Enviromental Hearing Board

Adjudications and Opinions

1997

Volume III

COMMONWEALTH OF PENNSYLVANIA

George J. Miller, Chairman

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

1997

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City by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 1997 EHB 1

ISBN No. 0-8182-0231-9

FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1997.

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

ADJUDICATIONS

OPINIONS

1997 DECISIONS

UNITED STATES CONSTITUTION

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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M. DIANE SMITH
SECRETARY TO THE BOARD

BRUCE D. SHORT	:	
	:	
v.	:	**EHB Docket No. 97-035-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMERIKOHL MINING, INC.	:	**Issued: September 16, 1997**

OPINION AND ORDER ON MOTION TO DISMISS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board denies a motion filed by a permittee to dismiss an appeal as moot. The permittee filed the motion after the deadline for dispositive motions had expired and failed to provide adequate support for the factual averments in the motion.

OPINION

This matter was initiated with the January 30, 1997 filing of an appeal by Bruce D. Short (Appellant) of Coraopolis, PA, to a surface mining permit issued by the Department of Environmental Protection (Department) to Amerikohl Mining, Inc. (Permittee) on January 8, 1997. On August 4, 1997, Permittee filed a motion to dismiss the appeal as moot. In the motion, Permittee avers that: (1) it has completed all of the coal removal at the Grays Station Mine and has backfilled and reclaimed the site; (2) Appellant did not object to the Permittee's reclamation plan in its notice

of appeal; and, (3) because Permittee has completed the coal removal and substantially completed the reclamation at the site, the Board can grant Appellant no effective relief. On August 13, 1997, the Department advised the Board that it concurred with Permittee's motion to dismiss.

Appellant failed to file a response to the motion within 25 days, as required by section 1021.73(d) of the Board's rules of practice and procedure, 25 Pa. Code § 1021.73(d). Instead, Appellant submitted his response six days late. Since Appellant failed to file a timely response, we will not consider it.

We will not, however, grant Permittee's motion to dismiss for two reasons. First, the motion to dismiss was untimely. A motion to dismiss is a dispositive motion,[1] and the deadline for filing dispositive motions was July 21, 1997. That deadline was set in Pre-Hearing Order No. 1, issued March 20, 1997, and Permittee never requested an extension. Second, even if Permittee had filed the motion before the deadline for dispositive motions expired, the motion would still be fatally flawed: The motion did not include any exhibits or other factual support to back up Permittee's averment that it has completed all of the coal removal at the Grays Station Mine and has backfilled and reclaimed the site. All that we have is the statement of Permittee's counsel in the motion itself and a verification submitted by Permittee's vice president. The verification does not constitute adequate factual support to dismiss Appellant's appeal. It is not a sworn statement and does not show that Permittee's vice president had personal knowledge of the facts alleged in the motion. All that Permittee's vice president does in the verification is to state that, *to the best of his knowledge*, the factual averments in the motion are correct.

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[1] Motions to dismiss are expressly included within the definition of "dispositive motions." *See* section 1021.2 of the Board's rules of practice and procedure, 25 Pa. Code § 1021.2.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRUCE D. SHORT	:	
	:	
v.	:	**EHB Docket No. 97-035-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMERIKOHL MINING, INC.	:	

ORDER

AND NOW, this 16th day of September, 1997, it is ordered that Permittee's motion to dismiss is denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: September 16, 1997

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ALICE WATER PROTECTION ASSOCIATION	:	
v.	:	**EHB Docket No. 95-112-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMERIKOHL MINING, INC.	:	**Issued: September 17, 1997**

OPINION AND ORDER ON PETITION FOR AWARD OF COSTS AND ATTORNEY'S FEES

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

A permittee's petition for award of attorney's fees and costs filed against an appellant in an unsuccessful appeal of a permit issuance is denied. In order for a permittee to recover attorney's fees and costs against an unsuccessful appellant, the permittee must demonstrate that the appeal was brought in bad faith.

O P I N I O N

Presently before the Board is a Petition for Award of Costs and Attorney's Fees filed by the permittee, Amerikohl Mining, Inc. ("Amerikohl"), pursuant to Section 4(b) of the Pennsylvania Surface Mining Conservation and Reclamation Act ("Pennsylvania Surface Mining Act"), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. § 1396.1 *et seq.*, at § 1396.4(b), and Section 307(b)

of the Pennsylvania Clean Streams Law, Act of June 22, 1937, P.L. 1987, 35 P.S. § 691.1 *et seq.*, at § 691.307(b). The Petition seeks to recover attorney's fees and costs from the appellant, Alice Water Protection Association ("Alice Water"), which unsuccessfully appealed the transfer of a mining permit to Amerikohl by the Department of Environmental Protection ("Department"). Alice Water sought to overturn the permit transfer on the basis that mining in the area had adversely impacted the water supplies of area residents. The Board issued an Adjudication in the appeal on January 31, 1997, finding that there was insufficient evidence from which to conclude that mining had caused the water problems experienced by the residents.[1]

Alice Water filed a response opposing the petition for attorney's fees. In addition, several organizations filed *amicus curiae* briefs on behalf of Alice Water.

Whether a permittee may recover attorney's fees under Section 4(b) of the Pennsylvania Surface Mining Act and Section 307(b) of the Clean Streams Law from an unsuccessful third-party appellant is a matter of first impression before the Board. In recognition of this fact, oral argument was held on June 26, 1997 before a three-judge panel of the Environmental Hearing Board.[2]

Authority for Awarding Attorney's Fees and Costs

Section 4(b) of the Pennsylvania Surface Mining Act reads in relevant part as follows:

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

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[1] *See Alice Water Protection Association v. DEP and Amerikohl Mining, Inc.*, EHB Docket No. 95-112-R (Adjudication issued January 31, 1997).

[2] Oral argument was also held on a petition for attorney's fees filed by a permittee against a private individual in another appeal before the Board.

pursuant to this section.

52 P.S. § 1396.4(b). Section 307(b) of the Clean Streams Act contains identical language (with the exception that it refers to "...proceedings pursuant to this act.") 35 P.S. § 691.307(b).

In *Big B Mining Co. v. Department of Environmental Resources*, 624 A.2d 713 (Pa. Cmwlth. 1993), *appeal denied*, 633 A.2d 153 (Pa. 1993) (hereinafter, referred to as "*Big B Mining II*"[3]), the Commonwealth Court set out a four-part test for determining a party's eligibility to recover attorney's fees and expenses under Section 4(b) of the Pennsylvania Surface Mining Act:

1) a final order must have been issued;

2) the applicant for the fees and expenses must be the prevailing party;

3) the applicant must have achieved some degree of success on the merits; and

4) the applicant must have made a substantial contribution to a full and final determination of the issues.

624 A.2d at 715. In *Medusa Aggregates Co. v. DER*, 1995 EHB 414, 428, n.6, we held that the same criteria apply to petitions for attorney's fees and costs filed under Section 307(b) of the Clean Streams Law.

The above four criteria for determining the eligibility for an award of attorney's fees had earlier been adopted by the Board in *Jay Township v. DER*, 1987 EHB 36, and followed again in *Kwalwasser v. DER*, 1988 EHB 1308, *aff'd*, 569 A.2d 422, prior to the affirmance of these criteria

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[3] An earlier decision on the attorney's fees petition was also issued by the Commonwealth Court in *Big B Mining Co. v. Department of Environmental Resources*, 597 A.2d 202 (Pa. Cmwlth. 1991), *appeal denied*, 602 A.2d 862 (Pa. 1992). This case shall be referred to as "*Big B Mining I.*"

by the Commonwealth Court in *Big B Mining II.* The Board derived these four criteria from the federal regulations at 43 C.F.R. § 4.1290 *et seq.* The federal regulations were promulgated under Section 525(e) of the Federal Surface Mining Control and Reclamation Act ("Federal Surface Mining Act"), 30 U.S.C. § 1275(e), which governs the award of attorney's fees in administrative proceedings brought under that statute.

The Board in *Jay Township* adopted the federal criteria for awarding attorney fees since "in order for Pennsylvania's primacy program to remain in effect, the award of fees and costs under Section 4(b) of [the Pennsylvania Surface Mining Act] must be no less effective than awards made by the federal government under Section 525(e) of the Federal Surface [Mining Act.]" *Kwalwasser*, 1988 EHB at 1310.

In the present case, the permittee, Amerikohl, asserts that it meets the above-four criteria and, therefore, is entitled to attorney's fees under Section 4(b) of the Pennsylvania Surface Mining Act and Section 307(b) of the Clean Streams Law. For the reasons which follow, we hold that a permittee seeking to recover attorney's fees from a citizens' group or private individual in an unsuccessful appeal of a permitting action must demonstrate, in addition to the above-four criteria, that the appeal was brought in bad faith or with the intent to harass or embarrass the permittee.

The language of Section 4(b) of the Pennsylvania Surface Mining Act and Section 307(b) of the Clean Streams Law provides little in the way of guidance in awarding attorney's fees. It simply states that the Board may award attorney's fees to "any party." The statutes specifically leave the awarding of attorney's fees to the Board "in its discretion." 52 P.S. § 1396.4(b) and 35 P.S. § 691.307(b).

Amerikohl argues that the Board is required to award fees in this case pursuant to the

Commonwealth Court's directive in *Big B Mining II*, wherein the court stated that "no segregation of petitioner classes is permissible" and that "Section 4(b) of [the Pennsylvania Surface Mining Act] must be applied equally to all those eligible for attorney's fees under Section 4(b)." 624 A.2d at 715.

However, in *Big B Mining II*, the issue was whether a permittee seeking attorney's fees against the Department after successfully challenging the Department's denial of a permit application should be treated differently than a third-party appellant seeking attorney's fees against the Department after successfully challenging the Department's issuance of a permit. The court held that these two classes should not be treated differently. The court was not faced with the question of whether a permittee should be allowed to recover attorney's fees against a third-party appellant. Moreover, the court reiterated that Section 4(b) of the Pennsylvania Surface Mining Act "vests *broad discretion in the board* in awarding costs and attorney's fees." *Id.* (Emphasis added)

Alice Water and the groups arguing on its behalf assert that if permittees are allowed to recover attorney's fees from unsuccessful third-party appellants, in the absence of bad faith, this will place a chilling effect on the rights of private individuals to petition the government for the redress of their grievances. The Department of Environmental Protection, too, joins in the concerns expressed by Alice Water and the citizens' groups. In its Supplemental Brief, filed July 7, 1997, the Department stated as follows:

> Faced with the threat of having to pay a mining permittee's attorney fees in the event that they are unsuccessful in a challenge to a permit action, the vast majority of citizens will never participate in such a challenge. Lack of citizen participation in Pennsylvania's surface mining regulatory program ultimately will weaken the program. The result inures to the detriment of the entire Commonwealth and should be avoided. It can be by the Board's

> modification of the formula for the calculation of fee awards.

(Department's Supplemental Brief, p. 4-5)

Lack of citizen participation in the appeal process before the Environmental Hearing Board presents a serious constitutional concern since the Supreme Court has recognized that "the right of access to the courts is an aspect of the First Amendment right to petition the government for redress of grievances." *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 741 (1983). The Court has further held, "The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot...lightly impute to Congress an intent to invade these freedoms...The right of access to the courts is indeed but one aspect of the right of petition." *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510 (1972).

To interpret Section 4(b) of the Pennsylvania Surface Mining Act and Section 307(b) of the Clean Streams Law as assessing attorney's fees against private individuals and citizens' groups who unsuccessfully challenge Departmental administrative actions will doubtless have a chilling effect on these citizens' constitutional right to bring an appeal before the Environmental Hearing Board. In the case of an appeal brought by a private individual or citizens' group, we believe that the intent of Section 4(b) of the Pennsylvania Surface Mining Act and Section 307(b) of the Clean Streams Law is not to punish those who ultimately fail in their appeal, but to limit the award of costs and attorney's fees to those cases where such an appeal is brought in bad faith.

Indeed, to avoid such a chilling effect in other areas of the law involving public policy issues, legislators and the courts have carved out exceptions for suits brought in the public interest. In the area of antitrust, the U.S. Supreme Court has held that the antitrust laws do not apply to individual

or group action which is intended to influence judicial, legislative, executive, or administrative decision-making. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). The principles set forth by the Court in the *Noerr* and *Pennington* cases have been expanded by the courts beyond the antitrust arena. *See Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155 (3d Cir. 1988) and *Barnes Foundation v. Township of Lower Merion*, 927 F. Supp. 874 (E.D. Pa. 1996). In *Barnes Foundation*, the court noted that citizens must be protected from liability for exercising their right to petition the government. 927 F. Supp. at 876.

Special protection has also been afforded private individuals in the area of civil rights litigation. Section 1988 of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, like the attorney's fees provisions involved in this case, authorizes an award of reasonable attorney's fees to the "prevailing party" in a civil rights suit. The United States Supreme Court has held that a different standard for determining eligibility for an award of fees is to be applied to prevailing defendants as to prevailing plaintiffs. In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Court held that in order for a plaintiff to recover attorney's fees under Section 1988, it simply must be a prevailing party, i.e. a party which has "succeed[ed] on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing suit." *Id.* at 433 (citing *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). However, a prevailing defendant may recover attorney's fees "only where the suit was vexatious, frivolous, brought to harass or embarrass the defendant." *Id.* (citing H.R. Rep. No. 94-1558, p. 7 (1976) and *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978)).

The reasoning behind holding plaintiffs and defendants to a different standard for recovery of attorney's fees, even though the statute simply refers to "prevailing party," was explained by the U.S. Court of Appeals for the Seventh Circuit in *Unity Ventures v. County of Lake*, 894 F.2d 250 (7th Cir. 1990). The court stated as follows:

> Both prevailing plaintiffs and prevailing defendants may collect attorney's fees under section 1988; different standards -- reflecting different policy considerations -- apply, however, depending on whether the plaintiff or the defendant prevails. A plaintiff, for example, may be awarded attorney's fees as a prevailing party if she succeeds on "any significant issue in the litigation which achieves some of the benefit [she] sought in bringing suit." [Citing *Hensley* and *Nadeau, supra*] A prevailing defendant, on the other had, must demonstrate that the plaintiff brought her action in subjective bad faith, or that "the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith" in order to collect attorney's fees. [Citing *Christianburg Garment Co., supra*]

894 F.2d at 253.

The different standard was further explained by the Supreme Court in *Christianburg Garment Co., supra.* Unlike a losing defendant, a losing plaintiff is not a violator of the law. 434 U.S. at 418

In both the civil rights area and the antitrust area, the courts have ruled that plaintiffs lose their special protection whenever the suit is frivolous, brought in bad faith, or a sham. *See California MotorTransport Co. v. Trucking Unlimited*, 404U.S. 508 (1972) ("[A] pattern of baseless, repetitive claims...effectively barring respondents from access to the agencies and courts" does not qualify for antitrust immunity under the "umbrella of political expression." *Id.* at 513); *Landmarks*

Holding Corp. v. Bermant, 664 F.2d 891 (2d Cir. 1981) ("The right to petition the courts for the redress of grievances does not protect abuse of the judicial process through the institution and subsidization of baseless litigation and delay of its final resolution, solely to harass and hinder a competitor." *Id.* at 896-97) In the civil rights arena, the Supreme Court addressed this issue as follows:

> A fair adversary process presupposes both a vigorous prosecution and a vigorous defense. It cannot be lightly assumed that in enacting [the attorney's fees section of the Civil Rights Act of 1964], Congress intended to distort that process by giving the private plaintiff substantial incentives to sue, while foreclosing to the defendant the possibility of recovering his expenses in resisting even a groundless action unless he can show that it was brought in bad faith.

Christianburg Garment Co. v. EEOC, 434 U.S. at 419.

The Federal Surface Mining Act, on which the Pennsylvania Surface Mining Act was patterned in order to obtain primacy, also provides for the award of attorney's fees and costs. The legislative history behind the Federal Act indicates that Congress intended to allow recovery of attorney's fees by a permittee against a third-party appellant only where the permittee can demonstrate that the proceeding was brought in bad faith or with the intent to harass or embarrass. This intent is reflected in the regulations promulgated pursuant to the Act. 43 C.F.R. § 4.1294.

Alice Water and the citizens' groups which have filed *amicus curiae* briefs urge us to follow the standard for awarding attorney's fees under the Federal Surface Mining Act. There is a strong argument in favor of doing so. In order to obtain exclusive jurisdiction over its surface mining program, Pennsylvania was required to adopt a program which at least meets the standards of the

Federal Act. 30 U.S.C. § 1253; *Pennsylvania Coal Association v. Babbitt*, 63 F.3d 231 (3d Cir. 1995). Arguably, in order for Pennsylvania to retain jurisdiction in this area, its provisions for awarding attorney's fees must be no less stringent than the federal standards.

However, Amerikohl points to the fact that in both *Big B Mining* decisions, the Commonwealth Court instructed the Board not to look to the federal law in interpreting the attorney's fees provision of the state law when the language of the Pennsylvania Surface Mining Act was clear and unambiguous.

In the Board's decision in *Big B Mining,* 1990 EHB 248, *rev'd*, 597 A.2d 202 (Pa. Cmwlth. 1991), the Board held that Section 4(b) of the Pennsylvania Surface Mining Act, authorizing the award of attorney's fees, applied only to enforcement proceedings and not to permit proceedings. In reaching this conclusion, the Board looked to Section 525(e) of the Federal Surface Mining Act, which does not allow attorney's fees in permit proceedings. The Commonwealth Court reversed the Board and held that the award of counsel fees in permit proceedings is provided for by Section 4(b), which specifically authorizes the Board to award attorney's fees in "proceedings *pursuant to this section.*" (Emphasis added) The court noted that the referenced section contained rules and procedures relating to mining permit applications, and it therefore reasoned that Section 4(b) authorized the award of attorney's fees in permit proceedings. *Big B Mining I*, 597 A.2d at 203. The court held that because the plain language of Section 4(b) authorized the award of attorney's fees in permit proceedings, "it was improper for the [Board] to explore the legislative intent of the federal statute." *Id.*

However, where the language of the Pennsylvania Surface Mining Act is not plain and clear, the Commonwealth Court has approved of the Board looking to the federal law for guidance. Both

Section 4(b) of the Surface Mining Act and Section 307(b) of the Clean Streams Law are silent as to the criteria for determining eligibility for an award of attorney's fees. In developing the criteria which an applicant must meet in order to recover attorney's fees from the Department under Section 4(b), the Board, in *Jay Township* and *Kwalwasser, supra,* relied on the criteria set forth in the federal regulations promulgated pursuant to the Federal Surface Mining Act. The Commonwealth Court in *Big B Mining II, supra,* approved the Board's use of these criteria.

Likewise, it is appropriate for the Board to look to the Federal Surface Mining Act for guidance in determining when a permittee may recover attorney's fees from an unsuccessful appellant under Section 4(b) and Section 307(b). As noted above, Section 525(e) of the Federal Surface Mining Act governs the award of attorney's fees in actions brought under that act. The regulation promulgated pursuant to that section states as follows:

> Appropriate costs and expenses including attorneys' fees may be awarded...
>
> (d) To a permittee from any person where the permittee demonstrates that the person initiated a proceeding under section 525 of the Act or participated in such a proceeding *in bad faith for the purpose of harassing or embarrassing the permittee.*

43 C.F.R. § 4.1294. (Emphasis added)

As noted by the Board in *Kwalwasser*, 1988 EHB 1308, "since [the Pennsylvania Surface Mining Act] and [the Federal Surface Mining Act] seek to regulate the same activity in a coordinated manner, it is appropriate that the Board's awards of fees and costs under [the Pennsylvania Surface Mining Act] reflect the standards applied by the federal government." *Id.* at 1311. This is particularly important since, in order to meet primacy, Pennsylvania's program must be at least as

stringent as the minimum federal requirements. *Pennsylvania Coal Association v. Babbitt*, 63 F.3d 231 (3d Cir. 1995).

Moreover, even though we are not bound by the language of the federal regulations, we find it appropriate, based on the constitutional grounds and public policy concerns expressed earlier, that private individuals and citizens' groups acting as third-party appellants should be required to pay attorney's fees and costs only where an appeal is brought in bad faith. As the Commonwealth Court has held in *Big B Mining II,* 624 A.2d at 715, and *Kwalwasser v. Department of Environmental Resources*, 569 A.2d 422, 424 (1990), Section 4(b) of the Pennsylvania Surface Mining Act (and, hence, Section 307(b) of the Clean Streams Law) "vests broad discretion in the board in awarding costs and attorney's fees."

Therefore, pursuant to our discretion, we hold that in order for a permittee to recover attorney's fees from an appellant under Section 4(b) of the Pennsylvania Surface Mining Act or Section 307(b) of the Clean Streams Law, it must demonstrate not only that it meets the four criteria enunciated by the Board in *Jay Township,* 1987 EHB 36, and *Kwalwasser,* 1988 EHB 1308, and by the Commonwealth Court in *Big B Mining II,* 624 A.2d at 715, but, additionally, it must demonstrate that the appeal was brought in bad faith.

We now turn to the question of whether these criteria have been met in the present case. Although we conclude that the permittee has met the initial four criteria, as set forth in *Big B Mining II, supra*, we find that the final criterion, a showing of bad faith, has not been met.

In our adjudication of this appeal, we found that Alice Water had "presented a strong case showing that the area's water supply suffer[ed] from a number of water quality problems," but that there was simply insufficient evidence to conclude that the poor quality was attributable to mining.

Alice Water, supra at p. 13. We further commended the parties, including Alice Water, on the thorough preparation which went into this case. *Id.*, n.2. Given the facts surrounding the appellant's claim, there was a basis for believing that mining could have impacted the residents' water; however, the appellant simply did not meet its burden of proving this allegation at the hearing. Under these circumstances, we cannot find that the appellant's claim was brought in bad faith.

By adopting this standard, we are not precluding permittees from ever recovering attorney's fees or costs from a third-party appellant. Where it is clear that there is no basis for an appeal or that the intent of the appeal is to harass or embarrass, a permittee will be entitled to recover attorney's fees and costs, provided that the remaining criteria for an award have also been met.

Because we have concluded that Alice Water's appeal was not brought in bad faith, we must deny Amerikohl's petition for attorney's fees and costs.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ALICE WATER PROTECTION ASSOCIATION	:	
	:	
v.	:	**EHB Docket No. 95-112-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMERIKOHL MINING, INC.	:	

ORDER

AND NOW, this 17th day of September, 1997, the Petition for Award of Attorney Fees and Costs, filed by Amerikohl Mining, Inc., is **denied**.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 95-112-R

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: September 17, 1997

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

THOMAS J. GEORGE	:	
	:	
v.	:	**EHB Docket No. 97-095-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** September 17, 1997

OPINION AND ORDER ON MOTION TO DISMISS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A Department of Environmental Protection's (Department) motion to dismiss is granted. Except in the case of appeals *nunc pro tunc*, the Board lacks jurisdiction over appeals filed more than 30 days after the appellant receives notice of the Department action.

OPINION

This matter was initiated with the May 1, 1997, filing of a notice of appeal by Thomas J. George (George), of Bradford, PA, appealing a March 14, 1997, order issued by the Department. The order concerns oil and gas wells George allegedly owns and operates, and it directs him to submit bonds and request-to-transfer forms for some of the wells, to plug others, and to install permit numbers on still more. On April 3, 1997, after receiving the order, George had sent a letter to Paul Kucsma, the Oil and Gas Compliance and Monitoring Chief in the Department's Meadville office. There, George had stated that he was not responsible for some of the wells mentioned in the order,

and that, while he would like to work with the Department to resolve the problems with the other wells, health and financial problems prevented him from doing so within the time frame set forth in the Department's order. On April 24, 1997, George had received a telephone call from Scott Lux of the Department's Meadville office. Lux had informed George that he could only contest the order in an appeal before the Board and that the time for filing an appeal of the order had expired. However, George filed the instant appeal.

The Department filed a motion to dismiss and supporting memorandum of law on June 20, 1997. The motion avers that George received the order on March 17, 1997, (motion to dismiss, para. 4) and contends that the Board lacks jurisdiction over the appeal because George filed it more than 30 days after receiving notice of the Department's action. George filed a response opposing the motion to dismiss on August 13, 1997. He does not dispute that more than 30 days elapsed between the time he received the order and the time he filed his appeal with the Department. Instead, he argues that the Board should not dismiss his appeal because: (1) he is appearing *pro se*; and, (2) when the Department received George's letter of April 3, 1997, it should have alerted him more promptly that he could only challenge the terms of the order by filing an appeal with the Board.

Section 1021.52(a) of the Board's rules of practice and procedure provides:

> Except as specifically provided in [25 Pa. Code] § 1021.53 (relating to appeal *nunc pro tunc*), jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of the action or within 30 days after notice of the action has been published in the *Pennsylvania Bulletin*. . . .

With the exception of third-party appeals and appeals *nunc pro tunc*, appellants before the Board must file their appeals within 30 days of receiving written notice of the Department's action or

publication in the Pennsylvania Bulletin--whichever comes first. *See, e.g., Ziccardi v. DEP*, EHB Docket No. 96-161-R (Opinion issued January 6, 1997). Since George acknowledges that he filed his appeal more than thirty days after he received the Department's order, we do not have jurisdiction over his appeal unless he shows that he has grounds to file an appeal *nunc pro tunc*.

The Board will grant a petition to appeal *nunc pro tunc* "only where there is a showing of fraud, breakdown in the administrative process, or unique and compelling factual circumstances establishing a non-negligent failure to file a timely appeal." *Falcon Oil v. DER*, 609 A.2d 876, 878 (Pa. Cmwlth. 1992). None of these situations exist here. George does not allege that the Department deliberately misled him about filing his appeal, and, even after the Department received his letter of April 3, 1997, the Department had no duty to promptly inform him that he could only challenge the order by filing an appeal with the Board. Furthermore, the Department's order expressly stated clearly that any challenge had to be filed with the Board. The last paragraph of the order provides, in pertinent part:

> Any person aggrieved by this action may appeal . . . to the Environmental Hearing Board, Second Floor, Rachel Carson State Office Building, 400 Market Street, P.O. Box 8457, Harrisburg . . . . Appeals must be filed with the Environmental Hearing Board within thirty . . . days of receipt of this written notice of the action. . . .

George, therefore, knew or should have known that he had to file any appeal of the order with the Board. Yet, despite the language in the order, George chose to direct his April 3, 1997, correspondence to the Department, rather than filing an appeal with the Board. Since his failure to file his appeal in a timely manner resulted from simple negligence, George cannot file an appeal *nunc pro tunc*.

While George maintains that the Board should give him more leeway because he is not an attorney, that argument is unavailing. We have previously warned appellants that they assume the risk of their lack of legal expertise when they opt to appear *pro se*. *See, e.g., Santus v. DER*, 1995 EHB 897, and *Taylor v. DER*, 1991 EHB 1926. And we have dismissed *pro se* appeals before for failure to file in a timely manner. *See, e.g., Hoffman v. DEP*, EHB Docket No. 96-237-C (Opinion issued March 26, 1997), and *Grimaud v. DER*, 1994 EHB 303.

In light of the foregoing, we agree with the Department that we do not have jurisdiction and we will dismiss George's appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THOMAS J. GEORGE	:	
	:	
v.	:	EHB Docket No. 97-095-C
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 17th day of September, 1997, it is ordered that the Department's motion to dismiss is granted and George's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: September 17, 1997

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

For the Commonwealth, DEP:
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Northwest Region

For Appellant:
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KINZUA ENERGY DEVELOPMENT CO.
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Thomas J. George
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717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

CLEARFIELD FOUNDATION	:	
	:	
v.	:	**EHB Docket No. 96-259-MR**
	:	**(consolidated with 96-277-CP-MR)**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** September 19, 1997

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT AND PRELIMINARY OBJECTION

by Robert D. Myers, Member

Synopsis:

A Motion for Summary Judgment is denied where a Department of Environmental Protection (DEP) Order requires that an economic development agency (EDA) cease earthmoving activities on certain property, submit an erosion and sedimentation control plan, submit a National Pollutant Discharge Elimination System (NPDES) permit application in connection with the earthmoving activities, and implement erosion and sedimentation control measures required by the permit; where the Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act (Act 3), 35 P.S. §§ 6027.1-6027.14, protects an EDA from certain liability under the environmental laws; and where there is a genuine issue of material fact as to whether the EDA's activities at the property are such that it can be required to obtain and implement permits. A Preliminary Objection to Strike New Matter as impertinent is overruled where the Board finds that the New Matter is pertinent.

OPINION

Appellant Clearfield Foundation (Clearfield) is a nonprofit Pennsylvania corporation, an "Industrial Development Agency" as defined in the Pennsylvania Industrial Development Authority Act (PIDA),[1] and an "Economic Development Agency" (EDA) as defined in the Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act (Act 3).[2] (Motion at paras. 4 & 28; Answer at paras. 4-5.) Clearfield acts in its capacity as an industrial development agency with respect to the Clearfield Firemen's Industrial Park (Park) near State Route 879 in Lawrence Township, Clearfield County. (Motion at paras. 5 & 28.),

In that regard, on November 13, 1986, Clearfield executed an option contract with the Clearfield Volunteer Firemen Fair and Park Board (Park Board), owner of the Park, to purchase all or part of the Park for industrial development. The option agreement provides that, upon securing an industrial occupant and specifying a site within the Park, the property will be conveyed either directly to the industrial occupant or to Clearfield as part of a PIDA transaction. In a PIDA transaction, Clearfield takes legal title to the property, acts as grantee-mortgagor to a bank and to the Pennsylvania Industrial Development Authority, and enters into an agreement of sale or lease with the industrial occupant whereby the occupant makes monthly mortgage payments. When the mortgage is paid, Clearfield conveys legal title to the industrial occupant. (Answer to DEP's Interrogatories Nos. 9 & 11; Motion at exh. 3.)

On October 30, 1996, the Department of Environmental Protection (DEP) issued an Order,

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[1] Section 3 of PIDA, Act of May 17, 1956, P.L. (1955) 1609, 73 P.S. § 303(g).

[2] Section 3 of Act 3, Act of May 19, 1995, P.L. 33, 35 P.S. § 6027.3.

alleging, *inter alia*, that: (1) Clearfield "owns" property within the Park (the Site) and is the "operator" and "developer" of the Park; (2) on May 29, 1990, DEP issued Earth Disturbance Permit No. 1790801 to Clearfield for construction of a road in the Park; (3) the permit expired on May 29, 1992; (4) since the permit's expiration, Clearfield has conducted earthmoving activities involving approximately 25 acres of land within the Park; (5) Clearfield has not maintained erosion and sedimentation controls within the Park which are adequate to prevent accelerated erosion and sedimentation; and (6) Clearfield has failed to control stormwater runoff within the Park..

Based on these allegations, DEP issued an Order requiring that Clearfield: (1) cease unpermitted earthmoving activities, except those necessary to implement soil erosion and sedimentation control measures approved in writing by DEP; (2) submit to DEP an erosion and sedimentation control plan; (3) submit to DEP a National Pollutant Discharge Elimination System (NPDES) permit application which addresses all earthmoving activities conducted, or to be conducted, by Clearfield on the Site; and, (4) upon issuance of the NPDES permit, implement erosion and sedimentation control measures required by the permit.

On November 26, 1996, Clearfield filed a Notice of Appeal with the Board, which was docketed at EHB Docket No. 96-259-MR. In the Notice of Appeal, Clearfield contended that DEP should not have issued its Order against Clearfield because: (1) as an industrial development agency, Clearfield does not "own" property within the Park and is not an "operator" or "developer" of the Park within the meaning of the evironmental laws; (2) the existing erosion and sedimentation problem is the result of DEP's failure to enforce reclamation of certain areas of the Park which have been strip mined; (3) the Park's surface and groundwaters are contaminated by acid mine drainage as a result of DEP's failure to enforce reclamation of Park areas which have been strip mined; (4)

DEP has allowed an adjoining property owner to place 200,000 tons of unconsolidated highly acidic overburden next to the Park, which adds to the runoff of acid mine drainage onto the Park; and, (5) whenever Clearfield's earthmoving activities required a permit, Clearfield obtained an appropriate permit.

On December 30, 1996, DEP filed a Complaint for Assessment of Civil Penalties (Complaint) with the Board, which was docketed at EHB Docket No. 96-277-CP-MR. In the Complaint, DEP alleged that Clearfield: (1) failed to develop an erosion and sedimentation control plan in connection with its earthmoving activities; (2) failed to implement effective sedimentation control measures and facilities while engaged in earthmoving activities; (3) failed to incorporate erosion and sedimentation control measures and facilities in its earthmoving activities; (4) failed to maintain sedimentation control measures and facilities; (5) failed to obtain a NPDES permit for earthmoving activities; and (6) caused sediment pollution to occur to waters of the Commonwealth. For these violations, DEP asked the Board to assess civil penalties against Clearfield under The Clean Streams Law.[3]

On January 27, 1997, Clearfield filed an Answer and New Matter in response to DEP's Complaint wherein Clearfield denied DEP's allegations. In paragraphs 69-77 of the New Matter, Clearfield averred that: (1) areas of the Park had been strip mined under surface mining permits issued by DEP; (2) unreclaimed strip mines are causing the sedimentation problem; (3) DEP allowed an adjoining property owner to place 200,000 tons of unconsolidated mine spoil near the edge of the Park; and (4) the pile of mine spoil is a cause of the sedimentation problem.

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[3] Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001.

On February 13, 1997, DEP filed an Answer to New Matter and a Preliminary Objection to paragraphs 69-77 of Clearfield's New Matter. In the Preliminary Objection, DEP argued that those paragraphs do not contain appropriate material for New Matter under Pa. R.C.P. No. 1030(a). Clearfield filed no response to the Preliminary Objection.

On February 18, 1997, Appellant filed a Motion for Enlargement of the time for discovery and the filing of dispositive motions with respect to EHB Docket No. 96-259-MR. In that motion, Appellant indicated that it had ceased unpermitted earthmoving activities and had submitted a NPDES permit application to DEP. DEP did not oppose the motion, and the Board granted an enlargement of time. On May 5, 1997, the parties notified the Board that they were attempting to negotiate a settlement of the matter and requested additional time for the filing of dispositive motions. The Board granted the request.

On June 4, 1997, however, DEP filed a Motion for Summary Judgment (Motion) at EHB Docket No. 96-259-MR, along with supporting documents, and a supporting brief. On August 4, 1997, Appellant filed an Answer to the Motion with supporting documents. On August 5, 1997, Appellant filed a Memorandum of Law in opposition to the Motion. On August 20, 1997, DEP filed a Reply Brief in support of the Motion.

With respect to EHB Docket No. 96-277-CP-MR, on July 29, 1997, the Board scheduled hearings on the matter for October 14, 15, and 16, 1997. On September 12, 1997, in a conference call with the presiding administrative law judge, the parties requested that the Board consolidate EHB Docket Nos. 96-259-MR and 96-277-CP-MR. The Board granted the request, cancelled the October hearings, and continued the matters until the Board's disposition of DEP's Motion and Preliminary Objection. We shall first address the Motion and then dispose of the Preliminary

Objection.

I. The Motion

In its Motion, DEP asserts that there is no dispute that Clearfield conducted earthmoving activities without a permit; that Clearfield's earthmoving activities caused a discharge of sediment into the waters of the Commonwealth; and that, in conducting its earthmoving activities, Clearfield failed to use or maintain effective erosion and sedimentation control measures. Because such constitutes a violation of 25 Pa. Code §§ 102.4, 102.11, 102.31 and 35 P.S. §§ 401, 402, 611, DEP is entitled to judgment as a matter of law.

Clearfield maintains that DEP is not entitled to judgment as a matter of law because, as an Act 3 EDA with an option contract for development of the Park Board's land, Clearfield is not responsible for obtaining a NPDES permit for the Park. Clearfield also suggests that there are genuine issues of material fact as to: (1) whether Clearfield had obtained all necessary permits for its earthmoving activities; (2) whether the condition of the Park precludes further development; and (3) whether the present erosion and sedimentation control problem is a result of Clearfield's earthmoving activities or the result of prior strip mining and a pile of mine spoil near the Park.

DEP counters that because Clearfield holds title to Park property and is the developer of the Park, Clearfield is responsible for securing a permit. DEP also maintains that Act 3 does not allow Clearfield to evade the legal requirement for a NPDES permit, that Act 3 only protects Clearfield from liability for the remediation of contaminated sites. DEP further asserts that, even if Act 3 is applicable here, Act 3 does not protect Clearfield from liability because Clearfield is directly responsible for the environmental conditions which prompted DEP's Order. As to the factual issues, DEP maintains that: (1) Clearfield did not have a permit in every instance in which it was required;

(2) Clearfield is responsible for the development of property which it owns within the Park; and (3) DEP's Order does not require Clearfield to abate accelerated erosion or sedimentation caused by others.

II. Act 3

We shall first examine Clearfield's contention that Act 3 provides Clearfield with a complete defense to DEP's Order. Act 3 is one of three companion acts passed by the Pennsylvania Legislature in May 1995; the other two acts are the Land Recycling and Environmental Remediation Standards Act (Act 2)[4] and the Industrial Sites Environmental Assessment Act (Act 4). [5] Commentators have referred to these acts as the "Brownfields Legislation" or the "Greenfields Legislation;" their purpose is to encourage the cleanup and reuse of industrial sites.[6] Steven F. Fairlie, *The New Greenfields Legislation: A Practitioner's Guide to Recycling Old Industrial Sites*, 5 Dick. J. Env. L. Pol. 77 (Winter 1996); Thomas G. Kessler, *Comment: The Land Recycling and Environmental Remediation Standards Act: Pennsylvania Tells CERCLA Enough is Enough*, 8 Vill. Envtl. L. J. 161, 182-83 (1997).

The Board has never been asked to interpret Act 3. In approaching it here, we believe it is helpful to set forth portions of Act 3's declaration of policy.

(12) In order to continue to stimulate growth and continue the use or reuse

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[4] Act of May 19, 1995, P.L. 4, 35 P.S. §§ 6026.101-6026.908.

[5] Act of May 19, 1995, P.L. 43, 35 P.S. §§ 6028.1-6028.5.

[6] The term "greenfields" refers to virgin sites or regions not yet impacted by industrial development or pollution. The term "brownfields" refers to sites that have been developed or contaminated. Steven F. Fairlie, *The New Greenfields Legislation: A Practitioner's Guide to Recycling Old Industrial Sites*, 5 Dick. J. Env. L. Pol. 77, 78 (Winter, 1996).

> of industrial and commercial property, *it is necessary to provide protection to . . . [EDAs] from environmental liability and remediation costs under environmental laws for releases and contamination caused by others.*
>
> (13) Environmental liability for . . . [EDAs] shall be limited in scope as specifically provided in this act, and *this act shall be interpreted as broadly as possible in order to preempt any laws, regulations or ordinances imposing environmental liability on such persons in order to promote economic development.*

35 P.S. § 6027.2 (emphasis added). Having stated its intention, the legislature limited the liability of an EDA as follows:

> An [EDA] that holds an indicia of ownership in property as a security interest for the purpose of developing or redeveloping the property or to finance an economic development or redevelopment activity shall not be liable under the environmental acts[7] to [DEP] or to any other person in accordance with the following:
>
> (1) An [EDA] shall not be liable in an action by [DEP], as a responsible person, unless the [EDA], its employees or agents directly cause an immediate release[8] or directly exacerbate a release of a regulated substance[9] on or from the property.

35 P.S. § 6027.4(1). The legislature even enumerated specific defenses to liability, stating that an EDA can avoid liability by showing that a release of regulated substances was caused by: an intervening act of a public agency; migration from property owned by a third party; or an act of a third party who was not an agent or employee of the EDA. 35 P.S. § 6027.7. The legislature also enunciated the following principle of construction:

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[7] "Environmental acts" include any federal, state, or local law, statute, regulation, or rule pertaining to public health or safety, natural resources, or the environment. 35 P.S. § 6027.3.

[8] A "release" is "any spill, rupture, emission, discharge, other action, occurrence, condition or any other term defined as a "release" or other threat of release or operative word or event which would trigger compliance requirements or liability under the environmental acts." 35 P.S. § 6027.3.

[9] "Regulated substances" include any element, compound or material which is subject to regulation under the environmental acts. 35 P.S. § 6027.3.

> The terms and conditions of this act are to be *liberally construed* so as to best achieve and effectuate the goals and purposes of this act. Liability shall be based on proximate and efficient causation. This act preempts and eliminates all present liability standards, including, but not limited to, the concept of a person who, without participation in the management of the property, holds indicia of ownership primarily to protect a security interest. Under all provisions herein, the burden of proof shall be upon the person seeking to have . . . [an EDA] held liable *for a response action or damages*.

35 P.S. § 6027.10 (emphasis added).

It should be obvious at this point that we cannot determine the applicability of Act 3 at this stage of the consolidated proceedings. So much depends on Clearfield's activities at the Park that we must allow the facts to be fully developed.

DEP's Order is two-pronged, requiring Clearfield to obtain certain permits and then to implement the permits. We are not convinced that Act 3 eliminates the need for permits in the development of industrial parks. Nothing in Act 3, by itself or in conjunction with the other Brownfields acts, suggests that the protection afforded to lending and developing agencies was intended to empower them to act without the need for permits. But, even if we conclude that permits are required for the development of the Park, it is not clear to us at this point that Clearfield is the entity that has to obtain the permits. A much closer examination of Clearfield's activities is required to resolve that issue.

To the extent that DEP's Order requires Clearfield to undertake remedial activity at the Park, Act 3 may be a defense. The resolution of this issue likewise requires a close examination of Clearfield's activities on that site because Act 3's protection is limited. It does not extend to pollutional discharges directly caused or exacerbated by Clearfield, its employees and agents.

III. Preliminary Objection

In addition to its Motion in EHB Docket No. 96-259-MR, DEP filed a Preliminary Objection to Clearfield's New Matter in EHB Docket No. 96-277-CP-MR. As stated above, DEP contended that paragraphs 69-77 of Clearfield's New Matter contain impertinent material. However, those paragraphs set forth allegations that the erosion and sedimentation violations which underlie the civil penalty assessments are the result of the unreclaimed mines and a pile of mine spoil near the Park. Because such allegations are relevant to the issue of causation under Act 3, we overrule DEP's Preliminary Objection.

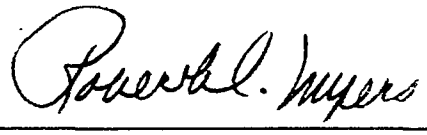
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEARFIELD FOUNDATION	:	
	:	
v.	:	**EHB Docket No. 96-259-MR**
	:	**(consolidated with 96-277-CP-MR)**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 19th day of September, 1997, it is ordered that the Department of Environmental Protection's Motion for Summary Judgment is denied. It is further ordered that the Department of Environmental Protection's Preliminary Objection is overruled.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: September 19, 1997

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

For the Commonwealth, DEP:
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For Appellant:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DAVID C. ABOD and DORA E. ABOD	:	
	:	
v.	:	**EHB Docket No. 95-017-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JAMES L. PUGH and M. JACQUELINE DEBO, Permittees	:	**Issued:** September 22, 1997

ADJUDICATION

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board dismisses an appeal from the granting of a small projects permit for the construction of docks in a lake under the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1 - 693.27 (Dam Safety Act) where Appellants failed to establish that the Department abused its discretion by issuing the permit without requiring proof of a property interest in the permitted site because neither the Dam Safety Act nor the Department of Environmental Protection's (Department) regulations thereunder requires a demonstration of such an interest for issuance of a small project permit.

Appellants failed to sustain their burden of proof that the Department knew in advance that the proposed project would encroach upon Appellants' property, or that the Permittees presented false or incorrect information in their application.

Since ownership of the property is not an issue in granting a small project permit, the Board

will proceed with a decision on the matter, even though there is a pending quiet title action for the property on which the proposed project is to be located.

The issuance is not a "regulatory taking" because the permit simply authorized the building of the project; it did not authorize building it on another's property without their consent.

PROCEDURAL HISTORY

On January 23, 1995, David C. and Dora E. Abod (Appellants) filed a notice of appeal[1] seeking review of the Department's December 14, 1994 issuance of a water obstruction and encroachment permit for a small project pursuant to Section 105.13(e) under the Dam Safety Act to allow the construction of a dock and boathouse by James L. Pugh and M. Jacqueline Debo of Kingston, Pennsylvania. The permit allows Mr. Pugh and Ms. Debo to construct and maintain a pile-supported private recreational dock/boathouse, having overall dimensions of 30 feet by 40 feet with a four foot wide walkway, located ten feet off the shoreline in Harveys Lake, at Pole 155 near the intersection of State Route 0415 and Park Road in Harveys Lake Borough, Luzerne County.

A hearing was held on March 19, 1996 before Administrative Law Judge Michelle A. Coleman. Both parties were represented by legal counsel and presented evidence in support of their positions. Appellants filed their post-hearing brief on May 24, 1996. Permittees and the Department filed their post-hearing briefs on June 14, 1996. On June 27, 1996 Appellants filed their reply to the Department's post-hearing brief.

The record consists of the pleadings, a joint stipulation, a hearing transcript of 104 pages and

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[1] On January 30, 1995 Appellants filed an amended appeal in which they raised the allegation that, "The action of the Department of Environmental Resources in issuing the permit was no (sic) a proper exercise of discretion, nor was it a valid exercise of police power, which has or will result in a regulatory taking of Appellant's (sic) property rights."

13 exhibits. After a full and complete review of the record we make the following findings:

FINDINGS OF FACT

1. The properties involved in this appeal are portions of Harveys Lake, Harveys Lake Borough, Luzerne County. (Notice of Appeal)[2]

2. Harveys Lake was declared a "public highway" by the Commonwealth by Act of March 2, 1871, P.L. 161. (J.S. No. 8; N.T. pp. 75-77)

3. The Commonwealth of Pennsylvania transferred the lakebed of Harveys Lake by patents and warrants to Charles T. Barnum and Hendrick B. Wright in 1871. (J.S. No. 7)

4. David C. and Dora E. Abod are individuals who live at Box 125, R.D. 1, Lakeside Drive, Harveys Lake, Pennsylvania, 18618. The Abods own property at Harveys Lake, Pennsylvania, Luzerne County which was purchased on May 12, 1987. (Notice of Appeal; J.S. No. 1; Appellants' Ex. 1)

5. The deed describes the property as two lots adjacent to the lake. The first lot is Lot 5 on the plot of lots of James B. Barnum recorded in the said County in Map Book No. 1, page 18 and 19. The second lot is described as "all land embraced between boundaries of the road and low water mark, and said easterly and westerly lines of said lot [Lot 1] extended." (Appellants' Ex.1)

6. James L. Pugh and M. Jacqueline Debo are individuals who live at 272 Richard Street, Kingston, Pennsylvania. Mr. Pugh and Ms. Debo own property at Harveys Lake, Pennsylvania, Luzerne County which was purchased on July 8, 1994. (Notice of Appeal; Permittees'

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[2] The following abbreviations will be used: "J.S. __" for the Joint Stipulation; "N.T. __" for the Transcript; "Appellants' Ex. __" for Appellants' Exhibits; and "Permittees' Ex. __" for Permittees' Exhibits.

Ex. A)

7. The Pugh/Debo property deed describes the property as "a lot and piece of land immediately in front of the above land on the shore of Harveys Lake, fifty (50) feet wide and extending from the public road to the low water mark of said lake." (Permittees' Ex. A)

8. The Abods and James L. Pugh and M. Jacqueline Debo are owners of adjoining parcels which are bounded by the low water mark of Harveys Lake as described in their deeds. (J.S. No.16)

9. The Abods have an existing dock which extends from their riparian property out into Harveys Lake. Part of the dock extends in front of the riparian property owned by James L. Pugh and M. Jacqueline Debo. (J.S. Nos. 3 and 17)

10. The Department is an administrative agency of the Commonwealth of Pennsylvania and the agency charged with the duty to administer and enforce the provisions of the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1 - 693.27 (Dam Safety Act); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 - 691.1001; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended,* 71 P.S. §§ 510 - 517 and the rules and regulations promulgated thereunder. (J.S. Nos. 13 and 14).

11. On August 19, 1994, the Department issued a notice of violation to David Abod based on a July 26, 1994 inspection which revealed that he modified his dock without obtaining a permit prior to modification in violation of the Dam Safety Act and the accompanying regulations. (Appellants' Ex. 3)

12. James L. Pugh and M. Jacqueline Debo planned to construct a pile-supported private

recreation dock/boathouse in Harveys Lake, Harveys Lake Borough, Luzerne County. (J.S. No. 9)

13. The project is to be constructed at Pole 155, near the intersection of S.R. 0415 and Park Road in Harveys Lake Borough, Luzerne County. (J.S. No. 12)

14. The dock proposed by James L. Pugh and M. Jacqueline Debo would be located on a portion of the lakebed which the Abods claim by adverse possession. (J.S. No. 21)

15. Neither the Abods nor James L. Pugh and M. Jacqueline Debo owned interests in the lake bed where the existing and proposed docks are located. (J.S. 10; J.S. 19; Permittee's Ex. B; Appellant's Ex. 7)

16. On September 30, 1994, the Department received a complete Small Projects Application from James L. Pugh and M. Jacqueline Debo for a permit to construct the pile-supported private recreation dock/boathouse in Harveys Lake, Harveys Lake Borough, Luzerne County. (J.S. No. 9)

17. The Department is authorized by the Dam Safety Act to issue permits for the construction of docks in Harveys Lake, or to otherwise regulate the area in question. (J.S. No. 14)

18. The Department issued a Water Construction and Encroachments Permit on December 14, 1994 to James L. Pugh and M. Jacqueline Debo which allows the construction and maintenance of a pile-supported private recreational dock/boathouse, having overall dimensions of 30 feet by 40 feet with a 4 foot wide walkway, locating (sic) 10 feet off the shoreline of Harveys Lake. (J.S. No. 11)

19. Appellants, David C. and Dora E. Abod, appealed the issuance of the permit to the Environmental Hearing Board by Notice of Appeal dated January 23, 1995 and an Amended Notice of Appeal dated January 30, 1995. (Notice of Appeal; Amended Notice of Appeal)

20. The Abods contend that the Department abused its discretion in issuing the permit because James L. Pugh's and M. Jacqueline Debo's application failed to reveal that the Abods owned that portion of the lakebed in dispute by adverse possession. (Notice of Appeal)

21. In the information submitted in the "Permit Application - General Information," James L. Pugh and M. Jacqueline Debo answered "no" to the question, "Are there any permanently occupied dwellings, existing stream crossings or adjoining properties that can be adversely affected by the proposed project?" (Appellants' Ex. 9)

22. Neither James L. Pugh and M. Jacqueline Debo nor the Abods held title to the lakebed of Harveys Lake in front of their parcels of land at the time the permit application was filed on or about September 30, 1994 or at the time the permit was issued on December 14, 1994. (J.S. No. 10)

25. By deed dated May 24,1995 James L. Pugh and M. Jacqueline Debo obtained an interest in the lakebed of Harveys Lake directly in front of their riparian lots from Wilkes-Barre Federation of the Blind, an heir or assign of Barnum and Wright. (J.S. No. 19; Permittee's Ex. B)

26. By deed dated November 7, 1995 the Abods obtained an interest in the lakebed of Harveys Lake directly in front of their riparian lot from Wilkes-Barre Federation of the Blind, an heir or assign of Barnum and Wright. (J.S. No. 19; Appellants' Ex. 7)

27. On March 27, 1995 the Abods filed an Action to Quiet Title in Luzerne County Court of Common Pleas for that portion of the lakebed where their dock is located, which includes an area of the lake adjacent to James L. Pugh's and M. Jacqueline Debo's lot. James L. Pugh and M. Jacqueline Debo have intervened in that matter to challenge the claims of the Abods. (Appellant's Ex. 6; J.S. No. 18)

28. To date no additional evidence has been submitted on the action to quiet title.

DISCUSSION

Appellants have the burden of proof and the burden of proceeding since this is an appeal of an action of the Department where Appellants are a party who is not the applicant or holder of a license or permit from the Department and are protesting the permit's issuance or continuation. 25 Pa. Code 1021.101(c)(2). To sustain their burden Appellants must prove by a preponderance of the evidence that the Department committed an error of law or abused its discretion when it issued Permittees' permit to build a recreational dock/boathouse on Harvey's Lake. 25 Pa. Code § 1021.101(a).

Appellants' principal basis for appeal can be placed into four categories - ownership, proof of ownership, misrepresentation, and taking. We will consider the principal issues raised by the notice of appeal and the post-hearing briefs in those groupings.[3]

Ownership

Appellants raise a number of objections concerning ownership, including among others, that the Permittees are not legal owners of the portion of the lakebed for the proposed dock, that the true owners were not notified of Permittees' application, and that Appellants are owners of the affected areas of the lakebed by adverse possession.

Appellants argue that under Section 15 of the Dam Safety Act, the Department abused its

[3] Although Appellants raise in their notice of appeal the issue of whether the Department has "jurisdiction and authority to issue a permit on the property in question or to otherwise regulate the area in question" Notice of Appeal, ¶ 11, they agreed in their joint stipulation that the Department is authorized by the Dam Safety Act to issue permits for the construction of docks in Harveys Lake, or to otherwise regulate the area in question. (J.S. 14) We will not consider that issue here.

discretion by issuing the permit without the Permittees proving that they had obtained an easement or at least the consent or permission of the owner. Furthermore, Appellants argue that it is evident that the Legislature and the Department did not intend that water obstruction and/or encroachment permits issued be used to cause damage to or adversely affect the property rights of others and cite sections 11 and 14(b) of the Dam Safety Act (32 P.S. §§ 693.11 and 693.14(b)) and Section 105.332 (Docks/Wharves and Bulkheads: Riparian property) of the Pennsylvania Code (25 Pa. Code § 105.332).

The Department contends that it is not required to assess property interests when reviewing an encroachments permit application and the scope of review of a permit application is limited to evaluating any potential environmental impact caused by the proposed structure to waterflow and the ecology. To support its contention that the Department's review of encroachment applications under the Dam Safety Act is limited the Department cites *Bernie Enterprises, Inc. v. DEP*, 1996 EHB 239 and *Welteroth v. DER*, 1989 EHB 1017.

We agree with the Department. Appellants' reliance on Section 15 of the Dam Safety Act for its argument that the Department abused its discretion is incorrect. Section 15 of the Dam Safety Act involves submerged lands and lakes that are deemed public highways. Although Harveys Lake was deemed a public highway in 1871, the Commonwealth subsequently deeded the lakebed to private individuals thus making Section 15 inapplicable. In this case the permit was issued as a permit for a small project pursuant to 25 Pa. Code § 105.13(e), which does not require proof of ownership. Section 105.13(e) states:

> A permit application for small projects located in streams or floodplains shall be accompanied by the following information. This permit application may not be used for projects located in wetlands.

> If upon review the Department determines that more information is required to determine whether a small project will have an insignificant impact on safety and protection of life, health, property or the environment, the Department may require the applicant to submit additional information and processing fees required by this chapter. (1) A site plan. .... (2) A cross sectional view. .... (3) A location map. .... (4) Project description. .... (5) Color photographs. ...

Proof of ownership or a demonstrated right to enter the property proposed for the project is not required prior to issuance of a small project permit. Consequently, the Department did not commit an abuse of discretion in issuing this permit.

Appellants also argue that the Department abused its discretion because it issued the permit even though it (1) had actual and constructive notice that the Appellants had a proprietary interest in their existing dock on the submerged lands, (2) knew that the proposed project would have an adverse impact on Appellants' property, and (3) processed the permit application as a small project application, but failed to require the consent of the Appellants or owners of the submerged lands on which the project would be built. The Department does not address this issue in its brief.

The only evidence that Appellants offer to establish their contention is Appellants' Exhibit 3 and the Notes of Testimony Page 22 line 8 through page 23 line 18.

Appellants' Exhibit 3 is an August 19, 1994 Department notice of violation. In the letter the Department states that it conducted an inspection of an unpermitted modification of Appellants' dock in Harveys Lake and was notifying Appellants of their options for correcting the violations. This document does not establish that the Department had actual or constructive notice that the proposed project would be built on Appellants' property. The letter only establishes that Appellants violated the law by not obtaining a permit prior to modifying their dock. Thus, nothing in the exhibit proves by a preponderance of the evidence that the Department knew that the Permittees' proposed

project would encroach upon Appellants' property. Furthermore, the Notes of Testimony on page 22, which Appellants cite in their post-hearing brief do not support their contention because the testimony is nothing more than the identification, moving for admission and admission of Appellants' Exhibit 3. Therefore, Appellants have failed to carry their burden of proof on this issue.

Misrepresentation

Appellants also contend that the permit should be revoked because the terms of the permit provide for the revocation or suspension of the permit if the information which the Permittees provided proved to be false , incomplete or inaccurate. Therefore, Appellants argue, the permit should be revoked because misrepresentations were made by the Permittees in the permit application. To support this Appellants cite their Exhibit No. 9 and several pages of testimony, specifically, page 23 and page 26.

In countering this argument the Department contends that there is no evidence on the record that the Appellants hold title to a portion of the lakebed where the proposed dock is to be situated. The Department argues that the Appellants have failed to establish by a preponderance of the evidence that such information is incorrect.

We agree with the Department. The sources Appellants cite in support of their argument do not demonstrate by a preponderance of the evidence that the information submitted in the permit application was false or incorrect. It is true that Appellants' Exhibit No. 9, Part C, Page 6, Line 7 shows that Permittees answered "no" to the question of whether there are any permanently occupied dwellings, existing stream crossings or adjoining properties that could be adversely affected by the proposed project. However, Appellants failed to present any evidence which demonstrates that Permittees knew this to be false when they applied for the permit. Furthermore, nothing in the

testimony Appellants cite supports their contention. The cited testimony includes:

> Q. When did you [Abod] first become aware that Mr. Pugh had purchased the property next door to you ?
>
> A. I'm not sure exactly. Jimmy had stopped by and introduced himself as the owner sometime just after the purchase.
>
> Q. Do you recall when that was, approximately ?
>
> A. I guess it would have been somewhere late summer, August, September.

Notes of Testimony, page 23 - 24, line 6.

In addition, lines 9 through 12 on page 26 which are cited by Appellants to support their contentions. These state:

> A. I'm back to what I just said again. We talked about the possibility of me modifying my dock to make room for a new proposed dock that Mr. Pugh desired.

Although Appellants cite only these lines it is important to consider the preceding lines of testimony in order to place Appellants' cite in the proper context. The preceding lines read as follows:

> Q. Did Mr. Pugh notify you that he was applying with the Department of Environmental Resources at the time for a permit to build a dock ?
>
> A. I believe he told me he was going to.
>
> Q. Do you recall when that was ?
>
> A. I don't recall the exact date, no.
>
> Q. Did you object to that ? Did you state your objection ?
>
> A. I'm back to what I just said again. We talked about the possibility of me modifying my dock to make room for a new proposed dock

that Mr. Pugh desired.

Notes of Testimony Page 25 through 26.

Nothing in the evidence presented by Appellants, regarding either the application documents or the testimony, proves by a preponderance of the evidence that the Permittees in completing and submitting their application provided false or incorrect information at the time of the permit application. The application shows only that at time of the application Permittees stated that no permanently occupied dwellings, existing crossings or adjoining properties would be adversely affected by the proposed project. The only testimony which would offer some proof is the testimony on page 26. Although there appears to have been a discussion between Appellant and Permittee regarding a proposed project, Appellant cannot recall when it took place or whether there was a problem with the proposed site. Consequently, Appellant has not demonstrated that Permittee knew at the time of the application that his proposed project would adversely affect other people's property rights. Thus, Appellant has failed to prove that Permittee submitted false or incorrect information on the application. As we noted in the beginning of this adjudication Appellants must establish their case by a preponderance of the evidence. Appellants have failed to establish by a preponderance of the evidence that the Department knew at the time of the issuance of the permit that the proposed project would encroach upon other property. For the foregoing reasons, we dismiss the allegations concerning ownership and revocation of the permit.

Taking

Appellants contend that by granting the permit the Department has given Permittees an interest in Appellants' land which they would not have but for the permit.

Citing *Bernie Enterprises, Inc. v. DEP*, 1996 EHB 239, the Department argues that

Appellants' taking objections are without merit because encroachment permits do not convey any property interest to Permittees.

The issuance of a permit conveys the Department's decision that the proposed project satisfies the public's concern for safety, navigation and environmental conservation. *Bernie Enterprises, Inc. v. DEP,* 1996 EHB 239. It goes no further. *Id.* at 243. The permit in question was issued under the Dam Safety Act and its regulations. The limited scope of the Dam Safety Act and its regulations was emphasized in *Welteroth v. DER, et al*, 1989 EHB 1017, where the Board held that the Department's authority in reviewing an application for a culvert did not extend to passing upon the suitability of the road design. The Board stated, "We find nothing in the [DSEA] which would extend [the Department's] authority in reviewing an encroachment application to all aspects of the project or activity associated with the encroachment." *Id.* at 1024. In the instant case, Permittees' right to enter upon the land and construct the project must be established independently of the permit. The Department required in Conditions 3 and 19A of the permit that Permittee obtain rights to enter on the land and construct the project independently from the rights granted under the Dam Safety Act. Conditions 3 and 19A state:

> 3. This permit does not give any property rights, either in real estate or material, nor any exclusive privileges, nor shall it be construed to grant or confer any right, title, easement, or interest in, to or over any land belonging to the Commonwealth of Pennsylvania; neither does it authorize any injury to private property or invasion of private rights, nor does it obviate the necessity of obtaining Federal assent when necessary.
>
> 19A. This permit does not convey any real property rights or interests or authorization to trespass on privately-owned riparian land. By accepting this permit, the permittee certifies that he/she holds title, easement, right or other real interest in the riparian land. Any dispute over ownership of this land is solely a matter for private litigation.

Clearly, the Department did not intend the scope of the permit to convey property rights or to settle any dispute on land ownership.

Assuming arguendo that Appellants believe that this action of the Department constitutes a *de facto* taking, Appellants bear the burden of proving such an argument. A "*de facto* taking" occurs where an entity clothed with the power of eminent domain substantially deprives an owner of the use and enjoyment of his property. *Conroy-Prugh Glass Company v. Commonwealth*, 321 A.2d 598 (Pa. 1974); *In re Condemnation by City of Philadelphia*, 398 A.2d 224 (Pa. Cmwlth. 1979). To establish that a *de facto* taking has occurred, a property owner must show that the loss of use and enjoyment of his property "is the direct and necessary consequence" of actions of an entity having the power of eminent domain (emphasis added). *In re Condemnation by Commonwealth, Department of Transportation*, 506 A.2d 990, 993 (Pa. Cmwlth. 1986).

Assuming, based on the facts presented, that Appellants may lose the use and enjoyment of a portion of the property they now claim to own, that loss or deprivation is not "the direct and necessary consequence" of the Department's issuance of the permit. It is the direct consequence of Permittees' desire to place a dock on a site where ownership is in dispute. As noted above, the permit simply authorized the building of the project, it did not authorize Permittees to build on another's property without that person's consent or without proof of ownership by Permittee. Therefore, the building of the project on another's property is not the direct and necessary consequence of the Department's issuance of the permit, it is a consequence of Permittees' design and placement of the project.

We dismiss the takings argument because Appellants have failed to either show that the

granting of the permit conveyed Appellants' land to Permittees or that Appellants have been deprived of the use and enjoyment of their property and that the deprivation is the direct and necessary consequence of the Department's issuance of the permit.

Post-hearing brief objections

Although Appellants also raised several allegations in their post-hearing brief we will only address those to which the Department objects.

The Department contends that Paragraphs 1, 2, 3, and 6 raised in Appellants' post-hearing brief are waived because they are beyond the scope of the objections identified in Appellants' notice of appeal. These paragraphs allege:

> 1. that the Board should refrain from deciding the case pending outcome of the quiet title action pending in Luzerne County Court;
>
> 2. that the Department committed an abuse of discretion or an arbitrary exercise of its duties in issuing and in processing the permit as a small project, as defined by 25 Pa. Code 105.1, where the Department knew or had sufficient notice that the appellants may have had a proprietary interest which would have been significantly impacted or adversely affected by the permittee's project;
>
> 3. that the Department committed an abuse of discretion or an arbitrary exercise of its duties in issuing the permit where it failed to require that the permittees present evidence that they had acquired an easement, right of way, license or lease, or other legally recognized interest in the lakebed from the owners of the lakebed;
>
> 6. that the Department committed an abuse of discretion in issuing the permit to permittees in December 1994 when it knew in advance that the boathouse/dock proposed by the permittee would encroach upon appellants' property.

The Board has long held that allegations which exceed the scope of the objections raised in the notice of appeal are waived absent a showing of good cause. *See Pennsylvania Game*

Commission v. DER, 509 A.2d 877 (Pa. Cmwlth. 1986), *aff'd on other grounds*, 555 A.2d 812 (Pa. 1989).

We will consider each of the paragraphs the Department seeks to have waived.

Paragraph 1

Subsequent to the filing of their appeal, Appellants filed an Action to Quiet Title in Luzerne County Court of Common Pleas for the property involved in this case. The case is currently pending and no one has submitted evidence that title to the disputed area is owned by the Appellants.

The Appellants contend that their assertion that the Board should refrain from issuing a decision pending the outcome of an action to quiet title in Luzerne County is not a new objection but a matter of legal procedure going directly to the Board's jurisdiction and authority to render a decision.

Permittees argue that the appeal should be dismissed because the Board does not have jurisdiction to determine property rights between competing parties and there has been no proof of title in Appellants or any other property interest.

The Department argues that Paragraph 1 was waived because the allegation exceeds the scope of the objections raised in the notice of appeal.

We will not address the Department's waiver argument regarding the quiet title action as it is irrelevant to rendering a decision in this case. The basis of the appeal is an action arising from the issuance of a permit pursuant to 25 Pa. Code § 105.13(e) where ownership is irrelevant to the permit issuance.

Appellants cite *Cooper v. DER*, 1982 EHB 250 to support the proposition that where there is a pending action to quiet title in a court of common pleas, where the ownership of the affected

property is an important issue, the Board should defer its adjudication until the court of common pleas has rendered its decision. The Board has considered that proposition as appropriate when the issue is ownership of the property. However, this case is distinguishable from *Cooper*. In *Cooper* the regulations required the permittee to present proof of ownership or other right of entry before a permit could be issued. In this case the permit was issued pursuant to 25 Pa. Code § 105.13(e), which does not require proof of ownership. Consequently, since this case is distinguishable from *Cooper* the Board will proceed to a decision on this matter.

Paragraphs 2, 3 and 6

The Department contends that these are new objections in the post-hearing brief which are not contained in the notice of appeal and therefore are waived.

We reject the Department's argument that these issues were waived because Appellants failed to include them in their notice of appeal. As noted above allegations which exceed the scope of the objections raised in the notice of appeal are waived absent a showing of good cause. *Pennsylvania Game Commission,* 509 A.2d 877 (Pa. Cmwlth. 1986), *aff'd on other grounds*, 555 A.2d 812 (Pa. 1989). The Board believes that Appellants' allegations have not exceeded the scope of the objections and that Appellants raised these objections in various paragraphs of the notice of appeal, specifically, Notice of Appeal Paragraphs 7, 9, 10 and 12.

These objections are worded broadly enough to include the objections that the Permittees did not own the property in question, nor had they obtained the rights to use the property from the owner, and the Department abused its discretion in issuing the permit because the proposed project would encroach upon Appellants' property. Consequently, we find that Paragraphs 2, 3 and 6 of the post-hearing brief are not waived because they are substantially the same as objections raised in the

notice of appeal. We find these objections without merit as set forth earlier in the opinion.

CONCLUSIONS OF LAW

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

2. Appellants have the burden of showing by a preponderance of the evidence that the Department acted unlawfully or abused its discretion in denying approval of Appellants' request.

3. The Department is authorized by the Dam Safety Act to issue permits for the construction of docks in Harveys Lake or to otherwise regulate the area in question.

4. The Department did not abuse its discretion by failing to require proof that the Permittees were owners of the land proposed for the dock project or had acquired an easement, right of way, license or lease or other legally recognized interest in the lakebed from the owners of the lakebed because a small projects application does not require proof of ownership or a property interest prior to issuance.

5. The Department did not commit an abuse of discretion by issuing the permit because it did not know in advance that the proposed project would encroach on another's property.

6. Appellants failed to sustain their burden of proof, as grounds that the Permittees submitted false or incorrect information on the application.

7. The Department's issuance of the permit did not result in a taking of Appellants' property.

8. Appellants did not waive allegations raised in their post-hearing brief when the allegations are either irrelevant to the Board's rendering its decision or are within the scope of the allegations raised in their notice of appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAVID C. ABOD and DORA E. ABOD	:	
	:	
v.	:	**EHB Docket No. 95-017-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JAMES L. PUGH and M. JACQUELINE DEBO, Permittees	:	

ORDER

AND NOW, this 22nd day of September, 1997, it is ordered that the appeal filed by David C. and Dora E. Abod is dismissed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: September 22, 1997

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

For the Commonwealth, DEP:
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Northeast Region

For Appellants:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DARLENE THOMAS, et al	:	
	:	
v.	:	**EHB Docket No. 97-075-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** September 23, 1997

OPINION AND ORDER ON MOTION FOR JUDGMENT ON THE PLEADINGS[1]

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A Department of Environmental Protection motion for summary judgment is granted when no material facts are disputed and the moving party is entitled to judgment as a matter of law because objections raised in the notice of appeal and subsequent amendments do not pertain to the Department action which is the basis for the appeal.

OPINION

This matter was initiated with the March 25, 1997 appeal by Darlene Thomas, L. Carl Rumbalski, Miriam L. Neff and Truman L. Neff (Appellants) of a Department of Environmental Protection (Department) letter notifying a township of the Department's decision not to recommend

[1] Although this motion was captioned a motion for judgment on the pleadings, it is more properly treated as a motion for summary judgment for reasons set forth later in this opinion.

the township's municipal authority's application for advanced funding under Act 537[2] for the design of sewer facilities in Lamar Township, Clinton County, Pennsylvania. Appellants subsequently amended the appeal on April 14, 1997. Presently before the Board is the Department's May 27, 1997 motion for judgment on the pleadings.

BACKGROUND

On or about September 29, 1995 Appellants filed an appeal (First Appeal) of the Department's approval of two Act 537 Plan Update Revisions prepared for Porter, Walker and Lamar Townships. That appeal is pending before the Board at Board Docket Number 95-206-C.

On or about March 25, 1997 the Appellants filed a second appeal (Second Appeal) the subject of which is the March 3, 1997 Department letter stating its decision not to recommend the township municipal authority's application for advanced funding for the design of sewer facilities in Lamar Township. The Second Appeal raises the following objections:

> 1. The original requirement by the Department was that a sewer system be installed at Lamar interchange of Routes 64/I-80.
>
> a. The proposed sewer system was extended to include the remainder of Route 64 corridor and another arc. East Nittany Valley Joint Municipal Authority (ENVJMA) was formed to implement the regional project. The extension was neither mandated nor needed.
>
> b. The Department letter denying approval of the grant application submitted to PENNVEST by Lamar Township Municipal Authority (LTMA) is based on inconsistencies with Act 537 Plans for Lamar Township and the requirement that Lamar Township work with ENVJMA.
>
> 2. The Department is in violation of Sections 4(e), 10(1) through (7.1), (15) and (19) because it accepted inadequate and/or incomplete data that do not justify the proposed sewer plan. The existing data

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[2] Act 537 is the Sewage Facilities Act, Act of January 24, 1966, P.L. 1535 (1965), *as amended*, 35 P.S. § 750.1-.20a.

does not adequately address:

a. septic malfunction rates and method for determining;
b. sources and rate of fecal coliform levels;
c. soil types and their relationship to septic systems; and
d. information based on out-of-date maps.

3. The Department is in violation of Section 3(1)(7) by accepting the proposed plan because it ignores:

a. the diminishment of open lands;
b. aesthetics; and
c. quality of life

4. The Department ignored the requirement to show need for the proposed sewer project. It is in violation of Section 5(g) . It accepted the opinion of a small number of organizations interested in economic development, but ignored the wishes of almost 700 residents who signed a petition opposing the sewer.

5. The Department is in support of development, not protection of the environment as mandated and set forth in its policy in Section 3.

a. The current plan encourages commercial development of the Rte.220/I-80 interchange, thus destroying farmland and impacting upon wildlife usage.

b. The plan would lead to residential development of farmland reducing land and wildlife usage.

6. The Department is in violation of Sections 3(1), (3), (7) and 5(3) because the proposed plan would allow large amounts of treated effluent to discharge into Fishing Creek

a. Chemical and thermal changes would affect the wildlife; would impact on recreational uses; and would present potential health hazards to children who recreate in the river.

b. Aesthetic degradation and the demise of quality of life would occur without the presence of wild ducks.

7. ENJMA is in violation of Section 5(d)(3) through (8) for failing to:

a. address the dumping of polluted waters into Fishing Creek;
b. consider all aspects of planning, including cost;
c. establish procedures for delineating and acquiring rights of ways;
d. set forth a time schedule;
e. propose methods of financing the project.

8. ENVJMA is in violation of Section 5(h) because it prevented adequate input by residents in the three townships covered in the regional plan.

a. ENVJMA did not survey residents in all three townships;

b. ENVJMA did not take into consideration the petition with nearly 700 signatures of residents opposing the sewer;

c. ENVJMA did not coordinate comments and discussion from residents of the separate townships, instead referred discussants (sic) to their own township supervisory board;

d. ENVJMA failed to accept responsibility for the sewer plan, claiming that each component township was responsible

9. ENVJMA deceived residents by telling them the regional sewer system was mandated by the Department.

10. The Department is in violation of Section 5(e) and Sections 10 (2)(3)(5)&(7) because it failed to disapprove the inadequate plan submitted by ENVJMA.

11. The Department is in violation of Sections 3(2), (7) and 5(h) because it did not assure proper dispensing of public information and adequate discussion by and before local agencies.

12. The Department is in violation of Section 10(6) because it has accepted plans for an expensive sewer project without informing the authority, the townships and residents about appropriate alternative wastewater systems that are less invasive and less costly.

On April 14, 1997 Appellants amended the Second Appeal with the following objections:

1. The Department is in violation of Sections 5(d)(1) - (9) for failing to:

a. take into consideration the 537 Plan already developed by ENVJMA;

b. designate municipal responsibility for implementation of the plan;

c. address dumping of polluted waters into Fishing Creek;

d. address pollution caused by sewage treatment plants;

e. address the issue of point source contamination in the West Branch of the Susquehanna River;

f. set forth a time schedule.

2. The Department is in violation of Sections 5(e)(1) - (3)

a. for not disapproving updated revisions to the sewage system by the LTMA within one year of date of submission.

b. for not disapproving said updated revisions by LTMA within sixty days of submission.

3. The Department is in violation of Section 5(f) for its negligence in coordinating the revised plan by LTMA; thereby aiding and abetting in illicit activity.

4. The Department is in violation of Section 6(a) through (c) and Section 10(4) by authorizing financial assistance to LTMA while not ascertaining the procedural improprieties of the Authority.

5. The Department is in violation of Sections 10(6) and (16) for not informing and instructing LTMA, Township Supervisors and sewage enforcement officers of new and alternative methods of sewage disposal.

The Second Appeal is the subject of the motion presently before the Board.

On May 27, 1997 the Department filed its motion for judgment on the pleadings and supporting memorandum.[3] On June 9, 1997 Appellants filed their response. On June 26, 1997 the Department filed its reply.

DISCUSSION

The Department moves to dismiss all of the allegations raised by Appellants with a motion for judgment on the pleadings. The Department contends the appeal should be dismissed because

[3] On June 9, 1997 Appellants filed a Motion to Enforce Compliance with Rules of Discovery. We decided to address the Department's motion for judgment on the pleadings first since the relief requested is dismissal of the case. If we grant the Department's motion there would be no need to address Appellants' motion.

all of the objections raised in the Second Appeal and the amendments, except one[4], are substantially identical to those raised in the First Appeal and address the Department's approval of Act 537 Plan Update revisions. The only objection not covered by this argument also fails to state a cause of action because it is not related to the Department's decision not to recommend the application for funding. The Department argues: 1) that the Board should grant the motion because none of the objections are related in any way to the action taken by the Department which forms the basis of the Second Appeal; 2) the Board does not have a basis to reverse the Department's decision; and 3) Appellants have failed to provide any ground upon which the Board may grant relief.

Appellants allege that the appeal should not be dismissed. Appellants argue: 1) that the Department is guilty of deception by attempting to bypass litigation currently before the Board; 2) the Department's action was meant as delaying tactics; 3) the Department is negligent; and 4) that there was fraudulent activity regarding a project.

As noted in the beginning of this opinion, we have decided to treat the Department's motion for judgment on the pleadings as a motion for summary judgment because the only facts presented to the Board were presented by the Department in the supporting documents to its motion. If we treat the Department's motion as a motion for judgment on the pleadings we would be allowed only to argue those facts which were pleaded in the notice of appeal. In deciding a motion for judgment on the pleadings, the Board must accept as true all of the well-pleaded facts contained in the notice of appeal, and may not consider any facts not contained in the notice of appeal. *Bensalem Twsp. School Dist. v. Commonwealth of Pennsylvania, et al,* 544 A.2d 1318, 1321 (Pa. 1988); *Joseph F. Cappelli*

---

[4] The Department is in violation of Section 6(a) through (c) and Section 10(4) by authorizing financial assistance to LTMA while not ascertaining the procedural improprieties of the Authority.

& Sons, Inc. v. DER, 1994 EHB 1835. In the instant case no facts were pleaded in the notice of appeal, only allegations. The Department has presented sufficient evidence in its motion for judgment on the pleadings to both establish the facts and demonstrate that it is entitled to judgment. Thus, in order to expedite the process of resolving this proceeding, we see no need to require the parties to use their attorneys' and the Board's time filing a new motion with all of the same information. Consequently, we will consider the motion as a motion for summary judgment.

When ruling on motions for summary judgment, the Board looks to Rules 1035.1 to 1035.5 of the Pennsylvania Rules of Civil Procedure. Pa. R.C.P. 1035.1 - 1035.5; *Kochems v. DEP*, EHB Docket No. 96-187-C (Opinion issued April 22, 1997). The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories and admissions of record, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035.2; *County of Adams v. DEP*, 687 A.2d 1222 (Pa. Cmwlth. 1997). Once a motion for summary judgment has been properly supported, the burden is on the non-moving party to disclose evidence that is the basis for his argument resisting summary judgment. *Felton Enterprises, Inc. v. DER*, 1990 EHB 42, 45-46. On a motion for summary judgment, the record must be viewed in the light most favorable to the non-moving party, and all doubts as to the existence of material facts must be resolved against the moving party. *Ducjai v. Dennis,* 656 A.2d 102 (Pa. 1995).

Viewing the facts in the light most favorable to Appellants as the non-moving party, there are no material facts in dispute since Appellants, the non-moving party, failed to disclose evidence which would support their arguments against the motion. The undisputed facts of this case are as set forth in the Background portion and will not be repeated here.

Having set forth the undisputed facts, we will consider whether the Department is entitled to judgment as a matter of law. Reviewing the notice of appeal and the Department's motion we find that the Department has demonstrated that the Second Appeal and its amendments cannot be sustained as a matter of law.

Second Appeal

We agree with the Department that the objections raised in both appeals were either exactly identical or substantially identical. The only differences between the two appeals are as follows:

> - the substitution of the East Nittany Valley Joint Municipal Authority in the Second Appeal in the place of one or more of the municipalities named in the First Appeal;
>
> - Paragraph 1- the language 1, 1(a) and (b) paraphrases those in the First Appeal. Subparagraph 1(c) of the First Appeal has been deleted;
>
> - Paragraphs 4, 6, 8, and 9 paraphrase those respective paragraphs of the First Appeal; and
>
> - Subparagraphs 12(b) and (c) of the First Appeal are deleted in the Second Appeal.

Thus, the objections are either identical or substantially identical in both appeals.

The Board has held that objections not relevant to the matter which is the basis of the appeal will be dismissed. *Borough of Dunmore v. DER, et al*, 1990 EHB 689. None of the objections in the Second Appeal refers to the Department's March 3, 1997 decision which allegedly is the basis of the Second Appeal. Consequently, the Department is entitled to judgment because Appellants' notice of appeal fails to plead sufficient grounds for appealing the Department's decision where the objections argued do not pertain to the Department action being challenged.

Amendments to Second Appeal

The Appellants amended their Second Appeal by adding new objections on or about April 14, 1997. The new objections are as follows:

> 1. DEP violated Section 5(d)(1) - (9) for failing to:
>
> a. take into consideration the 537 Plan already by East Nittany Valley Joint Municipal Authority;
> b. designate municipal responsibility for implementation of the plan;
> c. address dumping of polluted waters into Fishing Creek;
> d. address pollution caused by sewage treatment plants;
> e. address the issue of point source contamination in the West Branch of the Susquehanna River;
> f. set forth a time schedule.
>
> 2. DEP violated Section 5(e)(1) - (3) for not disapproving updated revisions to the sewage system by the Lamar Township Municipal Authority within one year of date of submission and for disapproving the update revision by LTMA within sixty days of submission.
>
> 3. DEP violated Section 5(f) for its negligence in coordinating the revised plan by LTMA thereby aiding and abetting in illicit activity.
>
> 4. DEP violated of Sections 6(a)-(c) and 10(4) by authorizing financial assistance to LTMA while not ascertaining the procedural improprieties of the Authority.
>
> 5. DEP violated Section 10(6) and (16) for not informing and instructing LTMA, Township Supervisors and sewage enforcement officers of new and alternative methods of sewage disposal.

All of these new objections, except Number 4, again relate to the Department's approval of the Act 537 Plan Update Revisions which formed the basis of the First Appeal, not the March 3, 1997 decision. Consequently, we will grant the Department's motion regarding these objections for the same reasons we set forth above.

Amended Objection Number 4 also must be dismissed. Although Number 4 does pertain to the subject of the Department action it claims relief for the Department's authorization of financial

assistance to LTMA when the Department decided not to recommend the application for funding. Consequently, we also grant summary judgment on that objection on the grounds that it fails to state a valid cause of action. Since we are granting the Department's motion as a motion for summary judgment, we will not consider Appellants' motion to enforce compliance with rules of discovery. Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DARLENE THOMAS, et al	:	
	:	
v.	:	**EHB Docket No. 97-075-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW this 23rd day of September, 1997 the Department of Environmental Protections' motion for judgment on the pleadings is granted and the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 97-075-C

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: September 23, 1997

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

PENN MARYLAND COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 97-050-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** October 2, 1997

OPINION AND ORDER ON MOTIONS TO EXTEND TIME FOR FILING DISPOSITIVE MOTIONS AND FOR CONTINUANCE OF HEARING

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board will not grant a motion for extension of time to file dispositive motions and continue the hearing when the time by which to file dispositive motions ended more than three months earlier and no activity in the prosecution or defense of the case has been filed by either party.

OPINION

This matter was initiated by the February 21, 1997 filing of a notice of appeal by Gregg M. Rosen, counsel to Penn Maryland Coal Company (Appellant). The appeal challenges a February 4, 1997 permit suspension and Notice of Intent to Forfeit Bonds issued by the Department of Environmental Protection (Department) through its Bureau of District Mining Operations. Appellant's Surface Mining Permit No. 56773130 was suspended for alleged failure to comply with four orders from the Department issued between October 2, 1996 and November 8, 1996. The notice

of appeal avers that Appellant has not failed to comply with an order of the Department nor any applicable law, rule or regulation, and, therefore, the Department's action is an abuse of discretion.

On February 27, 1997, the Board issued Pre-Hearing Order No. 1 which stated that all discovery was to be completed by May 27, 1997 and all dispositive motions filed by June 26, 1997. On March 14, 1997, counsel for the Department entered his notice of appearance. The next entry in the docket is the issuance of Pre-Hearing Order No. 2 on July 8, 1997 which set a hearing date of October 7 and 8, 1997, and a date of September 12, 1997 for Appellant's pre-hearing memorandum. On September 16, 1997, the Board sent a Rule to Show Cause, returnable September 22, 1997, when Appellant failed to file its pre-hearing memorandum on time. Appellant filed its pre-hearing memorandum by fax on September 20, 1997.

The next submission is the Department's Motion to Extend Time for Filing of Dispositive Motions and Motion for Continuance of Hearing which is the subject of this Opinion. Appellant has responded by letter of September 30, 1997, stating that it does not oppose the motion but disagrees with the Department on the issues on which the motion is based.

In the Motion the Department claims that the matter can be terminated by means of a dispositive motion if the Board will permit the Department additional time to file such a motion. The Department cites the doctrine of administrative finality as the principal reason for disposing of the appeal, but fails to explain how and why the doctrine is applicable. Moreover, the time for filing dispositive motions expired more than 90 days ago. There was no request to extend the time, or any submission from the Department at all, within that time. It appears from the lack of substantive filings in this matter that no major effort has been made to prosecute or defend the case. Therefore, there is no adequate basis on which to grant a motion to extend the time to file dispositive motions.

Since the Motion for Continuance of Hearing relies on the Motion to Extend Time for Filing of Dispositive Motions for its arguments, and, as stated above, the Motion to Extend Time lacks an adequate basis on which to grant the relief requested, the Motion for Continuance of Hearing cannot be granted either.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PENN MARYLAND COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 97-050-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 2nd day of October, 1997, IT IS ORDERED that the Motions to Extend Time for Filing of Dispositive Motions and for Continuance of Hearing are denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: October 2, 1997

c: **DEP Bureau of Litigation**
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Southcentral Region
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Pittsburgh, PA

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAF

CONSOLIDATED PENN LABS A PARTNERSHIP VAPCO ENGINEERING	:	
v.	:	**EHB Docket No. 97-140-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 3, 1997**

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By Thomas W. Renwand Administrative Law Judge

Synopsis

The Appellant's request for a supersedeas is granted where the Department revoked Appellant's certification in the Small Operators Assistance Program for failure to participate in the January 1997 EPA performance evaluation test. Based on wide-spread confusion as to whether one parameter was included on the June 1996 test, the Department abused its discretion in not affording Appellant another opportunity to take the required performance evaluation test. The Appellant has demonstrated a likelihood of success on the merits, that it will suffer irreparable harm if it loses its certification in the SOAP Program including the layoff of employees, and that the grant of supersedeas pending the results of the next performance evaluation test will pose no threat of injury to the public.

Background

On June 13, 1997 the Department of Environmental Protection ("Department") revoked Appellant Consolidated Penn Labs' certification in the Small Operators Assistance Program ("SOAP") to analyze water samples for the subcategory of discharge parameters known as Acid Mine Drainage ("AMD"). Consolidated Penn Labs is a partnership with a lab located in Punxsutawney, Pennsylvania. The lab has been in business approximately fifteen years and involved in the SOAP Program for about eight years. The lab's director is Lisa Milsop. Ms. Milsop supervises the lab's five employees consisting of two full-time lab technicians, two full-time field technicians, and one part-time employee.

Small mine operators who produce less than 300,000 tons of coal a year can qualify for the SOAP Program. The testing Consolidated Penn Labs does for the SOAP Program constitutes 18-20 percent of Appellant's business. It performs an average of 180 to 200 samples per month under the SOAP Program.

All labs that wish to participate in the Department's SOAP Program must undergo annual performance evaluation tests that are administered by the Environmental Protection Agency ("EPA"). These tests are given twice a year. The EPA sends samples to the labs who then must analyze the samples and send their results to the EPA. It takes approximately six months for the EPA and the Department to evaluate the test results.

The Department also conducts regular on-site inspections and tests. This appeal and our order do not involve the Department's on-site inspection testing. Instead, it involves the EPA administered performance evaluation test. The acid mine drainage component of this test involves

approximately eight or nine parameters.

The basis for the Department's revocation was Consolidated Penn Labs' failure to participate in the January 1997 EPA performance evaluation test. Following the revocation, Consolidated Penn Labs timely appealed the Department's action. It also requested that the Environmental Hearing Board ("Board") grant a supersedeas.[1]

The Department's action which is the subject of an appeal is not stayed pending disposition of the appeal unless the Board grants a supersedeas. *See* 35 P.S. §7514 (d)(1). Among the factors the Board considers in ruling on a petition for a supersedeas are:

1) Irreparable harm to the petitioner;

2) The likelihood of the petitioner prevailing on the merits; and

3) The likelihood of injury to the public or other parties.

The Board will not issue a supersedeas where pollution or injury to the public health, safety, or welfare exists or is threatened during the period when the supersedeas would be in effect. 35 P.S. §7514 (d)(1)(2) and 25 Pa. Code §1021.78. The Commonwealth Court has held that these standards are consistent with the test enunciated in *Pennsylvania Public Utility Commission v. Department of Environmental Resources*, 545 A.2d 404 (Pa. Cmwlth. 1988).

If a lab does not pass the test the first time (in June or July), the Department affords the lab a second chance by allowing it to take the test again in January. Consolidated Penn Labs did not pass the test the first time because it did not analyze the total suspended solid paramaters in

---

[1]The Board held a hearing. Our discussion of the facts is based on the record developed at that hearing. Several days following the hearing we issued a supersedeas. This opinion is written in support of our earlier Order granting Appellant's petition for supersedeas.

the AMD test. Consolidated Penn Labs was confused as to whether this was one of the parameters of the AMD test. In order to pass the AMD test a lab would have to be qualified for all the parameters in the test.

Other labs were also confused. Several labs, but not Consolidated Penn Labs, wrote to the Department following the first test. They questioned whether the total suspended solids parameters were part of the AMD performance evaluation test. Therefore, prior to the January 1997 test, the Department sent individualized certified letters to all the participating labs advising them of the fact that the total suspended solids test was part of the AMD performance evaluation test.

On October 30, 1996 Ms. Milsop gave birth to her son. Following the birth of her son Ms. Milsop was off work the month of November and then worked part-time during the months of December 1996 and January 1997. During this period the January EPA performance evaluation test was received by Consolidated Penn Labs. Ms. Milsop was aware that the total suspended solids had to be run on this performance evaluation test. However, the sample was misplaced and Ms. Milsop found it after the deadline to submit the results had passed.

As we indicated in *Pennsylvania Mines Corporation v. Department of Environmental Protection*, 1996 EHB 808, Board precedent regarding irreparable harm is based on equity cases dealing with preliminary injunctions where the test focuses on whether the party has an adequate remedy at law, i.e., money damages. *See Virginia Petroleum Jobbers Association v. Federal Power Commission*. 259 F.2d 921 (D.C. Cir. 1958); *Pennsylvania Public Utility Commission v. Process Gas Consumers Group*, 467 A.2d 805, 808-10 (Pa. 1983). Perhaps because the Board does not have powers in equity the test has been somewhat strained in its application to cases

before the Board. *See Raymark Industries, Inc. v. Department of Environmental Resources*, 1986 EHB 176.

The Department's revocation of Appellant's certification would result in the direct loss of approximately 18-20 percent of Appellant's business. Employees would lose their jobs. These losses could not be recovered if Appellant is successful on the merits at trial. Therefore, such losses would constitute irreparable harm. *Pennsylvania Mines Corporation v. Department of Environmental Protection*, 1996 EHB 808,812.

The continued certification of Appellant in SOAP while the results of the July 1997 test are being analyzed will not result in any harm to the public. Since the Department's policy is to afford a lab two chances to pass a performance evaluation test before revoking a lab's certification, we find that based on the evidently wide-spread confusion as to whether the total suspended solids parameters was included on the June 1996 test, the Department abused its discretion in not affording Consolidated Penn Labs another chance to take the test. Therefore, the test given in July 1997 should serve as the second test because of the confusion surrounding the June 1996 test. The Department's revocation of Consolidated Penn Labs' certification in SOAP in the subcategory of Acid Mine Drainage is overturned pending the results of the July 1997 performance evaluation test.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONSOLIDATED PENN LABS A PARTNERSHIP VAPCO ENGINEERING	:	
v.	:	EHB Docket No. 97-140-R
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 3rd day of October, 1997, we affirm our Order of August 14, 1997 partially granting Appellant's Petition for Supersedeas.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: October 3, 1997

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

RALPH GAMBLER	:	
	:	
v.	:	**EHB Docket No. 97-051-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** October 10, 1997

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A motion for summary judgment is granted. A Department order requiring an individual to restore a stream bed and banks is appropriate where the individual's actions violated conditions in his general permit for bank rehabilitation, bank protection, and gravel bar removal (permit), and rendered the stream bed and banks unstable. Whether the Department gave him adequate notice that his activities required prior approval from the U.S. Army Corps of Engineers (Corps of Engineers) is irrelevant where the Department did not request summary judgment based on his failure to secure approval from the Corps of Engineers. The Board does not have jurisdiction over an appellant's claim that the Department erred when it issued his permit where the appellant neither raised that issue in his notice of appeal nor avers that good cause exists for his failure to do so.

OPINION

This matter was initiated with the February 24, 1997, filing of a notice of appeal by Ralph Gambler (Appellant) to a January 27, 1997, administrative order (order) issued by the Department of Environmental Protection (Department). The order averred that Appellant had relocated or re-channeled approximately 325 feet of Lick Run in Lawrence Township, Clearfield County, and placed excavated gravel in the stream's floodway. According to the order, Appellant's activity was unlawful because he failed to secure prior approval from the Corps of Engineers and failed to comply with the terms of his permit, violating sections 6 and 18 of the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1- .27 (Dam Safety and Encroachments Act), at 32 P.S. §§ 693.6 and 693.18, and section 105.449 of the Department's regulations, 25 Pa. Code § 105.449. The order directed Appellant to either comply with a restoration plan prescribed by the Department or one he prepared himself and then had approved by the Department. In his notice of appeal, Appellant raised three specific objections to the order. He asserted that: (1) he did not violate sections 6 or 18 of the Dam Safety and Encroachments Act or section 105.449 of the Department's regulations; (2) he did not violate his permit; and, (3) even if he did violate his permit, the violation was only technical since it did not result in damage to the stream or stream bed.

The Department filed a motion for summary judgment and a memorandum in support on September 9, 1997. Appellant filed a memorandum in opposition on September 15, 1997.[1] The

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[1] Appellant's decision to simply file a memorandum in opposition, rather than a response *and* memorandum in opposition, is perilous. As we noted in *Barkman v. DER*, 1993 EHB 738, the purpose of a memorandum is to *explain* the relevant motion or response--not to *augment* it. It follows that a memorandum cannot substitute for a motion or response. Although Appellant argues

Department filed a memorandum in reply on September 29, 1997.

Before we turn to the parties' arguments on the motion for summary judgment, a brief review of the process for issuing general permits for stream bank and gravel bar modifications, such as the permit issued to Appellant, may be helpful. Under section 17(a) of the Dam Safety and Encroachments Act, 32 P.S. § 693.17(a), the Department has the authority to delegate its power to permit certain water obstructions to county conservation districts. An individual who would like a general permit must fill out a Notification to Use, BDWW-GP-3, form (notification), which contains certain standard conditions as well as spaces for the applicant's name, address, and the size and location of the proposed project. The applicant must then submit the notification to the Department or--if the Department has delegated its authority to a county conservation district--to the appropriate conservation district. The Department or conservation district will then review the notification, and, if the notification is satisfactory, acknowledge and return it to the applicant. At that point, the applicant has a general permit: The acknowledged notification itself is the permit and provides, "The [Department] hereby authorizes, by general permit . . . the installation, operation, modification and maintenance of bank rehabilitation and protection projects and the removal of gravel bars in and along the regulated waters of this Commonwealth." (Exhibit 2, p. 1-1, § A.)[2] The conditions to the notification become the conditions to the general permit.

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in his memorandum that he cannot be penalized for not responding to the Department's motion, he is mistaken. Rule 1035.3 of the Pa.R.C.P. provides that summary judgment may be entered against a party for failing to file a response. *See also Kochems v. DEP*, EHB Docket No. 96-187-C (Opinion issued April 18, 1997).

[2] All exhibits cited in this opinion are exhibits offered in support of the motion for summary judgment.

In its motion and supporting memorandum in this case, the Department argues that it is entitled to summary judgment because Gambler violated section 18(3) of the Dam Safety and Encroachment Act, 32 P.S. § 693.18(3), and section 105.449 of the Department's regulations. According to the Department, Appellant violated these provisions by: (1) leaving less than six inches of the gravel bar above the water, contrary to section F.2 of the permit; (2) bulldozing the gravel bar material across the stream channel and parts of the stream bank next to the gravel bar, contrary to section F. 4 of the permit; and, (3) depositing excavated gravel in the floodway of Lick Run, an area unsuitable for bank reconstruction, contrary to section F.5 of the permit.

Appellant, meanwhile, insists that the Department is not entitled to summary judgment. He contends that the Board cannot consider the affidavits the Department submitted in support of its motion because the affiants were employees or agents of the Department or Clearfield County Conservation District, and, under the *Nanty-Glo* rule, the Board cannot consider testimonial affidavits in support of a motion for summary judgment. Appellant also argues that summary judgment is inappropriate because discovery remains incomplete and material issues of fact remain.

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions of record--and affidavits, if any--show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035.2; *County of Adams v. Department of Environmental Protection*, 687 A.2d 1222 (Pa. Cmwlth. 1997). When ruling on motions for summary judgment, we view the record in the light most favorable to the nonmoving party and will enter summary judgment only where the right is clear and free from doubt. *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995). Since Appellants submitted no exhibits to rebut the allegations in the Department's motion, the Department is deemed to have

established all properly supported averments in its motion.

We will consider the affidavits of the Department and Clearfield County Conservation District personnel despite Appellant's argument that the use of those affidavits violates the *Nanty-Glo* rule. The so-called *Nanty-Glo* rule "prevents the entry of summary judgment where the moving party relies exclusively on oral testimony, whether through testimonial affidavits or deposition testimony, to establish the absence of a genuine issue of material fact." 6 Pennsylvania Standard Practice 2d *Summary Judgment* § 32:108 (1994). However, the *Nanty-Glo* rule does not apply to proceedings before the Board. *See Snyder v. DER,* 588 A.2d 1001 (Pa. Cmwlth. 1991); *LCA Leasing, Inc. v. DEP*, 1996 EHB 1053. Therefore, we will consider the testimonial exhibits the Department submitted.

We will not, however, consider the videotape that the Department filed in support of its motion. As noted above, the record for purposes of a motion for summary judgment consists of the pleadings, depositions, answers to interrogatories, admissions of record, and affidavits. Pa.R.C.P. 1035.2. The videotape, which depicts Appellant's work at the site, does not fall within any of these categories. Furthermore, the Department never refers to the videotape in its actual motion. The only reference the Department makes to the videotape appears in its memorandum of law in support of the motion. Even there, the Department does not cite the videotape to support specific assertions. It simply states that the videotape "provides graphic evidence of Mr. Appellant's conduct." (The Department's memorandum in support, p. 11.)

Having established what makes up the record for purposes of this motion, we turn next to the question of whether the Department has established that Appellant violated section 18(3) of the Dam Safety and Encroachments Act, 32 P.S. § 693.18(3), and section 105.449 of the Department's

regulations, 25 Pa. Code § 105.449. Both provisions the Department cites require that permittees comply with the terms of their permit. Section 18(3) of the Dam Safety and Encroachments Act provides, in pertinent part:

> It shall be unlawful for any person to:
>
> > (1) Violate or assist in the violation of any of the provisions of this act or of any rules or regulations adopted hereunder.
> >
> > . . .
> >
> > (3) Construct, enlarge, repair, alter, remove, maintain, operate or abandon any dam, water obstruction or encroachment contrary to the terms and conditions of a general or individual permit of the rules and regulations of the [D]epartment.

Section 105.449 of the Department's regulations, meanwhile, provides:

> A person who constructs, operates, maintains, modifies, enlarges or abandons a dam, water obstruction or encroachment under a general permit shall comply with the terms and conditions of the general permit. . . .

Appellant violated both provisions because he failed to comply with the terms of his permit which resulted when the Clearfield County Conservation District acknowledged his notification. The permit authorized him to restore three feet of stream bank channel by removing three feet of gravel deposition, and to remove gravel bar material measuring three feet by three feet. (Exhibit 2, p. 1, para. 1.) Yet Appellant's activities far exceeded the scope of activity authorized in his permit. He relocated or re-channeled approximately 325 feet of Lick Run. (Exhibit 4, para. 11.) Appellant also violated other permit conditions. Section F.2 of the permit provides that, when removing a gravel bar, permittees must leave at least six inches of the bar above the surface of the water.

(Exhibit 2, pp. 1-5 - 1-6.) Yet Appellant left less than six inches of the gravel bar above the surface of the water. (Exhibit 4, para. 9.) Section F.4 of the permit prohibits the bulldozing of gravel bar materials across streams as well as excavation into the stream bank adjacent to the gravel bar. (Exhibit 2, p. 1-6.) Yet Appellant bulldozed the gravel bar material across Lick Run and excavated into the stream bank adjacent to the bar. (Exhibit 4, para. 11.) Section F.5 of the permit requires that material excavated from the stream channel must be deposited outside the floodway unless the material is suitable for bank reconstruction. Yet Appellant deposited material which was unsuitable for bank reconstruction into the Lick Run floodway. (Exhibit 2, p. 1-6.)

In light of the foregoing, the Department has amply demonstrated that Appellant violated section 18(3) of the Dam Safety and Encroachments Act and section 105.449 of the Department's regulations. The only remaining question is whether the Department's order is appropriate given the violations established. We conclude that it is.

The Department not only has established that Appellant's activities involving Lick Run far exceeded those authorized in his permit. It also has established that those activities harmed the area, rendering the stream bed and banks unstable. (Exhibit 4, para. 14.) All that Appellant is left to argue is that summary judgment is inappropriate because: (1) discovery remains incomplete because the Department cannot locate a person Appellant alleges is central to the appeal, Stacey Laird of the Clearfield County Conservation District; (2) Appellant did not have adequate notice that approval from the Corps of Engineers was required for his activities; and, (3) the Department erroneously issued the permit. None of these reasons constitute appropriate grounds for denying the Department's motion for summary judgment.

Appellant's argument that discovery remains incomplete is unavailing. The discovery period

closed on June 6, 1997. Appellant did not file a motion to compel, nor does he allege in his memorandum that the Department is withholding information he requested. He simply avers that the Department cannot locate Ms. Laird. That, however, is insufficient grounds for denying the Department's motion for summary judgment. If Appellant felt the Department withheld information he requested concerning Ms. Laird, then he should have filed a motion to compel. And, if the Department did not withhold information he requested, but simply had no information to provide, then the Department did not fail to comply with Appellant's discovery request.[3]

As for Appellant's argument that the Department did not adequately notify him that he required approval from the Corps of Engineers before starting his project, that argument is irrelevant. The Department did not request summary judgment based on Appellant's failure to secure approval from the Corps of Engineers. Furthermore, Appellant did have notice that he should await approval from the Corps of Engineers. The instructions for the notification address the issue at least twice. Paragraph 4 of the instructions provides:

> Your project may also require a permit from the U.S. Army Corp of Engineers. . . . The registration to use this state General Permit does not relieve you of the obligation to comply with, and the state is not authorized to address, these Corps of Engineers' requirements. Therefore, in order to avoid violation of Federal statutes, please contact the appropriate U.S. Army Corps of Engineers District Office . . . to determine whether a Federal permit is required for your project. (Appendix C of 25 Pa. Code Chapter 105.)

---

[3] Even assuming the discovery period had not closed, Appellants' discovery argument would be problematic. It is evident from Appellant's memorandum in opposition that Appellant seeks Ms. Laird to discover evidence concerning whether the Department erred with respect to the terms included in the general permit. For the reasons discussed later in this opinion, Appellant cannot challenge the terms of the general permit in this appeal.

Paragraph 10 provides:

> Do not begin work until:
>
> > (d) You have obtained any other Federal, State or local permits which may be required, *including written authorization from the U.S. Army Corps of Engineers for gravel bar removal.* (Appendix C of 25 Pa. Code Chapter 105, emphasis added.)

Appellant's final argument--that the Department erroneously issued the permit--is also unavailing. Absent a showing of good cause, the Board lacks jurisdiction over issues not raised in the notice of appeal. *Pennsylvania Game Commission v. DER*, 509 A.2d 877 (Pa. Cmwlth. 1986) *aff'd on other grounds*, 521 Pa. 121, 555 A.2d 812 (1989); *NGK Metals Corp. v. DER*, 1990 EHB 376. Good cause may be demonstrated by fraud or breakdown in the Board's operation or by the necessity for further discovery, provided that a statement to that effect is contained in the notice of appeal. *Id.* Appellant never challenged the terms of the permit in his notice of appeal, nor does he aver that good cause exists for his failure to do so.[4] Therefore, we do not have jurisdiction over that issue.

In light of the foregoing, we conclude that the order the Department issued to Appellant is appropriate and that the Department is entitled to judgment as a matter of law.

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[4] Even assuming Appellant had made a showing of good cause, his challenge with respect to the permit would still be problematic. If Appellant wanted to challenge the terms of the permit, he should have filed an appeal to the permit. He failed to do so, despite receiving notification of the permit in August of 1996. Since he failed to file a timely appeal to the permit, the doctrine of administrative finality precludes him from collaterally attacking the terms of the permit in his appeal of the Department's order. *See DER v. Wheeling-Pittsburgh Steel Corporation*, 348 A.2d 765 (Pa. Cmwlth. 1975), *aff'd*, 473 Pa. 432, 375 A.2d 320 (1977), cert. denied, 434 U.S. 969 (1977); *Emporium Water Company v. DEP*, EHB Docket No. 96-175-C (Opinion issued April 17, 1997).

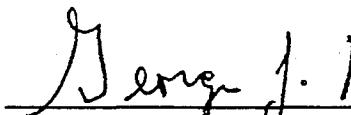
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RALPH GAMBLER	:	
	:	
v.	:	**EHB Docket No. 97-051-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

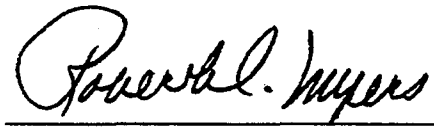
ORDER

AND NOW, this 10th day of October, 1997, it is ordered that the Department's motion for summary judgment is granted and Appellant's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 97-051-C

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: October 10, 1997

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

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Northcentral Region

For Appellant:
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GREEVY & YONKIN
Williamsport, PA

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

VALLEY FORGE CHAPTER OF TROUT UNLIMITED, et al.	:	
v.	:	**EHB Docket No. 97-112-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GREAT VALLEY SCHOOL DISTRICT, Permittee	:	**Issued:** October 10, 1997

OPINION AND ORDER ON PETITION FOR RECONSIDERATION

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A petition for reconsideration of a Board order denying a Department request for a stay of proceedings is denied. The Department failed to show that "extraordinary circumstances" exist justifying reconsideration of an interlocutory order, and the interest of Appellants in proceeding expeditiously with their appeal outweighs the interest of the Department in the stay.

OPINION

This matter was initiated with the May 20, 1997, filing of a notice of appeal by Karl Heine, President, Valley Forge Chapter of Trout Unlimited; M. John Johnson, President, West Chester Fish, Game & Wildlife Association; Marian Toland, President, Open Land Conservancy; John Hoekstra, Administrator, Green Valley Association; John Wilmer, Esq., on behalf of the Raymond Proffitt Foundation; and Charles Marshall, on behalf of the Pennsylvania Environmental Defense Foundation

(collectively, Appellants). They appeal the Department's April 22, 1997, issuance of a National Pollution Discharge Elimination System (NPDES) permit to Great Valley School District (Permittee) for a discharge to an unnamed tributary of Valley Creek (the receiving tributary) in East Whiteland Township, Chester County. In their notice of appeal, Appellants assert that the Department acted contrary to law by issuing the permit because: (1) the receiving tributary is an exceptional value water; (2) section 93.5(f)(2) of the Department's regulations, 25 Pa. Code § 93.5(f)(2), provides that facilities using chlorine must dechlorinate their effluent before discharging into exceptional value waters; and, (3) the NPDES permit issued to Permittee authorizes the Permittee to discharge effluent containing 0.5 mg/l total residual chlorine[1] into the receiving tributary.

On September 3, 1997, Permittee and the Department filed a joint motion for a stay of proceedings.[2] Appellants filed a response on September 4, 1997, and the Board denied the stay by an order issued September 5, 1997. On September 12, 1997, the Department filed a petition for reconsideration of our decision to deny the stay. Permittee filed a letter on September 15, 1997, stating that it also supported the motion for reconsideration. Appellants filed a response opposing reconsideration on September 17, 1997.

I. The standard for reconsideration

Section 1021.123 of the Board's rules, 25 Pa. Code § 1021.123, governs reconsideration of

---

[1] This and all other effluent limits discussed in this opinion are the average monthly limits.

[2] The motion also requested an extension of time to respond to a motion for summary judgment filed by Appellant. The Board granted the extension by a separate order, on September 5, 1997.

interlocutory orders. Regarding the criteria that will be used to evaluate petitions for reconsideration, section 1021.123 states only that the petition must demonstrate that "extraordinary circumstances" justify consideration of the matter by the Board. We have previously held that this means parties requesting reconsideration must show that they meet the criteria for reconsideration of a final order at section 1021.124 of the Board's rules of practice and procedure, 25 Pa. Code § 1021.124, and that, in addition, special circumstances are present which merit the Board taking the extraordinary step of reconsidering an interlocutory order. *Miller v. DEP,* EHB Docket No. 95-234-C (Opinion issued March 31, 1997). Section 1021.124 provides that we will reconsider final orders for "compelling and persuasive reasons," including:

> (1) The final order rests on a legal ground or factual finding which has not been proposed by any party.
>
> (2) The crucial facts set forth in the petition
>
> (i) Are inconsistent with the findings of the Board.
> (ii) Are such as would justify a reversal of the Board's decision.
> (iii) Could not have been presented earlier to the Board with the exercise of due diligence.
>
> 25 Pa. Code § 1021.124(a).

Therefore, to show that it is entitled to reconsideration of the motion for a stay, the Department must show that reconsideration would satisfy the criteria listed above. In addition, the Department must show that special circumstances are present which justify the Board taking the extraordinary step of reconsidering an interlocutory order.

II. Is reconsideration appropriate here?

The Department argues that we should reconsider the joint motion for a stay of proceedings because our order denying the stay was based in part on new matter raised in Appellants response to the Department's motion, and the Department never had an opportunity to respond to that new matter. With respect to the motion for a stay itself, the Department argues that we should have granted the stay because: (1) the sole issue raised in Appellants' appeal is the legality of the total residual chlorine effluent limitation in Permittee's NPDES permit; (2) the Department has issued a draft NPDES permit amendment which, when issued as a final permit, will revoke the current total residual chlorine effluent limitation and require Permittee to dechlorinate its effluent;[3] and, (3) upon issuance of the final permit amendment, the Board will no longer be able to grant effective relief, rendering the appeal of the instant NPDES permit moot. Appellants, meanwhile, argue that the Board should not reconsider its decision to deny the motion for stay because the Department raises no facts which the Board did not have at the time we denied the stay. With regard to the motion for stay itself, Appellants argue that the appeal is not moot because the draft NPDES permit is not yet final and because--like the current NPDES permit--the draft NPDES permit allows the discharge of chlorinated effluent, albeit only until September of 1998.

The Board's order denying the joint motion for a stay clearly was based, at least in part, on Appellants' new matter. The order asserts, "Appellants' New Matter raises issues which the parties should continue to address." (Board order of September 5, 1997.) We received a motion for summary judgment from Appellants on August 18, 1997. Permittee and the Department then had 25 days, until September 12, 1997, to respond to that motion. On September 3, 1997, the Board

---

[3] Notice of the draft NPDES permit has since been published. *See* 27 Pa. Bull. 4781 (1997).

received, by fax, the Department and Permittee's joint motion for extension of time to respond to Appellants' motion for summary judgment. Appellants responded to the motion to stay and added new matter, on September 4, 1997. Counsel for the parties called the Board to request expedience in our ruling. We issued our order denying the stay on the following day, September 5, 1997. The Department avers that it did not receive a copy of Appellants' response until three days later, on September 8, 1997.

While the Board's rules of practice and procedure provide that a moving party cannot ordinarily file a reply to a response in the case of non-dispositive motions, *see* 25 Pa. Code § 1021.70(f), we would probably have made an exception here to allow the Department to respond to the issues raised in Appellants' new matter. The fact that the Department never had an opportunity to request permission to file a reply could be significant. However, that does not necessarily mean that we will reconsider our decision to deny the stay. The Department has failed to show that it meets the criteria set forth above for reconsideration of an interlocutory order, and, even if it had, a stay would not be appropriate here.

To the extent that our order relied on Appellants' new matter, the order did not rest "on a legal ground or a factual finding which ha[d] not been proposed by either party," as required for reconsideration under section 1021.124(a)(1). Nor did the Department's request for reconsideration point to any facts which were inconsistent with the Board's findings or could not have been presented earlier to the Board with the exercise of due diligence, as required for reconsideration under subsections (a) or (c) of section 1021.124(a)(2). Therefore, the Department had to show that it satisfied the only remaining option under section 1021.124(a): that the facts in the request for reconsideration justify reversing our decision, as required for reconsideration under section

1021.124(a)(2)(b). Furthermore, since the Department requests reconsideration of an interlocutory order, the Department must not only show that the facts justify reversing our decision; it must also show that special circumstances exist which warrant us taking the extraordinary step of reconsidering an interlocutory order. The Department failed to do so here.

The Department and Permittee's entire argument for the stay of proceedings was based on the contention that the instant appeal will become moot as soon as the draft permit is issued. Even assuming that were true, however, that does not necessarily mean that a stay would be appropriate. When considering a request for a stay, relevant factors include the appellant's interest and potential prejudice, the burden on the Department and any permittee, the burden on the Board, the burden on non-parties, and the public interest. *See, e.g., In re Residential Doors Antitrust Litigation*, 900 F.Supp (E.D.Pa. 1995). We must also consider the time and effort of counsel and litigants with a view toward avoiding piecemeal litigation, and--since a stay is an extraordinary measure--the movant must offer some compelling reasons showing that a stay is warranted. *See, e.g., Stadler v. McCulloch*, 882 F.Supp (E.D.Pa. 1995).

The Appellants' interest in proceeding expeditiously with their appeal is substantial. They appeal Permittee's authorization to discharge chlorinated effluent into the receiving tributary. Since the NPDES permit authorizes that discharge and there is no supersedeas in place, the longer it takes for Appellants to prosecute their appeal, the more chlorinated effluent can be discharged. Furthermore, at the time the Board made its decision on the Department and Permittee's joint motion for a stay, the draft permit had not yet been published in the *Pennsylvania Bulletin.* Therefore, it was

unclear when, if ever, the draft permit might become final.[4] Had we granted the motion to stay the proceedings until the draft permit became final, Appellants would have had no means of challenging the Permittee's discharge of chlorinated solvent until the new permit was issued--whenever that might be--and the Department would have had less of an interest in ensuring that the draft permit was published quickly.

The Department and Permittee, meanwhile, have relatively little interest in staying the proceedings. Although the Department and Permittee caged much of their argument for the stay in terms of mootness, that argument is unavailing. The draft permit may become final in a relatively short time, but until it becomes final, the Board can grant Appellants' effective relief: we can supersede or revoke Permittee's current permit, preventing the Permittee from discharging chlorinated effluent before the draft permit becomes final. Furthermore, if it were really mootness the Department and Permittee were worried about, they would simply wait until the draft permit actually becomes final. Much of their motivation for filing the motion for stay and now the request for reconsideration appears to be to avoid filing responses to Appellants' motion for summary

---

[4] While the draft permit has since been published in the *Pennsylvania Bulletin*, as noted above, it was published only after we issued our order denying the motion for a stay. The fact that the draft permit was published subsequently might be relevant had the Department filed a second motion for a stay rather than a request for reconsideration. In requests for reconsideration, we are primarily concerned with whether our previous decision was appropriate *given the facts at the time it was issued.* While the Board's rules of practice and procedure do allow for reconsideration in some instances *where facts come to the attention of the parties* after a decision, where the facts on which a decision is based actually *change after the decision*, the parties must ordinarily file another motion of the same type based on the new facts. They cannot simply file a petition for reconsideration.

judgment.[5] Suffice it to say that the Department and Permittee's interest in this regard is small compared to Appellants' interest in preventing the discharge of chlorinated effluent prior to the issuance of the draft permit. Furthermore, the Department and Permittee's interest in not filing responses does not qualify as an "extraordinary circumstance" justifying reconsideration of an interlocutory order.

In light of the foregoing, we deny the Department's request for reconsideration.

[5] For instance, although the prayer for relief in the Department's request for reconsideration asks that all the proceedings be stayed, only one is expressly mentioned: the requirement for filing response to Appellants' motion for summary judgment. (Request for reconsideration, p. 6.) We have already granted one extension of their deadline for filing those responses.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

VALLEY FORGE CHAPTER OF TROUT UNLIMITED, et al.	:	
v.	:	**EHB Docket No. 97-112-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GREAT VALLEY SCHOOL DISTRICT, Permittee	:	

ORDER

AND NOW, this 10th day of October, 1997, the Department's request for reconsideration is denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: October 10, 1997

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

DARLINGTON TOWNSHIP BOARD OF SUPERVISORS	:	
v.	:	**EHB Docket No. 97-090-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ENVIROTROL, INC., Permittee	:	**Issued: October 16, 1997**

OPINION AND ORDER ON PETITION TO INTERVENE

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

A Petition to Intervene is denied where the Petition fails to establish that the Petitioner has a substantial, direct, and immediate interest in the subject matter of the appeal and it is apparent that the Petitioner is attempting to circumvent the appeal process.

OPINION

This appeal was originally filed as a "skeleton appeal" pursuant to 25 Pa. Code Section 1021.52(c) by the Darlington Township Board of Supervisors (Appellant) on April 18, 1997. In response to the Board's Order of April 23, 1997, the Appellant subsequently filed a Restated Notice of Appeal on May 12, 1997. It challenges the Department of Environmental Protection's (Department) March 5, 1997 issuance of stormwater National Pollution Discharge Elimination

System ("NPDES") Permit No. PAS406101 to Envirotrol, Inc. (Permittee) as being arbitrary, capricious, an abuse of discretion and otherwise contrary to law.

On July 8, 1997, Tri-State Concerned Citizens ("TSCC") filed a one page letter ("Petition") requesting permission to Intervene. On August 4, 1997, Permittee filed its Response to TSCC's Petition and Memorandum in Support of Response, which opposes the intervention sought by the Petition. On August 19, 1997, TSCC filed a reply to Permittee's Response. On August 22, 1997, Permittee filed a Motion To Strike TSCC's reply to Permittee's Response on the basis that it is unsigned and contains unverified averments of fact.

Any interested person may petition the Board to intervene in any pending matter prior to the initial presentation of evidence. 25 Pa. Code § 1021.62. Section 1021.62(b) requires that the petition be verified and contain sufficient factual averments and legal assertions to establish petitioner's reasons, basis, interests and specific issues upon which it seeks to intervene. An intervening party must be "interested" in the sense that it has a "substantial, direct and immediate" interest in the matter. *Borough of Glendon and Glendon Energy Company v. Department of Environmental Resources*, 603 A.2d 226 (Pa. Cmwlth. 1992).

A "substantial" interest is defined as a discernable greater interest surpassing the common interest of all citizens in seeking obedience to the law. A "direct" interest is one to which harm is caused by the Department's action. An "immediate" interest is one with a causal connection, not remote in nature, between the Department's action and any injury assertedly done. *General Glass Industries Corporation v. DEP*, 1995 EHB 353, 356.

Applying these concepts here compels us to deny TSCC's Petition. The Petition avers that all of TSCC's members are residents of Darlington Township. It also states that TSCC is an

interested party. However, as the Department points out in its Response to TSCC's Petition, the Petition contains allegations that do not establish or explain how TSCC is an "interested" party as this phrase has been defined. Although all of TSCC's members may be residents of Darlington Township, the Board has stated that mere ownership of property is not sufficient to establish a sufficiently interested party. *P.A.S.S., Inc. v. DEP and Wheelabrator Clean Water Systems, Inc.*, 1995 EHB 940, 942. Moreover, a Petition that only states that the Petitioner is interested fails to make that demonstration. *Id.* Simply because the members of TSCC formed an organization primarily to oppose the expansion of the Permittee's facility does not make it an interested party for the purposes of intervening in this appeal.

Additionally, a petitioner may not use intervention as a means of circumventing the time constraints of 25 Pa. Code Section 21.52(a), which requires that appeals be filed within 30 days of the Departmental action in question. *Christine Ann Crawford and Corey Eichman, et al., v. DEP and Browning-Ferris Industries of PA*, 1994 EHB 912. TSCC could have appealed the issuance of the NPDES permit but chose not to do so.[1] Notification of the NPDES permit was published in the March 22, 1997 issue of the Pennsylvania Bulletin. Rather than choosing to timely file an appeal, TSCC chose to file a Petition to intervene four months later.

Accordingly, the following order is entered:

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[1] TSCC timely filed an appeal of the issuance of Permit No. PAD98720725 for the operation of Envirotrol's hazardous waste storage and treatment and residual waste processing facility. (The appeal, *Darlington Township Board of Supervisors, et al. v. DEP and Envirotrol, Inc., Permittee* at EHB Docket No. 96-204-R, is currently pending before the Board). Therefore, TSCC was aware of the Permittee's expanding operation. The fact that TSCC attempts to raise new issues in its Petition, which it may not do as an intervenor, is an example of how it is trying to bypass the appeal process.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DARLINGTON TOWNSHIP BOARD OF SUPERVISORS	:	
	:	
v.	:	**EHB Docket No. 97-090-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ENVIROTROL, INC., Permittee	:	**Issued: October 16, 1997**

ORDER

AND NOW, this 16th day of October, 1997, it is ordered that Tri-State Concerned Citizens' Petition to Intervene is **denied**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: October 16, 1997

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

WILLIAM and MARY BELITSKUS, RONALD and ANITA HOUSLER, PROACT	:	
v.	:	**EHB Docket No. 96-196-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WILLAMETTE INDUSTRIES, INC., Permittee	:	**Issued: October 21, 1997**

OPINION AND ORDER ON
MOTION TO DISMISS AND/OR
MOTION FOR SUMMARY JUDGMENT

By Robert D. Myers, Member

Synopsis:

DEP's approval of coverage under a general NPDES permit pursuant to 25 Pa. Code § 92.83 is an appealable action. Where the Appellants appeal two separate coverage approvals and one of the appeals is untimely, partial summary judgment is entered against the Appellants. Appellants have standing to appeal the remaining approval of coverage for storm water discharges into waters of the Commonwealth where the Appellants use the receiving waters for trout fishing and other recreational uses. Because the Board is required on occasion to exercise equitable power, the Board will not enter summary judgment against the Appellants on the Permittee's claim that the Board has no such jurisdiction when it issues an adjudication. Partial summary judgment is granted in favor of the Permittee where the Appellants have failed to show that the Permittee's application for

coverage under a general permit and DEP's approval of coverage thereunder were deficient. Permittee's motion for summary judgment is denied as to whether DEP properly considered the Permittee's compliance history in approving coverage under a general permit where DEP regulations mandate that DEP deny general permit coverage to an applicant who has a significant history of noncompliance with prior permits issued by DEP. Finally, because a hearing is necessary to determine the relevance and severity of the Permittee's history of noncompliance, the Appellants' request for entry of summary judgment on that issue is denied.

OPINION

On September 30, 1996, William and Mary Belitskus (Belitskus), Ronald and Anita Housler (Housler), and PROACT, an unincorporated group of concerned citizens, filed a *pro se* Notice of Appeal with the Board, challenging the Department of Environmental Protection's (DEP) approval of coverage under General National Pollutant Discharge Elimination System (NPDES) Permit No. PAR228325 (Storm Water Permit) for discharges of storm water from the Willamette Industries-Johnsonburg Mill's (Willamette) North Chip Plant (Chip Plant) into the West Branch of the Clarion River in Hamlin Township, McKean County. DEP notified Willamette of the approval in a letter dated August 14, 1996 and gave public notice of the approval in the August 31, 1996 *Pennsylvania Bulletin*. *See* 26 Pa. Bull. 4270 (1996).

In the Notice of Appeal, Appellants set forth the following objections to DEP's approval of coverage:

> 1.) DEP should not have issued permits . . .to [Willamette], specifically . . . PAR104100 issued March 4, 1994 . . . [and the Storm Water Permit,] for Willamette's [Chip Plant] -- because the application contained inadequate information for DEP to make an informed decision -- until all community and environmental issues surrounding the operations and ongoing expansion of its

facilities and paper production capacities are resolved. DEP failed to acknowledge that [Willamette] has a substantial history of non-compliance of environmental regulations in Pennsylvania and other states. Willamette has a history of supplying inaccurate or inadequate information on permit applications. Only after Willamette begins to operate does the disruption of people's lives, communities, and environment become apparent. DEP's assessment of Willamette's application was inadequate, failing to acknowledge that the [Chip Plant] site was located in a headwater area and that the operation of the plant, in close proximity to homes, would create noise and lighting equated with international airports.

2.) DEP failed to uphold the requirements of the PA Clean Streams Law.[1] DEP, the McKean County Planning Commission, and Hamlin Township allowed [Willamette] to site, grade, excavate, and construct a high capacity wood chip mill, in Hamlin Township, in a sensitive headwater area, wetland, and upland recharge zone for the local aquifer, without an Environmental Impact Statement, Erosion and Sedimentation Plan, NPDES permit, or public input. (The [Chip Plant] site, located in a headwater area of the West Branch of the Clarion River, on the apex of the Allegheny Plateau, should be considered a special area, with construction not permitted in drainage and wetland areas.)

3.) DEP should have conducted an analysis of the cumulative impact of Willamette's operations on our community and environment. Specifically, Willamette's Johnsonburg, PA paper plant, and symbiotically related [Chip Plant] in Hamlin Township and Southern Satellite wood chip mill in Clearfield, PA.

4.) DEP failed to take appropriate action under PA Clean Streams Law to remedy these violations in the form of criminal prosecution, fines, denial of operating permits, and restoration of wetland areas damaged by Willamette's actions.

5.) DEP failed to exercise its authority to conduct a review of [Willamette's] history of failure to comply with environmental laws.

(Notice of Appeal at 1-2.) (Emphasis in original.) We note that Permit No. PAR104100, mentioned in Objection No. 1, refers to DEP's March 4, 1994 approval of coverage under General NPDES Permit No. PAR104100 for discharges of storm water into the West Branch of the Clarion River from construction of the Chip Plant. We shall henceforth refer to this general permit as the

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[1] The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001.

Construction Permit.

On June 13, 1997, Willamette filed the instant Motion to Dismiss and/or for Summary Judgment (Motion), along with a Memorandum of Law and supporting documents. In its Motion, Willamette seeks dismissal of the appeal for lack of jurisdiction because: (1) DEP's action is not appealable; (2) Appellants lack standing to appeal; (3) to the extent that Appellants are appealing DEP's issuance of the Construction Permit, the appeal is untimely; (4) to the extent that Appellants are appealing the issuance of the Storm Water Permit, the appeal is untimely; and (5) to the extent that Appellants seek equitable relief, the Board is not authorized to grant it. In the alternative, Willamette seeks summary judgment on the ground that DEP's approval of coverage under the Storm Water Permit was a "well-supported exercise of regulatory discretion, and was neither arbitrary nor capricious, or an abuse of discretion." (Motion at para. 33.) On July 3, 1997, DEP notified the Board that DEP agrees with Willamette's Motion.

On July 29-30, 1997, Appellants filed a response to Willamette's Motion,[2] along with a Memorandum of Law, supporting documents, and a videotape. In their response, Appellants aver that: (1) the permitting process for the Construction Permit was flawed; (2) the construction of the Chip Plant has disrupted people's lives; and, (3) therefore, the Board should review the entire permitting process.

In their Memorandum of Law, Appellants contend that: (1) DEP's action is appealable; (2) Appellants have standing to appeal; and (3) Appellants are *not* appealing the *issuance* of the

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[2] We note that Appellants' response does not comply with the requirements of 25 Pa. Code § 1021.70(e). Appellants have not set forth their averments in numbered paragraphs which correspond with the numbered paragraphs in the Motion.

Construction Permit or the Storm Water Permit but, instead, are appealing DEP's March 4, 1994 *approval of coverage* under the Construction Permit and DEP's August 14, 1996 *approval of coverage* under the Storm Water Permit. Appellants do not address Willamette's contention that, to some extent, they seek equitable relief. With respect to Willamette's request for summary judgment, Appellants simply assert that Appellants are entitled to summary judgment, not Willamette.

On September 22, 1997, DEP filed a letter with the Board, indicating that DEP generally agrees with Willamette's position as set forth in its Motion. In commenting on Appellants' response to the Motion, DEP states, *inter alia*, that, "because it appears that the Appellants' objection[] to the [Storm Water Permit] is based exclusively on [DEP's] approval of the earlier [Construction Permit], the Appellants' entire appeal appears to be untimely." (DEP's letter at 2; *see* Appellants' response at paras. 81-90, 93, & 95.) Appellants addressed DEP's letter with a letter of their own, docketed September 25, 1997, in which they defend their *pro se* status because of the cost of legal representation.

Because the parties have provided us with a voluminous record that includes affidavits, depositions, answers to interrogatories and other documents, it makes sense to us to deal with the Motion as exclusively one for summary judgment which, however, raises the jurisdictional grounds of a motion to dismiss.

We may grant summary judgment if the pleadings, depositions, answers to interrogatories, admissions, affidavits and expert witness reports, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. Nos. 1035.1-1035.5. With respect to Willamette's Motion, entitlement to judgment as a matter of

law can be established by a showing that Appellants, who bear the burden of proof in this appeal, have failed to produce evidence sufficient to make out a *prima facie* case. Pa. R.C.P. No. 1035.2(2). We must view Willamette's Motion in the light most favorable to Appellants, the non-moving party. *Ducjai v. Dennis,* 656 A.2d 102 (Pa. 1995).

Appealability of DEP's Action

In its Motion, Willamette argues that DEP's approval of coverage under the Storm Water Permit is not an appealable action because: (1) the definition of "action" at 25 Pa. Code § 1021.2(a) does not specifically include the approval of coverage under a general NPDES permit; and (2) the right to challenge an approval of coverage is absent from 25 Pa. Code § 92.83, the regulation which governs applications for coverage.

General permits, which are authorized under various statutes administered by DEP, are issued in place of individual permits when the activity being regulated does not pose a significant threat to public health, safety or welfare, or to the environment, and involves projects similar enough in nature to be regulated by standardized conditions. General NPDES permits are authorized under section 5 of The Clean Streams Law, 35 P.S. § 691.5, and are regulated by the provisions at 25 Pa. Code §§ 92.81-92.83.

Pursuant to this authority, DEP formally adopted on October 10, 1992 a General Permit for Discharges of Storm Water from Construction Activities, PAG-2. *See* 22 Pa.Bull. 5063. This general NPDES permit authorized discharges of storm water associated with construction activity to surface waters of the Commonwealth in accordance with effluent limitations, monitoring, where required, and other conditions set forth in Parts A, B and C of the permit.

DEP also adopted a General Permit for Discharges of Storm Water from Industrial Activities,

PAG-3, on November 7, 1992. *See* 22 Pa.Bull. 5462. This general NPDES permit authorized discharges of storm water associated with industrial activity to surface waters of the Commonwealth in accordance with effluent limitations, including the development and implementation of Best Management Practices, monitoring requirements, and other conditions set forth in Parts A, B and C of the permit.

In order to obtain coverage under these general NPDES permits, a discharger such as Willamette must file an application fulfilling the requirements of 25 Pa. Code § 92.83(a). If DEP is satisfied, it issues an approval of coverage. It is this approval of coverage that Willamette contends is not appealable. We have dealt with numerous general permits before this Board but, so far as we can ascertain, their appealability has never been questioned.

Section 4(a) of the Environmental Hearing Board Act[3] limits the Board's jurisdiction to the review of "orders, permits, licenses or decisions" of DEP. The Board's Rules of Practice and Procedure (Rules) refer to these collectively as DEP "actions." The Rules define the term "action" in pertinent part as:

> An order, decree, *decision*, determination or ruling by [DEP] *affecting personal or property rights*, privileges, immunities, duties, liabilities or obligations of a person, including, *but not limited to*, denials, modifications, suspensions and revocations or permits, licenses and registrations . . . .

25 Pa. Code § 1021.2(a) (emphasis added).

First, we reject Willamette's argument that DEP's action is not appealable because 25 Pa. Code § 1021.2(a) does not include approval of coverage in its definition of the term "action." The regulation clearly states that the definition of "action" is not limited to the enumerated examples.

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[3] Act of July 13, 1988, P.L. 530, 35 P.S. § 7514(a).

We also reject Willamette's contention that DEP's action is not appealable because 25 Pa. Code § 92.83 does not provide for a right to challenge DEP's approval of coverage. Initially, we note that 25 Pa. Code § 92.83 was promulgated under The Clean Streams Law. *See* 35 P.S. § 691.5. We further note that section 7 of The Clean Streams Law, 35 P.S. § 691.7, provides that "[a]ny person . . . having an interest which is or may be adversely affected by any action of [DEP] under this act shall have the right to appeal such action to the [Board]." Thus, certainly, when the regulation at 25 Pa. Code § 92.83(a)(3) requires DEP to publish each approval of coverage in the *Pennsylvania Bulletin*, it is intended to provide an opportunity for adversely affected persons to challenge the approval of coverage. In fact, 25 Pa. Code § 92.83(b), which requires that DEP *deny* an application for coverage in certain circumstances, provides eight possible grounds for appeal.

Willamette's suggestion that Appellants' only opportunities to challenge DEP's actions were the filing of timely appeals from the adoptions of the general NPDES permits in October and November 1992 is without merit. At that point, neither Appellants nor anyone else could foresee the instances where DEP would approve coverage in the future. The general NPDES permits at the time of adoption were executory in nature, creating frameworks within which specific applications for coverage would be considered. It was only when those applications were filed by Willamette, seeking coverage for specific discharges to specific streams from specific sites and when those applications were approved by DEP with specific conditions that final, appealable actions occurred. It was only at that point that Appellants or other persons or entities could have been adversely affected.

For all of the above reasons, we conclude that DEP's approvals of coverage for the Construction Permit and the Storm Water Permit were appealable actions.

In order for the Board to have jurisdiction to consider the appeals, Appellants had to act within 30 days after the approval of coverage was published in the *Pennsylvania Bulletin*. 25 Pa. Code § 1021.52(a). That occurred on March 26, 1994 with respect to the Construction Permit and on August 31, 1996 with respect to the Storm Water Permit. Appellants' Notice of Appeal, filed on September 30, 1996, was timely with respect to the Storm Water Permit but untimely with respect to the Construction Permit. Appellants offer no explanation for the untimeliness and, as a result, we assume there are no grounds for allowing an appeal *nunc pro tunc* under 25 Pa. Code § 1021.53(f). Accordingly, we will grant summary judgment to Willamette on the appeal of the Construction Permit coverage but deny it on the appeal of the Storm Water Permit coverage.

Appellants' Standing

Willamette claims that Appellants have failed to allege any adverse effect from DEP's approval of coverage under the Storm Water Permit and, therefore, lack standing to maintain this appeal. The law on standing was articulated succinctly in *Florence Township v. DEP*, 1996 EHB 282, 289 as follows:

> The appellants have standing to challenge the Department's action only if they are "aggrieved" by that action. They must have a direct, immediate and substantial interest in the litigation challenging that action. William Penn Parking Garage, Inc. v. City of Pittsburgh, 346 A.2d 269, 280 (1975); Fred McCutcheon and Rusmar Incorporated v. DER, et al., EHB Docket No. 94-096-W (Opinion issued January 5, 1995). A "substantial" interest is "an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law." Press-Enterprise, Inc. v. Benton Area School District, 604 A.2d 1221, 1223 (1992); South Whitehall Twsp. Police Service v. South Whitehall Twsp., 555 A.2d 793, 795 (1989). An interest is "direct" if the matter complained of caused harm to the party's interest. South Whitehall Twsp. Police Service v. South Whitehall Twsp., 555 A.2d 793, 795 (1989). An "immediate" interest means one with a sufficiently close causal connection to the challenged action, or one within the zone of interests protected by the statute at issue. Empire Sanitary Landfill, Inc. v. DER, et al., 1994 EHB 1395. We have held that residents of a community

> surrounding a proposed industrial facility have such a substantial interest. S.T.O.P., Inc. v. DER, et al., 1992 EHB 207. An organization has standing if one of its members has standing. RESCUE Wyoming, et al. v. DER, et al., 1993 EHB 839.

Because Appellants, unrepresented by legal counsel, did not understand at the outset of their appeal their need to show standing, *see Belitskus v. DEP*, EHB Docket No. 96-196-MR (Opinion issued March 19, 1997), we have carefully examined their voluminous filings in response to Willamette's Motion to ascertain whether they have direct, immediate and substantial interests that have been adversely affected by DEP's issuance of the Storm Water Permit to Willamette.

It is obvious that Appellants are greatly disturbed by the building of the Chip Plant in their neighborhood, bringing with it noise, lighting, truck traffic, dust, etc. and posing a potential threat to surface water and groundwater. In their Response to Willamette's Motion, they lay out in great detail the chronological steps Willamette took, beginning in May 1993, to construct the Chip Plant. They include, among others: (1) acquisition of the site on July 15, 1993; (2) receipt of a permit from Hamlin Township for installation of a sewage disposal system on August 9, 1993; (3) receipt of approval of its Land Development Plan from the McKean County Planning Commission on September 14, 1993; (4) receipt of tentative approval of its Land Development Plan from Hamlin Township on September 20, 1993; (5) sending to McKean County and Hamlin Township on October 1, 1993, notice of intent to apply to DEP for coverage under the general permit for storm water discharge from a construction project; (6) filing with DEP on October 10, 1993, an application for coverage under the general permit for storm water discharge from a construction project;[4] (7) receipt of DEP approval on March 4, 1994 for coverage under the general permit for storm water discharge

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[4] This application was returned by DEP as incomplete on November 24, 1993, and was resubmitted by Willamette on February 4, 1994.

from a construction project (the Construction Permit); and (8) advertisement of DEP's approval in the *Pennsylvania Bulletin* on March 26, 1994.

Appellants became aware of the Chip Plant project at least by August 1993 and Appellant William Belitskus was in attendance on September 20, 1993 when Hamlin Township tentatively approved the Land Development Plan. During that month and thereafter, Appellants were actively voicing their concerns to Willamette and to County and Township officials. Yet, they took no timely appeal from DEP's approval of the Construction Permit and, apparently, took no appeal from the Township's tentative approval of the Land Development Plan.

Like many lay persons, Appellants do not understand that DEP is not the exclusive agency for environmental protection in Pennsylvania. The power to regulate activity that may have environmental impact is divided between state government and local government. *Community College of Delaware County v. Fox*, 342 A.2d 468 (Pa. Cmwlth. 1975), *appeal dismissed as moot*, 381 A.2d 448 (Pa. 1977). Local governments, acting under the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§ 10101-11202, have the sole power to regulate land usage through zoning, subdivision and land development regulations and permits.[5] It was pursuant to that exclusive power that McKean County and Hamlin Township reviewed Willamette's proposal to place the Chip Plant on the site in Appellants' neighborhood; and it was pursuant to that exclusive power that they approved it over the objections of Appellants and others.

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[5] This split of responsibility is fully recognized in the Environmental Master Plan adopted January 21, 1977 and set forth at 25 Pa. Code § 9.1-9.317. See, specifically, sections 9.114 and 9.126.

Aggrieved by that decision, Appellants' recourse was to file an appeal with the Court of Common Pleas of McKean County within 30 days after the Township's action, as provided in section 1002-A of the MPC, 53 P.S. § 11002-A. When they failed to take that step, they lost the right to challenge the construction of the Chip Plant on the neighborhood site. *J.B. Steven, Inc. v. Zoning Hearing Board*, 658 A.2d 458 (Pa. Cmwlth. 1995).

Even if Appellants had taken a timely appeal from DEP's March 26, 1994 advertisement of the Construction Permit, they would not have been able to litigate the land use issues before the Board. DEP's role, when acting under The Clean Streams Law, is limited to regulating the discharge of polluting substances from the land being developed. It does not involve a consideration of whether and for what purpose the land should be developed. *Community College of Delaware County*. Thus, Appellants could only have litigated issues related to the control of polluting substances in the storm water run-off during construction.

Their appeal of the Storm Water Permit is similarly limited. They can raise only those issues that pertain to the adequacy of the storm water controls approved by the permit for the day-to-day operation of the Chip Plant. The adequacy of the controls approved by the Construction Permit is not at issue because Appellants did not take a timely appeal from that approval and cannot raise the issue now by indirection.

Paragraphs (2), (3) and (4) of Appellants' objections in their Notice of Appeal clearly relate either to land use decisions or the Construction Permit and, accordingly, must be dismissed. Paragraphs (1) and (5) can be construed, in part, to challenge the Storm Water Permit because of inadequacies in the application and Willamette's compliance history. These are potential issues that properly can be litigated in this appeal - if Appellants are adversely affected by them.

The affidavits of the Appellants and other members of PROACT deal mainly with noise, lights, truck traffic, dust and water supplies, matters not relevant to this appeal as already noted. Several, however, especially those of Mr. and Mrs. Housler, deal with the alleged siltation of Lanigan Brook by run-off from the Chip Plant site and the threatened impact of that siltation upon the trout population in the brook. Mr. Housler, at least, alleges that he has fished for trout in this brook in the past and hopes to do so, with his children, in the future.

We have held that a person who uses a surface stream for fishing or recreation on a regular basis has standing to challenge a DEP permit that threatens that use. *Barshinger v. DEP*, 1996 EHB 849; *Pohoqualine Fish Association v. DER*, 1992 EHB 502; *Heasley v. DER*, 1991 EHB 1758, 1763. Accordingly, we conclude that the Houslers and Mr. Belitskus have presented sufficient evidence to make out a *prima facie* case of their individual standing to challenge the Storm Water Permit. Since these individuals are members of PROACT, there is sufficient evidence to make out a *prima facie* case of that organization's representational standing. We shall deny summary judgment to Willamette, to this extent, on the standing issue.

Equitable Relief

Willamette's next two contentions - timeliness of the appeals - have already been resolved. Their final jurisdictional contention is that Appellants seek equitable relief this Board cannot grant. Appellants have not responded to this contention, probably not understanding it because it requires some knowledge of legal niceties.

In their depositions, especially, Appellants are uncertain what specific action they want the Board to take. They are certain, however, that DEP's action was improper and they want us to do something about it. While Appellants may not understand the limits of our power, we certainly do;

and, while equitable relief is not commonly granted, we are required on occasion to exercise equitable power. *Herr v. DEP*, EHB Docket No. 94-098-MR (Opinion issued June 16, 1997). If we are persuaded that this appeal requires such treatment, we will bestow it. Consequently, we will deny summary judgment to Willamette on this ground.

Summary Judgment on the Merits

Willamette asserts that we should enter summary judgment in its favor on the merits because Appellants have not made a showing that DEP's approval of the Storm Water Permit was illegal or an abuse of discretion. Appellants deny this assertion and claim that summary judgment should be entered instead in their favor. We will deal first with Willamette's argument.

As noted earlier, Appellants can survive a motion for summary judgment only by showing that there is at least one disputed issue of material fact or that they have produced sufficient evidence to make out a *prima facie* case. We must view the evidence in the light most favorable to Appellants. Manifestly, we must confine ourselves to the Storm Water Permit - the only permit properly before us - and its alleged impact on Lanigan Brook's use for fishing and other recreation - the only issue on which Appellants have standing.

To make out a *prima facie* case, Appellants must produce evidence to show that Willamette's application for the Storm Water Permit and DEP's subsequent approval were so deficient in some stated way that the water quality of Lanigan Brook will be degraded to the point that trout will disappear. The focus, of necessity, is on the application and the permit and their alleged deficiencies. Permit violations bringing about the degradation of water quality, while important for DEP enforcement, are not strictly relevant for our purposes because they do not prove the inadequacy of the permit conditions.

The record reveals that Willamette submitted to DEP an application on a DEP form designed specifically for the timber and forest products industry. Included with the application was a Preparedness, Prevention and Contingency (PPC) Plan which, *inter alia*, stated that the design and operation of the Chip Plant was based on the May 15, 1992 Best Management Practices to Prevent and Control Pollution for Hardwood Residue Storage Areas (BMPs). Maps were also included showing the proposed facilities for handling and discharging storm water.

DEP personnel reviewed the application for its administrative completeness, subjected it to technical review and determined that the PPC Plan was adequate to address the use, storage, processing, and disposal of materials and wastes at the Chip Plant, because the design and operation implemented the BMPs and diverted storm water so as to avoid contact with plant operations.

Appellants attack the application and resulting Storm Water Permit only on the ground that the receiving stream, Lanigan Brook, was not identified. They point to Block K on the application form which reads as follows:

> CHAPTER 93 RECEIVING WATER CLASSIFICATION: For each discharge point, please provide the receiving water classification provided in the Chapter 93 regulations. If you answer "yes" for any discharge point, you must file an individual permit application.[6]

This heading is followed by three columns where the applicant is to insert the discharge point number, the receiving water, and indicate by checking either "yes" or "no" whether it is "Special Protection" HQ or EV Water. Willamette inserted for discharge point no. 01, the only one designated, "West Branch, Clarion River" for receiving water and "no" for whether it was "Special Protection" HQ or EV Water.

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[6] This is mandated by the general NPDES permit regulations at 25 Pa. Code § 92.83(b)(8).

Appellants argue that this entry was wrong and misleading because the receiving water is Lanigan Brook which has higher quality water than the West Branch of the Clarion River. According to Appellants, Lanigan Brook flows into Buck Run which, in turn, flows into the West Branch of the Clarion River.

Chapter 93 of the regulations, 25 Pa. Code §§ 93.1-93.9z, deals with water quality standards. "Special Protection" waters in Table 1 of section 93.3 are HQ - High Quality Waters and EV - Exceptional Value Waters and are entitled to the greatest protection. That is one of the reasons why a general NPDES permit cannot be approved for such waters; an individual permit must be sought.

Specific classifications of surface water are all set forth in 25 Pa. Code § 93.9, arranged by drainage area. The Clarion River is covered by Drainage List R. The West Branch, its unnamed tributaries and Buck Run are all classified as CWF - Cold Water Fishes. These are not "Special Protection" waters. Lanigan Brook is not mentioned by name and, therefore, does not have its own classification. Its protection level would be governed either by that of Buck Run or of the unnamed tributaries, both of which are CWF.

Since these stream designations are set by regulations adopted by the Environmental Quality Board (EQB), they can be changed only by following the procedures for adopting or amending regulations. These are set forth at 25 Pa. Code §§ 23.1-23.9. Appendix A to Chapter 23, which appears immediately after section 23.9, deals with Stream Redesignations and requires interested persons to begin the process by petitioning the EQB. Appellants make no claim to having taken this step, the only avenue open to them to raise Lanigan Brook to a higher level of protection such as HQ or EV. In the absence of a change in the regulations, DEP was bound to treat Lanigan Brook as a CWF, not entitled to special protection and not mandating an individual rather than a general

NPDES permit under 25 Pa. Code § 92.83(b)(8).[7]

Willamette's designation of the receiving waters as "West Branch, Clarion River" instead of Lanigan Brook was not misleading since the designation CWF applies to both, and to Buck Run as well. In addition, Willamette filed with its application a DEP Topographic and Geologic Survey map of the Mt. Jewett Quadrangle showing the Chip Plant site and the water courses in its vicinity. Lanigan Brook is clearly shown on the map and the contour lines on and adjacent to the site show that surface drainage would go from the site to the brook. DEP personnel, who deal with these applications daily, understood where the storm water would discharge.

Appellants have not made out a *prima facie* case of showing that the application and DEP's issuance of the Storm Water Permit were deficient in a way that will adversely impact the water quality of Lanigan Brook. Accordingly, Willamette is entitled to summary judgment on this issue because there are no factual disputes and Willamette is entitled to judgment as a matter of law.

The only other of Appellants' challenges that merits discussion is Willamette's compliance history. The general NPDES permit regulations at 25 Pa. Code § 92.83(b)(1) provide that DEP shall deny an application for general permit coverage when the "discharger is not, or will not be, in compliance with any of the conditions of the general permit or has a significant history of noncompliance with a prior permit issued by the Department."

It should be noted that, to sustain this challenge, Appellants do not have to show a specific

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[7] This should not be interpreted as depriving Lanigan Brook of any protection. The classification CWF entitles the brook to such protection as is necessary for the "maintenance and/or propagation of fish species including the family Salmonidae [trout] and additional flora and fauna which are indigenous to a cold water habitat." 25 Pa. Code § 93.3, Table 1. Thus, the discharge limitations included in the Storm Water Permit, if adhered to by Willamette, should preserve Lanigan Brook as a trout stream.

impact upon Lanigan Brook's recreational uses. The Storm Water Permit's conditions may be entirely appropriate to protect the brook and still DEP's approval of coverage would be unlawful and an abuse of discretion if Willamette's compliance history shows that it cannot be trusted with a discharge permit. This applies not only to general NPDES permits but to any permit issued pursuant to The Clean Streams Law. *See* 35 P.S. § 691.609.

Appellants attach to their Response an exhibit listing what they contend are Willamette's violations of state and federal environmental laws, regulations and permits at Willamette's Johnsonburg, Pennsylvania paper plant, going back to 1987 and continuing up to the time of issuance of the Storm Water Permit. They contend that these violations demonstrate that Willamette has a "significant history of noncompliance" with prior permits issued by DEP and the federal government, disqualifying Willamette from general NPDES permit coverage.

In its Reply, Willamette addresses Appellants' contention but claims that the alleged violations do not involve the Chip Plant, have been, or are being, addressed by Willamette, and do not amount to a "significant history of noncompliance." Willamette does not provide any affidavits or other record references to support its argument. DEP, in its letter of September 17, 1997, merely claims that Willamette's compliance history has nothing to do with DEP's approval of coverage under the Storm Water Permit.

Since 25 Pa. Code § 92.83(b)(2) mandates denial of general NPDES permit coverage for a discharger with a "significant history of noncompliance with a prior permit issued by the Department," Willamette's compliance history has *everything* to do with DEP's approval of coverage under the Storm Water Permit. Since the disqualification is based upon noncompliance with a prior DEP permit, it is relevant to consider *any and all* permits issued by DEP to Willamette

for any site in the state. The inquiry is not limited to prior permits for the Chip Plant site.

We will deny Willamette's Motion for Summary Judgment on this issue because we cannot at this point conclude that it is entitled to judgment as a matter of law. But neither can we enter summary judgment for Appellants. While they have presented a litany of alleged violations, they have not related them to specific permits issued by DEP and have not established the severity of the violations. All of this is necessary to show a "significant" history of noncompliance.

A proper resolution of this issue requires a hearing where the relevant facts can be developed. Appellants are admonished that they bear the burden of proving that they have standing and that DEP abused its discretion in approving the Storm Water Permit despite Willamette's compliance history, 25 Pa. Code § 1021.101(c)(2), and must present their evidence at the beginning of the hearing.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WILLIAM and MARY BELITSKUS, RONALD and ANITA HOUSLER, PROACT	:	
v.	:	**EHB Docket No. 96-196-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WILLAMETTE INDUSTRIES, INC., Permittee	:	

ORDER

AND NOW, this 21st day of October, 1997, it is ordered that Willamette's Motion for Summary Judgment is granted in part and denied in part as follows:

1. Summary judgment is entered in favor of Willamette with respect to all matters pertaining to the Construction Permit.

2. Willamette's Motion for Summary Judgment is denied with respect to Appellants' appeal from the Storm Water Permit.

3. Summary judgment is granted due to lack of standing with respect to Mary Belitskus but is denied with respect to the other Appellants.

4. Summary judgment is denied with respect to all matters pertaining to the Board's equitable power.

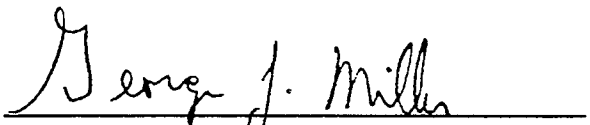
5. Summary judgment is entered in favor of Willamette on the sufficiency of Willamette's application for coverage under the Storm Water Permit and DEP's review of the application.

6. Summary judgment is denied to Willamette with respect to whether DEP properly considered Willamette's compliance history in approving coverage under the Storm Water Permit.

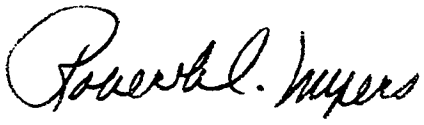
7. Summary judgment is denied to Appellants with respect to whether DEP properly considered Willamette's compliance history in approving coverage under the Storm Water Permit.

8. The Board will issue an order concurrently with this one which will schedule a hearing on whether Appellants have standing and whether DEP properly considered Willamette's compliance history in approving coverage under the Storm Water Permit.

ENVIRONMENTAL HEARING BOARD



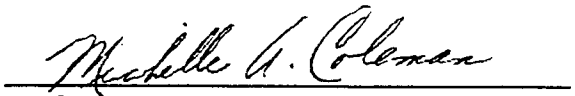
GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 96-196-MR



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: October 21, 1997

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

For the Commonwealth, DEP:
Mary Susan Davies, Esquire
Northwest Region

For Appellant:
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For the Permittee:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

KANE GAS LIGHT and HEATING COMPANY: and WETMORE GAS PRODUCING COMPANY	:	
v.	:	**EHB Docket No. 96-088-R (Consolidated)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 22, 1997**

OPINION AND ORDER ON APPELLANTS' PETITION FOR SUPERSEDEAS

By Thomas W. Renwand, Administrative Law Judge

Synopsis

A petition for supersedeas is denied without a hearing when it fails to allege facts sufficient to show entitlement to relief. The Appellants' petition for supersedeas is denied because the Appellants have failed to establish that they are likely to succeed on the merits of their appeal of the Department's denial to declare wells orphan wells and order to plug the wells.

OPINION

Before the Board is a petition for supersedeas filed by Kane Gas Light and Heating Company and Wetmore Gas Producing Company (Appellants). In 1994, the Appellants asked the Department of Environmental Protection (Department) to declare approximately 138 wells that were owned and/or operated by the Appellants as orphan wells. In 1996, the Department denied the applications to declare the wells orphan wells and further ordered the Appellants to plug the wells ("plugging order"). Various appeals followed which were consolidated. On May 7, 1997

the Board granted the Department's motion for summary judgment and held that the fact that the Appellants' shareholders may have changed since the wells were last operated was irrelevant. The Appellants currently have a petition for review before the Commonwealth Court of Pennsylvania, Docket No. 1490 C.D. 1997 and are scheduled for a hearing before the Court on November 5, 1997.

Under our procedural rules, the Board is empowered to deny a petition for supersedeas, *sua sponte,* without a hearing for failing to state grounds sufficient for the granting of a supersedeas. 25 Pa. Code § 1021.77(c)(4). In order to obtain a supersedeas, the Appellants are required to show by a preponderance of the evidence that: (1) they will suffer irreparable harm if the supersedeas is not granted; (2) they are likely to prevail on the merits of their appeal; and (3) there is little or no chance of injury to the public or other parties if the supersedeas is granted. *Pennsylvania Mines Corporation v. DEP*, 1996 EHB 808; *See also* Section 4(d)(1) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. § 7514(d)(1); 25 Pa. Code § 1021.78(a). Supersedeas is an extraordinary remedy which will not be granted absent a clear demonstration of appropriate need. *Oley Township v. DEP, et al.*, 1996 EHB 1359. Thus, a party seeking a supersedeas of the Department's order must satisfy all of the criteria. *Id.*

The Appellants contend that: (1) the plugging order has a negative and cancellation effect on the appeal before the Commonwealth Court; (2) an immediate well plugging program requiring a large outlay of money would cause irreparable harm; (3) present negotiations to sell the wells and discussions regarding which wells should be plugged are factors to be considered; (4) they are likely to prevail on the merits of their appeal since the wells in question were abandoned by the prior owners and the benefits from those wells never accrued in favor of the present owners;

and (5) there is no chance of injury or damage to the public or other parties as a result of any delay in plugging the wells.

In the appeal that was before the Board, the Board granted the Department's motion for summary judgment and dismissed the Appellants' appeal. Since the Board held that the change in the Appellants' shareholders was of no consequence and the plugging order was not an abuse of the Department's discretion, the Appellants have therefore failed to make the requisite demonstration that they are likely to succeed on the merits of their appeal.

Accordingly, the petition for relief is denied and the following order is entered:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KANE GAS LIGHT and HEATING COMPANY and WETMORE GAS PRODUCING COMPANY	:	
v.	:	**EHB Docket No. 96-088-R (Consolidated)**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 22nd day of October, 1997, it is ordered that the Petition for Supersedeas is **denied.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: October 22, 1997

cc: **DEP Bureau of Litigation:**
Attention: Brenda Houck, Library
For the Commonwealth, DEP:
Stephanie K. Gallogly, Esq.
Northwest Region
For Appellant:
John A. Bowler, Esq.
Erie, PA

jlp

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

A&M COMPOSTING, INC. and	:	
SOLID WASTE SERVICES, INC.	:	
d/b/a J. P. MASCARO & SONS	:	
v.	:	**EHB Docket No. 97-213-C**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued:** October 22, 1997
PROTECTION	:	

OPINION AND ORDER ON PETITION FOR TEMPORARY SUPERSEDEAS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A petition for temporary supersedeas is denied. The Board will not grant a petition for temporary supersedeas where the petitioner (1) supports the factual allegations in its petition with verifications rather than affidavits, and (2) fails to show that a significant threat of irreparable harm exists if the Board denies the petition.

OPINION

This matter was initiated with the October 14, 1997, filing of a notice of appeal by A&M Composting, Inc. (A&M) and Solid Waste Services, Inc. d/b/a J. P. Mascaro & Sons (collectively, Appellants). The notice of appeal challenges an October 6, 1997, Department of Environmental Protection (Department) order modifying a solid waste permit issued to an A&M sewage sludge composting facility (facility) in Penn Township, Lancaster County. The modification, among other

things, reduces the amount of sludge A&M's facility can accept and imposes additional requirements on the facility's treatment of the sludge.

When Appellants filed their notice of appeal, they also filed petitions for supersedeas and temporary supersedeas. The Department filed an answer to the petition for temporary supersedeas on October 16, 1997, shortly before the Board conducted a conference call regarding the petition with the parties' counsel. During that call, the Board entertained the parties' arguments concerning the petition for temporary supersedeas and scheduled a hearing on the petition for supersedeas for October 27, 1997. On October 17, 1997, the Board issued an order denying Appellants' petition for temporary supersedeas. The order also informed the parties that we would issue an opinion shortly explaining our denial. This is that opinion.

In their petition for temporary supersedeas, Appellants request that the Board issue a temporary supersedeas of the October 6, 1997, modification of A&M's permit, and authorize A&M to receive sludge under the terms provided for in its preexisting permit. In support of their position, Appellants refer to their petition for supersedeas, which argues that Appellants are likely to prevail on the merits of their appeal; that they and their employees will suffer irreparable harm if we do not grant a supersedeas; that a supersedeas would not result in pollution or a threat of pollution, nor harm others; and that the supersedeas they request would preserve the lawful status quo. In support of many of the various factual allegations made in its petition for supersedeas, Appellants rely on verifications alone.

The Department, meanwhile, argues that we should deny Appellants' petition for temporary supersedeas. According to the Department, Appellants are unlikely to prevail on the merits of their appeal, they will not suffer irreparable harm absent a temporary supersedeas, and it is more likely

that granting a temporary supersedeas would injure the public than denying it would injure Appellants. In the Board's lengthy conference call with counsel regarding the petition for temporary supersedeas, the Department raised one additional argument for denying the petition: Appellants' reliance on verifications, rather than affidavits, to support the factual averments in the petition for supersedeas.

After a careful review of the parties' filings and the arguments raised in the Board's conference call, we deny Appellants' petition for temporary supersedeas. The petition is fatally flawed because Appellants supported the factual allegations in their petition with verifications rather than affidavits, and because Appellants failed to show that denial of the temporary supersedeas would threaten them with irreparable injury.

(1) Appellants supported the factual allegations in their petition with verifications, not affidavits.

Section 1021.79(b) of the Board's rules, 25 Pa. Code § 1021.79(b), provides that a petition for temporary supersedeas "shall be accompanied by a petition for supersedeas which comports with the requirements at section 1021.77" of our rules, 25 Pa. Code § 1021.77. Although Appellants did submit a petition for supersedeas with their petition for temporary supersedeas, the petition for supersedeas does not comply with section 1021.77, as required.

Section 1021.77(a), 25 Pa. Code § 1021.77(a), provides that petitions for supersedeas must include affidavits supporting the facts averred, or must explain why such affidavits were not

included.[1] As noted above, Appellants failed to submit affidavits in support of their petition for supersedeas. Appellants also failed to provide an adequate explanation for why the affidavits are missing. In their petition for supersedeas, Appellants explain that they did not file affidavits because they submitted sworn verifications instead. Three of the four verifications Appellants submitted contained a statement that all of the averments in the notice of appeal and petition for supersedeas were true to the best of the signers' belief. The fourth made a similar statement with respect to 49 of the 71 paragraphs in the petition for supersedeas. Two of the verifications, however, were unsigned.

We previously have held that verifications cannot substitute for affidavits in support of petitions for supersedeas--even where the verification is signed and contains a statement averring that signer has read the petition and that the petition is true to the best of the signer's knowledge. *E. P. Bender Coal Co. v. DER*, 1990 EHB 1624. As we noted in *Pickelner v. DER,* 1995 EHB 359--where we held that verifications could not substitute for affidavits in support of a motion for summary judgment[2]--verifications do not necessarily show that the signer has personal knowledge

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[1] Section 1021.77(a) provides, in pertinent part:

A petition for supersedeas . . . shall be supported by one of the following:

> (1) Affidavits, prepared as specified in Pa.R.C.P. Nos. 76 and 1035(d) . . . , setting forth facts upon which issuance of the supersedeas may depend.
>
> (2) An explanation of why affidavits have not accompanied the petition if no supporting affidavits are submitted with the petition for supersedeas.

[2] While *Pickelner* involved a motion for summary judgment--not a petition for supersedeas--the distinction *Pickelner* draws between verifications and affidavits applies here nonetheless. As noted above, section 1021.77(a) of our rules provides that petitions for supersedeas must be supported by affidavits prepared as specified in Pa.R.C.P. 1035(d). Rule 1035(d) governs affidavits

of the facts alleged. 1995 EHB at 362.

Given our previous decisions holding that verifications cannot substitute for affidavits, Appellants' explanation for the absence of affidavits in support of the petition is inadequate. They cannot simply aver that they have submitted verifications instead; Appellants had to explain why they *could not have submitted affidavits*. Since Appellants failed to do so, they failed to provide an adequate explanation for the absence of affidavits in support of their petition. Under section 1021.77(c) of our rules, 25 Pa. Code § 1021.77(c), this defect is sufficient for the Board to deny the request for supersedeas *sua sponte*. *See, e.g., Abod v. DEP*, EHB Docket No. 97-104-C (Opinion issued June 6, 1997.)

(2) Appellants failed to show that denial of the temporary supersedeas would threaten them with irreparable injury.

In their petition for temporary supersedeas, Appellants do not aver what harm they would suffer if the Board denies their petition. Instead, they simply refer to the arguments set forth in their petition for supersedeas. Although there Appellants aver that they will suffer irreparable harm if the petition for supersedeas is not granted, they never address how they will be harmed if the Board refuses to grant their petition for *temporary* supersedeas. The distinction is significant because the fact that Appellants may suffer irreparable injury if denied a supersedeas does not necessarily mean that they will suffer irreparable injury if we deny their request for a temporary supersedeas. Were we to deny Appellants' petition for supersedeas, they would have to operate under the terms of the permit modification during their entire appeal: a period that could last weeks, months, perhaps even

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submitted in support of motions for summary judgment.

years. The length of a temporary supersedeas, however, is much shorter. If we deny Appellants' petition for a temporary supersedeas, they would only have to comply with the permit modification for a matter of days--until their supersedeas hearing on October 27, 1997. Therefore, for Appellants to show that a temporary supersedeas is necessary to prevent an irreparable harm to their interests, Appellants had to do more than show that they would suffer irreparable harm if forced to comply with the terms of the permit modification *until we resolve their appeal*; they had to show that they would suffer irreparable harm even if forced to comply with the permit modification *only until we rule on their petition for supersedeas*. They have failed to even allege that is the case here.

In light of the foregoing, Appellants' petition for temporary supersedeas is denied.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

A&M COMPOSTING, INC. and	:	
SOLID WASTE SERVICES, INC.	:	
d/b/a J. P. MASCARO & SONS	:	
v.	:	**EHB Docket No. 97-213-C**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

ORDER

AND NOW, this 22nd day of October, 1997, it is ordered that Appellants' petition for temporary supersedeas is denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: October 22, 1997

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

For the Commonwealth, DEP:
Dennis A. Whitaker, Esquire
Southcentral Region

For Appellant:
William F. Fox, Jr., Esquire
320 Godshall Drive
Harleysville, PA 19438

jb/bl

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

DAVISON SAND & GRAVEL COMPANY	:	
	:	
v.	:	**EHB Docket No. 96-090-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 24, 1997**

OPINION AND ORDER ON MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Department contends that a dredging company's appeal from the Department's mussel survey requirement is moot. We deny the Department's motion because this controversy is one capable of repetition yet evading judicial review.

OPINION

This appeal originated on April 22, 1996 with the filing of a notice of appeal by Davison Sand & Gravel Company (Davison), challenging the Department of Environmental Protection's (Department) refusal to extend Dam Safety and Encroachment Permit No. E03-156 (permit) beyond August 30, 1996.

Davison conducted commercial dredging in the Allegheny River pursuant to a permit issued March 3, 1986. The permit's term was ten years. On February 20, 1996, Davison requested a renewal of the permit. On March 21, 1996, the Department advised Davison that the permit would

not be extended unless Davison conducted and submitted a mussel survey[1] in those areas of the Allegheny River where Davison intended to dredge during the remainder of 1996 and 1997. The mussel surveys were to be performed in accordance with the United States Fish and Wildlife Service's "Minimum Requirements for an Acceptable Mussel Survey" (Protocol) for sand and gravel dredging.

The Department filed a motion to dismiss for mootness. In support of its motion, the Department argues that Davison's objection to performing the mussel surveys is moot since Davison was able to perform the surveys and submitted results at two different times, both before the prescribed deadline. Davison filed its response arguing that it did not file completed mussel surveys before the deadline, the Department did not have the authority to require the surveys, and this issue is capable of repetition yet evading judicial review.[2]

It has long been the law regarding appeals before this Board that when an event occurs which renders an appeal moot, this Board will dismiss the appeal. *Pequea Township v. DER*, 1994 EHB 755. In reviewing the Department's motion, we must view it in the light most favorable to Davison, the non-moving party. *Grand Central Sanitary Landfill, Inc. v. DER*, 1993 EHB 20. Therefore, the Department bears the burden of demonstrating that the appeal is moot.

The Department has not met this burden since a number of the allegations on which it bases its motion are unsupported if we view the facts in the light most favorable to Davison. Davison asserts, contrary to the Department's allegation, that it did not submit completed mussel surveys to

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[1] Mussels clean the water and are indicators of water quality.

[2] The Department filed neither a supporting memorandum of law with its dispositive motion nor a reply to Davison's response.

the Department by the August 30, 1996 deadline. It contends that the two pre-August 30, 1996 submissions were initial results, which were not done in accordance with the Protocol and which did not cover all the mile points for which Davison sought continued authorization to dredge. According to Davison, completed mussel surveys were not submitted until February 1997. Davison also asserts that it has not been able to dredge in all of the areas covered by the original permit as requested when it sought renewal of the permit.

Moreover, the key question when looking at mootness is whether this Board can grant meaningful or effective relief to the appellant. *Pequea Township v. DER*, 1994 EHB 755. Davison argues that the Department has not adequately established a legal basis for the mussel survey requirement and that this issue may evade judicial review. Exceptions to the mootness doctrine exist for instances where the conduct complained of is capable of repetition yet would evade review or where an action involves questions of great public importance. *Empire Sanitary Landfill, Inc. v. DER*, 1993 EHB, 1283, 1284.

While the deadline imposed by the Department for the completion and submission of the mussel surveys is past, Davison's challenge regarding the Department's authority for requiring the surveys is not moot since this controversy appears to be one capable of repetition yet evading judicial review. Each time that Davison seeks to renew a dredging permit, it is conceivable that the Department will require it to conduct and submit mussel surveys. If the mussel surveys are completed within the prescribed time frame, the Department will again argue that the appeal is moot, and Davison will again lose the opportunity to challenge the Department's authority for requiring the mussel surveys. It is appropriate to address the merits of Davison's objections at this time so that

this matter will not evade judicial review. *Bradway v. Cohen*, 642 A.2d 615, 617 (Pa. Cmwlth. 1994). Accordingly, the following order is entered:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAVISON SAND & GRAVEL COMPANY	:	
	:	
v.	:	**EHB Docket No. 96-090-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 23rd day of October, 1997, the Department of Environmental Protection's Motion to Dismiss for Mootness is **denied**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: October 24, 1997

cc: **DEP Bureau of Litigation:**
Attention: Brenda Houck, Library
For the Commonwealth, DEP:
Charney Regenstein, Esq.
Western Region
For Appellant:
Ronald S. Cusano, Esq.
SCHNADER HARRISON SEGAL & LEWIS
Pittsburgh, PA

jlp

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

E. MARVIN HERR, E.M. HERR FARMS	:	
	:	
v.	:	**EHB Docket No. 94-098-MR**
	:	**(Consolidated with 94-099-MR)**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PEQUEA TOWNSHIP, Intervenor	:	**Issued: October 31, 1997**

OPINION AND ORDER ON APPLICATION FOR STAY, MOTION TO DENY APPLICATION FOR STAY WITHOUT A HEARING AND REQUEST FOR SANCTIONS

By Robert D. Myers, Member

Synopsis:

An Intervenor's Application for Stay is denied because the application fails to show irreparable harm to the petitioner, the likelihood of the petitioner prevailing on the merits, or the likelihood of injury to the public or other parties. For the same reason, Appellant's Motion to Deny Application for Stay Without a Hearing is granted. However, Appellant's Request for Sanctions is denied because the Application for Stay was not filed in bad faith and was not frivolous.

OPINION

The Board granted the Appellant's (Landowner) Motion for Summary Judgment in the above-captioned matter on June 16, 1997. In doing so, the Board ordered the Department of Environmental Protection (DEP) to issue a letter to the Landowner on or before July 7, 1997

approving his planning module as a revision to Pequea Township's (Township) 1992 Act 537 Plan. DEP subsequently filed an Application for Stay with the Board, which, on July 14, 1997, the Board denied on the merits. On July 15, 1997, DEP approved the Landowner's planning module.

The Township filed a Petition for Review of the Board's June 16, 1997 decision in the Commonwealth Court of Pennsylvania at Docket No. 1912 C.D. 1997. DEP also filed a Petition for Review at Docket No. 2093 C.D. 1997. These appeals were consolidated on September 19, 1997.

On September 29, 1997, the Township filed the instant Application for Stay with the Board pursuant to Pa. R.A.P. 1781, requesting that the Board allow DEP to suspend its July 15, 1997 approval of the Landowner's planning module. The Landowner filed a Response to the Township's Application for Stay, along with a Motion to Deny the Township's Application for Stay Without a Hearing, and a Request for Sanctions. On October 14, 1997, the Township filed an Answer to these Landowner filings.

Application for Stay

In granting or denying a supersedeas, the Board is guided by relevant judicial precedent, and the Board's own precedent, and will consider the following factors: (1) irreparable harm to the petitioner; (2) the likelihood of the petitioner prevailing on the merits; and (3) the likelihood of injury to the public or other parties. 25 Pa. Code § 1021.78; *Pennsylvania Public Utility Commission v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983).

The Township alleges in its Application for Stay that the public health and welfare, and the Township, will be irreparably harmed without a stay because the Landowner will proceed with the industrial development of prime farmland within the Township. (Application for Stay at paras. 6-7.) In response, the Landowner points out that he is entitled to proceed with the industrial development

of the land in question because he received approval to develop the land for industrial uses, a zoning matter, and the Township did not file an appeal. The Landowner is correct on this matter.

Indeed, in our June 16, 1997 decision, we stated the very position expressed by the Landowner here:

> [P]reserving prime agricultural land is primarily the responsibility of municipalities under their zoning powers. Here, the Township did revise the zoning of the Site, changing the use from industrial to agriculture. But, under the provisions of Section 508(4) of the [Municipalities Planning Code[1]], the Landowner was not affected by the change and had a vested right to proceed with the development. The Township did not challenge this vested right by appealing the [Lancaster County Planning Commission's] approval of the final plan, as provided by Article IX and Article X-A of the MPC, 35 P.S. §§ 10901-10916.2 and §§ 11001-A - 11006-A, and the matter is now final and unassailable. Having failed to overcome the Landowner's vested rights to develop the Site under the MPC, the Township cannot re-litigate the issue under the guise of Act 537.

Herr v. DEP, EHB Docket No. 94-098-MR (Opinion issued June 16, 1997), slip op. at 15-16 (footnote omitted). Because the Landowner had a vested right to develop the land for industrial uses and because the Township did not challenge that right at the proper time, the Township's allegations of irreparable harm to prime farmland from industrial development have little import here.

The Township also alleges that the public health and welfare will be irreparably harmed because the Landowner will connect to the public sewer system in violation of the Township's official plan. (Application for Stay at para. 6.) In response, the Landowner asserts that his connection to the public sewer system will *not* harm the public health and welfare. Again, we must agree with the Landowner.

In our June 16, 1997 decision, we specifically addressed whether the Landowner's

---

[1] Section 508(4) of the Municipalities Planning Code, Act of July 31, 1968, P.L. 805, *as reenacted*, Act of December 21, 1988, P.L. 1329, *as amended*, 53 P.S. § 10508(4).

connection with the public sewer system would adversely affect the public health, safety or welfare. We concluded that there would be no harm.

> Public sewers generally are thought to be the best solution to sewage disposal problems and have been mandated by DEP on numerous occasions. Regional sewage facilities covering an entire drainage basin or watershed likewise have been encouraged by DEP. The disposal of industrial waste, which could be generated by an industrial park along with toxic and hazardous wastes, is best thought to be handled by [publicly owned treatment works] with their pretreatment programs.
>
> Neither DEP nor the Township has claimed that the use of public sewers on the Site will adversely affect the public health, safety or welfare. In fact, DEP issued the February 8, 1994 Order calling for Township approval of the use of public sewers. This Order was issued only after careful consideration of its effect on the environment. If the use of public sewers posed a danger to the public health, safety or welfare, DEP would not have required them. The fact that this Order was based on a superseded Act 537 Plan does not vitiate DEP's determination that public sewers would not cause harm.

Herr v. DEP, EHB Docket No. 94-098-MR (Opinion issued June 16, 1997), slip op. at 14-15 (citations omitted). The Township has not averred any facts in its Application for Stay that would cause us to reconsider this matter.

With respect to the merits of this case, the Township suggests in paragraphs 8 and 9 of its Application for Stay that it will likely prevail on the merits in Commonwealth Court because the Board originally ruled in favor of the Township, holding that the approval of a subdivision under the MPC does *not* give a developer a vested right to Act 537 Plan revision approval. However, the Township has failed to recognize that the Board's original ruling was *reversed and remanded* by the Commonwealth Court. Since the Board, in its June 16, 1997 decision, has attempted to comply with the Commonwealth Court's direction on remand, the Board cannot see how the Township is likely to prevail on the merits before the Commonwealth Court. *See Herr v. DEP*, EHB Docket No. 94-098-MR (Opinion issued June 16, 1997), slip op. at 8-9.

Because the Township has failed to show irreparable harm, the likelihood of injury to the public, or the likelihood that it will prevail on the merits, we deny the Township's Application for Stay and grant the Landowner's Motion to Deny the Application for Stay Without a Hearing.

Request for Sanctions

The Landowner has filed a Request for Sanctions under 25 Pa. Code §§ 1021.76(e) and 1021.125. These regulations provide that the Board may impose costs on parties or attorneys who, in the Board's opinion, have filed requests for supersedeas in bad faith or on frivolous grounds. The Landowner maintains that the Township's Application for Stay was sought in bad faith or on frivolous grounds because the application fails to state with particularity the facts relied upon, fails to state with particularity the legal authority relied upon, fails to explain the failure to support its allegations by affidavits, and fails to state sufficient grounds for granting a supersedeas.

It is true that, under 25 Pa. Code § 1021.77, the Board may deny a petition for supersedeas where the petition lacks particularity in the facts pleaded, lacks particularity in the legal authority cited, inadequately explains the failure to support factual allegations by affidavits, and fails to state sufficient grounds for a supersedeas. However, we may only impose sanctions where there is *bad faith* or *frivolous grounds*. We do not find them here.

The Township filed its Application for Stay under Pa. R.A.P. 1781(a), which provides that an application for stay or supersedeas of an order of a government unit pending review in an appellate court shall ordinarily be made in the first instance to the government unit. Because the Township, in filing its Application for Stay, was attempting to comply with the requirements of Pa. R.A.P. 1781(a), we cannot say that the Township filed the application in bad faith.

In its Request for Sanctions, the Landowner has claimed that the Township alleged

insufficient grounds for a supersedeas, but the Landowner has not alleged that the asserted grounds are *frivolous*. Where an argument demonstrates a justiciable issue that is not entirely without merit, it is not frivolous. *County of Delaware v. Workmen's Compensation Appeal Board (Thomas)*, 649 A.2d 491 (Pa. Cmwlth. 1994). The Township's argument is that the approval of a subdivision under the MPC does not give a developer a vested right to Act 537 Plan revision approval. As the Township points out, the Board originally ruled in favor of the Township on this issue. Thus, we cannot say that the argument is entirely without merit. Accordingly, we deny the Landowner's Request for Sanctions.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

E. MARVIN HERR, E.M. HERR FARMS	:	
	:	
v.	:	**EHB Docket No. 94-098-MR**
	:	**(Consolidated with 94-099-MR)**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and PEQUEA TOWNSHIP,	:	
Intervenor	:	

ORDER

AND NOW, this 31st day of October, 1997, it is ordered that Intervenor's Application for Stay is denied, and the Appellant's Motion to Deny the Application for Stay Without a Hearing is granted. It is further ordered that the Appellant's Request for Sanctions is denied.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 94-098-MR
(Consolidated with 94-099-MR)

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: October 31, 1997

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

For the Commonwealth, DEP:
Mary Martha Truschel, Esquire
Southcentral Region

For Appellant:
John J. Gallagher, Esquire
Carl R. Schultz, Esquire
LeBOEUF, LAMB, GREENE & MacRAE
Harrisburg, PA

For Intervenor:
Eugene E. Dice, Esquire
William W. Thompson, Esquire
Harrisburg, PA

ri/bap

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CITY OF SCRANTON AND BOROUGHS OF TAYLOR AND OLD FORGE	:	
v.	:	**EHB Docket No. 94-060-C**
	:	**(Consolidated with 94-061 and 94-062)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EMPIRE SANITARY LANDFILL, Permittee	:	**Issued:** November 4, 1997

OPINION AND ORDER ON PERMITTEE'S MOTION FOR SUMMARY JUDGMENT

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A motion for summary judgment is granted in part and denied in part. A city need not be a host municipality to have standing to challenge a solid waste permit modification authorizing the disposal of incinerator ash at a nearby landfill.

A host municipality need not file comments under section 504 of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. § 6018.101 *et seq.* (Solid Waste Management Act), at § 6018.504, to preserve its right to appeal a solid waste permit or permit modification to the Board.

An appellant cannot prevail on a claim that a permit modification allows the ash to become airborne during transportation where the permit modification authorizes only the disposal of ash and not its transportion.

The fact that a contingency is uncertain does not necessarily mean that the Department is free to ignore it. Whether the Department abuses its discretion depends on the nature of the harm threatened, the likelihood that it will occur, and the nature of the options available to prevent it.

Persons involved in the storage of incinerator ash must comply with sections 285.111-285.115 of the Department's regulations, 25 Pa. Code §§ 285.111-285.115, in addition to section 285.131, 25 Pa. Code § 285.131.

The Department exercises discretion when selecting among the leachate reduction methods listed at section 273.514(b)(2) of its regulations, 25 Pa. Code § 273.514(b)(2).

When ruling on a motion for summary judgment, the Board will not consider a letter which was not presented by an affidavit or one of the other documents listed as appropriate support for a motion for summary judgment under the Rules of Civil Procedure.

Collateral estoppel bars only the litigation of issues which were raised in previous proceedings.

Ash can be hazardous waste as well as special handling waste.

An appellant cannot prevail on a claim that the Department erred by authorizing co-disposal of the ash because other more "environmentally sound" alternatives are available, where the Department's regulations clearly authorize co-disposal.

The Board does not have jurisdiction over citizen suits involving alleged violations of chapter 82 of the Resource Conservation and Recovery Act, Act of October 21, 1976, P.L. 94-480, *as amended*, 42 U.S.C. § 6901 *et seq.* (RCRA), or the regulations adopted thereunder.

Where the Department acts pursuant to the Solid Waste Management Act, the Department need only comply with the act and its associated regulations to comply with Article I, Section 27,

of the Pennsylvania Constitution; the Department need not necessarily reduce the environmental incursion to a minimum or balance the environmental harm against the potential benefits.

OPINION

This matter was initiated with the March 24, 1994, filing of a notice of appeal by the City of Scranton (Scranton) to the February 25, 1994, solid waste permit modification issued by the Department of Environmental Protection (Department). The modification authorized Empire Sanitary Landfill (Permittee) to accept and dispose of incinerator ash residue from the Union County Utilities Authority (UCUA) in New Jersey, at a landfill Permittee operates in the Boroughs of Taylor (Taylor), Old Forge (Old Forge), and Ransom. Scranton's appeal was docketed at this docket number, EHB Docket No. 94-060.

Taylor and Old Forge also filed appeals of the permit modification on March 24, 1994. We originally docketed those appeals at EHB Docket Nos. 94-061 and 94-062, respectively. On July 11, 1994, however, we consolidated the Taylor and Old Forge appeals with Scranton's at this docket number, EHB Docket No. 94-060.

The Board has issued two previous opinions in this appeal. On January 25, 1995, we granted in part and denied in part a motion to dismiss which Permittee had filed. On May 11, 1995, we denied a Scranton, Taylor, and Old Forge (collectively, Appellants) motion for leave to amend their notice of appeal. The appeal was originally assigned to former Chairman Maxine Woelfling but, upon her departure from the Board, was reassigned to Administrative Law Judge Richard Ehmann. Upon his departure from the Board, the case was reassigned again, to Administrative Law Judge Michelle Coleman.

On June 14, 1995, Permittee filed the instant motion for summary judgment and a supporting

memorandum of law. Appellants filed an answer and memorandum in opposition on July 5, 1995. The Department filed its answer on July 6, 1995. Permittee countered with a reply memorandum on October 23, 1995.

Permittee contends that Scranton lacks standing and that both Taylor and Old Forge waived their right to appeal because they did not file comments with the Department pursuant to section 504 of the Solid Waste Management Act. Permittee also maintains that it is entitled to summary judgment on Appellants' remaining objections to the permit modification. Appellants, meanwhile, contend that Scranton does have standing, that they did not waive their objections to the permit modification by failing to file comments pursuant to section 504 of the Solid Waste Management Act, and that Permittee is not entitled to summary judgment on the issues raised in the notice of appeal.[1] The Department agrees with the Appellants on the question of waiver under section 504 of the Solid Waste Management Act, but does not otherwise address the arguments raised by the other parties.

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions of record--and affidavits, if any--show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa.R.C.P.1035(a); *Simmons v.* Snider, 645 A.2d 400 (Pa. Cmwlth. 1994).[2] When deciding on

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[1] As noted earlier in this opinion, all three Appellants filed separate notices of appeal. Those notices of appeal, however, are virtually identical--with the exception of Paragraph 1, which identifies the particular Appellant filing the notice of appeal. For purposes of this opinion, therefore, references to Appellants' "notice of appeal" refer to all three of Appellants' notices of appeal.

[2] Rule 1035 of the Rules of Civil Procedure, Pa.R.C.P. 1035, was rescinded effective July 1, 1996, when the new rules for summary judgment, at Pa.R.C.P. 1035.1-1035.5, became effective. (continued...)

motions for summary judgment, we view the record in the light most favorable to the nonmoving party, *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995), and will enter summary judgment only where the right is clear and free from doubt. *Hayward v. Medical Centre of Beaver County*, 608 A.2d 1040 (Pa. 1992).

We will examine each issue raised in Permittee's motion separately below.

I. Scranton's Standing

Permittee contends that Scranton does not have standing because the landfill affected by the permit modification lies outside the city's boundaries. Although Permittee concedes that the landfill lies adjacent to Scranton, that Scranton is responsible for the welfare of its citizens, and that the ash will be hauled to the facility in tarp-covered trucks, Permittee argues that the landfill must actually be in Scranton for the city to have standing under the Solid Waste Management Act.

Appellants, meanwhile, assert that Scranton does have standing. They aver that trucks hauling the ash to the landfill will use city streets and state highways within the city's boundaries, and that the truck traffic and trucks' cargo will pose a threat to the welfare of Scranton residents. (Appellants' answer, at Ex. D.) In support of that proposition, they submitted an affidavit from Scranton's mayor, James Conners.

While municipalities have standing to appeal certain permitting decisions under the Solid Waste Management Act simply by virtue of their status as a host municipality, *see, e.g., Franklin*

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[2](...continued)
Since the motion, response, and legal memoranda here were filed with the Board well before the new rules became effective, we have ruled on Permittee's motion using Rule 1035, rather than the new rules.

Township v. Department of Environmental Resources, 452 A.2d 718 (Pa. 1982)[3], there is no authority for the proposition that a municipality *must be* a host municipality to have standing. Similarly, while an individual does not have standing simply by virtue of owning contiguous real estate, *see, e.g., P.A.S.S., Inc. v. DEP,* 1995 EHB 940, there is no authority for the proposition that owners of contiguous property necessarily lack standing. Whether Scranton has standing turns, not on whether Scranton is a host municipality or contiguous land owner, but on whether it has met the general test for standing enunciated in *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (1975). Under that test, a party appealing a Department action must have a direct, immediate, and substantial interest in the action. *William Penn*; *McCutcheon v. DER,* 1995 EHB 6.

Since the standing issue arises here in the context of Permittee's motion for summary judgment, Permittee has to establish that Scranton lacks a direct, immediate, and substantial interest in the appeal. A party has a "direct" interest if the challenged action harmed it. *Empire Coal Mining & Development, Inc. v. Department of Environmental Resources*, 623 A.2d 897 (Pa. Cmwlth. 1993), *appeal denied* 629 A.2d 1384 (1993). Its interest is "substantial" if it surpasses the common interest of all citizens in obtaining obedience to the law. *South Whitehall Twp. Police Service v. South Whitehall Twp.*, 655 A.2d 793 (1989); *Press-Enterprise, Inc. v. Benton Area School District*, 604 A.2d 1221 (1992). And its interest is "immediate" if a sufficiently close connection exists between the challenged action and the asserted injury. *Tessitor v. Department of Environmental Resources,*

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[3] In *Franklin Township*, the Supreme Court held that a municipality had the direct, immediate, and substantial interest necessary to confer standing in an appeal of a hazardous waste permit simply by virtue of the municipality's status as host municipality.

682 A.2d 434 (Pa. Cmwlth. 1996).

Permittee failed to show that Scranton lacks a direct, immediate, and substantial interest in the appeal. In fact, Permittee's motion never even alleges as much. It simply avers that "Scranton *will fail to prove* . . . that it has a substantial, direct, and immediate interest. . . ." (Permittee's motion, paragraph 11(a), (emphasis added).) It provided no factual support for this assertion. Instead, Permittee seems to have relied on averments earlier in its motion that Scranton was not a host municipality but simply bordered the landfill. For the reasons stated above, this does not show that Scranton necessarily lacks standing. To prevail on its motion, Permittee had to do more than *aver* that Scranton *will not prove that it has standing*; it had to establish that Scranton *lacks standing*. Having failed to do so, Permittee is not entitled to summary judgment regarding Scranton's standing.

II. Waiver under section 504 of the Solid Waste Management Act

Permittee argues that Taylor and Old Forge waived their right to appeal because they are host municipalities yet did not file comments with the Department within 60 days, as required by section 504 of the Solid Waste Management Act. Appellants and the Department, on the other hand, contend that section 504 does not require that Taylor and Old Forge file comments to preserve their right to appeal and that, even if it did, Taylor and Old Forge filed their comments within 60 days, as required.

A host municipality need not file comments under section 504 to preserve its right to appeal. Section 504 provides:

> Applications for a permit shall be reviewed by the appropriate county, county planning agency or county health department where they exist and the host municipality, and they may recommend to the department conditions upon, revisions to, or disapproval of the permit

> only if specific cause is identified. In such case the department shall be required to publish in the Pennsylvania Bulletin its justification for overriding the county's recommendations. If the department does not receive comments within 60 days, the county shall be deemed to have waived its right to review.

Even assuming the language regarding waiving a "right to review" refers to waiving a right to appeal to the Board, Scranton would not be affected by the deemed waiver provision. That provision, by its terms, applies only to the *county*, not the *host municipality*. In the first sentence of section 504, the Legislature refers to the county and host municipality separately. In the deemed waiver provision in the third sentence, however, the Legislature refers only to the county. It is a cardinal rule of statutory construction that, where the Legislature includes specific language in one portion of a statute, but excludes it from another, the language is not implied where excluded. *Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Prekop*, 627 A.2d 223 (Pa. Cmwlth. 1993). Accordingly, Permittee is not entitled to summary judgment on this issue.

III. Issues Raised in the Notice of Appeal

Permittee also avers that it is entitled to summary judgment on the issues raised in Appellants' notice of appeal. Permittee addresses these issues in seven groups: (A) "transportation" issues; (B) "storage" issues; (C) "containment" issues; (D) "characterization/testing" issues; (E) "acceptance/disposal" issues; (F) "special handling" issues; and, (G) alleged violations of Article I, Section 27, of the Pennsylvania Constitution.[4] We will examine each of these groups of issues

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[4] Since Permittee addressed the issues in groups rather than individually, the Board has--for the sake of convenience--adopted the names attributed to the groups in Permittee's motion and memoranda. That does not necessarily mean that we agree with those labels. Permittee, (continued...)

separately below. Before doing so, however, we must note some idiosyncrasies in the motion, answer, and memoranda that have affected our disposition of the motion.

The first idiosyncrasy deals with the scope of the motion. Permittee's motion requested summary judgment with respect to *all* issues raised in the notice of appeal--not just some of them. However, while Permittee addressed many of those issues, it failed entirely to address the issues raised at paragraphs 24(o) and 24(p) of Appellants' first claim for relief, and--with the exception of the eighth claim for relief--failed to address Appellants' second through ninth claims for relief, at paragraphs 25-62 of the notice of appeal. Therefore, whatever our decision with respect to other issues below, the decision will not affect the issues raised at paragraphs 24(o) or 24(p) or those raised in the second through seventh or the ninth claims for relief.

The second idiosyncrasy also deals with how the issues were framed. As noted above, when Permittee addressed the issues raised in the notice of appeal, it addressed them in groups--"transportation" issues, "testing" issues, etc.--with some groups pertaining to up to six paragraphs in the notice of appeal. Rarely, if ever, did Permittee distinguish between the issues within these groups when it made its arguments. On its face, virtually every argument appears to apply to every issue within a group. The Board was left to surmise which arguments Permittee made with respect to which issue, and to rule on those arguments without the benefit of a specific explanation of Permittee's position on each issue. To make matters more confusing, Appellants tended to use the

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[4](...continued)
unfortunately, was rather liberal when assigning names to groups of issues. For instance, some of the issues the Permittee identifies as "transportation" issues, involve disposal issues as well. Since the applicable regulations vary depending on whether an activity involves disposal, storage, or transportation, the classification matters. Where the discrepancies are relevant to the outcome of the appeal, we have noted them.

same approach when they responded to Permittee's arguments. We have previously warned parties about the perils of one-size-fits-all arguments. *See Westinghouse Electric Corp. v. DEP*, 1996 EHB 1144, 1191. They not only compromise a party's position, they render complicated cases more complicated and cause considerable delay in the preparation of the Board's decisions.

We turn now to the issues Permittee raised regarding the notice of appeal.

A. Transportation issues

With regard to transportation issues, Permitee argues that it is entitled to summary judgment on paragraph 24(a) in the notice of appeal. In that paragraph, Appellants assert that the permit modification is deficient because it "is allowing or potentially allowing air borne [sic] dust or ash through the approved transportation and disposal of ash in tarped vehicles. . . ."

Permittee argues that it is entitled to summary judgment because the issue raised is merely speculative and, even assuming the transportation information in the application is incorporated into the permit modification, Appellants cannot show that the Department abused its discretion or acted contrary to law by authorizing the transport of ash in dump trucks covered by tarps. Appellants, meanwhile, argue that the permit modification is deficient because it does not regulate the transportation or delivery of the ash, because ash can escape from trucks covered with the tarps, and because the transportation of the ash in tarp-covered trucks violates subsections (a) and (b) of section 285.221 of the Department's regulations, 25 Pa. Code § 285.221.[5] Permittee, in its reply

[5] Appellants' arguments concerning 25 Pa. Code § 285.221 are discombobulated. In their argument concerning the regulation, Appellants refer sometimes to 25 Pa. Code § 283.221 (Appellants' memorandum in opposition, p. 16), elsewhere to 25 Pa. Code § 285.221 (*Id.*), and still elsewhere to "25 Pa. Code Section 221" (*Id.*, p. 6). Since 25 Pa. Code § 283.221 pertains to litter prevention required at resource recovery facilities, and the regulations at 25 Pa. Code Chapter 211 (continued...)

memorandum, argues that Appellants waived the arguments they now seek to raise because they did not list them in their notice of appeal.

To prove it was entitled to summary judgment on this issue, Permittee had to show that the permit modification did not allow ash to become airborne during transportation or disposal, or that the Department would not have acted contrary to law by issuing the permit modification even if ash may become airborne. Permittee's motion never asserts that ash will not become airborne. Therefore, the only question here is whether Permittee has established that the Department would have acted contrary to law by issuing the permit modification even if ash may become airborne during transportation or disposal. The answer to that question depends on whether the ash escapes during transportation or disposal.

1. Transportation

Permittee has established that it is entitled to summary judgment to the extent that Appellants contend that the Department acted contrary to law because the permit modification will allow ash to become airborne during transportation. The permit modification, by its terms, authorizes only the *disposal* of municipal incinerator ash, not its transportation. Therefore, any concerns Appellants have with respect to the transportation of the ash are inapposite in this appeal. We note, however, that nothing in the permit modification exempts those responsible for transporting the ash from complying with the requirement, at 25 Pa. Code § 285.211(a)(3), that they transport the ash with a cover that eliminates the possibility of leakage.

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[5](...continued)
refer to the medical use of X-rays, we assume that Appellants mean to refer to 25 Pa. Code § 285.221.

2. Disposal

Besides attacking the transportation aspect of Appellants' objection at 24(a), Permittee argues that it is entitled to summary judgment because the potential for the ash to escape into the air is "hypothetical" and "insufficient as a matter of law." In support of that proposition, Permittee cites *New Hanover Township v. DER*, 1991 EHB 1234, 1276. Appellants do not respond to this argument.

Permittee is not entitled to summary judgment to the extent that Appellants argue that the Department erred because the permit modification will allow ash to become airborne during disposal. The situation here is distinctly different from the one we confronted in *New Hanover Township*. That action involved a motion for summary judgment in an appeal of a solid waste permit issued to a landfill, where some citizens group claimed--among other things--that the Department abused its discretion by not determining how groundwater contamination may affect replacement water supplies. We granted the landfill's motion for summary judgment on that issue, holding that the Department could not reasonably weigh the consequences of such contamination where it was unclear what the nature of the contamination might be and replacement water supplies had yet to be identified.

As the opinion in *New Hanover* makes clear, our conclusion that the citizens group's claims were "purely hypothetical" was based on the fact that the group's position rested on two unknown factors: the nature of possible groundwater contamination, and the location and nature of the replacement water supplies. If there were only one unknown when the Department reviewed the permit, or if the appellant had shown that they could adduce information as to one of the unknowns at hearing, the result in *New Hanover* may well have been different.

What is perfectly clear, however, is that *New Hanover* does not stand for the broad proposition for which Permittee cites it here. Permittee suggests that, in light of *New Hanover*, it is entitled to summary judgment on 24(a) unless Appellants establish that ash will *definitely* become airborne--the mere *potential* for ash to become airborne is not enough. We disagree. Permittee's position not only relies on an overly-broad reading of *New Hanover,* but is at loggerheads with the rules for summary judgment.

The fact that a contingency is uncertain does not necessarily mean that the Department is free to ignore it. Whether the Department abuses its discretion depends on the nature of the harm threatened, the likelihood that it will occur, and the nature of the options available to prevent it. Here, for instance, if it is likely that significant amounts of ash will become airborne during disposal, and reasonable alternatives are available which could prevent such releases, then the Department may have erred by not requiring those alternatives in the permit modification. The fact that Appellants have not established that significant amounts of ash will likely become airborne, or that reasonable alternatives exist, is immaterial at this stage in the proceedings. As noted earlier in this opinion, when ruling on a motion for summary judgment, we must resolve all doubts as to the existence of material facts against the moving party--in this case, Permittee. *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995). Since Permittee's motion does not foreclose the possibility that significant amounts of ash will escape into the air and that reasonable alternatives could prevent it, we must consider that possibility. Were we to shift the burden to Appellants to demonstrate that these circumstances will actually occur--as Permittee suggests--we would not be resolving all doubts as to the existence of material facts against the moving party.

B. Storage issues

Regarding storage issues, Permittee argues that it is entitled to summary judgment on paragraphs 24(b), 24(c), and 24(f) in the notice of appeal. In those paragraphs, Appellants assert that the permit modification is deficient because:

> "the dumping at the face of the landfill is not sufficiently controlled to inhibit dust migration" (paragraph 24(b));
>
> the permit modification "does not sufficiently address the removal and/or place or method of removal of ash and/or wet ash from empty containers" (paragraph 24(c)); and
>
> "the temporary storage of the ash is not protective of the environment or in line with existing regulations" (paragraph 24(f)).

Permittee argues that it is entitled summary judgment on these issues because: (1) the permit modification requires that the ash be stored in accordance with section 285.131 of the Department's regulations, 25 Pa. Code § 285.131; (2) storage in compliance with section 285.131 is all that state law requires; and, (3) Appellants cannot establish that they will store the ash in violation of section 285.131 or otherwise contrary to state law. Appellants, meanwhile, contend that the Department erred because the permit modification does not require compliance with subsection (a)(1) of section 285.131 and--by authorizing ash storage for an indefinite amount of time, and in a manner in which the ash could escape into the air, land, and groundwater--violates section 285.115 of the Department's regulations, 25 Pa. Code § 285.115.[6]

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[6] Permittee argues in its reply memorandum that Appellant cannot raise the issue of compliance with sections 285.131 or 285.115 of the Department's regulations because Appellants did not raise those issues in their notice of appeal. While Appellants did not specifically address the issue of compliance with either 285.131 or 285.115 in the notice of appeal, both issues fall within

Even assuming Permittee were correct in its contention that paragraphs 24(b), 24(c), and 24(f) involve only storage issues, and that it has fully complied with section 285.131, Permittee is incorrect when it argues that storage in compliance with section 285.131 is all that state law requires.

Section 285.131 sets forth *additional* requirements for persons storing ash generated from the incineration of municipal waste. Section 285.101 of the regulations, 25 Pa. Code § 285.101, makes it clear that persons storing that ash must also comply with sections 285.111-285.115 of the regulations, 25 Pa. Code §§ 285.111-285.115. Section 285.101 provides:

> (a) A person . . . that stores municipal waste shall comply with §§ 285.111-285.115.
> . . .
> (b) *In addition* to the requirements of subsection (a):
>
> > (2) A person . . . that stores the type of waste referred to in §§ 285.131-285.134 . . . shall store the waste under the applicable provisions of those sections.
>
> (emphasis added)

Since persons storing ash from municipal waste incineration must comply with other regulations besides section 285.131, it follows that Permittee is not entitled to summary judgment on paragraphs 24(b), 24(c), or 24(f) where Permittee argues that it complied with section 285.131 and that is all that state law requires.

C. Containment issues

With regard to containment issues, Permittee argues that it is entitled to summary judgment

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the objection they raised at paragraph 24(f): compliance with "existing regulations." A notice of appeal need not individually enumerate every statutory or regulatory basis for its appeal in order to preserve them; so long as the issue is raised generally, that is sufficient. *See, e.g., Croner, Inc. v. Department of Environmental Resources*, 589 A.2d 1183 (Pa. Cmwlth. 1991); *Jefferson County Commissioners v. DEP*, 1996 EHB 997.

on paragraphs 24(d), 24(g), and 24(h) in the notice of appeal. In those paragraphs, Appellants assert that the permit modification is deficient because:

> "it does not address the release of ash or wet ash in the truck wash, migration to holding ponds, or release of migrating water containing the ash on the site from entering the unlined land at the site or entering the sewage system" (paragraph 24 (d));
>
> . . .
>
> "the short term method used in collecting leachate data is insufficient for determining the long term behavior of ash" (paragraph 24(g)); and
>
> "the allowance of lime-based reagents does not provide effective long-term stability with respect to heavy metal leachability and may exacerbate lead leaching from the ash" (paragraph 24(h)).

Permittee argues that it is entitled to summary judgment on these issues for three reasons: (1) section 273.514(b)(2) of the Department's regulations requires the use of lime deposition to stabilize the ash prior to co-disposal; (2) the allegation that ash would escape from the truck wash--or into the holding ponds, unlined land, or the sewage system--is hypothetical; and, (3) the administrative finality doctrine bars Appellants from challenging the "containment capacity" of Permittee's landfill.

Appellants, meanwhile, contend that the Department erred because the permit modification does not expressly require compliance with sections 273.514, 299.151, and 299.201 to 299.232 of the Department's regulations, 25 Pa. Code §§ 273.514, 299.151, and 299.201 to 299.232, and because genuine issues of fact remain concerning whether the permit modification requires that Permittee use all means to prevent the release of ash into the air, land and water.

We will address each reason Permittee advances for summary judgment on the

"containment" issues separately below:

(1) Section 273.514(b)(2) of the Department's regulations requires lime stabilization for co-disposal

Permittee argues that the Department could not have abused its discretion, or otherwise acted contrary to law, by authorizing lime stabilization of the ash because section 273.514 requires that ash destined for co-disposal must be treated to reduce leachability, and lime stabilization is one method of treatment specifically identified in section 273.514.

Section 273.514(b) provides:

> (b) The landfill, or cell of the landfill where disposal would occur, shall be designed, operated and maintained only for the disposal of ash residue, unless one of the following requirements is met:
>
> . . .
>
> (2) The ash residue has been treated to reduce leachability by treatment methods such as solidification, vitrification, pelletization, fixation, or lime stabilization.

Permittee is correct, therefore, when it argues that ash destined for co-disposal must be treated to reduce leachability and that lime stabilization is one of the methods of reducing leachability specifically listed in section 273.514. Yet the fact that lime stabilization is among the alternative methods listed in 273.514 does not necessarily mean that Permittee is entitled to summary judgment on this issue. We must decide whether the Department must exercise its discretion when it authorizes a method or whether, as Permittee contends, the Department cannot err if it selects one of the alternatives listed in the regulation.

We conclude that the Department must exercise its discretion when selecting a leachate reduction method. Appellants aver at paragraph 24(h) of their notice of appeal that lime stabilization

will be ineffective in preventing the leaching of heavy metals and may even exacerbate the leaching of lead. Since we must resolve all doubts as to the existence of material facts against the moving party, and Permittee's motion did not rebut Appellants' contentions with respect to the facts surrounding lime stabilization, we must treat Appellants' contentions as true. Assuming lime stabilization will be ineffective at preventing the leaching of heavy metals, then the Department may have erred by authorizing lime stabilization as opposed to one of the other methods of treatment listed at section 273.514(b)(2). Section 273.514(b)(2) states only that ash must be treated to reduce leachability and lists several examples. It does not state that *all* of those methods are acceptable in *any* instance where section 273.514(b)(2) applies. Because the Department must exercise discretion when selecting a leachate treatment method listed at section 273.514(b)(2), it may have abused its discretion even though it authorized one of the leachate treatment methods listed there.

(2) The allegation that ash would escape from the truck wash--or into the holding ponds, unlined land, or the sewage system--is hypothetical

In support of this argument, Permittee relies on the same reasoning it used when it argued that Appellants could not contend that ash would become airborne because, absent some factual support showing that ash will actually escape into the air, Appellants' claim was merely "hypothetical." We reject this "hypothetical" argument for the same reasons we rejected the previous one.

The Department can abuse its discretion even where certainties are not involved. If it is likely that significant amounts of ash will escape as alleged in paragraph 24(d), and that reasonable alternatives would prevent such releases, then the Department may have erred by not requiring those alternatives in the permit modification. The fact that Appellants have not established that significant

amounts of ash will escape, or that reasonable alternatives are available, is immaterial at this stage of the proceedings. Permittee's motion does not foreclose either possibility. Were we to place the burden on Appellants to show that ash will escape and no reasonable alternatives are available, we would not be resolving all doubts as to the existence of material facts against the moving party.

(3) The administrative finality doctrine bars Appellants from challenging the "containment capacity" of Permittee's landfill

Permittee argues that Appellants cannot challenge the "containment capacity" of the landfill because that issue could have been raised in an appeal of the previous solid waste permit modification, issued to Permittee in 1990, and that, because Appellants did not appeal that permit modification, the doctrine of administrative finality prevents them from raising the issue now. Precisely what Permittee means by the "containment capacity" is unclear. Judging from the context in the memoranda, however, it appears to be referring to challenges questioning the integrity of the landfill liner. Appellants do not respond to this aspect of Permittee's motion.

We note at the outset that neither paragraph 24(d), 24(g), nor 24(h) of the notice of appeal expressly challenge the integrity of the landfill liner. Therefore, it is unclear whether Appellants even intend to raise that issue. However, since such a challenge could conceivably fall within some issues raised in paragraphs 24(d), 24(g), or 24(h), we will address the administrative finality issue.

The doctrine of administrative finality precludes collateral attacks on appealable actions that were not challenged by a timely appeal. *See DER v. Wheeling-Pittsburgh Steel Corporation*, 348 A.2d 765 (Pa. Cmwlth. 1975), *aff'd*, 473 Pa. 432, 375 A.2d 320 (1977), *cert. denied*, 434 U.S. 969 (1977); *Lower Paxton Township Authority v. DER*, 1994 EHB 1826. Issues that could not have been raised in an appeal of the previous action, however, are not waived. *See, e.g., Barshinger v.*

DEP, 1996 EHB 849.

Permittee is not entitled to summary judgment on the issue of administrative finality. In its motion, Permittee avers only that the Department "reviewed the construction of the landfill and its ability to achieve containment at the time of issuance of [Permittee's] municipal waste disposal permit in 1990[7]" and that the Department determined that Permittee could achieve containment. In support of those assertions, Permittee points to a comment response letter written by William McDonnell, a solid waste program manager for the Department.[8] However, we cannot consider the McDonnell letter in support of Permittee's motion. Rule 1035(a) of the Pa.R.C.P. provides that, when ruling on a motion for summary judgment, the record consists of the pleadings, depositions, answers to interrogatories, admissions, and affidavits. If a party moving for summary judgment wants the Board to consider documentary evidence that--like McDonnell's letter--does not fall into one of these categories, the party must present the document by means of an affidavit or one of the other documents listed under Rule 1035(a); the party cannot simply append the document to the

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[7] Although Appellants refer to a 1990 *permit*, they appear to be referring to a 1990 permit *modification*. The permit modification currently before the Board indicates that it is a modification to a solid waste permit originally issued on March 14, 1986.

[8] In that letter, responding to comments that the permit modification currently before the Board would result in groundwater contamination, McDonnell wrote:

> The construction of the landfill and it's [sic] ability to accomplish containment was reviewed before [Permittee] was issued it's [sic] municipal waste disposal permit. It was determined that [Permittee] can achieve containment.
>
> (Motion for summary judgment, Exhibit 4, comment response letter IV, p. 8, answer to question 2)

motion for summary judgment as an exhibit.

Furthermore, even assuming Permittee had properly supported its motion, the doctrine of administrative finality would not preclude litigating the issue here. The doctrine of administrative finality only bars litigation of issues that could have been raised in appeals of earlier Department actions. Since the Department's previous actions regarding the landfill pertained to municipal waste generally--not incinerator ash--Appellants would not have had a previous opportunity to raise certain issues (*e.g.*, special problems the acceptance and disposal of ash might pose, as opposed to other municipal waste[9]).

D. Characterization/testing issues

With regard to characterization/testing issues, Permittee argues that it is entitled to summary judgment on paragraphs 24(e), 24(i), 24(j), and 24(n) of the notice of appeal. In those paragraphs, Appellants assert that the permit modification is deficient because:

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[9] The instant permit modification (authorizing Permittee to accept and dispose of the ash) may present different issues than the previous permit modifications for at least three reasons:

1. certain provisions in the instant permit modification apply specifically to ash and were not present in previous permit modifications (*e.g.*, the requirement at para 3(c)(iii) and 3(c)(iv) of the instant permit modification, requiring that the ash be stored for three working days under tarps at the landfill prior to disposal);

2. additional regulations may apply to the handling of ash, as opposed to municipal waste generally (*see, e.g.*, 25 Pa. Code § 273.514); or

3. the properties of the ash itself may differ from those of other types of municipal waste, so that the acceptance and disposal of the ash presents different problems than other types of municipal waste, even where the permit provisions and applicable regulations are the same.

"the TCLP [toxicity characteristic leaching procedure][10] and/or EP [extraction procedure toxicity][11] tests are insufficient for determining the hazardous constituents in the ash and additional testing is more appropriate because of the high concentration of lime" (paragraph 24(e));

"under the most current data and in light of the stabilization/solidification (S/S) treatment, the ash should be tested using the distilled waster (the "Distilled Water Leach Test" or DWLI"), or the Synthetic Acid Rain Procedure (especially for the waste piled at [Permittee's] landfill site before mingling with the Municipal Solid Waste), or Total Analysis set forth in Memorandum 36, Gail Hansen of OSW, Method Section, as opposed or in addition to the TCLP, for the presence of hazardous substances" (paragraph 24(i));

"the testing procedure to determine the presence of hazardous substances relies upon testing performed at a New Jersey facility over which the Pennsylvania Department of Environmental Resources has no control over the quality of such testing [sic]" (paragraph 24(j)); and

"the testing procedure set forth in paragraph 3(a) [of the permit modification] is incomplete and all substances and characteristics in 40 C.F.R. § 26 and 25 Pa. Code § 261.24 should be subject to same or alternatively at a minimum the eight (8) metals and any dioxins therein contained" (paragraph 24(n)).

Permittee contends that it is entitled summary judgment on these issues because:

(1) Appellants are collaterally estopped from challenging the incorporation of the testing requirements at 25 Pa. Code § 283.403(a) or the use of the TCLP test because they could have raised those issues in *Empire Sanitary Landfill, Inc. v. DEP,* 1994 EHB 1489;

(2) the Department was required to mandate the use of the TCLP test, as opposed to the other tests suggested by Appellants; and,

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[10] The TCLP is a test "designed to determine the the mobility of organic and inorganic contaminants present in liquid, solid, and multiphasic wastes." C. C. Lee, *Environmental Engineering Dictionary* 516 (1989).

[11] The EP is a test "designed to identify wastes likely to leach hazardous concentrations of particular consitutuents into the groundwater as the result of improper management." *Id.,* at 259.

(3) the permit modification contains testing requirements exceeding those mandated by law and the ash policy.

Appellants argue that they are not collaterally estopped by the earlier appeal because Commonwealth Court dismissed their appeal of the Board's decision as moot. In support of that proposition, Appellants point to *Peach Bottom Township v. Zoning Hearing Board*, 526 A.2d 837 (Pa. Cmwlth. 1987). With regard to the characterization/testing provisions themselves, Appellants argue that the Department erred because:

(1) the testing will be performed at the UCUA facility in New Jersey, and the Department does not have any control over the quality of the testing, nor does it require that the facility comply with any particular testing procedures when determining whether the ash is hazardous;

(2) the permit modification violates § 261.11(2) of the Department's regulations because the modification requires that the ash be tested for only three of the contaminants under Table I and does not require that the ash be tested for the other contaminants, including dioxin, under Table I;

(3) the permit modification allows Permittee to adjust the TCLP results for moisture and the removal of large ferrous/noncrushable materials, contrary to EPA guidance documents, and resulting in an underestimation of reported concentration levels.

We will address each reason Permittee advances for summary judgment on the characterization/testing provisions separately below.

(1) Appellants are collaterally estopped from challenging the incorporation of the testing requirements at 25 Pa. Code § 283.403(a) or the use of the TCLP test because they could have raised those issues in *Empire Sanitary Landfill, Inc. v. DEP*, 1994 EHB 1489

Appellants in the instant action were intervenors in an earlier appeal filed by Permittee. In that appeal, Permittee challenged the Department's disapproval of information Permittee submitted

pursuant to paragraph 3(c)(i)(b) of the permit modification. Paragraph 3(c)(i)(b) provides that the Department would authorize Permittee to accept ash "pursuant to Phase 1 procedures" if it submitted, and the Department approved, a "Section IIB: Chemical Analysis of the Form 36 'Request for Approval to Dispose of Municipal Incinerator Ash Residue.[12]'" The Department rejected Permittee's Section IIB submission because, among other things, the testing protocol it contained failed to conform with the TCLP procedure outlined in EPA Method 1311.[13] The Board sustained Permittee's appeal of the disapproval, holding that the Section IIB submission did in fact conform with EPA Method 1311. Appellants appealed our decision to Commonwealth Court, but the Department withdrew the Section IIB disapproval and Commonwealth Court dismissed Appellants' appeal.

Even assuming Commonwealth Court's dismissal of Appellants' appeal for mootness does not prevent collateral estoppel from operating here, Permittee has not established that Appellants are estopped from raising the characterization/testing issues identified above. Under the doctrine of collateral estoppel, factual and legal determinations are conclusive between the parties in a subsequent action involving different causes of action only to issues that: (1) are identical; (2) were actually litigated; (3) were essential to the judgment; and (4) were material to the adjudication. *Patel v. Workmen's Compensation Appeal Board (Sauquoit Fibers Co.)*, 488 A.2d 1177, 1179 (Pa. Cmwlth. 1985); *Mason v. Workmen's Compensation Appeal Board (Hilti Fastening Systems Corp.)*,

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[12] As we noted in *Empire Sanitary Landfill, Inc. v. DEP*, 1994 EHB 1489, the purpose of Section IIB is to characterize the ash a landfill proposes to accept. 1994 EHB at 1513.

[13] The other reasons for the Board's decision are irrelevant to the collateral estoppel issue in the instant appeal.

657 A.2d 1020, 1023 (Pa. Cmwlth. 1995).

Appellants are not barred from raising the characterization/testing issues at paragraphs 24(e), 24(i), 24(j), and 24(n) of their notice of appeal because those issues were not litigated in Permittee's appeal of the Section IIB disapproval. The question in the previous appeal was whether Permittee's Section IIB submission complied with the terms of paragraph 3(c)(i)(b) of the permit modification. The question here is *what the terms of the modification should be*--not whether Permittee is complying with those terms. In our adjudication on the appeal of the Section IIB disapproval, we expressly stated that we would not consider objections concerning the terms of the permit modification because those challenges had to be raised in an appeal of the modification. 1994 EHB at 1521-1522. Since the issues at paragraphs 24(e), 24(i), 24(j), and 24(n) of the notice of appeal all pertain to the adequacy of the terms in the permit modification--not with whether Permittee has complied with those terms-- they are appropriate issues in this appeal.

(2) the Department was required to mandate the use of the TCLP test, as opposed to the other tests suggested by Appellants

Permittee contends that it is entitled to summary judgment on the characterization/testing issues because the Department's regulations mandate the use of the TCLP test, as opposed to the other tests suggested by Appellants. In support of that position, Permittee points to 25 Pa. Code § 261.24(g) and § 261.34(b). Unfortunately, however, the regulations Permittee cites serve only to complicate matters. There is no subsection (g) to section 261.24 of the Department's regulations: section 261.24 was last amended in 1993 and has only subsections (a) through (c). As for section 261.34 of the regulations, subsection (b) provides only that the TCLP test at Appendix II of 40 CFR Part 261 is incorporated by reference. It does not require that the Department use the TCLP test, as

Permittee contends.

Furthermore, even assuming the Department's regulations do mandate the use of the TCLP test, that does not necessarily foreclose the issues Appellants raise at paragraphs 24(e), 24(i), 24(j), and 24(n) of their notice of appeal. Paragraphs 24(j) and 24(n) have nothing to do with the TCLP test, and paragraphs 24(e) and 24(i) do not contend that other tests should have been used instead of the TCLP test; they aver that the other tests should have been used instead of, *or in addition to,* the TCLP test. The fact that the regulations may require the use of the TCLP test does not necessarily preclude the Department from requiring other testing as well--especially if, as Appellants contend, the unique properties of the ash will result in inaccurate TCLP test results.

(3) the permit modification contains testing requirements exceeding those mandated by law and the ash policy

Permittee argues that the Department cannot have erred with respect to characterization/testing provisions because the permit modification contains testing requirements exceeding those mandated by law and the ash policy. In support of that position, Permittee points to sampling and statistical evaluation schedules in the permit modification and argues that both are more stringent than those required by the Department's regulations or the ash policy.

There are problems with Permittee's argument, even assuming the sampling and statistical evaluation schedules detailed in the permit modification are adequate. It is not clear from the relevant paragraphs of Appellants' notice of appeal that Appellants even mean to challenge those schedules. Instead, the paragraphs appear to target other aspects of the characterization/testing provisions. The fact that the permit modification may be adequate with respect to the sampling and statistical evaluation schedules does not mean that it is adequate with respect to all

characterization/testing provisions.

E. Acceptance/disposal issues

With regard to the acceptance/disposal issues, Permittee argues that it is entitled to summary judgment on paragraphs 24(k), 24(l), 24(m), 24(q), 24(r), and 24(s) in the notice of appeal. In those paragraphs, Appellants assert that the permit modification is deficient because:

> "the Permit Modification will allow the disposal of ash without sufficient analysis of leachate or the reaction with the present municipal or residual waste stream and the effect on the liner membrane" (paragraph 24(k));
>
> "the placement of ash in monolithic landfills or in segregated sections of a permitted sanitary landfill is a more environmentally sound practice" (paragraph 24(l));
>
> "the receipt of ash from the New Jersey facility before its characterization unduly risks the placement of hazardous substances into the landfill" (paragraph 24(m));
>
> "despite an eight . . . week characterization period set forth in the SWP for the Union County Facility for characterization of substances in the ash, the permit allows storage and disposal at the Landfill" (paragraph 24(q));
>
> "it does not use the least incursive methods of disposal, including but not limited to stabilizing the ash residue in a glass like [sic] state" (paragraph 24(r)); and
>
> "hazardous or potentially hazardous substances or wastes will be allowed to be disposed in a landfill which has not been permitted to receive hazardous waste" (paragraph 24(s)).

Permittee argues that it is entitled to summary judgment on these issues because:

> (1) Appellants are collaterally estopped from challenging the classification of the ash as special handling waste, the co-disposal of the ash under section 273.514, and the permit modification provisions precluding Permittee from accepting or disposing of hazardous waste;
>
> (2) the permit modification prohibits Permittee from accepting or disposing of hazardous waste, and, in any event, Appellants are collaterally estopped from raising the issue;

(3) the Pennsylvania regulations do not prohibit co-disposal under the conditions authorized in the permit;

(4) the permit modification allows for co-disposal of lime-stabilized ash residue consistent with the permit limits only after TCLP analysis shows that the ash is acceptable;

(5) the Department cannot have abused its discretion since the disposal and acceptance requirements are more stringent than required under the ash policy and the Department's regulations; and,

(6) the permit application included materials demonstrating liner capacity.

Appellants, meanwhile, contend that the Department erred because:

(1) by allowing Permittee to accept ash that was not tested for all of the contaminants under Table I, and by allowing the test results for each pile to be combined and aggregated, the modification violated 25 Pa. Code § 261.24 and other regulations requiring that wastes be characterized as hazardous or nonhazardous at the generating facility;

(2) by allowing piles of potentially hazardous ash to be stored indefinitely at the landfill, and only requiring that they be stored with tarps covering them, the permit modification did not select the least incursive method of disposal;

(3) it is not clear from the record whether the landfill leachate collection and treatment system will perform adequately for the ash residue and waste disposed of at the landfill; and,

(4) the modification does not expressly require compliance with 25 Pa. Code § 261.24, 25 Pa. Code § 261.514(b)(1), 25 Pa. Code § 273.514(b)(1), and 25 Pa. Code Chap. 299.

We will address each reason Permittee advances for summary judgment on the acceptance/disposal provisions separately below.

(1) Appellants are collaterally estopped from challenging the classification of the ash as special handling waste, the co-disposal of the ash under section 273.514, and the permit modification provisions precluding Permittee from accepting or disposing of hazardous waste

Permittee argues that Appellants are collaterally estopped from challenging the classification of the ash as special handling waste, the co-disposal of the ash under section 273.514, and the permit modification provisions precluding Permittee from accepting or disposing of hazardous waste, because Appellants had an opportunity to litigate those issues in the appeal in *Empire Sanitary Landfill, Inc. v. DEP,* 1994 EHB 1489.

We will examine each of these issues separately.[14]

(a) the classification of the ash as special handling waste

Permittee is not entitled to summary judgment on this issue because it is not clear that the classification of the ash as special handling waste is even at issue in this appeal. None of the notice of appeal paragraphs which Permittee identifies as raising "acceptance/disposal" issues address the question of whether the ash is special handling waste. While Appellants do assert that some of the ash is hazardous waste, they never suggest that the terms "hazardous waste" and "special handling waste" are mutually exclusive. And for good reason--special handling waste can be hazardous waste as well. The definition of "special handling waste," under 25 Pa. Code § 271.1, expressly includes "ash residue from a solid waste incineration facility." The definition of "hazardous waste" at the same section, meanwhile, includes "discarded material . . . resulting from municipal . . . operations . . . which . . . pose[s] a substantial potential hazard . . . when improperly . . . managed." Assuming waste from a solid waste incineration facility fulfills the criteria for "hazardous waste," it will be both hazardous *and* special handling waste.

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[14] We describe the *Empire* adjudication earlier in this opinion, at section D.1, on p. 24.

(b) the co-disposal of the ash under section 273.514

Permittee argues that Appellants are collaterally estopped from asserting that co-disposal of the ash violates section 273.514 because that issue was previously litigated at *Empire Sanitary Landfill, Inc. v. DER,* 1994 EHB 1489. However, Permittee failed to identify which portion of that opinion addresses the co-disposal issue.

After a careful review of our *Empire* adjudication, we conclude that Permittee is not entitled to summary judgment on this issue. Although we alluded to section 273.514 in the *Empire* adjudication, *see* 1994 EHB at 510, we never addressed the question of whether co-disposal of the ash would violate that section. Accordingly, that issue was not essential to our judgment in the previous decision, as required for collateral estoppel to apply.

(2) the permit modification prohibits Permittee from accepting or disposing of hazardous waste, and, in any event, Appellants are collaterally estopped from raising the issue

Permittee argues that it is entitled to summary judgment on Appellants' challenges to provisions in the permit modification prohibiting the acceptance of hazardous waste because: (1) the permit modification prohibits Permittee from accepting or disposing of hazardous waste; and, (2) Appellants are collaterally estopped from raising the issue because it was resolved in the *Empire* adjudication.

Permittee's characterization of Appellants' arguments is misleading. Appellants do not challenge the permit modification's *prohibition* on the *acceptance* of hazardous waste. Instead, they contend that the permit modification is inadequate because it *allows* Permittee to *dispose* of hazardous *or potentially hazardous* waste, (paragraph 24(s) of the notice of appeal), and that receipt of the ash at the landfill before characterization presents an undue risk that Permittee will *dispose*

of such ash there. (paragraph 24(m) of the notice of appeal) However, Permittee is correct to the extent that it argues that it may not accept or dispose of hazardous waste. Paragraph 8 of the permit modification, for instance, provides that the ash "shall not contain or be mixed with any hazardous waste. . . ." Similarly, section 273.514(a) of the Department's regulations provides that municipal waste landfills, like Permittee's, may only dispose of "*nonhazardous* ash residue."[15] (Emphasis added.) *See also Empire* at 1510.

Therefore, Permittee is entitled to summary judgment on paragraph 24(m) of the notice of appeal, and entitled to summary judgment on paragraph 24(s) to the extent that Permittee asserts the permit modification allows the disposal of hazardous waste. Permittee is not entitled to summary judgment on paragraph 24(s), however, to the extent that Permittee asserts that the permit modification allows the acceptance or disposal of "potentially hazardous" waste. What Appellants mean by the term "potentially hazardous" waste is unclear. It could mean either (1) that the waste is not presently hazardous but could become hazardous in the future, or (2) that it is unknown whether the waste is presently hazardous. Permittee did not specifically address either contingency in its motion for summary judgment--or otherwise address Appellants' challenge with respect to "potentially hazardous" waste. Nor did we resolve that issue in our previous decision in *Empire* so that Appellants would be collaterally estopped from raising it here.

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[15] Rather than attacking the terms of the permit modification, Appellants seem to be challenging the Department's willingness or ability to prevent possible future violations of the conditions in the permit modification. To the extent that this is Appellant's position, it is doomed for two reasons. First, any challenges regarding Department decisions on possible future violations are premature before those violations occur. Second, even assuming the violations did occur, Department decisions on how to respond to those violations fall within its prosecutorial discretion and are not subject to the Board's review. *See, e.g., Boling v. DER*, 1995 EHB 599.

(3) the Pennsylvania regulations do not prohibit co-disposal under the conditions authorized in the permit

Permittee argues that it is entitled to summary judgment with respect to the acceptance/disposal issues because the Department's regulations authorize co-disposal under the conditions set forth in the permit. This portion of Permittee's motion appears to be directed at paragraph 24(l) of the notice of appeal, where Appellants allege that the Department erred by authorizing co-disposal in the permit modification because placing the ash in monolithic landfills or segregated sections of a permitted sanitary landfill was more "environmentally sound."

We agree that Permittee is entitled to summary judgment with respect to paragraph 24(l). Appellants' challenge does not go to the particulars of co-disposal authorized here, but to the co-disposal of ash per se. The Department's regulations clearly authorize co-disposal. Section 273.514(b) of the regulations, 25 Pa. Code § 273.514(b), provides that ash may be disposed of with other waste in the landfill, or a cell therein, if the ash has been treated to reduce leachability, and the leachate collection and treatment system can adequately treat the leachate generated. Since the regulations expressly authorize co-disposal, the Department does not abuse its discretion by authorizing it--even if, as Appellants contend, other alternatives may exist which affect the environment less.[16]

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[16] The situation here is distinctly different from the one we confronted earlier in this opinion, when we examined whether the Department could abuse its discretion when authorizing a leachate reduction method. We concluded there that the Department could abuse its discretion, even when selecting among alternative leachate reduction methods listed in the regulations. That conclusion was based, in part, on the language in section 273.514(b)(2) of the regulations, which necessarily presents the Department with a choice among several alternative leachate reduction methods.

The Department does not have a similar choice with respect to authorizing co-dispoal. If a

(4) the permit modification allows for co-disposal of lime-stabilized ash residue consistent with limits in the modification only after TCLP analysis shows that the ash is acceptable

Permittee argues that it is entitled to summary judgment on the "acceptance/disposal" provisions because the permit modification allows the acceptance and disposal of ash only if the ash passes TCLP analysis. Permittee failed, however, to identify which of the "acceptance/disposal" provisions it meant to attack with this argument. Whichever issue Permittee meant to attack, it is not entitled to summary judgment.

Appellants never assert that ash will not be subject to TCLP analysis. Therefore, Permittee cannot establish that it is entitled to summary judgment simply by showing that ash will undergo TCLP analysis. Instead, Permittee must do more: It must explain how the fact that ash will undergo TCLP analysis refutes Appellants' allegations at paragraphs 24(k), 24(l), 24(m), 24(q), 24(r), and 24(s). The fact that ash will undergo TCLP analysis does not necessarily show that TCLP analysis is adequate--especially given Appellants' contentions about the problems with TCLP analysis in a high-lime environment.[17]

(5) the Department cannot have abused its discretion since the disposal and acceptance requirements are more stringent than required under the ash policy or the Department's regulations

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permit applicant meets the criteria at section 273.514(b)(1) and (b)(2), he is entitled to a permit authorizing co-disposal. He need not show that co-disposal is preferable to other alternatives.

[17] We fail to see, for instance, how the fact that the ash will be subject to TCLP analysis rebuts Appellants' claim at paragraph 24(r) of the notice of appeal that the permit modification fails to require the least intrusive method of disposal. If there is a connection between the TCLP analysis and the method of disposal, Permittee should have explained it. As the party moving for summary judgment, Permittee has the burden of demonstrating that it is entitled to the relief requested. *Green Thornbury Committee v. DER*, 1995 EHB 294.

Permittee argues that the Department did not abuse its discretion because the acceptance and disposal requirements in the permit modification are more stringent than required under the Department's regulations or its ash policy. Permittee failed to identify just which of the acceptance/disposal challenges it meant to attack with this argument, but, whichever issues it meant to attack, Permittee failed to show it was entitled to summary judgment.

In support of the proposition that the permit modification is more stringent than required under the Department's regulations, Permittee cites an excerpt from the comment response letter written by William McDonnell. However, even assuming the Board could defer to McDonnell on whether the conditions in the permit modification are as stringent as required under the Department's regulations, we could not do so based on his comment response letter. As we explained earlier in this appeal, Permittee failed to present the letter by affidavit or otherwise make it part of the record for purposes of ruling on the motion for summary judgment.

Permittee's argument regarding the ash policy is also problematic. In support of the proposition that the permit modification complies with the ash policy, Permittee simply cites paragraphs 7(b), 7(d), and 8(b) of the ash policy. The reference to the ash policy, however, does not show that the permit modification complied with that policy. At most, it establishes what the standard is. To establish that its permit modification met that standard, Permittee had to explain why the modification meets the criteria set forth in those paragraphs of the ash policy. Since Permittee failed to even attempt to explain how its permit modification meets the criteria in the ash policy, we will not grant summary judgment on this issue.

(6) the permit application included materials showing liner capacity

Permittee argues that it is entitled to summary judgment on the "acceptance/disposal" issues

because the application for the permit modification contained materials showing the liner capacity. In support of that proposition, Permittee cites only "Exhibit 2: Ojeshina and Steiner letter." (Permittee's memorandum in support, p. 22) Exhibit No. 2, however, does not contain a letter by either Ojeshina or Steiner. Therefore, an issue of material fact remains on this issue that precludes summary judgment.

F. Special handling regulations under Federal law

With regard to the special handling regulations, Permittee argues that it is entitled to summary judgment on paragraph 24(t) of the notice of appeal. There, Appellants assert that the permit modification is deficient because the special handling regulations violate the Resource Conservation and Recovery Act, Act of October 21, 1976, P.L. 94-480, *as amended*, 42 U.S.C. § 6901 *et seq.* (RCRA), and the regulations adopted thereunder. Permittee argues that it is entitled to summary judgment on the issue because the Board does not have jurisdiction over violations of RCRA or its accompanying regulations. Appellants failed to respond to this aspect of Permittee's motion.

Section 7002 of RCRA, 42 U.S.C. §6972, which governs citizen suits under the act, provides that actions filed concerning alleged violations of chapter 82 of Title 42, 42 U.S.C. §6901-6986 (solid waste) "shall be brought in the district court for the district in which the alleged violation occurred. . . ." Therefore, the Board does not have jurisdiction over Appellants' claims to the extent that Appellants assert that the "special handling" regulations do not comport with Chapter 82 of RCRA or the regulations thereunder. *See, e.g., City of Scranton v. DER,* 1995 EHB 104. Appellants' failure to respond to this aspect of Permittee's motion may be a tacit admission that their claims go to Chapter 82 of RCRA. Since it is not clear that they go to Chapter 82, however, and

since we may grant summary judgment only where the right is clear and free from doubt, *Hayward v. Medical Center of Beaver County*, 530 Pa. 320, 608 A.2d 1040 (1992); *SCA Services of Pennsylvania, Inc. v. DER*, 1994 EHB 1, we will not grant summary judgment on paragraph 24(t) of the notice of appeal in its entirety, but only to the extent that it goes to Chapter 82 of RCRA or the regulations thereunder.

G. Article I, Section 27

At paragraphs 58 through 60 of the notice of appeal, Appellants aver that the permit modification violated Article I, Section 27, of the Pennsylvania Constitution because the Department failed to minimize the environmental incursion and because the harm resulting from the modification will outweigh the putative benefits. Permittee argues that it is entitled to summary judgment on this issue because: (1) the modification was issued pursuant to the Solid Waste Management Act, (2) one cannot prove that the Department violated Article I, Section 27 with respect to an action taken pursuant to the Solid Waste Management Act without showing that the Department violated the Solid Waste Management Act or the associated regulations, and (3) Appellants cannot prove that the modification violates the Solid Waste Management Act or the associated regulations.

In their answer and memorandum in opposition, Appellants' retreat from their assertion that the permit modification violates Article I, Section 27, because the Department failed to minimize the environmental harm or to balance it against the putative benefits. Instead, Appellants aver that the permit modification violates that section because it violates the Solid Waste Management Act and the associated regulations.

Article I, Section 27, provides that the people have a right to clean air and water and the preservation of the "natural, scenic, historic, and esthetic values" of the environment, and provides

that the Commonwealth will conserve and maintain Pennsylvania's natural resources for the benefit of the people. The standard used to determine if the Department has complied with Article I, Section 27 depends on whether the Department has acted pursuant to a statute which implements that constitutional provision. See, *e.g., National Solid Waste Management Association v. Casey*, 600 A.2d 260 (Pa. Cmwlth. 1991), *aff'd* 323 A.2d 407 (Pa. Cmwlth. 1974), *aff'd* 361 A.2d 263 (1976); *Green Thornbury Committee v. DER*, 1995 EHB 636. Where the Department acts pursuant to a statute which implements Article I, Section 27, the action is deemed to comply with that constitutional provision, so long as the action complies with the statute and the regulations adopted pursuant to that statute. *Id.*

The Solid Waste Management Act implements Article I, Section 27. *National Solid Wastes Management Association v. Casey and DER*, 600 A.2d 260 (Pa. Cmwlth. 1991), *aff'd*, 533 Pa. 97, 619 A.2d 1063 (1993); *Concerned Residents of the Yough, Inc. v. DER*, 639 A.2d 1265 (Pa. Cmwlth. 1994). Therefore, to prevail on their claim that the Department violated Article I, Section 27, Appellants would have to prove that the Department violated the Solid Waste Management Act or its accompanying regulations. Although Appellants raise the issue of compliance with the regulations with respect to other claims raised in the notice of appeal, the assertions they made with respect to Article I, Section 27, at paragraphs 58-60 of their notice of appeal are clearly limited to environmental incursion and balancing the harm. Issues not raised by Appellants in their notice of appeal are deemed waived. *Pennsylvania Game Commission v. DER*, 509 A.2d 877 (Pa. Cmwlth. 1986) *aff'd on other grounds*, 521 Pa. 121, 555 A.2d 812 (1989); *NGK Metals Corp. v. DER*, 1990 EHB 376. Therefore, Permittee is entitled to summary judgment with respect to those paragraphs of the notice of appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CITY OF SCRANTON and BOROUGHS OF TAYLOR and OLD FORGE	:	
	:	
v.	:	**EHB Docket No. 94-060-C**
	:	**(Consolidated with 94-061-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EMPIRE SANITARY LANDFILL, Permittee	:	**and 94-062-C)**

ORDER

AND NOW, this 4th day of November, 1997, it is ordered that Permittee's motion for summary judgment is:

1) granted with respect to:

   a) paragraph 24(a) of the notice of appeal, to the extent that Appellants argue that ash will become airborne during transportation;

   b) paragraph 24(m) of the notice of appeal;

   c) paragraph 24(s) of the notice of appeal, to the extent that Appellants assert that the permit modification allows the disposal of hazardous waste;

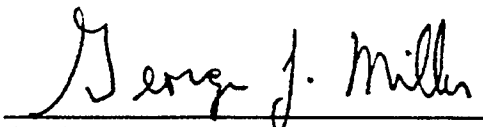
   d) paragraph 24(l) of the notice of appeal;

e) paragraph 24(t) of the notice of appeal, to the extent that Appellants assert that the Department violated Chapter 82 of RCRA or the regulations thereunder; and,

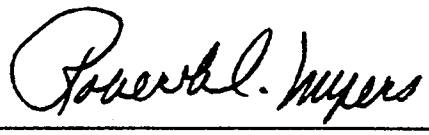
f) paragraphs 58-60 of the notice of appeal.

2) denied in all other respects.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 94-060-C
Consolidated with 94-061-C and 94-062-C)

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: November 4, 1997

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

DARLINGTON TOWNSHIP BOARD OF SUPERVISORS, TRI-STATE CONCERNED CITIZENS and UNITED PAPERWORKERS INTERNATIONAL UNION, LOCAL 1961	:	
v.	:	**EHB Docket No. 96-204-R (Consolidated with 96-202-R and 96-201-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ENVIROTROL, INC., Permittee	:	**Issued: November 12, 1997**

OPINION AND ORDER
ON MOTION FOR PROTECTIVE ORDER

By: Thomas W. Renwand, Administrative Law Judge

Synopsis

Pursuant to Board Rule Section 1021.21(a), 25 Pa. Code §1021.21(a), an association may be represented by a non-attorney officer in proceedings before the Board.

OPINION

Presently before the Board is Permittee Envirotrol's Motion for Protective Order, seeking *inter alia*, to bar non-attorneys representing Appellant Tri-State Concerned Citizens (Association) from questioning witnesses both during discovery and at hearing. Permittee contends this activity constitutes the practice of law and is thus restricted to attorneys pursuant to 42 Pa. C.S. §2524(a). The Association first points out that such representation is permitted by the Board's rules. Moreover, the Permittee never objected to the Association's non-lawyer representative's participation in earlier discovery proceedings. Finally, if the Board grants Permittee's Motion,

the Association contends it would result in a denial of its due process rights because of its alleged financial inability to retain counsel.

We need not address the Association's waiver and due process arguments because our rules specifically permit an Association to be represented by its officers in proceedings before the Board. *Weiss v. DEP*, 1996 EHB 246, 253. *See also* 25 Pa. Code §1021.21(a). Nevertheless, Permittee's contention may have merit. However, such a fundamental change in the Board's rules would be better addressed by the Pennsylvania Environmental Hearing Board Rules Committee and then by the entire Board. In this manner, such a proposed change could be publicly discussed with all views considered and with the added benefit of public comment.

Accordingly, we will deny Permittee's Motion to the extent it attempts to prohibit the Association's officers from representing it before this Board.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DARLINGTON TOWNSHIP BOARD OF SUPERVISORS, TRI-STATE CONCERNED CITIZENS and UNITED PAPERWORKERS INTERNATIONAL UNION, LOCAL 1961	:	
v.	:	**EHB Docket No. 96-204-R (Consolidated with 96-202-R and 96-201-R)**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION ENVIROTROL, INC., Permittee	:	

ORDER

AND NOW, this 12th day of November, 1997, Permittee's Motion for Protective Order, to the extent it seeks to prohibit non-attorney officers from representing Tri-State Concerned Citizens, is **denied.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: November 12, 1997

EHB Docket No. 96-204-R
(Consolidated with 96-202-R and 96-201-R)

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

WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

AMERICAN AUTO WASH, INC.	:	
	:	
v.	:	**EHB Docket No. 96-122-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 13, 1997**

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis:

In accordance with the requirements of the Air Pollution Control Act, the Department appropriately assessed a civil penalty in the amount of $78, 061 against the Appellant for failing to install Stage II control technology at three of its gasoline filling stations by the established deadline.

BACKGROUND

This appeal was filed on June 4, 1996, challenging a penalty assessed against American Auto Wash, Inc. (Appellant) by the Department of Environmental Protection (Department) in the amount of $78,309 for violations of the Pennsylvania Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, *as amended,* 35 P.S. §§ 4001-4106, by reason of the Appellant's failure to install Stage II control technology at three of its gasoline filling stations by the required November 15, 1993 compliance date. The purpose of the required Stage II controls is to recapture gasoline vapors which

would otherwise escape into the atmosphere during the process of fueling automobiles and result in the formation of ozone.

The installation of Stage II controls was mandated by Section 182(b)(3) of the federal Clean Air Act Amendments of 1990, Act of November 15, 1990, Pub. L. 101-549, Title I, § 103, 104 Stat. 2426. This provision required the Commonwealth of Pennsylvania to adopt as part of its implementation plan a regulation requiring the installation of a system for gasoline vapor recovery of emissions from the fueling of motor vehicles. In the case of gasoline stations such as the Appellant's which dispense at least 100,000 gallons of gasoline per month, the compliance date required by Congress was one year after the adoption of the required regulation. Pennsylvania adopted such a requirement in enacting amendments to the Air Pollution Control Act in February, 1992, 35 P.S. § 4006.7, and the Department implemented that requirement by regulation at 25 Pa. Code § 129.82 by requiring the installation of Stage II control technology at Appellant's gasoline stations by November 15, 1993.

The installation of Stage II controls is part of the strategy to achieve compliance with the National Ambient Air Quality Standard for ozone. Ground level ozone is formed when volatile organic compounds such as gasoline hydrocarbons react with nitrous oxide compounds in sunlight. Ozone is a primary cause of smog-induced eye irritation, impaired lung function, and damage to trees and crops.

The hearing on the merits was held on June 30 and July 1-2, 1997 before Judge George J. Miller, Chairman of the Board. Thereafter, the parties filed extensive requests for findings of fact and conclusions of law as well as post-hearing briefs. The record consists of 552 pages of notes of testimony and 90 exhibits including a stipulation of facts entered into evidence as Board Exhibit 3.

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

FINDINGS OF FACT

1. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Protection (Department), the agency of the Commonwealth charged with the duty and the responsibility to administer and enforce the Pennsylvania Air Pollution Control Act, Act of January 8, 1960, P.L. 2119 (1959), *as amended,* 35 P.S. §§ 4001-4106 (PA APCA); Section 1917-A of the Administrative Code of 1929, Act of April 9, P.L. 177, *as amended*, 71 P.S. §§ 510-517 (Administrative Code) and the rules and regulations promulgated thereunder. (Board Ex. 3, ¶ 1)[1]

2. Reinhard Bets, the President of American Auto Wash, Inc. (Appellant), owned and operated, at all pertinent times, three gasoline dispensing facilities, all with a business address of 512 E. King Road, Malvern, Pennsylvania, and with business locations as follows: 20 W. Main Street, Norristown, Montgomery County; 3100 Edgemont Avenue, Parkside, Delaware County; and 6601 Market Street, Upper Darby, Delaware County (three facilities). (Board Ex. 3, ¶ 2)

3. The three facilities are located in a severe ozone non-attainment area of Pennsylvania and have dispensed greater than 100,000 gallons of gasoline per month based on the average monthly sales for the two year period immediately preceding July 9, 1992, the effective date of Section 6.7 of the PA APCA, 35 P.S. § 4006.7. (Board Ex. 3, ¶ 3)

4. As set forth in Section 129.82 of the Pennsylvania Code, 25 Pa. Code § 129.82, and Section 6.7 of the PA APCA, 35 P.S. § 4006.7, Appellant was required to install a Department

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[1] "Board Ex. 3, ¶ __" is a reference to a paragraph in the parties' Stipulation of Facts. "C-___" is a reference to the Commonwealth of Pennsylvania, Department of Environmental Protection's exhibit. "A-___" is a reference to the Appellant's exhibit. "F.F." is a reference to the Findings of Fact.

approved and properly operating Stage II vapor recovery or vapor collection system ("Stage II system") at the three facilities by November 15, 1993. (Board Ex. 3, ¶ 4)

5. Section 129.82(a) of the Pennsylvania Code, 25 Pa. Code § 129.82(a), and Section 6.7(a) of the PA APCA, 35 P.S. § 4006.7(a), prohibit an owner or operator of a gasoline dispensing facility subject to these sections from transferring or allowing the transfer of gasoline into a motor vehicle fuel tank unless the dispensing facility is equipped with a Stage II system. (Board Ex. 3, ¶ 5)

6. Section 129.82(b)(1) of the Pennsylvania Code, 25 Pa. Code § 129.82(b)(1), and Section 6.7 of the PA APCA, 35 P.S. § 4006.7, require owners or operators of gasoline dispensing facilities subject to these sections to install necessary Stage II systems, to provide necessary maintenance, and to make modifications necessary to comply with the requirements. (Board Ex. 3, ¶ 6)

7. On January 4, 1994, an air quality specialist from the Department inspected the Appellant's facility located at 220 W. Main Street, Norristown, Montgomery County (Norristown station), and determined that Appellant had failed to install a Stage II system by November 15, 1993. (Board Ex. 3, ¶ 7; N.T. 29; C-1)

8. A Stage II system was not installed at the Norristown station until August 22, 1994. (Board Ex. 3, ¶ 8)

9. On March 31, 1994, an air quality specialist from the Department inspected Appellant's facility located at 3100 Edgemont Avenue, Parkside, Delaware County (Parkside station), and determined that Appellant had failed to install a Stage II system by November 15, 1993. (Board Ex. 3, ¶ 9; N.T. 14-15; C-2, C-3)

10. A Stage II system was not installed at the Parkside station until July 15, 1994. (Board Ex. 3, ¶ 10)

11. On April 26, 1994, an air quality specialist from the Department inspected the Appellant's facility located at 6601 Market Street, Upper Darby, Delaware County (Upper Darby station), and determined that Appellant had failed to install a Stage II system by November 15, 1993. (Board Ex. 3, ¶ 11; N.T. 21; C-5, C-6)

12. A Stage II system was not installed at the Upper Darby station until July 15, 1994. (Board Ex. 3, ¶ 12)

13. Section 9.1 of PA APCA, 35 P.S. § 4009.1 authorizes the Department to assess a civil penalty of up to $10,000 per day for each violation of the PA APCA which occurred prior to July 9, 1995. (Board Ex. 3, ¶ 13)

14. The Department used its penalty policy to calculate a penalty amount that would be assessed against each facility for failure to implement a Stage II system by November 15, 1993. (Board Ex. 3, ¶ 14; N.T. 60-61; C-29)

15. The Department first calculated a base penalty amount by assessing three cents per gallon ($0.03/gallon) for every gallon of gasoline sold by a facility lacking a Stage II system after November 15, 1993. (Board Ex. 3, ¶ 15; N.T. 62-63)

16. The Department reduced this penalty to one cent per gallon ($0.01/gallon) of gasoline sold by Appellant and other companies lacking a Stage II system from November 15, 1993 to March 31, 1994 since the emission of volatile organic compounds during the winter months is not as harmful as it is during the ground-level ozone season. (Board Ex. 3, ¶16; N.T. 62-67)

17. The Department then adjusted the base penalty amount to a final assessment amount

after considering the following factors: the willfulness of the violation; the damage to the environment; deterrence of future violations; the size of the facility; the compliance history of the facility; degree of cooperation in resolving the violation; whether the violation was voluntarily reported; the cost to the Department; the financial benefit to the person in consequence of the violation; and any other relevant factors. (Board Ex. 3, ¶ 17; N.T. 67-77; C-29)

18. The Department assessed a total penalty in the amount of $78,309 based on these considerations and determined in accordance with the provisions of the policy that:

a. the base penalty should be increased by 10% because all three facilities pumped over 100,000 gallons Average Throughput[2];

b. no adjustment was required since the violation had low environmental impact;

c. no adjustment was necessary for degree of cooperation since the Department discovered the violation rather than the Appellant coming forward voluntarily;

d. no adjustment was required for compliance history since the Department was not aware of any prior violations;

e. no adjustment was required for the "willfulness" of the violations since Appellant was negligent, rather than accidental or willful, in that he could have complied on time[3]; and

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[2] "Average Throughput" means the average number of gallons pumped per month based on a calendar year. (C-29) Greater than 100,000 gallons of gasoline per month were dispensed at the three facilities based on the average monthly sales for the two (2) year period immediately preceding July 9, 1992, the effective date of Section 6.7 of the PA APCA, 35 P.S. § 4006.7. (Board Ex. 3, ¶ 3)

[3] Three categories are considered when determining the willfulness of the violations under the Department's civil penalty policy: (1) negligence is defined as "ignorance of legal requirements or failure to exercise due care and caution"; (2) accidental is defined as "factors beyond control of facility or despite due care and caution"; and (3) willful is defined as "[i]ntentional and with knowledge that conduct was illegal or reckless disregard of good

f. no adjustment was required for the Appellant's alleged inabilities to afford the Stage II equipment and to pay the civil penalty since the Appellant's financial records indicated otherwise.

(N.T. 67-74)

19. This assessment was made after considering the basis for Appellant's contentions that there should be no penalty assessed or that the penalty should be reduced because of the inability to afford the required Stage II equipment and the unavailability of the required Stage II equipment. (N.T. 108-113)

20. The total assessment also included a calculation for the economic benefit of non-compliance. Although the Appellant does not contest the accuracy of the economic benefit calculation, the amount should be reduced by $248 to equal $5,276. (Board Ex. 3, ¶¶ 31-41; N.T. 77, 78)

21. The Appellant knew in the beginning of 1993 that the Stage II requirement had been adopted by the Department and he learned in the middle of 1993 of the November 15, 1993 compliance deadline which applied to the three stations involved in this proceeding. (N.T. 153-154)

22. The Appellant believed that the November 15, 1993 deadline was not firm and that he would not be penalized monetarily if he did not meet the November 15, 1993 deadline. The Appellant's conclusion was based on the following: he had been told that representatives of Mobil Oil Company had obtained an extension from the Department; a friend was told by a State Senator that he would not have any problem if he were diligent in trying to install the system; and, a contractor who worked for Sunoco said that Sunoco must have received an extension because

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operation practices." (C-29)

stations which it had sold to Atlantic did not have Stage II equipment after the deadline had passed. (N.T. 154-158, 200)

23. The Appellant had Gilbarco dispensers at the three facilities. (Board Ex. 3, ¶ 18; N.T. 160)

24. The Appellant knew in 1993 that he could comply with the Department's regulations by doing one of the following: retrofitting the existing older Gilbarco dispensers and installing Balance system equipment, Vacuum Assist system equipment, or Amoco V-1 system equipment; installing new dispensers with retrofitted vapor-assist equipment; or, installing brand new dispensers which were already equipped with Stage II equipment. (N.T. 159, 189, 290-291, 297-298, 341-342, 367)

25. From a gasoline station owner's point of view, Vacuum-Assist systems were preferable to the Balance or Amoco V-1 systems. (N.T. 314-315, 353, 397, 401-402)

26. The Appellant decided in the middle of 1993 not to comply with the regulations by installing Balance system equipment because he believed that the recently approved Vacuum Assist systems were preferable.[4] At this time, he knew that the availability of this equipment was not good, and he would need to wait to receive it. (N.T. 159-160)

27. Installation of Stage II equipment required advance underground work. The Appellant did not accept a proposal for performance of this work until October 16, 1993 even though

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[4] The underground portion is essentially the same for both systems: piping leads from a manifold going across the tanks to dispensing islands, and that piping takes vapors from the dispensers back to the tanks. On a Balance system, this is done by very small vacuums created by the movement of the product. On a Vacuum-Assist system, the well of vapors is assisted mechanically by a vacuum pump. (N.T. 351)

he had discussed the need for this work with his contractor early in 1993 and knew how much it would cost months ahead of the time he accepted the proposal. (N.T. 171-173, 243-248, 363-365)

28. The required underground work could have been completed well before the November 15, 1993 deadline had the Appellant ordered the work done earlier in 1993. (N.T. 378-380)

29. The underground work was accomplished at the three facilities before April 1, 1994, the beginning of the ground level ozone (smog) season. (Board Ex. 3, ¶¶ 25, 26)

30. The Appellant testified that although he orally ordered Tokheim Vacuum Assist equipment for the Upper Darby location through Amoco in October, 1993, the written order was not issued until May, 1994 because the equipment was not CARB approved until June 9, 1994 and the older Gilbarco dispensers at that location could not be retrofitted with other Vacuum Assist equipment. (Board Ex. 3, ¶ 30; N.T. 178-182, 329-331; C-21) Amoco had negotiated a national agreement with Tokheim in 1994 and Tokheim made the equipment to fit Amoco's electronics. (N.T. 247-248, 314)

31. The Gilbarco Vapor Vac system and retrofit kits were CARB approved on March 26, 1993. (Board Ex. 3, ¶ 22)

32. The Appellant knew in the Summer of 1993 that the Gilbarco Vapor Vac equipment was CARB certified Stage II equipment. (N.T. 221)

33. The Appellant orally ordered the Gilbarco Vapor Vac system for his facilities at Parkside and Norristown from Ten Hoeve Brothers ("Ten Hoeve Bros.") in the Fall of 1993 instead of installing the Balance system at those locations because he believed that the Balance system would soon be "obsolete." (N.T. 185-193, 206, 238-39)

34. The Appellant testified that he could have ordered the Gilbarco Vapor Vac system for these locations from Pet Chem, Inc. (Pet Chem), but he instead chose to order the equipment from Ten Hoeve Bros. because he believed that Pet Chem had too few people to install the equipment and that Pet Chem's prices were higher. (N.T. 191-192, 238-239)

35. Pet Chem, a Pennsylvania corporation, is a distributor of petroleum equipment including, but not limited to, the following: service station equipment both underground and above ground, commercial fueling equipment, and some chemical and handling equipment. (Board Ex. 3, ¶¶ 19, 20)

36. During 1993 and 1994, Pet Chem sold Stage II equipment in the southeast region of Pennsylvania and was the authorized Gilbarco equipment distributor in the southeast region of Pennsylvania, including Montgomery County and Delaware County. (Board Ex. 3, ¶ 21; N.T. 239-240)

37. Pet Chem sold 75 Gilbarco systems and 40 to 50 Vapor Vac retrofit kits between 1993 and 1994. (N.T. 522)

38. In 1993 and early 1994, Pet Chem delivered Gilbarco Vapor Vac retrofit kits to companies and/or individuals in no more than 15-16 weeks. (Board Ex. 3, ¶ 23)

39. The Appellant never asked Pet Chem what its lead time was in obtaining the Gilbarco retrofit equipment. (N.T. 294-295)

40. The Appellant made no inquiry of the Department to determine whether there was an extension of the deadline for the installation of Stage II equipment and received no written statement from the Department giving him an extension of this deadline. (N.T. 236)

41. At all times, the Appellant responded promptly by telephone and/or correspondence

to inquiries initiated by the Department concerning the status of Stage II installations at the three facilities. (Board Ex. ¶ 26)

42. The Appellant accomplished and submitted to the Department test results and Stage II registration forms for the Norristown, Parkside and Upper Darby stations. (Board Ex. 3, ¶ 27; C-15, C-16 and C-17; A-15, A-16, A-29, A-30, A-37 and A-38)

DISCUSSION

Under the Board's Rules of Practice and Procedure, 25 Pa. Code § 21.101(b)(1), the Department bears the burden of proof in an appeal of a civil penalty assessment as to the violations charged and the reasonableness of the penalty assessed. *Delaware Valley Scrap Co., Inc. v. DER,* 1993 EHB 1113, *aff'd,* 645 A.2d 947 (Pa. Cmwlth. 1994). By contrast, the Appellant in this case carries the burden of proof of the affirmative defense of impossibility of performance which it has asserted in this appeal. *International Brotherhood of Firemen and Oilers, Local 1201 v. The Board of Education of the School District of Pennsylvania,* 457 A.2d 1269 (Pa. 1983); *See* Rule 1030 of the Pennsylvania Rules of Civil Procedure.

Proof of the defense of impossibility of performance requires proof that the event or condition alleged as an excuse must have been beyond the party's control and not due to any fault or negligence by the non-performing party. Acts of a third party making performance impossible do not excuse failure to perform if such acts were foreseeable. *Martin v. Department of Environmental Resources,* 548 A.2d 675 (Pa. Cmwlth. 1988); *Yoffe v. Keller Industries, Inc.,* 443 A.2d 358 (Pa. Super. 1982).

As set forth more particularly in the Findings of Fact, it was stipulated that the Appellant did

not install the required Stage II control technology at the auto wash facilities in Norristown, Parkside and Upper Darby by the required November 15, 1993 deadline. (F.F. 7, 9, 11) The failure to comply with this regulatory requirement is a violation for which penalties may be assessed. 35 P.S. § 4008. The Appellant installed the required control systems at Parkside and Upper Darby by July 15, 1994 and at Norristown on August 22, 1994. (F.F. 8, 10, 12)

Impossibility of Compliance

The Appellant's claim that no penalty should be imposed at all by reason of his failure to meet the November 15, 1993 deadline for the installation of Stage II controls must be rejected. That deadline was a mandatory deadline required by both the federal Clean Air Act and the Pennsylvania Air Pollution Control Act. Neither the Department nor this Board has the power to waive the mandatory provisions of the Acts because of adverse economic consequences. *Rochez Bros., Inc. v. Department of Environmental Resources,* 334 A.2d 790, 794 (Pa. Cmwlth. 1975). Even if the technology were not available to satisfy the requirements of the Act with respect to Stage II controls, "technology forcing", by the imposition of civil penalties, is reasonably related to meeting the aims of the federal Clean Air Act and the Pennsylvania Air Pollution Control Act. *Department of Environmental Resources v. Pennsylvania Power Company,* 416 A.2d 995, 1003 (Pa. 1980). In the present controversy, the Appellant's failure to comply with the deadline would not be a defense to the imposition of penalties since he had a choice either to install the required controls or to cease operating.

However, it is plain that the Appellant could have installed the Balance system or the Amoco V-1 equipment by the required deadline had he chosen to do so. (F.F. 30-32) Instead, he waited for the availability of a particular Vacuum Assist system equipment because both he and the suppliers

of his gasoline viewed that equipment to be preferable. While the Board understands the Appellant's strong preference for a Vacuum Assist system, we also understand that the Legislature has mandated the installation of Stage II controls by the time specified for reasons of public health. In this case, considerations of public health outweigh the Appellant's preferences.

Considerations of Willfulness

In assessing the penalty against the Appellant, the Department did not view the Appellant's actions as willful. (F.F. 18(e)) Instead, it assessed his failure to comply as being merely negligent in that he could have installed the required Stage II controls by the deadline of November 15, 1993.

The Appellant asserts that he should have been assessed a lower penalty based on a characterization of his non-compliance as being "accidental" in that the matter was beyond his control. The difficulty with this argument is that the Appellant's decision to wait for the preferred Vacuum Assist system was a calculated decision made in the belief that the Vacuum Assist system was preferable to the then available technology. It was no accident that he did not comply with the deadline; indeed, it was a decision made after considering advice from Amoco representatives and a contractor who did the underground work for the Appellant as a necessary precedent to the installation of Stage II control systems. As shown by the foregoing Findings of Fact, it is clear that had the Appellant ordered the available technology in a timely manner from another supplier, the required deadline could have been met. (F.F. 27, 28, 30-39)

The Appellant testified that he was under the belief that the deadline was not final and that the Department would not impose penalties on him. Under the evidence presented, the Appellant's belief was not reasonable. The Appellant made no effort to contact the Department to determine whether the deadline was final and whether he could be exempt from the deadline and granted an

extension. Instead, he relied on oral representations of representatives of Mobil Oil Company and a fellow dealer as grounds for ignoring the Department's established deadline. Based on the evidence before the Board, the Department may have been justified in determining that the Appellant's conduct was willful, had it chosen to do so. In view of the Appellant's testimony that he believed that the deadline was not final and that he would not be penalized, we think that the Department's characterization of his conduct as being negligent was suitable.

Reasonableness of the Penalty

In reviewing the amount of a civil penalty assessment, we need not consider what penalty we would have imposed nor do we need to agree with the factors that the Department weighed or the amount it assessed for each factor considered for each violation. Instead, our job is limited to determining whether there is a "reasonable fit" between each violation and the amount of the penalty assessed. Only when it is found that the Department abused its discretion will we substitute our own to modify an assessment. *Charles W. Shay v. DEP*, 1996 EHB 1583, 1605.

The penalty assessed against the Appellant was based on the Department's penalty policy which set a base penalty depending on the number of gallons of gasoline pumped after the deadline. In the case of gasoline pumped outside of the "ozone season",[5] the penalty was calculated at only $0.01 per gallon. In the case of gasoline pumped during the "ozone season", the penalty was calculated at $0.03 per gallon.

The only adjustment made to the base penalty was the 10% upward adjustment because the gallonage pumped at each of the three facilities was in excess of 100,000 gallons per facility per

---

[5] The ozone season is the time of the year, approximately between April 1 and September 1, when ground level ozone is most likely to form due to the temperature. (N.T. 34)

year. Since this level of activity without Stage II controls creates a greater probability that substantially more ozone will be created, the Board finds this adjustment to be proper. The Appellant's contention that this adjustment in addition to a $0.03 per gallon charge, rather than a $0.02 per gallon charge applicable to smaller facilities, results in a double penalty is rejected.

The Appellant's contention that it should be given a reduced penalty because of its "cooperation" after the violation was discovered by the Department and for its good compliance history is rejected. That the Appellant purposely ignored the regulatory deadline in order to install the equipment he desired even though he could have complied with the deadline by installing other equipment speaks neither of a good compliance record or of cooperation.

The Department's testimony was that this application of its penalty policy was in accordance with the treatment that it gave to other gasoline station operators. The one exception where it decided not to impose a penalty involved a small gasoline station operator who just missed the installation of Stage II controls before the beginning of the ozone season in April, 1994. This operator had voluntarily discussed his problems with the Department in advance. (N.T. 436-441) In light of the differing circumstances between him and the Appellant, in that the Appellant failed to install the Stage II equipment until well after the beginning of the ozone season in 1994, we find that the Appellant cannot use this single act of administrative discretion by the Department to justify his claim that no penalty should be assessed against him.

Finally, the Appellant testified to difficulties he experienced in obtaining the desired Vacuum Assist equipment. The evidence indicates that had he acted in sufficient time to order it from Pet Chem, the authorized Pennsylvania distributor of this equipment, he could have had it installed in advance of the deadline. (F.F. 32-39). The fact that the Appellant's chosen distributor experienced

delays in obtaining the equipment after the Appellant finally placed his orders is hardly evidence that the Appellant should benefit by reason of his delay in placing the order for the equipment and the necessary underground work. The Appellant knew of the regulatory requirements in mid-summer; he chose to wait until October to place the orders for the equipment that was required in mid-November.

Economic Value of Non-Compliance

The parties have stipulated that the Department's calculations of the economic value of non-compliance should be reduced by $248. Accordingly, the amount of the penalty assessed by the Department will be reduced to equal a total penalty of $78,061.

CONCLUSIONS OF LAW

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

2. The Department has the burden of proving that its assessment of the penalty is reasonable and in conformance with the requirements of the Air Pollution Control Act and was not an abuse of discretion. 25 Pa. Code § 21.101(b)(1); *Delaware Valley Scrap Co., Inc. v. DER*, 1993 EHB 1113, *aff'd*, 645 A.2d 947 (Pa. Cmwlth. 1994).

3. The Appellant has the burden of proving its defense of impossibility of performance. *International Brotherhood of Firemen and Oilers, Local 1201 v. The Board of Education of the School District of Pennsylvania*, 457 A.2d 1269 (Pa. 1983); *See* Rule 1030 of the Pennsylvania Rules of Civil Procedure.

4. The Department's assessment of a base penalty for the violation and adjustment for factors such as the willfulness of the violation, the size and compliance history of the facility, the severity and duration of the violation, the degree of cooperation in resolving the violations, and

other factors set forth in Section 9.1 of the Pennsylvania Air Pollution Control Act, 35 P.S. § 4009.1, was in accordance with the requirements of the Act, a reasonable fit for the Appellant's violations, and within the Department's proper exercise of discretion.

5. The Department's economic benefit calculation for the Appellant's non-compliance was erroneous to the extent that this portion of the penalty must be reduced by $248.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

AMERICAN AUTO WASH, INC.	:	
	:	
v.	:	**EHB Docket No. 96-122-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 13th day of November, 1997, it is ordered that the Department's penalty assessment is hereby approved in the amount of $78,061 by giving effect to an agreed upon $248 error in the calculation of the economic benefit to the Appellant as a result of the violations.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: November 13, 1997

cc: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
Peter Yoon, Esq.
Southeast Region

For Appellant:
Lisa Wershaw, Esq.
ZARWIN, BAUM, De VITO, KAPLAN & O'DONNELL, P.C.
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

RUSSELL INDUSTRIES, INC.	:	
	:	
v.	:	**EHB Docket No. 97-018-MR**
	:	**(Consolidated with 97-021-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**and 97-022-MR)**
	:	
	:	**Issued: November 13, 1997**

OPINION AND ORDER ON MOTION TO DISMISS

by Robert D. Myers, Member

Synopsis:

Under 25 Pa. Code § 105.42(a), DEP should sign DSEA permits before sending them to permittees, and such permits will become effective after the permittee signs them and returns them to DEP. Although signing the permits indicates the permittee's acceptance of the terms and conditions of the permits, and agreement to comply with them, the permittee does not lose his appeal rights by signing the permits. The permittee's 30-day appeal period begins to run after receipt of written notice from DEP to the effect that DEP received the signed permits from the permittee.

DEP's Motion to Dismiss Based on Lack of Jurisdiction is denied where, although the Appellant filed premature appeals, the surrounding circumstances indicate that the Appellant did so because of the confusion and uncertainty created by DEP regarding proper appellate procedure. In particular, contrary to 25 Pa. Code § 105.42(a), DEP sent unsigned permits to the permittee with a cover letter stating that the permits would not be effective until the permittee signed and returned

them to DEP, and until DEP then signed them. In addition, the permittee was reluctant to sign the permits because the permittee feared that doing so would constitute a waiver of the permittee's appeal rights. While these circumstances are compelling in this case and cause us to treat the appeals as timely filed, the Board will not depart from its normal procedure except under the most compelling circumstances.

OPINION

I.

On December 20, 1996, the Department of Environmental Protection (DEP) sent copies of Water Obstruction and Encroachment Permit Nos. E03-174 and E02-494 to Russell Industries, Inc. (Russell) with a cover letter that stated:

> Enclosed are duplicate copies of your [permits]. These permits cannot be validated until they have been signed by you and by the Department. PLEASE SIGN BOTH COPIES OF THE PERMITS AND RETURN THEM TO THIS OFFICE IMMEDIATELY FOR FINAL SIGNATURE BY THE DEPARTMENT. Copies of the final signed permits will be returned to you for your records.
>
> Prior to the commencement of dredging, the enclosed Acknowledgments of Apprisal of Permit Conditions [Acceptance Form] must be completed and signed by you and an individual responsible for the supervision or conduct of the dredging acknowledging and accepting the general and special conditions contained in the permits. Unless the signed [Acceptance Form is] submitted to this office, the permits are void.
>
> A copy of both the Permit and the [Acceptance Form] must be available at the work site for inspection upon request by any officer or agent of the Department or any other Federal, State, County and Municipal agency.

(*See* Notice of Appeal, exh. A.) The permits themselves contained the following language:

> 1. *The permittee shall sign the permit thereby expressly certifying the permittee's acceptance of, and agreement to comply with, the terms and conditions of the permit.* The permittee shall return a signed copy of the permit to the Department. *The permit will not be effective until the signed copy of the permit is*

received by the Department.

. . . .

12. The permittee shall fully inform the engineer or contractor, responsible for the supervision and conduct of work, of the terms, conditions, restrictions and covenants of this permit. Prior to the commencement of construction, the permittee shall file with the Department in writing, on a form provided by the Department, a statement signed by the permittee and an individual responsible for the supervision or conduct of the construction work *acknowledging and accepting the general and special conditions contained in the permit.* Unless the acknowledgment and acceptance have been filed, the permit is void.

(Notices of Appeal, Permits at paras. 1, 12.) (Emphasis added.)

On January 20, 1997, Russell filed a Notice of Appeal with the Board utilizing Gregg M. Rosen, Esquire. The appeal, which was docketed at EHB Docket No. 97-018-MR, challenges Special Conditions A and G of Permit No. E02-494. In Paragraph 13 of the Notice of Appeal, Russell avers that DEP's action gave Russell only two choices: "either to accept Special Condition A and G and waive its right to contest those Special Conditions, or to appeal the issuance of the entire Permit and risk an interruption in [the] continuity of its dredging operations." (Notice of Appeal at 97-018-MR, paras. 7 & 13.) Russell chose the latter course and attached a copy of the unsigned permit to its Notice of Appeal. (*See* Notice of Appeal at 97-018-MR, exh. B.)

On January 21, 1997, Henry Ingram, Esquire, filed two other Notices of Appeal for Russell challenging new provisions of Permit Nos. E02-494 and E03-174 which restrict Russell's dredging activities along the Allegheny River. These appeals were docketed at EHB Docket Nos. 97-021-MR and 97-022-MR. Again, a copy of the unsigned permit was attached to each Notice of Appeal. (*See* Notices of Appeal at 97-021-MR and 97-022-MR.)

On January 22, 1997, Russell signed the permits but did not return them to DEP. (*See* DEP's

Motion, exh. F.) Apparently concerned about the effect of the signature on Russell's appeal rights, attorney Rosen had been in contact with DEP by telephone and letter on January 15 and February 6, 1997 seeking to enter into a stipulation with DEP. DEP responded in a letter dated February 14, 1997, stating:

> This letter serves as the Department's official response to confirm that Russell's signature on and acceptance of [Permit Nos. E02-494 and E03-174] will not constitute a waiver, diminishment or loss of Russell's rights pursuant to Section 4(c) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, §4, as amended, 35 P.S. §7514(c), to appeal to the Environmental Hearing Board from the Department's imposition of Special Conditions A and G[,] *or any other special condition from which Russell has in fact already appealed*[,[1]] of [Permit Nos. E02-494 and E03-174].
>
> Furthermore, Russell understands and acknowledges that the Department, by entering into this agreement, makes no agreement or admission concerning the substantive or procedural merits of any appeal that Russell has filed and further that the Department expressly reserves all of its rights to challenge and dispute the factual and legal basis of any such appeal. Further, Russell agrees that it will comply with the terms and conditions of the Permits when and until those terms and conditions are rescinded, amended or otherwise modified by action of the Department or Board or Court Order.
>
> Please confirm Russell's agreement by signing and returning the extra copy of this letter. Upon receipt of a signed copy of this letter, Russell agrees to sign the above permits and return them to the Department.

(DEP's Motion, exh. C.)

On February 24, 1997, Russell returned a copy of this letter to DEP, signed by Mr. Rosen and Mr. Russell, along with the signed permits. (DEP's Motion, exh. E.) On March 14, 1997, DEP executed the permits, and, on March 18, 1997, DEP sent them to Russell. (DEP's Motion, exh. F.) Russell did not file any appeals after receipt of the executed permits.

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[1] The italicized language was added to the margin of the letter and initialed by attorney Rosen and Steven Russell, President of Russell.

On April 28, 1997, the Board granted an Uncontested Motion to Consolidate Appeals docketed at EHB Docket Nos. 97-018-MR, 97-021-MR and 97-022-MR. On May 2, 1997, based on mussel sampling and analysis, DEP amended the permits to restrict dredging in Pools 3, 4, and 5 of the Allegheny River. (DEP's Motion, exh. H.) Russell did not appeal the amended permits.

On July 7, 1997, DEP filed the instant Motion to Dismiss Based on Lack of Jurisdiction (Motion), along with a Memorandum of Law and supporting documents. DEP asserts in its Motion that: (1) because the permits were not valid absent the signatures of Russell and DEP, the unsigned permits did not affect the personal or property rights of Russell; (2) because the unsigned permits did not affect Russell's personal or property rights, DEP's sending of draft permits to Russell on December 20, 1996 for Russell's acceptance was not an appealable action; and (3) because the unsigned draft permits were not appealable, Russell's appeal should be dismissed.

On August 29, 1997, Russell filed a Memorandum of Law in opposition to DEP's Motion. In its Memorandum of Law, Russell maintains that: (1) the permits were *not* tentative "draft permits" but were final permits "issued" by DEP to Russell on December 20, 1996; (2) DEP represented to Russell that the permits were effective without DEP's signature; (3) case law does not require that permits be signed before they are appealed; and (4) DEP's December 20, 1996 letter is, in effect, the denial of full dredging rights to Russell; because it is like the denial of a permit application, it is appealable without a signed permit.[2]

II.

The issues presented, then, are: (1) whether Russell's appeals are premature because they

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[2] This Memorandum was filed by John P. Edgar, Esquire, who has taken over the representation of Russell in these consolidated appeals.

were filed before the permits were signed; and, (2) if so, whether they should be dismissed. Section 4(a) of the Environmental Hearing Board Act[3] gives the Board jurisdiction to review "permits . . . of [DEP]." However, in order for a particular permit to be appealable, it must affect the "personal or property rights, privileges, immunities, duties, liabilities or obligations" of the appellant. 25 Pa. Code § 1021.2(a); *R & A Bender, Inc. v. DEP*, 1996 EHB 1041; *Elephant Septic Tank Service v. DER*, 1993 EHB 590. In determining whether a permit has such an effect, the Board will not view DEP's action as an isolated and passive act on the part of DEP; rather, the Board will consider the particular factual and procedural circumstances surrounding the permit. *Middle Creek Bible Conference, Inc. v. Department of Environmental Resources*, 645 A.2d 295 (Pa. Cmwlth. 1994); *JEK Construction Company, Inc. v. DER*, 1990 EHB 535.

Permits for commercial dredging activities are governed by the Dam Safety and Encroachments Act (DSEA), Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1-693.27, and the regulations at 25 Pa. Code §§ 105.1-105.64 and 105.361-105.385. Applicants for such permits must submit an extensive application to DEP in accordance with the requirements of 25 Pa. Code §§ 105.13 and 105.371. DEP, after reviewing the application pursuant to 25 Pa. Code §§ 105.14-105.21, may approve or deny it. Upon approval, DEP grants the permittee a permit with terms and conditions that are necessary to assure the permittee's compliance with applicable laws. 32 P.S. § 693.9. If DEP denies the application, however, DEP must communicate to the applicant in writing the reason for denial and the appeal procedures. 25 Pa. Code § 105.21(d).

In accordance with these statutory and regulatory provisions, Russell submitted applications

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[3] Act of July 13, 1988, P.L. 530, 35 P.S. § 7514(a).

to renew its commercial dredging permits. DEP reviewed them, approved them, prepared the permits and sent them out to Russell, unsigned, on December 20, 1996, accompanied by the transmittal letter quoted at the outset. According to this letter, the permits would not be effective until: (1) Russell signed them at the end accepting and agreeing to comply with the terms and conditions contained in them; (2) Russell sent them back to DEP; and (3) DEP signed them.

The renewed permits contained special conditions that Russell found unacceptable. The appropriate method for Russell to challenge the legality and appropriateness of these special conditions was by appeal to this Board. To invoke our jurisdiction, an appeal had to be filed within 30 days after Russell "received written notice of the [DEP] action . . . ." 25 Pa. Code § 1021.52(a). According to Russell, this created a dilemma. It could not activate the permits, according to the transmittal letter, without signing them and sending them back to DEP for its signature. But in signing the permits, Russell would agree to accept and comply with the special conditions it wanted to challenge before this Board. Russell feared that it would waive its appeal rights by signing and returning the permits.

Attorney Rosen apparently tried to obtain a stipulation with DEP that would preserve Russell's appeal rights as early as January 15, 1997 but was unable to get it in writing until a month later. In the meantime, the clock was running on the 30-day period triggered by receipt of the unsigned permits on or about December 21, 1996, if they were appealable. Both attorney Rosen and attorney Ingram, apparently acting independently, filed the present appeals as a protective measure before those 30 days expired. In doing so, they knowingly or unknowingly followed the Board's advice in Part IIIA. of its Practice and Procedure Manual where doubt exists as to the appealability of a DEP action.

With the appeals filed protecting Russell's appeal rights, Russell signed the permits but did not return them to DEP until it received the signed stipulation of February 14, 1997. This stipulation acknowledged Russell's appeal rights but did not waive any party's other rights with respect to any present or future appeals. The permits were returned to DEP on February 24, 1997, signed by DEP on March 14, 1997 and sent back to Russell on March 18, 1997. Russell did not file any other appeals.

DEP claims that the appeals filed in January 1997 must be dismissed as premature because DEP's "final actions" did not occur until March 14, 1997 when the permits were fully signed. Since Russell filed no appeals after receiving notice of the final actions, its appeal rights have expired with respect to those permits. Russell argues, to the contrary, that the appeals sent out on December 20, 1996 were "final actions" from which timely appeals were taken, and that the February 14, 1997 stipulation acknowledges that finality.

It is curious that neither party has cited the regulation at 25 Pa. Code § 105.42(a) which reads as follows:

> Upon receipt of a permit, the permittee shall sign the permit thereby expressly certifying the permittee's acceptance of, and agreement to comply with, the terms and conditions of the permit. The permittee shall return a signed copy of the permit to the Department. The permit will not be effective until the signed copy of the permit is received by the Department.

Despite the fact that this provision covers all DSEA permits and has been in effect for many years, it has never been construed either by this Board or any appellate court. Nor, to our knowledge, has any litigant previously questioned the point when a DSEA permit becomes final and appealable based on this regulation.

The last sentence clearly states that the "permit will not be effective until the signed copy .

. . is received by [DEP]." That certainly suggests that the action becomes final at that point. The drafters of the regulation either contemplated that the permit would be signed by DEP before being sent to the permittee, or that DEP's signature was unnecessary to make the permit effective. While the parties have not pointed us to any statutory or regulatory requirement that a permit be signed by DEP, it seems only reasonable for the proper administration of governmental affairs that such documents bear the signature of an authorized DEP official. That being the case, we conclude that the drafters of section 105.42(a) anticipated that the permit would be signed by DEP before being sent out and would go into effect after being signed by the permittee and returned to DEP. The permit action would become final, according to this regulation, when DEP received the fully-signed copy back from the permittee.

While final at that point, the permittee's 30-day appeal period from the permit action would not begin until he received written notice that the signed permit had been received by DEP. That would require DEP to send out a letter to that effect. Paragraph 1 of the permits sent to Russell on December 20, 1996, quoted at the outset of this opinion, parallels the language of 25 Pa. Code § 105.42(a) and was obviously meant to implement the regulation. The cover letter, however, set forth a different procedure.

Instead of permits signed by DEP, the cover letter transmitted unsigned permits that first had to be signed by Russell and returned to DEP. Instead of becoming effective when DEP received them back, the cover letter expressly changed the effective date to the date when DEP signs them. At the very least, the procedure followed by DEP with respect to these permits and the conflict between the language of the cover letter and paragraph 1 of the permits created uncertainty and confusion.

Additional anxiety on the part of Russell and its attorney was created by the possibility that Russell would waive its appeal rights by signing the permits, thereby "expressly certifying [Russell's] acceptance of, and agreement to comply with, the terms and conditions of the [permits]." 25 Pa. Code § 105.42(a). The record is not clear on the point, but it is probable that Russell was faced with this question when it was called upon to sign earlier permits; but if Russell was satisfied with all of the terms and conditions of the earlier permits, the question might not have taken on any significance.

It is curious, indeed, that no prior case has dealt with this waiver question under DSEA permits, given the many years the regulation at 25 Pa. Code § 105.42(a) has been in existence. The absence of any prior Board rulings on the issue was enough, in our judgment, to make Russell and its attorneys properly cautious about signing the permits without some agreement with DEP that the signatures would not constitute waivers.

Our construction of 25 Pa. Code § 105.42(a), discussed above, leads us to conclude that DEP should send out signed permits to a permittee under the DSEA, permits that will become final and appealable when signed by the permittee and received back by DEP. Since the permittee's signature is necessary to get the permit, it does not constitute a waiver of the permittee's rights to seek Board review of DEP's action. Written notice of DEP's receipt of the fully-signed permit should be sent to the permittee promptly so that the 30-day appeal period can be activated. The permittee's appeal rights will be preserved only if an appeal is filed within that period.

Russell's appeals here were premature under this construction of the regulation since they were filed before the permit actions became final and appealable. Being premature, they are vulnerable to a Motion to Dismiss such as that filed by DEP. Before granting the Motion, however,

we need to consider the surrounding circumstances. Since Russell has not filed later timely appeals from DEP's final actions, it will lose its appeal rights if we grant DEP's Motion.[4] That would work an injustice, in our judgment, because of the confusion and uncertainty created by DEP.

Commonwealth Court held in *Tarlo v. University of Pittsburgh*, 443 A.2d 879 (Pa. Cmwlth. 1982), that, when an appeal is filed late because a government agency misled the appellant about the running of the appeal period, an appeal *nunc pro tunc* will be allowed. Our Rules of Procedure provide for *nunc pro tunc* appeals at 25 Pa. Code § 1021.53(f). We followed the *Tarlo* case in *Fisher v. DER*, 1993 EHB 425, allowing an appeal *nunc pro tunc* when DEP misled an appellant about proper appellate procedure. *Nunc pro tunc* appeals excuse late filings rather than early filings as we have here. But we are persuaded that the same circumstances that confused Tarlo and Fisher to file their appeals late confused Russell to file its appeals early. While we do not have an appeal *tunc pro nunc* as such, the same compelling circumstances lead us to treat Russell's premature appeals as timely filed.

We caution litigants not to expect this type of treatment to be accorded them in the future. Protective appeals should be filed when appealability is in question because of uncertainty over the finality of DEP's action; but they should be followed by later timely appeals once it becomes clear that the earlier appeals were premature. That is the normal expected procedure, and we will permit litigants to depart from it only under the most compelling circumstances.

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[4] The appeals were final when DEP received them back; but the running of the 30-day appeal period did not begin until Russell received written notice from DEP. The notice was sent on March 18, 1997 and, presumably, received shortly thereafter.

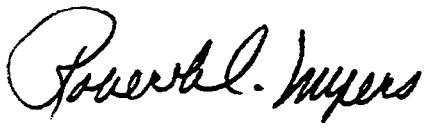
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RUSSELL INDUSTRIES, INC.	:	
	:	
v.	:	**EHB Docket No. 97-018-MR**
	:	**(Consolidated with 97-021-MR**
COMMONWEALTH OF PENNSYLVANIA,	:	**and 97-022-MR)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

ORDER

AND NOW, this 13th day of November, 1997, it is ordered that the Department's Motion to Dismiss for Lack of Jurisdiction is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: November 13, 1997

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

For the Commonwealth, DEP:
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Southwestern Region

For Appellant:
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Henry Ingram, Esquire
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

TRI-STATE RIVER PRODUCTS, INC.	:	
	:	
v.	:	**EHB Docket No. 97-019-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** November 19, 1997

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

by Robert D. Myers, Member

Synopsis:

A Motion for Summary Judgment Based on Lack of Jurisdiction is denied where it seeks to dismiss an appeal as untimely on the basis of a DEP procedure that is contrary to law. A Motion for Summary Judgment Based on Administrative Finality is granted where: (1) DEP issued a Water Obstruction and Encroachments Permit which required the permittee to conduct mussel surveys prior to dredging and prohibited dredging where there existed significant mussel resources; (2) these requirements became final; (3) DEP approved successive transfers of the permit, wherein the new permittees agreed to be bound by all terms and conditions of the permit; and (4) the terms and conditions of the reissued permit are not new but have been in continuous effect since the permit was originally issued.

OPINION

On May 16, 1991, the Department of Environmental Protection (DEP) issued Water

Obstruction and Encroachment Permit No. E02-919 (Permit No. E02-919) to Dravo Basic Materials Company (Dravo) for commercial sand and gravel dredging along the Ohio River. Special Condition F of Permit No. E02-919 provided as follows:

> F. Prior to dredging, Licensee shall undertake, or cause to be undertaken by a reputable environmental consultant, at Licensee's expense, a survey to determine if mussels are present in the area it proposes to dredge. The specific areas to be surveyed, and method of survey shall be determined through consultation with the U.S. Army Corps of Engineers and U.S. Department of the Interior, Fish and Wildlife Service. The data collected shall be provided to the Pennsylvania Department of Environmental Resources, Bureau of Dams and Waterway Management, Pennsylvania Fish Commission, U.S. Army Corps of Engineers and the U.S. Department of the Interior, Fish and Wildlife Service for review and comment before dredging is initiated. If significant mussel resources exist in the proposed dredging area, dredging shall be prohibited.

(DEP's Motion at paras. 1, 6.) Permit No. E02-919 also incorporated by reference a sand and gravel agreement between DEP and Dravo, Sand and Gravel Agreement No. M-280151-04, which provided in pertinent part:

> 4.01 Licensee agrees to conduct all dredging, processing and other operations related to this Agreement in such a manner as to comply with the provisions set forth in the STIPULATIONS FOR PROTECTION AND CONSERVATION OF STATE RIVERS, STREAMS AND/OR BODIES OF WATER AND OF PUBLIC NATURAL RESOURCES (STIPULATIONS), identified as Exhibit "B" attached hereto and made a part of this Agreement.

(DEP's Motion at paras. 2, 4.) The STIPULATIONS which were made part of the sand and gravel agreement provided in pertinent part:

> 2.25 Prior to dredging Licensee shall[,] at the request of [DEP], undertake or cause to be undertaken by a reputable environmental consultant, at Licensee's expense, a survey to determine if mussels are present in the area it proposes to dredge. The data collected shall be provided to [DEP], Pennsylvania Fish Commission, U.S. Army Corps of Engineers and the U.S. Department of the Interior, Fish and Wildlife Service for review and comment before dredging is initiated. If significant mussel resources exist in the proposed dredging area, dredging shall be prohibited.

(DEP's Motion at para. 5.) Dravo never appealed the issuance of Permit No. E02-919. (DEP's Motion at para. 7.)

In December 1995, Dravo and Martin Marietta Materials, Inc. (Martin Marietta) applied for the transfer of Permit No. E02-919 from Dravo to Martin Marietta. In the Application for Transfer of Permit, Martin Marietta agreed to be bound by all terms and conditions of the permit. DEP approved the transfer on January 5, 1996, and Martin Marietta never challenged the terms and conditions of the permit. (DEP's Motion at paras. 8-10.)

On July 24, 1995, Martin Marietta requested an extension of the time limits for Permit No. E02-919 and another permit. In a letter dated January 25, 1996, DEP granted the request and extended the time limits to August 30, 1996. In its letter, DEP stated: "All conditions specified in the original permits remain in effect and are to be complied with as part of this extension." DEP further indicated that it would not grant another extension unless Martin Marietta submitted mussel surveys for areas proposed for dredging in the remaining months of 1996 and in 1997. Martin Marietta never appealed the extension. (DEP's Motion at paras. 11-12; Appendix E.)

On May 16, 1996, Martin Marietta and Tri-State River Products, Inc. (Tri-State) applied for transfer of Permit No. E02-919 from Martin Marietta to Tri-State. In the Application for Transfer of Permit, Tri-State agreed to be bound by all terms and conditions of the permit. DEP approved the transfer on September 24, 1996. (DEP's Motion at paras. 13-15.)

Subsequent to this transfer, Tri-State applied for renewal of Permit No. E02-919. On December 20, 1996, DEP sent an unsigned copy of the permit to Tri-State. DEP's cover letter stated:

Enclosed are duplicate copies of your Water Obstruction and Encroachment Permits.

> These Permits cannot be validated until they have been signed by you and [DEP]. PLEASE SIGN BOTH COPIES OF PERMITS AND RETURN THEM TO THIS OFFICE IMMEDIATELY FOR FINAL SIGNATURE BY [DEP]. Copies of the final signed Permits will be returned to you for your records.

(DEP's Motion at para. 28.) Tri-State signed the permit on December 26, 1996[1] and sent it back so that DEP received it on January 3, 1997. (DEP's Motion, Appendix G.) On January 21, 1997, Tri-State filed a Notice of Appeal with the Board, attaching a copy of the permit, which had not yet been signed by DEP. (DEP's Motion at para. 29.)

In the Notice of Appeal, Tri-State objected to "new restrictions and requirements on dredging." (DEP's Motion at paras. 16-17.) The only "new" restrictions are contained in Special Conditions A and C, which state:

> A. Although Page 1 of this permit depicts areas approved for dredging in past permits, since no mussel surveys have been submitted to date, the permittee is not authorized to perform commercial sand and gravel dredging prior to conducting mussel surveys in accordance with [DEP] approved procedures and submitting six copies of the results to [DEP] for review and authorization for dredging specific river miles. This authorization will be in the form of a permit amendment.
>
> . . . .
>
> C. When the updated NEPA [National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d] documentation that will be prepared relative to commercial sand and gravel dredging on the Allegheny and Ohio Rivers is finalized, this permit may be reopened and modified to reflect the study results.

(DEP's Motion at paras. 18-20.)

After receiving the signed permit from Tri-State, DEP did not execute and return the permit to Tri-State until May 20, 1997. The reason for the delay was because Tri-State had not secured a

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[1] DEP alleges in its Motion that Tri-State signed the permit on January 26, 1997; however, the date which appears on the permit is December 26, 1996. (DEP's Motion at para. 29.)

bond that was required for the assignment of Sand and Gravel Agreement No. M-280176-04 from Martin Marietta to Tri-State. (DEP's Motion at paras. 30-31.) Tri-State did not file an appeal after DEP signed and returned the permit. (DEP's Motion at para. 32.)

On August 18, 1997, DEP filed the present Motion for Summary Judgment Based on Administrative Finality and Lack of Jurisdiction (Motion). DEP argues therein that: (1) because DEP had not signed the reissued permit when Tri-State filed its Notice of Appeal in January 1997, the reissued permit had no effect on Tri-state's personal or property rights at that time and, therefore, was not yet an appealable action; and (2) because the mussel survey requirement of Permit No. E02-919 has been in continuous effect and has never been appealed, and because Tri-State failed to challenge the requirement when the permit was transferred from Martin Marietta to Tri-State on September 24, 1996, Tri-State cannot challenge it here. Tri-State filed no response to DEP's Motion.

The Board will grant summary judgment where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Pa. R.C.P. No. 1035.2. Summary judgment may be entered against a party who does not respond to the motion; however, it is not required. Pa. R.C.P. No. 1035.3(d); Explanatory Comment - 1996 to Pa. R.C.P. No. 1035.1.

I. Lack of Jurisdiction

DEP contends that it is entitled to judgment as a matter of law because, when Tri-State filed its Notice of Appeal with the Board, DEP had not yet signed the permit. Because the cover letter required the signatures of both Tri-State and DEP to validate the permit, the permit had not yet affected Tri-State's personal or property rights. Therefore, DEP's reissuance of the permit was not an appealable action.

Permits for commercial dredging activities are governed by the Dam Safety and Encroachments Act (DSEA), Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1-693.27, and the regulations at 25 Pa. Code §§ 105.1-105.64 and 105.361-105.385. The effective date of a permit is covered by the DEP regulation at 25 Pa. Code § 105.42(a) (emphasis added):

> Upon receipt of a permit, the permittee shall sign the permit thereby expressly certifying the permittee's acceptance of, and agreement to comply with, the terms and conditions of the permit. The permittee shall return a signed copy of the permit to the Department. *The permit will not be effective until the signed copy of the permit is received by the Department.*[2]

We have held that the drafters of 25 Pa. Code § 105.42(a) anticipated that DSEA permits would be signed by DEP *before* being sent out and would go into effect after being signed by the permittee and returned to DEP. *Russell Industries, Inc. v. DEP*, EHB Docket No. 97-018-MR (cons. with 97-021-MR and 97-022-MR) (Opinion issued November 13, 1997.) The permit action would become final and appealable when DEP received the fully-executed copy back from the permittee. *Id.* The permittee's 30-day appeal period would begin to run when he received written notice from DEP that DEP had received the signed permit. *Id.*

In this case, Tri-State followed the procedure set forth in 25 Pa. Code § 105.42(a) by signing

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[2] We note that Condition No. 1 of the permit parallels the language of 25 Pa. Code § 105.42(a):

> 1. The permittee shall sign the permit thereby expressly certifying the permittee's acceptance of, and agreement to comply with, the terms and conditions of the permit. *The permittee shall return a signed copy of the permit to [DEP]. The permit will not be effective until the signed copy of the permit is received by [DEP].*

(DEP's Motion, Appendix J.) (Emphasis added.)

the permit, returning it to DEP, and filing its appeal within 30 days.[3] DEP, on the other hand, tried to create a new procedure in its cover letter whereby the permit would not become effective, and appealable, until Tri-State signed and returned the permit to DEP, and until DEP then signed the permit. Because DEP's cover letter procedure has no basis in existing law, DEP is not entitled to judgment as a matter of law. Therefore, we deny the portion of DEP's Motion that is based on lack of jurisdiction.

II. Administrative Finality

DEP also argues that it is entitled to summary judgment because the mussel survey requirement was always part of the permit; it was never appealed; and Tri-State did not appeal it after the permit transfer in September 1996.

The doctrine of administrative finality focuses on the failure of a party aggrieved by an administrative action to pursue a statutory appeal remedy. *Kent Coal Mining Co. v. Department of Environmental Resources*, 550 A.2d 279 (Pa. Cmwlth. 1988). In *Department of Environmental Resources v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765, 767 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977), the Commonwealth Court explained the doctrine as follows:

> 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.

With respect to the issuance of permits, the Board has held that, where a permit condition has been

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[3] This differs from the facts in *Russell* where the appeal was filed before the permit was sent back to DEP. There, the appeal was premature; here it is not.

in continuous effect, and the permittee did not appeal the condition when the permit was originally issued, the permit condition cannot be challenged in later permit modifications. *Glacial Sand and Gravel Company v. DEP*, EHB Docket No. 97-023-MR (Opinion issued August 25, 1997); *Empire Sanitary Landfill, Inc. v. DEP*, 1996 EHB 345.

In this case, the permit was originally issued to Dravo on May 16, 1991 containing Special Condition F, requiring Dravo to undertake, or cause to be undertaken, mussel surveys prior to dredging and prohibiting dredging where there existed significant mussel resources. The permit also contained the Sand and Gravel Agreement, incorporated by reference, which set forth the same restriction. Dravo did not appeal these requirements and, as a result, they became final. When Martin Marietta requested DEP to authorize the transfer of the Dravo permit in December 1995, Martin Marietta agreed to be bound by all of the terms and conditions contained within it. When Tri-State requested DEP to authorize the transfer of the Dravo/Martin Marietta permit (then on extension) on May 16, 1996, Tri-State agreed to be bound by all of the terms and conditions of the permit.

We have held that, under the doctrine of administrative finality, third-party appellants cannot use a challenge to a permit transfer as a vehicle to litigate the underlying terms and conditions of the permit which have not been changed. *Fuller v. DER*, 1990 EHB 1726, 1750. If those underlying terms and conditions are final as to third parties, they are also final as to transferees who have sought assignment of the permit into their own names. Thus, Martin Marietta and, in turn, Tri-State are bound by the requirements of Special Condition F and the Sand and Gravel Agreement which

became final when the permit was in Dravo's name.[4]

Tri-State, in the appeal, challenges "new" Special Conditions A and C. The "new" Special Condition A in Permit No. E02-919 prohibits dredging along the Ohio River until Tri-State has conducted proper mussel surveys. The "new" Special Condition C gives notice that DEP may modify the permit based on a NEPA mussel study. (*See* DEP's Motion, Appendix H.) However, it is clear that the original permit required mussel surveys prior to dredging and prohibited dredging where there existed significant mussel resources. Therefore, Special Conditions A and C are not really new requirements.[5]

Because the latest permit contains no "new" restrictions, and because Tri-State is bound by the terms and conditions of the original permit, we conclude that DEP is entitled to judgment as a matter of law based on the doctrine of administrative finality.[6]

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[4] Our conclusion here does not depend on the fact that Martin Marietta and Tri-State signed transfer applications expressly agreeing to be bound by the terms and conditions of the permit. That intention to be bound is implicit in the act of requesting a transfer of a specific permit with specific provisions. An entity dissatisfied with those terms and conditions has the option of applying for a new permit rather than a transfer.

[5] We reached the same conclusion on similar facts in *Glacial*, where the permit was still in the hands of the original permittee. It would be anomalous to reach a different result here simply on the basis that the permit has been transferred.

[6] In *Glacial* and *Tri-State* (EHB Docket No.97-020-MR), issued simultaneously with this Opinion, we granted partial summary judgment because those appeals contained challenges to the scientific basis of the mussel surveys which had already been conducted there. This appeal makes an identical challenge, but, because the mussel surveys have not yet been done with respect to this permit, the challenge is premature. Accordingly, partial summary judgment is not in order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

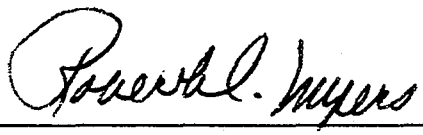
TRI-STATE RIVER PRODUCTS, INC.	:	
	:	
v.	:	**EHB Docket No. 97-019-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 19th day of November, 1997, it is ordered that the Department of Environmental Protection's (DEP) Motion for Summary Judgment Based on Lack of Jurisdiction is denied. It is further ordered that DEP's Motion for Summary Judgment Based on Administrative Finality is granted.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 97-019-MR

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: November 19, 1997

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

For the Commonwealth, DEP:
Charney Regenstein, Esquire
Southwestern Region

For Appellant:
Henry Ingram, Esquire
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

TRI-STATE RIVER PRODUCTS, INC.	:	
	:	
v.	:	**EHB Docket No. 97-020-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** November 19, 1997

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

by Robert D. Myers, Member

Synopsis:

A Motion for Summary Judgment Based on Lack of Jurisdiction is denied where it seeks to dismiss an appeal as untimely on the basis of a DEP procedure that is contrary to law. A Motion for Summary Judgment Based on Administrative Finality is granted in part where: (1) DEP issued a Water Obstruction and Encroachments Permit which required the permittee to conduct mussel surveys prior to dredging and prohibited dredging where there existed significant mussel resources; (2) these requirements became final; (3) DEP approved successive transfers of the permit, wherein the new permittees agreed to be bound by all terms and conditions of the permit; and (4) the terms and conditions of the reissued permit are not new but have been in continuous effect since the permit was originally issued.

OPINION

On May 16, 1991, the Department of Environmental Protection (DEP) issued Water

Obstruction and Encroachment Permit Nos. E04-184 (Permit No. E04-184) and E04-180 (Permit No. E04-180) to Dravo Basic Materials Company (Dravo) for commercial sand and gravel dredging along the Ohio River in Beaver County. Special Condition F of the permits provided as follows:

> F. Prior to dredging, Licensee shall undertake, or cause to be undertaken by a reputable environmental consultant, at Licensee's expense, a survey to determine if mussels are present in the area it proposes to dredge. The specific areas to be surveyed, and method of survey shall be determined through consultation with the U.S. Army Corps of Engineers and U.S. Department of the Interior, Fish and Wildlife Service. The data collected shall be provided to the Pennsylvania Department of Environmental Resources, Bureau of Dams and Waterway Management, Pennsylvania Fish Commission, U.S. Army Corps of Engineers and the U.S. Department of the Interior, Fish and Wildlife Service for review and comment before dredging is initiated. If significant mussel resources exist in the proposed dredging area, dredging shall be prohibited.

(DEP's Motion at para. 3.) The permits also incorporated by reference a sand and gravel agreement between DEP and Dravo, Sand and Gravel Agreement No. M-280151-04, which provided in pertinent part:

> 4.01 Licensee agrees to conduct all dredging, processing and other operations related to this Agreement in such a manner as to comply with the provisions set forth in the STIPULATIONS FOR PROTECTION AND CONSERVATION OF STATE RIVERS, STREAMS AND/OR BODIES OF WATER AND OF PUBLIC NATURAL RESOURCES (STIPULATIONS), identified as Exhibit "B" attached hereto and made a part of this Agreement.

(DEP's Motion at paras. 4-5.) The STIPULATIONS which were made part of the sand and gravel agreement provided in pertinent part:

> 2.25 Prior to dredging Licensee shall[,] at the request of [DEP], undertake or cause to be undertaken by a reputable environmental consultant, at Licensee's expense, a survey to determine if mussels are present in the area it proposes to dredge. The data collected shall be provided to [DEP], Pennsylvania Fish Commission, U.S. Army Corps of Engineers and the U.S. Department of the Interior, Fish and Wildlife Service for review and comment before dredging is initiated. If significant mussel resources exist in the proposed dredging area, dredging shall be prohibited.

(DEP's Motion at para. 6.) Dravo never appealed the issuance of the permits. (DEP's Motion at para. 7.)

In December 1995, Dravo and Martin Marietta Materials, Inc. (Martin Marietta) applied for the transfer of the permits from Dravo to Martin Marietta. In the Application for Transfer of Permit, Martin Marietta agreed to be bound by all terms and conditions of the permit. DEP approved the transfer on January 5, 1996, and Martin Marietta never challenged the terms and conditions of the permit. (DEP's Motion at paras. 8-10.)

On June 30, 1995, a sand and gravel agreement between DEP and Martin Marietta, Sand and Gravel Agreement No. M-280176-04, replaced the previous agreement between DEP and Dravo. However, the new agreement contained the same provisions as the old agreement with respect to mussel surveys. (DEP's Motion at paras. 11-13.)

In May 1996, Martin Marietta and Tri-State River Products, Inc. (Tri-State) applied for transfer of the permits from Martin Marietta to Tri-State. In the Application for Transfer of Permit, Tri-State agreed to be bound by all terms and conditions of the permit. DEP approved the transfer on September 24, 1996. (DEP's Motion at paras. 14-16.)

On September 16, 1996, DEP extended the permits' expiration date to December 31, 1996, modified the permissible dredging areas, and reminded Tri-State that: "All conditions specified in the original permit remain in effect and are to be complied with as part of this extension." (DEP's Motion, Appendix H.) Tri-State never appealed the extension. (DEP's Motion at paras. 17-18.)

Subsequently, Tri-State applied for renewal of the permits. On December 20, 1996, DEP sent unsigned copies of the permits to Tri-State. DEP's cover letter stated:

Enclosed are duplicate copies of your Water Obstruction and Encroachment Permits.

> These Permits cannot be validated until they have been signed by you and [DEP]. PLEASE SIGN BOTH COPIES OF PERMITS AND RETURN THEM TO THIS OFFICE IMMEDIATELY FOR FINAL SIGNATURE BY [DEP]. Copies of the final signed Permits will be returned to you for your records.

(DEP's Motion at para. 32.) Tri-State signed Permit No. E04-184[1] on December 26, 1996 and sent it back so that DEP received it on January 3, 1997. (DEP's Motion, Appendix I.) On January 21, 1997, Tri-State filed a Notice of Appeal with respect to that permit. Tri-State attached a copy of Permit No. E04-184 which had been signed by Tri-State on December 26. 1996 but had not yet been signed by DEP. (DEP's Motion at para. 33.)

In the Notice of Appeal, Tri-State objected to "new restrictions and requirements on dredging." (DEP's Motion at paras. 20.) Tri-State also challenged the scientific or technical basis for the permit's restrictions. (Notice of Appeal, para. 3(i).) The only "new" restrictions are those contained in Special Conditions A, C, and E, which state:

> A. Although Page 1 of this permit depicts areas approved for dredging in past permits, based on the mussel survey information submitted to date, you are only authorized to conduct commercial sand and gravel dredging between the river miles listed below.
>
> . . . .
>
> C. When the updated NEPA [National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d] documentation that will be prepared relative to commercial sand and gravel dredging on the Allegheny and Ohio Rivers is finalized, this permit may be reopened and modified to reflect the study results.
>
> . . . .
>
> E. Prior to dredging in locations other than those specified in Special Condition A above, the permittee shall conduct mussel surveys in accordance with [DEP]

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[1] Permit No. E04-184, as sent by DEP to Tri-State on December 20, 1996, and as signed by Tri-State on December 26, 1996, incorporated Permit No. E04-180. (DEP's Motion, Appendix I.)

> approved procedures, and submit six copies of the results to [DEP] for review and authorization of dredging activities for specific river miles. Work in these additional areas can only begin after authorization from [DEP]. This authorization will be in the form of a permit amendment.

(DEP's Motion at paras. 21-24.)

After receiving the signed permit from Tri-State, DEP did not execute and return the permit to Tri-State until May 20, 1997. The reason for the delay was because Tri-State had not secured a bond that was required for the assignment of Sand and Gravel Agreement No. M-280176-04 from Martin Marietta to Tri-State. (DEP's Motion at paras. 34-35.) Tri-State did not file an appeal once DEP signed and returned the permit. (DEP's Motion at para. 36.)

On August 18, 1997, DEP filed the present Motion for Summary Judgment Based on Administrative Finality and Lack of Jurisdiction (Motion). DEP argues therein that: (1) because DEP had not signed the reissued permit when Tri-State filed its Notice of Appeal in January 1997, the reissued permit had no effect on Tri-state's personal or property rights at that time and, therefore, was not yet an appealable action; and (2) because the mussel survey requirement of the permit has been in continuous effect and has never been appealed, and because Tri-State failed to challenge the requirement when the permit were transferred from Martin Marietta to Tri-State and when DEP extended the expiration date of the permit, Tri-State cannot challenge it here. Tri-State filed no response to DEP's Motion.

The Board will grant summary judgment where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Pa. R.C.P. No. 1035.2. Summary judgment may be entered against a party who does not respond to the motion; however, it is not required. Pa. R.C.P. No. 1035.3(d); Explanatory Comment - 1996 to Pa. R.C.P. No. 1035.1.

I. Lack of Jurisdiction

DEP contends that it is entitled to judgment as a matter of law because, when Tri-State filed its Notice of Appeal with the Board, DEP had not yet signed the permit. Because the cover letter required the signatures of both Tri-State and DEP to validate the permit, the permit had not yet affected Tri-State's personal or property rights. Therefore, DEP's reissuance of the permit was not an appealable action.

Permits for commercial dredging activities are governed by the Dam Safety and Encroachments Act (DSEA), Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1-693.27, and the regulations at 25 Pa. Code §§ 105.1-105.64 and 105.361-105.385. The effective date of a permit is covered by the DEP regulation at 25 Pa. Code § 105.42(a) (emphasis added):

> Upon receipt of a permit, the permittee shall sign the permit thereby expressly certifying the permittee's acceptance of, and agreement to comply with, the terms and conditions of the permit. The permittee shall return a signed copy of the permit to the Department. *The permit will not be effective until the signed copy of the permit is received by the Department.*[2]

We have held that the drafters of 25 Pa. Code § 105.42(a) anticipated that DSEA permits would be signed by DEP *before* being sent out and would go into effect after being signed by the permittee and returned to DEP. *Russell Industries, Inc. v. DEP*, EHB Docket No. 97-018-MR (cons. with 97-

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[2] We note that Condition No. 1 of the permit parallels the language of 25 Pa. Code § 105.42(a):

> 1. The permittee shall sign the permit thereby expressly certifying the permittee's acceptance of, and agreement to comply with, the terms and conditions of the permit. *The permittee shall return a signed copy of the permit to [DEP]. The permit will not be effective until the signed copy of the permit is received by [DEP].*

(DEP's Motion, Appendix J.) (Emphasis added.)

021-MR and 97-022-MR) (Opinion issued November 13, 1997.) The permit action would become final and appealable when DEP received the fully-executed copy back from the permittee. *Id.* The permittee's 30-day appeal period would begin to run when he received written notice from DEP that DEP had received the signed permit. *Id.*

In this case, Tri-State followed the procedure set forth in 25 Pa. Code § 105.42(a) by signing the permit, returning it to DEP, and filing its appeal within 30 days.[3] DEP, on the other hand, tried to create a new procedure in its cover letter whereby the permit would not become effective, and appealable, until Tri-State signed and returned the permit to DEP, and until DEP then signed the permit. Because DEP's cover letter procedure has no basis in existing law, DEP is not entitled to judgment as a matter of law. Therefore, we deny the portion of DEP's Motion that is based on lack of jurisdiction.

II. Administrative Finality

DEP also argues that it is entitled to summary judgment because the mussel survey requirement was always part of the permit; it was never appealed; Tri-State did not appeal it after the permit transfer; and Tri-State did not appeal it after the extension.

The doctrine of administrative finality focuses on the failure of a party aggrieved by an administrative action to pursue a statutory appeal remedy. *Kent Coal Mining Co. v. Department of Environmental Resources*, 550 A.2d 279 (Pa. Cmwlth. 1988). In *Department of Environmental Resources v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765, 767 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977), the Commonwealth Court explained the

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[3] This differs from the facts in *Russell* where the appeal was filed before the permit was sent back to DEP. There, the appeal was premature; here it is not.

doctrine as follows:

> 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.

With respect to the issuance of permits, the Board has held that, where a permit condition has been in continuous effect, and the permittee did not appeal the condition when the permit was originally issued, the permit condition cannot be challenged in later permit modifications. *Glacial Sand and Gravel Company v. DEP*, EHB Docket No. 97-023-MR (Opinion issued August 25, 1997); *Empire Sanitary Landfill, Inc. v. DEP*, 1996 EHB 345.

In this case, the permit was originally issued to Dravo on May 16, 1991 containing Special Condition F, requiring Dravo to undertake, or cause to be undertaken, mussel surveys prior to dredging and prohibiting dredging where there existed significant mussel resources. The permit also contained the Sand and Gravel Agreement, incorporated by reference, which set forth the same restriction. Dravo did not appeal these requirements and, as a result, they became final. When Martin Marietta requested DEP to authorize the transfer of the Dravo permit in December 1995, Martin Marietta agreed to be bound by all of the terms and conditions contained within it. When a new sand and gravel agreement with the mussel survey requirement replaced the old agreement in June 1995, Martin Marietta was a party to it and, of course, did not appeal. When Tri-State requested DEP to authorize the transfer of the Dravo/Martin Marietta permit in May 1996, Tri-State agreed to be bound by all of the terms and conditions of the permit. When DEP extended the expiration date of the permit in September 1996, expressly retaining all terms and conditions of the original permit, Tri-State did not appeal.

We have held that, under the doctrine of administrative finality, third-party appellants cannot use a challenge to a permit transfer as a vehicle to litigate the underlying terms and conditions of the permit which have not been changed. *Fuller v. DER*, 1990 EHB 1726, 1750. In an opinion issued simultaneously with this opinion, we hold that, if those underlying terms and conditions are final as to third parties, they are also final as to transferees who have sought assignment of the permit into their own names. *Tri-State River Products, Inc. v. DEP*, EHB Docket No. 97-019-MR (Opinion issued November 19, 1997.) Thus, Martin Marietta and, in turn, Tri-State are bound by the requirements of Special Condition F and the Sand and Gravel Agreement which became final when the permit was in Dravo's name.[4]

Tri-State, in the appeal, challenges "new" Special Conditions A, C, and E. The "new" Special Condition A restricts dredging along the Ohio River based on mussel survey results. The "new" Special Condition C gives notice that DEP may modify the permit based on a NEPA mussel study. (*See* DEP's Motion, Appendix N.) Special Condition E simply reiterates the mussel survey requirement. However, the original permit clearly required mussel surveys prior to dredging and prohibited dredging where there existed significant mussel resources. Therefore, Special Conditions A, C, and E are not really new requirements.[5]

---

[4] Our conclusion here does not depend on the fact that Martin Marietta and Tri-State signed transfer applications expressing agreeing to be bound by the terms and conditions of the permit. That intention to be bound is implicit in the act of requesting a transfer of a specific permit with specific provisions. An entity dissatisfied with those terms and conditions has the option of applying for a new permit rather than a transfer.

[5] We reached the same conclusion on similar facts in *Glacial*, where the permit was still in the hands of the original permittee. It would be anomalous to reach a different result here simply on the basis that the permit has been transferred.

Because the latest permit contains no "new" restrictions, and because Tri-State is bound by the terms and conditions of the original permit, we conclude that DEP is entitled to judgment as a matter of law to the extent that Tri-State challenges the presence of the mussel survey requirement in the permit. However, because Tri-State has also challenged the scientific and technical validity of the mussel survey results here, the proceedings will continue on that issue.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TRI-STATE RIVER PRODUCTS, INC.	:	
	:	
v.	:	**EHB Docket No. 97-020-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 19th day of November, 1997, it is ordered that the Department of Environmental Protection's (DEP) Motion for Summary Judgment Based on Lack of Jurisdiction is denied. It is further ordered that DEP's Motion for Summary Judgment Based on Administrative Finality is granted in part as set forth in the foregoing opinion.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: November 19, 1997

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

For the Commonwealth, DEP:
Charney Regenstein, Esquire
Southwestern Region

For Appellant:
Henry Ingram, Esquire
REED SMITH SHAW & McCLAY
Pittsburgh, PA

ri/bl

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

THROOP PROPERTY OWNER'S ASSOCIATION	:	
v.	:	**EHB Docket No. 97-164-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, Permittee	:	**Issued:** November 21, 1997

OPINION AND ORDER
ON
MOTION TO CORRECT CAPTION

By Robert D. Myers, Administrative Law Judge

Synopsis:

A Motion to Correct Caption to remove an association as a named Appellant is denied when the Notice of Appeal contains the name of an individual followed by his title as president of the association. Since Board rules at 25 Pa. Code § 1021.21(a) allow an association to appear by an officer, the Notice of Appeal properly named the association as an Appellant.

OPINION

On July 30, 1997, a Notice of Appeal was filed with the Board listing as Appellants "Andy Kerecman, Sharon Soltis-Sparano, Fred Soltis, President Throop Property Owner's Assn. 411

George St. Throop PA 18512 (717) 489-6201." The appeal was assigned EHB Docket No. 97-164 and captioned as -

THROOP PROPERTY OWNER'S ASSOCIATION
v.
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, Permittee

The appeal challenged the June 10, 1997, issuance by the Department of Environmental Protection (Department) of Major Modification, Phase II, Solid Waste Permit No. 101247, pertaining to the Keystone Sanitary Landfill in Dunmore and Throop Boroughs, Lackawanna County.

On October 3, 1997, Keystone Sanitary Landfill, Inc. (Permittee) filed a Motion to Correct Caption, contending that Throop Property Owner's Association should not be listed as a party Appellant. When Appellants failed to file a response to this Motion, the Board on October 28, 1997, issued a Rule directing Appellants to show cause why the Motion should not be granted. The Rule was returnable on or before November 12, 1997.

We were advised on November 11, 1997 that Appellants had retained replacement legal counsel who would soon enter an appearance. The appearance was entered on November 12, 1997 but the new attorney, Ms. Carr, was unaware of the Motion or the Rule to Show Cause returnable that day. As a result, Appellants' response was not filed until November 13, 1997, and then only in the form of a letter from Ms. Carr.

In the letter, Ms. Carr stated that the Appellants' intent was to file an appeal by Andrew Kerecman and Sharon Soltis-Sparano, individually, and by Throop Property Owner's Association, acting through its President, Fred Soltis. She requested the record be clarified to reflect this intent

and offered to file a formal motion to that effect if the Board wished her to do so.

Permittee's legal counsel, Mr. Overstreet, also filed a letter with the Board on November 13, 1997, responding to that of Ms. Carr and objecting to it.

Permittee's contention is that Throop Property Owner's Association (Association) was not listed as a party Appellant when the Notice of Appeal was filed and cannot be added at this late date since the appeal period has expired. We disagree. The Notice of Appeal lists Fred Soltis, President of Throop Property Owner's Association, clearly indicating to the Board that he was acting in a representative capacity as our Rules of Practice and Procedure allow at 25 Pa. Code § 1021.21(a). There would have been no other reason for mentioning Fred Soltis' connection to the Association.

We have discussed the status of associations in prior Board opinions, most thoroughly in *Weiss v. DEP*, 1996 EHB 246[1], and need not repeat the discussion here. We held in *Weiss* that, when an association has been inadvertently omitted from the notice of appeal, the caption can be corrected by amendment. 1996 EHB at 252. That is unnecessary here because the Association was properly included in the Notice of Appeal. Since Ms. Carr's letter makes clear that Kerecman and Soltis-Sparano are proceeding as individuals, we will revise the caption to reflect these additional parties.

[1] It was also discussed with reference to the same Association involved here: *Throop Property Owner's Association v. DER*, 1988 EHB 391, on a motion filed by the same Permittee.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

THROOP PROPERTY OWNER'S ASSOCIATION	:	
	:	
v.	:	**EHB Docket No. 97-164-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, Permittee	:	

ORDER

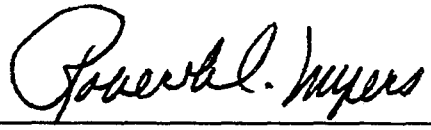
AND NOW, this 21st day of November, 1997, it is ordered as follows:

1. Permittee's Motion to Correct Caption is denied.

2. The caption shall henceforth be as follows:

THROOP PROPERTY OWNER'S ASSOCIATION, et al.	:	
v.	:	**EHB Docket No. 97-164-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, Permittee	:	

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: November 21, 1997

See following page for service list.

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

For the Commonwealth, DEP:
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David R. Overstreet, Esquire
Raymond P. Pepe, Esquire
KIRKPATRICK & LOCKHART
Harrisburg, PA
and
William P. Conaboy, Esquire
ABRAHAMSEN, MORAN & CONABOY
Scranton, PA

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

STOYSTOWN BOROUGH WATER AUTHORITY	:	
v.	:	**EHB Docket No. 97-174-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SOLAR FUEL COMPANY, INC., Permittee	:	**Issued: November 25 , 1997**

OPINION AND ORDER ON MOTIONS TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Where the Department of Environmental Protection was required to notify the Appellant upon receipt of the Permittee's complete application for a coal mining activity permit pursuant to the Department's regulations and it failed to do so, the Department's and Permittee's motions to dismiss must be denied and the appeal is deemed to have been timely filed within thirty (30) days of actual notice of the Department's action.

OPINION

On June 5, 1997, the Department of Environmental Protection (Department) issued a renewal for Coal Mining Activity Permit No. 54841318 (Permit) to Solar Fuel Company, Inc. (Permittee). Notice of the permit renewal was published in the *Pennsylvania Bulletin* on June 21, 1997. 27 Pa. Bull. 2990 (1997). Stoystown Borough Water Authority (Appellant, or Authority) filed a notice of appeal of the Department's issuance of the Permit renewal on August 20, 1997. The Permittee and

the Department each filed a motion to dismiss (collectively, motions)[1]. The Appellant filed responses to each of the motions along with a supporting brief and affidavit. The Department filed a reply, supporting brief and affidavit to the Appellant's response on October 31, 1997.

DISCUSSION

We must assess the motions to dismiss in the light most favorable to the non-moving party. *Tinicum Township v. DEP*, 1996 EHB 816. The Appellant asserts that it first learned of the Permit renewal on July 21, 1997 when it received verbal notice by telephone when an Authority member called the Department inquiring as to the status of the Permit renewal. Both the Permittee and the Department argue that since the Appellant did not file its appeal within thirty (30) days of June 21, 1997, when the notice of the Permit renewal was published in the *Pennsylvania Bulletin*, the Board does not have jurisdiction over this appeal pursuant to 25 Pa. Code § 1021.52(a).

However, the Appellant points to the notice requirements of the coal mining regulations at 25 Pa. Code § 86.31(c), which states in pertinent part:

> Upon receipt of a complete application [for a coal mining permit], the Department will publish notice of the proposed activities in the *Pennsylvania Bulletin* and send notice to the following:
> . . . (2) Sewage and water treatment authorities and water companies that may be affected by the activities.

According to its responses to the motions, the Appellant is a municipal authority incorporated under 53 P.S. § 306 and is charged with supplying drinking water for the Borough of Stoystown. The Appellant is concerned about the impact of mining on its water supply, which includes three wells adjacent to the permit area. (Notice of Appeal; Exhibit A to Appellant's response to

[1] The Permittee filed a "motion to quash" which we will regard as a motion to dismiss.

Permittee's motion). Based on the record before us, we conclude that the Appellant is a water treatment authority or water company that may be affected by the Permit renewal. As such, the Department was required to notify the Appellant upon receipt of the Permittee's complete application pursuant to the Department's regulations. 25 Pa. Code § 86.31(c). Since the Appellant was only made aware of the Permit renewal on July 21, 1997, it is deemed to have timely filed its notice of appeal within thirty (30) days of actual notice of the Department's action.

Accordingly, the following order is entered:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STOYSTOWN BOROUGH WATER AUTHORITY	:	
v.	:	**EHB Docket No. 97-174-R**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and SOLAR FUEL COMPANY, Permittee	:	

ORDER

AND NOW, this 25th day of November, 1997, the Motions to Dismiss are **denied.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: November 25, 1997

cc: **DEP Bureau of Litigation:**
Attention: Brenda Houck, Library
For the Commonwealth, DEP:
Barbara J. Grabowski, Esq.
Southwestern Region
For Permittee:
David C. Klementik, LL.M.
Windber, PA
For Appellant:
R.A. Reiley, Esq. &
Robert P. Ging, Jr., Esq.
Confluence, PA

jlp

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

A&M COMPOSTING, INC. and SOLID WASTE SERVICES, INC. d/b/a J.P. MASCARO & SONS	:	
v.	:	**EHB Docket No. 97-213-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** December 2, 1997

OPINION AND ORDER
ON PETITION FOR SUPERSEDEAS

by Michelle A. Coleman, Member

Synopsis:

A Petition for Supersedeas is granted in part where, absent the partial supersedeas, the petitioner will suffer significant financial harm and loss of business reputation; where the petitioner is likely to succeed on the merits of those portions of the appeal; and where the granting of a partial supersedeas is not likely to cause injury to the public.

OPINION

On October 14, 1997, A&M Composting, Inc. (A&M) and Solid Waste Services, Inc. d/b/a J.P. Mascaro & Sons (SWS) (collectively, Appellants), filed a Notice of Appeal with the Board, challenging certain parts of an October 6, 1997 Administrative Order issued by the Department of Environmental Protection (Department). On the same date, Appellants filed a Petition for Temporary Supersedeas, a Petition for Supersedeas, and a Memorandum of Law in support of the Petition for Supersedeas.

On October 16, 1997, the Department filed an Answer to Appellants' Petition for Temporary Supersedeas. After a conference call with the parties, the Board issued an Order on October 17, 1997 denying Appellants' Petition for Temporary Supersedeas and scheduling a hearing on the Petition for Supersedeas. On October 22, 1997, the Board issued an Opinion and Order explaining its reasons for denying a temporary supersedeas.

On October 23, 1997, the Department filed a Motion to Deny Appellants' supersedeas petition without a hearing. On October 24, 1997, following a conference call with the parties, the Board denied the motion and rescheduled the supersedeas hearing for October 30, 1997. On October 29, 1997, the Department filed an Answer to Appellants' Petition for Supersedeas. The Board held hearings on Appellants' Petition for Supersedeas on Thursday, October 30, 1997; Monday, November 3, 1997; Tuesday, November 4, 1997; and Friday, November 7, 1997.

On November 21, 1997, the Department filed a Post-hearing Memorandum of Law in opposition to Appellants' Petition for Supersedeas.[1] On November 24, 1997, Appellants filed a Post-

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[1] The parties were to file post-hearing briefs on or before Friday, November 21, 1997. The Department filed its Memorandum of Law on that date by fax transmission beginning at 6:28 p.m., which is after the working hours of the Board. The Department also hand-delivered a copy of the Memorandum of Law to the Board on Monday, November 24, 1997. The Department never called the Board to request an extension or to explain any problem with the filing of its brief.

Even though the Board has read the brief, the brief does not provide strong support for the Department's actions in this case. The Department has devoted only two pages of its brief to a discussion of the merits of this appeal. (Department's Memorandum of Law at 21-23.) In those two pages, there is no reference to the testimony of its own witnesses on the specific issues before the Board, and there are only a few sentences attempting to refute the expert testimony offered by A&M. For these reasons, the Department's brief has not been cited extensively in this opinion.

hearing Memorandum of Law in support of the Petition for Supersedeas.[2]

In their Petition for Supersedeas, Appellants ask the Board to supersede Paragraphs 2(A), 2(B)(2), 2(B)(3), 2(B)(4)(a), 2(B)(4)(b), 2(B)(4)(b)(1), 2(B)(4)(c), 2(B)(4)(c)(1), 2(B)(6), 2(E)(1), 2(E)(2), 2(G)(1), 2(G)(2), 2(H), and 2(L) of the Administrative Order.[3]

In granting or denying a supersedeas, the Board shall be guided by relevant judicial precedent and the Board's own precedent. Section 4(d)(1) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. § 7514(d)(1); 25 Pa. Code § 1021.78(a). The Board shall consider: (1) irreparable harm to the petitioner; (2) the likelihood of the petitioner prevailing on the merits; and (3) the likelihood of injury to the public or other parties, such as the permittee in third party appeals. *Id.* The Board will not grant a supersedeas in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect. 35 P.S. § 7514(d)(2); 25 Pa. Code § 1021.78(b).

I. Irreparable Harm to the Petitioner

Appellants argue that the Department's Administrative Order will cause them irreparable harm because the order reduces A&M's tonnage capacity from 225 tons per day to 80 tons per day. (*See* Paragraph 2(A) of the Department's Administrative Order.) Appellants maintain that such a reduction, along with the other provisions of the order: (1) will economically destroy A&M's ability

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[2] Appellants attempted to file their Memorandum of Law on November 21, 1997; however, they were unable to do so because of a problem with the Board's fax machine. Appellants called the Board and explained the problem. The Board then instructed Appellants to send their brief by overnight mail, which they did. For that reason, the Board will accept the Memorandum of Law as timely filed.

[3] Appellants indicated at the hearings that they were no longer seeking a supersedeas with respect to Paragraphs 2(G)(2), 2(H), and 2(L). (Hearing of October 30, 1997, N.T. at 12.)

to operate its composting business; (2) will prevent A&M from meeting its mandatory obligations under a beneficial use sludge contract with Nassau County, New York; (3) will place A&M in anticipatory breach of a mandatory beneficial use sludge contract with New York City; (4) will place at substantial risk Appellants' multi-million dollar investment in the composting facility; (5) is causing irreparable harm to Appellants' business reputation; and (6) will adversely affect their bonding and banking relationships. (Petition for Supersedeas at para. 70.) The Board has held that significant financial harm or loss of business reputation constitutes irreparable harm. *Empire Sanitary Landfill, Inc. v. DER*, 1991 EHB 102.

At the October 30, 1997 hearing, Pasquale N. Mascaro (Mascaro), President and Chief Financial Officer of A&M and President of SWS, testified that the 67% to 70% tonnage reduction provided for in the Administrative Order will devastate A&M's composting business. (Hearing of October 30, 1997, N.T. at 39-40, 45.) According to Mascaro, in order to meet A&M's fixed operating costs, and in order for A&M to break even, A&M needs $160,000 per month. (Hearing of October 30, 1997, N.T. at 55-56, 65-67.) However, the 67% to 70% tonnage reduction will result in a $100,000 monthly loss.[4] (Hearing of October 30, 1997, N.T. at 46-47, 67.) Mascaro testified that, in effect, the Department's Administrative Order will shut him down. (Hearing of October 30, 1997, N.T. at 68.)

To refute Appellants' allegations of irreparable financial harm, the Department presented the expert testimony of James C. Bixby, a certified public accountant. Bixby testified that he was unable

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[4] The Department counters that $50,000 of the projected $100,000 loss would be from depreciation. (Hearing of November 3, 1997, N.T. at 403.) Even if the tonnage reduction causes a $50,000 monthly loss, such constitutes significant financial harm.

to form an opinion regarding Appellants' claim of irreparable financial harm. (Hearing of November 3, 1997, N.T. at 382.) Bixby explained that, because A&M and SWS were part of a control group of corporations, it was necessary for him to examine the effect of the tonnage reduction on the control group's financial statements *as a whole*.[5] This he was unable to do without the proper documentation in the form of financial statements. (Hearing of November 3, 1997, N.T. at 383-84.)

We are not persuaded that, in order to determine irreparable harm in this case, we must consider the financial impact of the Administrative Order on an entire control group of corporations, including some that are not parties in this case. SWS and A&M are the only party-appellants here. A&M operates the composting facility; SWS utilizes the composting capacity at A&M in carrying out the provisions of its sludge management contract with Nassau County, New York. It is apparent from Mascaro's credible testimony that, at least, the tonnage reduction set forth in the Administrative Order will have a significant adverse financial effect on A&M.[6]

With respect to SWS, Appellants argue that the Department's Administrative Order will irreparably harm its business reputation. Appellants presented the testimony of Jeff Butler, an

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[5] Bixby suggested that his approach was proper because it appeared that revenue was being apportioned between the corporations in an arbitrary fashion and in the absence of an arm's length transaction. In that regard, Bixby pointed out that, while the Nassau County contract provided for $88.00 per ton of sludge, A&M received only $44.00 per ton of sludge. (Hearing of November 3, 1997, N.T. at 385.) On cross-examination, Bixby acknowledged that the $88.00 figure covered hauling, transfer, and composting, and the $44.00 figure covered only composting. (Hearing of November 3, 1997, N.T. at 409-410.) Bixby also indicated that he did not know the fair market rate for processing sludge. (Hearing of November 3, 1997, N.T. at 392-93.) Thus, Bixby's testimony does *not* establish that revenue is being apportioned between the corporations in an arbitrary fashion, or in the absence of an arm's length transaction.

[6] Bixby conceded that, considering A&M alone, a 66% tonnage reduction would have a very substantial financial impact on A&M. (Hearing of November 3, 1997, N.T. at 395-96.)

employee of the New York City Department of Environmental Protection. Butler testified that New York City awarded a contract to SWS for composting services; however, because of the Administrative Order, he is concerned that SWS would not be able to meet its tonnage obligations under the contract. (Hearing of October 30, 1997, N.T. at 143-44.) Turning to the Nassau County contract, Mascaro testified that, because of the Administrative Order, he will not be able to meet his bonding company and bank obligations; in fact, the bonding company and bank have already contacted the Department to express their concern over the Administrative Order. (Hearing of October 30, 1997, N.T. at 73-78.) Such evidence convinces us that the Department's Administrative Order is causing irreparable harm to the business reputation of SWS.

II. Likelihood of Injury to the Public

Appellants argue that, should the Board grant a supersedeas, A&M will continue to produce Class A compost at its facility, which would not harm the public. We agree with Appellants on this matter. If the Board denies a supersedeas here, fewer tons of sludge will be converted each day, for beneficial re-use, into Class A compost. Certainly, the public has more to gain from the beneficial re-use of sludge than from the disposal of sludge at landfills. Thus, the granting of a supersedeas is not likely to injure the public; quite the contrary, the *denial* of a supersedeas is likely to injure the public.

III. Likelihood of Success on the Merits

Appellants argue that they are likely to succeed on the merits of their appeal before the Board. A petitioner's chance of success on the merits must be more than speculative, but the petitioner is not required to establish the claim absolutely. *Pennsylvania Fish Commission v. DER*, 1989 EHB 619. Rather, the petitioner must garner a *prima facie* case showing a reasonable probability of success. *Id.*

In order to succeed on the merits of their appeal, Appellants would have to show that the Department abused its discretion. The Board has held that the Department abuses its discretion by acting arbitrarily or capriciously, by acting without a reasonable basis, or by failing to act in accordance with applicable law. *Concerned Residents of the Yough, Inc. v. DER*, 1995 EHB 41. The Board also has a duty to determine if the Department's action can be sustained or supported by the evidence taken by the Board. *Id.* In this case, as indicated by the discussion which follows, the Department presented *no evidence* to show that it had valid reasons for taking the drastic action it did in its Administrative Order.[7]

A. Tonnage Reduction

Appellants maintain that the Department abused its discretion in Paragraph 2(A) of the Administrative Order, which reduced A&M's monthly daily average capacity from 225 tons of sludge to 80 tons of sludge.[8]

The Department evidently ordered such a drastic cutback because it believed that A&M would have difficulty complying with new compost regulations. *See* 25 Pa. Code §§ 271.901-

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[7] The Department issued its enforcement order under section 602(a) of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. § 6018.602(a), which authorizes the Department to issue an enforcement order modifying a permit when a facility is in violation of the act, its regulations, or a permit. The Department's evidence does not demonstrate that A&M is currently in violation of such.

Rather, the Department's evidence establishes that the Administrative Order was issued: (1) to punish A&M for prior violations which have been rectified; and (2) to control A&M's composting process, using A&M's facility as the Department's laboratory, so that the Department can learn more about composting. (*See* Administrative Order at paras. F-JJ; Hearing of November 7, 1997, N.T. at 837-46.)

[8] As noted above, such a reduction would cause A&M to operate at a substantial economic loss and, ultimately, would shut down its operations.

271.933; *see also* Paragraphs NN and OO of the Administrative Order. In reaching that conclusion, the Department relied upon data which A&M collected and submitted to the Department under the old regulations. It is true that, under the new more stringent standards for Class A compost, some of A&M's figures would have exceeded permissible limits. However, both sides of this dispute agree that composting is a biological process, and that, at times, the limits will be exceeded. When that occurs, A&M's practice has been to reprocess compost until it meets the Class A compost requirements. Paragraph 2(B) of the Department's Administrative Order provides that any compost that does not meet Class A compost standards may be reprocessed. As long as A&M is able to consistently produce Class A compost and to reprocess compost that does not meet Class A standards, the Board sees no reason to excessively restrict A&M's tonnage.

The Department also based its decision to reduce tonnage on its determination that A&M's available working space is severely restricted due to the amount of material in the compost building. (Paragraph PP of the Administrative Order.) However, the Administrative Order provides for a building capacity limit of 54,000 cubic yards of material, which is the same limit imposed by the Department in A&M's 1995 permit modification. (Paragraph 2(D) of the Administrative Order.) If the Department really believed that there was a work space problem, the Department would have altered the building capacity limit in its Administrative Order.

The Department also reduced the tonnage capacity because it determined that the height of the compost piles at A&M has had an adverse effect on the efficiency of the composting process. (Paragraph QQ of the Administrative Order.) However, prior to the Administrative Order, the compost pile height limit was 13.5 feet, and the Department did not change that limit in its Administrative Order. Moreover, the Department's own expert stated that, according to reference

materials used by the Department, composting can be successful with piles at heights of 13 feet and 18 feet. (Hearing of November 7, 1997, N.T. at 951-52.)

In deciding to reduce tonnage capacity, the Department also considered the fact that, in cool weather, moisture in the compost building impedes the compost screening process. (Paragraph QQ of the Administrative Order.) However, it is clear to the Board from the record that, although the moisture makes it more difficult to screen the material, the moisture does not hinder compliance with composting regulations. The Department's own expert conceded that this is true. (Hearing of November 7, 1997, N.T. at 956-57.)

Finally, the Department reduced the tonnage because it believed that there is insufficient air flow within the compost piles. (Paragraph QQ of the Administrative Order.) However, Appellants' expert explained that: (1) because A&M consistently meets the time and temperature requirements for Class A pathogen reduction and vector attraction reduction, there *has to be* sufficient air flowing through the compost piles; and (2) because there is no evidence of methane and hydrogen sulfide from an anaerobic condition, there *has to be* sufficient air flowing through the compost piles.[9] (Hearing of October 30, 1997, N.T. at 254-55.)

Because the record does not support the rationale stated in the Administrative Order for the Department's tonnage reduction, a supersedeas is granted with respect to Paragraph 2(A) of the Department's Administrative Order.

B. Incoming Sludge

Appellants contend that the Department abused its discretion by requiring that sludge coming

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[9] The Department's own expert acknowledged that a compost windrow in anaerobic mode gives off methane. (Hearing of November 7, 1997, N.T. at 963.)

into A&M's facility must meet Class A compost pollutant limits and Class B pathogen reduction and vector attraction reduction requirements. (Paragraphs 2(E)(1) and 2(E)(2) of the Administrative Order.) Appellants argue that applicable regulations only govern compost that has been produced for distribution and use. The regulations do *not* govern sludge delivered to a facility for processing.

The Department concedes that nothing in the regulations state that incoming sludge must meet Class A or Class B compost requirements. (Hearing of November 7, 1997, N.T. at 972-73.) Nevertheless, the Department set forth these more stringent requirements in the Administrative Order because of the potential for odors.[10] (Hearing of November 7, 1997, N.T. at 974-75.) However, the Department has stipulated that the Administrative Order is not based on problems with malodors at A&M's facility. Indeed, the Department acknowledges that A&M's biofilter exists to eliminate odors at the facility. (Hearing of November 7, 1997, N.T. at 975.)

Because Paragraphs 2(E)(1) and 2(E)(2) of the Administrative Order are additional and more stringent requirements to deal with the potential for odors at the facility, because A&M has a biofilter system to deal with odors, and because malodors are not an issue in this proceeding, a supersedeas is granted with respect to these paragraphs.

C. Temperature Requirements

Appellants argue that the Department abused its discretion by requiring A&M to take hourly temperature readings on its compost piles and to maintain a temperature range of 90 to 140 degrees

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[10] The regulation at 25 Pa. Code § 271.3 provides that the Department, in issuing a permit, may impose terms and conditions which the Department deems necessary to implement the provisions and purposes of the environmental acts and regulations. The regulation at 25 Pa. Code § 271.904 provides that the Department may impose additional or more stringent requirements when necessary to protect public health and the environment from any adverse effect of a pollutant in the sewage sludge.

Fahrenheit. (Paragraph 2(B)(4)(a) of the Administrative Order.)

Appellants note that these provisions are *not* required by regulation. (*See* Hearing of November 7, 1997, N.T. at 986-87.) Moreover, Appellants rely on the testimony of their expert to show that there is no reason for hourly temperature readings, that a frequency of twice a day is standard in the industry and is sufficient. (Hearing of October 30, 1997, N.T. at 256.) Appellants' expert also testified that there is no environmental reason to require an upper limit of 140 degrees Fahrenheit, and that successful compost windrows average in the 160 to 170 degree Fahrenheit range. (Hearing of October 30, 1997, N.T. at 257, 311.) A&M has been successfully composting with temperatures ranging between 104 and 165 degrees Fahrenheit, and the 140 degrees upper limit set by the Department is only 9 degrees above the minimum temperature needed to meet Class A pathogen reduction requirements. (Hearing of November 7, 1997, N.T. at 1000-1003.)

Based on our review of the record, we must agree with Appellants that the Department offered no valid reason for including these requirements in the Administrative Order. Accordingly, a supersedeas is granted with respect to the above requirements in Paragraph 2(B)(4)(a) of the Administrative Order.

D. Oxygen

Appellants next argue that the Department abused its discretion by requiring A&M to take oxygen level measurements in its compost piles and to maintain a minimum oxygen level of five percent. (Paragraph 2(B)(4)(b) of the Administrative Order.)

Appellants rely on the testimony of their expert, who stated that the best indication that compost piles are receiving sufficient oxygen is the meeting of the time and temperature requirements for pathogen and vector reduction. (Hearing of October 30, 1997, N.T. at 254-55.)

In fact, according to Appellants' expert, it is possible to have a fully aerobic compost pile in excellent condition and have very low or non-detectible oxygen levels.[11] (Hearing of October 30, 1997, N.T. at 257-59, 312-315.) The Department's expert agreed that it is possible to get non-detectible readings or very low readings for oxygen in a healthy compost pile. (Hearing of November 7, 1997, N.T. at 1008.)

Based on the foregoing, a supersedeas is granted with respect to Paragraph 2(B)(4)(b) of the Administrative Order.

E. Double Pathogen Density Testing

Appellants also argue that the Department abused its discretion by requiring A&M to conduct fecal coliform pathogen density testing before the compost windrows are screened and before the compost is cured. (Paragraph 2(B)(4)(c) of the Administrative Order.)

Both sides agree that the regulations do *not* require pathogen density testing before screening or curing. (Hearing of October 30, 1997, N.T. at 260; Hearing of November 7, 1997, N.T. at 913.) And, there is also no dispute that the applicable regulation only requires pathogen density testing before the compost is distributed or used. *See* 25 Pa. Code § 271.932(a)(7)(i). The Department's expert testified on cross-examination that *none* of the reference materials used by the Department in preparing the Administrative Order advocate double pathogen density testing. (Hearing of November 7, 1997, N.T. at 1008-09.) Based on such a record, we see no reason for this requirement.

Accordingly, a supersedeas is granted with respect to Paragraph 2(B)(4)(c) of the Administrative Order.

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[11] Appellants also point out that the new composting regulations do not require oxygen monitoring or the maintenance of a certain oxygen level.

F. Thirty Day Curing Period

Appellants argue that the Department abused its discretion by requiring a 30-day curing period for all compost processed at A&M. (Paragraph 2(B)(3) of the Administrative Order.)

In support of this argument, Appellants point out that both experts testified that there is no requirement in the regulations for a 30-day curing period. (Hearing of October 30, 1997, N.T. at 259; Hearing of November 7, 1997, N.T. at 1009.) Appellants contend that they should be allowed to distribute Class A compost as soon as it meets the Class A standards for pollutant limits, pathogen reduction and vector attraction reduction. (Appellants' Memorandum of Law at 28.)

The Department's expert explained that the 30-day curing requirement was included in the Administrative Order to assure that Class A pathogen reduction standards would be met before the material is distributed. (Hearing of November 7, 1997, N.T. at 871.) However, it makes no sense to *require* a 30-day curing period when some compost will meet Class A standards in a much shorter period of time.

For this reason, a supersedeas is granted with respect to Paragraph 2(B)(3) of the Administrative Order.

G. Monthly Composite Testing

Appellants maintain that the Department abused its discretion by requiring A&M to conduct monthly composite testing on each source of sludge coming into the facility. (Paragraph 2(G)(1) of the Administrative Order.) Appellants point out that the regulation at 25 Pa. Code § 271.917(a)(1) provides for the frequency of such testing based on the amount of sewage sludge received by the facility. Appellants, of course, are willing to comply with the regulation.

The Department's position is that more frequent testing will assure the high quality of the

end product. (Hearing of November 7, 1997, N.T. at 879.) However, the end product must be Class A compost; that is the legal standard. A&M does *not* have to meet a "super-Class A" standard; no such standard exists. If A&M's end product does not meet Class A standards, A&M can reprocess the material until it does meet those standards, or A&M can take it to a landfill. We understand that a high quality sludge coming into A&M for processing can more readily be converted into Class A compost. However, if a composting facility can make Class A compost out of a lesser quality sludge, then everyone benefits from A&M doing so. Therefore, the Board is at a loss to understand the Department's position here.

Accordingly, a supersedeas is granted with respect to this provision in Paragraph 2(G)(1) of the Administrative Order.

H. Posting of Tracking Forms on Columns

Appellants argue that the Department abused its discretion by requiring A&M to post the tracking forms for each of the compost piles on the columns in the compost building. (Paragraph 2(B)(6) of the Administrative Order.) According to Appellants, this is an absurd requirement because it is impossible to maintain these paper forms in the humid and moist atmosphere of the active compost building. Appellants point out that the Department's expert acknowledged that she did not consider these adverse conditions when she wrote the requirement. (Hearing of November 7, 1997, N.T. at 1015.) We also note that the Department's expert conceded that it could be a challenge to keep the paper forms attached to the columns. (Hearing of November 7, 1997, N.T. at 1016.)

Accordingly, a supersedeas is granted with respect to this requirement in Paragraph 2(B)(6) of the Administrative Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

A&M COMPOSTING, INC. and	:	
SOLID WASTE SERVICES, INC.	:	
d/b/a J.P. MASCARO & SONS	:	
v.	:	**EHB Docket No. 97-213-C**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

ORDER

AND NOW, this 2nd day of December, 1997, IT IS ORDERED that Appellants' Petition for Supersedeas is granted in part as set forth in the foregoing opinion.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: December 2, 1997

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

For the Commonwealth, DEP:
Dennis A. Whitaker, Esquire
Southcentral Region

For Appellant:
William F. Fox, Jr., Esquire
Harleysville, PA

ri/bl

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

RODGER KRAUSE	:	
	:	
v.	:	**EHB Docket No. 97-059-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** December 3, 1997

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Department of Environmental Protection's motion for summary judgment is granted in part and denied in part. The Board grants the motion on the grounds that the Department is entitled to judgment as a matter of law because appellant's due process rights were not violated when the Department issued an administrative order prior to having a hearing on the issues stated in the order. The motion is denied on the grounds that there is a dispute of a material fact where appellant asserts that he was not involved in the alleged activities resulting in the violations contained in the order, and that the Department knew prior to the issuance of the order that he was not involved.

OPINION

This matter was initiated with Rodger Krause's (Appellant) filing a notice of appeal on March 11, 1997 challenging the Department of Environmental Protection's (Department) issuance

of a February 21, 1997 order stating that Appellant[1] violated provisions of the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1- 693.27 and accompanying regulations and the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 - 691.1001 and accompanying regulations. The order also requires Appellant to cease all earth moving activities and submit temporary and permanent erosion and sedimentation control plans for a parcel located in Chest[2] Township, Clearfield County. Currently before the Board is the Department's August 14, 1997 Motion for Summary Judgment.

BACKGROUND

Appellant is an individual with the mailing address of R.D. # 1, Box 131, West Decatur, Pennsylvania. Keystone Land and Timber Company (Keystone)[3], of 1540 Dry Run Road, Duncansville, Pennsylvania, owns a parcel of approximately 119 acres located in Chest Township, Clearfield County (identified as Tax Map No. E-17 and Parcel No. 24) (Site). On January 6, 1997 Keystone entered into a Timber Purchase Agreement with KC Logging Company[4] for the purchase of "all merchantable timber 6 inches and larger"on the entire parcel. The contract was signed by

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[1] The Department issued its February 21, 1997 Administrative Order to "Keystone Land and Timber Company, David Cassick, Michael Krause, Roger Krause (sic) t/d/b/a KC Logging Company."

[2] The briefs use Chess as well as Chest. Other documents submitted by the parties list the name as Chest so for purposes of this opinion we will consider it to be Chest.

[3] David P. Rightenour and William B. Reilly filed the fictitious name of Keystone Land and Timber Company on May 2, 1994.

[4] KC Logging Company is a fictitious name filed by David Cassick and Michael Krause on May 2, 1994.

David Cassick and Michael Krause, for KC Logging Company, the buyer, and by Paul Rightenour[5] and William B. Reilly, for Keystone the seller. The logging operations commenced some time after the signing of the contract.

On February 6, 1997 the Department, the Pennsylvania Fish and Boat Commission and the Clearfield County Conservation District conducted an inspection at the Site. During the inspection the Department determined that KC Logging, Michael Krause, David Cassick and Rodger Krause as the result of their logging operations had clear cut up to the edge of Rogues Harbor Run, a designated exceptional value stream; that they had constructed temporary road crossings for skid roads with tree tops and tree branches across Rogues Harbor Run; that they had encroached upon Rogues Harbor Run by constructing fords across tributaries of Rogues Harbor Run and upon the stream's floodway when they constructed roads within that floodway; and that significant amounts of sediment pollution were entering Rogues Harbor Run as a direct result of earthmoving activities performed by KC Logging and its failure to implement effective erosion and sedimentation control facilities. The above resulted in the sediment pollution into Rogues Harbor Run. On February 10, 1997 the Department again inspected the Site and found that some of the crossings were removed utilizing heavy equipment which resulted in accelerated erosion and sediment pollution to tributaries of Rogue Harbor Run. No one applied for or received an encroachment permit. On February 21, 1997 the Department issued an Administrative Order to Keystone Land and Timber Company, KC Logging Company, Messrs. David Cassick, Michael Krause and Rodger Krause citing them for violations of the Dam Safety and Encroachment Act and the Clean Streams Law and their

[5] We will assume that Paul Rightenour and David P. Rightenour are the same person since all the evidence indicates that is the case.

accompanying regulations.

On March 7, 1997 Rodger Krause filed his Notice of Appeal. On August 14, 1997 the Department filed its Motion for Summary Judgment and an accompanying memorandum. On September 29, 1997 Appellant filed his Response and accompanying memorandum. On October 15, 1997 the Department filed its Reply Brief.

DISCUSSION

The Department alleges that it is entitled to a motion for summary judgment on all the issues because there are no material facts in dispute, and that it is entitled to judgment as a matter of law. The Department argues that Appellant was involved with the logging operations at the Site and that the Department fulfilled Appellant's due process rights.

Appellant contends that the Department is not entitled to a motion for summary judgment on these issues because material issues of fact are disputed since he was not involved in the logging operations. He alleges that the Department violated his due process rights by issuing the order before there was a hearing on this matter, and therefore, the Department is not entitled to judgment as a matter of law.

The Board may grant summary judgment (1) whenever the record shows that no material facts are in dispute, or (2) whenever the record contains insufficient evidence of facts to make out a *prima facie* cause of action or defense. Pa.R.C.P. 1035.1-1035.5; *Bethenergy Mines, Inc. v. DEP,* EHB Docket No. 90-050-MR (Consolidated) (Opinion issued March 17,1997) The Board will grant a motion for summary judgment only where the movant's right to summary judgment is clear and free from doubt. *Al Hamilton Contracting Company v. DEP*, EHB Docket No. 95-124-R (Opinion issued September 11, 1997). All doubts as to the existence of material facts are resolved against the

moving party. *Tranguch v. DEP*, EHB Docket No. 95-255-C (Opinion issued February 25, 1997) (citing *Ducjai v. Dennis,* 656 A.2d 102 (Pa. 1995).

In his Notice of Appeal Appellant raises the following three objections:

1. He (Rodger Krause) was not involved in the logging operation in Chess (sic)Township. It is not his logging.

2. The Department was informed by responsible parties that he was not involved in this logging operation.

3. The Department violated his rights to due process by issuing an order without granting him the opportunity to be heard with regard to his total lack of involvement.

We grant in part and deny in part the Department's motion. We grant the Department's motion on the issue of due process and deny the motion on the issue of Appellant's involvement with the logging operations because on that issue material facts are disputed.

Due process

The Department contends that it is entitled to summary judgment on this issue since under Subsection 4(c) of the Environmental Hearing Board Act it is entitled to take action initially without providing notice or a hearing. The Department asserts that this order is an initial action which does not require notice or hearing prior to taking action, and the Appellant's due process rights are not violated because he is given the opportunity to challenge the order through an appeal to the Board.

Appellant does not address this issue in his response or its accompanying memorandum.

We find that the Department is entitled to judgment as a matter of law. Subsection 4(c) of the Environmental Hearing Board Act states:

> The department may take an action initially without regard to 2 Pa. C.S.Ch. 5 Subch. A, but no action of the Department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board ....

35 P.S. § 7514(c). The Board has construed this language to allow the Department initially to act without an opportunity for hearing. *Empire Sanitary Landfill, Inc. v. DER*, 1991 EHB 102, 119. The Board has held that due process requirements are satisfied by a Board hearing subsequent to a Departmental action. *Id.* In this instance the order of the Department was an action that could be taken without prior notice or hearing, and therefore Appellant's due process rights have not been violated because he has an opportunity to challenge the order by filing an appeal with the Board. The parties do not dispute the facts on this issue and the Department is entitled to judgment as a matter of law. Consequently, we grant the Department's motion on this issue.

Involvement

The Department contends that Appellant was involved in the logging operations and argues that the facts supporting this contention are 1) that he is a family relation to both of the principals comprising KC Logging, 2) that he has timbered other sites with KC Logging, 3) that he has paid penalties for violations on at least one of those sites, 4) that it is common practice for him to work with KC Logging to jointly harvest timber, and 5) that he met with a water company officer to discuss use of a municipal access road[6]. Also, Appellant has been present at the Site, has negotiated with third parties on behalf of all the individuals and entities performing logging operations on the Site, and has admitted to performing earthmoving activities at the Site. Although Appellant asserts that responsible parties informed the Department that he was not involved in the logging operation, the Department argues that regardless of what he asserts, as a matter of fact, Appellant was involved

[6] The use of the road requires the filing of a bond and monthly rental payments. (Deposition of Eugene Hagans, Department Ex. 6, p. 15)

with the logging operation for the reasons stated above, or in the alternative, a Department employee states by affidavit that the Department was never informed that Appellant was involved.

Appellant contends that he was not involved in the logging operations and that the Department was aware of that information. In addition, Appellant claims that the facts present in the record do not support the Department's assertions or conclusions.

We agree with Appellant and deny the Department's motion. The record indicates a dispute of material issues of fact exists concerning Appellant's assertions that he was not involved with the operations at the Site and that the Department was aware that he was not involved. A moving party bears the burden of proving that it is entitled to the relief requested. *Ralph Gambler v. DEP*, EHB Docket No. 97-051-C (Opinion issued June 18, 1997). That party has a duty to present its best case, and the Board will not do so by default. *Green Thornbury Committee v. DER*, 1995 EHB 636, 667. In the instant case, the Department has failed to sustain its burden of proof that no material facts are disputed regarding these issues.

The Department's order alleges that Rodger Krause participated in the logging operations. There are two ways that the Department could sustain proving its allegation. The Department must present evidence to show either: 1) that Appellant is affiliated with KC Logging Company or 2) that he participated in the alleged activities as an individual. The evidence submitted to support the contention that Appellant is affiliated with KC Logging Company states that Appellant is the father and father-in-law of the men who registered KC Logging Company's fictitious name (Answer to First Request for Admissions, Department Ex.1; Department Interrogatories, Department Ex. 5, No.8; Appellant's Response No. 18), that he was present at the Site on one occasion for a conversation concerning the use of a municipal access road with Eugene Hagans, Secretary and

Treasurer of a local water company whose water supply allegedly was affected by the activities (Department Interrogatories, Department Ex. 6), and that he cleared a spot for log placement with a bulldozer (Department Interrogatories, Department Ex. 5, No. 6; Appellant's Response, No.21). However, Appellant in his response to the Department's interrogatories states that he was not involved (Department Interrogatories, Department Ex. 5). All of these facts are tenuous at best to establishing Appellant's participation in the activities at the Site which resulted in the violations either on behalf of KC Logging or as an individual. The one fact that appears to indicate some affiliation with KC Logging is the testimony of Eugene Hagans. In his testimony he states that he had a conversation with Appellant to arrange for the signing of a contract and payment for the use of the municipal access road. However, on cross and recross in the deposition, Mr. Hagans stated he thought Appellant was in charge of the operations because that is what he was told by Keystone Land and Timber Company personnel and that when he talked to Appellant at the Site Appellant was in a pickup truck. (Deposition of Eugene Hagans, Department Ex. 6, pp. 17-18) This testimony does not clarify Appellant's affiliation with KC Logging, but only confuses the picture of his alleged role in the operations. The evidence presented indicates a material issue of fact over whether or not Appellant was involved in the actions which precipitated the issuance of the order. The Department has failed to prove that no material facts are disputed establishing his participation in the operation, either through KC Logging Company or as an individual. Consequently, we deny the Department's motion on this issue.

The facts concerning whether or not the Department had been informed that Appellant was not involved prior to the issuance of the order are also disputed. The Department submitted an affidavit of Darrell Smeal, Senior Engineer in Soils and Waterways who inspected the Site, in which

he states that "at no time before the Department issued it's Order of February 21, 1997, did Michael Krause, Roger (sic) Krause, David Cassick, or anyone else involved in the logging operation at the Site inform the Department that Roger (sic) Krause was not involved with that operation." (Department's Exhibit 2) However, in response to Question 11 of the Department's interrogatories which asked Appellant "to identify and describe the factual basis for [his] assertion the Department was informed by the responsible parties that [Appellant] was not involved in the logging operation," Appellant answered, " David Cassick and Michael Krause told the members of the Department on at lease (sic) two occasions that Rodger Krause was not involved with KC Logging and was not involved in this logging operation." (Department's Exhibit 5) The evidence presented indicates the parties dispute this material issue of fact whether the Department knew Appellant was not involved. Consequently, we deny the motion on this issue. For the foregoing reasons, we deny the Department's motion on these issues.

Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RODGER KRAUSE	:	
	:	
v.	:	**EHB Docket No. 97-059-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 3rd day of December, 1997 the Department of Environmental Protection's motion for summary judgment is:

1) granted for the Rodger Krause's Notice of Appeal assertion that his due process rights were violated;

2) denied for the assertions that Mr. Krause was not involved with the logging operations and that the Department was told that he was not involved.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: December 3, 1997

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

For the Commonwealth, DEP:
Geoffrey J. Ayers, Esquire
Northcentral Region

For Appellant:
James C. Eberly, Esquire
Hollidaysburg, PA

kh/bl

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

TINICUM TOWNSHIP and ECO, INC.	:	
v.	:	**EHB Docket No. 95-266-MG (Consolidated with 95-268-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-STATE TRANSFER COMPANY, INC., Permittee	:	**Issued:** December 8, 1997

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis:

The Board sustains an appeal of a permit renewal for the operation of a municipal waste transfer station and voids the permit. We find that the Department of Environmental Protection abused its discretion in allowing the applicant to apply for a permit renewal when its existing permit had expired by operation of law. Specifically, no waste has ever been processed at the facility which required the Department to consider the original permit void pursuant to 25 Pa. Code § 271.211. Therefore the Department should have required an application for a new permit. Further, the Department abused its discretion by not requiring adequate information to be shown on the site plan. Because this information was not included in the permit application and not properly considered by the Department, the Department failed to perform an adequate environmental assessment as required by 25 Pa. Code § 271.127, and did not ensure other environmental protection statutes would not be violated in accordance with 25 Pa. Code § 271.201. The Department further erred by not requiring

the floodproofing of all parts of the facility which occupy a floodplain, and not requiring appropriate access controls.

BACKGROUND

These consolidated appeals of Tinicum Township and ECO, Inc. (collectively, Appellants), filed on December 20, 1995, arise from the Department of Environmental Protection's (Department) issuance of a permit renewal on November 20, 1995, to Tri-State Transfer Company, Inc. (Tri-State) for the operation of a municipal waste transfer station under the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. § 6018.101-6018.1003 (Solid Waste Management Act). This permit, originally issued in 1976, reauthorized the construction and operation of a facility to be located near Route 611 in Tinicum Township, Bucks County, Pennsylvania.[1]

The Appellants claim, among other things, that the permit was improperly renewed because the facility's application could not meet the requirements applicable to a transfer facility under the current law and regulations. A hearing on the merits was held for nine days on June 2 through June 13, 1997 before Administrative Law Judge, George J. Miller. Following the hearing, the parties filed extensive requests for findings of fact and conclusions of law and supporting legal memoranda. The record consists of the pleadings, a transcript and over one hundred exhibits. After a full and complete review of the record and briefs, we make the following:

FINDINGS OF FACT

1. The Department is the agency of the Commonwealth with the authority to administer and enforce the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S.

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[1] For a review of the history of this facility, *see Tinicum Township v. DEP*, 1996 EHB 816.

§ 6018.101-6018-1003; the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001; the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1- 693.27, and the rules and regulations thereunder.

2. Tri-State is a Pennsylvania corporation with a business address of P.O. Box 196, Pipersville, PA 18947.

3. Tinicum Township is a political subdivision of the Commonwealth of Pennsylvania.

4. ECO, Inc. is a Pennsylvania non-profit corporation which was created for the purpose of preserving the quality of the environment in the community. The primary focus and particular concern of the organization was the proposed facility. (Exhibit ECO-79; N.T. 20-21; 269-70)

5. On November 20, 1995, the Department issued to Tri-State a permit renewal of Permit No. 100972, pursuant to the Solid Waste Management Act, authorizing the operation of a municipal waste transfer station located in Tinicum Township, Bucks County. (Exhibit ECO-34; Exhibit TST-69).[2]

6. Solid waste permit 100972 was originally issued in May, 1976 to T.R.A.S.H., Inc. for a transfer station identified by latitude 40 degrees 27 minutes 99 seconds, longitute 75 degrees 9 minutes 30 seconds west. (Exhibit ECO-1)

7. In February, 1979, the permit was amended to reflect the permittee name as Thomas L. Treadway (t/a T.R.A.S.H., Inc.). (Exhibit ECO-4)

8. In August 1982, this permit was reissued to Tri-State Transfer Company, Inc.

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[2] The exhibits of ECO are hereinafter referred to as "Exhibit ECO-__"; Tinicum's exhibits are referred to as "Exhibit A-__"; and Tri-State's exhibits are referred to as "Exhibit TST-__".

a. This permit action was simply a reissuance of the permit to another permittee.

b. It did not contain an expiration date.

(Exhibits ECO-2; ECO-5; TST-20)

9. The Department's reissuance of the permit was appealed by Sophie Halla to the Board at EHB Docket No. 82-216-M (hereafter referred to as the *Halla* appeal). Sophie Halla was Tinicum Township's Zoning Officer.

10. That appeal was settled on June 8, 1983 on the basis of an agreement made on the record of that proceeding which referred to a site plan. (Exhibit TST-13)

a. The site plan included in the settlement showed the footprint of the transfer station on the site and was to be the final determination for the location of the building. (Exhibit TST-13)

b. The settlement was published in the *Pennsylvania Bulletin* at 13 Pa. Bull. 2091 (July 2, 1983) and no person appealed the terms of the settlement. (Exhibit TST-7)

c. The site plan which was the subject of the *Halla* appeal settlement was admitted into evidence in this proceeding as stipulated Exhibit S-1.

11. The Department adopted amendments to the municipal waste regulations on April 8, 1988, which became effective April 9, 1988. (18 Pa. Bull. 1681 (April 9, 1988))

12. The Department determined that the facility could not operate until a modification was approved to upgrade the facility to the greatly expanded requirements of the 1988 regulations. (N.T. 955)

13. On September 24, 1990, the Department issued a unilateral modification to the

facility permit which stated that since the permittee did not construct the facility within five years the facility could not operate until a permit modification was approved in accordance with Chapters 271, 279 and 285 of the Department's regulations. (Exhibits A-2; TST-8)

14. Tri-State appealed from the unilateral modification. The parties resolved the appeal by consent order and adjudication which was published in the *Pennsylvania Bulletin*, March 7, 1992. (Exhibit TST-9)

15. Under the terms of the settlement, Tri-State agreed to submit to the Department by July 1, 1992, an application for a major modification and renewal of permit 100972 and agreed that it would not construct the transfer station prior to receiving departmental approval of its application. (Exhibit TST-9)

16. Tri-State did not submit a new application until March 1993. The application was an application for a renewal of permit 100972, not a major modification as required by the terms of the consent order and adjudication. (Exhibit TST-1)

17. The facility building itself has never been constructed except for the footers at the corner of the building. Also, two septic systems have been constructed and stone fill was poured for the access road. (N.T. 1205; Exhibit TST-72; Exhibit TST-1)

18. William F. Pounds is the Chief of the Division of Municipal and Residual Waste with the Department's Bureau of Land Recycling and Waste Management. He played a role in the development of the 1988 solid waste regulations. (N.T. 1246-47)

19. Mr. Pounds testified that 25 Pa. Code § 271.211(e), deals specifically with facilities that have never been "operationalized." (N.T. 1252-54)

20. This regulation provides that permits of facilities which have not processed or

disposed of waste within five years of permit issuance are void. 25 Pa. Code § 271.211(e)

21. Mr. Pounds explained that the regulation was originally drafted with a two-year time frame but there was discussion about what would happen if a permit had to go through an appeals process that could easily extend beyond two years. As part of the response to these comments, the final regulation contained a five-year time frame which was thought to be adequate. (N.T. 1261)

22. Larry Lunsk is employed by the Department as a Facilities Manager in the Waste Management Program. He has worked for the Department for almost 27 years. He is responsible for supervising permit application reviews. He supervised the review of the present Tri-State permit. (N.T. 940-41)

23. Mr. Lunsk testified that when he was contacted in 1988 or 1989 by either Tom Treadway or Rick Bodner, he told them they could not construct a facility at the site without getting repermitted under the 1988 regulations. (N.T. 950)

24. Mr. Lunsk later determined that 25 Pa. Code 271.211(e), did not apply to Tri-State.

a. Mr. Lunsk testified that the five years referred to in Section 271.211(e) related to permits issued under the 1988 regulations and not before. (N.T. 953)

b. That section applies to the 1995 permit but not to the 1982 permit. (N.T. 16-29)

25. Richard M. Bodner is an engineer employed by Tri-State in connection with this permit. He has been involved since 1990. (N.T. 1277)

26. He had a conversation with Mr. Lunsk concerning the status of the permit in 1990. He recalled Lunsk telling him that 25 Pa. Code § 271.211(e), said that if the facility were not

constructed within five years of the permit's issuance, then the permit had lapsed. (N.T. 1281-82; Exhibit A-510)

27. Mr. Pounds recalls that he and John Dernbach "worked with the region to develop an interpretation [of 25 Pa. Code § 271.211(e)], which would provide for [the Tri-State] facility to continue to fit within the regulations." (N.T. 1256)

28. Ronald C. Furlan is a Program Manager for the Waste Management Program in the Department's Southeast Regional Office. He has held that position since July, 1994. He is in charge of the oversight of personnel and signed the Tri-State permit as the Program Manager. (N.T. 1066-68)

29. Because the facility already had a permit, it was the Department's position that the criteria in 25 Pa. Code § 279.202(a) did not apply. The Department did, however, request Tri-State to provide information concerning those criteria. The Department was satisfied with the information which Tri-State provided. (N.T. 1608-09)

30. The Department initially only required Tri-State to meet the isolation distances in Section 279.202(a)(2) through (a)(5). (Exhibit TST-55; N.T. 955-56)

31. If the Tri-State application had been for a new permit, all of the criteria in 25 Pa. Code § 279.202(a), referred to as setback requirements, would apply. (N.T. 1606)

32. Section 202(a)(1) of the regulations requires that facilities located in floodplains must be floodproofed.

33. In a memo dated August 5, 1994 to Mr. Lunsk, Matthew Aresery noted that Tri-State agreed to revise its drawings to raise the elevation higher than 298.9 feet, the 100-year flood level. (Exhibit TST- 44)

34. Areas where any waste processing or transfer activities would take place were built up above the 100-year flood elevation. (N.T. 1544, 1824-28)

35. To floodproof the facility the areas were graded to create a 300-foot contour elevation around the building, the holding tank, the access road, and the staging areas except for the lower staging area. (N.T. 1824; *see also* Exhibit ECO-90)

36. Mr. Bodner testified that he believed that the Department approved this method of floodproofing because they issued the permit. (N.T. 1545)

37. Mr. Bodner determined that the facility was not prohibited pursuant to Section 279.202(a)(2), because there were no "important" or "exceptional value" wetlands within 300 feet of the proposed facility.

a. Kenneth Anderson is a water pollution biologist for the Soils & Waterways section of the Department. (N.T. 769-71)

b. He testified that he had no evidence that the wetlands present on the site were "important" or "exceptional value" wetlands as defined by the regulations. (N.T. 824)

38. By personal observation, Mr. Bodner determined that there were no occupied dwellings within 300 feet of the facility which would prohibit its operation under § 279.202(a)(3). (N.T. 1548)

39. Mr. Bodner concluded that there is no perennial stream as defined by 25 Pa. Code § 271.1 within 100 feet of the facility; therefore, § 279.202(a)(4) did not apply. (N.T. 1548-49)

40. Mr. Bodner determined that 279.202(a)(5) did not apply because there will be no processing of waste within 50 feet of a property line. (N.T. 1555)

41. An elevated sand mound septic system was built on the Tri-State site some time around 1989. (Exhibit TST-78)

42. The sand mound is located in the floodway of Tohickon Creek. (N.T. 387)[3]

43. The sand mound was not depicted on the site plan for the site. (N.T. 399; Exhibit ECO-90)

44. Joel DeFreytas, a civil engineer for Tinicum Township, testified that township ordinance prohibits the location of a sand mound in a floodway. (N.T. 406)

45. The septic system which existed prior to the installation of the sand mound is depicted on the site plan. (Exhibit ECO-90)

46. Mr. Bodner testified that it was shown because it was on the base map that was used to prepare the site plan for the Tri-State renewal application. (N.T. 1995)

47. The site plan was originally submitted to the Department in 1992. (N.T. 1995)

48. The location of this "existing" septic system is approximately shown on the site plan within the area entitled "facility limits" and just inside the border of the floodway of the Tohickon Creek. (Exhibit ECO-90)

49. The purpose of the sand mound is to support the facility as a bathroom. (N.T. 1760)

50. Mr. Bodner conceded that the elevated sand mound plays a part in the ultimate land use of the site. (N.T. 1943).

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[3] The record does not contain an adequate definition of "floodway" and "floodplain." However, in *Tohickon Valley Transfer, Inc. v. Tinicum Township Zoning Hearing Board*, 509 A.2d 896, 901 (Pa. Cmwlth. 1986), the court observed that "[t]he area of land encompassed by the 100 year floodline is called the floodplain which is divided into two flood districts, the flood*way*, the land adjacent to the stream, and the flood*fringe*, the area between the floodway and the 100 year floodline." (Emphasis in original).

51. There was no evidence as to whether or not the existing septic system or sand mound system was floodproofed.

52. The facility permit application submitted to the Department contained only the signature block portion of a plan drawn by DelVal Soil Consultants for the permit application submitted to the Bucks County Department of Health for construction of the elevated sand mound. (N.T. 402; Exhibit TST-1 at Form 32, Attachment 4)

53. The plan submitted to the Bucks County Department of Health did not show the boundaries of the 100-year floodplain or the floodway. (Exhibit TST-132)

54. Larry Lunsk testified that the Department relied on the Bucks County Department of Health to "do their job as far as the sewage program is concerned." (N.T. 1610; *see also* N.T. 980)

55. Mr. Lunsk testified that the Department only requested Tri-State to prove that it had a valid septic permit in response to a comment received from the public. (N.T. 1610)

56. However, over a year before the public hearing, Mr. Lunsk issued a technical review letter dated March 10, 1994 which requested "[a]n explanation of the design and permitting of the existing septic tank system" which "must be explained in detail." (Exhibit TST-66 at p. 3 ¶ 7.G; N.T. 970-71)

57. The information was required as part of the technical review "because it is relevant to the facility's operation because there is no public sewer . . . ." (N.T. 971)

58. The information supplied by Tri-State is contained in Form 32, Attachment 4 of the permit application. (N.T. 971; Exhibit TST-1; *see also* Exhibit TST-104 at p. 8)

59. By letter dated June 21, 1994, the Bucks County Department of Health also

responded to the Department's technical review letter noting that the elevated sand mound was constructed except for the building sewer, pump apparatus, seeding and drilling of a well. (Exhibit TST-78)

60. A public hearing was held on July 11, 1995. The Department responded to concerns raised by the public in a Public Comment Response Document, including concerns regarding the septic system. (Exhibit TST-70 at pp 2-3)

61. Patricia Ann Quigley, Inc. performed a wetland delineation of the site as part of the permitting process to obtain an after-the-fact permit for the fill in the access road. Her delineation was accepted by the Army Corps of Engineers (Corps). (N.T. 626; 776-77; Exhibit ECO-37)

62. This wetland delineation was performed in the fall/winter of 1987-88. This delineation does not appear to include Tax Parcel 44-001-009-001, an adjoining parcel owned by Tri-State, or the area along Rt. 611, north of the access road. (Exhibits ECO-6; ECO-37)

63. As part of the after-the-fact permitting process with the Corps, the Project Manager from the U.S. Army Corps of Engineers who was involved in the initial surveillance and enforcement investigation participated with Ms. Quigley, consultant for TST, in determining the extent of the wetlands on the property. (N.T. 588-89)

64. The Corps made its jurisdictional determination and issued its permit for the fill for the access road in February, 1989. (Exhibit TST-31)

65. Jurisdictional determinations by the Corps are good for five years. Accordingly, the Corps' jurisdictional determination with respect to wetlands on the site expired in 1994, which predates the issuance of the permit. (N.T. 614)

66. The wetlands occur at the toe of the slope of Route 611 and form a continuous band

around the perimeter of the site. (Exhibits ECO-6; ECO-37)

67. There are wetlands along the full length of the access road which were delineated by Ms. Quigley but are not shown on the site plan. (N.T. 393)

68. Any access from Route 611 to the interior of the site entails an "unavoidable" crossing of the band of wetlands along the highway. (Exhibit ECO-6)

69. In 1991, Ken Anderson inspected the site along the west side of Route 611. He noted that a wetland delineation was needed. (Exhibit TST-39)

70. There is no evidence that a delineation was performed after 1991.

71. Mark Gallagher presented by the Township as a wetlands expert, reviewed Ms. Quigley's delineation notes, which included a site plan with shaded areas indicating the location of wetlands on the site. (N.T. 729-30; Exhibit ECO-37).

72. He testified that there appeared to be wetlands along Route 611 north of the access road. (N.T. 657-58)

73. Mr. Bodner admitted that wetlands southwest of Route 611 were not shown on the site plan. (N.T. 1557)

74. The *Halla* appeal settlement authorizes Tri-State to fill the so-called wetland "tongue" on the site. (Exhibit S-1; Exhibit TST-13)

75. Mr. Gallagher stated that it was difficult for him to accurately identify the wetlands on the site because he has not been on the site and was basing his opinion only on what he could see from the perimeter of the site. (N.T. 654-55)

76. Tri-State intends to construct an acceleration lane and a deceleration lane (accel/decel lanes) in the PennDOT right-of-way off of Route 611 for access and egress to the site. The

accel/decel lanes are disclosed in Attachment 14 to Form D of the Application. (N.T. 1936-37; Exhibit TST-1)

77. Tri-State currently possesses a valid Highway Occupancy Permit from PennDOT to make the improvements on Route 611 for access to the facility. (N.T. 1926-27)

78. Mr. Bodner admitted that the construction of the accel/decel lanes in accordance with plans submitted to PennDOT is likely to cause an encroachment in the wetlands. (N.T. 1927-28)

79. Mr. Lunsk testified that:

a. he did not recall whether the Department considered whether or not the accel/decel lanes would encroach on wetlands; (N.T. 1000)

b. he did not know if Tri-State had to secure an encroachment permit; (N.T. 1000)

c. he did not know whether the accel/decel lanes would encroach on wetlands. (N.T. 1748)

80. He assumes that if the accel/decel lanes required the filling of wetlands a permit would be necessary. (N.T. 1000-01)

81. The accel/decel lanes were not shown on the site plan because Mr. Bodner did not believe they were an access road as defined by the regulations. They were not part of the facility changes that were depicted for the repermitting application. (N.T. 1933-34)

82. The stretch of the Tohickon Creek which runs past the proposed facility is not completely shown on the site plan. (Exhibit ECO-90)

83. The Tohickon Creek has been under study for inclusion in the National Wild and Scenic River System since 1992. (N.T. 150-51; Exhibit TST-115)

84. The Tohickon Creek has been "nominated" as a 1-A Priority waterway for study in the Pennsylvania Scenic Rivers Inventory, but has not been "designated" under the Pennsylvania Scenic Rivers Programs. (N.T. 1436; Exhibit TST-112)

85. The status of the Tohickon as a "nominated" but not a "designated" watercourse under the Pennsylvania Scenic Rivers Program does not preclude municipal waste facilities being sited near it. (N.T. 1436-37)

86. Materials relevant to the status of the Tohickon in the federal and state Scenic River Programs were eventually submitted as part of Form D of the permit application. (N.T. 1562-75; Exhibits TST-114; TST-115)

87. There is a channel at the back end of the property that was only shown by its contours but not labelled on the site plan. (N.T. 1963)

88. Bodner testified that he did not explicitly identify it because it was of a different character than other identified channels on the site. Rather than a clear drainage channel like the others, it is "a broad, large, low spot that meanders through the back of the property and on the adjacent site." (N.T. 1963)

89. Mr. Lunsk could not locate this channel on the site plan from the topographical lines. (N.T. 1029)

90. This channel was not a perennial stream because it does not have flow every month of the year. (N.T. 1030-31)

91. The Department determined that Tri-State had adequate access controls under 25 Pa. Code § 279.212, because they proposed a gate across the access road and there was a natural vegetative barrier around the site. (N.T. 1630)

92. Also, there is no other way other than the access road to approach the site by vehicle and the operations will all take place inside the buildings which will be locked. (N.T. 1630)

93. There is not a fence which goes around the perimeter of the property. (N.T. 1586-89)

94. Mr. Bodner testified that the vegetative barrier was a suitable access control based on his experience in the permitting of transfer stations and numerous other waste management facilities within the Commonwealth. (N.T. 1591)

95. Mr. Bodner stated that if the Department deemed the natural vegetative buffer to be inadequate, a fence could be located to prevent unauthorized access to necessary portions of the site. This fence would not encroach on wetlands or encroach within the floodway. It would encroach within the floodplain. (N.T. 1820-21)

DISCUSSION

As third parties appealing the issuance of the transfer station permit, the Appellants bear the burden of proving that the Department abused its discretion. 25 Pa. Code § 1021.101(c)(2). The Department abuses its discretion when it acts with "manifestly unreasonable judgment, partiality, prejudice, bias, ill-will" or misapplies or overrides the law. *Sussex, Inc. v. DER,* 1984 EHB 355, 366.[4]

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[4] The Appellants argue that this Board should consider evidence of the Department's "motivation" in reissuing the permit to Tri-State. They allege that the Department was "motivated by an intent to satisfy the request of a Senator that the problems be worked out." (Tinicum Township Post-Hearing Brief at p. 51). In our prior opinion, we precluded the Appellants from presenting evidence that the Department issued the permit as a political accommodation. *Tinicum Township v. DEP*, 1996 EHB 816, 829. The Appellants remind us that motivation is fairly encompassed as "prejudice, bias or ill-will" in our definition of an abuse of discretion. While we agree that this is so, we also note that the right to contact one's representative in government is constitutionally protected. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). ("In a representative democracy...[the] branches of government act

Our review of the Department's action is *de novo*; thus we may substitute our discretion for that of the Department where we find, based on the evidence presented to us at hearing, that the Department failed to properly exercise its authority. *Warren Sand & Gravel v. Department of Environmental Resources,* 341 A.2d 556, 565 (Pa. Cmwlth 1975); *Harbison-Walker Refractories v. DEP*, 1996 EHB 116. The Board is not required to substitute its discretion even where we find that the Department erred. *Western Hickory Coal Company v. Department of Environmental Resources*, 485 A.2d 877 (Pa. Cmwlth 1984); *LCA Leasing, Inc. v. DEP,* EHB Docket No. 95-203-MG (Adjudication issued June 17, 1997).

We turn first to the Appellants' argument that the Department abused its discretion because it did not require Tri-State to submit a new permit application under the 1988 solid waste regulations. The Appellants contend that Tri-State's original permit had expired by operation of law under 25 Pa. Code § 271.211(e). Therefore, the Department should have required a new permit application and required compliance with all of the current regulatory requirements.

The Department's interpretation of its own regulations is entitled to great weight and will not be disregarded unless clearly erroneous. *Hatchard v. DER*, 612 A.2d 621 (Pa. Cmwlth. 1992), *petition for allowance of appeal denied*, 622 A.2d 1378 (Pa. 1993); *Kise v. DER*, 1992 EHB 1580. However, we are not bound to the Department's interpretation when the Department ignores the plain language of regulations. We have observed that "[a]n agency cannot, under the guise of

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on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."); *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972) (applying principle of *Noerr* to the right of citizens to petition administrative agencies and the courts). The mere involvement of a State Senator acting on behalf of a constituent -- by contacting relevant administrative officials-- does not constitute bias or ill-will on the part of those administrative officials.

interpretation, ignore the language of its regulations, for the agency as well as the regulated public is bound by the regulation." *County of Schuylkill v. DER*, 1989 EHB 1241, 1267.

The 1988 amendments to the Department's solid waste regulations constituted a complete overhaul of the solid waste management program. The old regulations, adopted in 1971 and amended in 1977, provided one regulation specific to transfer stations. 25 Pa. Code § 75.27 (repealed). After 1988, an entire chapter in the regulations was devoted specifically to transfer stations. 25 Pa. Code §§ 279.1-279.262.[5] The general provisions of the new regulations required existing permit holders to either upgrade their facilities to comply with the new regulatory scheme or close their facilities. 25 Pa. Code § 271.211.

Section 271.211(e) provides that "[i]f no municipal waste is processed or disposed at a facility within 5 years of the date of issuance by the Department of a permit for the facility, the permit is void." 25 Pa. Code § 271.211(e). It is uncontroverted that there has never been any processing or disposal of waste at the Tri-State site. Thomas Treadway testified that the only construction of the transfer station building which has occurred is the setting of footers for the main building. Two septic systems were also constructed and stone fill was poured for the access road. Nevertheless, the Department took the position that 25 Pa. Code § 271.211(e), did not apply to the Tri-State facility because it was originally permitted before 1988. Therefore, it allowed Tri-State to apply for a *renewal* of its permit rather than submit an application for a new permit.

There is no language in the regulations which provides the Department with any explicit authority to exempt facilities with pre-1988 permits from application of subsection (e). In

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[5] Additional sections were added to the chapter in 1992 and were not part of the 1988 package. *See* 25 Pa. Code §§ 279.271-279.272.

promulgating the 1988 solid waste regulations, it was the purpose of the Environmental Quality Board (EQB) to require more comprehensive and stringent regulations of solid waste management facilities. 18 Pa. Bull. 1601 (April 9, 1988). Where the EQB intended to exempt facilities which had been permitted prior to 1988 from the new requirements, it explicitly did so. *Compare* 25 Pa. Code § 279.202(a) (applies "[e]xcept for areas that were permitted prior to April 9, 1988 . . .").

By promulgating Section 271.211, the EQB obviously intended to discourage the building of new facilities under outdated conditions as departmental regulation and technology progressed. Under subsection (e) facilities cannot defer their operation indefinitely and still claim rights under an existing permit. The EQB was not insensitive to the fact that litigation could impede the timely commencement of a facility's operations. The regulation, as originally proposed, provided for permits to lapse after two years. 17 Pa. Bull. 2303, 2327 (June 13, 1987). This period was increased to five years to make allowances for litigation. 18 Pa. Bull. at 1685. Therefore, the EQB had already taken into consideration the fact that litigation could prevent a permittee from building a solid waste facility, and made allowances accordingly. The Department had no authority to further extend the five year time limit. *See O'Boyle Ice Cream Island v. Commonwealth*, 605 A.2d 130 (Pa. Cmwlth. 1992)(where the legislature includes specific language in one portion of a statute and excludes it in another, the language should not be implied where excluded);*City of Scranton v. DEP*, EHB Docket 94-060-C (Opinion issued November 4, 1997).[6]

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[6] *But see Bichler v. Department of Environmental Resources*, 600 A.2d 686 (Pa. Cmwlth. 1991), where the Commonwealth Court exercised its equity authority to extend the deadline in 25 Pa. Code § 271.111, for the filing of a preliminary permit application for a permit modification for the operation of a landfill with a pre-1988 permit. In reversing the Board's decision, which held that litigation did not excuse compliance with the filing deadline, the court explicitly stated that its determination was based upon the unique circumstances presented by the case. *Id.* at 689. The

The 1988 regulations allow for the transitioning of existing facilities which were originally permitted under the old regulations. The purpose of such a transition period was to require existing facilities to eventually conform to current regulation. *See City of Bethlehem v. DER*, 1991 EHB 224; 18 Pa. Bull. 1681, 1684. However, there is no evidence of an intent to grandfather unbuilt facilities whose permits had not been finalized. It simply makes no sense to allow such a transition for a facility which existed only on paper and which did not conform to all current regulations.

Tri-State argues that application of subsection (e) amounts to an improper retroactive application of the regulation. We need not decide whether the Tri-State permit was void in 1988. The facility was not even under construction in any meaningful way in 1993, five years after the effective date of the new regulations. Accordingly, there is no basis for the position that the Tri-State permit was not void under Section 271.211(e), simply because a permit existed before 1988.

Tri-State argues that we should apply subsection (f) of 25 Pa. Code § 271.211, and not subsection (e). Even under subsection (f) Tri-State's permit lapsed by operation of law. Subsection (f) provides:

> A municipal waste management facility without a permit term that was permitted by the Department prior to April 9, 1988 shall have a permit term that expires April 9, 1993. The operator of the facility may apply for permit renewal under § 271.223.

25 Pa. Code § 271.211(f). Section 271.223 requires that:

> A permittee that plans to dispose of or process municipal waste after the expiration of the term set under § 271.211 (relating to term of permits) shall file a complete application for permit renewal on forms provided by the Department *at least 180 days before the expiration date of the permit.*

25 Pa. Code § 271.223(a)(emphasis added). Under this section, Tri-State was required to submit its

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decision does not confer authority to extend regulatory deadlines to the Department or this Board.

renewal application by September, 1992.[7] It did not submit its renewal application until March, 1993. Reading Section 271.211(f) and Section 271.223(a) together, by failing to submit a renewal application 180 days before the expiration of its permit, Tri-State lost the right to seek renewal of its permit and instead was required to seek a new permit under the 1988 regulations. Otherwise the language requiring the filing of a renewal 180 days prior to the expiration of a permit would be mere surplusage; failing to timely file for renewal would have no consequences.

Since we have concluded that the Department should have required Tri-State to file a new permit application, our review next turns to the question of whether the application which was submitted comports with the 1988 regulations. The Appellants contend, among other things, that the environmental assessment required by 25 Pa. Code § 271.127, was inadequate and that there was not an adequate demonstration that other environmental protection acts would not be violated by the operation of the transfer facility as required by 25 Pa. Code § 271.201(a)(3). We agree.

Section 271.127 requires a permit application for a permit under the Solid Waste Management Act to include an environmental assessment which provides "a detailed analysis of the potential impact of the proposed facility on the environment, public health and safety, including traffic, aesthetics, air quality, water quality, stream flow, fish and wildlife, plants, aquatic habitat, threatened or endangered species, water uses and land use." 25 Pa. Code § 271.127(a). Where the Department determines that a harm exists created by the operation of the proposed waste facility, the applicant must provide the Department with plans to mitigate this potential harm. This regulation fulfills the Department's duty to implement Article I, § 27 of the Pennsylvania

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[7] In fact, under the terms of the February consent agreement, Tri-State was required to submit a permit modification and renewal application by July, 1992. (Exhibit TST-9).

Constitution. 18 Pa. Bull. 1681, 1684 (April 9, 1988); *Jefferson County Commissioners v. DEP*, 1996 EHB 997; *see also Pennsylvania Environmental Management Services, Inc. v. Department of Environmental Resources*, 503 A.2d 477 (Pa. Cmwlth. 1986).

Section 271.201(a)(3) of the solid waste regulations provides that "[a] permit application will not be approved unless the applicant affirmatively demonstrates that . . . the requirements of the act, the environmental protection acts, this title and Pa. Const. art. I, § 27 have been complied with." 25 Pa. Code § 271.201(a)(3); *see also* 25 Pa. Code § 271.1 (defining "environmental protection acts"). Further, Section 502(d) of the Solid Waste Management Act, 35 P.S. § 6018.502(d), requires that the application "shall set forth the manner in which the operator plans to comply with the requirements of the . . . 'The Clean Streams Law,' . . . and . . . the 'Dam Safety and Encroachments Act' as applicable." 35 P.S. § 6018.502(d). We have held that this language does not require the information to be as detailed as the information required by those acts for permit applications, but suggests that an applicant must provide such information which would allow the Department to conclude that the applicant has considered their provisions and has some reasonable likelihood of securing necessary permits. *See Jefferson County Commissioners v. DEP*, 1996 EHB 997.

Reviewing the evidence, we find that there was inadequate information in the permit application for a meaningful evaluation of all of the environmental impacts of the proposed facility and for the Department to conclude that Tri-State had a reasonable likelihood of securing other permits necessary for construction and operation of the facility. Specifically, there was insufficient information concerning the sewage facilities at the site, wetlands, the access road, lanes to be added to Route 611, and Tohickon Creek. Although these features were addressed in some manner in different portions of the permit application, they were not illustrated on the site plan in accordance

with 25 Pa. Code § 279.103. Such omissions seriously eroded the Department's ability to consider the full scope of the project.

We first turn to the sewage facilities on the site. The method of sewage disposal for the proposed transfer station is an on-lot elevated sand mound and an on-lot septic tank. The Department's review of the sewage disposal system for the site was cursory at best. Although concerned enough to request a detailed description of the septic system as part of its technical review, Larry Lunsk testified that all that was really considered was whether or not Tri-State had a valid permit from the Bucks County Department of Health. The only information submitted by Tri-State were materials submitted to the Bucks County Department of Health which included some schematic sketches of the proposed system, and copies of correspondence detailing some of the controversy surrounding the status of the sewage permit. This information did not specify the exact location of the elevated sand mound. The sand mound was not depicted on the site plan, although the existing septic tank was shown.

While Tri-State did submit a plan to the Bucks County Department of Health which depicted the sewage facility, this drawing lacked important details, such as the boundaries of the floodway and floodplain of the Tohickon Creek. Moreover, this plan was not submitted to the Department. The Department only noted that the method of sewage disposal had been approved by the Bucks County Department of Health, the sewage enforcement officer for the area. (Exhibit TST-132) The Department did not know where the sand mound was located and evidently did not consider the consequences of locating the sand mound in the floodway of the creek and did not consider the likelihood that its location in the floodway could cause pollution to waters of the Commonwealth, potentially resulting in environmental harm and violating the Clean Streams Law.

Tri-State argues that there is no requirement that the sand mound be shown on the site plan. The Appellants counter that the sand mound is part of the transfer station as that term is defined by the regulations, and therefore should have been included on the site plan.

Section 271.1 of the regulations in effect at the time the permit application was approved,[8] defines a "transfer facility" as:

> A facility which receives and temporarily stores solid waste at a location other than the generation site . . . . The term includes land affected during the lifetime of the operations, including, but not limited to, areas where storage or transfer actually occurs, support facilities, borrow areas, offices, equipment sheds, air and water pollution control and treatment systems, access roads, associate onsite or contiguous collection and transportation facilities, closure and postclosure care and maintenance activities and other activities in which the natural surface has been disturbed as a result of or incidental to operation of a transfer station. . . .

We believe that sewage disposal is included in this definition[9] because it is a "support facility." Since there are people working at the transfer station, it is necessary for sanitary facilities to be provided. Such facilities are not directly connected to the function of a transfer station to process waste, but are certainly incidental to that function.[10] At one point in the permit review process, the

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[8] The definition of transfer facility was amended in 1997 to be identical to that in the Solid Waste Management Act. 27 Pa. Bull. 521, 526 (January 25, 1997).

[9] The more general definition of "facility" as "land, structures and other appurtenances or improvements where municipal waste disposal or processing is permitted. . ." and "permit area" which "includes the areas which are or will be affected by the municipal waste processing or disposal facility" also support our analysis. The construction of sewage facilities to support lavatories located inside a transfer station building affects land within a permit area. The definition of facility also contemplates the existence of structures other than just the transfer building itself. These definitions remain unchanged by amendment.

[10] We note with puzzlement that Tri-State did depict the septic tank, but not the sand mound system, on its site plan and showed it to be within the facility limits. If sewage facilities need not be depicted, why illustrate one on the site plan, but not the other? Mr. Bodner explains that it was placed on the site plan because it had been shown on earlier site plans.

Department took this view. In its technical review, the Department considered the sewage facilities relevant enough to the operation of the proposed transfer station to request additional information, but gave them little further consideration.

There are several provisions of the regulations which require sewage facilities to be shown on a site plan. First, 25 Pa. Code § 279.103(a)(16), requires the map to show "the location and use of buildings and *related facilities* which will be used in the operation." (*Emphasis added.*) Larry Lunsk stated that the sewage facilities were relevant to the transfer station's operation. (Finding of Fact No. 57) Second, since the sand mound and septic tank were part of the transfer facility and were to be located in the floodplain, they should have been included on the site plan pursuant to subsection (a)(8), which requires a topographic map which addresses the siting prohibitions of 25 Pa. Code § 279.202. 25 Pa. Code § 279.103(a)(8).

The acceleration/deceleration lanes which Tri-State proposes to construct within the right-of-way of Route 611 also should have been shown on the site plan. Subsection (a)(11) of 25 Pa. Code § 279.103 requires the site plan to include "the location of access roads to and within the proposed permit area . . . ." Tri-State contends that these lanes do not constitute "access roads" and it was therefore unnecessary to include them on the site plan. We disagree.

Access road is defined as "a roadway or course providing access to a municipal waste processing or disposal facility, or areas within the facility from a road that is under Federal, Commonwealth or local control." 25 Pa. Code § 271.1. The acceleration/decelerations lanes qualify as a "course" which provides access to the facility from a road under "Federal, Commonwealth or local control." These lanes serve no other purpose and are only being constructed to facilitate truck traffic entering and leaving the transfer station. The fact that they are additions to the width of an

existing roadway does not disqualify the lands from the definition of access road.

Further, by not showing the lanes on the site plan the Department could not evaluate the environmental impact of this portion of the project or determine the necessity or likelihood of obtaining other permits. Mr. Bodner admitted that as currently designed the lanes are likely to encroach upon the band of wetlands that circle the Tri-State site. This fact was not readily apparent from the materials submitted by Tri-State in the permit application. In fact, Mr. Lunsk testified that he did not know whether or not the lanes would encroach on wetlands. The wetland materials did not have information concerning the acceleration/deceleration lanes, and the DOT materials submitted with the Form D did not have information concerning wetlands. Had the lanes been shown on the site plan, the Department would have more clearly known that wetland encroachment with the acceleration/deceleration lanes was an issue that had to be considered as part of its review under 25 Pa. Code § 271.127 (environmental assessment) and 25 Pa. Code § 271.201 (compliance with other acts).

The site plan also should have included a more complete depiction of the Tohickon Creek, a channel at the back end of the property and wetlands on the site. Subsection (a)(3) requires the site plan to show the location of surface water bodies including streams, wetlands, drains, irrigation ditches and wetlands. 25 Pa. Code § 279.103(a)(3). The regulation requires the site plan to include features within the permit area, but also features in "adjacent areas." 25 Pa. Code § 279.103(a). "Adjacent area" is defined as "land located outside the permit area, where air, surface water or groundwater, fish, wildlife, vegetation or other resources . . . may be adversely affected by municipal waste . . . facilities." 25 Pa. Code § 271.1. Admittedly the creek does not border the Tri-State property, but it is certainly "adjacent" as defined by the regulations. The small portion of the creek

which is depicted on the site plan is inadequate to judge the effect of the facility, including the sewage facilities, on the creek. The gravity of this omission is enhanced by the creek's consideration for inclusion in state and federal scenic river programs, which indicates the importance of the creek as a water resource in the area.

Further, Mr. Bodner testified that a channel at the back of the property was only shown topographically on the site plan. He stated that it was not clearly shown on the site plan because it was not a perennial stream. Subsection (a)(3) is not limited to perennial streams but requires *all* streams, drains and ditches to be depicted on the site plan. Therefore, this channel, which had water in it at least some time during the year, should have been depicted on the site plan.

Finally, subsection (a)(3) requires wetlands to be shown on the site plan. There are wetlands along the access road and along Route 611 which are not shown on the site plan. Therefore, it is incomplete in this respect as well.

The Department was aware of the existence of these features and gave some consideration to most of them. However, the absence of these features in the site plan may well have resulted in a failure to give adequate consideration to the cumulative impact of this facility on the bordering water resources.

In addition to providing inadequate information on the site plan, the Tri-State permit application fails to adequately address the floodproofing requirements of 25 Pa. Code § 279.202(a)(1). That section prohibits a transfer facility to be:

> In the 100-year floodplain of waters in this Commonwealth, unless the Department approves in the permit a method of protecting the facility from a 100-year flood consistent with the Flood Plain Management Act (32 P.S. §§ 679.101-679.601) and the Dam Safety and Encroachments Act (32 P.S. §§ 693.1-693.27).

25 Pa. Code § 279.202(a)(1). Richard Bodner, Tri-State's consultant, admitted that the facility was located in the 100-year floodplain. Although he described design measures for the facility to mitigate damage caused by a 100-year flood, there is nothing in the permit that explicitly conditions construction and operation of the facility on provision of adequate floodproofing consistent with the Floodplain Management Act and the Dam Safety and Encroachments Act. Rather, the site plan and memoranda, which include some discussion of floodproofing measures, are incorporated into the permit only by reference. (Exhibit ECO-34 at p. 2) Many of the Department's regulations require waste facilities to meet certain requirements, but few specifically require inclusion in the permit. We believe by stating that the Department must approve a method of floodproofing *in the permit*, that the EQB intended a specific provision.[11] The Department did not require Tri-State to include either the sand mound or the septic tank in the floodproofing of the facility. Portions of one of the staging areas are also below the 100-year flood elevation. In order to locate a transfer facility or *part* of the facility, in a 100-year floodplain, the facility must be floodproofed. 25 Pa. Code § 279.202 (a)(1). The regulation does not provide for any exceptions. In sum, the Department abused its discretion by inadequately addressing floodproofing in the permit and by not requiring the entire facility to be floodproofed.

We also find that the Department abused its discretion by approving the access controls proposed for the Tri-State facility. The Department's regulation provides that:

> The operator [of a transfer facility] shall construct and maintain a fence or other suitable barrier around the site sufficient to prevent unauthorized access.

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[11] The regulation as originally proposed precluded a transfer sation to be operated in a 100-year floodplain whether it was floodproofed or not. 17 Pa Bull. 2303, 2392.

25 Pa. Code § 279.212(b). The Department determined that Tri-State had adequate access controls although it did not propose a fence around the perimeter of the property because there was a natural vegetative barrier around the site. The "vegetative barrier" was considered a "suitable barrier."

We do not believe that the vegetation around the site is sufficient to "prevent unauthorized access" as required by the regulation. It is not relevant that the waste processing occurs inside a building which is locked. Therefore, we conclude that the Department erred in not requiring Tri-State to provide plans which included a barrier sufficient to prevent unauthorized access.[12]

Although we could remand this permit to the Department for further consideration, we decline to do so. Remand is not always the most desirable course for the Board to take. *Lower Windsor Township v. DER*, 1993 EHB 1761. This permit application contains a dizzying array of plans and drawings, some of which are nearly twenty years old. Given the changes in regulations and technology, we believe the more prudent course is to reverse the Department's action and void the Tri-State permit.[13] *See Harmar Township v. DER*, 1993 EHB 1856 (declining to remand a permit for further consideration where a permit application failed to include information required by the

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[12] The Appellants also contend that the permit application contained inadequate information concerning professional certifications, insurance and groundwater and radiation monitoring. We find that they did not sustain their burden of proving that the Department erred in these matters.

[13] With leave of the Board Tri-State has requested that the Board strike certain proposed findings of Appellant's post-hearing briefs because some of the proposed findings are either not supported by any citation to the record, are supported by evidence not admitted into the record or are not supported by the references cited. Tri-State also seeks counsel fees for the time spent reviewing these improper proposed findings.

Because we did not rely on these inadequately supported findings in reaching our disposition of this case, we decline to reach Tri-State's motion. We do agree that the Appellants' post-hearing submissions did not comport with Judge Miller's instructions at the close of the hearings, and caution counsel to exercise greater care in future filings before this Board.

regulations).

Accordingly, we reach the following:

CONCLUSIONS OF LAW

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

2. The Board's review is *de novo* and may substitute its discretion for the Department's when the Department fails to properly exercise its authority.

3. When the Board finds that the Department abused its discretion, it has the authority to void a permit.

4. The Appellants have the burden of proving by a preponderance of the evidence that the Department acted unlawfully or abused its discretion in issuing the permit.

5. The Department abused its discretion in processing Tri-State's application as a permit renewal because the permit had lapsed by operation of law. 25 Pa. Code § 271.211(e).

6. The Department abused its discretion in approving the permit application because the site plan for the facility did not include all of the elements required by 25 Pa. Code § 279.103.

7. The Department abused its discretion by failing to adequately review the permit application pursuant to 25 Pa. Code § 271.127 (environmental assessment) and 25 Pa. Code § 271.201 (compliance with environmental statutes).

8. The Department abused its discretion by not explicitly requiring compliance with the floodproofing requirements of 25 Pa. Code § 279.202(a)(1) as a condition of the permit.

9. The Department abused its discretion by not requiring Tri-State to include a fence around the perimeter of the proposed facility in accordance with 25 Pa. Code § 279.212.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TINICUM TOWNSHIP and ECO, INC.	:	
	:	
v.	:	**EHB Docket No. 95-266-MG**
	:	**(Consolidated with 95-268-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TRI-STATE TRANSFER COMPANY, INC., Permittee	:	

ORDER

AND NOW, this 8th day of December, 1997, it is ordered as follows:

1. These consolidated appeals are sustained.

2. Solid Waste Permit No. 100972 is voided.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 95-266-MG
(Consolidated with 95-268-MG)

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: December 8, 1997

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Southeast Region

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MARWELL, INC.	:	
	:	
v.	:	**EHB Docket No. 97-057-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** December 10, 1997

OPINION AND ORDER
ON
MOTION FOR SUMMARY JUDGMENT

by Robert D. Myers, Member

Synopsis:

A well operator that qualifies for the "fee in lieu" of bonding program under the Oil and Gas Act, 58 P.S. §§ 601.101 - 601.605, is required to make the annual payments or else cease operating the oil and gas wells and plug them. When the Department shows, by affidavits and other documents of record, that the operator failed to make the payments - even after being directed to do so by Department letter - the Department establishes that its Order directing the operator to cease operations and to plug the wells was authorized by the Oil and Gas Act and was not an abuse of discretion. The operator's claim that the wells are "Pre-Act" wells qualifying for a bonding moratorium is unsupported on the record. In any event, the moratorium applies only to wells not yet bonded on the effective date of a 1992 amendatory act and the operator's wells were all bonded prior to that date. The operator's contention that the bonding provisions of the Oil and Gas Act are

unconstitutional was not raised in the Notice of Appeal and is waived. Summary judgment is granted to the Department.

OPINION

Marwell, Inc. (Appellant) filed a Notice of Appeal on March 6, 1997 seeking Board review of an Order issued by the Department of Environmental Protection (Department) on February 6, 1997. The Order, reciting that Appellant is the owner and operator of 130 oil and gas wells in Venango County and has failed to bond the wells or pay a blanket "fee in lieu" of bonds, directed Appellant to cease operations and plug the wells.

On June 10, 1997, the Department filed a Motion for Summary Judgment accompanied by affidavits, documentary exhibits, a reply to request for admissions, and a Memorandum of Law. Because Appellant switched attorneys about this time, its Response to the Motion was not filed until October 28, 1997. The Response does not answer the Motion in correspondingly-numbered paragraphs as required by our Rules of Practice and Procedure at 25 Pa. Code § 1021.70(e). Nor is it verified or supported by any affidavits or other "record" documents. Pa. R.C.P. 1035.1. It amounts only to a memorandum of law and we will treat it as such.

The Department filed a Reply to the Response accompanied by an affidavit and Memorandum of Law on November 17, 1997.

In its Motion, the Department avers, as allegedly undisputed facts,[1] that Appellant (1) is the registered operator of the 130 wells, (2) never filed a bond for the wells, (3) paid annual fees of $1,000 in lieu of bonds beginning on September 7, 1988 and continuing up through the year 1991,

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[1] We paraphrase and condense the allegations.

(4) failed to pay any annual fees in lieu of bonds for the years 1992 through 1996, (5) did not respond to a Department letter of August 2, 1996 (received by Appellant on August 17, 1996) inquiring about the delinquent payments, and (6) did not plug the wells. The Department contends that, on the basis of these undisputed facts, the Department is entitled to judgment as a matter of law because of mandatory provisions of the Oil and Gas Act, Act of December 19, 1984, P.L. 1140 *as amended,* 58 P. S. §§ 601.101-601.605.

Appellant, in its Response, claims that (1) Appellant's wells are so-called "Pre-Act" wells that do not have to be bonded, and that (2) Appellant lacked the financial resources either to post bonds or to pay the fees in lieu of bonds. As noted above, these allegations are completely unsupported. Nonetheless, Appellant argues that, because of these allegations, the Department's action is in violation of the Oil and Gas Act and deprives Appellant of its property without due process of law.

In its Reply, the Department alleges that Appellant's wells are not covered by the "Pre-Act" provisions. Accordingly, the Department was required to issue the Order. In addition, the Department argues, Appellant failed to raise a constitutional challenge in its Notice of Appeal.

Section 215 of the Oil and Gas Act, 58 P. S. § 601.215, sets up a comprehensive scheme for quaranteeing the performance by well owners and operators of the requirements of the Act and its regulations. Subsection (d) deals with operators of not more than 200 wells drilled prior to the effective date of the Oil and Gas Act (April 18, 1985) who cannot obtain a bond because of financial inability. Such an operator may pay an annual fee in lieu of bonds, $1,000 where more than 20 wells are involved. Operators qualifying for this "fee in lieu" program may continue to operate so long as they do "not miss any payments" and remain "in compliance with the provisions of [the Oil and

Gas Act] and regulations and permits . . . ."58 P. S. § 601.215(d)(2).

If a payment is missed, the operator must: "(i) immediately submit the appropriate bond amount in full; or (ii) cease all operations and plug the wells in accordance with section 210." 58 P. S. § 601.215(d)(2).

According to the affidavit of Peggy C. Smith, Bonding Clerk for the Department's Northwest Regional Office, Oil and Gas Management, and the documents attached to it, Appellant requested the Department to transfer the permits or registrations for the 130 wells into Appellant's name over a five-year period from 1986 to 1991, specifically on October 7, 1986, August 30, 1988, April 18, 1989, November 9, 1989, May 2, 1990 and August 9, 1991. The transfers were approved on September 18, 1988, November 14, 1988, March 1, 1989, April 26, 1989, May 9, 1990 and September 10, 1991, respectively.

Before the transfer application could be approved, Appellant had to satisfy the financial guarantee requirements of Section 215 of the Oil and Gas Act. On April 14, 1988, according to Smith and the Department documents, Appellant applied to the Department for approval of its participation in the "fee in lieu" program, submitting letters establishing the refusal of four surety companies to issue the required $25,000 bonds because of Appellant's "insufficient financial resources." Satisfied with Appellant's qualifications to be in the program and with Appellant's $1,000 check in hand, the Department gave its approval on September 7, 1988. As noted above, the first series of transfers was approved 11 days later.

Appellant made its annual payments (apparently faithfully) for the three subsequent years 1989 through 1991, as alleged in Smith's affidavit. Then the payments stopped. None were made for the years 1992 through 1996. Dwight G. Ralph, a Water Quality Specialist Supervisor in the

Department's Northwest Regional Office, Oil and Gas Management, states in his affidavit that he sent a letter to Appellant on August 2, 1996, reminding Appellant that it was four years delinquent in its "fee in lieu" payments and that, unless the $4,000 was paid within 30 days, Appellant had to cease operations and plug the wells. This letter was sent certified mail and was received by Appellant on August 17, 1996. No more payments were made and the wells were not shut down and plugged.

Accordingly, the Department issued the Order on February 6, 1997. That Order required Appellant to cease operating the 130 wells immediately and to plug them beginning by March 22, 1997 and continuing at the rate of at least 33 wells every three months until they were all plugged by April 1, 1998. Well site restoration was to be completed by December 31, 1998.

The foregoing history is adequately alleged and supported by the Department. As noted earlier, Appellant's Response does not dispute any of it. We will, therefore, accept these facts as undisputed.

We can grant a motion for summary judgment if the pleadings, depositions, answers to interrogatories, admissions, affidavits and expert reports, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. Nos. 1035.1-1035.5; 25 Pa. Code § 1021.73(b). We must view the Department's Motion in the light most favorable to Appellant, the non-moving party. *Belitskus v. DEP,* EHB Docket No. 96-196-MR (Opinion and Order issued October 21, 1997).

The undisputed facts clearly show that Appellant sought and received the transfer of permits or registrations for 130 wells on the basis of a commitment to pay $1,000 annually in lieu of a bond. It is also clear that Appellant failed to make those payments for the years 1992 through 1996, even

after being directed to do so by the Department's August 2, 1996 letter. On the basis of these undisputed facts, Appellant was required by section 215(d)(2) of the Oil and Gas Act, 58 P. S. § 601.215(d)(2), to immediately submit a bond in the full amount or cease operating the wells and plug them. When Appellant failed to take either of these actions, the Department was fully justified in issuing the Order directing the cessation and plugging.

Appellant claims, however, that the 130 wells are "Pre-Act" wells exempt from bonding. The term, according to Appellant, refers to wells drilled prior to the effective date of the Gas Operations Well-Drilling Petroleum and Coal Mining Act, Act of November 30, 1955, P.L. 756, *as amended,* 52 P. S. §§ 2101-2504, largely repealed by the Oil and Gas Act. These wells are entitled to a bonding moratorium in section 203(a)(4) of the Oil and Gas Act, 58 P. S. § 601.203(a)(4), which, according to Appellant, lasted until August 1, 1997. Apparently legislation has been introduced to make the moratorium permanent.

The first problem with this claim is that it is completely unsupported by any averment or any document making up the record for summary judgment purposes. Pa. R.C.P. 1035.1. Since the age of the 130 wells is crucial to the claim, Appellant had to establish it in order to raise a defense to the Motion. Pa. R.C.P. 1035.3.

Even if Appellant had established that the wells predated the November 30, 1955 Act, P.L. 756, the claim to be covered by the moratorium would still fail. Section 203 of the Oil and Gas Act, 58 P. S. § 601.203, as originally enacted, contained no bonding moratorium. Subsection (a)(4) required either a bond or "fee in lieu" payment as a condition of well registration. The subsection was amended by the Act of July 2, 1992, P.L. 365, effective in 30 days, *inter alia,* by adding the following language:

> For those wells drilled prior to the effective date of the Act of November 30, 1955 (P.L. 756, No. 225), known as the Gas Operations Well-Drilling Petroleum and Coal Mining Act, *which have not been bonded,* the well operator shall have three years to comply. (emphasis supplied).

The three-year period was extended to five by the Act of July 6, 1995, P.L. 286, immediately effective. Thus, a bonding moratorium for qualifying "Pre-Act" wells existed from August 1, 1992 to July 31, 1997. In order to qualify, however, the "Pre-Act" wells had to be wells which had not been bonded at the time the moratorium became effective.[2] Since Appellant's 130 wells had all been bonded before that date, between 1988 and 1991, they were not eligible for the moratorium. Appellant's claim to be exempt from bonding, accordingly, is rejected.

Appellant's second defense to the Motion is that sections 215 and 503 of the Oil and Gas Act, 58 P.S. §§ 601.215 and 601.503, are unconstitutional because Appellant lacks the financial resources to pay the "fee in lieu" arrearages and will be deprived of its property rights in the wells without due process of law if the Department's Order stands. As the Department observes, Appellant failed to raise this issue in its Notice of Appeal. Accordingly, it is waived. 25 Pa. Code § 1021.51(e); *Pennsylvania Game Commission v. DER,* 509 A.2d 877 (Pa. Cmwlth. 1986) *aff'd on other grounds,* 555 A.2d 812 (Pa. 1989). Besides, we do not have the power to determine the constitutionality of a statute. *St. Joe Minerals Corporation v. Goddard,* 324 A.2d 800 (Pa. Cmwlth. 1974).

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[2] New provisions of an amendatory statute shall be construed as effective only from the date when the amendment became effective. 1 Pa. C.S.A. § 1953.

After viewing the matter in the light most favorable to Appellant, we are satisfied that there are no disputes as to any material facts and the Department is entitled to judgment as a matter of law.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARWELL, INC.	:	
	:	
v.	:	EHB Docket No. 97-057-MR
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 10th day of December, 1997, it is ordered as follows:

1. The Department's Motion is granted.

2. Summary judgment is entered against Appellant.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 97-057-MR

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: December 10, 1997

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

For the Commonwealth, DEP:
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Northwestern Region

For Appellant:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

VALLEY FORGE CHAPTER OF TROUT UNLIMITED, et al	:	
	:	**EHB Docket No. 97-112-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GREAT VALLEY SCHOOL DISTRICT, Permittee	:	**Issued:** December 11, 1997

OPINION AND ORDER ON MOTION TO DISMISS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board grants Permittee's Motion to Dismiss on the grounds that the sole issue of the appeal is moot when new provisions concerning dechlorination of effluent in an amended NPDES permit corrects Appellants' issue.

OPINION

This matter was initiated with the filing of a notice of appeal by the Valley Forge Chapter of Trout Unlimited, the West Chester Fish, Game, and Wildlife Association, the Open Land Conservancy of Chester County, the Green Valleys Association of Southeastern Pennsylvania, the Raymond Proffitt Foundation, and the Pennsylvania Environmental Defense Foundation

(collectively, Appellants[1]) challenging the Department's issuance of an April 22, 1997 NPDES Permit No. 0031739 to Great Valley School District (Great Valley) for a sewage facility on Church Road in East Whiteland Township, Chester County, Pennsylvania. This permit was the reissuance of an existing permit and failed to require Great Valley to dechlorinate the effluent from its treatment plant as required by the Department's most recent regulations.[2] Under the terms of the permit, Great Valley is allowed to discharge total residual chlorine (TRC) 0.5 milligrams per liter on a monthly average to an unnamed tributary of Valley Creek, which is designated an Exceptional Value watershed.[3]

Currently before the Board is Great Valley's October 21, 1997 Motion to Dismiss the appeal on grounds of mootness because the Board can no longer grant the relief requested. By a letter dated October 23, 1997 the Department joined in the motion.

BACKGROUND

On May 20, 1997 Appellants appealed the Department's April 22, 1997 reissuance of the NPDES Permit No. 0031739 to Great Valley. On August 18, 1997 Appellants filed a Motion for Summary Judgment in which they alleged that the Department acted contrary to law because it did not follow its own regulations. On August 27, 1997 the Department issued a draft NPDES permit amendment revoking the effluent limitation challenged in the appeal and requiring Great Valley to

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[1] All of the organizations are non-profit corporations dedicated to environmental conservation and protection.

[2] The final regulations became effective on February 12, 1994.

[3] "Facilities utilizing chlorine which discharge to Exceptional Value Waters, ... shall dechlorinate their effluents prior to discharge into the waters." 25 Pa. Code § 93.5(f)(2)

dechlorinate its effluent. On September 3, 1997 Great Valley and the Department filed a Joint Motion for Extension of Time to Respond to Appellants' Motion for Summary Judgment and for a Stay of Proceedings. The requested extension was based on the fact that the Department intended to issue a permit amendment which would render the sole issue of the appeal, the legality of the TRC effluent limitation, moot. By an October 22, 1997 letter Appellants withdrew the motion.

On October 14, 1997, the Department issued an amended permit to Great Valley. The amended permit revokes the challenged TRC limit and specifically requires Great Valley to dechlorinate its effluent. The permit provides Appellants with the precise relief sought in the appeal. Appellants recognize that issuance of the final permit resolves the issue in the case presently before the Board. In their October 22, 1997 letter withdrawing their Motion for Summary Judgment Appellants state, "Appellants are satisfied that the permit (amended) in this matter now requires dechlorination, as required by law, and as requested in the Appeal." Moreover, on or about October 1, 1997 Great Valley completed installation of dechlorination facilities and has commenced dechlorinating its effluent.

On October 21, 1997 Great Valley filed its motion to dismiss. Appellants have not filed a response.

DISCUSSION

Great Valley contends that the appeal should be dismissed for mootness since the Board can no longer grant the relief requested. Great Valley asserts that the amended permit, which revokes the challenged TRC limit and requires Great Valley to dechlorinate its effluent, renders the prior permit null and void.

Under Board Rule 1021.73(d), 25 Pa. Code § 1021.73(d), a response to a dispositive motion

shall be filed within 25 days of the date of service of the motion. Since Great Valley served a copy of its motion on Appellants's counsel on October 17, 1997, Appellants had until November 12, 1997[4] to file their response. To date Appellants have not filed their response. However, because counsel for Appellants states in the letter withdrawing the appeal that Appellants cannot afford to further litigate, are satisfied that the amended permit requires dechlorination, and will withdraw the appeal 30 days after the issuance of the amended permit, the Board will accept the October 22, 1997 letter as a response.

We must assess the motion to dismiss in a light most favorable to the non-moving party. *Florence Twp. and Donald Mobley v. DEP*, 1996 EHB 282, 288. The Board treats motions to dismiss the same way it treats motions for judgment on the pleadings; we will dismiss the appeal only where the moving party is entitled to judgment as a matter of law. *Id.*

The Board repeatedly has stated that where an event occurs during the pendency of an appeal before the Board which deprives it of the ability to provide effective relief, the matter becomes moot. *Commonwealth Environmental Systems, L.P. v. DEP*, 1996 EHB 340. As in this case, the appeal of a Department action, specifically the issuance of the NPDES permit with the limitation of TRC effluent, is null and void when the Department issues an amended permit changing the effluent limitations. The amended permit supersedes the prior appealed action. Since the Department issued an amended permit superseding the conditions of the NPDES permit from which this matter arose, the matter is now moot. Since the matter has become moot, no grounds remain upon which to continue the appeal.

Accordingly, we enter the following order.

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[4] Since the 25 day period ended on November 11, 1997 a state holiday, Appellants had until November 12, 1997 to file their response.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

VALLEY FORGE CHAPTER OF TROUT UNLIMITED, et al	:	
v.	:	**EHB Docket No. 97-112-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GREAT VALLEY SCHOOL DISTRICT, Permittee	:	

ORDER

AND NOW, this 11th day of December, 1997, Great Valley's Motion to Dismiss is granted and the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: December 11, 1997

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

For the Commonwealth, DEP:
Martha E. Blasberg, Esquire
Southeastern Region

For Appellant:
John Wilmer, Esquire
Media, PA

For Permittee:
Vincent M. Pompo, Esquire
James E. McErlane, Esquire
LAMB, WINDLE & McERLANE
West Chester, PA

kh/bl

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

WILLIAM E. MURPHY	:	
	:	
v.	:	**EHB Docket No. 97-156-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LACKAWANNA COUNTY RAILROAD AUTHORITY, Permittee and HARVEST STATES COOPERATIVES/ AMBER MILLING COMPANY DIVISION, Intervenor	:	**Issued: December 19, 1997**

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

by Robert D. Myers, Member

Synopsis:

A Motion for Summary Judgment is granted, and the appeal is dismissed for lack of standing, where the Appellant has appealed the Department's issuance of a NPDES permit authorizing storm water discharge from construction activities into a receiving stream, but the record evidence does not show that Appellant has a substantial, direct, and immediate interest in the litigation.

OPINION

On July 25, 1997, William E. Murphy (Appellant) filed a Notice of Appeal with the Board *pro se* challenging the issuance of National Pollutant Discharge Elimination System (NPDES) Permit No. PAS10S042 (Permit) to Lackawanna County Railroad Authority (Permittee). This Permit authorizes the discharge of storm water into Indian Run, the receiving stream, from the

construction of a flour mill on 42 acres of land in Mt. Pocono Borough, Pocono Township, Tobyhanna Township, and Coolbaugh Township, Monroe County, Pennsylvania (Project Site). In the Notice of Appeal, Appellant alleges:

> 1) The NPDES permitting process required by the Clean Water Act (Public Law 100-4) was carried out utilizing at least one piece of erroneous information (a map showing incorrect location of springs and pump houses) that had been provided by RKR Hess, a company that is currently under investigation by the U.S. Attorney's Office in Philadelphia (see Attachments 1 and 2).
>
> 2) The NPDES permit was issued prior to the completion of the 106 review process required by the National Historic Preservation Act Amendments (Public Law 90-665), which should not have happened, according to an employee of EPA (see Attachment 3.)
>
> 3) The NPDES permit was issued prior to the completion of the 106 review process and the finalization of a Memorandum of Agreement (MOA) which, as of July 15, 1997, was opposed by a participant in the process on the grounds that certain EPA employees and the State Historic Preservation Officer were inflexible in their thinking as to the content of the MOA's (see Attachment 4).
>
> 4) All of the above-cited processes have been interfered with by elected officials, not the least of whom is Senator Rick Santorum, who has attempted to mislead the Head of EPA by indicating that the mill will produce 500 new jobs in the Northeast (see Attachment 5).

(Notice of Appeal at 5.)

On July 29, 1997, Harvest States Cooperatives/Amber Milling Company Division (Intervenor) filed a Petition to Intervene in this matter. Because Intervenor is the actual developer of the project and has a leasehold interest in the Project Site, the Board granted the petition on August 19, 1997.

On August 14, 1997, Appellant filed a Motion for Protective Order. On August 21, 1997, Permittee filed a related Motion to Compel the Deposition of Appellant. The Board denied Appellant's Motion for Protective Order on August 21, 1997 and directed that Appellant present

himself for deposition. On October 10, 1997, the Board extended the period for discovery at the request of the parties.

On October 28, 1997, Permittee and Intervenor filed the present Motion for Summary Judgment and Motion to Dismiss, with a supporting Memorandum of Law, and Motion for Stay of Discovery Pending Disposition of the Motion for Summary Judgment and Motion to Dismiss. On November 12, 1997, the Board stayed discovery pending disposition of the Motion for Summary Judgment and Motion to Dismiss. On November 24, 1997, the Department of Environmental Protection (Department) filed a letter advising the Board that it concurs with the Motion for Summary Judgment and Motion to Dismiss.

Appellant did not file a response to the Motion for Summary Judgment and Motion to Dismiss. However, on December 2, 1997, Appellant filed a letter with the Board making the following remarks: (1) Appellant was unaware that he could oppose the Motion for Stay of Discovery and suggests that the Board should have notified him of that right;[1] (2) Appellant has knowledge of several apparent irregularities in the Department's permitting process here; (3) Appellant has evidence that the Department was under significant political pressure to issue the Permit;[2] (4) Appellant's inability to pursue discovery renders his appeal moot and denies Appellant

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[1] The Board may not give legal advice to parties in an action before the Board. The Board has previously warned appellants opting to appear before the Board *pro se* that they assume the risk of their lack of legal expertise. *See, e.g., Taylor v. DER*, 1991 EHB 1926; *Santus v. DER*, 1995 EHB 897.

[2] To the extent that this evidence pertains to Objection No. 4 in the Notice of Appeal, we note that, at his deposition, Appellant agreed that this objection should be stricken from the appeal. (*See* Motion, Murphy Deposition at 74.)

his due process rights;[3] (5) summary judgment is not proper here because there is a genuine issue of material fact as to whether the Department issed the Permit before completing an MOA;[4] and (6) summary judgment is not proper here because Appellant has not completed discovery.[5]

Rule 1035.2 of the Pennsylvania Rules of Civil Procedure, Pa. R.C.P. No. 1035.2, states in pertinent part that a party may move for summary judgment as a matter of law *before the completion of discovery* whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery. Summary judgment may be entered against a party who does not respond to the motion. Pa. R.C.P. No. 1035.3(d).

Standing

Permittee and Intervenor contend that the Board should grant summary judgment here because Appellant lacks standing to appeal the Department's issuance of a NPDES permit for storm water discharge from construction activities into Indian run.

An appellant has standing to challenge a departmental action only if he is "aggrieved" by that action. *Belitskus v. DEP*, EHB Docket No. 96-196-MR (Opinion issued October 21, 1997). To be "aggrieved," the appellant must have a direct, immediate and substantial interest in the litigation

---

[3] Due process under the law is based, in part, upon the parties' compliance with established procedural rules. Under the Board's rules, Appellant had an opportunity to oppose the Motion to Stay Discovery but failed to file a timely response. *See* 25 Pa. Code § 1021.71(f).

[4] Actually, there is no dispute that the Department issued the Permit before completion of an MOA. The Permit was issued on May 6, 1997, and the MOA was completed on August 8, 1997. (*See* Motion, paras. 2.2 and 2.47.)

[5] In addition to Appellant's letter, on December 15, 1997, the Board received a copy of a letter, dated December 11, 1997, from Jean K. Wolf to the individuals who signed the final MOA. However, Jean K. Wolf is not a party to this appeal, and the content of the final MOA is not at issue here. Therefore, we have not considered the Jean K. Wolf letter.

challenging that action. *Id.*; *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975). A "substantial" interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law. *Id.* An interest is "direct" if the matter complained of caused harm to the party's interest. *Id.* An "immediate" interest is one with a sufficiently close causal connection to the challenged action, or one within the zone of interests protected by the statute at issue. *Id.*

In making their argument for lack of standing, Permittee and Intervenor rely on Appellant's own deposition testimony, a topographical map upon which Appellant marked the location of his home, and their Storm Water Management Plan. (*See* Motion, Murphy Deposition and Exhibits 2, 6, 7.) Based on this evidence, Permittee and Intervenor allege that: (1) Appellant's residence is 6,300 feet from the proposed project site, is on the opposite side of Pocono Manor hill from Indian Run, and is *not* located in the Indian Run watershed; (2) Appellant does not own or occupy any other property on or abutting Indian Run; (3) Storm water flowing from the project site will *not* travel through, across or adjacent to any property owned or occupied by Appellant; (4) Appellant admits that the storm water control and detention facilities to be constructed under the Permit will actually improve storm water runoff conditions; and (5) when constructed, the project will not even be visible from Appellant's property. (Motion at 6-7, paras. 2.20-2.25; Murphy Deposition at 12-13, 41; and Exhibits 2, 6, 7.)

Our review of the evidence indicates that Appellant's interest here is in the preservation of historic properties. Indeed, Appellant made clear at his deposition that his only real objection to the Department's action is that, contrary to the federal regulation at 36 C.F.R. § 800.3(c), the Department issued the storm water Permit before an MOA was completed on issues pertaining to

historic preservation. (Motion, Murphy Deposition at 5, 63, 75.) However, nothing in the record suggests to us that Appellant's interest in historic preservation surpasses the common interest of all citizens in procuring obedience to the law in that regard. Thus, we cannot say that Appellant has a "substantial" interest in this litigation. Even if we could conclude that Appellant's interest was "substantial," we could not say that Appellant has a "direct" and "immediate" interest in this litigation. By Appellant's own admission, the storm water Permit will cause *no* harm to historic properties. Quite the contrary, the Permit provisions will *improve* storm water runoff conditions in the area. (Motion, Murphy Deposition at 41.)

Because the record evidence does not show that Appellant has a substantial, direct and immediate interest in this litigation, the Motion for Summary Judgment is granted, and this appeal is dismissed for lack of standing.[6]

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[6] We note, in passing, that the only substantive issue remaining in the appeal after Appellant's deposition, the absence of an MOA at the date of permit issuance, is very likely mooted by the Department's execution of an MOA a few weeks after the appeal was filed.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WILLIAM E. MURPHY	:	
	:	
v.	:	**EHB Docket No. 97-156-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and LACKAWANNA COUNTY:		
RAILROAD AUTHORITY, Permittee	:	
and HARVEST STATES COOPERATIVES/	:	
AMBER MILLING COMPANY DIVISION,	:	
Intervenor	:	

ORDER

AND NOW, this 19th day of December, 1997, it is ordered that the Motion for Summary filed by Permittee and Intervenor is granted, and the appeal is dismissed for lack of standing.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: December 19, 1997

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ASSOCIATED WHOLESALERS, INC. and SUNSHINE MARKETS, INC.	:	
v.	:	**EHB Docket No. 97-080-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARK CENTERS LIMITED PARTNERSHIP, Permittee	:	**Issued:** December 22, 1997

OPINION AND ORDER ON MOTIONS TO DISMISS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The motions to dismiss are granted in part and denied in part. The Board has jurisdiction over the appeal because it was timely filed. Appellants have substantial, direct and immediate interests as co-occupants of the shopping center where Permittee's proposed development and activities are scheduled to take place. The Board grants the portion of the motions to dismiss pertaining to a Department letter that interprets Department regulations since that letter is a nonappealable action. The motions are denied in reference to a Section 404 Clean Water Act Pennsylvania State Programmatic General Permit issued by the Department because the permit affects the permittee's privileges and duties and thus is an appealable action.

OPINION

This matter was initiated with Associated Wholesalers, Inc.'s (AWI) and Sunshine Markets,

Inc.'s (Sunshine) (collectively, Appellants) April 8, 1997 appeal challenging a January 28, 1997 Department of Environmental Protection (Department) letter and the issuance of a federal Section 404 Clean Water Act Pennsylvania State Programmatic General Permit No. WL4097401 for proposed site improvements at the Mark Plaza Shopping Center, a Mark Land Development, in Edwardsville Borough, Luzerne County. The letter, sent to Mark Centers Limited Partnership (MCLP), informed MCLP that after reviewing the documents the Department: 1) determined that a Water Obstruction and Encroachment Permit is not required in accordance with the provisions of the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1-693.27 and its accompanying regulations; and 2) enclosed a Section 404 Clean Water Act Pennsylvania State Programmatic General Permit (PASPGP), providing authorization for an activity waived under the regulations.

Currently before the Board are the motions to dismiss filed by MCLP and by the Department on May 19, 1997 and June 13, 1997, respectively.

BACKGROUND

MCLP is seeking the necessary governmental approvals to demolish a building located on property previously or currently used for a shopping center to make way for the construction of a new building on the same site. As part of the proposed project there will be placement of fill material. Due to the anticipated fill activity and the project's proximity to Toby Creek, MCLP's engineering consultant, Borton-Lawson Engineering, Inc., forwarded its plans for preliminary review to the Department for it to determine whether a Water Obstruction and Encroachment Permit was required under the Pennsylvania Dam Safety and Encroachment Act and its accompanying regulations.

By a December 6, 1996 letter and enclosures, MCLP, through its engineering consultant, submitted a copy of the site improvement plan for the proposed store and requested the Department's review of the plan and the Department's response that no floodplain related permits were required for the project. A copy of the cover letter, submitted by Appellants, states that Christopher D. McCue, P.E. of Borton-Lawson Engineering, Inc., met with Mary Hastings, P.E., Senior Civil Engineer of the Department's Northeast Regional Office's Water Management Program during preliminary design stages to discuss permitting requirements. At that meeting, according to the letter, Ms. Hastings indicated that anything more than 50 feet from the top of the bank of Toby Creek is not regulated by the Department and should be handled on a municipal level. On December 30, 1996 Mary Hastings responded to the letter advising Mr. McCue that the plan had been reviewed to determine whether the proposed project would change, expand, or diminish the course, current, cross-section of a body of water, or will include a fill or structure located in, along or across, or projecting into any water course, floodway or body of water. Based on that review the Department offered the following comments in a December 30, 1996 letter:

> 1. The proposed grading within 50 feet from the top of the bank of Toby Creek would require a Water Obstruction and Encroachment Permit. Based on the location and extent of the proposed grading with respect to the floodway of Toby Creek, it appears a Small Projects application would be appropriate. Please note that, in accordance with the definition of floodway in the Chapter 105 regulations, it is possible that evidence may be submitted to demonstrate the floodway is narrower than the assumed 50 feet from the top of bank. Activities located outside of the floodway would not be regulated as water obstructions or encroachments.
>
> 2. Per our follow-up discussion on December 16, the outfall from 27 inch stormwater pipe is outside of the floodway of Toby Creek and

would not require a permit.

3. Permit requirements for filling of the area which appears to be a small watercourse running through the site would be waived in accordance with Section 105.12(a) if either the drainage area to the watercourse is 100 acres or less, or the channel was constructed for the purpose of stormwater management.

By a January 9, 1997 letter Borton-Lawson Engineering, Inc. requested a letter from Mary Hastings confirming a phone conversation of earlier that day that the proposed work is outside floodway areas. Attached to the letter for reference were various plans including an existing condition plan, a site layout plan, and a grading plan.

By a January 28, 1997 letter, which is the basis of this appeal, the Department advised MCLP of its determinations after having reviewed the January 9, 1997 letter and attachments. The Department determined that the proposed project did not constitute a water obstruction or encroachment within the floodway of Toby Creek, that the placement of fill in the floodway of the small watercourse is regulated by the Dam Safety and Encroachment Act, and that the requirements for a state permit are waived for a water obstruction in a stream or floodway with a drainage area of 100 acres or less. The letter noted that the Department compared the submitted plans to the Flood Boundary and Floodway Map for the Borough of Edwardsville using the definition of floodway in Section 105.1 of the Department's regulations.

On May 19, 1997 MCLP filed a motion to dismiss and supporting memorandum. On June 13, 1997, Appellants filed their response and supporting memorandum. On June 23, 1997 the Department filed its motion to dismiss only on the grounds that the letter and Section 404 Permit are not appealable actions. On July 3, 1997 MCLP filed its reply brief in support of its May 19, 1997

motion to dismiss. On July 17, 1997 Appellants filed their answer and supporting memorandum in opposition to the Department's motion to dismiss.

DISCUSSION

We must assess the motion to dismiss in a light most favorable to the non-moving party. *Tinicum Township v. DEP,* 1996 EHB 816. The Board treats motions to dismiss the same way it treats motions for judgment on the pleadings: we will dismiss the appeal only where there are no material factual disputes and the law is clear so that the moving party is clearly entitled to a judgment as a matter of law. *Tinicum Township v. DEP,* 1996 EHB 816; *City of Scranton v. DER,* 1995 EHB 104.

MCLP and the Department contend that the appeal should be dismissed because 1) the appeal is untimely, 2) Appellants lack standing to maintain the appeal, and 3) the letter and permit are non-appealable actions. We will consider each contention.

Lack of Jurisdiction

MCLP contends the Board lacks jurisdiction over the appeal because it is untimely. MCLP asserts that Appellants received notice of the Section 404 Permit issuance on March 14, 1997 but they did not file their appeal until April 18, 1997[1] well past the 30 day limit.

Appellants contend that they filed in a timely manner. Appellants assert they became aware of the actions on March 14, 1997 and filed the appeal on April 8, 1997 well within the thirty days.

We reject MCLP's contentions. Appellants averred the following in their response to MCLP's Motion to Dismiss: 1) where the Department has not published notice of its action in the

[1] Appellant's counsel did not serve the Department and MCLP with a copy of their appeal until April 18, 1997.

Pennsylvania Bulletin, the thirty day appeal period will begin to run for a third party when he receives actual or constructive notice; 2) constructive notice is information or knowledge of a fact imputed by law to a person because he could have discovered the fact by proper diligence and his situation was such as to require him to look into it; 3) where a party's attorney has received actual notice of a Department action, that notice will be imputed to the client that he represents and, thus, the date of receipt of notice by a party's attorney starts that appeal period; and 4) Appellants received a copy of the Department's January 28, 1997 letter through their counsel on March 14, 1997.

Board Rule 1021.52(a) states an appeal of an action of the Department must be filed with the Environmental Hearing Board within thirty days of receiving notice of the action. 25 Pa. Code § 1021.52(a). Under this rule Appellants had until April 14, 1997[2] to file an appeal to the March 14, 1997 action. Appellants filed their appeal on April 8, 1997 which is well within the 30 day time limit. Furthermore, MCLP has misinterpreted the Board's rules of procedure. The deadline for filing a timely appeal begins to run when the parties have been notified either by active or constructive notice of the action, and ends either when an appeal is filed with the Board or when 30 days have passed, and not when the parties are served with a copy of the appeal. Consequently, Appellants' appeal was timely filed. Therefore, we deny the motion on the grounds of lack of jurisdiction.

Standing

MCLP contends Appellants lack standing to maintain this appeal. MCLP alleges Appellants have failed to establish that they have a direct, immediate and substantial interest in the subject

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[2] The thirty days ended on April 12, 1997. However, since that was a Saturday Appellants had until the following Monday, April 14, 1997.

matter of the appeal. MCLP asserts that they have not alleged that any harm will be caused to the wetlands, floodway or other body of water; that there are any wetlands, floodways or other body of water which may be impacted; and that their only alleged impact is economic which is insufficient to establish standing.

Appellants contend they have standing. Appellants assert they have standing because: 1) they are assignor and assignee of a leasehold interest in the same shopping center as MCLP; 2) Appellants and MCLP share a common parking area and it is in the vicinity of the floodplain of Toby Creek, which runs parallel to the rear of the entire shopping center; and 3) the proposed grading and filling activities and development could cause substantial losses to a co-tenant in the same shopping center who relies on a common parking area of the parties and the MCLP's proposed site.

Appellants have standing to challenge a Department's action only if they are "aggrieved" by that action. They must have a direct, immediate and substantial interest in the litigation challenging that action. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269,289 (Pa. 1975); *McCutcheon v. DER*, 1995 EHB 6. A "substantial" interest is "an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law." *Press-Enterprises, Inc. v. Benton Area School District*, 604 A.2d 1221, 1223 (Pa. Cmwlth. 1992); *South Whitehall Twsp. Police Service v. South Whitehall Twsp.*, 555 A.2d 793,795 (Pa. 1989). An interest is "direct" if the matter complained of caused harm to the party's interest. *South Whitehall Twsp. Police Service v. South Whitehall Twsp.*, 555 A.2d 793,795 (Pa. 1989). An "immediate" interest means one with a sufficiently close causal connection to the challenged action, or one within the zone of interests protected by the statute at issue. *Empire Sanitary Landfill, Inc. v. DER*, 1994

EHB 1395.

We conclude Appellants have standing. Looking at the facts in the light most favorable to Appellants as the non-moving party, we deny MCLP's motion. Appellants have a "substantial interest" since they are in the same shopping center as the proposed project. Their interest in parking and flooding surpasses a common citizen's interest.

In order for an interest to be "direct," the aggrieved party must show causation of the harm to his interest by the matter about which he complains. *Ferri Contracting Co., Inc. v. DER*, 1985 EHB 339; *William Penn, supra.* The prospective litigant should demonstrate that there is a "substantial probability" that the result he wants would materialize. *Ferri Contracting Co, Inc., supra*; *Warth v. Seldin*, 422 U.S. 490, 504 (1975). In the present context, we are willing to assume, for the purpose of argument, that there is a sufficiently direct causal connection between the Department's action and Appellants claimed harm. Absent the actual development and activities, it is difficult for us to determine with certainty that the Department's issuance of the permit will have the effect of causing flooding and parking problems for Appellants. However, looking at the facts in the light most favorable to the non-moving parties, we are persuaded that there is a substantial probability that the harm will materialize.

An "immediate" interest means one with a sufficiently close causal connection to the challenged action. The alleged facts indicate MCLP's proposed activities could result in potential flooding and limit parking in the shopping center where MCLP and Appellants are both tenants. Since the parties share a common location and the Department's action could result in harm to Appellants they have a sufficient causal connection to the Department's action to establish an "immediate interest."

Appealable actions

As set forth in § 4(a) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. § 7514(a), our jurisdiction is limited to "orders, permits, licenses or decisions" of the Department. Our rules refer to these collectively as Department "actions." Action is defined in 25 Pa. Code § 1021.2(a) to include an "order, decree, decision, determination or ruling by the [Department] affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any person, including, but not limited to, denials, modifications, suspensions and revocations of permits, licenses and registrations; orders to cease the operation of an establishment or facility; orders to correct conditions endangering waters of the Commonwealth; orders to construct sewers or treatment facilities; orders to abate air pollution; and appeals from and complaints for the assessment of civil penalties."

January 28, 1997 letter

We grant the motions to dismiss regarding the letter on the grounds that it is not an appealable action. Although the definition is expansive because of the many types of actions the Department can take under numerous statutes it administers, it does not encompass Department letters merely providing information or advice or setting forth the Department's interpretation of laws or regulations. *Lancaster County Solid Waste Management Authority v. DER*, 1993 EHB 667. The January 28, 1997 letter sent by the Department to MCLP falls within this category. It simply states:

> - the project as proposed did not constitute a water obstruction or encroachment within the floodway of Toby Creek (or the Susquehanna River);
> - the placement of fill in the floodway of the small watercourse with in a building's footprint is regulated in accordance with the

> provisions of Section 4 of the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, No. 325 (as amended by Act 70) . However, the requirements for a state permit are waived for a water obstruction in a stream or floodway with a drainage area of 100 acres or less in accordance with Section 7(a) of the Dam Safety and Encroachments Act and the provisions of Section 105.12(a)(2) of the Chapter 105 regulations as amended on October 12, 1991.

These statements do not in any way affect the personal or property rights, privileges, immunities, duties, liabilities or obligations of any person. They simply provide MCLP with the Department's interpretation of its regulations. Consequently, the letter is not an appealable action.

Section 404 Permit

We deny the motions regarding the Section 404 Clean Water Act Pennsylvania State Programmatic General Permit. Under the Federal Water Pollution Control Act , 33 U.S.C. §1251 *et seq.* (Clean Water Act) a state can administer its own individual and general permits. 33 U.S.C. § 1344(g). Under such a program the state has the authority to issue permits. 33 U.S.C. § 1344(h). The state agreed to administer the requirements of the Clean Water Act and the accompanying regulations. The PASPGP-1 permit states that "it has been determined that the project as authorized by the Pennsylvania Department of Environmental Protection Authorization qualifies for the PASPGP-1." Consequently, since the Department issued the permit, the permit is an action of the Department which affected the privileges of MCLP and the Appellants in the project at the shopping center. The issuance of the Section 404 Permit is an appealable action and thus we will deny the motions to dismiss concerning this matter. Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ASSOCIATED WHOLESALERS, INC. and SUBSHINE MARKETS, INC.	:	
v.	:	**EHB Docket No. 97-080-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARK CENTERS LIMITED PARTNERSHIP, Permittee	:	

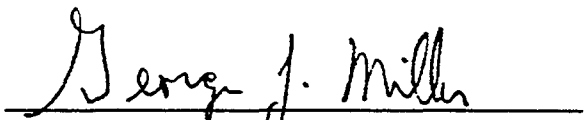
ORDER

AND NOW this 22nd day of December, 1997 it is hereby ordered:

1) Mark Centers Limited Partnership's and the Department of Environmental Protection's motions to dismiss the appeal of the Department's January 28, 1997 letter are granted;

2) Mark Centers Limited Partnership's and the Department of Environmental Protection's motions to dismiss the appeal of a Section 404 Clean Water Act Pennsylvania State Programmatic General Permit are denied.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: December 22, 1997

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

For the Commonwealth, DEP:
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Northeast Region

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KREDER, BROOKS, HAILSTONE & LUDWIG
Scranton, PA

For Permittee:
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McNEES, WALLACE & NURICK
Harrisburg, PA

kh/bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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717-787-3483
TELECOPIER 717-783-4738

WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

POWER OPERATING COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 97-212-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** December 22, 1997

OPINION AND ORDER ON MOTION TO DISMISS AND PETITION FOR SUPERSEDEAS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Department of Environmental Protection's Motion to Dismiss is denied on the grounds that the doctrine of administrative finality is inapplicable because the order which is the basis of this appeal is distinguishable from an earlier Department administrative order involving the same party about the same surface mine site.

The Board rejects the Department's assertion that Appellant's Petition for Supersedeas failed to comply with the Board's rule to file a petition to plead facts with particularity and file an affidavit to support the facts when there has been a hearing on the merits of the petition.

The Board concurs with the Department that sediment is pollution under the Clean Streams Law, Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001.

We reject the Department's contention that the issuance of this petition would alter the last lawful *status quo* because the use of a pre-existing road at a mine site is a lawful unpermitted

activity.

We grant a petition for supersedeas where the petitioner demonstrates that it will suffer irreparable harm, it will prevail on the merits and there is a likelihood of injury to the public. While we grant the petition we do so on a conditional basis. In this instance the Board is presented with the situation that whether we grant or deny the petition injury to the public will occur. Therefore, in order to protect the public we grant the petition on the condition that Appellant shall devise and implement a plan acceptable to the Department to ameliorate or eliminate the pollution of the stream(s) affected.

OPINION

This matter was initiated with the October 10, 1997 filing of a notice of appeal by Power Operating Company, Inc. (Appellant) to Compliance Order No. 974054 which it received from the Department of Environmental Protection (Department) on October 1, 1997. The order requires Appellant to, among other items, cease operation of equipment on a road that is not bonded under a surface mining permit at a site in Rush Township, Centre County. The road in question is described in the order as an "access road between permit 14663004[1] and permit 17673057[2]."

In the notice of appeal, Appellant raises a number of objections to the cessation requirement including: 1) that the cessation constitutes an error of both fact and law and constitutes an action which is arbitrary, capricious and an abuse of discretion; 2) that the road has existed for as long as anyone can recall (established 70-100 years) and has been used long before the enactment of the

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[1] This permit is for the Dugan site.

[2] This permit is for the Rosemary site.

Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§ 1396.1 - 1396.31 (Surface Mining Act) or its accompanying regulations; 3) that it is not an "access road" as defined in the Surface Mining Act or accompanying regulations; 4) that Appellant's use of the road is not a "surface mining activity" as defined by the Surface Mining Act or regulations; 5) that the Department was aware of Appellant's use of the road prior to and at the time of issuance of SMP 14663004 and 17673057 more than 30 years ago; 6) that the cost of bonding and permitting the unregulated road would be prohibitive for Appellant; 7) that there is no prohibition in the regulations prohibiting the use of an existing roadway; 8) that there is no reason to bond the road because it is not subject to the Department permitting requirements; and 9) that the Department's attempt to enforce the Surface Mining Act and accompanying regulations constitutes a taking in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 10 of the Pennsylvania Constitution.

Simultaneous with filing its Notice of Appeal, Appellant filed a Petition for Supersedeas in which it raises several of the same assertions. Specifically, 1) the Department did not have jurisdiction to issue the order because the road is not an "access road" and the mere use of a pre-existing road is not "surface mining activity" as defined by the regulations and thus is not subject to the Department permitting requirements; 2) the Department exceeded its jurisdiction by issuing an order affecting such a road; and 3) Appellant will suffer irreparable harm by the implementation of the order because use of public roads will cause prohibitively costly time delays and unnecessary traffic delays on the public roads.

On October 15, 1997 the Department filed its answer and a motion for a temporary supersedeas. The Board in its October 15, 1997 order denied the request for the temporary

supersedeas and set the hearing for the supersedeas on October 24, 1997.

On October 23, 1997 the Department filed a motion to dismiss on the grounds of administrative finality.

On October 24, 1997 a hearing was held before Administrative Law Judge Michelle A. Coleman. At the beginning of the hearing the Department again moved for dismissal of the appeal. After briefly arguing their respective positions on this motion the parties were asked to address it in their briefs. We will address the motion to dismiss before considering the petition for supersedeas.

The record of the supersedeas hearing consists of 264 pages of transcript and 11 exhibits. At the hearing Appellant offered its response in opposition to the Department's anticipated motion to dismiss[3] and its supporting memorandum. On November 7, 1997 Appellant refiled their response with the Board's permission.

DISCUSSION

Motion to Dismiss

On October 23, 1997 the Department filed a motion to dismiss and a supporting memorandum of law. In its motion, the Department asserts that the Board should dismiss Appellant's Notice of Appeal and their Petition of Supersedeas. According to the Department the doctrine of administrative finality precludes Appellant from challenging 1) that the use of the road between the Rosemary and Dugan mine sites is regulated under the Surface Mining Act and its regulations and 2) the requirement to choose either to obtain a permit to use the road or to cease using the road because Appellant did not appeal a 1994 Compliance Order which was virtually

[3] Appellant had not received the October 23, 1997 filing prior to the hearing.

identical to the 1997 Order. The Department asserts that the doctrine of administrative finality bars the appeal because the orders are based on identical facts and legal theory, past and present uses of the road are included in "surface mining activity" and are prohibited without a permit, the doctrine bars Appellant from appealing the present compliance order because the company failed to appeal the earlier order, and the cases Appellant cites are inapposite and misleading.

Appellant contends in its response[4] that the doctrine of administrative finality is inapplicable. Appellant asserts that the doctrine does not apply where the legal and factual issues are not the same, and where a challenge to an earlier action was unwarranted. Appellant asserts that the 1994 and 1997 Orders are not the same because the factual bases of the Orders, the nature of the orders and the circumstances that gave rise to the Orders are readily distinguishable thus making administrative finality inapplicable.

We must assess the motion to dismiss in a light most favorable to the non-moving party. *Tinicum Twp. v. DEP*, 1996 EHB 816. The Board treats motions to dismiss the same way it treats motions for judgment on the pleadings: we will dismiss the appeal only where there are no material factual disputes and the law is clear so that the moving party is clearly entitled to a judgment as a matter of law. *City of Scranton v. DER*, 1995 EHB 104; *Snyder Brothers, Inc. v. DER*, 1994 EHB 1888.

Under the doctrine of administrative finality, "one who fails to exhaust his statutory remedies may not thereafter raise an issue which could have and should have been raised in the proceeding afforded by his statutory remedy." *DER v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765 (Pa.

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[4] Appellant also made a motion for summary judgment in its response but did not file a formal motion. Therefore, we will not address its motion for summary judgment.

Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977). This Board has stated that where a party aggrieved by an administrative action of the Department fails to pursue its statutory appeal rights, neither the content nor the validity of either the Department's action or the regulations underlying it may be attacked in the appeal of a Department action in a subsequent administrative or judicial proceeding. *Kennemetal, Inc. v. DER*, 1990 EHB 1453. Furthermore, the Board has consistently held that in accordance with the principles of administrative finality, "the factual and legal bases of unappealed administrative orders are final and unassailable" unless an exception applies. *Ingram Coal Co. v. DER*, 1988 EHB 800.

We agree with Appellant that the doctrine of administrative finality is inapplicable. For purposes of our analysis, the two orders are distinguishable. The corrective action required or the activity to be ceased are very different between the two orders. The orders required the following:

> 1994 Order - Operator shall either reclaim the roads within 30 days or submit a permit revision within 30 days or submit a permit revision within 30 days to make roads part of the surface mine permit.
>
> 1997 Order - Operator shall cease operation of equipment on road that is not bonded under a surface mining permit.

The Department states, " (the) Notice of Appeal is no more than the belated challenge to the same requirements imposed by the 1994 Order." We disagree. Prior to the issuance of the 1997 Order Appellant could not have challenged the Department's order to cease operations at the site. It could have challenged only reclamation or submission of a permit revision. That is very different from cessation of operations. Therefore, the doctrine of administrative finality can not apply as the cessation provision could not have been challenged prior to the issuance of the 1997 Order. Consequently we deny the Department's motion to dismiss regarding the Notice of Appeal challenging the 1997 Order.

We also deny the Department's motion to dismiss concerning the Petition for Supersedeas. The Department states that since the doctrine of administrative finality applies, as noted above, the Board lacks jurisdiction over the Petition for Supersedeas. Since we found the doctrine of administrative finality inapplicable, we must also reject the Department's argument that the Board lacks jurisdiction over the Petition for Supersedeas.

Petition for Supersedeas

New Matter

The Department in its answer to Appellant's Petition for Supersedeas contends, among other new matters, that Appellant's Petition should be dismissed for failure to comply with Board Rule 1021.77 requiring a petition to plead facts with particularity with an affidavit to support those facts. 25 Pa. Code § 1021.77. Appellant did not address this issue and a hearing had been scheduled and was held within 24 hours of the Board's receipt of the Department's Answer.

The Board having already held a hearing will render a judgment on the petition based on the merits of the proceeding established by the substantive material presented at the hearing and not on a procedural issue.

The Department also raised the issues that 1) the road in dispute traverses two streams and as the equipment crosses each stream sediment pollution is released down stream and, 2) because the road is not permitted and bonded there are no control measures to prevent the road from eroding and the sediment pollution from the erosion contaminating the stream. The Department asserts that the sediment disturbance, either from breakdown of the roadbed or from the trucks fording the stream, is pollution under the Clean Streams Law and that pollution would continue to occur if the Board grants the petition.

Appellant contends that the Department failed to establish that pollution will occur during the pendency of the supersedeas. Appellant asserts that the Department witness did not testify that he saw "sediment pollution" but "sediment," and the definition of pollution (emphasis added) requires harm to the environment. There was no testimony that the released sediment harmed the environment.

We agree with the Department that sediment is pollution under the Clean Streams Law and that the use of the road is causing sediment pollution. The Clean Streams Law defines "pollution" as:

> "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 department shall determine when a discharge constitutes pollution, as herein defined, and shall establish standards whereby and wherefrom it can be ascertained and determined whether any such discharge does or does not constitute pollution as herein defined.

The definition is broadly defined to include the discharge of solid materials that are likely to render waters of the Commonwealth harmful to public health, safety or welfare, or to recreational use, or to fish and other aquatic life. The Board and Commonwealth Court have held that sediment falls within the definition. *See, Frisch v. DER*, 1994 EHB 1226, *aff'd* 662 A.2d 1166 (Pa. Cmwlth. 1995); *Community College of Delaware County v. Fox*, 342 A.2d 468 (Pa. Cmwlth. 1975). Therefore, the Department is correct that sediment is pollution.

Status Quo

The Department contends that the issuance of a supersedeas would alter the last lawful *status quo* because the order requires Appellant to cease an unpermitted activity for which it has to have a permit. The Department asserts that the Board would be issuing a temporary permit authorizing use of the road and the Board lacks authority to do so.

Appellant contends that the Department's argument is unavailing. Appellant asserts that the Department in arguing that the *status quo* is unlawful assumes that a permit is needed to use the road, but this is an issue of the current appeal and the Board has yet to decide. The mere use of a pre-existing road Appellant argues is not "surface mining activity" as defined in the regulations and therefore is not subject to permitting requirements.

The Board repeatedly has held that the purpose of a supersedeas is to preserve the lawful *status quo* while the appeal is proceeding to final disposition and, therefore, we will deny a supersedeas which alters the *status quo*. *Richard Solomon v. DEP*, 1996 EHB 989; *Lower Paxton Authority v. DER*, 1994 EHB 1826.

We disagree with the Department that granting the supersedeas would alter the last lawful *status quo*. Appellant's use of a pre-existing road at a mine site is lawful. Section 87.1 defines "surface mining activity" as:

> Activities whereby coal is extracted from the earth or from waste or stock piles or from pits or banks by removing the strata or material which overlies or is above or between the coal or otherwise exposing and retrieving the coal from the surface, ... The term includes activities in which the land surface has been disturbed as a result of or incidental to surface mining operations of the operator, including, but not limited to, private ways and roads appurtenant to a surface mining operation,.... The term includes the construction of a road or similar disturbance for any purpose related to a surface mining

> activity, including that of moving or walking a dragline or other equipment or for the assembly of disassembly or staging of equipment.

The Department in its answer admits that the mere use of a pre-existing road, as Appellant is doing here, is not included in the definition of "surface mining activities." (Department Answer No. 4). Although the Department makes this admission, it proceeds to cite a portion of the definition, specifically, "the construction of a road or similar disturbance for any purpose related to a surface mining activity including that of moving ... other equipment," as an argument. This citation does not make any sense as a basis of an argument when the Department has admitted that the use of the pre-existing road is not a surface mining activity. The Department did not reserve any portion of the definition as applicable in its admission. Thus, if an admission exists which states that the use is not an activity covered by the definition then every portion of that definition is inapplicable. Furthermore, the Department asserts that the road is covered by the definition under language that the use is a disturbance (emphasis added). The portion of the definition the Department cites requires "construction of a road or similar disturbance." Neither requirement exists in this case - there was no construction of the road as it was pre-existing nor is there a continuing disturbance. The regulations define a "disturbed area" as "an area where vegetation, topsoil or overburden is removed or upon which topsoil, spoil, coal processing waste or noncoal waste is placed by surface coal mining activities." 25 Pa. Code § 87.1. Again, since the road in question was pre-existing and there is no evidence that Appellant removes vegetation or topsoil from the road to further surface mining the use is not a "surface mining activity."

The order stated the location of the violation as the "access road" between the sites.

However, in its response the Department admitted that it was not an "access road" but rather a "haul road" as defined by the regulations and thus requires a permit. "Haul roads" include the following:

> (i) Roads that are planned, designed, located, constructed, reconstructed or improved, utilized and maintained for the transportation of equipment, fuel, personnel, coal, spoil and other operating resources from a public road to points within the surface mine or between principal operations on the mine site or both, but not including roads within the pit or unreclaimed spoil areas.
> (ii) Roads (including public roads) which are constructed, reconstructed, improved, maintained or substantially used as an integral part of the coal mining activities.
> (iii) The entire area within the right-of-way, including the roadbed, shoulders, parking and side area, approaches, structures and ditches.

25 Pa. Code § 87.1. In this instance for the road in question to qualify as a haul road would be to have it satisfy either subsection (i) or (ii). Under subsection (i) the road would have to be used for the transportation of equipment between principal operations on the mine site. However, that is not the case here. Testimony states that Appellant's use of the road is infrequent and for non-surface mining purposes. (N.T. 54, 77-78, 88, 97) This use falls far short of "principal operations" at a mine site. Subsection (ii) also does not apply in this instance. The key language is "substantially used as an integral part of the coal mining activities." The evidence also fails to satisfy that criteria. As noted above, testimony at the hearing indicated that Appellant uses the road infrequently and for non-surface mining purposes which do not satisfy the requirement of being an integral part of the coal mining activities. Consequently, we can not use the definition of "haul road" because the circumstances here fail to satisfy any of the criteria set forth in the regulations for the definition.

The activity is not one requiring a permit as determined by the regulations. Thus, the activity is lawful and if the Board grants the supersedeas the lawful *status quo* would not be altered. Appellant can continue use of the road as it is a lawful activity which does not require a permit.

Issues for Supersedeas

In granting or denying a supersedeas the Board shall be guided by relevant judicial precedent and the Board's own precedent. Section 4(d)(1) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. § 7514 (d)(1); 25 Pa. Code § 1021.78(a). The Board shall consider: 1) irreparable harm to the petitioner; 2) the likelihood of the petitioner prevailing on the merits; and 3) the likelihood of injury to the public or other parties, such as the permittee in third party appeals. *Id.* The Board will not grant a supersedeas in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect. 35 P.S. § 7514(d)(2). 25 Pa. Code § 1021.78(b). We discuss each issue separately below.

Irreparable Harm

Appellant contends that the Department gave Appellant two options: either bond and permit the road, or cease use of the road. In either instance, either the time involved or the cost is prohibitive.

The Department contends Appellant failed to show "irreparable harm." As proof the Department asserts that : 1) Appellant failed to consider and present evidence of alternative methods of getting equipment between the sites besides disassembling and reassembling; 2) the cost to comply must be considered against the Appellant's overall financial picture of capital structure, assets and liabilities or profit and losses; and 3) mere pecuniary loss does not constitute irreparable harm as a matter of law.

Irreparable harm is essentially an equity concept. The Board precedent is based on equity cases concerning preliminary injunctions where the test focuses on whether the party had an adequate remedy at law, i.e. money damages. *See Virginia Petroleum Jobbers Assoc. v. Federal*

Power Commission, 259 F.2d 921 (D.C. Cir. 1958); *Pennsylvania Public Utility Commission v. Process Gas Consumers Group*, 467 A.2d 805-808-810 (Pa. 1983). Perhaps because the Board has no equity powers the test has been somewhat strained in its application to cases before the Board. *See Raymark Industries, Inc. v. DER*, 1986 EHB 176.

The Board's cases on whether economic loss can be considered irreparable harm go in two different directions. First, one line of cases holds that the cost of compliance with a lawful order of the Department can never constitute irreparable harm, *See C&L Enterprises, Inc. v. DER,* 1987 EHB 67*; Tenth Street Building Corp. v. DER,* 1983 EHB 528. A second line of cases clearly stands for the proposition that significant economic expense incurred by a party in complying with a Department order may indeed constitute irreparable harm. *A&M Composting, Inc. v. DEP*, (EHB Docket No. 97-213-C, Opinion issued December 2, 1997); *McDonald Land & Mining Co., Inc. v. DER*, 1991 EHB 129, 133-134; *McDonald Land & Mining Co., Inc. v. DER*, 1991 EHB 1610; *Baumgardner v. DER*, 1988 EHB 786; *Silverbrook Anthracite Inc. v. DER*, 1988 EHB 365.

Considering the facts in this case, the Board finds that the total cost of and time to complete the permitting process of the road would is significant. John Varner, Permit Chief of the Department's district office, stated on cross examination that it would take anywhere from four to six months to complete the permitting process for the road. (N.T. 202-203). Testimony on the cost of the permitting process ranges from $479,000 to $538,000. (N.T. 196, 249, 252). Glyn Powell, President and CEO of Appellant, testified that over the next four months Appellant would make 5-6 trips, or 1.5 trips per month. (N.T. 43, 88) Thus, over a four month period it would cost Appellant

$564,000 per truck and $846,000 per truck if the permitting takes six months[5]. Thus, the total minimum cost to Appellant for four months of the permit process and the accompanying disassembly and reassembly of the trucks would be over $1,043,000 for four months using the only the lower figures offered in testimony. The result in either instance would be substantial and cause irreparable harm to Appellant.

Merits

Appellant raised several issues in its appeal including that the road in question is not an "access road," and that use of the road is not a "surface mining activity." Appellant contends that it is likely to succeed on the merits because use of a pre-existing road does not fit into the definition of "surface mining activity," and the Department distorts the definition by equating the general movement of a vehicle along the road with the moving of a dragline or other equipment which is part of the construction of a road or similar disturbance.

The Department contends that Appellant is not likely to succeed on the merits because Appellant must have a permit and authorization to use the road. The Department asserts that the road is a "haul road" (even though in the Department order it is called an "access road"), and that Appellant has "substantially used" the road.

We agree with Appellant. For the reason previously stated the road in question is not an "access road." Therefore, Appellant would succeed on the merits on this issue.

Again, for reasons previously stated, we agree with Appellant on the issue that the use of a

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[5] There also was testimony that treatment of the discharges involved in the case would cost $100,000 to $150,000 (N.T. 201) and the annual maintenance would cost $150,000 (N.T. 249).

pre-existing road does not qualify as a "surface mining activity" or as an access road. Therefore, Appellant would succeed on the merits on this issue as well.

Injury to public

Appellant contends that if it complies with the order there would be a greater danger to the public for the potential danger of transporting large pieces of mining equipment over public roads is obvious.

The Department contends that if the Board grants the petition pollution to the stream would continue, because it asserts, every time Appellant's trucks ford the stream there is pollution under the Clean Streams Law in the form of sediment to a water of the Commonwealth and thus an injury to the public.

This case presents very unique circumstances where the Board agrees with both parties. The parties presented conflicting testimony regarding the health of the stream. Appellant's witness stated that the stream is dead. (N.T. 100-102) On the other hand, the Department's witness stated on cross that some portions of the stream are healthy and other portions are dead. (N.T. 162-163) Based on this testimony it is not clear just where the stream becomes dead, but there is testimony that one creek in question is a trout stream above the confluence of deep mine discharges from the Brenda Gayle mining site. (N.T. 162-163) We are not sure exactly where the line of demarcation is in relation to the site of concern here. Since we were not presented with clear evidence where the stream becomes dead in relation to the mining in this case, we will assume that the stream is alive in the vicinity of this site.

Assuming that the stream is alive and sediment is polluting the stream as defined under the Clean Streams Law then granting the petition would allow Appellant to continue driving trucks

through the stream generating sediment pollution in violation of the Clean Streams Law and injuring the public. On the other hand, denying the petition would force Appellant either to drive the trucks through town or disassemble and reassemble the trucks. Considering the financial burden of disassembling and reassembling the trucks, Appellant probably would choose to use the public roads. Testimony presented at the hearing claimed that driving the trucks through town on streets not wide enough to accommodate the trucks and other traffic created another danger to the public. The trucks destroyed a couple of cars by driving over them. (N.T. 95-96) Thus, the alternative of using the public road resulted in injury to the public and could result in future injury if transporting through town is required. Consequently, we will grant the petition on the condition that Appellant shall devise and implement a plan acceptable to the Department to ameliorate or eliminate the pollution of the stream(s) affected.

Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

POWER OPERATING COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 97-212-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW this 22nd day of December, 1997 Power Operating Company Inc.'s Petition for Supersedeas is granted on the condition that Appellant shall devise and implement a plan acceptable to the Department to ameliorate or eliminate the pollution of the stream(s) affected. The Department's Motion to Dismiss is denied on the grounds that the doctrine of administrative finality is inapplicable because the order which is the basis of this appeal is distinguishable from an earlier Department administrative order involving the same party about the same surface mine site.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: December 22, 1997

See following page for service list.

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

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**EHB Docket No. 96-234-CP-MG**
v.	:	**Issued:** December 23, 1997
CARBRO CONSTRUCTION CORPORATION	:	

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis:

The Board assesses a civil penalty against a pipeline construction contractor in the amount of $195,835 as originally assessed by the Department for violations of the Clean Streams Law, the terms and conditions of the applicable NPDES permit and the Dam Safety and Encroachments Act consisting, among other things, of pumping sediment-laden water directly to waters of the Commonwealth, the failure to utilize required sediment controls resulting in the flow of sediment-laden waters and resultant damage to waters classified as protected for cold water and migratory fish and the improper construction of bridges and culverts without required sediment controls.

BACKGROUND

The Department filed this Complaint for Assessment of Civil Penalties on November 7, 1996

based on alleged violations of the laws of the Commonwealth resulting from construction of a 42 inch water transmission main project in Towamensing and Lower Towamensing Townships in Carbon County, Pennsylvania. The Defendant, Carbro Construction Corporation (Defendant), was the principal contractor for this project under contract to the Bethlehem Authority, a Pennsylvania Municipal Authority, which maintains its offices in Bethlehem, Pennsylvania. The transmission main project crosses several streams and associated wetlands, including Hunter Creek, Buckwha Creek, Aquashicola Creek and unnamed tributaries to these streams.

The Complaint charges numerous violations of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended,* 35 P.S. §§ 691.1-691.1001 (Clean Streams Law) and the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1-693.27 (Encroachments Act) and the rules and regulations thereunder. The basis for the Complaint is the allegations that Defendant was conducting earthmoving activities without implementing adequate erosion and sedimentation control measures which resulted in the discharge of sediment pollution to the waters of the Commonwealth, and that some of these discharges of the sediment to the waters of the Commonwealth were willful.

The Defendant filed an answer to the Complaint denying many of the allegations of the Complaint and raised as new matter defenses of impossibility of performance due to existing weather conditions. After the case was assigned for a hearing, the Defendant withdrew its answer to the Complaint and elected to defend only on the reasonableness of the penalty claimed by the Department. The Department's Complaint asked that the Environmental Hearing Board (Board) enter judgment in favor of the Department in the amount of $195,835.00 for the violations set forth in the Complaint.

The hearing on the merits was held before Administrative Law Judge George J. Miller on August 20 and 21, 1997. The record consists of 308 pages of notes of testimony and 31 exhibits.[1] The well-pled allegations of the Complaint are also a part of the record by reason of the Defendant's decision to defend solely on the reasonableness of the penalty and the withdrawal of its answer to the Complaint.

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

FINDINGS OF FACT

1. The Department of Environmental Protection (Department) is the executive agency of the Commonwealth with the duty and authority to administer and enforce the provisions of the Clean Streams Law and the Encroachments Act as well as the rules and regulations promulgated thereunder at Title 25 of the Pennsylvania Code.

2. Defendant, Carbro Construction Corporation, is a New Jersey corporation authorized to do business in Pennsylvania with a registered business address of Carbro Construction Corporation, c/o Prentice-Hall Corporation Service, 301 Market Street, Harrisburg, Pennsylvania 17101. (Complaint, ¶3)

3. The Carbon County Conservation District (District) is by delegation agreement with the Department authorized to investigate Complaints and earthmoving activities to determine compliance with the Clean Streams Law and the Erosion Control Regulations promulgated thereunder at Chapter 102 of Title 25 of the Pennsylvania Code (erosion control regulations). (Complaint, ¶5)

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[1] The Department's exhibits are referred to as "C-__"; the Defendant's exhibits are referred to as "D-__."

4. The Bethlehem Authority (Authority), a Pennsylvania Municipal Authority which maintains a business address at 10 East Church Street, Bethlehem, Pennsylvania 18018, retained Defendant to construct approximately 23,500 linear feet of 42-inch water transmission main in Towamensing and Lower Towamensing Townships, Carbon County, Pennsylvania (transmission main project). (Complaint, ¶6)

5. The Authority retained Gannett Fleming, Inc. (Gannett Fleming) to design and oversee the construction of the transmission main project. (Complaint, ¶7)

6. The transmission main project crosses several streams, tributaries and associated wetlands, including Hunter Creek, Buckwha Creek, Aquashicola Creek and unnamed tributaries associated with each. (Complaint, ¶8)

7. Aquashicola Creek is designated by Section 93.9d of the Water Quality Regulations, 25 Pa. Code § 93.9d, as a special protected water because it is a high quality cold water fishery and a migratory fishery. (Complaint, ¶9)

8. Buckwha Creek and Hunter Creek are designated by Section 93.9d of the Water Quality Regulations, 25 Pa. Code § 93.9d for the protected use of a cold water fishery and a migratory fishery. (Complaint, ¶10)

9. On March 9, 1994, the Department issued Water Obstruction and Encroachments Permit (Encroachments Permit) No. E13-082 to the Authority authorizing the construction of certain water obstructions and encroachments associated with the transmission main project. (Complaint, ¶11)

10. On December 5, 1994, the Department received an acknowledgment of appraisal of permit conditions signed by the Authority as the Permittee and by the Defendant as the "individual

responsible for supervision of work" acknowledging that they had been appraised of and were familiar with the requirements of the NPDES and Encroachment permits. (Complaint, ¶¶12-13)

11. On August 25, 1994, the Department issued National Pollutant Discharge Elimination System (NPDES) Permit No. PAS101304 to the Authority authorizing the discharge of storm water from the transmission main project. (Complaint, ¶14).

12. NPDES Permit No. PAS101304 requires the implementation of an approved site specific erosion and sediment pollution control plan (plan), including maps, plans, profiles, specifications, and any approved amendments thereto. (Complaint, ¶15)

13. On June 26, 1995, the District received a co-permittee application and an assumption of responsibility agreement for NPDES Permit No. PAS101304 on which Defendant certifies its status as a co-permittee. (Complaint, ¶16)

14. On July 6, 1995, the Department and the Authority entered into a Consent Assessment of Civil Penalty resolving violations of NPDES Permit No. PAS101304, the Clean Streams Law, and the Erosion Control Regulations which occurred on December 6 and 29, 1994 at the transmission main project. By the Consent Assessment the Department assessed, and the Authority agreed to, a penalty of $1,900 pursuant to Section 605 of the Clean Streams Law, 35 P.S. § 691.605. (Complaint, ¶17)

15. Since at least November 23, 1994, Defendant conducted construction and installation activities pursuant to NPDES Permit No. PAS101304 and the Encroachments Permit at and around the transmission main project. (Complaint, ¶18)

16. On December 6, 1995, the District inspected part of the transmission main project and observed the following conditions:

a. sediment-laden water was being discharged to Hunter Creek without installation of erosion and sedimentation controls in accordance with the plan at approximately Station 142+00;

b. stone construction entrances were not installed or maintained in accordance with the plan at various locations along the transmission main project;

c. erosion and sedimentation controls, including silt fence, were not installed or properly maintained in conformance with the plan at various locations along the transmission main project including, but not limited to, Station 142+00;

d. numerous disturbed areas at various locations along the transmission main project, including but not limited to, areas between approximately Stations 12+50 and 29+00, Stations 53+00 and 76+00 and 93+00, Stations 94+50 and 108+00, and Stations 109+00 and 238+00, were not temporarily stabilized in accordance with the plan; and

e. the staging area between approximately Stations 95+00 and 96+00 and at approximately Station 2+00 were not adequately stabilized in accordance with the plan. (Complaint, ¶19)

17. A representative of Gannett Fleming signed the December 6, 1995 inspection report acknowledging that they read the report, that they received a copy of the report, and that they were given the opportunity to discuss it with the inspector. (Complaint, ¶20)

18. On December 18, 1995, the Department and the District inspected part of the transmission main project and determined that Defendant did not remedy each violation identified in the December 6, 1995 inspection report. During the inspection the Department and the District observed the following conditions:

a. sediment-laden water was being discharged to Hunter Creek without installation of erosion and sedimentation control facilities in accordance with the plan at approximately Station 77+00;

b. sediment-laden water was discharging to a tributary of the Aquashicola Creek from disturbed areas which were not stabilized in accordance with the plan at approximately Station 238+00;

c. erosion and sedimentation controls including silt fence, water bars, and diversion ditches, were not being installed or maintained in accordance with the plan at various locations along the transmission main project, including at approximately Station 77+00 and between approximately Stations 225+00 and 238+00;

d. stone construction entrances at various locations along the transmission main project, including the construction entrance at Station 141+00, were not being maintained in accordance with the plan; and

e. areas of the transmission main project which have been disturbed by construction activities have not been temporarily stabilized in accordance with the plan including areas at approximately Stations 141+00 and 238+00. (Complaint, ¶21)

19. A representative of Defendant signed the December 18, 1995 inspection report acknowledging that they read the report, that they received a copy of the report, and that they were given the opportunity to discuss it with the inspector. (Complaint, ¶22)

20. On December 18, 1995, the Department issued a Compliance Order to Defendant stating that Defendant failed to implement the plan resulting in pollution and a potential for pollution to the waters of the Commonwealth in violation of the Clean Streams Law and the Erosion Control Regulations. (Complaint, ¶¶23-24)

21. The December 18, 1995 Compliance Order also directed Defendant to implement erosion and sedimentation controls as detailed in the plan including, but not limited to, dewatering facilities, rock construction entrances and silt fence and required Defendant to cease all earthmoving activities until the Department gave written authorization to resume work. (Complaint, ¶25)

22. Defendant did not appeal the Department's issuance of the December 18, 1995 Compliance Order to this Board. (Complaint, ¶26)

23. On December 22, 1995, the District inspected part of the transmission main project.

The District determined that Defendant had not implemented the corrective actions directed by the December 18, 1995 Compliance Order. In addition to those conditions documented in the December 18, 1995 inspection report, the district observed that culvert pipes at Station 142+00 were not stabilized in accordance with the plan. (Complaint, ¶27)

24. The District faxed a copy of the December 22, 1995 inspection report to Gannett Fleming. (Complaint, ¶28)

25. Since existing weather conditions hindered the implementation of all erosion and sedimentation controls pursuant to the December 18, 1995 Compliance Order, the District indicated to Defendant on December 22, 1995 that Defendant could resume earthmoving activities on December 26, 1995 if:

a. construction entrances are repaired and maintained in accordance with the plan;

b. silt fence is repaired in accordance with the plan at areas where construction crews are currently working;

c. remaining silt fence will be repaired in accordance with the plan as weather permits;

d. culvert pipes at approximately Station 142+00 are repaired and maintained in accordance with the plan; and

e. all disturbed areas will be stabilized in accordance with the plan as soon as weather permits. (Complaint, ¶29)

26. On December 26, 1995, the Department received a letter from Defendant dated December 21, 1995 which requests that Defendant not be required to install or repair erosion and sedimentation controls pursuant to the December 18, 1995 Compliance Order in areas of the transmission main project where there is substantial snow cover. (Complaint, ¶30)

27. On January 3, 1996, the Department sent a letter to Defendant indicating that the Department would not enforce Paragraphs 2G and 2H of the December 18, 1995 Compliance Order against Defendant while snow cover hinders the implementation of the respective corrective actions. (Complaint, ¶31)

28. On February 13, 1996, the Department and the District inspected part of the transmission main project and determined that Defendant had not implemented the corrective action directed by the December 18, 1995 Compliance Order. The Department and the District found additional violations not previously noted in prior inspection reports. The Department and the District observed the following conditions at the transmission main project:

a. stone construction entrances are not being installed or maintained in accordance with the plan at various locations along the transmission main project, including at approximately Station 176+00;

b. erosion and sedimentation controls, including silt fence and sedimentation traps, were not installed and/or maintained in accordance with the plan at various locations along the transmission main project, including at approximately Station 176+00 and 191+00; and

c. sediment-laden water was being discharged from an inadequately constructed sedimentation trap to waters of the Commonwealth at Station 191+00. (Complaint, ¶32)

29. A representative of Defendant signed the February 13, 1996 inspection report acknowledging that they read the report, that they received a copy of the report, and that they were given the opportunity to discuss it with the inspector. (Complaint, ¶33)

30. On February 13, 1996, the Department issued a Compliance Order to Defendant stating that Defendant failed to implement their plan resulting in pollution and a potential of pollution to the waters of the Commonwealth in violation of the Clean Streams Law and the Erosion

Control Regulations. (Complaint, ¶¶34-35)

31. The February 13, 1996 Compliance Order also directed Defendant to implement erosion and sedimentation controls as detailed in the plan including, but not limited to, dewatering facilities, rock construction entrances, and silt fence. The Compliance Order required Defendant to cease all earthmoving activities until the Department gave written authorization to resume work. (Complaint, ¶36)

32. Defendant did not appeal the Department's issuance of the February 13, 1996 Compliance Order to this Board. (Complaint, ¶37)

33. On February 20, 1996, the Department sent a Notice of Violation (NOV) to Defendant informing Defendant that its earthmoving activities at the transmission main project were conducted in violation of the Clean Streams Law and that those activities caused sediment pollution to enter the waters of the Commonwealth in violation of the terms and conditions of NPDES Permit No. PAS101304, the Clean Streams Law, and the rules and regulations promulgated thereunder. The NOV requested Defendant to attend an administrative conference with the Department on February 23, 1996 to discuss correction of the violations at the transmission main project and settlement of past violations. (Complaint, ¶ 38)

34. On February 20, 1996, the District inspected part of the transmission main project as a follow-up to the February 13, 1996 Compliance Order and determined that Defendant did not implement the corrective actions directed by the December 18, 1995 and the February 13, 1996 Compliance Orders. The District observed the following conditions:

a. erosion and sedimentation controls, including sediment traps, silt fence, stone filters, and rip-rap, were not properly installed or maintained in accordance with the plan at various locations along the transmission main project

including approximately Station 173+00 and between approximately Stations 191+00 and 203+00;

b. disturbed areas and top soil stockpiles were not temporarily stabilized with erosion and sedimentation controls in accordance with the plan at various locations along the transmission main project including at approximately 200+00;

c. stone construction entrances were not being installed and/or maintained in conformance with the plan at various locations along the transmission main project including at approximately Station 173+00; and

d. stone filters were not installed in dewatering channels in accordance with the plan at various locations along the transmission main project. (Complaint, ¶39)

35. The District faxed a copy of the February 20, 1996 inspection report to Defendant on February 21, 1996. (Complaint, ¶40)

36. On February 22, 1996, the District inspected part of the transmission main project as a follow-up to the February 13, 1996 Compliance Order and determined that Defendant did not implement the corrective actions directed by the December 18, 1995 and the February 13, 1996 Compliance Orders. The District observed the following conditions:

a. construction entrances were not installed or maintained in conformance with the plan at various locations along the transmission main project including the main construction entrance at Station 4+00 to 7+50 and the construction entrance at approximately Station 238+00;

b. off-site sedimentation is occurring from the main construction entrance between approximately Stations 4+00 and 7+50;

c. sediment was being discharged into the waters of the Commonwealth resulting from the failure to install or maintain erosion control facilities in accordance with the plan;

d. erosion and sedimentation controls including, but not limited to, silt fence, and interceptor dikes, were not installed or maintained in accordance with the plan at the wetland crossing between approximately Stations 224+00 and 238+00;

e. erosion and sedimentation controls at approximately Station 225+25 were damaged by construction activities and required maintenance;

f. various areas of the transmission main project, including at approximately Stations 224+00 and 238+00, were not stabilized in accordance with the plan; and

g. access road to the work area at approximately Station 238+00 required stabilization in accordance with the plan to prevent the potential for off-site sedimentation. (Complaint, ¶ 41)

37. The District faxed a copy of the February 22, 1996 inspection report to Defendant on or about February 22, 1996. (Complaint, ¶42)

38. On February 23, 1996, the Department and the District met with Defendant to discuss the documented violations at the transmission main project, proper implementation of erosion and sedimentation controls, and settlement of past violations. After the administrative conference the Department and the District inspected the transmission main project and determined that Defendant did not implement the corrective actions directed by the December 18, 1995 and the February 13, 1996 Compliance Orders. The Department and the District observed the following conditions:

a. erosion and sedimentation controls have not been installed or maintained in accordance with the plan at various locations along the transmission main project including, but not limited to, silt fence at Station 140+00, outlet and inlet protection for culvert pipe at Station 196+75, and sediment trap outlet at Station 191+00;

b. wetland crossing between approximately Stations 216+00 and 219+00 was not installed in accordance with the plan;

c. sediment was being discharged into the waters of the Commonwealth resulting from the failure to install or maintain erosion and sedimentation controls in accordance with the plan;

d. erosion and sedimentation controls were not installed in accordance with the plan at approximately Station 173+50 resulting in the deposition of sediment upon State Road 2002;

e. loose fill material was placed into and around an intermittent stream between approximately Stations 237+00 and 238+00 without the implementation of temporary erosion and sedimentation controls in accordance with the plan;

f. conditions observed between Stations 237+00 to 238+00 indicate that earthmoving activities were conducted in violation of the February 13, 1996 Compliance Order;

g. various areas at the transmission main project require temporary and permanent stabilization in accordance with the plan;

h. temporary culverts constructed at approximately Stations 141+00 and 146.6, respectively, were not constructed in accordance with the plans incorporated into Encroachments Permit No. E13-082; and

i. temporary bridges at approximately Stations 191 and 219, respectively, were not constructed in accordance with the plans incorporated into Encroachments Permit No. E13-082. (Complaint, ¶43)

39. The District faxed a copy of the February 23, 1996 inspection report to Defendant on or about February 27, 1996. (Complaint, ¶43)

40. On February 28, 1996, the District inspected part of the water transmission main project and determined that Defendant did not implement the corrective actions directed by the December 18, 1995 and the February 13, 1996 Compliance Orders. The District observed the following conditions:

a. sediment-laden water was being pumped directly into a water of the Commonwealth without any means to control sedimentation at approximately Station 96+75;

b. erosion controls, including silt fence, were not properly installed or maintained in accordance with the plan at various areas along the transmission main project including, but not limited to, approximately Station 140+00 and 146+00;

c. disturbed areas between approximately Stations 134+00 and 140+00 have not been stabilized in accordance with the plan;

d. interceptor dikes have not been installed in accordance with the plan between approximately Stations 226+00 and 238+00;

e. access road at Station 238+00 was not stabilized in accordance with the plan; and

f. wetland crossings at approximately Stations 217+00 and 226+00 have not been installed in accordance with the plan. (Complaint, ¶45)

41. The District faxed a copy of the February 28, 1996 inspection report to Defendant on February 29, 1996. (Complaint, ¶46)

42. On March 5, 1996, the District inspected the transmission main project and determined that Defendant had implemented the majority of the corrective actions directed by the December 18, 1995 and the February 13, 1996 Compliance Orders. The District found additional violations not previously noted in prior inspection reports and observed the following conditions:

a. three interceptor dikes installed between approximately Stations 226+00 and 238+00 were not installed in accordance with the plan;

b. slope at approximately Station 146+00 required additional stabilization through the placement of additional erosion and sedimentation controls; and

c. erosion and sedimentation controls, such as silt fence, required repair or replacement at various locations along the transmission main project. (Complaint, ¶47)

43. On March 5, 1996, the District allowed Defendant to resume earthmoving activities with the understanding that Defendant would immediately implement and maintain all erosion and

sedimentation controls in accordance with the plan. (Complaint, ¶48)

44. The District faxed a copy of the March 5, 1996 inspection report to Defendant on March 8, 1996. (Complaint, ¶49)

45. The Department sent an NOV to Defendant dated March 13, 1996 indicating that the temporary culverts constructed in tributaries to Hunter Creek at approximately Stations 141+00 and 146.6 and that temporary bridges across the Buckwha Creek and Aquashicola Creek at approximately Stations 191+00 and 219+00, respectively, were constructed in violation of the terms and conditions of the Encroachments Permit. (Complaint, ¶50)

46. On April 15, 1996, the District inspected the transmission main project and observed the following conditions:

a. erosion and sedimentation controls including, but not limited to, filter bags, silt fence, and water bars, were not properly installed or maintained in accordance with the plan at various locations along the transmission main project including at approximately Stations 133+00 and 225+20 and between approximately Stations 226+00 and 232+00; and

b. sediment-laden water was being discharged into a wetland tributary of the Aquashicola Creek at approximately Station 225+20. (Complaint, ¶51)

47. A representative of Gannett Fleming signed the April 15, 1996 inspection report acknowledging that they read the report, that they received a copy of the report, and that they were given the opportunity to discuss it with the inspector. (Complaint, ¶52)

48. On May 22, 1996, the Department and the District inspected the transmission main project and observed the following conditions:

a. filter bags were not properly installed at approximately Station 135+00 resulting in the discharge of sediment to Hunter Creek;

b. erosion and sedimentation controls were not implemented and maintained at approximately Station 217+00 in accordance with the plan and sediment-laden water was discharging directly into the Aquashicola Creek;

c. erosion and sedimentation controls, such as silt fence, filter bags and diversion channels, have not been installed or maintained in accordance with the plan at various locations along the transmission main project including, but not limited to, approximately Stations 77+00, 135+00 and 217+00 and between approximately Stations 191+00 and 203+00 in accordance with the plan;

d. no temporary or permanent erosion and sedimentation controls such as regrading, seeding and mulching have been installed between approximately Stations 191+00 and 203+00 in accordance with the plan;

e. construction entrances are not being maintained in accordance with the plan at various locations along the transmission main project; and

f. disturbed soil was not stabilized in accordance with the plan at various locations along the transmission main project including areas at approximately Stations 77+00 and 96+00 and areas between Stations 191+00 and 203+00. (Complaint, ¶53)

49. The District faxed a copy of the May 22, 1996 inspection report to Defendant on May 24, 1996. (Complaint, ¶54)

50. On June 25, 1996, the District inspected the Buckwha Stream Crossing at approximately Station 177+00 of the transmission main project and observed, among other things, that filter bags were not being properly installed and maintained in conformance with their designed capabilities resulting in the discharge of sediment to waters of the Commonwealth. (Complaint, ¶55)

51. A representative of Gannett Fleming signed the June 25, 1996 inspection report acknowledging that they read the report, that they received a copy of the report, and that they were given the opportunity to discuss it with the inspector. (Complaint, ¶56)

52. On August 13, 1996, the Department and the District inspected a portion of the transmission main project and observed the following conditions:

a. erosion and sedimentation controls including silt fence, rip-rap, filter bags, and diversion ditches, were not installed or maintained in accordance with the plan at various locations along the transmission main project including at approximately Stations 177+00, 191+00, 205+00, 219+00 and 237+00 and between approximately Stations 191+00 and 204+00;

b. construction entrances were not maintained in accordance with the plan at various locations along the transmission main project including the construction entrances at approximately Stations 177+00, 191+00 and 205+00;

c. sediment had been discharged to a wetland at approximately Station 177+50;

d. temporary water diversion at approximately Station 237+00 was not maintained in a manner to minimize erosion and sedimentation;

e. stone approaches to stream crossing at approximately Station 191+00 were not maintained in accordance with the plan; and

f. disturbed soil was not stabilized in accordance with the plan at various locations along the transmission main project including at approximately Station 237+00 and areas between Stations 191+00 and 204+00. (Complaint, ¶57)

53. The District faxed a copy of the August 13, 1996 inspection report to Defendant on August 15, 1996. (Complaint, ¶58)

54. On October 21, 1996, the Department and the District inspected the transmission main project and observed the following conditions:

a. silt fence was not properly installed or maintained in accordance with the plan at various locations along the transmission main project including between approximately Stations 0+00 to 7+00, between approximately Stations 9+00 to 11+30, at approximately Station 69+75, between approximately Stations 75+00 to 77+00, between approximately Station 136+00 to 139+00, and at approximately Section 191+00;

b. permanent seeding and/or mulching was not completed in accordance with the plan at various locations at the transmission main project including between approximately 9+00 to 11+30, at approximately Station 69+75, between approximately Stations 75+00 to 77+00, between approximately Station 94+00 to 97+00, at approximately Station 100+00, and between approximately Stations 136+00 to 139+00;

c. silt fence had been removed from the stream crossing at approximately Stations 136+00 to 139+00 prior to the establishment of at least 70% cover in violation of the plan;

d. water diversion located to the left of the proposed Interconnect Chamber No. 2 at approximately Station 238+00 has failed resulting in the discharge of water into the excavation area and across an access road causing erosion and sedimentation; and

e. temporary soil stockpile at approximately Station 238+00 was not stabilized in accordance with the plan. (Complaint, ¶59)

55. A copy of the October 21, 1996 inspection report was sent to Defendant by fax on November 1, 1996. (Complaint, ¶60)

56. The Authority, through Gannett Fleming, reported non-compliance to the District pursuant to its obligations under Permit Condition No. 3B, Part A, of NPDES Permit No. PAS101304 for the discharge of sediment into waters of the Commonwealth which occurred on the following days: October 26, 27 and 30, 1995; November 9 and 30, 1995; December 4 and 5, 1995; and February 1, 2, 6, 9, 12 and 13, 1996. (Complaint, ¶61)

57. The Authority, through Gannett Fleming, reported non-compliance to the District pursuant to its obligations under Permit Condition No. 3B, Part A, of NPDES Permit No. PAS101304 for failing to implement and maintain erosion and sedimentation controls in conformation with the plan on the following days: October 18, 26, 27 and 30, 1995; November 9 and 30, 1995; December 1, 4 and 5, 1995; and February 1, 2, 6, 9, 12 and 13, 1996. (Complaint, ¶62)

58. Defendant's failure to comply with NPDES Permit No. PAS101304 after receiving numerous inspection reports and notices of violation constitutes knowing, intentional and willful violation of the laws of this Commonwealth by Defendant. (Complaint, ¶63 and Findings of Fact Nos. 16-54)

59. The Department filed a Complaint for civil penalties in the amount of $195,835 for violations of the Clean Streams Law and the Encroachments Act.

Clean Streams Law Penalty

60. Mr. Murin describes the manner in which the amount of penalty was calculated pursuant to the Erosion and Sedimentation Pollution Control Form Civil Penalty Assessment Policy. (NT. 163-164, Ex. C-20)

61. The first section of the policy requires the Department to gather background information by determining whether there were technical violations of the applicable laws and regulations, and to assess sediment discharges to waters of the Commonwealth. Mr. Murin determined, among other things, that:

a. sedimentation had resulted from negligent maintenance of erosion control facilities;

b. Defendant directly discharged sediment-laden water to waters of the Commonwealth without any erosion control facilities on more than one occasion;

c. approximately fourteen inspections had been conducted at the site; and

d. the violator was aware of the violation, was uncooperative, and that violation was willful. (Ex. C-20, N.T. 164)

62. Count I of the Department's Complaint seeks the assessment of $99,250 for Defendant's activities resulting in pollution and potential pollution to the waters of the

Commonwealth. Further, Count I seeks the reimbursement of the District's expenses in the amount of $1,935 for costs associated with resolution of the violations alleged in the Complaint.

63. The Department and/or the District inspected the transmission main project and found that sediment was discharged to Hunter Creek, Buckwha Creek, Aquashicola Creek, or unnamed tributaries associated with each, which are waters of the Commonwealth, as a result of Defendant's earthmoving activities without adequate means to prevent erosion and sedimentation on the following days: December 6 and 18, 1995, February 13, 22, 23 and 28, 1996, April 15, 1996, May 22, 1996, June 25, 1996, and August 13, 1996. (Complaint, ¶¶ 19, 21, 32, 41, 43, 45, 51, 55, 57, 58 and 69)

64. Mr. Murin determined that nine days of violation in Count I are severe because there was an environmental threat to health and safety, there was more than one prior occasion of sediment discharge to the waters of the Commonwealth, and that there were large amounts of sediment being discharged to waters of the Commonwealth. (N.T. 172)

65. The Authority, through Gannett Fleming, reported to the District the release of sediment into waters of the Commonwealth occurring on the following days: October 26, 27 and 30, 1995; November 9 and 30, 1995; December 4 and 5, 1995; and February 1, 2, 6, 9, 12, and 13, 1996. (Complaint, ¶70)

66. The Department provided for a discount for self-reported violations, even though they would have been classified as severe violations. (N.T. 173)

Encroachments Act Penalty

67. Mr. Cadwallader described the manner in which the amount of penalty was calculated pursuant to adopted Civil Penalty Assessment Policy for encroachments. (N.T. 208)

68. Count II of the Department's Complaint seeks an assessment of $12,400 for violating the terms and conditions of the Encroachments Permit.

69. On February 23, 1996, the Department inspected the transmission main project and observed that Defendant constructed temporary culverts at approximately Station 141 and 146.6 and temporary bridges at approximately Stations 191 and 219 which did not conform with the Encroachments Permit, the Encroachments Act and the regulations promulgated thereunder. (Complaint, ¶77)

70. Mr. Cadwallader properly classified the violations related to the improperly constructed culverts and bridges observed on February 23, 1996 as major violations because of the flow of sediment to the streams resulting in at least one dead trout. (N.T. 200-215, 220 and 224-225)

Violation of NPDES Permit

71. Count III of the Department's Complaint seeks an assessment of $69,750 for violations of the terms and conditions of NPDES Permit No. PAS101304.

72. The Department and/or the District inspected the site and observed that Defendant failed to construct or maintain erosion and sedimentation controls in accordance with the plan on December 6, 18, and 22, 1995; February 13, 20, 22, 23 and 28, 1996; March 5, 1996; April 15, 1996; May 22, 1996; June 25, 1996; August 13, 1996; and October 21, 1996 in violation of Sections 402(b) of the Clean Streams Law, 35 P.S. § 691.402(b), Section 102.4(a) of the Erosion Control Regulations, 25 Pa. Code § 102.4(a) and Section 611 of the Clean Streams Law, 35 P.S. § 691.611. (Complaint, ¶84)

73. Mr. Murin properly determined that thirteen days of violation in Count III are severe. (N.T. 173)

74. Following each inspection by the Department and/or the District, Defendant and/or the Authority was provided a copy of an inspection report which describes the site conditions found by the Department and/or the District which constitute violations of the terms and conditions of NPDES Permit No. PAS101304. (Complaint, ¶85)

75. The Authority, through Gannett Fleming, reported non-compliance to the District pursuant to its obligations under Permit Condition No. 3B, Part A of NPDES Permit No. PAS101304 for Defendant's failure to implement and maintain erosion and sedimentation control measures in conformance with the plan in violation of Sections 402 of the Clean Streams Law, 35 P.S. § 691.402, Section 102.4(a) of the Erosion Control Regulations, 25 Pa. Code § 102.4(a), and Section 611 of the Clean Streams Law, 35 P.S. § 691.611, on the following days: October 18, 26, 27 and 30, 1995; November 9 and 30, 1995; December 1, 4 and 5, 1995; and February 1, 2, 6, 9, 12 and 13, 1996. (Complaint, ¶86)

76. Mr. Murin properly determined that thirteen days of violation in Count III are severe. (N.T. 173)

Penalty for Failure to Comply with Orders

77. Count IV of the Department's Complaint seeks an assessment of $12,500 for Defendant's failure to comply with orders issued by the Department.

78. The Department issued Compliance Orders to Defendant dated December 18, 1995 and February 13, 1996 pursuant to Sections 5, 316, 402 and 610 of the Clean Streams Law, 35 P.S. §§ 691.5, 691.316, 691.402 and 691.610 and Section 1917-A of the Administrative Code, 71 P.S. § 510-17. (Complaint, ¶89 and Findings of Fact Nos. 20 and 30)

79. Defendant did not appeal the Department's issuance of the December 18, 1995 and the February 13, 1996 Compliance Orders to this Board. (Complaint, ¶90)

80. The Department and the District inspected the transmission main project on February 13, 1996 and observed that Defendant did not comply with the Department's Order issued on December 18, 1995. (Complaint, ¶91)

81. The Department and/or District inspected the site on February 20, 1996; February 22, 1996; February 23, 1996; and February 28, 1996, and observed that Defendant did not comply with the Department's Orders issued on December 18, 1995 and February 13, 1996. (Complaint, ¶92)

82. Mr. Murin determined that the five days of violations in Count IV are at the high range of moderate or the low range of severe. (N.T. 173)

83. The District incurred expenses in the amount of $1,935 for costs associated with resolution of the violations alleged in the Complaint. (Ex. C-18)

84. The testimony of Mr. Murin and Mr. Cadwallader is credible and convincing.

85. Defendant presented no testimony at the hearing on the merits to indicate that it was not aware of the orders, reports of inspections or notices of violation issued by the Department or reports of non-compliance which the Department received from the Authority or Gannett Fleming.

The Defendant's Evidence

86. The only evidence offered by Defendant at the hearing on the merits was the testimony of an expert witness, Edward Kuc, based on a study done long after the many discharges of sediment-laden water to the streams along the pipeline construction project. The conclusion of this study, if believed, tended to show that the discharges to those streams caused no long-term

damage to the streams. (N.T. 242-260)

87. Mr. Kuc's study was not a sufficient basis for this conclusion because, among other things the study was conducted in June, 1997 long after the discharges in question, no study was conducted on the effects on fish in the stream, and there was insufficient data as to the status of the soil and macroinvertebrates in the streams prior to the discharges in question. (N.T. 264-280)

88. Mr. Kuc's testimony indicated that the sediment in the streams would in all probability settle out further down stream so that permanent damage probably was done to other waters of the Commonwealth. (N.T. 281-282)

89. The discharge of sediment into an aquatic system negatively impacts the macroinvertebrate fish and flora and fauna in a stream which are dependent on the water resources. (N.T. 178)

90. Sediment discharge to a stream may also diminish the carrying capacity of a stream through accumulation of sediment in the stream bed, and water suspended sediment can cause stream bank erosion. (N.T. 179)

DISCUSSION

The principal issue before the Board is whether or not the assessment of a penalty in the total amount of $195,835 is justified by reason of the violations set forth in the Complaint and admitted by the Defendant. Under the Clean Streams Law, the Board may assess a maximum civil penalty of Ten Thousand Dollars per day for each violation of that Act pursuant to Section 605(a) of the Clean Streams Law, 35 P.S. § 691.605(a). Section 605(a) provides as follows with respect to the determination of the amount of the penalty:

> In determining the amount of the civil penalty the department shall consider the willfulness of the violation, damage or injury to the waters of the Commonwealth or their use, cost of restoration and other relevant factors.

In the case of the Encroachments Act, Section 21, 32 P.S. § 693.21, directs the penalty to be assessed as follows:

> Such a penalty may be assessed whether or not the violation was willful. The civil penalty so assessed shall not exceed $10,000 plus $500 for each day of continued violation. In determining the amount of the civil penalty, the board shall consider the willfulness of the violation, damage or injury to the stream regimen and down stream areas of the Commonwealth, cost of restoration, the cost of the Commonwealth of enforcing the provisions of the act against such person and other relevant factors.

The Environmental Hearing Board is a government body with the authority to set civil penalties under both the Clean Streams Law and the Encroachments Act. The Department's calculation of a civil penalty is advisory only. *DEP v. Silverstein*, 1996 EHB 619; *EMS Resource Group, Inc. v. DER,* 1995 EHB 834.

The well-pled averments of the Department's Complaint, admitted by the Defendant, clearly establish numerous, repetitive and, in some instances, continuous violations. As set forth in the Department's Complaint, there were at least nine occurrences out of 14 inspections where sediment was being discharged from the project into the waters of the Commonwealth. In some instances, these resulted merely from a failure to properly implement or maintain erosion and sedimentation control facilities. (Complaint, ¶19, 21, 32, 41, 43, 45, 51, 55, 57 and 59) These violations occurred on December 6, 1995, December 18, 1995, February 13, 1996, February 22, 1996, February 23, 1996, February 28, 1996, April 15, 1996, June 25, 1996 and August 13, 1996. However, on at least three separate occasions, the District or the Department observed Defendant pumping sediment-laden

water into the stream without any method of control. (Complaint, ¶19 and C-8; Complaint, ¶¶26 and Exhibit. C-9; Complaint, ¶45 and C-14) The occasions of these clearly willful violations were on December 6, 1995, December 18, 1995 and February 28, 1996.

In addition to these direct discharges to streams neighboring the project, the well-pled allegations of the Complaint showed that Defendant failed to install erosion and sedimentation controls pursuant to the plan on each of the four additional occasions where the project was inspected between December, 1995 and October, 1996. (Complaint, ¶¶27, 39, 47 and 53) These additional violations occurred on December 22, 1995, February 20, 1996, March 5, 1996 and May 22, 1996. These violations included the failure to install and maintain a silt fence, a failure to stabilize access roads, a failure to stabilize disturbed areas, a failure to install interceptor dikes and a failure to install and maintain construction entrances.

Defendant's discharge of sediment from the transmission main project into the waters of the Commonwealth is a discharge of pollution which is a violation of Section 401 of the Clean Streams Law, 35 P.S. § 691.401, Section 102.12(g) of the Erosion Control Regulations, 25 Pa. Code § 102.12(g). Such a discharge constitutes unlawful conduct and a statutory nuisance pursuant to Sections 401 and 611 of the Clean Streams Law, 35 P.S. §§ 691.401 and 691.611.

The failure of Defendant to construct and operate the temporary culverts at approximately Stations 141 and 146.6 and the temporary bridges at approximately Stations 191 and 219 in accordance with the approved plan and the Department approved plan amendments is a violation of the terms and conditions of the Encroachments Permit and Section 13 of the Encroachments Act, 32 P.S. § 693.13. Failure to construct water obstructions in violation of the terms and conditions of a permit is unlawful conduct pursuant to Section 18 of the Encroachments Act, 32 P.S. § 693.18.

The failure of Defendant to implement and maintain erosion and sediment pollution control measures to effectively minimize accelerated erosion and sedimentation is a violation of the terms and conditions of NPDES Permit No. PAS101304, Section 102.4 of the Erosion Control Regulations, 25 Pa. Code § 102.4, and Section 402 and 611 of the Clean Streams Law, 35 P.S. §§ 691.402 and 691.611.

The failure of Defendant to comply with orders issued by the Department is a violation of Section 611 of the Clean Streams Law, 35 P.S. § 691.611, and is a nuisance pursuant to Sections 402 and 610 of the Clean Streams Law, 35 P.S. §§ 691.402 and 691.610.

Willfulness of Violations

The well-pled allegations of the Complaint leave no doubt but that many of the Defendant's violations were willful to the highest degree. On December 6, 1995, the District's inspection showed that sediment-laden water was being discharged to Hunter Creek without the installation of erosion and sedimentation controls. (Complaint, ¶19) The testimony of Mr. Clauser with respect to this occasion shows that muddy water was being pumped from a utility line excavation and was being conveyed by pipes to a wooded section immediately adjacent to Hunter Creek. There was a discharge to that creek and there were no erosion or sedimentation controls in place at this site. There was also evidence of sedimentation in the creek at this point. (N.T. 60-62; C-8)

On December 18, 1995, the Department and the District's inspection showed that sediment-laden water was being discharged to Hunter Creek and into a tributary of the Aquashicola Creek from areas that did not have erosion and sedimentation control facilities or from disturbed areas which were not stabilized in accordance with the sedimentation control plan. (Complaint, ¶21) Photographs taken during the course of this inspection show direct discharges to these streams.

(N.T. 67-74; C-9) On February 28, 1996, the Department and the District inspected the project and found that sediment-laden water was being pumped into the waters of the Commonwealth as a result of a failure to install or maintain erosion and sedimentation controls in accordance with the plan. (Complaint, ¶45; N.T. 98-102; C-14)

These three incidents of pumping muddy water into or near the streams without adequate sedimentation controls are clearly willful violations of the highest degree. Defendant is well aware of its obligations to implement the approved plans as demonstrated by the co-permittee application and its acknowledgment of its understanding of the permit conditions.

In addition to these three incidents of direct pumping of sediment-laden water into the nearby streams, the Complaint sets forth seven other occasions in which sediment was being discharged to nearby streams. These incidents are as follows:

Date	Complaint
2/13/96	Paragraph 32
2/22/96	Paragraph 41
2/23/96	Paragraph 43
4/15/96	Paragraph 51
6/25/96	Paragraph 55
8/13/96	Paragraph 57
10/21/96	Paragraph 59

The Complaint shows that throughout this period, the Department issued compliance orders and notices of violation with respect to these incidents and that on many occasions no action had been taken by the Defendant even in response to the Department's orders. This history of violations

resulting in discharges to the nearby steams clearly show a willful conduct for which the Defendant offers no justification whatsoever.

In the case of other violations, the Complaint and the Department's evidence showed a number of violations which were repetitive or continuous in nature. For example, the District documented Defendant's failure to properly construct and maintain construction entrances on several occasions. (N.T. 62, 72; C-8, C-9) In addition, the District's inspection reports placed in evidence documented numerous instances of Defendant's failure to properly install and maintain silt fences. (C-17) These conditions were documented by photographs on December 18, 1995 and February 22, 1996. (C-9 and C-12) Exhibit C-10 also depicts a silt fence strewn in the brush in the immediate vicinity of the water of the Commonwealth on February 19, 1996. Photographs presented by the Department which were taken on February 13, 22 and 23, 1996 show improperly maintained silt fences one of which appears to have been driven over. (C-11D, C-12A, C-13B)

Defendant also demonstrated a willful disregard for complying with orders of the Department issued to Defendant on December 18, 1995 and February 13, 1996. Subsequent inspections of the site observed that Defendant did not comply with the Department's orders. (Complaint, ¶¶32, 39, 41, 43 and 45) Clearly, all of these violations were preventable. The only explanation for their not being prevented is that Defendant simply willfully disregarded the Department's orders.

History of Violations at the Site

The history of the Defendant's violations and compliance efforts is another relevant factor which may be considered by the Department and by the Board in assessing the penalty. Indeed, the Department's Civil Penalty Assessment Policy identifies a violator's compliance history as a factor when classifying violations. (C-20) In classifying the violations documented at the site, the

Department properly considered whether the violator was the subject of any past compliance and enforcement actions by the Department. (N.T. 164) Accordingly, other past violations may be considered by the Department and by this Board in assessing the amount of the penalty in addition to the violations for which the penalty is being assessed.

In classifying the violations charged as being willful, it is also proper to consider the history of other violations. Prior to the violations which underline the basis for the Department's Complaint, the Department and District inspected the transmission main project on December 6, 1994 and December 29, 1994 and documented numerous violations. (C-6, C-7) The Department found that on both days sediment discharged to Hunter Creek and that erosion limitation controls had not been implemented in accordance with the NPDES Permit. The inspection report of December 29, 1994 shows that the violations identified in the December 6, 1994 inspection report had not been adequately remedied. The Department's evidence at the hearing showed that both Defendant and the Authority were involved in resolving the documented violations in the execution of a Consent Assessment of Civil Penalty executed by the Authority and the Department. (C-23)

The Department also presented testimony of other violations by Defendant in addition to those charged in the Complaint. On February 12, 1996, the senior field representative with Gannett Fleming observed muddy water being pumped into Hunter Creek at approximately Station 143+00 as depicted in a photograph that he took of this condition which was marked as C-2. (N.T. 13-19) In addition, on February 13, 1996, the Gannett Fleming representative gave Defendant a non-compliance notice based on his observation that Defendant was discharging sediment into the waters of the Commonwealth at approximately Station 191+00 into Hunter Creek. (N.T. 21-24; C-4) While this history of violations cannot serve as the basis for the penalty, the Board may properly take this

history into consideration in determining the willful nature of the violations charged in the Complaint.

Quality of Resources Impacted

Section 605 of the Clean Streams Law specifically directs that "damage or injury to the waters of the Commonwealth or their use" be considered in determining the amount of the civil penalty. Similarly, the Encroachments Act at 32 P.S. § 693.21 directs the Board to consider "damage or injury to the stream regimen and down stream areas of the Commonwealth, cost of restoration" in determining the amount of the penalty.

The Department presented the testimony of Mr. Murin, who made the Department's penalty assessment for violations of the Clean Streams Law, that generally the discharge of sediment to a stream or a creek has a detrimental effect on the chemical, physical and biological properties of the water. The sediment itself may contain chemical components such as fertilizers, nutrients and petrochemicals that could have a chemical effect on the water resources. In addition, the discharge of sediments may have a biological effect on macroinvertebrates, the fish populations, as well as on flora and fauna involved in the water resource. Sediments can also affect the reproduction rates of the fauna and the fish. Sediments affect the quality of the water as far as drinking water supplies, recreational usage of the waters or other potential uses that the water has down stream. It may also affect the carrying capacity of the stream by the laying down of sediments or through a scouring effect and causing additional stream bank erosion conditions. (N.T. 177-179) In assessing the penalty, Mr. Murin testified that he considered the likely effect of sediment discharges on water quality with the receiving streams as well as the fact that these were streams which have not only stocked trout but have been identified as having wild trout populations. In addition, Mr. Murin took

into consideration the effect that the drainage would have on other waters of the Commonwealth. (N.T. 196-197)

Mr. Cadwallader, who calculated the Department's penalty assessment for violations of the Encroachments Act, also testified to impacts to the stream. He testified to violations by Defendant having put the transmission line on the wrong side of the stream when the Department had approved the other side of the stream. During his inspections he also found a number of temporary culverts connected with road crossings that the contractor had improperly constructed in connection with the stream locations and a filling of wetlands. He noticed sediment pollution to the streams and in one stream that was diverted he found a dead trout. (N.T. 200-215) He classified these violations for purposes of calculating the penalty as major violations because of the impact on the streams that he saw, the potential for harm to the environment and the erosion that had occurred in connection with some of these violations. (N.T. 216) In addition, Mr. Cadwallader testified to a scouring effect underneath a bridge which created a backwater situation that had a potential for flooding adjacent properties. (N.T. 224-225)

The Defendant presented only one witness, Edward Kuc, an expert witness whose testimony concluded that there was no long-term impact to the waterways in question. He testified that long after the violations charged, he examined the three waterways, Hunter Creek, Buckwha Creek and Aquashicola Creek along with the relative tributaries that the pipeline crossed. He examined the streams to as much as 100 feet above the impact location and 200 feet below the impact location. (N.T. 247-253) He concluded in his study that he did not find any significant differences in comparison between the up stream and down stream sample locations of the overall pipeline project at each potential impact location that he evaluated. (N.T. 253, 260; D-3) He did find that there were

moderate to high levels of nitrification in the stream beds at these locations. He attributed this result to agricultural operations and dirt driveways in the area. (N.T. 254-255) He did find that there were disturbances to the banks of the streams associated with the actual locations of the crossing. (N.T. 259) However, he was of the opinion that he did not see any evidence of long-term impact resulting from the sedimentation associated with the project. (N.T. 260) He acknowledged that while sedimentation to the stream might impact the reproduction of fish, his evaluation involved no assessment of fisheries or fish populations in the area. (N.T. 263) While Mr. Kuc believed that there was no change in macroinvertebrate population, in conducting his stream evaluation he had no background information concerning the populations of macroinvertebrates in the streams compiled prior to the construction activities. (N.T. 280) In addition, his study did not evaluate down stream locations beyond 200 feet down stream from the pipeline project. He acknowledged that the sediment was most likely carried further down stream at which point the sediment would settle out at the bottom of the stream. (N.T. 281-82)

In rebuttal, the Department called Mr. Clauser who testified that there was a sediment buildup at one improperly constructed culvert which resulted in a complaint from a landowner that he couldn't utilize the stream crossing because of the overflow condition as a result of increased sediment load. (N.T. 296-299) He testified that the Authority and its engineer determined to help the landowner out and cleaned the sediment which was directly related to this flooding condition. (N.T. 300)

In assessing the amount of the penalty we give no weight to Mr. Kuc's testimony. His opinion as an expert was not stated to be with a reasonable degree of scientific certainty which is normally required of expert testimony in Pennsylvania. *McMahon v. Young,* 276 A.2d 534 (Pa.

1971); *McCann v. Amy Joy Donut Shops,* 472 A.2d 1149, 1151 (Pa. Super. 1984).[2] More importantly, however, Mr. Kuc's review was conducted approximately a year and a half after the beginning of sediment discharges to the streams. His views with respect to effects on macroinvertebrates suffers from having no background studies on which to base his conclusion as to whether the sediment discharges had a long-term effect on the streams. (N.T. 280) As indicated above, he acknowledged that he made no study of fish. There is contrary testimony on the record of at least the killing of one fish by sediment pollution. Finally, his testimony is entitled to no consideration because it does not adequately consider the impacts of sediment discharges to reaches down stream from the transmission line project.

Assessment of Penalty

The Department asked that we approve its assessment of a penalty under Count I relating to pollution to the waters of the Commonwealth in violation of the Clean Streams Law in the amount of $101,185 which calculation is summarized as follows:

1 day violation	@ $2,500 per day	=	$ 2,500
9 days of violation	@ $7,500 per day	=	$ 67,500
13 days/non-compliance reports	@ $2,250 per day	=	$ 29,250
Costs to District		=	$ 1,935
	Subtotal	=	$101,185

We think the Department's assessment of the penalty for these violations is appropriate. The ten incidents of direct discharge of sediment-laden water to the streams alone justifies a maximum penalty based on its willfulness. In addition, the Department's penalty of $2,250 a day for 13 days for non-compliance seems to us to be reasonable. While we think the Department's penalty policy

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[2] Defendant's counsel was prompted to address this point (N.T. 292), but he chose not to do so.

in multiplying the estimated costs to the District by factors for willfulness of the violations may not be appropriate because the statute does not authorize "treble damages," we think that the violations alleged under Count I of the Complaint could easily justify a penalty in excess of the amount assessed by the Department. In any event, Defendant makes no claim that the calculation of the penalty for costs incurred by the District is improper in his post-hearing brief so that any such objection is waived. *Lucky Strike Coal Co. v. DER*, 547 A.2d 447 (Pa. Cmwlth. 1988)

The Department assessed a penalty of $12,400 under Count II for violations of the terms and conditions of the Encroachments Permit. That assessment is summarized as follows:

2 violations	@ $1,500 per violation	=	$ 3,000
2 violations	@ $4,500 per violation	=	$ 9,000
Costs to DEP		=	$ 400
	Subtotal	=	$ 12,400

Mr. Cadwallader's testimony with respect to the nature of these violations and the result of sedimentation which posed a threat to public safety resulting in the scouring of a stream bed as a result of improper installation of culverts amply justifies the proposed penalty. (N.T. 208-224) The estimate of $400 in costs of his time in conducting inspections, preparing reports and preparing the notice of violation is fully justified. (N.T. 227)

The Department calculated a total penalty of $69,750 under Count III for violations to terms and conditions of the NPDES Permit. That calculation is summarized as follows:

1 day of violation	@ $1,000 per day	=	$ 1,000
13 days of violation	@ $4,250 per day	=	$ 55,250
15 days/non-compliance reports	@ $ 900 per day	=	$ 13,500
	Subtotal	=	$ 69,750

Evidence presented at the hearing shows 14 separate days of inspections in which violations were noted including ten days of evidence of discharges to the streams. In the case of each such

inspection, violations were in connection with earthmoving activities and were shown to involve other violations of the terms and conditions of the permit. Since these violations appear to be willful, the Department's giving Defendant the benefit of the doubt in assessing only $1,000 for the first day of violation and $4,250 a day for subsequent violations is certainly proper in view of the willful nature of the violations. The assessment of $13,500 for 15 days of non-compliance is certainly reasonable.

The Department estimated a penalty in the amount of $12,500 under Count IV for failure to comply with orders of the Department. That calculation is as follows:

5 days of violation	@ $2,500 per day	=	$ 12,500

The admitted allegations of the Complaint show that Defendant ignored orders issued by the Department on December 18, 1995 and February 13, 1996. Later inspections on February 20, 1996, February 22, 1996, February 23, 1996 and February 28, 1996 showed that Defendant had not complied with those orders of the Department as of those times. (Complaint, ¶32, 39, 41, 43 and 45) The violations were classified as serious because it was necessary to issue two compliance orders because of the presence of numerous continuous violations. (N.T. 141-143, 158) The second order was necessary because the first one had not been complied with. (N.T. 157-158) Obviously, all of these violations were preventable so that the violations can only be viewed as willful.

Accordingly, we make the following:

CONCLUSIONS OF LAW

1. The Department has the burden of proof in this matter and must establish that the assessment of civil penalties is authorized by law.

2. Defendant discharged sediment pollution into waters of the Commonwealth in violation of Section 601 of the Clean Streams Law, 35 P.S. § 691.401.

3. Defendant failed to monitor, operate and maintain encroachments to streams in accordance with the terms and conditions of its permit in violation of Section 13 of the Encroachments Act, 32 P.S. § 693.13.

4. Defendant failed to implement the terms and conditions of the Erosion and Sedimentation Control Plan in violation of Section 402(b) of the Clean Streams Law, 35 P.S. § 691.402(b) and Section 102.4 of the Erosion Control Regulations, 25 Pa. Code § 102.4.

5. Defendant violated the terms and conditions of the Compliance Orders of the Department in violation of Section 610 of the Clean Streams Law, 35 P.S. § 691.610.

6. Failure to comply with an order issued by the Department is a nuisance under Section 402 and Section 610 of the Clean Streams Law, 35 P.S. §§ 691.402 and 691.610.

7. By violating the Clean Streams Law and the Encroachments Act and the regulations promulgated under each, Defendant engaged in unlawful conduct as defined by Section 611 of the Clean Streams Law, 35 P.S. § 691.611 and Section 18 of the Encroachments Act, 32 P.S. § 693.18.

8. The Defendant's expert testimony was not sufficient to establish that no permanent damage had been done to the streams as a result of the Defendant's violations.

9. A penalty in the amount of $99,250 is assessed for Count I of the Complaint as civil penalties for discharging sediment to the waters of the Commonwealth in contravention of Section 401 of the Clean Streams Law, 35 P.S. § 691.401 and Section 102.12(g) of the Erosion Control Regulations, 25 Pa. Code § 102.12(g).

10. A penalty in the amount of $12,400 is assessed for Count II of the Complaint as civil penalties for failing to install and maintain facilities in accordance with the terms and conditions of an encroachments permit in contravention of Section 13 of the Encroachments Act, 32 P.S. § 693.13.

11. A penalty in the amount of $69,750 is assessed for Count III of the Complaint as civil penalties for failing to implement and maintain erosion and sedimentation controls in contravention of Section 402 of the Clean Streams Law, 35 P.S. § 691.402 and Section 102.4(a) of the Erosion Control Regulations, 25 Pa. Code § 102.4(a).

12. A penalty in the amount of $12,500 is assessed for Count IV of the Complaint for failing to comply with Orders of the Department in violation of Section 610 and 611 of the Clean Streams Law, 35 P.S. §§ 691.611.

13. A penalty in the amount of $1,935 is assessed to reimburse to District for its expense pursuant to Section 316 of the Clean Streams Law, 35 P.S. § 691.316.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	EHB Docket No. 96-234-CP-MG
v.	:	
CARBRO CONSTRUCTION CORPORATION	:	

ORDER

AND NOW, this 23rd day of December, 1997, IT IS ORDERED that civil penalties are assessed against Carbro Construction Corporation in the total amount of $195,835.00. Of this penalty, $183,435.00 is assessed for violations of the Clean Streams Law. This amount is due and payable immediately into the Clean Water Fund. The remaining $12,400.00 is assessed for violations of the Dam, Safety and Encroachments Act. This amount is due and payable into the Dam and Encroachments Fund.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: December 23, 1997

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

For the Commonwealth, DEP:
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Northeast Region

For Defendant:
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RENDA & SCHWARTZ
Somerville, NJ