "is justified as a result of necessary economic or social development which is of significant public value." DER's original finding that Big B's application "had failed to demonstrate social and economic justification for all discharges to the Silver Creek Watershed" was an overly strict application of §95.1(b). This ruling is consistent with our past decision in Maskenozha Rod and Gun Club v. DER, 1981 EHB 244, aff'd Marcon v. DER, 462 A.2d 969 (Pa.Cmwlth. 1983).

We have found Big B's memorandum of law of little use for deciding the answers to the questions a and b (quoted supra) which that memorandum was supposed to address. In general, Big B urges that the justification, whether social or economic, must be established by balancing the corresponding benefits against the environmental harm which the discharges threaten. The Board agrees with this largely uncontroversial thesis; the real issues, however, are what factors are to be balanced and how those factors are to be weighed. Maskenozha, supra, which Big B has not cited, is the only Pennsylvania case which has addressed these issues. Maskenozha involved a challenge to a permit allowing a planned housing development to discharge treated sewage into a high quality stream. The Maskenozha permittee offered, and the Board apparently was willing to entertain, arguments of the following sort in support of social and economic justification:

> A. In support of social justification:
>
> (1) The proposed housing development will enhance public recreational opportunities.
>
> (2) The proposed housing development will relieve the mental and physical stresses of people presently in need of housing.
>
> (3) The increased population in the area resulting from the housing development will bring more physicians, hospital services and cultural programs to the area.

B. In support of economic justification:

(1) Construction of the proposed development will provide job and entrepreneurial opportunities for people presently living in the area.

(2) The proposed development will attract new industries to the area, thereby providing additional jobs and entrepreneurial opportunities.

(3) There will be increased tax revenues to local municipalities.

Of the foregoing Maskenozha arguments, only B(1) appears to have any relevance to the instant appeal. Indeed, Big B's memorandum of law--though admittedly not necessarily dispositive of Big B's arguments in support of social and economic justification--argues only that the proposed surface mining operation will provide jobs to local residents, including the landowner, whose expenditures from their increased incomes then will revive a presently depressed economy. We agree that evidence in support of this Big B argument can be relevant to the economic justification for the proposed mining operation, but we point out that 25 Pa.Code §95.1(b)(1) requires that the expected economic or social development be "necessary" and of "significant public value". Our research has disclosed no Pennsylvania cases which offer useful constructions of these terms in the context of the instant appeal. Therefore, we will construe them as best we can, consistent with the requirements of the Statutory Construction Act, 1 Pa.C.S.A. §1901, et seq., especially §1903, and 1 Pa.Code §1.7.

We take the modifier "necessary" to mean that the operation for which the permit is sought must be needed by the public and that the benefits which it allegedly will produce are highly probable. Development which the public does not need or which would be merely a speculative result of the mining operation does not provide the kind of justification mandated by 95.1(b)(1). Similarly, under §95.1(b)(1), the economic or social development must be valuable to the public,

not merely to the mining operator or his landowner lessor, and this public value must be significant. Webster's Third New International Dictionary (1981) gives "important", "weighty" and "notable" as synonyms for "significant". As we see it, the intent of the EQB in promulgating 25 Pa.Code §95.1(b) together with 25 Pa. Code §93.3 (quoted infra) is that significant be given a strong rather than weak interpretation; we shall take "significant" to mean "unquestionably important".

The economic or social benefits which ultimately will be balanced against the environmental degradation Big B's discharges are expected to produce must be net; the parties opposing Big B in this matter must be given the opportunity to establish that the expected environmental degradation will cause social or economic losses to the public, which have to be subtracted from any social or economic benefits Big B has established. The testimony in support of such counterbalancing social or economic losses must be persuasive, however; in effect the Board regards allegations of social or economic losses to the public from the expected environmental degradation as an affirmative defense (which DER and the Intervenor will have to put forth) against Big B's attempt to provide the required social or economic justification for the discharges. But, as explained earlier, it remains Big B's burden to persuade the Board that (net) social or economic justification exists.

As to the balancing act itself, the Board sees no "bright line" rule for weighing the net social or economic benefits against environmental degradation; previous opinions which have performed the similar balancing mandated by the third prong of the test enunciated in Payne v. Kassab, 468 Pa. 226, 361 A.2d 263 (1976), interpreted with the aid of good common sense, will be our best guide. 25 Pa.Code §93.3 defines "High Quality Waters" as:

> A stream or watershed which has excellent quality waters and environmental or other features that require special water quality protection.

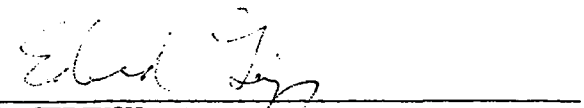
It is Big B's burden to persuade us that this EQB precept to provide special water quality protection to the Silver Creek watershed is outweighed by the net social or economic benefits of the proposed mining operation. In this connection we stress, to avoid any possible misapprehension, that the balancing must be of net social or economic benefits vs. environmental degradation; it is not sufficient for Big B to persuade us that the social or economic benefits from the proposed mining operation will exceed the social or economic losses from the expected environmental degradation.

Without further information about the kind of evidnece Big B intends to offer, which we sought from Big B but did not receive in its memorandum of law, we cannot offer Big B any better guidance than given supra concerning Big B's burden of demonstrating social or economic justification under 25 Pa.Code §95.1(b). The Board reserves the right to rule out any testimony offered at the forthcoming hearing on the merits which appears to be irrelevant in the light of this Opinion.

O R D E R

WHEREFORE, this 18th day of December, 1985, it is ordered that, insofar as the issue of social or economic justification for Big B's proposed mining operation is concerned, rulings on the admissibility of testimony at the forthcoming hearing on the merits will be guided by the above Opinion.

ENVIRONMENTAL HEARING BOARD



EDWARD GERJUOY
Member

DATED: December 18, 1985

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GEORGE ENTERPRISES, INC.
and
INTERSTATE DRILLING, INC.

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

and CONSOLIDATION COAL COMPANY,
Intervenor

Docket No. 85-291-G

(Issued: December 19, 1985)

OPINION AND ORDER
SUR MOTION TO DISMISS

Synopsis

This appeal is dismissed as having been taken from an unappealable DER action. The letter which is appealed constitutes a mere statement of opinion and does not bind the appellant in any way. No action has been taken which affects the appellant's rights, duties, obligations or privileges. 2 Pa. C.S.A. §101; 1 Pa.Code §31.3; 25 Pa.Code §21.2. Therefore, the appeal must be dismissed.

* * *

OPINION

This appeal is related to the appeal by Consolidation Coal Company (hereinafter "Consol") docketed at 84-243-G, whose adjudication has not yet been filed. At 84-243-G, Consol appealed DER's issuance of four permits to George Enterprises ("George") to drill gas wells at four surface sites above Consol's Purseglove No. 15 underground coal mine (the "mine"). The wells in question are numbered 1, 2, 4 and 5.

On April 30, 1985, after the conclusion of the hearing on the appeal at 84-243-G, Consol wrote DER, stating that Consol believed the permits for wells 1, 2 and 4 had expired and would require repermitting under the newly passed Oil and Gas Act of December 19, 1984, P.L. 1140, Act 223, which became effective on April 18, 1985. "Accordingly", Consol's April 30, 1985 letter continued:

> Consol requests the Bureau of Oil and Gas Management to formally notify George Enterprises, Inc. ("George") of the expiration of the above-referenced permits and to take whatever action is necessary to prevent the unauthorized drilling of any gas wells and the resultant harm to Consol.

DER refused this request, in a letter to Consol dated May 2, 1985. Consol has appealed this refusal, in an appeal docketed at 85-220-G. But then DER wrote George on June 21, 1985 that DER had reconsidered its May 2, 1985 letter to Consol, and now believed the permits for wells 1 and 2 indeed had expired, as Consol originally had maintained. Therefore, DER now wrote George:

> Since you did not commence activities on these two wells prior to April 18, 1985, the effective date of the Oil and Gas Act, Act of December 19, 1984, P.L.1140, you must secure permits under the new Oil and Gas Act if you intend to drill deeper these two existing wells.

The above-captioned matter involves George's appeal of DER's June 21, 1985 letter. On September 18, 1985, DER moved to dismiss this appeal, on the

grounds that DER's letter of June 21, 1985 was not an appealable action. We granted DER's motion, and dismissed the appeal, in an Order (unaccompanied by an Opinion) dated November 6, 1985. This Opinion explains the basis for our November 6, 1985 Order.

DER's motion to dismiss this appeal argues mainly that its letter to DER merely is an expression of opinion--by the DER counsel who authored the letter--concerning the legal implications of the new Act's passage. The June 21, 1985 letter, DER maintains, does not "renew, revoke, suspend or otherwise affect the well permits previously issued for wells 1 and 2, nor does the letter "order George to take an action to comply with the law." Accordingly, DER further maintains, its June 21, 1985 letter is not an action "affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any person," which would be appealable under the Administrative Agency Law, 2 Pa.C.S.A. §101, the General Rules of Administrative Practice and Procedure, 1 Pa.Code §31.3, or the Board's own Rules and Regulations, 25 Pa.Code §21.2.

We agree with DER, which has cited numerous precedents in support of its contentions. George's response to DER's motion has criticized DER's use of several of these precedents, but we do not find these criticisms to be apposite. For example, George claims:

> In Gateway Coal Co. v. Commonwealth, 399 A.2d 802 (1979) the court held that a letter of the Commissioner of Deep Mine Safety that the company's proposal was contrary to law did "constitute a final decision regarding the testing procedures proposed by petitioner."

However, the Commissioner to whom the Gateway opinion refers is not merely a DER counsel, and his letter did not merely paraphrase the legal opinion of DER

counsel that the company's proposal "was contrary to law." Under the Commonwealth Attorneys Act, 71 P.S. §§732-101 et seq., DER's counsel's duties and obligations are confined essentially to coordinating legal services and offering legal advice: DER's counsel does not have the authority to issue compliance orders over counsel's signature alone. On the other hand, as the Gateway opinion states, the Commissioner in Gateway was acting for the Secretary of DER, who--under 71 P.S. §§510-1 and 510-15--does have the authority to issue orders under the Bituminous Coal Mine Act, 52 P.S. §§701-101 et seq. The Commissioner's letter explicitly rescinded DER's initial approval of Gateway's plan for methane gas testing in Gateway's bituminous mine, and ordered Gateway to formulate a new plan. Thus, as the Gateway opinion explains, the Commissioner's letter was consistent with the principle that:

> In order for an action of the Department to constitute a final action from which an appeal can be taken, the determination of the department must direct compliance with an Act and impose some liability or otherwise affect the obligations or duties of a person.

And, as we have held repeatedly, a mere statement of opinion by DER is not an appealable action. Doan Mining Company v. DER, EHB Docket No. 84-419-G (Opinion and Order, April 19, 1985); Gary Huey v. DER, 1984 EHB 667 (Opinion and Order, May 15, 1984).

In sum, George's belief that Gateway, supra, supports George's rather than DER's contentions in this matter is incorrect; George's objections to Gateway as support for DER's motion are inapposite. George's other criticisms of DER's cited precedents are equally inapposite. DER's June 21, 1985 letter to George was not appealable.

O R D E R

WHEREFORE, this 19th day of December, 1985, this Board affirms our Order of November 6, 1985, dismissing this appeal.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, Chairman

Anthony J. Mazullo Jr.

ANTHONY J. MAZULLO, JR., Member

Edward Gerjuoy

EDWARD GERJUOY, Member

DATED: December 19, 1985

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BRADFORD COAL COMPANY, INC. :

:

: Docket No. 83-061-G

: Issued December 19, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION FOR PROTECTIVE ORDER

Synopsis

The Department's Motion for a protective order is granted to the extent that Appellant seeks discovery of instructions and legal opinions given to a Department inspector by Department counsel regarding actions to be taken against an operator with whom the Department was involved in on-going litigation. Such legal opinions and advice are protected against discovery by the work product doctrine. Pa.R.C.P. 4003.3. A ruling on the Department's Motion is deferred insofar as the motion seeks to prevent Appellant's discovery of the substance of a notation made by the inspector in her daily diary concerning the conversation between the inspector and the Department counsel. While the notation may be protected by either the work product doctrine or the attorney-client privilege, the Board is unable to determine whether either is applicable until it conducts an in camera inspection of the notation.

OPINION

This Opinion addresses a discovery dispute concerning the duty of the Department of Environmental Resources to disclose the substance of certain communications between Department counsel and a mine conservation inspector. The Department has argued that it has no duty to disclose these communications because they are protected by either the attorney-client privilege or the work product doctrine. In an earlier Opinion dated August 16, 1985 (Bradford Coal v. DER, EHB Docket No. 85-163-G) we ruled that under the facts as alleged, the attorney-client privilege appeared to be inapplicable; we noted, however, that the information sought by Appellant might be exempt from disclosure under the work product doctrine. We requested that the parties brief the work product issue. We now address the merits of the parties' arguments.

The parties appear to be in general agreement concerning the facts which underlie this dispute. One of the Department actions with which this appeal deals is a compliance order dated March 29, 1985 issued by Mine Conservation Inspector Colleen Brophy. The compliance order was written as a consequence of the inspector's observations of Appellant's mine site during an inspection conducted on March 29, 1985. The report which the inspector completed as a result of that inspection states that it "was written under the instructions of Department attorney Tim Bergere."[1] It is this statement which has given rise to the controversy at hand.

Appellant, in connection with a notice of deposition of Inspector Brophy, requested that the Department make available the following information:

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[1] Inspector Brophy states that she included the aforesaid statement in her report to advise relevant parties that she had complied with the Department's policy of contacting counsel when taking action concerning an operator with whom the Department was engaged in litigation.

> A copy of any written instructions or documents furnished to you, Colleen A. Brophy, by Attorney Timothy Bergere, as referred to in the report of March 29, 1985 pertaining to the cessation order issued by you, Colleen A. Brophy, on that date as involved in this proceeding.

In response to this request the Department sought a protective order preventing Appellant from obtaining discovery of the requested information. Appellant has renewed its request for this information through interrogatories served upon Department counsel. In response to these interrogatories the Department has stated that Inspector Brophy contacted Attorney Bergere in March 29, 1985 for the purpose of obtaining legal advice, being aware that the mine site with which the inspection report and associated cessation order were concerned was the subject of on-going litigation between the Department and Appellant (which litigation is the subject matter of this consolidated appeal). Inspector Brophy made an entry in her daily diary concerning the conversation she had with Attorney Bergere. The Department's position is that it need not disclose the written notation in the diary or the substance of the conversations between Inspector Brophy and Attorney Bergere because such information is protected by either the attorney-client privilege or the work product doctrine.

As we stated in our earlier Opinion, supra, the attorney-client privilege protects against discovery of statements made by the client to counsel. Union Carbide Corporation v. Traveler's Indemnity Company, 62 F.R.D. 411 (W.D.Pa.1973); LaRocca v. State Farm Mutual Auto Insurance Company, 47 F.R.D. 278 (W.D.Pa.1969) (construing 42 Pa.C.S.A. §5928). See also, Goodrich Amram, Depositions and Discovery, §4011(c):2. This is not to say that statements made by counsel to the client are necessarily subject to discovery, however. To the extent that statements of the attorney reiterate or incorporate communications from the client,

the attorney-client privilege applies. Eisenman v. Hornberger, 44 D & C 2d 128 (1967); In re Westinghouse Corporation Uranium Contracts Litigation, 76 F.R.D. 47 (W.D.Pa.1977). In addition, Pa.R.C.P. 4003.3, which embodies the work product doctrine first enunciated in Hickman v. Taylor, 329 U.S. 495 (1947), protects against disclosure of the "mental impressions of a party's attorney, or his conclusions, opinions, memoranda, notes or summaries, legal research or legal theories."[2]

In ruling upon the Department's Motion for a protective order the purposes underlying the work product doctrine and the attorney-client privilege must be kept in mind. The work product doctrine rests upon considerations of "strong public policy. . . [I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper [preparation] of a client's case demands that he assemble information, sift what he considers to be relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." U.S. v. Nobles, 422 U.S. 225, 237 (1975).

While the work product doctrine serves to assure confidentiality of the attorney's thoughts, theories and the like, the attorney-client privilege is designed to encourage "full and frank communication" between attorneys and their clients. It rests upon "the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." Upjohn, supra, at 383.

In either case, whether the attorney-client privilege or the work product doctrine applies, the basic consideration is that both client and counsel must be

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[2] The explanatory note following the rule states that in circumstances where the legal opinion of the attorney is a relevant issue in the action, such as in an action for malicious prosecution, the opinion is not protected against discovery by the work product doctrine. This exception to the rule clearly has no application to the instant matter, however.

free to openly discuss the client's legal situation. It is often the case that parties seeking advice concerning the proper course of conduct can go nowhere other than their attorney "to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs." Hickman v. Taylor, 329 U.S. at 514-15 (Justice Jackson concurring).

Keeping these purposes in mind, we reject Appellant's suggestion that the purpose for which it seeks the information should be determinative. The attorney-client privilege "is not concerned with prejudice or the better ascertainment of the truth. . . (but with) a policy entirely extrinsic to the protection of the fact-finding process." Estate of Kofsky, 487 Pa. 473, 409 A.2d 1358 (1980). Similarly, where work product is concerned, the primary consideration is whether disclosure of the information sought would threaten the interests which the doctrine is designed to protect. Under Pa.R.C.P. 4003.3, the need of opposing counsel for the information is not taken into consideration. This distinguishes Pennsylvania practice from the federal rule, which provides that discovery of work product materials may be had upon a showing of "substantial need" and proof that opposing counsel is unable without "undue hardship" to obtain the substantial equivalent of the materials sought by other means. Fed.R.Civ.P. 26(b)(3). We believe this distinction is significant. Even among the federal courts there is considerable dispute as to whether "opinion work product", i.e., the attorney's theories and thoughts, are subject to disclosure despite the language of the federal rule. See Upjohn Company v. U.S., 449 U.S. 383 (1981); Borgosian v. Gulf Oil Corp., 738 F.2d 587 (3rd Cir.1984). The Pennsylvania Rule contains no such qualification; the comment following the rule unambiguously states that the rule "means exactly what it says. It immunizes the lawyer's mental impressions, conclusions, memoranda notes, summaries, legal research and legal theories." Therefore,

we conclude that to the extent the information sought by Appellant includes Attorney Bergere's protected work product under Rule 4003.3 or incorporates communications from Inspector Brophy to Attorney Bergere, it is immune from discovery, regardless of the uses to which Appellant hopes to apply it.

This ruling, however, is subject to one important qualification. The work product doctrine and the attorney-client privilege cannot be used to shield from discovery information to which opposing counsel otherwise would be entitled. As the comment to Rule 4003.3 makes clear, despite a claim of work product, "documents, otherwise subject to discovery, cannot be immunized by placing them in the lawyer's file." Likewise, the attorney-client privilege protects only disclosure of communications; it does not prevent disclosure of the underlying facts by the client who communicated with the attorney. Upjohn v. U.S., supra. Thus, where a document contains both factual information and information which is privileged or which constitutes work product, the document must be edited to eliminate the protected information. Borgosian v. Gulf Oil Corporation, supra.

In light of the foregoing considerations, we conclude that the Appellant is not entitled to the information sought via Interrogatories 4 and 5. These interrogatories request that the Department reveal any instructions given by Attorney Bergere to Inspector Brophy regarding the writing of the inspection report and order of March 29, 1985. We do not see that such instructions are likely to contain any substantive factual information to which Appellant conceivably might be entitled. Rather, such instructions, if any were given, would concern the Department's choice of action concerning a matter which was presently in litigation; Attorney Bergere's opinions and legal theories would be implicit, if not explicit, in those instructions. Therefore, these instructions deserve

the special protection provided by Rule 4003.3. As one court has stated, an attorney's "investigative and strategic efforts on behalf of a client in litigation" are protected by the work product doctrine. "Nothing falls more clearly within the area protected by the work product doctrine than the legal advice counsel may have given or considered giving a client during ongoing litigation." In re Grand Jury Investigation, 412 F.Supp. 944, 949 (E.D.Pa.1976) (holding that file memoranda summarizing an attorney's legal theories are protected against disclosure).

With regard to the notation which Inspector Brophy made in her diary, whose text is requested in Interrogatory 10, the issue is not as clearly defined. Without examining the notation itself it is impossible for us to determine whether it contains information to which Appellant would be entitled, i.e., information not protected by the attorney-client privilege or the work product doctrine. As we have stated, supra, communications from the client to the attorney made in the course of seeking legal advice are privileged and cannot be revealed, except to the extent that they embody factual details, which if revealed would not disclose the substance of the client's confidential communications to the attorney. Furthermore, if the notation reiterates subject matter from which Attorney Bergere's legal conclusions, opinions and the like can be readily inferred, it will be protected to that extent against disclosure under the work product doctrine. Although we are aware of no cases discussing this issue, we see no reason to hold that the mere fact that the client, rather than the attorney, committed the legal opinions to paper makes any difference with regard to application of the doctrine. The essential considerations are that the attorney's legal opinions remain confidential and that the attorney be able to advise his client freely and fully, even if this advice includes disclosure of his legal opinions or theories to his

client.[3] Accordingly, since without an examination of Inspector Brophy's notation we are unable to determine whether any of the foregoing considerations are applicable, the accompanying order requires that a copy of the notation be provided to the Board for in camera inspection.

[3] We stress that we are not ruling that an attorney's communications of his legal conclusions, opinions, etc. to any person cannot be discovered; however, there is no need for us to decide here how widely an attorney may disseminate his legal opinions without losing the protection afforded by Rule 4003.3.

O R D E R

WHEREFORE, this 19th day of December, 1985, it is ordered as follows:

1. The Department's Motion for a Protective Order is granted with regard to the information sought by Appellant's Interrogatories 4 and 5, which request the Department to reveal the instructions given by Attorney Bergere to Inspector Brophy regarding the writing of the inspection report and order of March 29, 1985. Appellant is not entitled to discovery of the information sought by Interrogatories 4 and 5.

2. A ruling on the Department's Motion for a Protective Order regarding the notation made by Inspector Brophy in her daily diary is deferred pending an in camera inspection of the notation by the Board.

3. On or before January 2, 1986, the Department shall provide the Board with a copy of the aforesaid notation for in camera inspection.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: December 19, 1985

cc: Bureau of Litigation
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CONSOLIDATION COAL COMPANY :

Appellant :

: Docket No. 85-220-G

: Issued December 20, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Appellee

and

GEORGE ENTERPRISES, INC. & INTERSTATE DRILLING, INC.

Intervenors

OPINION AND ORDER

Synopsis

DER's Motion to Dismiss as moot is denied. Despite the fact that DER has altered its legal position on one of the issues presented herein, the essential issue remains unchanged: whether DER could have or should have taken action in response to Appellant's request. Therefore, no portion of the appeal has been rendered moot. Motions for judgment on the pleadings will be considered upon receipt of the same and responses thereto.

* * *

OPINION

On September 18, 1985, we issued an Opinion and Order in this matter, to which the reader should refer, explaining why we had rejected a petition to quash this appeal as having been taken from an unappealable DER action. We now deal with DER's Motion, filed October 25, 1985, to dismiss portions of this appeal as moot.

As discussed in our September 18, 1985 Opinion, this appeal has evolved from the appeal of Consolidation Coal Company ("Consol") v. DER and George Enterprises ("George") docketed at 84-243-G, which has not yet been adjudicated.

On April 30, 1985, after the conclusion of the hearing on the appeal at 84-243-G, Consol wrote DER, stating that Consol believed the permits for wells 1 and 2 had expired and would require repermitting under the newly passed Oil and Gas Act of December 19, 1984, P.L. 1140, Act 223 (the "Act"), which became effective on April 18, 1985.[1] "Accordingly," Consol's April 30, 1985 letter continued:

> Consol requests the Bureau of Oil and Gas Management to formally notify George Enterprises, Inc. ("George") of the expiration of the above-referenced permits and to take whatever action is necessary to prevent the unauthorized drilling of any gas wells and the resultant harm to Consol.

In response, on May 2, 1985, DER's counsel wrote to Consol as follows:

> We have considered your request. Based on the information available to us and our interpretation of the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, Act 223, we believe these [two] permits are sufficient permits under the Oil and Gas Act.

---

[1] Consol's letter also stated that Consol believed that the permit for well 4 had expired. Since DER's Motion to Dismiss only addresses wells 1 and 2, however, we need not discuss well 4 herein.

The above-captioned appeal involves Consol's appeal of DER's May 2, 1985 letter. Our September 18, 1985 Opinion held that this letter was more than a mere expression of DER's legal opinion about the status of the previously issued permits for wells 1 and 2, because the letter implicitly but unmistakably informed Consol that DER had decided not to interfere in any way with George's drilling plans. If DER's May 2, 1985 letter merely had stated DER's legal opinion for Consol's benefit, then under well-established precedent the letter would not have been an appealable DER action. George Enterprises v. DER, Docket No. 85-291-G (Opinion and Order, December 19, 1985) and citations therein.

This just-cited Opinion at 85-291-G concerns a June 21, 1985 letter from DER to George, written by the same DER Assistant Counsel who wrote the May 2, 1985 letter to Consol, informing George that DER had reconsidered its May 2, 1985 letter to Consol and now believed the permits for wells 1 and 2 indeed had expired as Consol originally had maintained. DER's precise language was:

> [The permits for wells 1 and 2] were issued to George Enterprises on June 26, 1984, authorizing George Enterprises to drill deeper two existing wells. These permits were issued under the Gas Operations Well Drilling Petroleum and Coal Mining Act, Act of November 30, 1955, P.L. 756 as amended.
>
> Since you did not commence activities on these two wells prior to April 18, 1985, the effective date of the Oil & Gas Act, Act of December 19, 1984, P.L. 1140, you must secure permits under the new Oil & Gas Act if you intend to drill deeper these two existing wells.

George Enterprises, supra, held that under the Commonwealth Attorneys Act, 71 P.S. §§732-101 et seq., DER's counsel does not have the authority to issue compliance orders over counsel's signature alone. Therefore the June 21, 1985 letter, despite its phrase "you must secure permits under the new Oil & Gas Act if you intend to drill deeper," could not have been more than DER's legal opinion for George's benefit.

In contrast, DER's May 2, 1985 letter, though signed by DER's counsel alone, is reasonably construed as formal notification that DER (whether on advice of counsel or not is immaterial) had decided to refuse Consol's request for action by DER "to prevent the unauthorized drilling of any gas wells and the resultant harm to Consol." Of course, as fully discussed in our September 18, 1985 Opinion in this appeal, there also is considerable Board precedent that DER's refusal of a third party request for action on another party's permit need not be--and generally should not be--an appealable DER action. But, as also fully discussed in our September 18, 1985 Opinion, under the very special circumstances of this request by Consol for action on George's permits, it is better public policy to hold that DER's refusal to act is appealable.

The DER Motion presently before us maintains that DER's June 21, 1985 letter to George, quoted supra, has made Consol's appeal moot as to the George permits for wells 1 and 2. DER argues that its June 21, 1985 letter has granted Consol's original request (formulated in Consol's May 2, 1985 letter) as to wells 1 and 2, and therefore that there is no relief (to Consol) which this Board can grant as to those wells. This argument is not well taken. Our December 19, 1985 George Enterprises Opinion, supra, accepted DER's argument that its June 21, 1985 letter to George merely expressed DER's legal opinion. Our September 18, 1985 Opinion in the instant appeal construed Consol's April 30, 1985 letter to DER as a request for action "to prevent the unauthorized drilling of any gas wells." DER's legal opinion is not a DER action. George Enterprises, supra. Therefore DER's June 21, 1985 letter has not given Consol the relief Consol originally requested as to wells 1 and 2, i.e., has not rendered this appeal moot as to those wells.

The foregoing has not wholly disposed of issues raised by DER's Motion, however, because Consol's response to the motion asks for judgment on the pleadings in Consol's favor, on the grounds that DER now has admitted that George's previously issued permits for wells 1 and 2 have expired; therefore, Consol maintains in effect, DER's refusal to order George to cease drilling operations on wells 1 and 2 until George receives new permits under the Act is an abuse of DER's discretion as a matter of law. DER has not directly replied to Consol's request, but previously has argued--in an October 2, 1985 Petition for Reconsideration of our September 18, 1985 Opinion and Order--that DER's legal opinion (as of June 21, 1985) that George's permits to drill wells 1 and 2 had expired by operation of law did not give DER the authority to order George to cease drilling operations on those wells. On October 8, 1985, we denied the Petition for Reconsideration, but did not address DER's just-stated argument. If this argument is correct, then not only must Consol's request for judgment on the pleadings be denied, but rather DER should be granted judgment on the pleadings (which, however, DER has not formally requested); if DER does not have the authority to order George to cease drilling, its refusal to issue such an order cannot be an abuse of its discretion.

We shall not grant Consol its requested judgment on the pleadings. Irrespective of the just-mentioned disputed issue concerning DER's authority to order George to cease drilling, we cannot grant judgment on the pleadings to Consol unless Consol (and now DER) are correct in their contention that George's previously granted permits for wells 1 and 2 have expired by operation of law. This contention was hotly disputed by George in the appeal at 85-291-G. Although that appeal now has been dismissed on the grounds that DER's June 21, 1985 letter was unappealable, the merits of George's contention that the permits had not expired were not reached by this unappealability ruling.

O R D E R

WHEREFORE, this 20th day of December, 1985, it is ordered that:

1. DER's Motion to dismiss portions of this appeal as moot is denied.

2. On or before thirty days from the date of this order, the parties, including the Intervenors, shall respond to Consol's request for judgment on the pleadings; DER's response may refer to DER's petition for reconsideration of our September 18, 1985 Opinion and Order.

3. On or before thirty days from the date of this order, DER may move for judgment on the pleadings on the ground that it did not have the legal authority to take the action requested by Consol.

4. Responses to DER's Motion, if any, must be filed within twenty days of receipt of the Motion. Documents not filed within the time frames specified by this order may not be considered by the Board.

5. The parties may submit briefs, if they desire, discussing the factual circumstances, if any, under which it would be appropriate for DER to take the action requested by Consol, assuming arguendo that DER possesses the legal authority to take such action.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: December 20, 1985

cc: Bureau of Litigation
For the Commonwealth:
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Western Region, Pittsburgh, PA
For the Appellant:
Henry Ingram, Esquire
ROSE, SCHMIDT, CHAPMAN, DUFF & HASLEY
Pittsburgh, PA
For the Intervenors:
Patrick McGinley, Esquire
Morgantown, WV

COMMONWEALTH OF PENNSYLVANIA
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221 NORTH SECOND STREET
THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

PHILIP F. BOGATIN, INC. :
:
:
:
v. : Docket No.: 85-023-M
:
COMMONWEALTH OF PENNSYLVANIA, : Issued December 20, 1985
DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION AND ORDER

Synopsis

This appeal is dismissed pursuant to 25 Pa. Code §21.124 because appellant failed to comply with Board orders.

OPINION

Philip F. Bogatin, Inc. filed an appeal with the Board on January 25, 1985 from the denial by the Department of Environmental Resources of a permit to place fill material in the Delaware River for the purpose of building a parking lot. The Board issued its Pre-Hearing Order No. 1 on February 12, 1985, directing appellant to file its pre-hearing memorandum by April 29, 1985. On April 16, 1985 the Board granted appellant an extension to June 29, 1985 to file its pre-hearing memorandum. Then, on June 6, 1985, appellant informed the Board it was engaging in settlement discussions with the Department and requested another extension of time for filing its pre-hearing

memorandum, which the Board granted, giving appellant until August 29, 1985 to file its pre-hearing memorandum.

On September 24, 1985, not having received appellant's pre-hearing memorandum, the Board issued a default notice, informing appellant that unless it filed its pre-hearing memorandum by October 7, 1985, the Board may impose sanctions, including dismissal of the appeal. On November 6, 1985, appellant still had not filed its pre-hearing memorandum, and the Board issued a second default notice giving appellant another reprieve until November 21, 1985. Meanwhile, on November 4, 1985, the Board received a letter from appellant's counsel, withdrawing his appearance on appellant's behalf. Appellant's counsel also sent the Board a copy of a letter he had sent to appellant, informing appellant that he was withdrawing his appearance before the Board, and that he did not prepare a pre-hearing memorandum because appellant did not want him to pursue the matter, but that if appellant had "second thoughts" and wanted to prosecute the appeal, he must file a pre-hearing memorandum.

As of this date, appellant has neither filed a pre-hearing memorandum, nor given the Board any indication that he wants to prosecute this appeal. Therefore, the Board, pursuant to 25 Pa. Code §21.124, dismisses this appeal for failure to comply with Board orders.

ORDER

AND NOW, this 20th day of December, 1985, the appeal of Philip F. Bogatin, Inc. at EHB Docket No. 85-023-M is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

Anthony J. Mazullo Jr.
ANTHONY J. MAZULLO, JR., MEMBER

Edward Gerjuoy
EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation
John Wilmer, Esq./DER Eastern
Philip F. Bogatin

DATED: December 20, 1985
nb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
221 NORTH SECOND STREET
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MAURICE FOLEY	:	
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	EHB Docket No. 85-001-W
	:	
and	:	(Issued: December 23, 1985)
	:	
HAMMERMILL PAPER COMPANY,	:	
Permittee	:	

OPINION AND ORDER
SUR PREHEARING CONFERENCE

This case involves the appeal by Maurice and Catherine Foley of a solid waste management permit authorizing the disposal of residual waste from Hammermill Paper Company's manufacturing facility in Erie. Mr. and Mrs. Foley own property adjacent to the proposed site, known as the Lowville No. 3 site, and are concerned about the effect of the proposed disposal site on their home and their business, a racetrack. The Board, per Member Gerjuoy, sua sponte raised the issue of the nature of the Foley's standing to contest the issuance of the permit and by order dated September 23, 1985, required the Foleys to supplement their prehearing memorandum by justifying their standing to raise the issues enumerated therein. Such a supplemental prehearing memorandum abandoning some contentions and justifying the remainder was filed with the Board on October 10, 1985, and a response thereto was filed by Hammermill on November 4, 1985. The case was then reassigned to Chairman Woelfling and a prehearing conference was conducted by telephone on December 9, 1985.

The Foleys do have standing to contest the issuance of this permit. However, as is suggested in the alternative in Hammermill's response to the supplemental prehearing memorandum, the more salient matter is limitation of the issues to those which are relevant to the issuance of the solid waste disposal permit. Upon consideration of the Foleys' supplemental prehearing memorandum and Hammermill's response thereto, the contentions of law not abandoned by appellant will be limited as set forth below.

A reading of the contentions of law contained in the Foleys' prehearing memorandum and the supplement thereto indicates that many of the Foleys' concerns are directed toward the results of possible improper operation of the waste disposal site. This Board has previously ruled in Township of Middle Paxton, Pennsylvania Environmental Management Services, Inc., and Middle Paxton Concerned Citizens v. DER, 1981 EHB 315, that the Department did not commit an abuse of discretion in granting a solid waste disposal permit where appellants contended that future development of the disposal site would lead to an increase in leachate which could, in turn, lead to violations at the leachate collection and treatment facility. Monitoring and inspection by the Department, as well as the exercise of its enforcement remedies, were, the Board held, the proper means to address operational problems. Consequently, any issue which is solely operational in nature is not now properly before the Board.

Inasmuch as the permit at issue herein is for an industrial waste disposal site, 25 Pa.Code,§§75.21, 75.22, 75.23 and 75.38, as well as portions of §§75.24 and 75.33, are the applicable regulations. Unfortunately, those regulations are not drafted so that design, construction, and operation requirements are clearly and readily discernible. Thus, the Foleys'

contentions of law must be separately analyzed.

Contention of Law (1) states that the disposal site is not in compliance with 25 Pa.Code §75.21(g) which requires solid waste disposal sites to be operated in accordance with Chapter 75. Section 75.21(g) prescribes a general rule of conduct for the operation of solid waste processing and disposal areas and is not relevant to the propriety of the permit issuance.

Section 75.38(a) Phase II incorporates §75.24(c)(3) by reference. Section 75.24(c)(3) requires the submission of a "detailed written operational plan" to address the standards in Chapter 75. Consequently, Contentions of Law (2), (3), (5), (7), (8), (10), (24) and (25) are only relevant to the extent that they are addressed or not addressed in the operational plan. Whether or not Hammermill carries out those requirements once it begins to operate the disposal site and how noncompliance would affect the Foleys is not a matter presently before this Board.

Contention of Law (13) alleges that Hammermill has failed to make provision to minimize and control dust as required by "25 Pa.Code §75.33(L)(i)(1)(ii)(iii)." To the extent that §75.33 is relevant, because of the nature of the waste, there is no such subsection. However, if appellant is referring to §75.33(d)(1)(i), it is relevant to the extent it must be included in the operational plan required by §75.24(c)(3).

Contention of Law (14) refers to §75.22(i)(1)(ii). There is no such section.

Contention of Law (22) states that the Department "failed to insure correct reclamation as required by the surface mining conservation and Reclamation Act . . . " Section 502(d) of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, 35 P.S. §6018.502(d) requires each permit

applicant to demonstrate compliance with these statutes. Since no surface mining activities are proposed for this site, the Surface Mining Conservation and Reclamation Act is inapplicable.

Contention of Law (26) alleges that the "Permittee cannot conform to 25 Pa.Code §75.33(i)(2)." There is no such section.

And, finally, Contention of Law (27) states that the applicant has not met the requirements of 25 Pa.Code §101.4, which relates to impoundments. The design standards contained in subsection (a) must be met by the Permittee, so the issue of compliance with this regulation will be limited to design requirements.

All other contentions of law not abandoned or limited above are relevant.

Section 21.86(a) of the Board's rules provide that the member hearing a matter may decide petitions for supersedeas and motions. Consequently, despite the transfer of this case, this member is extremely reluctant to disturb those rulings, especially that which relates to the standing issue, because of possible unfairness to the parties. However, the concept of standing, as related to the issues which may be litigated once standing is established, has been a controversial issue. It was touched upon in Pennsylvania Game Commission v. DER et al., EHB Docket No. 82-284-G (issued January 17, 1985) and has been elaborated and expanded in single member rulings upon motions. It is an important enough issue to be decided by the entire Board.

ORDER

AND NOW, this 23rd day of December, 1985, it is ordered that:

1) Appellant shall complete discovery in this matter by February 3, 1986;

2) Appellant shall supplement its prehearing memorandum by February 3, 1986;

3) The issues in this appeal shall be limited as set forth above; and

4) A hearing in this matter shall be scheduled for February 24 through 27, 1986, in Harrisburg. A separate hearing notice will follow.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: December 23, 1985

cc: Bureau of Litigation
Harrisburg, PA

For the Commonwealth, DER:
Howard J. Wein, Esquire
Western Region

For Appellant:
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HAIN AND HAIN
Erie, PA

For Permittee:
William J. Kelly, Esquire
ELDERKIN, MARTIN, KELLY,
MESSINA & ZAMBOLDI
Erie, PA

bl

ROBERT C. PENOYER t/a
D.C. PENOYER & COMPANY

V.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Docket Nos. 82-303-M
and 85-154-M

Issued December 26, 1985

OPINION AND ORDER

Synopsis

The Department of Environmental Resources (DER) filed a Motion for Sanctions and a Motion for Summary Adjudication because appellant failed to timely file a response to DER's Request for Admissions. Since there have been settlement negotiations and a stay of proceedings in this matter, and since at this point appellant has filed its response to DER's Request for Admissions, deeming appellant to have admitted the statements in DER's Request for Admissions and entering a summary judgment in favor of DER would be too harsh a sanction. Thus, DER's motions are denied.

OPINION

The Department of Environmental Resources (DER) filed with this Board, on November 7, 1985, a Motion for Sanctions and a Motion for Summary Adjudication in the appeals at EHB Docket Nos. 82-303-M and 85-154-M. S.R.P. Coal Company filed the appeal at 82-303-M on December 23, 1982. This appeal

was from an order dated December 1, 1982, in which DER ordered S.R.P. to treat certain discharges from its surface mining operations. On April 5, 1983, S.R.P. and DER entered into a Consent Order and Agreement that resolved some of the issues in this appeal, but left unresolved the issue of liability for one of the discharges. S.R.P. transferred permits to Robert C. Penoyer, and on December 3, 1984, Robert C. Penoyer was substituted as the party appellant at EHB Docket No. 82-303-M. Then, on March 26, 1985, DER issued a Cessation Order to Penoyer citing violations of the April 5, 1983 Consent Order and Agreement, section 18.6 of the Surface Mining Conservation and Reclamation Act, 52 P.S.§1396.18(f), section 610 of the Clean Streams Law, 35 P.S. §691.610, and 25 Pa. Code §87.102(a)(1), (a)(3), and (a)(5). Penoyer appealed this Cessation Order on April 26, 1985, and the Board docketed this appeal as 85-154-M.

Meanwhile, DER served on Penoyer, on or about March 27, 1985, a Request for Production of Documents and a Request for Admissions. The Board received a copy of these discovery requests on April 2, 1985, and the Board received nothing further from either party to these appeals until August 27, 1985, when counsel for DER requested the Board to stay indefinitely all further proceedings in the appeals at EHB Docket Nos. 82-303-M and 85-154-M, because the parties were engaged in active settlement negotiations, and an amicable resolution appeared imminent. Accordingly, the Board issued an order on August 28, 1985, staying indefinitely the proceedings in these appeals, pending settlement negotiations.

Then, on October 31, 1985, counsel for DER informed the Board that the settlement negotiations were not successful, and requested the Board to lift the stay in these proceedings. A week later, on November 7, 1985, the Board

received DER's Motion for Sanctions and Motion for Summary Adjudication. The basis for these motions was the failure of Penoyer to respond to the Request for Admissions that DER served on Penoyer on or about March 27, 1985. On November 19, 1985, the Board received Penoyer's response to DER's Motion for Sanctions and Motion for Summary Adjudication, and the Board also received a copy of Penoyer's Response to DER's Request for Admissions, which was accompanied by a Certificate of Service showing that Penoyer mailed to DER its Response to DER's Request for Admissions on November 15, 1985.

Although the Board admonishes Penoyer that any extension of a filing deadline in a proceeding before this Board must be approved by the Board, the Board denies DER's Motion for Sanctions and Motion for Summary Adjudication. The Board believes that in light of the settlement negotiations, and the stay of proceedings in this matter, and also in light of Penoyer's having filed, on November 15, 1985, its response to DER's Request for Admissions, that deeming Penoyer to have admitted the statements in DER's Request for Admissions and therefore, entering a summary adjudication in favor of DER, would be too harsh a sanction for Penoyer's failure to timely respond to DER's Request for Admissions.

ORDER

AND NOW, this 26th day of December, 1985, the Motion for Sanctions, and the Motion for Summary Adjudication filed by the Department of Environmental Resources at EHB Docket Nos. 82-303-M, and 85-154-M, are hereby denied.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR., MEMBER

cc: Bureau of Litigation

Bernard Labuskes, Esq./DER Central

For Appellant:
Alan F. Kirk, Esq.,Clearfield, PA

DATED: December 26, 1985
nb

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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(717) 787-3483

BOARD OF SUPERVISORS OF GREENE TOWNSHIP :

:

: Docket Nos. 85-363-G
: 85-393-G

v. : Issued December 27, 1985

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and VIABLE COAL COMPANY, Permittee

OPINION AND ORDER

SYNOPSIS

These appeals of a DER decision to allow a Stage I bond release under the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 et seq., and the applicable regulation, 25 Pa.Code §86.172, are dismissed. Appellant claims that the permittee is indebted to the appellant under the terms of a contract and that this debt prevents DER from releasing any portion of Appellant's bond. DER is bound to comply with the regulations concerning bond release, none of which permit consideration of alleged debts owed by the permittee. The Board has only those powers conferred upon it by statute; it does not possess the power to resolve private parties disputes.

* * *

OPINION

These two appeals concern a Stage I bond release authorized by the Department of Environmental Resources (DER). The bond was posted by the permittee, Viable Coal Company, in connection with its surface mining activities on the lands of an individual who is not a party to this appeal. The appellant, Greene Township, has appealed the DER decision to release a portion of the bond; the permittee has filed preliminary objections to the appeals in the nature of a demurrer. Since the Board's practice does not normally provide for the filing of preliminary objections to a Notice of Appeal, the Board notified the parties that it would treat the preliminary objections as a motion to dismiss. The appellant has filed a response to the motion. The motions and responses in the two appeals are identical and therefore we address both appeals in this opinion.

The Pennsylvania Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 et seq. (SMCRA), requires that a mine operator furnish a bond in order to conduct surface mining activities within the Commonwealth. Section 1396.4(d) provides that the bond be conditioned upon faithful performance of all of the requirements of SMCRA, as well as other relevant environmental protection statutes, and that liability on the bond shall continue for the duration of the surface mining operations on the site, "unless released in part prior thereto." Subsection (g) of §1396.4 states that the Department may, upon the permittee's request, release portions of the bond in accordance with a schedule set forth in the Act. In order to gain Stage I bond release, the operator must have completed backfilling, regrading and drainage control measures in accordance with the reclamation plan approved by the Department. 52 P.S. §1396.4(g). See also 25 Pa. Code §86.172.

Appellant herein has appealed two DER actions concerning a Stage I bond release to the permittee. The first of these actions is an inspection report dated August 1, 1985 which details the Department's findings with respect to the conditions existing on the mining site. Initially we note that an inspection report normally is not considered an appealable action, since it in itself does not directly affect rights, duties or obligations of the operator, or of anyone else. Inspection reports are in many ways akin to notices of violation, which the Board repeatedly has held to be unappealable actions. Erickson v. DER, 1984 EHB 679 (Opinion and Order dated June 20, 1984); Reitz Coal v. DER, 1984 EHB 794 (Opinion and Order dated September 19, 1984).

We need not discuss this issue in detail, however, since appellant has also appealed a DER letter of September 3,1985 which expressly denies the appellant's request that the Department refrain from approving the Stage I bond release. This refusal is an appealable DER action under the terms of 52 P.S. §1396.4(b). In any event, irrespective of appealability, both of these appeals must be dismissed because it is clear that there is no legal basis upon which the Board could grant the relief which appellant requests.

Appellant alleges that it entered into a contract with the permittee concerning haulage of coal over township roads. Appellant further alleges that the permittee has breached this contract and that as a consequence, permittee is indebted to appellant. For these reasons the appellant requests that DER refrain from releasing any portion of the bond at issue herein, apparently contending that it somehow has a claim to the bond funds.

It is clear that neither DER nor this Board has any jurisdiction over disputes between the permittee and the appellant. DER has neither the power nor

the expertise to determine the respective rights and duties of the permittee and the appellant; it clearly would be an abuse of its discretion if it were to take into consideration extraneous matters such as unresolved claims against a permittee's assets in deciding whether to release a bond. DER is bound by the regulations which govern bond release, none of which permit consideration of any factors other than the operator's compliance with the applicable environmental law, e.g., SMCRA and the regulations promulgated pursuant thereto. 25 Pa.Code §86.172. In re Bentleyville Plaza Inc., 38 Pa.Cmwlth 235, 392 A.2d 899 (1977).

The jurisdiction of this Board is limited to review of "actions" of DER. 71 P.S. §510-21; 25 Pa.Code §21.2 and §21.52(a). Sunbeam Coal Company v. Commonwealth, DER, 8 Pa.Cmwlth 622, 304 A.2d 169 (1973). By implication, the Board's powers are circumscribed by those granted to DER; we cannot act in circumstances where DER has been granted no authority to take action, such as the resolution of private parties' disputes among themselves, and we have no power other than that granted by statute. Varos v. DER, EHB Docket No. 85-105-W (Opinion and Order dated November 27, 1985). In other words, appellant's allegations do not state a valid legal basis upon which the Board could act to reverse DER's release of the bond. The dispute between appellant and the permittee will have to be resolved between themselves, perhaps in a forum with jurisdiction to render a binding decision regarding the respective rights and duties under their contract.

O R D E R

WHEREFORE, this 27th day of December , 1985, it is ordered that the above-captioned appeals are dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Chairman

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: December 27, 1985

cc: Bureau of Litigation
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