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ENVIRONMENTAL HEARING BOARD

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The Environmental Hearing Board was created by the Act of December 3, 1970, P.L. 834, which amended the Administrative Code of 1929, the Act of April 9, 1929, P.L. 177, as amended. Section 21 of Act 275, §1921-A(a) of the Administrative Code, empowered the Board:

> "to hold hearings and issue adjudications under the provisions of the act of June 4, 1945 (P.L. 1388), known as the "Administrative Agency Law," on any order, permit, license or decision of the Department of Environmental Resources."

1988

ADJUDICATIONS

OPINIONS AND ORDERS

1988 DECISIONS

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

MAGNUM MINERALS	:	
	:	
v.	:	EHB Docket No. 82-230-G
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: October 4, 1988

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

By the Board

This adjudication is issued by the Board after its review and modification of a draft adjudication prepared by former Board Member Edward Gerjuoy, now serving the Board as a hearing examiner. This appeal was assigned to Mr. Gerjuoy when he was on the Board, and he conducted the hearings on which this adjudication is based.

Synopsis

The Board sustains the Department of Environmental Resources' denial of a mine drainage permit application because the applicant failed to demonstrate that surface and groundwater pollution would not result from its mining activities. The Board holds that where the acid base accounting method of overburden analysis is employed, a neutralization potential of less than 100, in the absence of fizzing, is not a reliable indicator of potential alkalinity. The Board also rejects the applicant's estoppel claims.

FINDINGS OF FACT

1. The Appellant is Magnum Minerals, Inc., ("Magnum") a Pennsylvania corporation, whose mailing address during this appeal has been P. O. Box 34, Branchton, Pa. 16021.

2. The Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), the agency of the Commonwealth authorized to administer the provisions of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. ("CSL"), and the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. ("SMCRA").

3. On or about June 17, 1981, Magnum[1] submitted Mine Drainage Permit Application No. 10810111 ("the permit application") to DER (App. Ex. 4).

4. The permit application sought authorization to conduct a surface coal mining operation at a location known as the "New Hope Mine" ("the site"), in Marion and Cherry Townships, Butler County; in particular, the application proposed mining the Middle Kittanning ("MK") seam of coal on two tracts of land, known as the Munkacy and Effinger-Sabin properties (N.T. 68 and 364; DER Ex. 1; App. Ex. 4).

5. Drainage from the site will run to two streams, McMurray Run and Slippery Rock Creek (N.T. 12, 67).

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[1] The permit application actually was submitted by Lucas Coal Company, Inc. ("Lucas"), at the address listed in Finding of Fact No. 1. Magnum's answer to Interrogatory No. 1 in DER's First Set of Interrogatories explains that on December 29, 1981, Lucas changed its name to Magnum. Henceforth, we always will refer to Appellant as "Magnum", even if the reference pertains to a time before Lucas had changed its name.

6. The area affected by the proposed mining will be about 1200 feet from McMurray Run and about 400 feet from an unnamed tributary to Slippery Rock Creek (N.T. 12).

7. The site is adjacent to an abandoned surface coal mine, which had been operated by the B&D Coal Company (N.T. 20, 49, 102, 370).

8. Only the Munkacy portion of the site ("the Munkacy portion") immediately abuts the abandoned B&D mine (N.T. 179; DER Ex. 1; App. Ex. 10-3).

9. The area to be mined on the Munkacy portion is not contiguous to the area that will be mined on the Effinger-Sabin portion of the site ("the Effinger portion"); each of these two areas lies on a distinct "topographic nob" (N.T. 376; DER Ex. 1).

10. The Munkacy portion lies to the north of the Effinger portion (DER Ex. 1).

11. There are no abandoned mines on or abutting the Effinger portion (N.T. 914; App. Ex. 10-3; DER Ex. 1).

12. On or about January 26, 1982, Magnum submitted an overburden analysis report ("the Kenealy report") to DER as part of its permit application for the site (App. Ex. 9).

13. The Kenealy report, prepared by Magnum's expert Matthew Kenealy, contained the results of acid base accounting ("ABA") analyses and of leachate tests done according to the American Society for Testing Materials ("ASTM") method, upon rock samples collected from two drill holes, one of which, Test Hole OA-1, was located on the Munkacy portion and the other, Test Hole OA-2, on the Effinger portion (N.T. 69; App. Ex. 9, Fig. 1; DER Ex. 1).

14. On or about September 3, 1982, DER issued a letter notifying Magnum that its permit application was denied; the letter stated that the

application had been refused because it failed to demonstrate that "pollution of the surface and groundwater from, but not limited to, iron, manganese and acid mine drainage" would not result from the proposed mining operation (App. Ex. 5).

15. On September 27, 1982, Magnum filed an appeal of DER's September 3, 1982 denial letter.

16. In October, 1983 Magnum submitted an amended permit application to DER (N.T. 53; App. Ex. 18).

17. On January 18, 1984, DER issued a second denial letter, notifying Magnum that the materials which Magnum had submitted in October, 1983 "had failed to provide any new information that would cause the Department to alter its initial decision" to deny the permit (App. Ex. 25).

18. On October 16, 1984, Magnum submitted to DER a plan for the handling of potentially acid-producing strata at the site ("the special handling plan"); this plan proposed, inter alia, that a potentially acid-forming layer in the overburden be returned to the mining pit at a height at least 10 feet above the pit floor, and that the returned potentially acid-forming layer then be covered with a layer of agricultural lime, in a quantity of 20 tons/acre (App. Ex. 6).

19. No formal response by DER to Magnum's special handling plan was put on the record, but DER's experts stated that they did not believe the special handling plan would prevent the acid mine drainage ("AMD") DER fears will result from Magnum's proposed mining; in other words, the suggested special handling plan has not caused DER's experts to change their decision to deny the permit (N.T. 940, 1078, 1123-4).

20. As part of its permit application, Magnum analyzed water samples taken from a number of discharges and streams in the vicinity of the site (App. Ex. 4 and 18; N.T. 180).

21. Of the many water sample analyses that Magnum furnished as part of its permit application, two--taken at monitoring points identified as LN-1 and LN-2--were the cause of special DER concern (N.T. 868-9; App. Ex. 4 and 18).

22. Monitoring points LN-1 and LN-2 lie immediately to the north of the Munkacy portion, in groundwater discharges at the cropline of the MK seam (N.T. 192-194; DER Ex.1).

23. The cropline of a coal seam is that portion of the earth's surface which is intercepted by the coal seam (N.T. 193-4).

24. LN-1 and LN-2 are located near the toe of the spoil from the abandoned B&D mine (N.T. 369-70; App. Ex. 4, p. 5A).

25. The analyses of the LN-1 and LN-2 discharges manifest the low pH's, high sulfate concentrations and excesses of acidity over alkalinity that normally characterize AMD (N.T. 25-26, 369, 603-4, 866-7, 986-8).

26. The LN-1 and LN-2 discharges are draining from an area where the MK seam previously was mined (N.T. 19-24, 179, 866-7; App. Ex. 4, §7.5; App. Ex. 10-3; DER Ex. 1).

27. Monitoring point LN-3 lies in a stream below discharges LN-1 and LN-2, receives their waters, and also appears to be AMD. (N.T. 180, 369, 812; App Ex. 14, p. 7).

28. Except for monitoring points LN-1, LN-2 and LN-3, none of the water sample analyses from monitoring points in the vicinity of the Munkacy

portion that were reported on the original permit application exhibit the characteristic manifestations of AMD (N.T. 101-3, 179-180; App. Ex. 4, pp. 6A; DER Ex. 1).

29. Of all the monitoring points in the vicinity of the Munkacy portion whose water analyses were reported in the original application, only LN-1, LN-2, and LN-3 represent discharges from previous surface mining of the MK seam (N.T. 194-6).

30. DER's September 3, 1982 denial of the permit application primarily was based on the inferences DER drew from the LN-1 and LN-2 water analyses (N.T. 868-9, 891-2).

31. The LN-1 and LN-2 water samples reported in the original permit application were taken on or about March 19, 1981 (App. Ex. 4, pp. 6A).

32. The revised permit application contained no new analyses of the LN-1 and LN-2 discharges; for those monitoring points, the revised permit application merely repeated the analyses included in the original permit application (App. Ex. 18, pp. 8.1A).

33. Monitoring points LN-1 and LN-2 were resampled on November 22, 1985; the water analyses again were characteristic of AMD (N.T. 601-604; DER Ex. 2, 3).

34. On November 20, 1985, DER collected a water sample at a point very close to monitoring point LN-2; the sample was collected from the same discharge area in the toe of the spoil wherein LN-2 is located (N.T. 867, DER Ex. 4).

35. The November 20, 1985 sample near LN-2 also manifests AMD (N.T. 867-8).

36. On November 20, 1985, DER also sampled a spring identified as monitoring point LN-A, located in the vicinity of the Munkacy portion to the

north of LN-1 and LN-2, but still downgradient from the B&D mine (N.T. 863-7; DER Ex. 1, 4; App. Ex. 4, pp. 5A).

37. The LN-A sample described in Finding of Fact 36 had a pH of 3.9, a sulfate (SO_4) concentration of 660 milligrams per liter ("mg/l), zero alkalinity, and acidity of 214 mg/l (DER Ex. 4).

38. LN-A has been degraded by AMD (N.T. 866).

39. Kenealy testified that his overburden analysis results show that Magnum's proposed mining, whether on the Munkacy portion or on the Effinger portion, will not produce AMD (N.T. 79-84).

40. On November 6, 1985, well after DER had issued its January 18, 1984 second denial letter, Magnum filed a Supplemental Pre-Trial Statement in this appeal, which included another overburden report prepared by Magnum's consultant Edward Steele ("The Steele report", App. Ex. 14).

41. The Steele report contained the results of ABA analyses and of leachate tests performed by the "Sturey" method, upon rock samples collected from two additional drill holes located on the Effinger portion ("Test Holes OB-1 and OC-1") (N.T. 366; App. Ex. 14; DER Ex. 1).

42. Steele testified that his overburden analysis results show "to a reasonable degree of scientific certainty" (which Steele interpreted as meaning 99% certain) that Magnum's proposed mining on the Effinger portion will not produce AMD (N.T. 440-442, 723-5).

43. Steele testified that his review of the evidence, including the Kenealy report, shows that water draining through the Munkacy portion after Magnum's proposed mining activities would have a pH between 5.5 and 6.0, i.e., would be moderately acidic (N.T. 486-7, 570, 721-2).

44. Steele granted, therefore, that the Munkacy portion does have the potential to produce moderately acidic drainage (N.T. 721-2).

45. Nevertheless, Steele does not believe Magnum's mining on the Munkacy portion will produce AMD, because, according to Steele, there will be no groundwater discharges of any kind from the Munkacy portion (N.T. 749-50).

46. Steele's opinion that the Munkacy portion will produce no discharges rests on his belief, from his personal observations and the drill hole data provided to him, that no groundwater was encountered in those drill holes, and on his readings in the scientific literature indicating that the strata on the Munkacy portion are very resistant to water infiltration (N.T. 749-50).

47. Drill holes OA-1, OA-2, OB-1, and OC-1 yielded core samples; these samples revealed the presence of varied rock strata in the overburden (the material above the coal seam) on the site (App. Ex. 9 and 14).

48. Kenealy's overburden analysis involved chemical analyses of the material in the strata found in Test Holes OA-1 and OA-2 that were located above the coal layer; there were eleven such distinct strata in OA-1 and fourteen in OA-2 (App. Ex. 9).

49. From these chemical analyses Kenealy performed an ABA for each stratum in each of the two Test Holes (App. Ex. 9).

50. For each stratum, the chemical analysis involved in Kenealy's ABA yielded two numbers: the neutralization potential ("NP") and the potential acidity ("PA") (N.T. 71).

51. Each of the NP and PA is expressed in tons of calcium carbonate ($CaCO_3$) per 1000 tons of the material under study (N.T. 72-5).

52. The NP represents the mass of $CaCO_3$ that would have the same ability to neutralize acid as 1000 tons of the material (N.T. 73-4).

53. The PA represents the amount of $CaCO_3$ that would be required to neutralize any acid discharge 1000 tons of the material might be expected to produce (N.T. 72-4).

54. For each stratum, Kenealy computed the PA from the measured amount of pyritic sulfur in the material (N.T. 75-6).

55. Some of the strata studied by Kenealy contained considerable quantities of non-pyritic sulfur, e.g. organic sulfur (App. Ex. 9, Table I).

56. Kenealy testified "it had been demonstrated" that the only important potential source of AMD in a material is pyritic sulfur (N.T. 71, 76-7, 283).

57. Once the NP and PA have been determined for a stratum, then, according to Kenealy, the ABA is accomplished via direct comparison of the two quantities. If the NP is less than the PA, the stratum is expected to have the potential for producing AMD and may be termed "acid"; conversely, if the NP exceeds the PA, any acid discharge produced in the stratum is expected to be neutralized by the very material in that stratum, implying the stratum should not be expected to produce AMD and may be termed "alkaline" (N.T. 75, 78-80; App. Ex. 1, Table I).

58. For any stratum, a leachate test is a laboratory measurement of the ionic concentrations, pH, alkalinity and acidity attained by water leaching through the material composing the stratum (N.T. 657-9; App. Ex. 9, 14).

59. The purpose of a leachate test is to gain some idea of how a stratum actually would leach under field conditions (N.T. 72).

60. Steele has no faith in the results of leachate tests performed by the ASTM "water shake" method Kenealy used (N.T. 71-2, 657).

61. With increasing depth in Test Hole OA-1 there were 10 distinct sandstone zones, followed by a layer of shale lying directly above the coal layer. Kenealy's leachate tests on these strata yielded only one sandstone stratum (labeled zone 2 in Kenealy's report) wherein the acidity exceeded the alkalinity (App. Ex. 9, Table I and Fig. 4).

62. Kenealy's ABA for the strata in OA-1 yielded only two sandstone strata, namely zones 2 and 6, wherein the PA exceeded the NP, by amounts 0.10 and 0.04 respectively (App. Ex. 9, Table I and Fig. 4).

63. Kenealy's ABA for the strata in OA-1 indicated that zone 11, the shale layer just above the coal seam, had a PA of 20.8 and an NP of 1.35, yielding a net PA of 19.55; the leachate test found a net acidity of 4 for this stratum (App. Ex. 9, Table I).

64. Kenealy regards a PA of 20 as "relatively low" (N.T. 80-81).

65. The net PA from Kenealy's ABA for zone 6 of OA-1 was only 0.04, and was merely 0.1 for zone 2 (App. Ex. 9, Table I).

66. Kenealy computed the effective NP and PA for OA-1 by summing the previously obtained NP's and PA's for the various strata above the coal layer, weighted by the stratum thickness (App. Ex. 9, Table III).

67. Kenealy computed the effective acidity and alkalinity for OA-1 by summing the previously obtained leachate test acidities and alkalinities for the various strata above the coal layer, weighted by the stratum thickness (App. Ex. 9, Table III).

68. Kenealy's ABA computation for OA-1 yielded a total weighted NP that exceeded the total weighted PA by a factor of 2.12 (App. Ex. 9, Table III).

69. The leachate test computation for OA-1 yielded a total weighted alkalinity that exceeded the total weighted acidity by a factor of 3.96 (App. Ex. 9, Table III).

70. The ABA and leachate test computations led Kenealy to conclude that there is no significant potential for AMD production at the Munkacy portion of the site (N.T. 78).

71. DER's expert Roger Hornberger believes that NP's as low as "5 or 10 or 20 or even 30" are too low to be relied on for the purpose of offsetting acidity (N.T. 1072).

72. For the OA-1 strata Kenealy studied, the maximum NP was 2.97 (App. Ex. 9, Table I).

73. Therefore, Hornberger does not believe the NP's measured by Kenealy in the OA-1 strata can be relied on to neutralize potential AMD, even though Kenealy's computation suggests there is more than enough NP to neutralize the existing PA (N.T. 994, 1000-1002, 1009, 1057, 1118).

74. Hornberger declared that the ASTM leachate test used by Kenealy is "of little use in predicting AMD or in overburden analysis work" (N.T. 1074).

75. Steele believes any NP or PA value must be greater than 5 to be reliable for predicting actual acid formation or neutralization under field conditions (N.T. 416, 685).

76. Steele was not present when Test Hole OA-1 was drilled (N.T. 620-1).

77. Steele had no personal knowledge of the amount of water that was encountered in the holes drilled on the Munkacy portion (N.T. 620).

78. Steele never returned to those drill holes to see if they had water in them (N.T. 621).

79. Magnum's permit application states there is a fluctuating perched water table on the Munkacy portion (N.T. 623; App. Ex. 18, paragraph 8.3).

80. Steele admitted that the discharges LN-1 and LN-2 indicate the existence of a perched water table at Munkacy (N.T. 622).

81. DER's witness Nancy Pointon testified that ground water often is observed to infiltrate drill holes that seem dry when drilled (N.T. 880, 947-9).

82. Ms. Pointon's testimony concerning water infiltration into drill holes was not rebutted.

83. Kenealy believes that the observed AMD in the LN-1 and LN-2 discharges must have resulted from "something unique" in the abandoned B&D mine, e.g., from the disposal of "foreign" (from some other mine) tipple refuse within the B&D mine (N.T. 101-2).

84. The only direct testimony that foreign tipple refuse might have been deposited in the B&D mine was given by Magnum's witness James L. Strange.

85. Mr. Strange said he had observed disposals of waste materials into the B&D pit on a number of occasions during 1968-70 when he was a part-time employee at the B&D mine (N.T. 113-116).

86. Mr. Strange admitted, however, that he did not know what material was being deposited into the B&D pit, and that this material very well could have been B&D's own refuse, i.e., need not have been "foreign" refuse (N.T. 132-3).

87. DER required Magnum to submit an overburden analysis as part of its application (N.T. 906).

88. An undated letter by Anthony Ercole, Director DER's Bureau of Surface Mine Reclamation, lists three overburden analysis techniques which, at the time the letter was written, were acceptable to DER (App. Ex. 19).

89. Two of the three overburden analysis techniques regarded as acceptable by DER at the time Ercole's letter was written were: (1) The NP and PA ABA method used by Kenealy, and (2) The ASTM water shake leachate test method, also used by Kenealy (App. Ex. 19).

90. Steele did not perform his own overburden analyses of any core samples from holes drilled on the Munkacy portion.

91. Steele took water samples at a number of locations where he believed the MK seam previously had been mined (N.T. 462-6).

92. These sample points were designated by Steele as S-1 and S-2, and MU-1 through MU-7 (N.T. 464, 473-6).

93. The locations of S-1, S-2, and MU-1 through MU-7 have been reasonably accurately indicated on App. Ex. 10-3 (N.T. 797).

94. App. Ex. 10-3 is drawn to a scale of 2000 feet to the inch (App. Ex. 10-3).

95. The Munkacy and Effinger portions of the site are respectively the northern and southern red-circled areas labeled "Lucas Coal Co." on App. Ex. 10-3 (DER Ex. 1; App. Ex. 10-3).

96. Of Steele's sample points, the closest to the Munkacy portion is S-2, whose distance from the center of the Munkacy portion is about 5,000 feet (App. Ex. 10-3).

97. Of Steele's sample points, the closest to the Effinger portion appears to be MU-6, which is about 7,000 feet from the center of the Effinger portion (App. Ex. 10-3).

98. Steele's sample point MU-5 is over three miles from either the Munkacy or Effinger portions (App. Ex. 10-3).

99. Steele testified that stratographic variations significant enough to affect an overburden analysis can occur in a distance of a few hundred feet (N.T. 458-9).

100. DER Ex. 1 is drawn to a scale of 400 feet to the inch (DER Ex. 1).

101. Sample points LN-1 and LN-2 are at most 2000 feet from the center of the Munkacy portion (DER Ex. 1).

102. Steele testified that none of the water samples he collected had the characteristics of AMD (N.T. 471-2, 480-2).

103. Steele, therefore, drew much the same conclusion as Kenealy (Finding of Fact 83), namely that the AMD observed in discharges LN-1 and LN-2 must have been caused by the disposal of coal refuse material in the pit of the former B&D mine (N.T. 483-4).

104. Pointon testified that she had sampled the water at essentially the same point as MU-1, and that the sample indicated AMD (N.T. 869-72).

105. According to Steele, his sample S-1 was stagnant water lying on unreclaimed spoil; S-2 was taken in a stream; MU-1 was collected at a seep below a toe of spoil; MU-2 was "water in an old strip cut"; MU-3 was impounded water; MU-4 was collected from the headwaters of a stream; MU-5 was collected from impounded water; and MU-6 and MU-7 were obtained from "old strip cuts" (N.T. 465, 471-6; App. Ex. 14, pp. 8, 10 and 12).

106. Most of Steele's water samples cannot be expected to represent the water quality in discharges emanating from groundwater that has filtered through surface mining spoil (N.T. 876-7).

107. Evidence presented by Magnum to support its contention that Steele's samples were located at points where the MK seam previously had been mined was based on maps in DER's files that had been furnished to DER in connection with mining permit applications by would-be operators other than Magnum (N.T. 324-338).

108. Some of the evidence originally presented by Magnum to support its contention that Steele's water samples were located at points where the MK seam previously had been mined was erroneous, i.e., did not really pertain to mining of the MK seam (N.T. 535-557, 740-42).

109. Eventually Magnum's witness Kenneth Bobak presented a map (App. Ex. 10-3) from which the errors referred to in Finding of Fact 108 purportedly had been eliminated (N.T. 790-91).

110. The parties agreed that Ex. 10-3 "is an accurate copy of maps that have been supplied to The Department by mine drainage permit applicants showing the outlines of proposed mine drainage permits, or requested mine drainage permits," for which DER "did in fact issue mine drainage permits," and on which the applicant proposed to mine the MK seam and (in some cases) other seams as well (N.T. 791-3).

111. There was no direct evidence that mining of the MK seam actually had occurred on the stippled areas shown in Exhibit 10-3 (N.T. 791-2).

112. Neither Magnum nor DER presented any quantitative evidence regarding the adequacy of 20 tons/acre of lime for removing the threat of AMD from either the Munkacy or the Effinger portions of the proposed mining site (N.T. 487-9, 624-628, 716-720, 1115-1117).

113. The AMD discharges LN-1, LN-2 and LN-A are at least 4500 feet from the center of the Effinger portion of the site (DER Ex. 1).

114. Pointon testified that DER had taken no water samples from the Effinger site because--since there had been no previous mining at or abutting Effinger (Finding of Fact 11)--water samples from the Effinger portion would not represent the expected AMD potential of Effinger (N.T. 914, 955-6).

115. DER did not claim that the discharges LN-1, LN-2 and LN-A were located close enough to the Effinger portion to be considered representative of the AMD potential of the Effinger portion.

116. Of the fourteen zones above the coal layer at Test Hole OA-2 (recall Finding of Fact 48), eleven were sandstone and three were shale (App. Ex. 9, Table II).

117. In the ABA performed by Kenealy on Test Hole OA-2, four of the sandstone layers manifested a PA greater than the NP (App. Ex. 9, Table II).

118. These excesses (of the PA over the NP) were: 0.03 (zone 1), 0.18 (zones 2 and 3) and 6.12 (zone 12) (App. Ex. 9, Table II).

119. Kenealy's leachate tests found alkalinities exceeding acidities for all but two of the above-named eleven sandstone layers, namely zones 1 and 12 (App. Ex. 9, Table II).

120. The net acidities of OA-2 zones 1 and 12 in Kenealy's leachate tests were 1 and 4 respectively (App. Ex. 9, Table II).

121. Two of the three shale layers above the coal layer in OA-2, namely layers 13 and 14, had an NA exceeding the PA, by amounts of 18.64 and 8.04 respectively (App. Ex. 9, Table II).

122. In Kenealy's leachate tests for OA-2, shale layers 13 and 14 had net alkalinities equal to 21 and 18 respectively (App. Ex. 9, Table II).

123. In OA-2, shale layer 11 had a PA exceeding the NA by 14.9; the leachate test for this layer gave a net acidity of 6 (App. Ex. 9, Table II).

124. Using the weighting by layer thickness described in Findings of Fact 66 and 67, Kenealy computed the effective NP and PA for Test Hole OA-2, as well as the effective acidity and alkalinity (App. Ex. 9, Table III).

125. For OA-2, the ABA computation yielded a total weighted NP that exceeded the total weighted PA by a factor of 2.36; using the leachate test results, the total weighted alkalinity exceeded the total weighted acidity by a factor of 3.94 (App. Ex. 9, Table III).

126. Kenealy's computations led him to conclude that there is no significant potential for AMD production at the Effinger portion of the site (N.T. 83-84).

127. Kenealy concluded that, if anything, the Effinger portion of the site had more neutralizing potential, i.e., had less likelihood of producing AMD than the Munkacy portion (N.T. 83-84).

128. For the sandstone layer in OA-2, the maximum NP was 4.38 (App. Ex. 9, Table II).

129. This 4.38 NP value was attained for zone 12 (App. Ex. 9, Table II).

130. All sandstone layers in OA-2 other than zone 12 had NP's of at most 2.25 (App. Ex. 9, Table II).

131. The two shale zones 13 and 14 had NP's of 23.3 and 10.6 respectively (App. Ex. 9, Table II).

132. Steele did not testify concerning the Effinger portion that his review of the Kenealy report indicated that water draining through the Effinger portion after Magnum's proposed mining would be acidic.

133. Rather, Steele testified that his own overburden analyses for the Effinger portion indicated that it would not produce AMD (N.T. 439-442).

134. This conclusion of Steele's was based on his own overburden analyses of the core samples taken from Test Holes OB-1 and OC-1 and not in any significant respect on Kenealy's overburden analysis for the Effinger portion (N.T. 439-442, 701).

135. Steele used Test Holes OB-1 and OC-1 because he believes Kenealy's Test Hole OA-2 is not representative of the lithology on the Effinger portion, i.e., might produce somewhat different geochemistry than OA-2 (N.T. 362-3, 451-2, 578).

136. Test Hole OB-1 was drilled about 250 feet south of OA-2; OC-1 was drilled about 800 feet north of OA-2 (N. T. 455; DER Ex. 1)

137. At OB-1, Steele delineated nine sandstone zones, lying above seven shale zones (zones 10 through 16) extending down to the coal layer (App. Ex. 14, p. 65).

138. AT OC-1, Steele delineated nine sandstone zones lying above ten shale zones (zones 10 through 19) extending down to the coal layer (App. Ex. 14. p. 69).

139. Steele computed the PA of each zone from the total sulfur content, not merely the pyritic sulfur (N.T. 442).

140. Except for using the total sulfur instead of the pyritic sulfur, as Kenealy had done, Steele's ABA for each zone was accomplished in much the same manner as Kenealy's.

141. For the sandstone zones in OB-1, the NP's obtained by Steele were no larger than 2.17 and the maximum PA was 2.19; the maximum NP and PA for the sandstone zones in OC-1 were 3.03 and 1.25 respectively (App. Ex. 14, pp. 62 and 67).

142. The shale zones 10 through 16 in OB-1 had larger NP's than the sandstone zones in OB-1, the maximum NP was 25.96, for zone 11 (App. Ex. 14, p. 62).

143. Three of the shale zones in OB-1 had a PA that exceeded the NA; in particular the NP's for zones 12, 13 and 14 were 2.92, 2.29 and 16.78, whereas the corresponding PA's were 86.25, 8.44 and 24.69 (App. Ex. 14, p. 62).

144. The shale zones 10 through 19 in OC-1 also had larger NP's than the sandstone zones in that Test Hole; the maximum NP was 36.57 (zone 16) and four other shale zones (13, 15, 18 and 19) had NP's exceeding 30 (App. Ex. 14, p. 67).

145. Two of the shale zones in OC-1 had a PA that exceeded the NP; in particular the NP's for zones 10 and 11 were 12.21 and 20.84 respectively, whereas the PA for each of those zones was 35.63 (App. Ex. 14, p. 67).

146. Like Kenealy, Steele performed what might be termed an overall ABA for each of his Test Holes by computing weighted sums of his previously obtained NP's and PA's for the various strata (N.T. 414-16, 422-23, 772-3; App. Ex. 14, pp. 66 and 70).

147. Actually, Steele used three different summation procedures, in order to assure that his conclusion that there was adequate neutralization potential at each of OB-1 and OC-1 was not a result of a particular summation procedure (N.T. 372-3).

148. Like Kenealy, Steele used the zone thickness to weight each of his summation procedures for the NP and PA values in each zone (N.T. 414-15; App. Ex. 14, p. 60).

149. Steele's first summation procedure was just like Kenealy's, namely Steele simply summed the weighted NP's and weighted PA's, and compared

those sums; by this summation procedure, the total weighted NP exceeded the total weighted PA by factors of 1.19 and 2.87 for OB-1 and OC-1, respectively (App. Ex. 14, pp. 66 and 70).

150. Steele's second summation procedure was similar, except that all NP's and PA's less than 5 were set equal to zero; by this summation procedure, the total weighted NP exceeded the total weighted PA by factors of 1.22 and 3.61 for OB-1 and OC-1, respectively (App. Ex. 14, pp. 66 and 70).

151. Steele's third summation procedure employed the net NP's and net PA's, weighted by the zone thicknesses; in other words, Steele summed the weighted net PA's for those zones whose PA exceeded the NP and compared that sum with the sum of the weighted NA's for those zones whose NP exceeded the PA (App. Ex. 14, p. 60).

152. Using Steele's third summation procedure, the total weighted net NP exceeded the total weighted net PA by factors of 1.3 and 14.2 for OB-1 and OC-1, respectively (App. Ex. 14, pp. 66 and 70).

153. NP's and PA's less than 5 were omitted in Steele's second summation procedure because Steele does not believe values less than 5 have any significance (N.T. 415-16).

154. Actually, both the NP's and PA's for each of the sandstone zones in OB-1 and OC-1 were so small that Steele wholly ignored the sandstone contributions to each of his three summation procedures; according to Steele, the sandstone zones were "inert" (N.T. 414; App. Ex. 14, p. 66).

155. The Sturey leachate tests employed by Steele yielded much the same parameters as Kenealy's ASTM leachate tests, but the Sturey tests yielded those parameters as a function of time, over an extended period (typically about six weeks in the tests Steele conducted) after leaching had begun (N.T. 423-434; App. Ex. 14, pp. 74-94).

156. Steele performed Sturey leachate tests on selected shale zones in OB-1 and OC-1, as well as on composite samples which were intended to represent the entire overburdens at OB-1 and OC-1 (N.T. 423-437; App. Ex. 14, pp. 72-91; App. Ex. 20).

157. Steele felt that the Sturey leachate tests for OC-1 were not quite as confirmatory of his ABA as were the Sturey leachate tests for OB-1 (N.T. 433).

158. Steele's conclusion that the Effinger portion would not produce AMD rested primarily on the results (Findings of Fact 149-154) of his summation procedures; according to Steele, the Sturey leachate tests merely provided confirmation that his ABA summation procedures were reliable (N.T. 425-433, 661-2).

159. Steele could not cite any reports presenting empirical evidence that the Sturey leachate tests accurately predict post mining water quality (N.T. 660).

160. DER's Roger Hornberger also testified that he knew of "no field evidence whatsoever" as to how well the Sturey leachate test results compare with field results (N.T. 1076).

161. One of DER's major objections to both Steele's and Kenealy's overburden analyses was the fact that there was no evidence of successful "fizz" tests for any of the strata Kenealy and Steele had examined in their Test Holes OA-1, OA-2, OB-1 and OC-1.

162. A fizz test of a rock sample is performed by applying hydrochloric acid at some predetermined concentration to the sample and then recording the intensity of "fizzing", i.e. of escaping gas effervescence, induced by the acid (N.T. 248-249, 995-7).

163. Fizz tests were performed on the material in each of the zones delineated by Steele in his Test Holes OB-1 and OC-1 (App. Ex. 14, pp. 62 and 67).

164. Each zone in OB-1 and OC-1 manifested no fizzing (App. Ex. 14, pp. 62 and 67).

165. Pointon opined that a positive fizz test is one of the most reliable indicators of alkalinity (N.T. 966).

166. Hornberger testified that the fizz rating is an important indicator of potential alkalinity and is required to properly interpret the measured NP (N.T. 995-1000).

167. Hornberger believes that in the absence of fizzing an NP less than 100 ordinarily is not a reliable indicator of potential alkalinity (N.T. 994, 1069-70, 1089).

168. Especially in view of the absence of fizzing, Hornberger does not believe any of the NP's measured in OB-1 and OC-1 are large enough to be reliable indicators of acid neutralization potential (N.T. 1008, 1070).

169. Since Hornberger doesn't believe any of the strata in OB-1 and OC-1 have large enough NP's to be reliable indicators of significant acid neutralization potential, he places no credence in Steele's summation procedures using those NP's (N.T. 1019, 1068-9).

170. On occasion, Hornberger has been willing to regard strata whose NP's were less than 100, but which fizzed strongly, as having significant neutralization potential (N.T. 1089).

171. Hornberger believes that weighting the strata by their thicknesses is incorrect; instead the strata should be weighted by their total volumes or by their total masses (N.T. 1062-66).

172. Both Steele and Hornberger were believable and forthright witnesses.

173. Hornberger has an M.S. degree in geology from Penn State University (N.T. 973).

174. Steele does not have an advanced degree, but has taken some postgraduate courses in subjects relevant to overburden analysis, e.g., a Penn State University course in advanced ground water geochemistry (N.T. 358; App. Ex. 3).

175. Hornberger has been involved in a research project that resulted in a report titled, "Delineation of Acid Mine Drainage Potential of Coal Bearing Strata of the Pottsville and Allegheny Groups in Western Pennsylvania."

176. Steele has had no formal research experience (App. Ex. 3).

177. Steele has not published the results of any research closely relevant to overburden analysis, although he has published a report for DER titled, "Erosion and Sedimentation Control Manual for Surface Mines." (App. Ex. 3).

178. Hornberger has taught short courses on overburden analysis at Penn State University (N.T. 977).

179. Hornberger is the principal author of DER's manual on the interpretation of overburden analyses (N.T. 978).

180. Steele has no credentials comparable to Hornberger's.

DISCUSSION

I. Introduction. Magnum's Burden

Our adjudication of this matter is to determine whether the denial of Magnum's permit application was an abuse of DER's discretion or an arbitrary

exercise of its duties or functions. Warren Sand and Gravel v. DER, 20 Pa.Cmwlth. 186, 341 A.2d 556 (1975); Ohio Farmers Insurance Co. v. DER, 1981 EHB 384, aff'd 73 Pa. Cmwlth. 18, 457 A.2d 1004 (1983); Big "B" Mining Company v. DER, 1987 EHB 815. In the context of the present appeal an arbitrary exercise by DER of its duties or functions would be an abuse of its discretion as well, so that--following well-established Board precedent--we may and will use the phrase "abuse of discretion" to denote our complete scope of review. Commonwealth of Pa. Game Commission v. DER, 1985 EHB 1 at 8; Old Home Manor v. DER, 1986 EHB 1248 at 1280; Big "B", supra. The burden of showing that the denial was an abuse of discretion falls on Magnum. 25 Pa.Code §21.101(c)(1).

The Board has ruled previously that although Magnum may employ lawful defenses such as estoppel and waiver in its attempt to sustain its burden of proof, these defenses cannot relieve Magnum of its obligation not to pollute the waters of the Commonwealth by its mining activities. Magnum Minerals v. DER, 1983 EHB 589. Originally, Magnum raised an estoppel defense to DER's claim that the permit denial was justified because Magnum had not complied with all applicable regulations (see Magnum Minerals v. DER, 1983 EHB 522, which was explained and partially vacated at 1983 EHB 589). But Magnum's post-hearing brief ("brief") has not renewed this particular estoppel claim, which we therefore rule has been waived.[2] Equipment Finance, Inc. v. Toth, 476 A. 2d 1366, 328 Pa. Super 255 (1984); Robert Kwalwasser v. DER, 1986 EHB 24 at 39; Dale R. Mackey and Grace Mackey v. DER, EHB Docket No. 86-078-G (Adjudication, March 10, 1988). Indeed, both parties now agree that this appeal turns on whether or not Magnum has complied with 25 Pa.Code §86.37, which reads:

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[2] A different estoppel claim, raised by Magnum during the hearings and in its brief, is discussed infra.

§86.37. Criteria for permit approval or denial.

(a) No permit or revised permit application shall be approved, unless the application affirmatively demonstrates and the Department finds, in writing, on the basis of the information set forth in the application or from information otherwise available, which is documented in the approval, and made available to the applicant, that all of the following exist:

* * * * *

(3) The applicant has demonstrated that there is no presumptive evidence of potential pollution to the waters of the Commonwealth.

Despite the Hearing Examiner's request (N.T. 1148, 1152), Magnum has not proffered a suggested interpretation of the phrase "no presumptive evidence of potential pollution to the waters of the Commonwealth." On the other hand, DER suggests that, as it stated in its denial letter (App. Ex. 5), the phrase means that the applicant must demonstrate that pollution of the surface and groundwater from its mining activities will not occur. The interpretation advanced by DER, in essence, is the standard set forth by the Commonwealth Court in Harman Coal Co. v. Com., Dept. of Envir. Resources, 34 Pa.Cmwlth. 610, 384 A.2d 289 (1978) and we find no reason to alter that standard. Combining it with Magnum's obligation to convince us by a preponderance of the evidence that DER's denial of Magnum's permit application was an abuse of discretion, we hold that Magnum's burden with respect to 25 Pa.Code §86.37(a)(3) is to convince us that the evidence in support of its assertion that pollution will not occur from its mining activities outweighs the evidence that pollution will occur.

Magnum's burden having been specified, we turn to the record in this matter. Although this appeal involves a single permit application, we find

the evidence for and against DER's decision to deny the permit is sufficiently different for the two separate portions of the site that it is simpler to consider each portion separately.

II. The Munkacy Portion

The original permit application was accompanied by a map, introduced into evidence as DER Ex. 1 (N.T. 177), locating numerous possible water quality monitoring points in the vicinity of the site. Water samples from many of these monitoring points actually were sampled by Magnum, and the resultant analyses of these samples were reported in the original permit application (App. Ex. 4). Of these analyses, monitoring points LN-1 and LN-2 caused DER particular concern. These water samples showed all the characteristic signs of AMD, including very low pH's, acidity greatly in excess of alkalinity and high sulfate concentrations.

LN-1 and LN-2 are located at discharges from the cropline of the same MK coal seam Magnum proposes to mine. Moreover, these discharges are located immediately to the north of the Munkacy portion, near the toe of the spoil from an abandoned B&D surface mine that abuts the northern boundary of the Munkacy portion and that also had mined the MK seam. The water analysis of a third sampling point, LN-3, located in a stream that receives the LN-1 and LN-2 discharges, also manifested AMD. None of the many other water analyses from monitoring points in the vicinity of the Munkacy portion that were reported in the original permit application (App. Ex. 4) showed the signs of AMD. On the other hand, except for LN-1 and LN-2 (and LN-3 which receives the waters from LN-1 and LN-2), none of the water samples from points in the vicinity of the Munkacy portion that were analysed and reported in the original permit application represented discharges from previous surface mining of the MK seam.

DER's original denial of the permit application was based primarily on DER's inferences from the existence of the AMD discharges LN-1 and LN-2. As DER's hydrogeologist Nancy Pointon, who had reviewed the original permit application and had participated in the decision to deny it, (N.T. 860-1) explained (N.T. 868-9):

> Q) Now, in your opinion, are the analyses of the discharges from points LN-1 and LN-2 indicative of potential drainage characteristics which may be produced by Magnum's proposed operation?
>
> A) Yes.
>
> Q) Can you explain why you have that opinion?
>
> A) These discharges are groundwater discharge points, which are emanating from a mine, an old surface mine that was on the Middle Kittanning coal seam, which is the same coal seam that's being proposed. It's directly adjacent to the site that is being proposed. The proposed site and the existing site are both in generally the same topographic area, and they would appear to have the same stratigraphy.

No new observations of LN-1 and LN-2 were reported in the amended permit application, so that Pointon's testimony was as pertinent to DER's denial of the amended permit application as to the denial of the original application; indeed, Pointon's testimony did not distinguish between the original and the amended application. Moreover, analyses obtained in November, 1985 of LN-1, LN-2 and a third spring, LN-A, in the vicinity of LN-1 and LN-2, continued to indicate AMD from the toe of spoil area adjoining the Munkacy portion where the MK seam had been mined by B&D.

Insofar as the Munkacy site is concerned, therefore, if the evidence summarized in the preceding two paragraphs were the complete record,

adjudication of this appeal would be simple. On the sole facts just summarized, Magnum unquestionably has not met its burden, under §86.37(a)(3), of showing that groundwater pollution would not occur from its proposed mining. When AMD discharges are observed from spoil associated with the same MK seam Magnum proposes to mine, in a location very close to Magnum's proposed mining site, it normally is a reasonable conclusion that groundwater pollution will result from Magnum's proposed mining.

A. The Kenealy Overburden Analysis

However, we must also consider the overburden analysis of the strata on the site. Magnum's expert Kenealy performed such an analysis; according to Kenealy, this analysis showed that mining the MK seam in the Munkacy portion could not possibly produce AMD. Kenealy concluded, therefore, that the observed AMD in the LN-1 and LN-2 discharges must have resulted from "something unique" in the abandoned B&D mine, e.g., from the disposal of "foreign" (from some other mine) tipple refuse within the B&D strip mining site. In other words, Kenealy believes, and Magnum contends that despite the observed LN-1 and LN-2 AMD discharges, his overburden analysis has demonstrated that AMD and other pollution of the groundwater would not result from Magnum's proposed mining on the Munkacy portion.

To evaluate this contention, we cannot avoid a rather detailed examination of Kenealy's overburden analysis. This analysis involved two distinct procedures: an ABA analysis and leachate tests (Finding of Fact 13). ABA involves chemical analysis of the strata found in the drill holes. For each stratum studied, this chemical analysis yields two numbers: the neutralization potential ("NP") and the potential acidity ("PA"), each of which is expressed in equivalent tons of calcium carbonate ($CaCO_3$) per 1000 tons of the material tested. The NP represents the mass of $CaCO_3$ that would

have the same ability to neutralize acid as 1000 tons of the material. The PA purportedly represents the amount of $CaCO_3$ that would be required to neutralize the AMD 1000 tons of the material might be expected to produce; for each stratum, Kenealy computed the PA from the measured amount of pyritic sulfur in the material, on the theory that pyritic sulfur is the only important potential source of AMD in the strata found on the site. According to Kenealy, once the NP and PA have been determined for a stratum, the ABA is accomplished via a direct comparison of the two quantities. If the NP is less than the PA, the stratum is expected to have the potential for producing AMD; conversely, if the NP exceeds the PA, any AMD produced in the stratum is expected to be neutralized by the very material in that stratum, implying the stratum should not be expected to produce AMD.

For any stratum, a leachate test is a laboratory measurement of the ionic concentrations, pH, alkalinity and acidity attained by water leaching through (i.e., brought in contact with) the material composing the stratum. Theoretically, the ionic concentrations, pH, alkalinity and acidity values thus measured in the laboratory yield the corresponding values for water leaching through the stratum under actual field conditions. Kenealy performed leachate tests on the strata in Test Hole OA-1 using the so-called ASTM water shake method. These leachate tests on these OA-1 strata yielded alkalinities exceeding acidities for all but one of the sandstone strata found in OA-1, namely the stratum labeled as zone 2 in Kenealy's report. Kenealy's ABA for these same sandstone strata found that the NP exceeded the PA for all zones except zones 2 and 6. Zone 6 was very weakly acidic, however, in that the PA exceeded the NP by only 0.04; even zone 2 had a net PA of only 0.10. Kenealy regarded a net PA of 20 as already "relatively low" (Finding of Fact 64). On the other hand, Kenealy's ABA for the sole shale zone, namely zone

11, yielded a net PA of 19.55; but the leachate test for this zone yielded a considerably lower net acidity, namely 4.

On the basis of comparisons of the sort just described between the ABA and leachate test results, Kenealy concluded that his ABA and leachate test results reasonably confirmed each other, and that either set of results could be used to predict whether AMD would be produced by Magnum's proposed mining on the Munkacy site. To make such a prediction, it obviously was necessary to compute some appropriately weighted sum of the ABA and/or leachate test results for the various strata, so as to determine the effective NP or PA (ABA) and/or the effective acidity or alkalinity (leachate test) of the entire overburden. Kenealy performed this calculation, weighting the NP or PA of each layer above the coal layer by the layer thickness. Using his ABA results, the calculation indicated that the total weighted NP exceeded the total weighted PA by a factor of 2.12. Using his leachate test results, the total weighted alkalinity exceeded the total weighted acidity by a factor of 3.96. Kenealy, therefore, concluded that there is no significant potential for AMD production at the Munkacy portion of the site.

DER has strongly challenged Kenealy's reasoning on numerous grounds. DER's expert Roger Hornberger testified that "NP's of 5 or 10 or 20 or even 30" are too low to be relied on for the purpose of offsetting acidity. For the OA-1 strata Kenealy studied, the maximum NP was 2.97. Hornberger, therefore, felt that Kenealy's weighted ABA calculation was unreliable for the purpose of deciding whether the OA-1 strata had sufficient potential alkalinity to neutralize whatever PA was present. Hornberger also declared that the ASTM leachate test used by Kenealy is "of little use in predicting AMD or in overburden analysis work."

B. Steele's Testimony Concerning Munkacy

These DER criticisms of Kenealy's reasoning were supported by the testimony of Magnum's own expert witness Edward Steele. Steele agreed that measured NP's can be too low to be reliable for predicting actual acid neutralization under field conditions. According to Steele, NP's should be greater than 5 to be reliable; in other words, Steele does not agree with Hornberger that even NP's as large as 30 or more need not be reliable. However, because the maximum NP found by Kenealy for any OA-1 stratum was 2.97, this difference of opinion between Hornberger and Steele is inconsequential for Kenealy's OA-1 ABA; for OA-1, Steele's testimony implies his agreement with Hornberger's assertion that Kenealy's ABA could not be relied on.

Moreover, Steele also has no faith in the ASTM leachate test. In fact, Steele testified that his review of the evidence, including the OA-1 overburden analysis in the Kenealy report, suggests that water draining through the Munkacy portion after Magnum's proposed mining activities would have a pH between 5.5 and 6.0, i.e., would be moderately acidic. Steele granted, therefore, that the Munkacy portion does have the potential to produce moderately acidic AMD.

In view of this concession by Steele, we need not take seriously Kenealy's conclusion that the observed AMD in the LN-1 and LN-2 discharges must have resulted from "something unique" in the abandoned B&D mine, e.g., from the disposal of "foreign" tipple refuse within the B&D mine. Since Steele himself was not convinced that Kenealy's ABA had shown that the Munkacy portion would not produce AMD, Kenealy's conclusion cannot be said to follow from his ABA. Nevertheless, despite this concession, Steele agreed with Kenealy that the observed AMD in the LN-1 and LN-2 discharges could not have

been caused by normal mining of the MK seam and, therefore, must have been caused by "foreign" tipple refuse within the B&D mine. Steele arrived at this conclusion on the basis of water samples he had taken at a number of locations where he believed the MK seam previously had been mined.

These sample points of Steele's are located quite far from the Munkacy portion, however, compared to the distances from Munkacy of the discharges LN-1 and LN-2 (Findings of Fact 96, 98, and 101). Moreover, most of the water samples on which Steele's conclusion relied were taken from waters (e.g., impoundments or actual streams) that could not be expected to represent the water quality in discharges emanating from groundwater that has filtered through surface mining spoils. Furthermore, Magnum's evidence for its contention that Steele's sample points were located where the MK seam previously had been mined was indirect, based solely on maps furnished in applications by other operators mining permits (Findings of Fact 107 and 110), with no evidence confirming that mining of the MK seam actually had taken place where Steele had taken his samples.

Steele's opinion that the AMD in LN-1 and LN-2 was caused by foreign tipple refuse in the B&D pit is made very dubious by the large distances of Steele's sample points from the Munkacy portion and the fact that most of his samples did not represent groundwater that had filtered through mining spoil. Steele himself testified that stratographic variations significant enough to affect an overburden analysis can occur in a distance of a few hundred feet (Finding of Fact 99); given this testimony, we do not see how Steele could conclude that his water samples, taken a mile or more from Munkacy, would predict the AMD potential of the Munkacy portion, even if all those samples had represented groundwater filtering through mining spoil.

In short, whether examined from the standpoint of Kenealy's or Steele's logic, the inference that the AMD in the LN-1 and LN-2 discharges was caused by foreign tipple refuse was not sound. The only direct testimony that B&D might have been depositing such refuse was given by Magnum's Mr. Strange (Finding of Fact 84) who admitted, however, that he really did not know what materials B&D was depositing into the pit amd that the deposits very well could have come from B&D's own mine (Finding of Fact 86). We reject the foreign tipple refuse suggestion as being little more than pure speculation.

Nevertheless, we still have not fully dealt with Steele's testimony about the Munkacy portion because Steele offered an independent theory for believing that the Munkacy portion of the site would not produce AMD. According to Steele, Magnum's mining of the Munkacy portion would not produce AMD, in any event, because there will be no groundwater discharges of any kind from the Munkacy portion. This opinion of Steele's rested on his belief (from his personal observations of the Munkacy portion and from the drill hole data provided to him) that groundwater had not been encountered in the drill holes; this belief of Steele's was bolstered by Steele's readings in the scientific literature, which, according to Steele, indicated that the strata on the Munkacy portion are very resistant to water infiltration.

On the other hand, Steele admitted that he had no personal knowledge of the amount of water in the Munkacy portion drill holes, that he was relying solely on the drill hole data that had been reported to him, and that he never had returned to the Munkacy portion to see if there was water in those drill holes. Steele also agreed that the permit application states there is a perched water table at the Munkacy portion and that LN-1 and LN-2, which have persisted from at least March, 1981 to November, 1985 (Findings of Fact 31 and 22), confirm the existence of that perched water table. DER's witness Nancy

Pointon testified that groundwater often is observed to infiltrate into drill holes that seem dry when drilled, and this testimony was not rebutted.

As we see it, therefore, Steele's opinion that there would be no groundwater at the Munkacy portion to produce AMD also was little more than pure speculation, with essentially no underlying factual substantiation and with considerable reason to question the opinion. Thus, Magnum did not meet its burden of showing that AMD at Munkacy would not result from Magnum's mining.

C. Estoppel; Special Handling Plan

Before we can go on to conclude that for the Munkacy portion DER's denial of the permit was not an abuse of discretion, however, we must examine two additional arguments raised by Magnum. First, Magnum maintains that Kenealy performed his overburden analyses at DER's request and in accordance with methods suggested by DER. Therefore, Magnum argues, DER is "estopped" from questioning the validity of the overburden analyses. Magnum has made no showing of the elements of estoppel, however. There has been no showing that Magnum changed its position, to its detriment, after justifiably relying on DER. P.L.E. Estoppel, §§21-25; Ohio Farmers Insurance Co. v. DER, 1981 EHB 384 at 389, aff'd, 73 Pa.Cmwlth 18, 457 A.2d 1004 (1983). DER's letter (App. Ex. 19) describing overburden analysis techniques, on which Magnum apparently claims it relied, explicitly states (Ex. 19, p. 1):

> The Bureau of Surface Reclamation has not taken a position as to the technique(s) that will ultimately be acceptable or unacceptable, nor does it believe that the above-listed techniques are necessarily without problems.

On its p.2, Ex. 19 further states:

> The overburden analysis should not be considered as a guarantee for obtaining a mine drainage permit, nor is it the single dispositive factor

in the decision to issue or deny a mine drainage permit.

(emphasis in the original)

It is evident that DER had reserved the right to question the results of its listed nominally acceptable overburden techniques, and that no applicant for a mining permit had any reason to think an apparently favorable overburden analysis would guarantee granting of a permit. Thus, there was no showing of justified reliance, and Magnum's estoppel claim must be rejected.

We also have not yet dealt with Magnum's proposed "special handling plan" involving addition of agricultural lime to the potentially acid-forming layers in the overburden that are redeposited in the pit (Finding of Fact 18). Magnum seeks to convince the Board that this special handling will almost certainly completely neutralize any acid-forming potential at the site, so that there will be almost no possibility of AMD even if the Board believes that without special handling Magnum has not met its burden. Unfortunately for Magnum, it presented absolutely no evidence that could so convince the Board. While adding lime may help neutralize the potentially acid-forming layers in the overburden, there was nothing on the record to indicate that 20 tons/acre, the amount proposed by Magnum, would be sufficient; the necessary amount could be over 200 tons/acre, insofar as the record Magnum made is concerned. Certainly there was no estimate whatsoever of, e.g., how much the pH of discharges like LN-1 or LN-2 would have been increased if 20 tons/acre of lime had been included in the spoil from which LN-1 and LN-2 were emanating. In Magnum's brief, its sole arguments in support of the special handling plan literally were no more than the following excerpts from Steele's testimony, offered as part of Magnum's proposed Findings of Fact:

Alkaline Additive

Steele - I to not believe the addition of alkaline

material is necessary in the case of Sabin-Effinger (717).

- The addition of 20 tons/acre of alkaline material on Effinger-Sabin would give an additional source of alkalinity over what is already there (718).

It may be that Magnum's proposed special handling plan is not properly before us, because it was not part of the amended permit application filed in October, 1983 and never was formally denied by DER (Findings of Fact 16-19). During the hearing, however, DER's witnesses obviously were cognizant of the proposal, and made it quite clear that Magnum's proposed special handling had not shaken their belief that Magnum's mining of the Munkacy portion would produce AMD (Finding of Fact 19). Taking this testimony of DER's as the equivalent of DER's formal rejection of Magnum's proposed special handling, we hold that Magnum did not meet its burden of showing that the addition of 20 tons/acre of lime would be sufficient to prevent AMD discharges from the Munkacy portion. We already have ruled that if special handling is ignored, Magnum did not meet its burden. We hold that, insofar as the Munkacy portion is concerned, DER's refusal to grant Magnum its requested permit was not an abuse of discretion.

III. The Effinger Portion

There are no former mines on or abutting the Effinger portion of the site. Of Steele's water samples purporting to show that mining the MK seam would not produce AMD, the closest to the Effinger portion was about 7,000 feet from the Effinger center. Therefore, our previous discussion of the relevance of these water samples to the expected AMD potential of the Munkacy portion is at least equally pertinent to the relevance of these water samples to the expected AMD potential of the Effinger portion. We do not see how Steele could conclude that his water samples would predict the AMD potential

of the Effinger portion even if all those samples had represented groundwater filtering through mining spoil. DER itself did not claim that AMD discharges LN-1, LN-2 and LN-A, which are at least 4500 feet from the center of the Effinger portion, directly represented the kinds of discharges which might be expected from mining the MK seam on the Effinger portion.

A. Kenealy's Overburden Analysis for Test Hole OA-2

Consequently any decision about the AMD potential of the Effinger portion must rest solely on the overburden analyses performed. For the Effinger portion, Magnum offered overburden analyses by Steele as well as by Kenealy. We will first discuss the Kenealy overburden analysis, which was performed by Kenealy using the same procedure as has been described earlier, on the strata found in his Test Hole OA-2.

Fourteen of the zones delineated by Kenealy at OA-2 were above the coal layer; of these, eleven were sandstone and three were shale. In the ABA, four of these sandstone layers had a PA greater than the NP, by the amounts 0.03 (zone 1), 0.18 (zones 2 and 3) and 6.12 (zone 12). Kenealy's leachate tests found alkalinities exceeding acidities for all but two of the above-discussed eleven sandstone layers, namely zones 1 and 12, whose net acidities were 1 and 4, respectively. Two of the shale layers, namely layers 13 and 14, had an NP exceeding the PA by amounts of 18.64 and 8.04, respectively; these shale layers also had net alkalinities in the leachate tests, equal to 21 and 18, respectively. Shale layer 11 had a PA exceeding the NP by 41.9, however; correspondingly the leachate test showed this layer had a net acidity of 6.

Once again, apparently on the basis of comparisons of this sort, Kenealy concluded that his ABA and leachate tests for Test Hole OA-2

reasonably confirmed each other, and that either set of results could be used to predict whether Magnum's proposed mining would produce AMD. Employing weighting by layer thickness, Kenealy computed that the total weighted NP for Test Hole OA-2 exceeded the total weighted PA by a factor of 2.36. Using his leachate test results, the total weighted alkalinity exceeded the total weighted acidity by a factor of 3.94. Thus, Kenealy concluded that there is no significant potential for AMD production at the Effinger portion of the site. Indeed, Kenealy felt that, if anything, the Effinger portion had even less likelihood of producing AMD than the Munkacy portion, whose probability of producing AMD was already low according to Kenealy.

DER's objections to Kenealy's reasoning for the Munkacy portion apply equally well to his reasoning for the Effinger portion. For the sandstone layers in OA-2 the maximum NP was 4.38, but this maximum NP was attained in zone 12 which (as explained above) actually had a PA exceeding this NP by 6.12; all the other sandstone zones had NP's of at most 2.25. The two shale zones 13 and 14 wherein the NP exceeded the PA did have larger NP's than the sandstones, namely 23.3 and 10.6 respectively. It remains the case, however, that none of the OA-2 zones had NP's as high as 30, a value Hornberger felt still was too low to be relied on for the purpose of offsetting acidity; moreover, all zones other than the shale zones 13 and 14 even had NP's less than the value of 5 that Steele felt was required for reliability. Steele did not testify concerning the Effinger portion--as he did testify concerning the Munkacy portion--that his review of the Kenealy report indicated that water draining through the Effinger portion after Magnum's proposed mining would be acidic. Nevertheless, viewing Kenealy's overburden analyses for OA-2 in the

light of DER's and Steele's objections thereto, we cannot feel that this analysis of Kenealy's, standing alone, shows that AMD at Effinger would not result from Magnum's mining.

B. Steele's Overburden Analysis

Kenealy's overburden analysis for the Effinger portion did not stand alone; although Steele criticized Kenealy's overburden analysis, Steele, on the basis of his own overburden analysis for Effinger, supported Kenealy's conclusion that there is no significant potential for AMD production at the Effinger portion. Steele performed his overburden analysis for two newly drilled holes, Test Holes OB-1 and OC-1, on the Effinger portion because he believed Kenealy's Test Hole OA-2 was not representative of the lithology on the Effinger portion; OB-1 was drilled about 250 feet south of OA-2, and OC-1 was about 800 feet north of OA-2. At OB-1, Steele delineated nine sandstone zones, lying above seven shale zones (zones 10 through 16) extending down to the coal layer; at OC-1 there again were nine sandstone zones lying above the shale, but ten shale zones (zones 10 through 16) were delineated between the sandstone and the coal.

Steele computed the PA of each zone from the total sulfur content, not merely the pyritic sulfur (as Kenealy had done, Finding of Fact 54). Except for using the total sulfur, instead of the pyritic sulfur, Steele's determination of the NP and PA for each zone was accomplished in much the same manner as Kenealy's. Steele found that the NP's and PA's of all the sandstone zones in OB-1 and OC-1 were very small, certainly less than the value of 5 he believed was as small as could be considered reliable for predicting acid formation or neutralization under field conditions (Findings of Fact 75 and 141). Thus, he regarded the sandstone as essentially inert for the purpose of acid formation or neutralization; accordingly, the sandstone was ignored in

his computations (described below) of the effective acid producing potentials and neutralization potentials of the entire overburdens at OB-1 and OC-1.

The NP's and PA's of several of the shale zones at OB-1 and OC-1 were considerably greater than 5, however, and therefore reliable, in Steele's view, for predicting acid formation or neutralization. The maximum NP in OB-1 was 25.96 (zone 11); the maximum NP in OC-1 was 36.57 (zone 16), and four other shale zones (13, 15, 18 and 19) had NP's exceeding 30. At the same time, one of the shale zones in OB-1 had a PA of 86.25 (zone 12), while two of the shale zones in OC-1 had a PA of 35.63. To estimate the acid formation or neutralization capabilities of the entire overburdens at OB-1 and OC-1, Steele first weighted the PA and NP values for each zone by the zone thickness, as Kenealy also did (Finding of Fact 66), and then summed those weighted values by three different procedures (Findings of Fact 149-151). Each of these summation procedures, one identical to Kenealy's (Finding of Fact 67), and the other two reasonable variants, yielded an "effective" (i.e. total weighted) NP that exceeded the effective PA, for each of the Test Holes OB-1 and OC-1; the actual ratios of the effective NP to the effective PA by the three summation procedures were 1.19, 1.22 and 1.3 for OB-1, and were 2.87, 3.61 and 14.2 for OC-1.

On the basis of these results Steele concluded "to a reasonable degree of scientific certainty" (which Steele interpreted as meaning 99% certain) that the Effinger portion would not produce AMD after Magnum's proposed mining. This conclusion of Steele's did not rest strongly on the Sturey leachate tests Steele conducted for OB-1 and OC-1; according to Steele those leachate tests merely provided confirmation (somewhat less satisfactory for OC-1 than for OB-1) that his ABA summation procedures were reliable. Consequently, we need not further discuss Steele's Sturey leachate tests whose

utility for predicting post mining water quality has not been determined, as Steele himself admitted (Finding of Fact 159). The primary question now before us is how confident we can be in the predictive value of Steele's overburden analysis, from which he deduced his "99% certain" conclusion that the Effinger portion would not produce post mining AMD.

To a considerable degree, DER's criticisms of Steele's ABA summation procedures paralleled DER's criticism of Kenealy's ABA summation. These criticisms were described only cursorily in connection with our discussion of Kenealy's ABA because Kenealy's results also had been criticized by Magnum's own witness Steele, on whose testimony we could and did rely for the purpose of assessing the reliability of Kenealy's results. One of DER's major (but heretofore not mentioned) objections to Steele's and Kenealy's overburden analyses was the fact that Magnum had not demonstrated successful "fizz" tests for any of the strata in Test Holes OA-1, OA-2, OB-1 and OC-1. In particular, concentrating now on Steele's overburden analysis, fizz tests actually were performed on each of the zones in OB-1 and OC-1, but no fizz was observed in any zone.

A fizz test of a rock sample is performed by applying a predetermined concentration of hydrochloric acid to the sample, and then recording the intensity of "fizzing," i.e., of escaping gas effervescence, induced by the acid. According to DER's expert witnesses, the fizz test is an important indication of acid neutralization potential. Hornberger testified, moreover, that the fizz test is needed in order to properly interpret the measured NP. In particular, Hornberger believes that when fizzing is absent, an NP less than 100 ordinarily is not a reliable indicator that potential alkalinity is available to neutralize the acidity potential of various portions of the overburden. As we already have explained, the maximum NP

observed by Steele in either OB-1 or OC-1 was 36.57, which is far less than 100. Thus, although Hornberger sometimes (e.g., when there is strong fizzing) may be willing to regard NP's less than 100 as reliable indicators of potential alkalinity, he had no faith in the neutralizing powers of the strata in OB-1 and OC-1. This being the case, Hornberger quite logically placed no credence in the results of any of the three Steele summation procedures.

DER had other criticisms of Steele's overburden analysis, of course, e.g., that weighting the strata by layer thickness does not take into account the differing horizontal extents of the strata; according to Hornberger it would be more correct to weight the strata by their total volumes or their total masses, rather than merely by their thicknesses. Objections such as these were not strongly put forth, however; it was apparent that DER's main concern was that Steele was overestimating the actual neutralization potentials of the strata in OB-1 and OC-1. The issue before us can be put quite simply, therefore: Do we agree with Steele that NP's greater than 5 can be relied on to neutralize acidity, or do we agree with Hornberger that, in the absence of fizzing, NP's less than 100 generally are not reliable for this neutralizing purpose?

We have already recognized the limitations of ABA in Sanner Brothers Coal Company v. DER, 1987 EHB 202, where we stated

> OA, using any technique, is not an exact science. The ABA technique's accuracy and reliability is particularly questionable where there is a lack of extremes in alkalinity or acidity. In other words, the ABA method is reasonably valid where it predicts a highly alkaline or highly acidic discharge. But, where, as in the present case, the discharge is predicted to be slightly acidic or slightly alkaline, the test has little or no value. Sanner's own expert, Ronald L. Schrock, admitted so on cross-examination:
>
> Q) Would you be able to say, with any degree of scientific certainty, that there will not be

an acid discharge post mining?

A) Not based just on these numbers.

(N.T. 345)

> Part of the problem lies with the fact that the ABA method attempts to directly equate the acid producing characteristics of soils with the alkalinity producing characteristics of soils. The resulting values do not necessarily correspond to real world values, because acidity is actually produced more quickly than alkalinity in nature.
>
> 1987 EHB at 224-225
> (footnotes omitted)

We find the circumstances here to be analogous to those in Sanner Brothers and again accept the Department's arguments that, in the absence of fizzing, an NP less than 100 generally is not a reliable indicator of potential alkalinity.

If the Board had not addressed the reliability of ABA in Sanner Brothers, our conclusion would be based on the Board's assessment of the weight of the testimony. The Board found both these witnesses believable and forthright; certainly Steele's willingness to criticize his fellow expert Kenealy's overburden analysis enhanced his own credibility. There can be no doubt, however, that Hornberger is much the more qualified to give opinion testimony on the utility of overburden analysis procedures for predicting AMD formation under field conditions. For instance, Hornberger has an M.S. degree in geology from Penn State University, Steele does not have a higher degree, although he has taken some postgraduate courses in subjects relevant to overburden analysis, e.g., a Penn State course in advanced groundwater geochemistry. Hornberger has been involved in a research project that resulted in a report titled, "Delineation of Acid Mine Drainage Potential of Coal Bearing Strata of the Pottsville and Allegheny Groups in Western Pennsylvania"; Steele has had no formal research experience and has not published any comparably relevant (to overburden

analysis) research report, although he has published a report for DER titled, "Erosion and Sedimentation Control Manual for Surface Mines." Hornberger has taught short courses on overburden analysis at Penn State University and is the principal author of DER's manual on the interpretation of overburden analysis; Steele has no comparable credentials.

We hold, therefore, that, in the absence of fizzing, an NP less than 100 generally was not, in this case, a reliable indicator of potential alkalinity. With this holding, recognizing that our previous rejections of Magnum's estoppel and special handling claims for Munkacy pertain equally well to Effinger, it follows that DER's denial of Magnum's permit application for the Effinger portion cannot be termed an abuse of it's discretion.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties to this appeal and the subject matter thereof.

2. The burden of showing DER's denial of Magnum's permit application was an abuse of DER's discretion or an arbitrary exercise of DER's duties or functions falls on Magnum. 25 Pa.Code §21.101(c)(1).

3. Magnum has the threshold burden of rebutting any DER claims that Magnum has not complied with all applicable regulations.

4. In this rebuttal Magnum may employ all lawful defenses, such as rebuttal and waiver, but the existence of such defenses cannot relieve Magnum of its obligation not to pollute the waters of the Commonwealth by its mining activities.

5. As this appeal has evolved, it turns on whether or not Magnum has complied with 25 Pa.Code §86.37(a)(3).

6. Magnum's burden under 25 Pa.Code §86.37(a)(3) is to demonstrate, by a preponderance of the evidence, that pollution of the surface and

groundwaters

will not result from its proposed mining activities. Harman Coal Co. v. Com., Dept. of Envir. Resources, 34 Pa.Cmwlth. 610, 384 A.2d 289 (1978).

7. Magnum's evidence for its contention that its expert's Steele's water sampling points were located where the Middle Kitanning coal seam previously had been mined was indirect and uncorraborated.

8. Magnum's experts' inference that the observed AMD in the LN-1 and LN-2 discharges was caused, e.g., by foreign tipple refuse was unsound.

9. The suggestion that the AMD in the LN-1 and LN-2 discharges was caused, e.g., by foreign tipple refuse was little more than pure speculation.

10. Magnum's expert's Steele's opinion that there would be no groundwater at the Munkacy portion of the site to produce AMD also was little more than pure speculation.

11. Magnum's claim that DER is estopped from questioning the validity of Magnum's overburden analysis is rejected, because Magnum has made no showing of the necessary elements of its estoppel claim.

12. Magnum has not met its burden of showing that the addition of 20 tons/acre of lime will prevent any AMD discharges from either the Munkacy or the Effinger portions of the site.

13. In the absence of fizzing, an NP of less than 100 was not a reliable indicator of potential alkalinity on this site.

14. DER's expert's opinion on the reliability of Magnum's overburden analysis was the more credible because, although Magnum's and DER's experts were equally believable and forthright on the witness stand, DER's expert Roger Hornberger was much more qualified than Magnum's experts to give opinion testimony on the utility of overburden analysis procedures for predicting AMD formation under field conditions.

15. For either the Munkacy or Effinger portion of the site, Magnum has not met its burden of showing that DER's denial of Magnum's permit application was an abuse of DER's discretion or an arbitrary exercise of DER's duties or functions.

O R D E R

AND NOW, this 4th day of October, 1988, it is ordered that the appeal of Magnum Minerals, Inc. is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

William A. Roth
WILLIAM A. ROTH, MEMBER

Robert D. Myers
ROBERT D. MYERS, MEMBER

DATED: October 4, 1988

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M. DIANE SMITH
SECRETARY TO THE BOARD

FLIGHT SYSTEMS, INC.	:	
	:	
v.	:	EHB Docket No. 86-662-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: October 5, 1988

OPINION AND ORDER
SUR
MOTION TO COMPEL

Synopsis

Where Appellant has requested information from the Department of Environmental Resources concerning investigations of groundwater contamination at other facilities within a ten mile radius of its facility and enforcement actions relating to other alleged dischargers of hazardous waste within Cumberland County, the Department's objections that these requests are overbroad, burdensome, and not reasonably calculated to lead to admissible evidence and that production of such information would be overly burdensome are sustained in part and overruled in part. The Department must state its objections with specificity.

OPINION

This matter was initiated by an appeal by Flight Systems, Inc. (Flight Systems) of the Department of Environmental Resources' (Department) November 25, 1986 order determining that Flight Systems engaged in the unlawful discharge of hazardous waste at its Hempt Road facility in Silver

Spring Township, Cumberland County, in violation of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq., and the Clean Streams Law, the Act of June 25, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. The Department alleged that Flight Systems was discharging 1-1-1 trichloroethane (TCE), methylene chloride, and other volatile organic compounds (VOC's), causing groundwater pollution in the area of Flight Systems' Hempt Road facility and nearby residential wells and ordered it to cease this practice.

On December 30, 1986, Flight Systems propounded interrogatories seeking, inter alia, information concerning any Department investigation of groundwater pollution within a ten mile radius of its Hempt Road facility, as well as information concerning the Department's enforcement actions relating to any other entity in Cumberland County discharging hazardous waste.

The Department objected to these interrogatories on the grounds that they were overbroad, not reasonably calculated to lead to the discovery of admissible evidence, and would impose an unreasonable annoyance, oppression and burden on the Department. The Department was willing, however, to provide information about studies conducted and enforcement actions regarding other entities within one-half mile of the Hempt Road facility. The Department similarly objected to Flight Systems' December 30, 1986 request for production of documents.

Flight Systems filed a motion to compel on July 11, 1988, and the Department responded to the motion on September 2, 1988. Flight Systems' motion is now before us for disposition.

Discovery practice before the Board is governed generally by the Pennsylvania Rules of Civil Procedure. 25 Pa.Code §21.111. The Rules of

Civil Procedure allow the discovery of all information reasonably calculated to lead to admissible evidence. Pa.R.C.P. No. 4003.1.

We will deal first with the Department's general objections. The Department alleges that the information requested by Flight Systems is overbroad and not reasonably calculated to lead to admissible evidence. These objections are improper, as objections to interrogatories must be specific. See Goodrich Amram 2d §4006(a). While the Department should have set forth its specific reasons for objecting to the discovery requests in its response, we will, in the interests of expediency, consider the arguments contained in its brief in support of its response.

The Department gives no reason in support of its one-half mile cut-off point, but it does state in its brief in support of its response that it is improbable that the source of the groundwater contamination would be found on the eastern side of the Susquehanna River. The Board finds the Department's statement regarding the eastern side of the Susquehanna River persuasive and will not compel discovery as to its investigations of groundwater pollution east of the Susquehanna River. However, the Department fails to substantiate its argument regarding the ten mile radius of the Hempt Road facility or its enforcement actions relating to hazardous waste discharges in Cumberland County.

The Department argues that the interrogatories and the request for production of documents are unduly burdensome because they do not place a time limit on the request for information and would thus generate a great deal of work for Department personnel. The Pennsylvania Rules of Civil Procedure provide limitations on the scope of discovery, restricting discovery that "would cause unreasonable annoyance, embarrassment, oppression, burden or expense." Pa.R.C.P. No. 4011. We will sustain the Department's objection in

part and grant Flight Systems' motion in part. The order at issue contains references to testing of residential wells for VOC's in 1985, which information appeared to form part of the basis for the order. We will compel the Department to provide information from 1985 onward. We again note that the Department failed to substantiate its objections, a burden which is the Department's and not the Board's.

Finally, the Department objects to Flight Systems' discovery requests seeking information on hazardous substances other than those found in the groundwater in the vicinity of the Hempt Road facility. We agree that this request is overbroad and, therefore, the Department may limit its response to those substances which Flight Systems has allegedly discharged, namely TCE, methylene chloride, and other VOC's. See Houtzdale v. DER, 1986 EHB 1161.

O R D E R

AND NOW, this 5th day of October, it is ordered that:

1) Flight Systems' motion to compel is granted in part and denied in part;

2) On or before November 4, 1988, the Department shall respond to Flight Systems' interrogatories and request for production of documents. The Department shall provide information relating to studies of groundwater contamination from facilities west of the Susquehanna River allegedly discharging TCE, methylene chloride and other VOC's from 1985 onward. The Department shall also provide information regarding enforcement activities relating to

alleged discharges of TCE, methylene chloride, and other VOC's within Cumberland County from 1985 to the present.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: October 5, 1988

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M. DIANE SMITH
SECRETARY TO THE BOARD

INGRID MORNING	:	
	:	
v.	:	EHB Docket No. 88-094-M
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: October 6, 1988

OPINION AND ORDER
SUR
JOINT MOTION FOR JUDGMENT ON THE PLEADINGS

Synopsis

A Joint Motion for Judgment on the Pleadings will not be granted (1) when it would result in a precedent-setting ruling entered without a thorough consideration of facts and law, and (2) when a party has not been involved in the case because of an oversight.

OPINION

On March 16, 1988, Ingrid Morning (Appellant) filed a Notice of Appeal from the alleged failure of the Department of Environmental Resources (DER) to act upon a proposed amendment to the Official Sewage Facilities Plan (Official Plan) of Pike Township, Berks County, pertaining to the Hidden Hollow Subdivision. In the Notice of Appeal, Appellant alleged that the proposed amendment was filed with DER on or about October 19, 1987. Since DER did not act upon the proposed amendment within 120 days, it was deemed approved under 25 Pa. Code §71.16.

In a pre-hearing memorandum filed on June 30, 1988, Appellant stated that the Hidden Hollow Subdivision is located partly in Pike Township and

partly in District Township, Berks County. The proposed amendment to Pike Township's Official Plan was received by DER on or about October 19, 1987. DER took no action on the proposed amendment within 120 days after that date and made no effort to secure a time extension. While DER sent a letter to both townships on March 18, 1988, setting forth the need for additional information, that communication took place after the 120 days had expired on Pike Township's submission.

DER filed a Motion to Dismiss the appeal on July 18, 1988, challenging Appellant's standing to appeal and asserting that Pike Township's proposed amendment was not deemed approved. In support of this assertion, DER alleged that (1) since the Hidden Hollow Subdivision is located in Pike and District Townships, both municipalities had to file proposed amendments; (2) while Pike Township filed its proposed amendment on October 19, 1987, District Township did not file its proposed amendment until December 11, 1987; (3) neither proposed amendment was complete and acceptable; and (4) DER has no duty to act, and the 120 days does not begin to run, until complete and acceptable proposed amendments are filed.

Appellant answered the Motion to Dismiss on August 30, 1988, agreeing with DER's assertions that the proposed amendments were incomplete and unacceptable but disagreeing with DER's position that Appellant had no standing to appeal. On the same date, the parties filed a Joint Motion for Judgment on the Pleadings, together with a joint memorandum of law and a proposed order. This Joint Motion would have the Board rule that DER's failure to act within 120 days did not result in a deemed approval of the proposed amendment to Pike Township's Official Plan.

Section 5 of the Pennsylvania Sewage Facilities Act (SFA), Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.5, requires each

municipality to submit to DER an Official Plan and, "from time to time," revisions thereto as required by DER regulations. 25 Pa. Code §§71.1 et seq. contain the regulations adopted by DER pursuant to the SFA. These regulations draw a distinction between an Official Plan revision and an Official Plan supplement.

A supplement is permitted when the Official Plan adequately provides for the sewage disposal needs of a proposed subdivision [25 Pa. Code §71.15 (c)]. A revision is required in all other cases [25 Pa. Code §71.15 (a) and (b)]. A supplement need not contain all of the detail required of a revision (25 Pa. Code §§71.14) and need not be approved by local planning agencies (25 Pa. Code §§71.15 and 71.16).

DER is given 45 days to act on a supplement [25 Pa. Code §71.15 (c) (3)] and 120 days to act on a revision [25 Pa. Code §71.16 (c)]. The revision is deemed approved if DER does not act within the 120 days and does not request an extension of time (25 Pa. Code §71.16 (d)]. No similar sanction applies to the failure of DER to act timely on a supplement. DER has wide discretion in determining whether a particular submission represents a revision or a supplement. Swartwood v. DER, 1979 EHB 248, affirmed 56 Pa. Cmwlth. 298, 424 A.2d 993 (1981).

It is not clear from the record in the present case (consisting at this point solely of documents filed with the Board) whether Pike Township submitted a supplement or a revision. The transmittal letter calls it a supplement but the resolution adopted by the Township's Board of Supervisors calls it a revision. DER's letter of March 18, 1988, pointing out to both Pike Township and District Township the incompleteness of their submissions, refers to them as a supplement. Yet, the letter also cites 25 Pa. Code §71.16 (a) and the 120-day review period applicable to revisions. Appellant's

pre-hearing memorandum avoids the use of either supplement or revision but treats the submission as a revision. DER's Motion to Dismiss employs both terms but also treats the filing as a revision.

If Pike Township submitted a supplement, the 120-day review period provided for in 25 Pa. Code §71.16 (c) and the "deemed approved" consequence of 25 Pa. Code §71.16 (d) are not applicable. If, on the other hand, Pike Township submitted a revision, those sections of the regulations do apply. Unfortunately, the language used by DER sends a mixed signal and the Board cannot determine whether DER exercised its discretion by calling it a supplement or by calling it a revision.

Even if it be assumed, for purposes of disposing of the Joint Motion, that Pike Township submitted a revision, the uncertainties do not vanish. The Board is being asked to rule that (1) the 120 days does not begin to run until the submission is complete in all respects; (2) the 120 days does not begin to run with respect to a revision that involves a proposed subdivision extending into two or more municipalities until each municipality submits a complete revision; and (3) a letter sent by DER after the expiration of 120 days, enumerating deficiencies in the submission, is adequate to toll the running of the 120-day review period.

These issues are matters of first impression before the Board. While the completeness of the submission has been referred to peripherally in previous decisions (Butera v. DER, 1981 EHB 53 at page 60; Sultanik v. DER, 1986 EHB 1238 at page 1240), the Board has never squarely faced the question presented here. And the only decisions pertaining to the effectiveness of a DER letter in tolling the running of the 120-day review period involved letters sent before the 120 days had run (Beaver Construction Company v. Commonwealth, Department of Environmental Resources, No. 1767 C.D. 1980,

unreported opinion and order issued October 2, 1980; Butera v. DER, 1981 EHB 53. Eagles' View Lake, Inc. v. DER, 1978 EHB 44).

It would be inappropriate for the Board to render a precedent-setting decision on these issues on the basis of a joint motion filed by nominally adverse but correlative parties and supported only by a meager record and one-page legal memorandum. A much fuller exposition of the facts and a much deeper examination of the law is needed before the Board can take such action.

There is another reason why the Joint Motion cannot be granted. This case involves an appeal from a deemed approval of an amendment to an Official Plan. The Board's rules at 25 Pa. Code §21.51 (f) and (g) require the appellant to serve a copy of the Notice of Appeal upon the recipient of the approval forming the subject matter of the appeal. Such service subjects the recipient "to the jurisdiction of the Board as a party appellee." While it appears that Appellant did serve Pike Township with at least some of the filings, it is apparent that Appellant, DER and the Board itself all overlooked the fact that Pike Township was automatically a party appellee.

This oversight undoubtedly resulted from the fact that this appeal, unlike typical third-party appeals, challenges DER's non-action rather than its action. Nonetheless, the Board's rules are clear. When an appeal contests DER's approval of a submission, however that approval comes about, the recipient of the approval automatically becomes a party appellee. The Board obviously cannot act on the Joint Motion without giving Pike Township the opportunity to file an Answer.

ORDER

AND NOW, this 6th day of October, 1988, it is ordered as follows:

1. Pike Township shall be added to the caption of this case as a party appellee and the caption shall be:

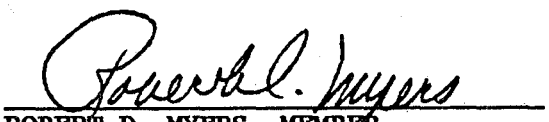
INGRID MORNING	:	
v.	:	**EHB Docket No. 88-094-M**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and PIKE TOWNSHIP	:	

2. Copies of all docket entries and documents in the Board's file at this docket number shall be sent by the Board to Pike Township along with a copy of this Opinion and Order.

3. Pike Township will have a period of thirty (30) days from the date of this Order to file a response, if it chooses to do so, to the Joint Motion for Judgment on the Pleadings.

4. All other proceedings will be stayed until further notice.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS, MEMBER

DATED: October 6, 1988

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M. DIANE SMITH
SECRETARY TO THE BOARD

CITY OF HARRISBURG	:	
	:	
v.	:	EHB Docket No. 88-120-F
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	: :	Issued: October 6, 1988

OPINION AND ORDER SUR
MOTION TO LIMIT ISSUES

Synopsis:

An Appellant's Motion to Limit Issues is granted in part and denied in part in an appeal from a denial of water quality certification by the Department of Environmental Resources (DER) pursuant to Section 401 of the Federal Clean Water Act, 33 U.S.C. §1341. Section 401 allows DER to apply state law requirements regarding discharges of pollutants which are more stringent than those established under the Act. In addition, Section 401 authorizes DER to examine any point source and non-point source discharges of pollutants which result from the construction and operation of the project, whether these discharges occur upstream or downstream of the dam itself. Section 401 does not, however, authorize DER to examine the environmental effects of "discharges of dredged or fill material," except to the extent that these discharges cause "discharges of pollutants." Nor does Section 401 authorize DER to examine "discharges of pollution." Applying this reasoning in the instant case, DER exceeded its authority by considering the effect of the project on wetlands, on fish migration, and on aquatic resources to the extent

that these resources are affected solely by physical changes in the river. The scope of evidence at the hearing will be limited accordingly.

OPINION

I Introduction

This case involves an appeal by the City of Harrisburg (City) from the denial by the Department of Environmental Resources (DER) of the City's request for water quality certification pursuant to Section 401 of the Federal Clean Water Act, 33 U.S.C. §1341. The project for which the City sought certification is the "Dock Street Dam and Lake Project"--a proposed hydroelectric dam to be constructed across the Susquehanna River. Requests to intervene in this proceeding have been filed by the Pennsylvania Fish Commission, by Voith Hydro, Inc. (the company which manufactures the turbines the City plans to use in the project), and by five environmental groups: the Pennsylvania Environmental Defense Foundation, the Natural Resources Defense Council, Inc., the Governor Pinchot Group of the Sierra Club, the Appalachian Audubon Society, and the Pennsylvania Federation of Sportsmen's Clubs.[1]

This Opinion and Order will address the City's Motion for Summary Judgment (since amended to request either partial summary judgment or an order limiting the issues for hearing) which was filed along with a supporting brief on May 26, 1988. Briefs opposing the motion were filed by DER and the environmental groups on July 15, 1988. The City filed a Reply Brief on August 17, 1988, in which it amended its motion to request either partial summary

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[1] A separate Opinion and Order on these requests to intervene is being issued on this same date.

judgment or an order limiting the issues.[2]

In its motion and brief, the City argues that DER overstepped its authority under Section 401 in denying the City's request for certification. According to the City, DER has authority under Section 401 to examine only whether, as a result of the dam's operation, the water downstream of the dam will violate DER's water quality regulations at 25 Pa. Code Chapter 93.[3] These regulations are approved by the Environmental Protection Agency (EPA) pursuant to Section 303 of the Clean Water Act, 33 U.S.C. §1313. The City argues that, under the Federal Power Act, 16 U.S.C. §791 et seq, the licensing of hydroelectric projects on interstate waterways is within the "exclusive jurisdiction" of the Federal Energy Regulatory Commission (FERC), and that DER's alleged excursion beyond Section 401 constitutes an unlawful infringement upon FERC's jurisdiction. The City suggests that the appropriate way for DER to raise these issues is to submit comments to FERC as part of the federal licensing process. Finally, with regard to whether the water downstream of the dam will violate the regulations at 25 Pa. Code Ch. 93, the City now (after amending its motion) concedes that there is an issue of fact to be resolved; therefore, the City has changed its motion to request either partial summary judgment or an order limiting the issues.

DER argues in its brief that the legal issue in this proceeding involves the scope of its authority under Section 401 of the Clean Water Act, 33 U.S.C.

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[2] Since the City framed its request in the alternative, we will treat this as a motion to limit the issues.

[3] DER's letter denying certification identified nine problems with the project: loss of wetlands, impact from increased groundwater levels, impact of increased dissolved oxygen, impact on nutrient problems in the Conodoguinet Creek, impact of combining existing sewer overflows, impact upon the 150 acre area between the proposed dam and the existing Dock Street dam, impact upon aquatic resources upstream of the impoundment, impact upon migration of migratory fish, and impact of increased sedimentation within the pool area.

§1341, and that FERC's jurisdiction is irrelevant in resolving this question. With regard to the scope of its authority under Section 401, DER contends that this section authorizes it to evaluate the effects of the project--both upstream and downstream of the dam--in light of the total body of Pennsylvania's water quality related laws, policies, and regulations. In DER's view, this interpretation is consistent with both the language of Section 401 and with the purpose of the Clean Water Act to establish minimum requirements while, at the same time, allowing states to impose more stringent measures. See 33 U.S.C. §1370. DER contends that it may examine the effects of the project upstream of the dam because the term "discharge" in Section 401 refers to point source discharges of pollutants, non-point source discharges of pollutants, discharges of pollution, and discharges of dredged or fill material, which are caused by the dam. Finally, DER contends that even if its interpretation of the Clean Water Act is rejected by the Board, there is still a factual issue regarding whether the water downstream of the dam will violate the water quality regulations at 25 Pa. Code Ch. 93; therefore, a hearing is necessary.

The brief of the environmental groups mirrors DER's reasoning to some extent. However, they argue that DER should have gone further in its reasoning denying certification. Specifically, they argue that the Environmental Protection Agency's antidegradation regulation, 40 C.F.R. §131.12, requires DER to protect not only water quality but also existing uses of waterways. Moreover, they argue that DER was required to deny certification because the project is not consistent with DER's "comprehensive area-wide management plan"--developed pursuant to section 208 of the Act, 33 U.S.C.

§1288--for the lower Susquehanna River basin.[4]

II **Discussion**

1. The Relationship Between the Federal Power Act and the Clean Water Act

The City's main argument is that DER's denial of certification exceeded DER's authority under Section 401 of the federal Clean Water Act, 33 U.S.C. §1341. As a result, DER allegedly was not acting pursuant to a federal law, and its denial of certification--which was based solely upon state law--is preempted by the Federal Power Act, 16 U.S.C. §791(a) et seq.[5] In support of its preemption argument, the City cites cases which have held that state agencies, acting pursuant to state law, could not regulate projects on interstate waterways. See e.g. First Iowa Hydro-electric Cooperative v. Federal Power Commission, 328 U.S. 152, 66 S. Ct. 906, 90 L. Ed. 1143 (1946), Federal Power Commission v. Oregon, 349 U.S. 435, 75 S. Ct. 832, 99 L. Ed. 1215 (1955).

The first step in analyzing the City's argument must be to determine the scope of DER's authority under Section 401 of the federal Clean Water Act. Preemption only applies if there is a conflict between federal and state law;[6] therefore, DER's action in this case is not preempted if DER was acting within the scope of authority delegated to it under Section 401. The City does not appear to argue that there is a conflict between the Federal Power Act and Section 401 of the Clean Water Act. (City Reply Brief, p. 3,

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[4] We will discuss the environmental groups' arguments that DER should have listed these additional reasons for denying certification in our Opinion and Order on the petitions to intervene.

[5] The Federal Power Act grants licensing authority over this type of project to the Federal Energy Regulatory Commission (FERC).

[6] When such a conflict occurs, the Supremacy Clause of the U. S. Constitution dictates that federal law controls. U. S. Constitution, Article VI, Clause 2.

note 1). The City does argue, however, that DER's authority under Section 401 should be narrowly construed to preserve the exclusive nature of FERC's jurisdiction under the Federal Power Act:

> "Where, as here, a Federal Statute has otherwise preempted the field of state regulation, the authority granted to the state through the Section 401 certification process must be narrow in light of the broad pre-emptive feature of the Federal Power Act."

City Reply Brief, p. 2. Thus, while the City does not argue that the Federal Power Act supersedes the Clean Water Act, it does argue that the Clean Water Act must be narrowly construed to minimize any overlap with the Federal Power Act.

In our view, the Clean Water Act must be interpreted based upon its own language and policy. This is not to say that we will treat the Federal Power Act as wholly irrelevant, but our primary emphasis must be on the Clean Water Act, because DER's authority to review this project arises from the Clean Water Act.

It appears to us that there is a tension between the policies of the Federal Power Act and the Clean Water Act. The policy of the Federal Power Act, at least at its inception, was to promote development: "Congress was concerned with overcoming the danger of divided authority so as to bring about the needed development of water power..." First Iowa Hydro-electric Cooperative v. Federal Power Commission, 328 U.S. 152, 174, 66 S. Ct. 906, 916 (1946).[7] The policy of the Clean Water Act, on the other hand, is to protect and restore the quality of the nation's waters. 33 U.S.C. §1251. In particular, Section 401 of the Clean Water Act, 33 U.S.C. §1341, reflects

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[7] Congress has tempered this pro-development emphasis by passing the Electric Consumer Protection Act of 1986, P. L. 99-495, 100 Stat. 1243, which requires FERC to give equal weight to the policies of energy development, energy conservation, and environmental protection. See 16 U.S.C. §797(e)

increased concern over the environmental effects of federally licensed projects. The vehicle which Congress chose in Section 401 to address this concern was to vest authority in the States to review "discharges" resulting from the projects.

If we were to accept the City's argument that we should narrowly construe Section 401 of the Clean Water Act to minimize any overlap between DER's jurisdiction and FERC's jurisdiction under the Federal Power Act, we would be making a policy decision under the guise of interpreting these federal laws.[8] While we will carefully evaluate the language of Section 401, we reject the notion that it should be narrowly construed to avoid overlap with the Federal Power Act.

The City relies heavily on the Electric Consumer Protection Act of 1986 (ECPA), P.L. 99-495, 100 stat. 1243, which amended the Federal Power Act to require FERC to give equal weight to environmental concerns, and FERC's regulations implementing that Act, to buttress its argument that virtually all of the issues raised by DER should be addressed in the FERC proceeding. We find the provisions of ECPA to be only marginally relevant in construing Section 401 of the Clean Water Act. ECPA became law after Section 401 was enacted in its present form,[9] so its existence could not have affected the intent of Congress in drafting Section 401. Moreover, it would be anomalous if we were to cite ECPA, because of its environmental protection features, as

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[8] Moreover, it is impossible to eliminate all overlap between DER's and FERC's jurisdiction over environmental effects. The City admits that DER may examine dissolved oxygen downstream of the dam, but FERC's regulations call for data on dissolved oxygen to be submitted to FERC as well. See 18 C.F.R. §4.41(f)(2)(ii). The division of authority which the City advocates between DER and FERC is totally contrived.

[9] ECPA was enacted in 1986, Section 401 was enacted in 1972 and amended in 1977.

a reason for narrowly construing another statute designed to protect the environment--the Clean Water Act. Absent compelling evidence that this was the intent of Congress, which was certainly not presented here, we will not interpret ECPA's command that FERC give equal consideration to environmental considerations as implicitly limiting the authority of the States under Section 401.

2. Whether Section 401 Authorized DER to Review the Project in Light of State Law Requirements Regarding Water Quality More Stringent Than Those Established Under the Clean Water Act, or Only Those Contained in 25 Pa. Code Ch. 93.

The next issue is whether in reviewing the City's request for certification, DER was authorized to apply state law requirements regarding water quality more stringent than those established under the Clean Water Act. DER alleges that it was. The City argues that Section 401(a) only authorized DER to apply the regulations at 25 Pa. Code Ch. 93 to the project. Section 401 of the Clean Water Act, 33 U.S.C. §1341, provides in relevant part:

> §1341. Certification
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> (a) Compliance with applicable requirements; application; procedures; license suspension
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> (1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.
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> (d) Limitations and monitoring requirements of certification
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> Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for

> a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pre-treatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

33 U.S.C. §1341(a), (d).

Section 401(a)(1) requires compliance with sections 1311, 1312, 1313, 1316, and 1317 of Title 33, United States Code. Of these sections, DER alleges that Sections 1311 and 1313 are relevant to this proceeding. The City argues that only Section 1313 is relevant. Section 1311, subsection (a), provides that the discharge of pollutants is unlawful, except in compliance with certain other provisions of the Act, most notably Section 404.[10] Section 1311, subsection (b)(1)(c), requires compliance with any state laws or regulations establishing limitations more stringent than those established pursuant to the Act.[11]

Section 1313, subsection (c), provides for water quality standards and implementation plans developed by the states and approved by EPA. (The Commonwealth's standards adopted pursuant to this section are contained at 25 Pa. Code Chapter 93). Section 1313, subsection (e), requires each state to have a "continuing planning process," which must contain effluent limitations and schedules of compliance at least as stringent as those in the Act.

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[10] Section 404 of the Act, 33 U.S.C. §1344, provides for the issuance by the U. S. Army Corps of Engineers of permits for the "discharge of dredged or fill material." This section will be discussed below.

[11] Section 1311, subsection (b)(1)(c), refers to Section 510 of the Act, 33 U.S.C. §1370, which provides that the states have authority to adopt standards or requirements regarding pollution as long as they are at least as stringent as those established pursuant to the Act.

First, we disagree with the City that Section 1311 is wholly inapplicable in this proceeding. The City argues that Section 1311 is not applicable here because this section requires EPA to publish effluent standards for specific industries, and EPA has not promulgated such standards for hydroelectric dams. However, the basic thrust of Section 1311 is to prohibit the discharge of pollutants, except in accordance with that section and certain other specific sections of the Clean Water Act. 33 U.S.C. §1311(a). Moreover, Section 1311 (b)(1)(c) requires compliance with state imposed "limitations," so long as the limitations are more stringent than those established pursuant to the Act. Therefore, we believe that Section 1311 is relevant to this proceeding.

On the broader question of DER's authority, we agree with DER that Section 401 allows it to examine the project in light of all state laws and regulations which relate to water quality.[12] Section 510 of the Act, 33 U.S.C. §1370, which is cited in Section 1311(b)(1)(c), explicitly protects the rights of the states to establish water quality limitations so long as the limitations are no less stringent than those in the Act. 33 U.S.C. §1370. A federal Court has stated that 33 U.S.C. §1311(b)(1)(c) "effectively incorporates into federal law all state water quality standards, schedules of compliance, law or regulations which are more stringent than otherwise provided by federal law." Mobil Oil Corp. v. Kelley, 426 F. Supp. 230, 234 (S.D. Ala. 1976).

Section 401(d), 33 U.S.C. §1341(d), is even more explicit on this point. It provides that any certification provided under Section 401 shall set forth

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[12] In the next section of this Opinion we conclude that DER is authorized by Section 401 to examine only discharges of pollutants (from point sources or non-point sources) which may result from the project. Therefore, DER may examine the project in light of all state laws and regulations, so long as they relate to discharges of pollutants.

any "limitation" necessary to assure that the applicant will comply with, among other things, any effluent limitation under Section 1311 "and with any other appropriate requirement of state law set forth in such certification," and that such limitations shall become conditions on the federal license. 33 U.S.C. §1341(d) (emphasis added). The language "any other appropriate requirement of state law" can only mean requirements which are more stringent than those established under the Clean Water Act and which the state is authorized to impose by the Act itself. 33 U.S.C. §§1311(b)(1)(c), 1370.

While it is clear that DER may apply all state water quality laws relating to discharges of pollutants (from a point source or non-point source) in a Section 401 proceeding, there is an additional question whether DER can apply the full scope of state law to deny certification, or only to condition it. DER argues that state law can be used to justify denial of certification. The City argues, first, that DER's only authority here is 25 Pa. Code Ch. 93, but, in the alternative, if DER could apply other state law requirements, it could only apply these requirements to condition certification. As stated above, a Federal Court has stated that Section 1311(b)(1)(c) incorporates all state law requirements more stringent than those in the Act. Mobil Oil Corp. v. Kelley, 426 F. Supp. 230 (S.D. Ala. 1976). Since Section 1311 is cited in Section 401(a), this would mean that these state law requirements can be invoked to deny certification. On the other hand, Section 401(d) states specifically that "any other appropriate requirement of state law" can be invoked as a condition upon certification. A state court in Oregon, citing Section 401(d), has stated that general state law requirements could form the basis for conditioning, but not denying, certification. Arnold Irrigation District v. Department of Environmental Quality, 717 P. 2d 1274 (Or. App. 1986), review denied, 726 P. 2d 377.

Given the choice between these two interpretations, we favor the reasoning of the federal court in Mobil since we are interpreting a Federal statute. In addition, allowing states to deny certification based upon more stringent state requirements is the better interpretation because simply conditioning the certification may not always suffice to guarantee compliance with state law. However, it is not necessary to answer this question definitively in this opinion since evidence relating to compliance with state law will be admissible whether the state law is used to deny or to condition certification. The final resolution of this question must await the Board's Adjudication.

In summary, we agree with DER that Section 401 authorizes it to apply state law requirements to this project other than those found at 25 Pa. Code Ch. 93. As we will explain in the next section, these state law requirements must relate to point source or non-point source discharges of pollutants.

3. Whether Section 401 Authorized DER to Examine All of the Alleged Environmental Effects From the Project Which DER Cited in Its Letter Denying Certification.

The City's next argument is that DER erred by examining environmental effects which Section 401 does not authorize it to consider. The City argues that the express language of Section 401 only allows DER to examine "any discharge" from the project. The City interprets "discharge" in Section 401 to mean the discharge through the turbines of the dam. The City goes on to argue that although the discharge from the turbines could affect downstream water quality, it might not be classified under the Clean Water Act as either a "discharge of pollutants" or as a "point source discharge." Still, the City concedes that DER may examine the downstream effects of the dam, citing

National Wildlife Federation v. Gorsuch, 693 F. 2d 156 (D.C. Cir. 1982).[13]

DER disagrees with the City's interpretation of discharge in Section 401 as referring only to the discharge through the turbines. DER argues that Section 401 authorizes it to examine several types of discharges which are caused by the project: point source and non-point source discharges of pollutants, discharges of pollution, and discharges of dredged or fill material. All of the nine reasons DER relied upon in its letter denying certification can be traced to one of these types of "discharge." Under DER's definition of "discharge," it would have authority to examine the effects of the project upstream and downstream of the dam itself.

Obviously, the key to resolving this issue is to determine the meaning of the term "discharge" in Section 401. The first step is to examine the context in which the term is used in Section 401: "Any applicant for a Federal license or permit to conduct any activity . . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates . . . that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title" (emphasis supplied). In our opinion, the underscored language does not refer to a single "discharge" from the project, it refers to any type of "discharge" which is caused by the project.

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[13] In Gorsuch, the court held that under 33 U.S.C. §1342 EPA need not require a National Pollutant Discharge Elimination System (NPDES) permit for dam projects, because NPDES permits are only necessary for discharges of pollutants which are added at a point source. While the water flowing through the turbines of a dam constitutes a "point source," the pollutants involved in that case were added in the impoundment of the dam, not at the "point source." In dicta, the Court remarked that states could regulate the water quality impact of dams, citing Sections 208 and 401 of the Clean Water Act, 33 U.S.C. §§1288, 1341.

The definition of "discharge" in the Clean Water Act provides: "The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants" 33 U.S.C. §1362. The Act defines a "discharge of a pollutant" as "any addition of any pollutant to navigable waters from a point source...." 33 U.S.C. §1362(12). The term "point source" is defined to mean "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, conduit . . . . from which pollutants are or may be discharged" 33 U.S.C. §1362(14).

Evaluating these definitions, we note that the term discharge "includes" a "discharge of pollutants" (from a point source). This definition is open-ended--it implies that the term can mean more than just a point source discharge of pollutants. It "includes" the latter term, but presumably it could include other things as well.[14]

We do not completely agree with either the City or DER regarding the meaning of "discharge" in Section 401. The City's definition of "discharge", limited to the discharge through the turbines, cannot be supported by any reasonable interpretation of the Clean Water Act. Indeed, the City seems to be using the term discharge as referring only to the water flowing through the dam, regardless of where, or how, any pollutants in that water might have been added. The Court in Gorsuch specifically rejected the argument that the water flowing through a dam constituted a "discharge of pollutants" since any pollutants flowing through the dam were not added to the water at that point.

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[14] This construction of the definition of "discharge" is supported by National Wildlife Federation v. Gorsuch, 693 F. 2d 156 (D.C. Cir. 1982). In that opinion, the Court contrasted the definition of the term "pollutant," which the Act states "means" certain specific things, with that of the term "discharge," which states that it "includes" a discharge of pollutants. The Court viewed the use of the word "includes" in the latter definition as evidence of an intent that the term "discharge" could have other meanings as well. 793 F. 2d at 172, note 49.

While a layman might refer to the water flowing through the turbines as a "discharge," that is not the sense in which the term is used in the Clean Water Act. Moreover, even the City itself uses the term discharge in a broader sense. At page 17 of its Reply Brief, the City discusses "upstream discharges" and "point and non-point source discharges" in arguing that the project will not cause the addition of pollutants to the Susquehanna River and the Conodoguinet Creek. These are appropriate uses of the term "discharge." The City has not supplied any analysis to support its interpretation of "discharge" in Section 401, let alone why its definition should be adopted to the exclusion of other definitions which have some basis in the Clean Water Act itself.

Turning to DER's proposed definition of "discharge," we agree that it includes point source and non-point source discharges of pollutants; however, we do not agree that it includes "discharges of dredged or fill material," or "discharges of pollution."

First, we agree with DER that "discharge" includes point source and non-point source discharges of pollutants. As stated above, the Act defines "discharge" to "include" a "discharge of pollutants." When the term "discharge of pollutants" is used in the Act, it means any addition of pollutants from a point source. 33 U.S.C. §1362(12). Therefore, point source discharges of pollutants are explicitly subject to review under the terms of the Act. Among the point source discharges resulting from the project identified by DER in its letter denying certification are the combination of twelve existing sewer overflows upstream of the dam into a single overflow (which DER alleges may affect water quality), the increased flow at the Harrisburg sewage treatment plant, and others.

It is also reasonable to interpret the term "discharge" to include non-point source discharge of pollutants. These non-point source discharges would consist of any addition of pollutants caused by the project, from other than a discrete conveyance (such as a pipe), to the Susquehanna River or Conodoguinet Creek.[15] We believe non-point source discharges should be considered "discharges" under Section 401 because the overall scheme of regulation under the Clean Water Act as interpreted by EPA and the Court in Gorsuch was to vest primary authority over point source discharges in EPA and non-point source discharges in the States. Gorsuch, 693 F. 2d at 183. Indeed, the Court reasoned in Gorsuch that while an NPDES permit from EPA was not required for a dam, that dam-induced pollution resulting from non-point source discharges would be regulated by the States under Sections 208 and 401 of the Clean Water Act, 33 U.S.C. §§1288, 1341. We find this analysis of the federal statutory scheme by a federal appeals court to be very important in reviewing DER's action in the present case.

Second, we do not agree with DER that the term "discharge" in Section 401 includes a "discharge of dredged or fill material." In our view, DER may only evaluate whether a "discharge of dredged or fill material" will cause a "discharge of pollutants."

DER and the City agree that the City will be required to obtain a permit for the "discharge of dredged or fill material" from the United States Army Corps of Engineers (Corps of Engineers) for this project. See Section 404 of the Clean Water Act, 33 U.S.C. §1344. The "dredge or fill permit" is a "Federal license or permit" under Section 401; therefore, the City is required

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[15] The project could cause different types of discharges of pollutants which may occur either upstream or downstream of the dam itself. Therefore, DER's authority is not restricted to the area downstream of the dam, as the City suggests.

to obtain a Section 401 certification from DER before the Corps of Engineers can issue a permit.[16] See 33 CFR §§320.3(a), 325.2(b)(ii). The issue here is the appropriate scope of DER's review in deciding whether to certify the project.

Before addressing the scope of DER's certification pursuant to the Section 404 permit process, it is necessary to examine the scope of the Section 404 permit itself. In other words, we must decide what "discharges of dredged or fill material" are involved in this project. DER argues that discharges of dredged or fill material will occur when the City builds a "coffer dam,"[17] when the city builds the hydroelectric dam itself, and--possibly--when the City places "riprap" along the shoreline.[18] DER points out that the federal regulations define "discharge of fill material" to include the construction of dams and placement of riprap. See 33 C.F.R. §323.2(f). In its Reply Brief, the City argues that the Section 404 permit only applies to the construction of the temporary coffer dams (City Reply Brief, p. 13, note 7).

We agree with DER's argument regarding the extent of the discharges of dredged or fill material involved here. DER is correct that the federal

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[16] DER argues in its brief (pp. 15-16) that its responsibility to certify discharges of dredged or fill material arises from the fact that "discharge" in section 401 includes "discharges of dredged or fill material." We disagree. DER's responsibility to certify arises from the fact that the "dredge or fill" permit from the Corps of Engineers is a "Federal license or permit" which requires state certification under Section 401.

[17] DER defines a "coffer dam" as a temporary dam used to drain a section of the river to allow construction of the hydroelectric dam. (DER Brief, p. 17, note 26).

[18] "Riprap," as we believe DER is using the term, is a foundation or sustaining wall of stones or chunks of concrete thrown together without order on an embankment slope to prevent erosion. Webster's Ninth New Collegiate Dictionary, (1988). DER states in its Brief (p. 17, note 29) that the City has not yet determined whether riprap will be necessary.

regulations define a "discharge of fill material" to include the construction of dams and placement of riprap. The City has not explained in its Brief or Reply Brief why a coffer dam comes under the requirements of Section 404 but the hydroelectric dam itself does not; it merely stated that FERC would evaluate the environmental effects of the hydroelectric dam. Acceptance of the City's argument would be tantamount to overruling the regulations of the Corps of Engineers defining "discharge of fill material", 33 C.F.R. §323.2(f).

We also agree with DER that its certification under Section 401 must apply to both the construction and operation of the facilities which are to be constructed under the "dredge and fill" permit. Both Section 401(a) itself and the federal regulations (33 C.F.R. §320.3(a)) state explicitly that certification applies to both the construction and operation of the facilities. The City's argument that the certification only applies to the construction of facilities, not the operation of those facilities, is contrary to the express language of Section 401(a) and the federal regulations.

While we agree with DER regarding the scope of the discharges of dredged or fill material involved here, and that a review of these discharges entails a review of the construction and operation of the facilities, we disagree regarding the scope of DER's review of these discharges under Section 401. The federal regulations implementing the Section 404 permit process make it clear that the purpose of the state certification under Section 401 is to evaluate any "discharge of a pollutant" which may result from the "discharge of dredged or fill material" See 33 C.F.R. §320.3(a). This is an explicit recognition that DER's authority does not extend to other environmental effects of the discharge of dredged or fill material; Section 404 vests the authority to review those effects in the Secretary of the Army and the

Administrator of EPA. Indeed, the federal regulations at 40 C.F.R. Part 230 contain detailed guidelines for evaluation by the Corps of Engineers and EPA of the environmental effects of the discharge of dredged or fill material. Therefore, if we were to accept DER's argument that "discharge" in Section 401 includes a "discharge of dredged or fill material," we would be authorizing DER to conduct the review which Section 404 reserves to these federal agencies.

The third type of discharge identified by DER is a "discharge of pollution." The term "pollution" is defined in the Clean Water Act as the "man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water", 33 U.S.C. §1362(19). While there is no doubt that the dam may constitute "pollution" in the sense that it may alter the physical and biological characteristics of the river, we do not believe that it can be said that such alterations are "discharged." The term "discharge of pollution" is not found anywhere in the Act. Even if we interpret "discharge" in its ordinary sense of a "release" or "letting go," we do not understand how the City's alteration of the physical and biological properties of the river constitutes a discharge. The only argument put forth by DER in support of this definition is that it will further the Act's goal of restoring and maintaining the integrity of the Nation's waters.[19] However, we are mindful that the Act establishes not only goals, but also means to achieve those goals. It appears to us that the environmental effects of this project which come under the term "pollution"--in the sense that DER is using

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[19] 33 U.S.C. §1251

the term-will be reviewed by the U.S. Army Corps of Engineers and EPA pursuant to the Section 404 "dredge or fill permit" process. See, 33 U.S.C. §1344, 40 C.F.R. Part 230.

Applying our interpretation of discharge to the nine reasons cited in DER's denial letter, it appears that DER exceeded its authority by examining the effect of the project on wetlands, on fish migration, and on aquatic resources to the extent that these resources are affected solely by physical changes in the river. This conclusion is based upon DER's brief, which tied these three reasons to "discharges of dredged or fill material" or "discharges of pollution," which we have concluded do not fit within the term "discharge" in Section 401.

ORDER

AND NOW, this 6th day of October, 1988, it is ordered that:

1) The City of Harrisburg's Motion to Limit Issues is granted in part and denied in part.

2) The scope of evidence at the hearing shall be restricted to whether the project will cause point source or non-point source discharges of pollutants which will violate the Commonwealth's requirements for water quality, and the effects of such discharges.

3) The issues of the effect of the project on wetlands, on fish migration, and on aquatic resources to the extent that these resources are affected solely by physical changes in the river, are beyond the scope of this proceeding.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Hearing Examiner

DATED: October 6, 1988

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M. DIANE SMITH
SECRETARY TO THE BOARD

CITY OF HARRISBURG	:	
	:	
v.	:	EHB Docket No. 88-120-F
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: October 6, 1988

OPINION AND ORDER
SUR
PETITIONS TO INTERVENE

Synopsis

One petition to intervene is granted and two petitions to intervene are denied in an appeal from a denial of water quality certification by the Department of Environmental Resources (DER) pursuant to Section 401 of the federal Clean Water Act, 33 U.S.C. §1341. The Pennsylvania Fish Commission will be permitted to intervene, although the scope of its participation will be limited to demonstrating that the project will cause discharges of pollutants, and the effect of these discharges upon fisheries and aquatic habitat. The petition to intervene filed by five environmental groups will be denied because the effect of the project on most of the interests they allege raises issues which are beyond the scope of this proceeding. Moreover, their interest in maintaining water quality will be adequately represented by DER and the Pennsylvania Fish Commission. Finally, a petition to intervene by the

manufacturer of the turbines for the project will be denied because the only legally recognizable interest which it possesses is adequately represented by the City of Harrisburg.

OPINION

This case involves an appeal by the City of Harrisburg (City) from the denial by the Department of Environmental Resources (DER) of the City's request for water quality certification pursuant to Section 401 of the Federal Clean Water Act, 33 U.S.C. §1341.[1] Requests to intervene in this proceeding have been filed by the Pennsylvania Fish Commission, by Voith Hydro, Inc. (the company which manufactures the turbines the City plans to use in the project), and by five environmental groups: the Pennsylvania Environmental Defense Foundation, the Natural Resources Defense Council, Inc., the Governor Pinchot Group of the Sierra Club, the Appalachian Audubon Society, and the Pennsylvania Federation of Sportsmen's Clubs. This Opinion and Order addresses these Petitions to Intervene.

The decision whether to grant intervention is discretionary Keystone Sanitation Co., Inc. v. DER, 1987 EHB 22. The Board will examine five factors in ruling upon a petition to intervene:

1) The nature of the prospective intervenor's interest.

2) The adequacy of the representation of that interest by other parties.

3) The nature of the issues before the Board.

4) The ability of the prospective intervenor to present relevant evidence.

5) The effect of intervention on administration of the statute under which the proceeding is brought.

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[1] A more complete description of the issues in this proceeding is contained in an Opinion and Order Sur Motion to Limit Issues issued on this same date.

Franklin Township v. DER, 1985 EHB 853, Delta Excavating and Trucking v. DER, 1986 EHB 1010, 1012. A prospective intervenor has the burden of showing that intervention should be granted. Sunny Farms Ltd. v. DER, 1982 EHB 442. Generally, the Board will grant intervention where the petitioner establishes a direct, substantial, and immediate interest in the outcome of litigation provided that this interest is inadequately represented by the present parties to the controversy. Keystone, Save Our Lehigh Valley Environment v. DER, 1987 EHB 117.

We shall address the petitions to intervene separately.

1. The Pennsylvania Fish Commission

The Pennsylvania Fish Commission filed a petition to intervene on June 23, 1988. In its petition, the Fish Commission claims that, under 1 Pa. Code §35.28(b), it may intervene "as of right" because it is an agency of the Commonwealth. It also claims that it is the agency with primary jurisdiction over the management of fish, fishing, and boating in waters of the Commonwealth, and that one of its principal goals is to restore migratory fish to waters of the Commonwealth. The Fish Commission claims it has an interest in this proceeding because the project may adversely affect fisheries and fish habitat both upstream and downstream of the proposed dam. Furthermore, it claims an interest because the project may lead to the loss of wetlands and other aquatic habitat, and may have an adverse impact on efforts to restore migratory fish to the Susquehanna River. The Fish Commission argues that, if permitted to intervene, it would present evidence regarding the effect of the project upon aquatic habitat in the Susquehanna River and its tributaries in the project area, the effect upon resident fisheries (particularly smallmouth bass) upstream and downstream of the dam, and the impact upon restoration of migratory fish. Finally, the Fish Commission claims that its interests will

be inadequately represented by other parties to the proceeding because of its statutory duties for conserving and managing fisheries resources, its responsibility for restoring migratory fish, and the particular expertise of the Fish Commission's staff.

The City filed an objection to the Fish Commission's petition to intervene. The City denies that the project will have an adverse impact upon fisheries, and claims that the project design includes fish passage facilities consistent with efforts to restore migratory fish to the river. The City also argues that the evidence which the Fish Commission intends to introduce is beyond the scope of this proceeding; this contention is based upon the City's argument that the Federal Energy Regulatory Commission (FERC) has exclusive jurisdiction over all environmental questions related to the project except whether the water downstream of the dam will comply with the water quality regulations at 25 Pa. Code Chapter 93.[2] Finally, the City argues that the Fish Commission's interest in water quality downstream of the dam is adequately represented by DER.

The Fish Commission's petition to intervene will be granted. As an agency of the Commonwealth, it has a right to intervene in this proceeding based upon its claim that the project may adversely affect fisheries resources which are within its jurisdiction. See 1 Pa. Code §35.28(b). Moreover, we believe that the Fish Commission has particular expertise and responsibilities with regard to fisheries and aquatic habitat so that its participation will assist the Board in adjudicating this matter.

We will, however, limit the evidence proferred by the Fish Commission to comport with our view of the scope of these proceedings, as outlined in our

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[2] This argument is addressed in our Opinion and Order Sur Motion to Limit Issues.

Opinion and Order Sur Motion to Limit Issues. The Fish Commission's concern over loss of wetlands, the physical alteration of aquatic habitat, and physical barriers to fish migration exceed the scope of this proceeding. The Fish Commission's evidence will be limited to showing that the project will cause discharges of pollutants and to the effect upon fisheries, etc. due to these discharges.

2. The Environmental Groups

On June 6, 1988, the Board received a petition to intervene from the five environmental groups listed at the beginning of this opinion. The environmental groups claim an interest in this proceeding because one of the purposes of the groups is to protect and conserve the Susquehanna River and the Chesapeake Bay, and because members of the groups use the River and the Bay for recreational activities such as fishing, swimming, canoeing, bird watching, hiking and aesthetic enjoyment. The groups state that the project will inundate wetlands and the island nesting areas of the great egret, the blackcrowned night heron, and the yellow-crowned night heron. The groups also state that the project will ruin nesting habitat for waterfowl, ruin the waterfowl resting area on the Susquehanna River near West Fairview, adversely affect fish migration, and degrade water quality (especially because of a dissolved oxygen problem). The groups intend to introduce evidence as to their interests in this proceeding, and how the construction of the dam will adversely affect these interests. The groups also argue that their environmental and recreational interests will not be adequately represented by DER, and that DER will not adequately represent the issues of destruction of fish and wildlife habitat resulting from the impoundment. Finally, the groups argue that DER does not adequately represent their interest because DER disagrees with the groups' contention that the regulations of the

Environmental Protection Agency (EPA) contain an "antidegradation requirement" which, they allege, requires DER to prevent the elimination of existing beneficial uses of the Susquehanna River and Conodoguinet Creek. See 40 C.F.R. §131.12.

DER filed a response to the environmental groups' petition to intervene, indicating that it did not oppose the petition. DER stated, however, that it disagreed with the groups' characterization of the antidegradation requirements in EPA's regulations.

The City filed an objection to the environmental groups' petition to intervene. The City denied that the project will degrade the environment. Furthermore, the City argued that the allegations of damage to wildlife and recreational uses are within the exclusive jurisdiction of FERC; therefore, these issues are beyond the scope of this proceeding. With regard to water quality downstream of the dam, the City argued that DER adequately represents the groups' interest on this issue. Finally, with regard to the groups' argument concerning EPA's antidegradation requirement, the City contended that this issue is also beyond the scope of this proceeding, and that general concerns over degradation of the environment should be addressed to FERC.

The environmental groups' petition to intervene will be denied. Much of the evidence which the environmental groups propose to present relates to physical alterations of the river, wildlife habitat, and wetlands as a result of the impoundment. As we explain in our Opinion and Order Sur Motion to Limit Issues, these issues are beyond the scope of this proceeding; therefore, this evidence is irrelevant. To the extent that the environmental groups are interested in water quality and allege that the project will cause discharges of pollutants which will adversely affect their recreational uses, we believe that their interests will be adequately represented by DER and the

Pennsylvania Fish Commission. Therefore, any evidence which the environmental groups would produce on this issue would be repetitive and would not assist the Board in deciding this case.

Finally, we disagree with the environmental groups that their dispute with DER over the meaning of EPA's antidegradation regulation provides a basis for their intervention in this proceeding. As we stated above, the scope of this proceeding under Section 401 is limited to whether the project will cause discharges of pollutants which will violate state water quality requirements. The antidegradation regulation does not justify expanding the scope of this proceeding to encompass "physical impairments or changes to biological habitat" as the environmental groups argue in their brief opposing the City's Motion for Summary Judgment.[3] Moreover, the environmental groups are free to raise their legal arguments in an amicus curiae brief at the end of this proceeding.

3. Voith Hydro, Inc.

On June 15, 1988, the Board received a petition to intervene from Voith Hydro, Inc. (Voith). Voith asserted in its petition that it has a contract with the City to manufacture and install the turbines used in the project; therefore, its interest in performing and receiving payments under the contract could be affected by this proceeding. Voith claimed that the City will not adequately represent its interest because Voith has expertise in turbine design and environmental impacts of turbines which the City does not. Voith also alleged an interest because its employees' economic interests would

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[3] This reasoning also applies to the argument, which the environmental groups also raised in their brief opposing the City's Motion for Summary Judgment (p. 30), that existing uses of the river must be protected under DER's "comprehensive area-wide management plan" (management plan) for the lower Susquehanna river. These management plans are required under Section 208 of the Clean Water Act, 33 U.S.C. §1288.

be affected by the permit denial, and the economic interests of the Commonwealth's citizens are relevant here under the Clean Streams Law, 35 P.S. §691.5(a)(5).

DER filed a response and memorandum of law objecting to Voith's petition to intervene. DER alleged that the Board has held that third party contractors have no right to intervention, citing Franklin Township Board of Supervisors v. DER, 1985 EHB 853, and Theodore V. Skotedis and Tedd's Landing, Inc. v. DER, EHB Docket No. 88-181-F (Opinion and Order issued June 23, 1988). The City also argued that Voith's petition does not meet the five criteria for granting intervention set out at the beginning of this Opinion and Order; specifically, DER alleged that Voith's interest will be adequately represented by the City. Finally, DER alleged that Voith's petition is so clearly lacking in merit that DER is entitled to recover its costs of objecting to the petition.

Voith filed a reply to DER's objections. In its reply, Voith asserted that its economic interest is different from the City's because the City might enter into a settlement with DER which would provide for a "non-power generation alternative", thus depriving Voith and its employees of their rights under Voith's contract with the City. Voith also alleged that it has an interest in its "professional reputation" and that the City and DER might enter into a settlement which would be environmentally deficient and would sully Voith's "international reputation as a good environmental citizen." Voith also argued that Franklin Township and Skotedis are not controlling because, unlike the parties which attempted to intervene in those cases, Voith's expertise would aid the Board in deciding this case. Furthermore, Voith argued that Franklin Township and Skotedis are flawed because the economic interest of a proposed intervenor is a legally cognizable

interest. Finally, Voith argued that DER is not entitled to recover its costs of opposing the petition.[4]

Voith's petition to intervene will be denied. The Board's precedent indicates that third party contractors do not have the type of interest which warrants granting intervention. Franklin Township, Skotedis. Voith's attempt to distinguish these cases fails. Voith's argument regarding the possibility of an environmentally deficient settlement between the City and DER is implausible. To give any weight to this argument, we would have to assume that DER will agree to a settlement which does not protect the environment; the record in this proceeding provides no basis for such an assumption. Voith's argument that its economic interest could differ from the City's, because the City could agree to a non-power generating alternative, is also unpersuasive. This is the City's project, not Voith's. If the City agrees to a project which does not require Voith's products and services, then Voith's recourse--if it has any--lies in a contract action against the City. The Board is not authorized to rule on contract questions.

We also disagree with Voith that the Board's decisions in Franklin Township and Skotedis are legally flawed. The standards set out in Franklin Township recognize the importance of allowing affected parties to intervene when they have the appropriate type of interest and when their interest is not adequately represented by other parties. But these standards do not--and should not--compel the Board to grant intervention to anyone seeking it. The Board has a legitimate interest in maintaining the efficiency of its operations by deterring the needless proliferation of parties, witnesses, and issues.

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[4] Voith and DER each filed another round of pleadings which we will not discuss.

Finally, we disagree with Voith's argument that it must be granted intervention because the economic interest of its employees must be considered under the Clean Streams Law, 35 P.S. §691.5(a)(5). The City alleged in paragraph 28 of its Notice of Appeal that DER failed to consider the economic impact of the project. We see no reason to assume that the City will not adequately represent Voith's interest by including the impact upon Voith and its employees in listing the economic benefits of the project. In addition, it is the City which has the direct interest in this proceeding--the interest of Voith's employees is indirect because it arises from Voith's contract with the City. Moreover, we are not certain whether the economics of the project are relevant in this proceeding. This is a proceeding under Section 401 of the federal Clean Water Act, 33 U.S.C. §1341. We have stated in our Opinion and Order Sur Motion to Limit Issues that Section 401 authorized DER to apply state law requirements which are more stringent than the minimum requirements under the Clean Water Act; however, we are not certain that this section of the Clean Streams Law, 35 P.S. §691.5(a)(5), fits into the category of "more stringent state law requirements." Moreover, consideration of the economics of this project could increase dramatically the scope of this proceeding. Unfortunately, DER has not specifically addressed the argument that economics must be considered here, so we can only speculate as to its position.

While we will deny Voith's petition to intervene, we will also deny DER's request to recover its costs of opposing Voith's petition. We do not agree with Voith's arguments, but the arguments are not so lacking in substance that they constitute "obdurate" behavior which warrants allowing DER to recover its costs.

4. Summary

We will grant the Fish Commission's petition to intervene, though we will limit the scope of its testimony to the effect of discharges of pollutants upon fisheries and aquatic habitat. The petition to intervene of the environmental groups will be denied because most of their proposed testimony is beyond the scope of this proceeding, and their interest in preventing discharges of pollutants is adequately represented by DER and the Fish Commission. Finally, Voith Hydro, Inc.'s petition to intervene will be denied because the only legitimate interests which it has in this proceeding are adequately represented by the City of Harrisburg.

ORDER

AND NOW, this 6th day of October, 1988, it is ordered that:

1) The Pennsylvania Fish Commission's petition to intervene is granted, though its participation is restricted to showing that the project will cause discharges of pollutants and the effects of these pollutants on fisheries and aquatic habitat.

2) The petition to intervene filed by the Pennsylvania Environmental Defense Foundation, the Natural Resources Defense Council, Inc., the Governor Pinchot Group of the Sierra Club, the Appalachian Audubon Society, and the Pennsylvania Federation of Sportsmen's Clubs, is denied.

3) The petition to intervene filed by Voith Hydro, Inc. is denied.

4) DER, the Fish Commission, and the City shall confer and file a report with the Board by October 24, 1988 which proposes dates for completing discovery and for filing pre-hearing memorandums.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick
TERRANCE J. FITZPATRICK
Hearing Examiner

DATED: October 6, 1988

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M. DIANE SMITH
SECRETARY TO THE BOARD

PHILADELPHIA SUBURBAN WATER COMPANY :
:
v. : EHB Docket No. 85-151-M
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: October 13, 1988
and NORTH WALES WATER AUTHORITY, Permittee :

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

A Motion for Summary Judgment will be denied as untimely when it is filed less than two weeks prior to the start of hearings and is objected to by one of the other parties.

OPINION

Final action on this Appeal, filed April 25, 1985, has been delayed for a variety of reasons. It was ready for hearing in July 1986, but could not be heard because of the Board's backlog of cases. It was finally scheduled for hearing beginning June 7, 1988, but was postponed, at the request of Philadelphia Suburban Water Company (Appellant), because of pending legislation (Senate Bill 1283) that, if enacted, would have a substantial bearing on the case.

On June 30, 1988, Appellant filed a Motion for Leave to Conduct Discovery to which the Department of Environmental Resources (DER) filed objections on July 27, 1988. DER complained of the lateness of Appellant's request and stated that it would file a Motion for Summary Judgment within 14

days. The Board denied Appellant's Motion in an Opinion and Order issued August 30, 1988.

As of September 1, 1988, Senate Bill 1283 had not been enacted and DER had not filed a Motion for Summary Judgment. Accordingly, the Board set the case for hearing beginning October 18, 1988. On October 4, 1988, DER made an oral request (followed by letter) for permission to file a Motion for Summary Judgment by October 7, 1988, indicating that all parties were agreeable to proceed in this manner in lieu of the hearing scheduled to begin on October 18, 1988.

On the basis of this representation, the Board orally consented to the filing of the Motion. However, Appellant advised the Board orally on October 4, 1988, and later by letter, that it objected to the lateness of DER's Motion and objected to any suspension of the scheduled hearing. Nonetheless, DER filed its Motion on October 7, 1988.

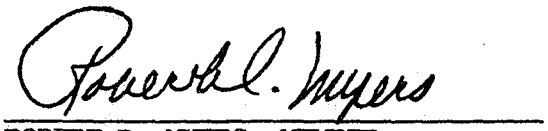
Motions for Summary Judgment are governed by Pa. R.C.P. 1035. That rule provides inter alia, that such motions must be filed "within such time as not to delay trial." DER's Motion clearly is untimely, when measured against this standard, and must be denied on the strength of objections by one of the other parties.

This result is especially appropriate in this instance. DER objected to Appellant's discovery motion on the ground that it would delay further the ultimate resolution of this controversy. In the same document, DER stated that it would file a Motion for Summary Judgment within two weeks. No Motion was filed and, after four weeks had elapsed, the Board set the case for hearing. DER still took no action until a month later, barely two weeks before the scheduled hearing date, when it filed the Motion. No excuse has been offered for these delays, and the Board assumes that there is no excuse.

ORDER

AND NOW, this 13th day of October, 1988, it is ordered that the Motion for Summary Judgment filed by the Department of Environmental Resources is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS, MEMBER

DATED: October 13, 1988

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M. DIANE SMITH
SECRETARY TO THE BOARD

NORWIN YMCA	:	
	:	
v.	:	**EHB Docket No. 87-384-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: October 18, 1988

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

DER's motion for summary judgment is granted. Use of a pool for therapeutic and instructional swimming falls within the purview of "amateur swimming" in the definition of "bathing place." The pool is a "public" bathing place, since the only requirement for membership is payment of a nominal fee--there is no subjective screening process. Since Appellant's pool is therefore "public" and a "bathing place" and Appellant failed to acquire a statutorily mandated permit, DER's closure order was proper.

O P I N I O N

On September 9, 1987, Norwin YMCA (Norwin) initiated this matter by the filing of a Notice of Appeal from an order issued by the Department of Environmental Resources (DER). The order, which was issued pursuant to Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17, required Norwin to close and drain its

pool, which is located in North Huntingdon Township, Westmoreland County. Along with its notice of appeal, Norwin filed a Petition for Supersedeas. During the course of a September 24, 1987 conference call, the parties agreed that the matter could be resolved through the submission of cross-motions for summary judgment and a stipulation of facts.

The parties stipulated that the Norwin YMCA is used for instructional and therapeutic purposes only by Norwin YMCA members and members of neighboring YMCA chapters upon transference of their membership to Norwin. Membership in the Norwin YMCA is attained through the payment of a nominal fee. On November 30, 1987, Norwin filed its motion for summary judgment, arguing that its pool is not a "public bathing place" as defined by Section 2(1) of the Public Bathing Law, the Act of June 23, 1931, P.L. 899, as amended, 35 P.S. §673(1) (Public Bathing Law), because it is used for instructional and therapeutic sessions only and not amateur and professional swimming and recreative bathing. It further contends that because its use is restricted to members and members are not permitted to bring guests, the pool does not fall within the interpretation of "public bathing place" articulated by the Commonwealth Court in Commonwealth of Pennsylvania, DER v. Apple Valley Racquet Club, 20 Pa. Cmwlth. 325, 342 A.2d 150 (1975) and that the pool, despite its nominal membership fee, is restrictive and "private."

On December 30, 1987, DER filed its cross-motion for summary judgment, alleging that Norwin's pool did fall within the definition of public bathing place. DER, relying on New York State Club Ass'n, Inc. v. City of New York, 69 N.Y. 2d 211, 513 N.Y.S. 2d 349, 505 N.E. 2d 915 (1987) and Matter of United States Power Squadron v. State Human Rights Appeal Board, 59 N.Y. 2d 401, 465 N.Y.S. 2d 871, 452 N.E. 2d 1199 (1983), contends that selectivity in membership, rather than the acceptance of guests or

membership fees, should be the determining factor in assessing whether the Norwin pool is truly private.

The Board is authorized to render summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. P.G.W. Associates v. DER and Angerman, EHB Docket No. 86-635-R (Opinion and order issued March 16, 1988).

The material facts have been stipulated in this appeal, and, based on those stipulations, we must determine whether Norwin's pool is a "public bathing place," thereby placing it within the ambit of the permitting requirement of Section 5 of the Public Bathing Law, 35 P.S. §676. This is a two part determination: we must consider the use and the users. If the pool is, in fact a "public bathing place" and Norwin did not procure a permit, a fact Norwin does not dispute, DER's closure order was proper pursuant to both Section 12 of the Public Bathing Law, 35 P.S. §683, and §1917-A of the Administrative Code.

Norwin believes that the use of the pool for instructional and therapeutic purposes falls outside of the statutory definition of "public bathing place" in §2(1) of the statute, specifically the phrase "amateur and professional swimming or recreative bathing." Because the Public Bathing Law does not define the terms "amateur," "professional" or "recreative," we must look to their common and ordinary meaning. §1903(b) of the Statutory Construction Act, 1 Pa.C.S.A. §1903(b); and Nemacolin, Inc. v. DER, ____ Pa.Cmwlth ____, 541 A.2d 811 (1988). An "amateur" is defined in Webster's New Collegiate Dictionary as "one who engages in a pursuit, study, science or

sport as a pastime rather than a profession." Id at 35 (1976).[1] Based on that definition, we believe instructional and therapeutic swimming to fall within the category of amateur swimming.

Next, we must determine whether the Norwin facility is a public facility. Norwin, relying on Apple Valley Racquet Club, supra, urges that the nature of its guest policy is the indicia by which we should judge whether it is public or private. The Commonwealth Court did not suggest in Apple Valley Racquet Club that guest policy was the sole determinant of whether a bathing place was public, although it did reach its holding on that basis. The Commonwealth Court looked to the case law interpreting the definition of "public accommodation" under the Pennsylvania Human Relations Act, the Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §951 et seq. in deciding the case and, in doing so, recognized the trend toward a broad definition in other jurisdictions. We have found no relevant Pennsylvania cases since the landmark Commonwealth, Human Relations Commission v. Loyal Order of Moose, Lodge No. 107, 448 Pa. 451, 294 A.2d 594 (1972) cited as the basis for the Apple Valley Racquet Club decision. There is some dicta in Human Relations Commission v. Landsdowne Swim Club, 515 Pa. 1, 526 A.2d 758 (1987) relating to whether a pool at a swimming club may be a public accommodation and citing the New York precedent in DER's brief. We will use that New York case law as guidance in this matter.

In New York State Club, Inc., supra, upon which DER relies, citing In The Matter of Power Squadrons, supra, the New York Court of Appeals, in enforcing New York City's Human Rights Law, held that clubs are not public

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[1]See also Mt. Laurel Racing Association v. Zoning Hearing Board, 73 Pa.Cmwlth 531, 458 A.2d 1043 (1983). There, the Commonwealth Court held that undefined terms in a zoning ordinance must be given their plain meaning and used Webster's Dictionary as its source. Id at 1899 (1966).

accommodations if they are "distinctly private" in nature. See 505 N.E. 2d 918. The New York Court of Appeals held in the Power Squadron case that:

> "... The essence of a private club is selectivity in its membership. It must have a plan or purpose of exclusiveness... Organizations which routinely accept applicants and place no subjective limits on the numbers of persons eligible for membership are not private clubs..."
>
> 452 N.E. 2d at 1204 (citations omitted)

The stipulations herein establish that the payment of a nominal fee, and nothing else, is the prerequisite to membership in the Norwin pool. Because there is no systematic and subjective membership policy, Norwin's pool, to be consistent with the broad purpose of the Public Bathing Law to protect public health and safety, must be regarded as a "public bathing place." As such, Norwin was required to procure a permit under Section 5 of the Public Bathing Law, 35 P.S. §676. When it failed to do so, DER's closure order was properly issued pursuant to both Section 12 of the Public Bathing Law, 35 P.S. §683 and Section 1917-A of the Administrative Code. Accordingly, we will enter summary judgment in DER's favor.

O R D E R

AND NOW, this 18th day of October, 1988, it is ordered that DER's motion for summary judgment is granted and the appeal of Norwin YMCA at Docket No. 87-384-R is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: October 18, 1988

cc: **Bureau of Litigation**
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David Strazinsky, Esq.
North Huntingdon, PA

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

M. DIANE SMITH
SECRETARY TO THE BOARD

HEPBURNIA COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 85-309-G**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** October 19, 1988

OPINION AND ORDER SUR APPLICATION OF AWARD OF ADJUDICATORY FEES

Synopsis

An application for an award of fees and expenses under the Commonwealth Agency Adjudicatory Expenses Award Law is denied where the applicant fails to provide information sufficient to make a determination that it falls within the definition of "party" set forth in the statute.

OPINION

On May 28, 1986, the Board issued an adjudication which sustained, in part, and dismissed, in part, Hepburnia Coal Company's (Hepburnia) appeals of the Department of Environmental Resources' (Department) alleged refusal to process certain of Hepburnia's then-pending mining permit applications and its issuance of an order directing Hepburnia to treat three pollutional discharges purportedly caused by Hepburnia. The Board held that Hepburnia had waived its right to contest the Department's alleged failure to act on its mining permit applications and dismissed that portion of Hepburnia's appeals. Since Hepburnia admitted its responsibility for two of the discharges, the Board

also dismissed that portion of Hepburnia's appeals. However, the Board sustained Hepburnia's appeal with respect to its liability for treating the remaining discharge. See Hepburnia Coal Company, 1986 EHB 563.

Subsequent to the issuance of the adjudication, Hepburnia, on June 27, 1986, filed an application for the award of attorneys fees and expenses in the amount of $185,290.95, contending that there was no substantial justification for the Department's order. Attached to the application was a detailed accounting of Hepburnia's legal fees and other expenses associated with the prosecution of its appeal before the Board.

The Department responded to Hepburnia's application on July 9, 1986, denying that its compliance order directing Hepburnia to treat the discharges was not substantially justified. The Department's response also contained new matter contesting the amount and propriety of various elements of the requested award, as well as Hepburnia's eligibility for such an award under the Act of December 13, 1982, P.L. 1127, as amended, 71 P.S. §2031 et seq., commonly referred to as the Commonwealth Adjudicatory Expenses Award Law ("Costs Act"). Hepburnia replied to the Department's new matter on August 1, 1986.

The Board Member to whom the appeal was assigned for primary handling, Edward Gerjuoy, resigned from the Board on December 31, 1986, without having prepared a ruling on the application. Thereafter, Hepburnia, on May 4, 1988, inquired of the status of its application.

The Board, after having reviewed Hepburnia's application, the Department's response and new matter, and Hepburnia's reply, determined that it was without sufficient information to determine whether Hepburnia fell within the

definition of "party" in the Costs Act,[1] and, by order dated June 21, 1988, deferred action on Hepburnia's application until the receipt of additional information from Hepburnia relating to whether it fell within the statutory definition of party. Hepburnia was to submit the requested information on or before July 20, 1988.

Hepburnia failed to file the requested information in accordance with the Board's order of June 21, 1988, and the Board, by letter dated July 28, 1988, notified Hepburnia of its default and advised it that sanctions would be imposed unless the information were filed by August 8, 1988. Hepburnia, by letter dated August 4, 1988, requested an additional two weeks to respond to the Board's order. The Board, by order dated August 9, 1988, granted Hepburnia an extension to August 22, 1988 to file the requested information. As of the date of this opinion and order, Hepburnia has failed to file the information in accordance with the Board's order. We will dismiss Hepburnia's application for the reasons which follow.

Section 3(a) of the Costs Act provides that:

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

"Party" is defined in §2 of the Costs Act as

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[1] Hepburnia did not cite any statutory authority in its application for fees and expenses. Because we are aware of no authority under either the Clean Streams Law, the Act of June 25, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., or the Surface Mining Conservation and Reclamation Act, the Act of July 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq., which authorizes the award of attorneys fees and expenses where the recipient of an order from the Department prevails in an appeal of that order to the Board, we treated Hepburnia's application as an application pursuant to the Costs Act.

> A party, as defined in 2 Pa.C.S. §101, which is an individual, partnership, corporation, association or public or private organization other than an agency. The term does not include:
>
> (1) Any individual whose net worth exceeded $500,000 at the time the adversary adjudication was initiated and any sole owner of an unincorporated business, or any partnership, corporation, association, or organization whose net worth exceeded $2,000,000 at the time the adversary adjudication was initiated.
>
> (2) Any sole owner of an unincorporated business, or any partnership, corporation, association or organization having more than 250 employees at the time the adversary adjudication was initiated.
>
> (3) Any party represented by counsel paid, directly or indirectly, in whole or in part, by an appropriation, grant, subsidy or loan made by the state, local or federal government.

Section 3(b) of the Costs Act requires a party to file an application establishing eligibility. Consequently, to be eligible for an award of fees and expenses under the Costs Act, one must fall within the definition of "party" and must file an application that establishes that fact.

The regulations implementing the Costs Act[2] provide at 4 Pa.Code §2.6 et seq. that:

> (a) To be eligible for an award of fees and expenses under the act, an applicant must be a party, as defined in the act; must prevail over the Commonwealth agency initiating the adversary adjudication; must allege that the position of the Commonwealth agency was not substantially justified; and must meet all of the conditions set forth in the act.

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[2] 4 Pa.Code §2.1 et seq. is applicable to all executive and independent Commonwealth agencies, 4 Pa.Code §2.4. However, agencies are given the choice in 4 Pa.Code §2.9 to either adopt the procedures set forth therein or establish their own procedures. The Department did not adopt the uniform procedures, nor did it adopt its own procedures. We will, however, use the uniform procedures as guidance.

(b) The applicant must provide the information required by this subchapter and by the Application for Award of Adjudicative Fees and Expenses.

(c) Each applicant shall provide a statement showing the net worth of the applicant. The statement may be in any form convenient to the applicant that provides full disclosure of assets and liabilities and is sufficient to determine eligibility under this subchapter. The net worth statement shall be made available only to the adjudicative officer and the Commonwealth agency except when an appeal is taken, in which case the net worth statement shall be included in the record of the proceeding in which an award is sought.

(d) For purposes of eligibility, the net worth and number of employees of an applicant will be determined as of the date the proceeding was initiated.

(emphasis added)

Hepburnia did not furnish such a statement in its application for award of fees and expenses, nor did it avail itself of the opportunity given to it to provide the requisite information.[3] Therefore, we have no choice but to deny its application.

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[3] 4 Pa.Code §2.14 authorizes reopening the record following the adjudication to "require additional evidence relating to the amount of fees and expenses and whether or not they were reasonable and necessary." It does not authorize reopening the record to hear evidence regarding an applicant's eligibility, since eligibility must be established in the application. 4 Pa.Code §2.6(c).

O R D E R

AND NOW, this 19th day of October, 1988, it is ordered that Hepburnia Coal Company's application for award of attorneys fees and expenses is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: October 19, 1988

cc: **Bureau of Litigation**
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ENVIRONMENTAL HEARING BOARD
101 South Second Street
Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

TOWNSHIP OF MAXATAWNY	:	
v.	:	EHB Docket No. 87-271-W
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
CLIFFORD R. HILL SANITATION	:	
SERVICE, Permittee	:	Issued: October 19, 1988

OPINION AND ORDER

Synopsis

Appeal is dismissed as a sanction for failure to comply with Board orders.

OPINION

This matter was initiated on July 10, 1987, with the filing of a notice of appeal by the Township of Maxatawny (Township) challenging the issuance of a solid waste transfer station permit to Clifford R. Hill Sanitation Service (Hill) by the Department of Environmental Resources (Department). As grounds for its appeal the Township stated "Local municipal zoning regulations preclude use being sought by applicant and therefore, permit should be rejected."

Pre-hearing memoranda were duly filed by the Township and Hill, and the Department advised the Board, consistent with its usual practice, that it would not actively participate in the appeal. The Board reviewed the pre-hearing memoranda and ascertained that the only issue raised by the Township was that the Department's issuance of the permit was an abuse of

discretion because the Township's zoning ordinance precluded Hill from using the site as a transfer station. It then conducted a telephonic conference with the parties on January 12, 1988 to discuss disposition of the appeal without hearing.

During the course of the conference call the Township advised the Board it would withdraw its appeal. When no withdrawal was filed, the Board, by order dated July 14, 1988, required the Township to either file its request for withdrawal of the appeal or a motion for summary judgment on or before July 29, 1988. The Township failed to comply with the Board's July 14, 1988 order, and the Board, on August 30, 1988, issued a rule upon the Township to show cause why its appeal should not be dismissed as a sanction for ignoring Board orders. The rule was returnable on September 30, 1988. The Township did not respond. In light of the Township's disregard for the Board's orders, dismissal pursuant to 25 Pa.Code §21.124 is an appropriate sanction.

O R D E R

AND NOW, this 19th day of October, 1988, it is ordered that the Board's August 30, 1988 rule is made absolute and the Township of Maxatawny's appeal is dismissed as a sanction for disregarding Board orders.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

William A. Roth
WILLIAM A. ROTH, MEMBER

Robert D. Myers
ROBERT D. MYERS, MEMBER

DATED: October 19, 1988

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M. DIANE SMITH
SECRETARY TO THE BOARD

NEWLIN CORPORATION, SOMERSET OF VIRGINIA INCORPORATED, DAVID EHRLICH AND RICHARD WINN	:	
v.	:	**EHB Docket No. 83-237-W**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** October 21, 1988

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

A motion for summary judgment by the recipients of an order to perform abatement work at a solid waste disposal site will be denied where there are genuine issues of material fact relating to ownership of the site, to the role of various individuals in the operation of the site, and to whether a corporation was merely an alter ego for individuals involved with the disposal.

OPINION

This appeal by Newlin Corporation (Newlin) and Somerset Strippers of Virginia, Inc. (Somerset) and the two stockholders of Newlin, David Ehrlich and Richard Winn (collectively, Appellants), concerns a September 21, 1983 order of the Department of Environmental Resources (Department) requiring Appellants to perform a complete hydrogeologic study and abatement program for groundwater contamination by leachate from the Strasburg Landfill in Newlin

Township, Chester County.[1]

The landfill was originally owned by Strasburg Associates (SA), a Pennsylvania joint venture consisting of two limited partnerships, SA I and SA II, both of which had as their general partner, Earle Hart. On August 15, 1975, the Department issued a sanitary landfill permit for 22 acres of the site. Construction of the landfill was halted through October, 1978 due to zoning disputes, groundwater problems and erosion control problems. Financial difficulties led to a search for investors and the formation of a joint venture known as Strasburg Landfill Associates (SLA).

The joint venture, as described in the Board's adjudication in Newlin Township v. DER, 1979 EHB 33, consisted of Newlin, Somerset, and a third corporation controlled by Hart known as Eco-Waste, Inc. The interests and liabilities of the joint venturers were 50% for Eco-Waste and 25% each for the other joint venturers. The purpose of the joint venture was to acquire, own, improve, and operate a sanitary landfill on the property owned by SA. The Department concluded that the proposed joint venture and sale-leaseback arrangement would constitute a change of ownership requiring a transfer of the permit in accordance with 25 Pa.Code §75.22(f). When SLA and SA learned of this, they entered into an agreement terminating the landfill lease-management contract and submitted it for the Department's approval. Upon reviewing the documents, the Department accepted the agreement in a letter dated September 8, 1978.

Meanwhile, SA, SLA, the American Bank, and the Chester County Industrial Development Authority (CCIDA) were negotiating a commitment and

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[1] Where no other citation appears, the facts of this case have been drawn from the opinion of the Commonwealth Court in Strasburg Associates v. Newlin Township, 52 Pa.Cmwlth. 514, 415 A.2d 1014 (1980).

mortgage financing for the purchase and construction of the landfill. On October 11, 1978, the final agreements were executed, the tract was sold to CCIDA, and resold by installment sale to SLA, financed by an American Bank mortgage. SLA took title and became owner of the tract including the landfill, then leased to SA that portion which included the landfill. According to the facts in the Board's 1979 adjudication, the lease provided that SLA receive 75% of SA's net revenue from operation of the landfill.

On October 9, 1978, Newlin Township appealed to this Board, contending that the Department erred in approving the agreements between SLA and SA without reissuance of the permit. In an adjudication dated February 16, 1979, the Board held that the proposed agreement between SLA and SA amounted to a transfer of control requiring compliance with 25 Pa.Code §75.22(f)'s "change of ownership" provision. Newlin Township v. DER, 1979 EHB 33. The Commonwealth Court reversed the adjudication on appeal, finding that Newlin Township lacked standing to bring the appeal. Strasburg Associates v. Newlin Township, 52 Pa.Cmwlth.514, 415 A.2d 1014 (1980).

In April of 1983, the Department issued to SA and Hart an assessment of civil penalties under the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. (SWMA) and an order indefinitely suspending SA's permit for exceeding maximum slope grades, inadequate terracing and cover, failing to implement erosion and sedimentation controls, and discharging leachate. The order and assessment were appealed to the Board and SA and Hart were found liable. Strasburg Associates v. DER, 1984 EHB 423.

Upon finding that certain conditions remained unacceptable, the Department issued another order dated September 21, 1983, which is the subject

of this current appeal, to Newlin, Somerset, Eco-Waste, SLA, SA, Hart, Winn and Ehrlich, directing them to take action to eliminate soil, groundwater and surface water pollution and to remove leachate from the landfill. The order also required groundwater and soil studies and a pollution abatement program. On October 21, 1983, Strasburg Landfill, SA, SLA, Newlin, Somerset, Eco-Waste, Hart, Winn, and Ehrlich filed an appeal from the September 21, 1983 order.[2]

The appeals of Strasburg Landfill, SA, Eco-Waste, and Hart were dismissed for lack of prosecution by Board order dated March 19, 1987.

On April 7, 1988, Newlin, Somerset, Ehrlich, and Winn filed a motion for summary judgment, contending that as of April 14, 1986, they no longer had any interest in SLA, having conveyed their 50% interest in the joint venture to M. H. Properties, Inc. Ehrlich and Winn maintain they cannot be held personally liable for abatement of pollution, since neither they nor the corporations were ever listed as a permittee and they are not the current landowners. In defense of this claim, Ehrlich and Winn explain there is no positive proof of their intentional neglect or misconduct, no evidence to support piercing the corporate veil, and no evidence establishing that their sale of their interests in SLA was not a valid and binding transaction.

On May 12, 1988, the Department filed its response to the motion, alleging that because SLA is in privity with SA, SLA should be bound by the Board's 1979 adjudication which was reversed only as it related to standing. Further, the Department maintains that Newlin and Somerset remain liable as owners under the SWMA, the Administrative Code, the Act of April 9, 1929, P.L.

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[2] On May 9, 1984, the Department denied SA's application for a solid waste permit to expand Strasburg Landfill. The denial letter, which made detailed findings regarding site conditions and the failure to control those conditions, was sent to and received by all parties to the present appeal. None of the parties appealed the expansion denial letter.

177, as amended, 71 P.S. §510-17, and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (Clean Streams Law), and that the Board is limited in its review to the facts as they existed at the time the September 21, 1983 order was issued. Finally, the Department avers in its pre-hearing memorandum, as well as in its response to the motion for summary judgment, that Newlin and Somerset's realty transfer was fraudulent, for inadequate consideration and made only to avoid liability as property owners and that there is ample evidence to pierce the corporate veil.

In its disposition of a motion for summary judgment, the Board is authorized to render summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The Board must read the motion for summary judgment in the light most favorable to the non-moving party. Robert C. Penoyer v. DER, 1987 EHB 131.

At the outset, we must address the issue of what point in time we are reviewing the Department's action. Newlin and Somerset contend, among other things, that the sale of their interest in the SLA joint venture in 1986 absolved them of any potential liability as landowners under the Department's 1983 order. Our task, however, is to determine whether the Department's issuance of the order in September, 1983 was an abuse of discretion. What effect, if any, the sale of the 50% interest in SLA to M. H. Properties is not before us. The question of landowner liability is, and we do believe there is authority under the relevant environmental control statutes for imposition of such liability.

Section 316 of the Clean Streams Law authorizes the Department to order landowners, including "any person holding title to or having a

proprietary interest in either surface or subsurface rights," and occupiers to correct pollutional conditions on or under the land. National Wood Preservers v. DER, 489 Pa. 221, 414 A.2d 37 (1980), appeal dismissed, 449 U.S. 803 (1980), and Com., DER v. PBS Coals, Inc., ___ Pa.Cmwlth. ___, 534 A.2d 1130 (1987). And, the SWMA has been broadly construed in concert with §1917-A of the Administrative Code to empower the Department to order landowners or occupiers to abate nuisance conditions. Ryan v. DER, 30 Pa.Cmwlth. 180, 373 A.2d 475 (1977); Reeser's Landfill v. DER, 1984 EHB 398.

Each of the theories advanced by the Department in response to Appellants' summary judgment motion for holding corporate officers liable - liability as former landowners, participation of the officers under tort law, and the piercing of Newlin"s corporate veil - relies primarily on the premise that SLA as a joint venture held title to the tract of land including the landfill. Newlin and Somerset, through their counsel in the brief supporting summary judgment, state, "It is undisputed that SLA holds title to the landfill property." We have determined this to be a material fact remaining in dispute sufficient to defeat a motion for summary judgment at this time.

The record as it now appears before the Board does not show the chain of ownership. This becomes a major factor if the Department intends to hold either Appellant liable as an owner or as a major stockholder in the corporation if the corporate veil is pierced. The unverified information filed with the Board indicates by quitclaim deed dated on or about May 5, 1986 that Newlin and Somerset may have had an interest to transfer to M. H. Properties. However, that very instrument also indicates that on October 11, 1978, the date of the formalized agreement between SLA and SA, there was a deed from SA I and SA II to the CCIDA. In a paragraph following the descriptions of the various tracts of land to be conveyed from Newlin and

Somerset to M. H. Properties, the conveyance to CCIDA is referenced as follows:

> BEING the same premises which Strasburg Associates II, Limited Partnerships, by deed dated October 11, 1978, and recorded in the Recorder of Deeds Office of Chester County, Pennsylvania in Deed Book V-53, page 324, granted and conveyed to Chester County Industrial Development Authority, party hereto, in fee.

It is unclear what interest was conveyed to CCIDA or the current status of that conveyance. Both the 1979 Board adjudication and the 1980 Commonwealth Court decision deciding that case on appeal refer to the tract being resold by installment sale to SLA. Again, we do not know the status of that agreement or what quality of title was transferred to SLA from CCIDA. The question of ownership cannot be resolved based on the record now before the Board. Because summary judgment must be viewed in the light most favorable to the non-moving party, it is not possible to render summary judgment in the Appellants' favor in the absence of this critical information.

Even if the Board had been able to resolve the ownership issue in Appellants' favor, material issues of fact and law remain in dispute under the other theories advanced by the Department supporting corporate liability and personal liability of the officers.

In the motion for summary judgment, the Appellants argue that tort liability under a participation theory is not possible here. Newlin, Somerset, Ehrlich and Winn aver that to hold corporate officers liable requires proof positive of wrongful conduct evidencing intentional neglect or misconduct as outlined in John E. Kaites, et al. v. DER, ___ Pa.Cmwlth. ___, 529 A.2d 1148 (1987). They maintain no such evidence has been produced here. Further, they allege there was no participation on the part of Ehrlich or Winn, either positive or negative. In an affidavit attached to the

Appellants' brief in support of summary judgment, Ehrlich states:

> Finally, I must address the question of whether either Richard Winn or myself in fact participated in the operation of the Strasburg Landfill. A short answer is that we did not do anything. Thus, leaving aside the legal and/or theoretical question of whether, under the documents, we had a right to participate, the reality of the situation is that we did not participate either physically, mentally, or decisionally, in the operation of the landfill.

The Department argues that Ehrlich and Winn should be held individually liable for committing gross non-feasance in their roles as corporate officers of Newlin. The Department alleges Ehrlich and Winn had a higher obligation as owners than to watch as Hart allegedly mismanaged the site. Also, in support of the participation theory, the Department points to two employment agreements with Ehrlich; one for a one year period as stated in SLA's joint venture agreement, and a separate five year agreement which is referenced in the Board's 1979 adjudication. Under both of these agreements, Ehrlich was to act as a supervisor of operations resposible for the ordinary and customary operations of the joint venture for a fee equal to four per cent (4%) of the gross operating revenues of the landfill for the year.

It is unclear what Ehrlich's actual role was as supervisor of landfill operations and how much control he exercised in that position. The existence of the contradictory employment agreements and the affidavit create a genuine dispute as to the material fact sufficient to defeat a motion for summary judgment at this time.

Finally, Newlin, Ehrlich and Winn argue there is no evidence to support piercing the corporate veil of Newlin. In support of this argument, they point to the affidavit of Ehrlich which they assert shows the use of the corporate form to be regular and proper in every sense, and to the absence of contradictory evidence.

By contrast, the Department cites several specific reasons for finding that Newlin has operated as the alter ego of Ehrlich and Winn, arguing that the corporate veil should be pierced and that Ehrlich and Winn held personally liable for the abatement of pollution at the site. The Department alleges, among other things, that Newlin was undercapitalized, funds of Ehrlich and Winn were commingled with corporate funds without formality, and that the corporation never paid a dividend to shareholders. Again, viewing the motion in the light most favorable to the Department, the non-moving party, it would be inappropriate to grant summary judgment in the Appellants' favor in the absence of more concrete evidence supporting their argument that use of the corporate form was not irregular.

O R D E R

AND NOW, this 21st day of October, 1988, it is ordered that the motion of Newlin Corporation, Somerset Strippers of Virginia, Inc., David Ehrlich, and Richard Winn for summary judgment is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: October 21, 1988

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M. DIANE SMITH
SECRETARY TO THE BOARD

GERALD W. WYANT	:	EHB Docket No. 84-422-M
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
BOROUGH OF NEWRY, Permittee	:	Issued: October 24, 1988

ADJUDICATION

By Maxine Woelfling, Chairman

Synopsis

The Board dismisses a third party appeal of the issuance of permits to a municipality which authorized the construction and operation of a sewage treatment plant, holding that the appellant failed to satisfy its burden of proof. The Board refused to take official notice of an engineering text which appellant sought to introduce in support of his contentions that the Department of Environmental Resources had not properly calculated discharge limitations because of the age of the text and the fact that the formulae contained therein were of critial importance to resolution of the issues in the appeal. The Board also refused to admit the text under 25 Pa.Code §21.107(a) because there was no corroborating evidence on the record and, again, because the formulae were critical to resolution of the issues in the appeal.

INTRODUCTION

On or about November 14, 1983, the Borough of Newry (Newry) adopted a revision to its official sewage facilities plan (official plan) to provide for the construction of a wastewater collection system and treatment facility. The Department of Environmental Resources (Department) published notice of its action approving Newry's plan revision at 14 Pa.B. 188 (Jan. 14, 1984). Thereafter, the Department issued National Pollutant Discharge Elimination System (NPDES) Permit No. PA0081621 and Water Quality Management (WQM) Permit No. 9784403 to Newry on November 2, 1984; the permits authorized the construction and operation of the wastewater collection and treatment facilities incorporated in the Newry official plan. Notice of the issuance of these permits was published at 14 Pa.B. 4197 (Nov. 17, 1984). Gerald W. Wyant (Wyant) filed an appeal with the Board on December 17, 1984, challenging the Department's actions in approving the revision of Newry's official plan and issuing the permits.

Newry filed a motion to dismiss that portion of Wyant's appeal pertaining to the Department's approval of Newry's revision of its official plan, contending that since Wyant's appeal was filed more than thirty days after publication of the Department's approval of the plan revision in the Pennsylvania Bulletin, the Board was without jurisdiction to hear that portion of Wyant's appeal. The Board granted Newry's motion and dismissed that portion of Wyant's appeal relating to the Department's approval of Newry's plan revision. Gerald W. Wyant v. DER, 1985 EHB 849. The Board's dismissal of that portion of Wyant's appeal was affirmed by the Commonwealth Court in an unreported opinion. Gerald W. Wyant v. DER and Borough of Newry, No. 3247 C.D. 1985 (Pa.Cmwlth, filed January 7, 1987).

Hearings on the remaining issues in the appeal, the propriety of the Department's issuance of the NPDES and WQM Permits, were conducted on March 10-14, 1986. The parties duly filed their post-hearing briefs and the matter is now ripe for adjudication. Consistent with our precedent, any issue not expressly raised by the parties in their post-hearing briefs is waived. Robert Kwalwasser v. DER and Kerry Coal Company, 1986 EHB 24.

FINDINGS OF FACT

1. Appellant is Wyant, an individual residing in Blair Township, Blair County, who owns a tract of land near Newry upon which Newry intends to construct a sewage treatment plant. (N.T. 6-7)

2. Appellee is the Department, the administrative agency of the Commonwealth of Pennsylvania vested with the authority and the duty to administer the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 et seq., and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq.

3. Permittee is Newry, a municipality of the County of Blair.

4. On November 2, 1984, the Department issued NPDES Permit No. PA0081621 and WQM Permit No. 0784403 to Newry, authorizing the construction and operation of a sewage treatment plant that will discharge treated effluent into Poplar Run, a tributary of the Frankstown Branch of the Juniata River. (App.Ex. 41 and 45)

5. Poplar Run is designated a cold water fishery under 25 Pa.Code §93.9, Drainage List N.

6. The Department published notice of its issuance of the NPDES and WQM permits to Newry at 14 Pa.B. 4197 (Nov. 17, 1984).

7. Wyant filed an appeal with the Board challenging the issuance of these permits on December 17, 1984.

8. The NPDES permit contained the following effluent limits expressed as concentrations of milligrams per liter (mg/l):

Biochemical oxygen demand (BOD)	30 mg/l	(monthly average)
Total suspended solids (TSS)	30 mg/l	(monthly average)
Dissolved oxygen (dO)	5 mg/l	(at all times)
Ammonia nitrogen	12 mg/l	(monthly average)

(App.Ex.41)

9. These effluent limits were developed by Martin Ferry, a planning engineer in the Department's Harrisburg Regional Office. (N.T. 103)

10. Ferry employed a stream design flow (expressed as Q_{7-10}) of 1.75 cubic feet per second (cfs) (N.T. 115), calculated and derived from the U. S. Geological Survey (USGS) gauge station at Williamsburg, Pennsylvania, and then adjusted for differences known to exist between the Frankstown Branch of the Juniata River, on which the gauge station is located, and Poplar Run, where the discharge is to be located. (N.T. 117-120 and 199-200)

11. Q_{7-10}, defined as the lowest seven day average flow that recurs every ten years, often is impossible to determine exactly since it requires the measurement of a particular stream flow over a seven day consecutive time period which one would know to be the lowest average seven day consecutive flow to occur in a ten year interval. (N.T. 198-199)

12. Wyant called no witnesses nor produced any evidence to indicate that the design flow, or Q_{7-10}, was anything other than that calculated by the Department, or that the Department's calculations were incorrect.

13. Mr. Ferry used a computer model to calculate the impact of the effluent upon the dO in the stream. The computer model showed the critical dO

level to be 7.67 mg/l; the water quality standard for Poplar Run is 6.0 mg/l. (N.T. 210-211; App.Ex. 32)

14. The NPDES permit did not contain a temperature limitation. (App. Ex. 41)

15. Wyant produced no evidence to establish the temperature of the effluent from the plant, or to establish that it would violate water quality criteria for Poplar Run.

16. In calculating the ammonia nitrogen limitation, Ferry considered other sources of pollutant discharged in Poplar Run and concluded these sources operated independently of one another and, therefore, a wasteload allocation under 25 Pa.Code §95.3 was not necessary. (N.T. 470)

17. Ferry used a median pH value of 7.5, also derived from the Williamsburg gauge station, a station used as a data base for over 50 years. (N.T. 140) This pH value also corresponded to the pH measurement in the aquatic survey performed by Ronald Hughey, an aquatic biologist for the Department, at Station No. 2, the station closest to the proposed point of discharge. (N.T. 78, 140, and 201)

18. Using the design flow of 1.75 cfs and a median pH of 7.5, Ferry calculated the limit for ammonia nitrogen, based upon a water quality goal of .02 mg/l unionized ammonia (N.T. 126-127) and applying a safety factor of 33%, and arrived at an effluent limit of 13.25 mg/l. (App.Ex. 32)

19. Ferry also calculated the ammonia nitrogen effluent limit based upon regulations which became effective after the NPDES permit had been issued (N.T. 142); found these calculations yielded an ammonia nitrogen effluent limit of 14 mg/l as a monthly average, with a 30% safety factor. (N.T. 441-475)

20. By providing a 33% reserve (or a 30% reserve under the new regulations), Ferry provided for both a reserve and a margin of safety in the effluent limit, so that the discharge will not consume the entire assimilative capacity of the stream. (N.T. 477-478)

21. Wyant produced no evidence to establish that the ammonia nitrogen limits in Newry's NPDES permit violated the Department's water quality standards or were otherwise improperly calculated.

22. The application for the WQM permit was reviewed by Ms. Deann Steiner, a sanitary engineer in the Facility Section of the Bureau of Water Quality Management in the Department's Harrisburg Regional Office. (N.T. 240). Steiner concluded that the sewage treatment plant as designed could meet the effluent limits in the NPDES permit, including BOD requirements (N.T. 249 and App.Ex. 43, p.6) and ammonia nitrogen limitations. (N.T. 287-288 and App.Ex. 43, p.9)

23. Wyant produced no evidence to refute Steiner's conclusion that the sewage treatment plant was properly designed and would meet the effluent limits in the NPDES permit.

24. The geological and hydrogeological aspects of the WQM permit application, specifically Module 5A, were reviewed by Mr. Jeffrey Molnar, a Department hydrogeologist. (N.T. 374-375 and App.Ex. 29)

25. Mr. Molnar originally determined that the liner of the sedimentation ponds of the Newry sewage treatment plant would not meet the Department's requirement of a specific discharge rate of $5x10^{-7}$ centimeters per second (cm/sec.). (N.T. 357-358 and App.Ex. 6)

26. Newry responded to Molnar's concerns with a redesigned liner which met the Department's requirements. (N.T. 356-361, 376-378 and Ex. 67)

This redesign was satisfactory, even though the liner was not two feet thick as Molnar had originally suggested, since the increased application of bentonite in the liner would increase its imperviousness. (N.T. 376-378)

27. Although Wyant asserted that engineering reports of the American Colloid Company disproved Molnar's conclusions and made speculations regarding the possible effects of drainage swale around the sewage treatment plant, no evidence was presented to support these assertions.

DISCUSSION

1. Burden of Proof

Under 25 Pa.Code §21.101(c)(3), a third party appealing the Department's issuance of a permit has the burden of proof. Joseph D. Hill, et al. v. DER and Horsham Township, EHB Docket No. 85-356-R (Adjudication issued March 22, 1988). The scope of the Board's review is to determine whether the Department's action was an abuse of discretion or an arbitrary exercise of its duties. Warren Sand and Gravel v. DER, 20 Pa.Cmwlth. 186, 341 A.2d 556 (1975). Accordingly, Wyant has the burden of establishing that in this case the Department's issuance of the NPDES and the WQM permits to Newry constituted an abuse of discretion or an arbitrary exercise of its authority. We rule here that Wyant has failed to satisfy this burden on the record before this Board.

Throughout this proceeding, Wyant has suggested alternate ways which the Department could have conducted its review and evaluated data and has suggested other conclusions which he believes should have been made; however, Wyant failed to produce any credible or competent documentary evidence or expert witness testimony to bolster these allegations and assumptions. Rather, Wyant sought to introduce such evidence through the testimony of his counsel, and we have no choice but to disregard such testimony.

Also, Wyant urges us to shift this burden of proof back to the Department under 25 Pa.Code §21.101(b)(4) on the strength of several arguments. In his post-hearing brief, Wyant alleges that the Department has failed in its stewardship of the Commonwealth's natural resources, citing Article I, Section 27 of the Pennsylvania Constitution and Payne v. Kassab, 11 Pa.Cmwlth. 14, 312 A.2d 86 (1973), aff'd 468 Pa. 226, 36 A.2d 263 (1976). Payne mandates a three-part inquiry to determine whether agency actions comport with Article I, Section 27. The so-called three-prong test under Payne requires that:

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

Wyant focuses on the first prong of the Payne test, suggesting that because the Department failed to satisfy the requirements of 25 Pa.Code, Chapters 93 and 95, for calculating the effluent limitations in the NPDES permit, it is appropriate to shift the burden back to the Department to establish that its decision to issue these permits is prudent and to demonstrate the adequacy of measures taken to reduce environmental harm to a minimum. We need not address the merits of this argument, since Wyant has not produced any evidence tending to establish that the Department failed to comply with statutes and regulations relevant to the issuance of these permits.

Wyant also cites two decisions in support of his claims that the burden of proof in this case should be shifted to the Department. Each of the

cases cited by Wyant is distinguishable. In the case of Marcon, Inc. v. DER, 76 Pa.Cmwlth. 56, 462 A.2d 969 (1983), the Commonwealth Court held the Board properly shifted the burden of proof to the Department and the permittee where hunting and fishing clubs objecting to the issuance of an NPDES permit presented expert scientific evidence showing that the discharge authorized by the permit would have deleterious effects on the receiving waters, thus establishing the likelihood of environmental harm. In so holding, the Commonwealth Court placed a great deal of reliance on the fact that the receiving waters were classified in 25 Pa.Code §93.4 as High Quality (HQ) Waters and, therefore, subject to stringent protective measures under 25 Pa.Code §95.1. Poplar Run is not classified as an HQ water, as were the receiving waters in Marcon, but an even more salient point distinguishes this case from the Marcon case. In Marcon, the burden of proof was shifted only after an initial and persuasive evidentiary showing by the appellant. Wyant, by contrast, has provided no expert scientific evidence tending to show environmental harm will likely result here. In the other case cited by Wyant, David D. Beitman v. DER and Amity Township, 1974 EHB 297, the Board found that the appellant had presented enough evidence relating to potential problems which could arise from locating a proposed sewage treatment plant on a site subject to flooding to shift the burden of proof to either the Department or the permittee to establish that this decision was prudent. Again, the decision to shift the burden of proof was made only after sufficient testimony was presented showing the likelihood of environmental harm. In fact, the evidence in the Beitman case, unlike the matter now before us, indicated that the Department utterly failed to consider the flooding problem.

In presenting his case, Wyant attempted to call as witnesses employees of the Department as on cross-examination. The Board, consistent with its

prior practice, refused to allow them to be called as on cross-examination or impeached after being called as Wyant's own witnesses, citing precedent that a Commonwealth employee cannot be examined as on cross-examination because he has no adverse interest. (N.T. 61)

The so-called adverse interest rule was contained at §7 of the Act of May 23, 1887, P.L. 158, as amended, 28 P.S. §381, and recodified at 42 Pa.C.S.A. §5935. This rule operates to compel the testimony of persons "whose interest is adverse" to the party calling them as if under cross-examination. It has been interpreted to exclude public officers and employees, since their legal rights and liabilities would not be affected by a judgment in a matter and their interest would not be promoted by the success of the adversary of the party calling them. Jordan v. Clearfield County, 107 Pa.Super. 441, 164 A.98 (1933).

More recent cases have continued this interpretation. In Pittsburgh Miracle Mile v. Board of Property Assessment Appeals, 6 Pa.Cmwlth. 187, 294 A.2d 226 (1972), the Commonwealth Court upheld the trial court's refusal to allow a taxpayer to call a member of the Board of Property Assessment Appeals for Allegheny County as if on cross-examination, finding that, "a member of the assessment board has no interest adverse to a property owner because he has no personal interest in the outcome." Id. at 231. See also, Redevelopment Authority of the City of Philadelphia v. Cohen, 31 Pa.Cmwlth. 173, 375 A.2d 881 (1975), and Commonwealth of Pennsylvania, Dept. of Health v. Brownsville Golden Age Nursing Home, Inc., ___ Pa.Cmwlth. ___, 520 A.2d 926, appeal denied, 529 A.2d 1083 (1987) (holding that employee of adverse party ordinarily is not himself "adverse" for purpose of rule permitting party to call adverse witness as on cross-examination). In this appeal, the Department is not actively defending its issuance of the permits, as is its

usual practice with third party appeals. Thus, aside from the fact that their status as public employees endows them with no adverse interest, as a practical matter, they have no adverse interest here. Therefore, we must conclude that the Department employees have no interest adverse to Wyant and cannot be called by Wyant as if under cross-examination.

2. Stream Design Flow

Stream design flow is the actual or estimated lowest seven consecutive day average flow that occurs once in ten years for a stream with an unregulated flow; it is commonly referred to as Q_{7-10}. 25 Pa.Code §93.5(b). The design flow calculated by the Department for Poplar Run is 1.75 cfs.

Wyant attacks these estimates on the basis of the testimony of Floyd Baker, a local resident who testified as to his familiarity with seasonal flow variations in Poplar Run. Wyant provided photographs of the stream, but neither these nor Baker's lay testimony provide an adequate scientific foundation to estimate stream design flow. There is no indication that the photographs were taken during a Q_{7-10} period. Baker testified that portions of this stream are considerably deeper than portions shown in the photographs produced at the hearing (N.T. 38). However, the Q_{7-10} is calculated on the basis of estimates of stream dimensions as averages for the reach of the stream from the point of discharge to the confluence with the Frankstown Branch, rather than a measurement at any one point in the reach. (N.T. 116-119; App.Ex. 32)

Wyant suggests that a pynameter should have been used to measure the flow velocity for a small stream such as Poplar Run, and yet, he provides no evidence to show the methodology employed by the Department was unreasonable. Wyant details the many factors which can affect yield, e.g. the surface water flow per unit of drainage area (N.T. 122), and cause a variance from stream to

stream, but offers no evidence that any of these factors exist in Poplar Run or were not accounted for. In fact, Ferry testified regarding other Department studies and evaluations and the fact that adjustments were made in the run-off rate to account for the differences between streams. (N.T. 118-221)

3. Stream Re-aeration

Wyant alleges that the dO levels in Poplar Run will be violative of water quality standards for this stream and that the Department's estimate of natural re-aeration due to mixing with the atmosphere through turbulence are unfounded and unreasonable (App.brief, p.28). Wyant's only support for this assertion is his rejected offer of proof to have the Board take official notice of a table of re-aeration rates in S.J. Arccibala, Waste Water Treatment and Disposal (1981), a textbook. The Board ruled the textbook to be hearsay, since it was not sponsored by a witness subject to cross-examination, nor recognized by any other witness as an authoritative work in the field (N.T. 234-9). The Board also refused to take official notice of the textbook.

Rule 201 of the Federal Rules of Evidence provides that judicial notice of a fact may be taken where it is generally known within the geographic area or capable of accurate determination by resort to sources whose accuracy are not reasonably questioned. The rule has not been adopted in Pennsylvania, although the Supreme Court, in Com. v. Casper, 481 Pa. 143, 392 A.2d 287 (1978), recognized Pennsylvania law to be consistent with it. Our courts have long taken judicial notice of medical and scientific facts, but have refused to do so where there was insufficient support in the literature for a particular proposition (Utter v. Aston-Hill Manufacturing Company, 453 Pa. 401, 309 A.2d 583 (1973)) or where a particular fact was of

critical importance to the case (Hoffman v. Misericordia Hospital of Philadelphia, 439 Pa. 501, 267 A.2d 867 (1970)). The courts have also been reluctant to judicially notice scientific or medical facts in sources published some time before, given the rapid advances in knowledge and technology (Hoffman, id.) The re-aeration rates of which Wyant wished the Board to take official notice were central to the Department's calculation of the dO effluent limit. Wyant's re-aeration rates were contained in a text copyrighted several years before the Department's decision, and the veracity and the reliability of the textbook were not established. On the other hand, the Department utilized a sophisticated computer program to make the calculation (N.T. 177). Under such circumstances, it would have been unwarranted to take official notice of the re-aeration rates in the text.

Wyant also urged the Board to admit this evidence over hearsay objections pursuant to 25 Pa.Code §21.107(a) which states that "the Board shall not be bound by technical rules of evidence and all relevant and material evidence of reasonable probative value shall be admissible." The subject of hearsay evidence in administrative proceedings was addressed by the Commonwealth Court in the well-known case of Bleilevens v. Commonwealth, State Civil Serv. Com'n, 11 Pa.Cmwlth. 1, 312 A.2d 109 (1973):

> The Hearsay Rule is not a technical rule of evidence but a basic, vital and fundamental rule of law which ought to be followed by administrative agencies at those points in their hearings when facts crucial to the issue are sought to be placed upon the record. Indeed, an adjudication of an administrative agency may not be founded wholly on hearsay evidence, although such evidence may be admitted in cases made out by circumstantial evidence, if not inconsistent with the undisputed facts, for the additional light it may throw on the matter....
>
> 312 A.2d at 111 (citations omitted)

This principle was amplified in Com., St. Bd. of Med. Ed. & Licen. v. Contakos, 21 Pa.Cmwlth. 422, 346 A.2d 850 (1975), wherein it was stated that:

> The hearsay rule, however, is not a technical rule of evidence but a fundamental rule of law which ought to be followed by administrative agencies at those points in their hearings when facts crucial to the issue are sought to be placed upon the record and an objection is made thereto. Bleilevens v. Pennsylvania State Civil Service Commission, 11 Pa.Cmwlth. 1, 312 A.2d 109 (1973). See Unemployment Compensation Board of Review v. Stiles, 19 Pa.Cmwlth. 38, 340 A.2d 594 (1975).
>
> 346 A.2d at 852

The admission of the text sought to be admitted by Wyant would be contrary to these cases for several reasons. Objections to the admission of such evidence were placed on the record by Newry, no corroborating evidence was placed in the record by Wyant, and the validity of the assumptions used by the Department to calculate the dO limits are a critical issue in this appeal.

The record shows that the discharges, as allowed by the permit, will result in an instream dO within the water quality criteria of 6.0 mg/l (App.Ex. 32, computer page). This is shown in the figures for both the time of initial discharge and at the end of the reach. The computer model shows the critical dO (the lowest value to occur) will be 7.67 mg/l, also well within the water quality criteria. (N.T. 210-211; App.Ex. 32)

4. Ammonia Nitrogen Limit

Wyant argues that the Department should have calculated the limits for ammonia nitrogen in accordance with the water quality criteria for instream ammonia nitrogen at 25 Pa.Code §93.7(c), Table 3, adopted by the Environmental Quality Board (EQB) on February 16, 1985. The Department responds that it has shown that under either the regulations existing at the time of the NPDES permit's issuance or those subsequently adopted by the EQB, the ammonia

nitrogen concentration in Newry's discharge will not violate water quality criteria. Ferry calculated the acceptable discharge to be 13.25 mg/l with a 33% safety margin under the old regulations (N.T. 126, App.Ex. 32). Under the new regulations, he calculated an acceptable level of discharge to be 14 mg/l with a 30% safety factor (N.T. 440-442, 445). The limitation included in the permit is 12.0 mg/l.

Wyant also objects to Ferry's estimate of the median pH of 7.5 for Poplar Run. The pH is a necessary element of the computation required to calculate instream ammonia nitrogen.[1] Although the pH levels were not determined with measurements directly from Poplar Run, Ferry testified he derived the 7.5 figure from data at the Williamsburg water quality station which has a 50 year data base (N.T. 200, 245). This 7.5 value also corresponded with Ronald Hughey's measurement at Station 2 (Permittee's Ex. 1), the station closest to the point of the proposed discharge (N.T. 75, 94-95, 201; App.Ex. 21). Ferry testified that he relied on the network station's data due to its long historical record, finding it to be more valid than two other pH readings made in one day in 1980 by Hughey showing pH levels of 7.9 upstream and 7.4 downstream.

Wyant made extensive arguments (N.T. 465-468) that the disparity between Ferry's pH values and Hughey's pH values was evidence of the need for a wasteload allocation under 25 Pa.Code §95.3. In particular, 25 Pa.Code §95.3(c) provides that a wasteload allocation will be made by the Department under these circumstances:

> (1) Water quality criteria for a stream section, segment, or zone are not being achieved, even

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[1] We will not quote the rather extensive formulae for calculation of the ammonia nitrogen limits under either the current or former versions of the regulation.

> though discharges to such section, segment, or zone are being treated to meet the minimum treatment requirements specified elsewhere in this title or 33 U.S.C. §1251 et seq.
>
> (2) Water quality criteria for a stream section, segment or zone may not be achieved during periods of accepted design stream flow, as identified in §93.5(b) (relating to application of water quality criteria to discharge of pollutants), even if existing or anticipated discharges to such section, segment, or zone were treated to meet the minimum treatment requirements specified elsewhere in this title.
>
> (3) Minimum treatment requirements have not been established for a particular pollutant.

A variation in pH readings, alone, is not a basis for requiring that a wasteload allocation be performed for ammonia nitrogen. It must be established, by substantial evidence, that any of the conditions in 25 Pa.Code §95.3(c)(1)-(3) prevail, and Wyant has failed to come forth with any competent evidence that the Department's decision not to perform a wasteload allocation was an abuse of discretion.

Wyant further alleges that the Department failed to provide a sufficient margin of safety in calculating its ammonia nitrogen limitations to take into account the pH variations. Ferry explained that the 33% reserve under the old regulations or 30% reserve under the new regulations accounted also for a margin of safety (N.T. 478).

5. Wastewater Temperature

Wyant questions why no temperature limitation was included in the NPDES permit, contending that the wastewater temperature in the pond will be the same as the effluent (N.T. 276). This assumption was never established as a fact in the record (N.T. 276). Further, Wyant offered no evidence to establish that a discharge at the pond temperature of 25°C would adversely impact or violate water quality standards for Poplar Run. He notes only that

if Ferry had included a temperature limitation for the discharge, perhaps Steiner would have considered the implications of a higher influent water temperature. (App.Brief. 47-48).

Ferry testified twice that temperature is not normally included as a limitation in municipal sewage plant permits, since it has not been a significant problem in the past (N.T. 109, 213-215). Ferry had no reason to think this was a critical factor in this case either (N.T. 214), and we have no reason to assail his judgment as an abuse of discretion.

6. **WQM Permit Review/BOD**

Wyant questions the competence of Deann Steiner, the Department's sanitary engineer responsible for reviewing Newry's WQM permit application. During the hearing, Wyant attempted to qualify Steiner as an expert in areas such as biochemistry in order to assail the adequacy of her review of the sewage treatment plant's ability to remove biochemical oxygen demand (BOD) and ammonia. The Board accepted Steiner as an expert in the engineering field, but not as a general expert in biology, chemistry, microbiology, biochemistry and related fields (N.T. 268). In addition to attacking Steiner's qualifications, Wyant also attacks her judgment on the basis that she did not remember the specific procedures or formulae she used in reviewing Newry's WQM permit application two years prior to the hearing (N.T. 253-254; App.Brief, p.37).

At the outset, we note that, subject to well-recognized exceptions such as surprise and hostility, a party who calls a witness stands behind the witness' credibility and the truth of his assertions. Cunningham v. Commonwealth, State Civ. Serv. Com'n, 17 Pa.Cmwlth, 375, 332 A.2d 839 (1975). Although Ms. Steiner could not remember formulae in detail, she could identify that portion of the application containing calculations used to

determine the BOD effluent from aerated lagoons[2] (N.T. 249; App.Ex. 46, p.6), that part of the application demonstrating compliance with ammonia nitrogen limitations (N.T. 287-288), and the process of suspended solids being removed in sedimentation ponds (N.T. 256-261, 301-312). Steiner further testified that she had raised questions concerning the application with Newry to which Newry responded satisfactorily (N.T. 313-314; App.Ex. 56, 57, 61, and 62). Steiner then concluded that the application fulfilled all Department regulations and recommended that a permit be issued, subject to certain special conditions (N.T. 314-315, 316; App.Ex. 45). Wyant offers no evidence to dispute Steiner's conclusion that the sewage treatment plant as designed would meet all effluent limits in the NPDES permit, so we must conclude that the Department did not abuse its discretion.

7. **Ammonia Nitrogen Removal**

Newry's calculations as to the removal of ammonia nitrogen in the lagoon system are found in Section K of Newry's Basic Design Criteria in Exhibit 43. Nitrification is the process by which ammonia is oxidized into nitrate form (N.T. 87, 112-114). It is conditioned upon the presence of oxygen, proper temperature and a minimal level of dissolved oxygen in the wastewater (N.T. 287).

Although Wyant asserts he attempted to prove that nitrification of ammonia does not generally occur in a flow through a lagoon of the kind

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[2] Wyant again attacked Steiner's BOD computations by attempting to place into evidence a textbook containing a table of values for BOD removal using a K factor at variance with the K factor employed by Steiner (N.T. 428-429). The Board refused to take official notice of the text (N.T. 430) for reasons discussed supra, in §3.

approved here, there is no support in the record for such a claim. Wyant requested the Board to take judicial notice of a text supporting these claims, but the Board refused to do so for the reasons explained in §3, supra.

Wyant alleges that the lagoon design approved by the Department will not achieve the ammonia nitrogen removal necessary to achieve the limits in the NPDES permit. Wyant, without a proper foundation in the record, substitutes his own calculations as to the total daily oxygen requirements of the lagoon system to determine the necessary amount of aeration horsepower and oxygen required to remove ammonia nitrogen and carbonaceous BOD and meet the effluent limits in the NPDES permit (N.T. 287-288). We must disregard these calculations.

8. Oxygen Requirements (De-oxygenation in Wastewater Within the Sedimentation Pond)

Newry has proposed to store in the sedimentation pond sludge produced by the treatment process in the aerated lagoons and to landfill the sludge within five to ten years (N.T. 306). Newry's permit application included an accounting of the accumulated mass of sludge in order to determine the depth required for sludge storage (N.T. 307). The lagoon system was designed to include two completely mixed ponds, each followed by two partially mixed ponds (N.T. 290). The calculated detention time of the wastewaters in the complete mix system is six days (N.T. 251-253; Ex. 43, Basic Design Criteria H(1), H(2), I(5), J(2), pp.5-8). The purpose of the sedimentation pond is the settling out of BOD, particularly volatile suspended solids (VSS) produced in treatment and removed in the form of suspended solids (N.T. 301).

Wyant cites testimony that VSS will exert biochemical oxygen demand and consume dO present in the wastewater (N.T. 301-302) and that if these

organic solids escape with the final effluent and settle on the stream bed, instead of within the sedimentation pond, they will consume dO there (N.T. 88-89). Wyant, through the testimony of his counsel at the hearing, makes several conclusions about the presence of this sludge in the pond over a period of years. He alleges that odor will be a problem and that the two horsepower aerator Newry plans to use in the sedimentation pond is insufficient to achieve the contemplated BOD removal and maintain a dissolved oxygen concentration of 5.0 mg/l or more in the lagoons (App.Brief, p.41).

Wyant proceeds to attack the Department's calculations of the amounts of oxygen to be supplied to the aeration system and the method by which the oxygen will be supplied, concluding that because the sedimentation pond is the last step in the wastewater treatment process, except for the chlorine tank, the effluent limit of 5.0 mg/l dO will be violated according to Exhibits 53 and 54 (App.Brief, p.41). As Newry points out, there is simply no basis for Wyant's assumption that the dO level in the pond equates to the dO level in the effluent after it has passed through the chlorine contact tank and traveled through the effluent pipe at a slope of 28% (Permittee's Brief, p.13-14; Ex.53).

Wyant has presented no evidence to support his assumption that the sedimentation ponds in combination with the chlorine contact tank and effluent pipe will be incapable of achieving the BOD and dO limits contained in the NPDES permit.

9. Lagoon Liner

Wyant disputes the suitability of the lagoon liner design approved by the Department. Initially, Newry had proposed to line its treatment lagoons with bentonite soil sealant to a depth of four inches to be applied at a rate of 2.2 pounds per square foot in order to prevent leakage (N.T. 366; Ex. 4F,

p.6-1). In response to the comments of Jeffrey Molnar, the Department hydrogeologist, Newry modified the lagoon design to incorporate the application of an additional half pound per square foot of bentonite, thus raising the coefficient of permeability to 1.5 x 10-8 centimeters per second, the rate required by the Department. With these modifications, the Department found the proposal acceptable (N.T. 356-361, 375-378).

Wyant, again through counsel and not a competent witness, asserts that the proposed liner will not be sufficiently impermeable, and in support of this theory, attacks the engineering reports and calculations produced by the bentonite manufacturer, American Colloid Company (App.Brief, p.51-53). Wyant fails to establish any abuse of discretion or authority by the Department based on Molnar's conclusions or any infirmity in the calculations of the American Colloid Company.

Finally, Wyant attacks Newry's proposed drainage swale to divert surface and groundwater around the lagoon site, speculating that it may cause flooding, stream siltation, and erosion because of excavations below the water table level. Wyant only guesses that these problems may occur and that they were not assessed by anyone reviewing the permit application; no evidence was produced to support any of these speculations or the allegation that the stewardship responsibilities of the Department were not met.[3]

CONCLUSIONS OF LAW

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

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[3] Wyant has failed to establish that Newry's permits were not issued in compliance with all relevant statutes and regulations or that any environmental harm will occur as a result of the activity authorized by the permits. Since there is no evidence of any environmental harm, it is unnecessary for us to consider whether the environmental incursion will be minimized or the benefits of the sewage treatment plant will outweigh any of the harm.

2. Wyant has the burden of proving that the Department's issuance of the NPDES and WQM permits was an abuse of discretion or arbitrary exercise of the Department's duties. 25 Pa.Code §21.101(c)(3); Joseph D. Hill et al. v. DER and Horsham Township, EHB Docket No. 85-356-R (Adjudication issued March 22, 1988).

3. Any issue not expressly raised by the parties in their post-hearing briefs is waived. Robert Kwalwasser v. DER and Kerry Coal Company, 1986 EHB 24.

4. Wyant failed to produce the threshold of evidence necessary to shift the burden of proof in this matter pursuant to 25 Pa.Code §21.101(b)(4). Marcon, Inc. v. DER, 76 Pa.Cmwlth.56, 462 A.2d 969 (1983).

5. The Board properly prohibited Wyant from examining Department personnel as on cross-examination. 42 Pa.C.S.A. §5935.

6. 25 Pa.Code §95.3(d) gives the Department discretionary authority to determine which stream segments require a wasteload allocation. The Department did not act contrary to 25 Pa.Code §95.3 in not performing a wasteload allocation for the ammonia nitrogen discharge into Poplar Run.

7. The Department's calculation of an ammonia nitrogen effluent limitation contained adequate margins of safety.

8. The treatment technology authorized by Newry's WQM permit will achieve the effluent limits in Newry's NPDES permit.

9. The Department properly carried out its duties under Article I, §27 of the Pennsylvania Constitution in issuing Newry's NPDES and WQM permits.

10. Wyant failed to satisfy its burden of proving that the Department's action in issuing Newry's permits was arbitrary, capricious or unreasonable.

O R D E R

AND NOW, this 24th day of October, 1988, it is ordered that the appeal of Gerald W. Wyant is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

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DATED: October 24, 1988

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101
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M. DIANE SMITH
SECRETARY TO THE BOARD

HILLTOWN TOWNSHIP BOARD OF SUPERVISORS :
v. : EHB Docket No. 87-201-W
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES :
and : Issued: October 26, 1988
BUX-MONT REFUSE SERVICES, INC., Permittee :

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

A motion for summary judgment is granted in part and denied in part. The Department of Environmental Resources did not abuse its discretion by issuing a solid waste management permit for a trash transfer station where there were allegations that the facility did not comply with applicable municipal zoning and land development ordinances. A leachate retention tank required neither a plan revision nor a permit under the Pennsylvania Sewage Facilities Act. In denying the motion in part the Board held that a municipality did not waive its right to comment under §504 of the Solid Waste Management Act by raising issues in its comment letter seemingly outside the purview of the statute. The Board also held that there were material facts at issue relating to the Department's review of traffic issues and referral of the matter to the Pennsylvania Department of Transportation.

OPINION

This matter was initiated by the filing of a notice of appeal by the Hilltown Township Board of Supervisors (Township) on May 22, 1987. The

Township is seeking review of Solid Waste Disposal and/or Processing Facilities Permit No. 101462 (permit) issued to Bux-Mont Refuse Services (B/M) on April 21, 1987 by the Department of Environmental Resources (Department) pursuant to the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. (SWMA). The permit authorizes the construction of a trash transfer station on a 2.54 acre parcel of land in Hilltown Township, Bucks County.

In its notice of appeal, the Township alleged that the issuance of the permit was an abuse of the Department's discretion because the permit application did not demonstrate compliance with all applicable statutes and regulations, in violation of Article I, Section 27 of the Pennsylvania Constitution and the SWMA; B/M failed to comply with the local holding tank ordinance; the application failed to demonstrate that the facility would have no adverse effect on local traffic conditions; the facility would create noise problems; and the closure bond was inadequate.

After a review of the pre-hearing memoranda, the Board conducted a telephonic pre-hearing conference call with the parties on September 18, 1987, to discuss possible disposition of all or part of the appeal through summary judgment. The parties were directed to file cross motions for summary judgment by Board order dated September 18, 1987.

On October 21, 1987, B/M filed its motion for summary judgment, alleging that the Department need not consider an applicant's compliance with local zoning and land development ordinances prior to issuing a solid waste permit; the Township's response letter containing its comments on the proposed facility failed to meet the requirements of §504 of the SWMA and thus constituted a waiver of its right to participate in the permit review process; a storage tank for industrial waste at the site is regulated by the SWMA and

does not require a plan revision under the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 et seq. (SFA); and the Department did not abuse its discretion in notifying the Pennsylvania Department of Transportation (PennDOT) of potential traffic problems at the site and issuing the permit prior to receiving PennDOT's review.

On November 20, 1987, the Township filed its answer[1] to the motion for summary judgment, arguing that the Department abused its discretion in that it failed to consider the adequacy of public roads and traffic safety prior to issuing the permit; it failed to require a plan revision under the SFA for the trash transfer storage tank; it did not cooperate with local government as mandated by the SWMA; and it failed to balance social and environmental concerns pursuant to Article I, Section 27 of the Pennsylvania Constitution.

In its disposition of a motion for summary judgment, the Board is authorized to render summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The Board must read the motion for summary judgment in the light most favorable to the non-moving party. Robert C. Penoyer v. DER, 1987 EHB 131.

1. Zoning

The Township argues in its notice of appeal that the Department acted arbitrarily in issuing B/M's permit before B/M had fully complied with all

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[1] The Township did not file a cross-motion for summary judgment.

applicable laws and regulations, particularly local zoning and land development ordinances, citing as support Council of Middletown Township v. Benham, ___ Pa.Cmwlth. ___, 523 A.2d 311 (1987), which held that local zoning will not be preempted by legislative enactment unless the General Assembly's attempt to preempt is clearly shown in the statute. B/M acknowledges that local zoning is not preempted by the SWMA, but argues that the permitting process under the SWMA is separate and distinct from the process for obtaining local approval under applicable municipal ordinances.

The recent Commonwealth Court decision in Plymouth Twp. v. Montgomery County, ___ Pa.Cmwlth. ___, 531 A.2d 49 (1987), emphatically ruled that the SWMA does not preempt local zoning ordinances concerning the location of facilities for solid waste management and disposal except for certain hazardous waste facilities.

Following the Commonwealth Court precedent, the Board held in Borough of Taylor v. DER and Amity Sanitary Landfill, EHB Docket No. 83-153-M (Adjudication issued March 24, 1988), that while a municipality may regulate the location of a solid waste management facility through its zoning ordinances, the Department has the authority to regulate the design and operation of the facility and there is no requirement in the SWMA that the Department's decisions must be in compliance with local zoning ordinances. Similarly, in Township of Washington v. DER and Neal R. Toms, EHB Docket No. 87-267-W (Opinion and order issued April 12, 1988), the Board found that under the SWMA, municipalities retain their power to regulate the location of solid waste facilities and the Department is not precluded from issuing a permit where a facility may not be in compliance with local zoning requirements.

In the instant case also, the Department was not precluded from issuing a permit to B/M under the SWMA simply because B/M did not comply with

local zoning ordinances. We will enter summary judgment for B/M on this issue.

2. Local Government Review

Next, B/M argues that the Township's November 11, 1986 response letter from C. Robert Wynn, Township engineer, to B/M does not meet the criteria for a §504 review letter. The letter reported that the Township's Board of Supervisors denied B/M's land development plan for non-compliance with zoning and land development ordinance regulations and a local holding tank ordinance. Attached to this letter was the engineer's detailed report prepared by Herbert H. Metz, Inc., and dated September 26, 1986, and containing comments or recommendations on zoning, land development, sewage disposal and traffic concerns relative to B/M's development plan This report recommends denial of B/M's development plan.

Section 504 of the SWMA deals with review of a permit application by a governing body and provides that:

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

B/M alleges that the Township's response letter contained no recommendations, nor did it identify any specific causes for permit denial related to the requirements of the SWMA. Therefore, B/M argues that the Department had no legal obligation to consider matters raised by the letter and the Township waived its right to any further review of the permitting process.

The Township responds that §504 of the SWMA does not limit Township commentary solely to issues based upon the SWMA or the rules and regulations adopted thereunder. The Township asserts its primary responsibility is to enforce its zoning and land use regulations and that objections based upon the SWMA are to be made by the Department. The Township defends its denial of B/M's land development plan, stating that it listed valid land use criteria and that adequacy of roads, traffic safety, and sewage disposal as addressed by the letter are items the Department must consider prior to issuing any permit.

We can find no language in §504 of the SWMA limiting a host municipality's commentary to issues related only to the SWMA, although the content of the comment letter may be ignored by the Department if not relevant to the Department's evaluation of the permit application under the relevant statutes and regulations. The Township's letter recommended denial of B/M's development plan and listed specific reasons for the denial; namely, the non-compliance with local zoning and land use regulations and the holding tank ordinance. The letter met the requirements of §504 of the SWMA and did not constitute a waiver of the Township's right to contest the permit.

3. Sewage Facilities Plan Revision

B/M argues that the Department properly concluded that a storage tank for industrial wastes at the proposed facility is regulated under the SWMA and does not require a plan revision under the SFA. In addition, B/M argues that the Township did not timely raise the plan revision issue in its notice of appeal. The Township responds that this issue was raised by incorporation of an exhibit in its notice of appeal and that there was inadequate evidence presented to the Department by B/M to conclude that the liquid wastes from the trash transfer station did not meet the definition of sewage in the SFA.

It appears that the Township did make reference to the holding tank issue in its notice of appeal. Section III(c)(1) reads: "Generated liquid wastes will be deposited into an on-site holding tank which installation requires the issuance of an appropriate Holding Tank permit by Hilltown Township pursuant to local legislation." We do believe that B/M was put on sufficient notice by the language in the Township's appeal that the Township was contending that the holding tank did not satisfy applicable requirements.

In a June 4, 1987 letter from American Resource Consultants (ARC) on behalf of B/M, to the Bucks County Health Department, it was explained that the holding tank is to be used to collect liquids generated from the tipping floor during wet weather or cleaning operations. From the tank, the liquids are to be periodically pumped and taken to a Department-approved facility for disposal. According to ARC, sanitary sewage from employee facilities will be handled by a separate, on-lot septic system.

By letter dated December 9, 1986, Glenn Stinson, the Department's sewage facilities consultant, waived the Department's water quality permit requirements pursuant to 25 Pa.Code §72.1 et seq. The Bucks County Health Department advised B/M in a letter dated June 22, 1987 that no Act 537 revision or permit approval is necessary for the tank under Chapters 71 and 73 of the SWMA regulations or by Bucks County Health Department, provided the washdown does not come within the Act 337 definition of sewage, and advising B/M that industrial waste does require Department approval.

Both B/M and the Township have thoroughly confused the planning and permitting issues. We will treat this argument as presenting two questions - whether the holding tank for the wash water from the transfer station floor requires a permit under the SFA and whether the Township is required to revise its official plan as a result of the industrial waste holding tank.

Section 7(a)[2] of the SFA provides that:

> (a) No person shall install, construct, or request bid proposals for construction, or alter an individual sewage system or community sewage system or construct, or request bid proposals for construction, or install or occupy any building or structure for which an individual sewage system or community sewage system is to be installed without first obtaining a permit indicating that the site and the plans and specifications of such system are in compliance with the provisions of this act and the standards adopted pursuant to this act. No permit may be issued by the local agency in those cases where a permit from the department is required pursuant to the act of June 22, 1937 (P.L. 1987, No. 394), known as "The Clean Streams Law," as amended, or where the department pursuant to its rules and regulations, determines that such permit is not necessary either for a rural residence or for the protection of the public health.
> (emphasis added)

The storage of industrial waste in a holding tank for ultimate disposal at another site is governed by 25 Pa.Code §§101.1 and 101.4, regulations adopted under the Clean Streams Law. The holding tank is an impoundment, which is defined at 25 Pa.Code §101.1 as "any depression, excavation or facility situated in or upon the ground, whether natural or artificial and whether lined or unlined." 25 Pa.Code §101.4 provides that:

> (a) Except as provided otherwise under Subsection (c) of this Section, no person or municipality shall operate, maintain or use or permit the operation, maintenance use of an impoundment for the production, processing, storage, treatment or disposal of polluting substances unless such impoundment is structurally sound, impermeable, protected from unauthorized acts of third parties and is maintained so that a freeboard of at least two (2) feet remains at all times. The person or municipality owning, operating or possessing an impoundment shall have the burden of satisfying the Department that the impoundment complies with these requirements.

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[2] See also 25 Pa.Code §72.25(f).

(b) Any person or municipality owning, operating or in possession of an existing impoundment, containing polluting substances, or intending to construct or use such an impoundment, shall promptly submit to the Department a report or plan setting forth the location, size, construction and contents of the impoundment and such other information as the Department may require.

(c) Except where an impoundment is already approved under an existing permit from the Department, a permit from the department shall be required approving the location, construction, use, operation and maintenance of an impoundment subject to subsection (a) of this Section in the following cases:

(1) Where a variance is requested from the requirements set forth in Subsection (a) of this Section.

(2) Where the capacity of any one impoundment or of any two or more interconnected impoundments exceeds 250,000 gallons.

(3) Where the total capacity of polluting substances contained in impoundments on one tract or related tracts of land exceeds 500,000 gallons.

(4) Where the department determines that a permit is necessary for effective regulation to insure that pollution will not result from the use, operation or maintenance of the impoundment.

(emphasis added)

If the holding tank is encompassed by another permit issued by the Department, a separate permit issued under the Clean Streams Law is not required.

Sections 201 and 501 of the SWMA require that a permit be obtained for a solid waste transfer station. See also 25 Pa.Code §75.21(a) and (e). The rules and regulations adopted pursuant to the SWMA contain standards for transfer stations at 25 Pa.Code §75.27. Subsections (f) and (r), in particular, state that:

(f) The tipping areas, loading areas, and unloading areas shall be constructed of impervious material which is readily cleanable by flushing

> and shall be equipped with drains or pumps connected to a sanitary sewer system or its equivalent to facilitate the removal of moisture.
>
> * * * * *
>
> (r) Treatment and disposal of leachate collected at the transfer station site shall meet the requirements of this chapter.

Thus, the leachate handling system is incorporated in the transfer station's permit under the SWMA and a separate permit under 25 Pa.Code §101.4 is not necessary. In any event, a permit is not required under the SFA and we must hold for B/M on this issue.

Whether a plan revision was necessary under §5(a) of the SFA and the related regulations is another issue. Section 5(a) of the SFA provides that municipalities must revise their official plans as may be required by the rules and regulations of the Department. The regulations governing plan revisions at 25 Pa.Code §71.15(b)(1) provide in relevant part that:

> **(b) Revisions to plans for new subdivisions.** Revisions to plans for new subdivisions shall conform with the following:
>
> (1) A municipality shall also revise its official plan whenever a single tract or other parcel of land or part thereof is subdivided into two or more lots, whenever a person applies for a permit to install the second or subsequent individual or community sewage system in a subdivision or whenever a person applies for a permit required from the Department as provided by §71.45(e) (relating to issuance of permits) (Repealed). The municipality within which the subdivision or proposed individual or community sewage system is located shall revise its official plan except as provided for in subsection (c), pertaining to supplements to official plans.

B/M contends that no plan revision is required for the leachate holding tank because no permit for the facility was required from the Bureau of Water Quality Management. We interpret this argument to be that since no permit is

required under 25 Pa.Code §71.45(e),[3] now repealed,[4] a plan revision was not necessary.

The former §71.45(e) provided that:

> (e) A permit is required from the Department for an individual or community sewage system, if the proposed system will use a method of sewage disposal other than renovation in a subsurface absorption area or retention in a holding tank. For such systems issuance of the permit shall be governed by §71.32 of this Subchapter and by the applicable rules and regulations of the other Chapters of this Title.

The key phrase is "if the proposed system will use a method of sewage disposal other than renovation in a subsurface absorption area or retention in a holding tank." "Sewage" is defined in §2 of the SFA as "...any substance that contains any of the waste products or other discharge from the bodies of human beings or animals...." Since sewage from the transfer station will be disposed of in a separate subsurface disposal system and the holding tank will contain only leachate, we are of the opinion that no plan revision was required under the SFA.

4. Traffic Review

Finally, the Township alleges that the Department abused its discretion and violated its duty to balance environmental and social concerns under Article I, Section 27 of the Pennsylvania Constitution by failing to consider the adequacy of public roads and PennDOT's traffic review prior to issuing the solid waste permit. The Township also disputes whether or not the Department ever gave notice to PennDOT of the potential traffic hazards at

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[3] We note that the Department's "soft-copy" text of §71.15 states that §71.45(e) should be changed to §72.25(f). However, the Pennsylvania Code contains no such notation, and its language controls by virtue of 45 Pa.C.S.A. §901(a).

[4] See 17 Pa.B. 172 (January 10, 1987).

this site. B/M contends that the Department met its only obligation - which was to make PennDOT aware of the potential traffic hazard.

The caselaw supports B/M's position that the Department may properly defer to PennDOT for a review of any potential traffic hazard. Township of Indiana v. DER, 1984 EHB 1, at 38, held that the primary responsibility for evaluating road utilization from the standpoint of traffic safety is PennDOT's, not the Department's and that the Department cannot be faulted for accepting PennDOT's evaluation. B/M has also cited the case, Wisniewski v. DER and Kuhl, 1986 EHB 111, which upheld the Department's action of seeking comment and review of traffic problems from PennDOT, but found that the appellants did not establish that the Department failed to give consideration to the traffic hazards or to notify PennDOT of these concerns.

Here, B/M, as the moving party, has the burden of establishing that the Department considered the traffic problems and notified PennDOT at a reasonable time in advance of the permit issuance of any potential traffic hazards. PennDOT issued two reviews of potential traffic problems dated May 6, 1987 and May 18, 1987, subsequent to the April 21, 1987 issuance of the permit. B/M's own traffic assessment was dated March 3, 1987 and was referenced in PennDOT's May 18, 1987 review. None of the exhibits, briefs or correspondence indicate the specific date, if any, that the Department sent notification to PennDOT.

Because there remains a factual dispute about whether this notification ever occurred, it is not possible to grant summary judgment on this issue. Further, the Township will be allowed to attempt to meet its burden in proving its claim that the Department abused its discretion and failed to give proper consideration to the traffic issues created by this proposed facility.

O R D E R

AND NOW, this 26th day of October, 1988, it is ordered that Bux-Mont Refuse Services' Motion for Summary Judgment is granted with respect to the issues of the necessity of compliance with local zoning and land development ordinances prior to the issuance of a solid waste management permit and whether a leachate holding tank requires either a permit or plan revision under the Pennsylvania Sewage Facilities Act. The motion is denied with respect to issues of traffic and the Section 504 SWMA review requirements consistent with the findings of this opinion.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

William A. Roth
WILLIAM A. ROTH, MEMBER

Robert D. Myers
ROBERT D. MYERS, MEMBER

DATED: October 26, 1988

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ENVIRONMENTAL HEARING BOARD
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M. DIANE SMITH
SECRETARY TO THE BOARD

MACK ALTMIRE	:	EHB Docket Nos. 88-188-W
	:	88-189-W
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: October 27, 1988

OPINION AND ORDER SUR NOTICES OF APPEAL NUNC PRO TUNC AND MOTIONS TO DISMISS

Synopsis

Appeals nunc pro tunc are denied where the Appellant failed to provide adequate justification. Attempts to negotiate remedial actions with the Department are not grounds for an appeal nunc pro tunc.

OPINION

These matters were initiated by the May 9, 1988 filing of two appeals nunc pro tunc by Mack Altmire (Altmire). Altmire seeks review of the Department of Environmental Resources' (Department) forfeiture, by letter dated December 16, 1987, of bonds posted for the Altmire Brothers Coal Company's operation in Kiskiminetas Township, Armstrong County, pursuant to Mining Permit (MP) 29-18 and by letter dated March 31, 1987, of bonds posted for the Altmire Brothers Coal Company operation in South Bend Township, Armstrong County, pursuant to MP-29-21. The Board has docketed these appeals as 88-188-W and 88-189-W, respectively.

As grounds for allowance of his appeals nunc pro tunc, Altmire alleges that neither he nor his attorney received the Department's notices of forfeiture for either site and that he did not receive actual oral notice until March 28, 1988. Altmire further alleges that at the time of the forfeitures, he was "undertaking a corrective action plan for all properties with a reclamation specialist working closely with local DER officials."

On August 8, 1988, in response to Altmire's notices of appeal nunc pro tunc, the Department filed motions to dismiss for lack of jurisdiction due to the untimely filing of the appeals. The Department alleges that written notification of the forfeiture of bonds posted for the operation pursuant to MP 29-21 was sent March 31, 1987, by certified mail. A copy of the return receipt shows delivery was accepted April 20, 1987.

The Department also alleges that written notification of forfeiture of bonds posted for the operation pursuant to MP 29-18 was sent by certified mail on December 16, 1987, but that Altmire refused acceptance of this notice. A copy of the notice and return receipt indicates the first and second attempt at delivery on December 24, 1987 and December 29, 1987, respectively, and the return on January 8, 1988. The Department claims that additional notice of the forfeiture for MP 29-18 was given by sending a copy of the certified letter by first class mail and that this letter was never returned to the Department. Additionally, the Department alleges, and Altmire admits, that oral notification occurred on March 28, 1988.

An appeal of Department action must be filed with the Board within 30 days of the date the recipient of the action receives written notification of the Department's action. Failure to timely file the appeal deprives the Board of jurisdiction to hear the appeal. 25 Pa.Code §21.52(a); Rostosky v. Commonwealth, DER, 26 Pa.Cmwlth. 478, 364 A.2d 761 (1976).

The Board is empowered to grant an appeal nunc pro tunc "for good cause." 25 Pa.Code §21.53(a). The standards for which such an appeal will be granted are to be determined by the common law standards used in "analogous cases in Courts of Common Pleas in the Commonwealth." Id. While the Board possesses the authority to grant an appeal nunc pro tunc, it will only do so in extraordinary circumstances. Situations which give rise to the Board approving an appeal nunc pro tunc include fraud and the breakdown of operations of the Board. Commonwealth, Game Commission v. DER, 1985 EHB 1, aff'd 509 A.2d 877 (1986), citing DOT, Bureau of Traffic Safety v. Royster, 31 Pa.Cmwlth. 647, 377 A.2d 1038 (1977).

The Department is required to provide written notification by mail to the permittee, landowner and surety on the bond in a bond forfeiture action. 25 Pa.Code §86.182. In the absence of evidence to the contrary, we must assume that Altmire did receive a copy of the forfeiture letter for the bonds posted for MP 29-18, which letter was sent by first class mail. And, the return receipt indicates that Altmire received the forfeiture letter for the bonds posted for MP 29-21 on April 20, 1987. Altmire, having received notification more than 30 days prior to filing his appeals cannot use insufficient notice as grounds for requesting his appeals nunc pro tunc.

Nor does Altmire's contentions that he is rarely at home and that he requested the Department to forward correspondence to his counsel constitute grounds for allowance of an appeal nunc pro tunc. The Department has no obligation to forward notice to Altmire's counsel. See 25 Pa.Code §86.182. And, even if written notice was defective, Altmire failed to file timely appeals after receiving actual notice on March 28, 1988.

Neither can Altmire rely on his second averment. Attempts to resolve matters with the Department are not a basis for an appeal nunc pro tunc.

Grand Central Sanitary Landfill v. Commonwealth, DER, EHB Docket No. 88-163-F and 88-211-F (Opinion and order issued August 30, 1988).

Because the Board's power to allow an appeal nunc pro tunc is limited, and no such justification exists in the present cases, Altmire's appeals nunc pro tunc are denied and the Department's motions to dismiss are granted.

O R D E R

AND NOW, this 27th day of October, 1988, it is ordered that:

1) Mack Altmire's requests for appeals nunc pro tunc are denied; and

2) The Department's motions to dismiss are granted.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: October 27, 1988

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M. DIANE SMITH
SECRETARY TO THE BOARD

ENVIROSAFE SERVICES, OF PA, INC.	:	
	:	
v.	:	EHB Docket No. 83-101-W
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES, et al.	:	Issued: October 31, 1988

OPINION AND ORDER
SUR
MOTION TO COMPEL

Synopsis

Appellant's motion to compel answers to interrogatories is granted when the interrogatories are relevant to the subject matter of the pending action and seek information to determine what facts and issues are in contention.

OPINION

On May 25, 1983, Envirosafe Services of Pennsylvania, Inc. (Envirosafe) filed a notice of appeal from the Department of Environmental Resources' (Department) April 27, 1983 denial of a permit application (No. PA0980707624) for the construction and operation of an industrial and hazardous waste treatment, storage, and disposal facility in Narvon, Lancaster County, on the basis that the proposed facility did not meet the provisions of

25 Pa.Code §75.264(v)(3)(xv).[1] This appeal was originally stayed on January 23, 1984, to allow Envirosafe the opportunity to apply for a variance from the applicable regulations pursuant to 25 Pa.Code §75.264(a)(4).

On December 30, 1987, the Department denied the variance request, claiming that Envirosafe did not show how its proposal would provide the equivalent level of protection to the environment and public health as would compliance with 25 Pa.Code §75.264(v)(3)(xv), this being required as a condition of variance approval under 25 Pa.Code §75.264(a)(ii). Envirosafe appealed the variance denial to the Board on February 2, 1988. The two appeals were consolidated on February 24, 1988 and are presently scheduled for a hearing on the merits February 13-17, and February 21-24, 1989.

On March 28, 1988, Envirosafe propounded a second set of interrogatories on the Department, to which the Department responded in part and objected in part. These objections were set forth as general objections and incorporated into the answer to each interrogatory. The grounds cited for these objections were that the interrogatories propounded were subject to the attorney-client and the attorney work product privileges and that they were unduly burdensome and unreasonable.

Envirosafe filed this motion to compel on August 10, 1988, and on August 30, 1988, the Commonwealth responded by supplementing its answers to

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[1] 25 Pa.Code §75.264(v)(3)(xv) states that

> For all landfills, a minimum of four feet shall be maintained between the top of the subbase and any seasonal high water table without the use of any artificial or manmade groundwater drainage or dewatering systems. Soil mottling shall indicate the presence of a seasonal high groundwater table. The distance between the top of the subbase and the groundwater table shall be a minimum of 8 feet.

all but one of the interrogatories which were the subject of the motion to compel.

The interrogatories at issue are Nos. 7, 8, 9, 13, and 19. Interrogatories No. 7, 8, 9 and 13 ask whether the Department agrees with certain contentions about the colluvium layer at the Narvon site.[2] If the Department disagrees with the specific contention set forth, the interrogatories seek the facts, expert opinions, documents and individuals responsible for, consulted, contacted or relied upon with respect to the disagreement. The Department claimed not to know what Envirosafe meant by certain terms used in the interrogatories and failed to respond. After this motion to compel was filed, the Department supplemented its answers to, among others, Interrogatories No. 7, 8, 9, and 13, with the following response to each interrogatory regarding the facts upon which the Department bases its disagreement:

> "The entire diversion ditch proposal as detailed in ESPI's Variance Request, its numerous supplements, and various ESPI letters from 1984 through 1987 along with visual observations of the Narvon site."

Interrogatory No. 19 seeks information on the Department's position as to the effectiveness of the north-south diversion channel and for any facts, documents, expert opinions, and other individuals relied upon in the

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[2] Interrogatory No. 7. "Does the Department agree that any water within the colluvium at the Narvon site does not form a true water table?"

Interrogatory No. 8. "Assuming that the colluvial layer at the Narvon site contains a seasonal high water table, does the Department agree that any water present in the colluvium is minor, ephemeral and transient?"

Interrogatory No. 9. "Does the Department agree that any water in the colluvium at the Narvon site by virtue of its small volume, transient nature, and the fact that it is laterally separated from the proposed landfill, would have no effect upon the integrity of the liner of the landfill?"

Interrogatory No. 13. "Assuming the proposed run-on diversion channel is deemed to be a man-made or artificial groundwater drainage or dewatering system, does the Department agree that it will control only an insignificant amount of seepage from the colluvium layer?"

event the Department disagrees that the "north-south diversion channel within the landfill area will collect any water which might seep from the colluvium/silt interface west of the active landfill face." The Department responded to Interrogatory No. 19, stating it could not agree or disagree because it was focusing its study on a different diversion ditch and had not yet studied the effectiveness of the north-south channel. Additionally, the Department argues that it has no duty to determine the effectiveness of the north-south diversion channel because it was not a basis for the variance denial. The Department did not supplement its answer to Interrogatory No. 19.

In support of its motion to compel, Envirosafe argues that it is important to discover the Department's contentions on the issues in Interrogatories No. 7, 8, 9, 13, and 19 in order to avoid surprise at the hearing and argues that the Department's objections are too general to be considered. Additionally, Envirosafe argues in its September 15, 1988 letter[3] that the supplemental responses to Interrogatories No. 7, 8, 9 and 13 do not specify facts or even documents and that the one response regarding the facts on which the Department bases its disagreement, "visual observations," does not specify what was seen, where it was seen, when it was seen, or by whom it was seen.

We believe that Envirosafe's arguments claiming the Department failed to set out particular objections to specific interrogatories are well-taken. Objections should be specific and detailed as to the matters which are objectionable. Goodrich Amram 2d §4006(a)(3). The Board has held that specific discovery requests will be viewed liberally and will not be denied on

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[3] Envirosafe's September 15, 1988 letter commented on the supplemental answers to Interrogatory Nos. 7, 8, 9, and 13, and we considered the arguments contained therein, as well as those in its memorandum in support of its motion.

the overbroad use of privilege. Smithkline v. DER, 1986 EHB 346. Even if such general objections were proper, the grounds cited by the Department were not substantiated. We fail to see how any response at all to the interrogatories at issue in this motion to compel would fall within attorney-client privilege or the attorney work product exception. To the extent that the Department feels that any documents containing the requested information may be privileged, it can submit them to the Board for an in camera inspection for such a determination. See New Hanover Township v. DER and New Hanover Corporation, EHB Docket No. 89-119-W (Opinion and order issued September 27, 1988).

Rule 4003.1 of the Pennsylvania Rules of Civil Procedure permits broad discovery, allowing a party to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action..." Relevancy is to be construed broadly. 6 Standard Pa. Practice 2d §34:16. We believe that Interrogatories No. 7, 8, 9, 13, and 19 are relevant to the subject matter of the permit and variance denials.

Additionally, we fail to see how the interrogatories are overly broad or unduly burdensome. Each interrogatory deals with a specific contention. Requiring the Department to provide information which forms the basis for each contention or for facts on which experts rely does not appear overly burdensome. See New Hanover Township v. DER and New Hanover Corporation, EHB Docket No. 88-119-W (Opinion and order issued September 27, 1988).

The Department's supplemental answers to Interrogatories No. 7, 8, 9, and 13 did not provide specific information. Instead, the Department directed Envirosafe to the variance proposal, correspondence from 1981 to 1987, and to the Narvon site in question. Envirosafe should be able to discover whether, and on what bases, these matters will be contested and should not be expected

to divine the Department's reasoning from a mass of documents when it has posed specific questions to the Department.

O R D E R

AND NOW, this 31st day of October, 1988, it is ordered that Envirosafe's Motion to Compel is granted in part and denied in part:

1) Envirosafe's motion to compel the Department of Environmental Resources to respond to Interrogatories No. 7, 8, 9, 13, and 19 of its Second Set of Interrogatories is granted and the Department shall, on or before November 21, 1988, fully and completely respond to those interrogatories; and

2) Envirosafe's request to preclude the Department from raising any contentions at hearing regarding the north-south diversion channel is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

DATED: October 31, 1988

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

GLEN IRVAN CORPORATION	:	
	:	
v.	:	**EHB Docket No. 87-158-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** October 31, 1988

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

A motion for summary judgment is granted where the only grounds alleged in an appeal of the denial of a bond release application is financial inability to correct violations at the mining site. Financial inability to correct violations is not a valid defense to the denial of bond release.

OPINION

On April 20, 1987, Glen Irvan Corporation (Glen Irvan) filed a notice of appeal from a March 19, 1987 Department of Environmental Resources' (Department) letter denying Glen Irvan's application for bond release on Mine Drainage Permit No. 4678SM1 for its operation in Benezette Township, Elk County.[1] The application was based on Completion Report No. 2-87-013, filed

[1] Glen Irvan also filed three other appeals on April 17, 1987, relating to the Department's denial of bond release on other areas of this mine drainage permit. Glen Irvan raised the same objections to the denials. The Board granted the Department's motions for summary judgment and dismissed the appeals. See Glen Irvan Corporation v. DER, 1987 EHB 983, 1987 EHB 986, and 1987 EHB 1989.

February 23, 1987. The Department denied the bond release request because of Glen Irvan's alleged failure to submit quarterly monitoring reports and its failure to treat a sediment basin discharge to meet applicable effluent criteria. As grounds for its appeal, Glen Irvan alleged that it was a debtor-in-possession pursuant to a voluntary petition filed under Chapter 11 of the Bankruptcy Code on May 20, 1986, and that it did not have the financial ability to take the corrective actions required in the March 19, 1987 denial letter.

The Department filed a motion for summary judgment on May 20, 1988, to which Glen Irvan did not respond. In its motion the Department argues that there are no disputed facts and that it is entitled to judgment as a matter of law because the only grounds cited by Glen Irvan in its appeal is its financial inability to perform the required corrective actions, which is not a valid legal defense to the bond release denial. Glen Irvan Corporation v. DER, 1987 EHB 983.

A party is entitled to summary judgment when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Pa.R.C.P. No. 1035(b).

This Board has previously held that financial inability is not a valid defense to appeals of bond release denials. Glen Irvan v. DER, 1987 EHB 983, 1987 EHB 986, and 1987 EHB 989, relying by analogy on Mt. Thor Minerals v. DER, 1986 EHB 128. Orville Richter, d/b/a Richter Trucking Co. v. DER, 1984 EHB 43, and James E. Martin v. DER, 1987 EHB 408.

Since this is the only ground for appeal cited by Glen Irvan, the Department is entitled to summary judgment as a matter of law. See Glen Irvan, supra, and cases cited therein.

O R D E R

AND NOW, this 31st day of October, 1988, it is ordered that the Department of Environmental Resources' Motion for Summary Judgment is granted, and the appeal of Glen Irvan Corporation is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

William A. Roth
WILLIAM A. ROTH, MEMBER

Robert D. Myers
ROBERT D. MYERS, MEMBER

DATED: October 31, 1988

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M. DIANE SMITH
SECRETARY TO THE BOARD

ROTHERMEL COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 87-182-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: October 31, 1988
	:	

OPINION AND ORDER

Synopsis

An appeal is dismissed due to appellant's failure to comply with an order of the Board and for appellant's failure to prosecute its appeal.

O P I N I O N

This matter was initiated with the May 13, 1987 filing of a notice of appeal by Rothermel Coal Company, Inc. (Rothermel) seeking the Board's review of a compliance order issued by the Department of Environmental Resources (DER) on April 15, 1987. The compliance order alleged that Rothermel failed to clearly mark the perimeter of its permit area at its Lykens Valley #5 Slope deep mine in Tremont, Schuylkill County, did not submit its phased deposit of collateral bond as required by DER, and constructed a haul road off its permit area. The compliance order directed Rothermel to cease all mining activities at the mine site unless it submitted the necessary phased collateral deposit to DER by May 15, 1987 and to cease using the unpermitted haul road and properly reclaim it.

Rothermel timely filed its pre-hearing memorandum on August 5, 1987.

DER, with Rothermel's consent, was granted numerous extensions for the filing of its pre-hearing memorandum as a result of the pendency of Tracey Mining Company et al. v. DER, ____Pa. Cmwlth.____,544 A. 2d 1075 (1988).

At the expiration of one of these extensions on April 27, 1988, DER filed a status report requesting another ninety-day continuance and noting that it was uncertain whether Rothermel would pursue the appeal, as its counsel had been unable to contact Rothermel. The Board granted DER the continuance, and on July 26, 1988, DER requested another extension, again stated that there was uncertainty as to Rothermel's intention to pursue its appeal, and advised the Board of a permit transfer which might render the appeal moot. The Board, in an August 11, 1988 order, granted DER an extension until September 1, 1988, and also directed Rothermel to advise the Board on or before September 1, 1988, of its intent to pursue the appeal.

When Rothermel failed to file a status report, the Board, on September 16, 1988, issued a rule upon Rothermel to show cause why its appeal should not be dismissed for failure to comply with the Board's August 11, 1988 order. The rule was returnable on or before October 6, 1988.

To date, Rothermel has failed to respond to the rule or to indicate its intent to go forward with this appeal. The Board cannot continue to devote its time to attempting to compel prosecution of a matter by an appellant who has shown no interest in doing so. Accordingly, this appeal will be dismissed.

O R D E R

AND NOW, this 31st day of October, 1988 it is ordered that the appeal of Rothermel Coal Company, Inc. at Docket No. 87-182-R is dismissed for failure to follow a Board order and for lack of prosecution.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: October 31, 1988

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M. DIANE SMITH
SECRETARY TO THE BOARD

INGRAM COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 87-256-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 31, 1988**

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

Summary judgment in an appeal of a civil penalty assessment is entered in favor of the Department of Environmental Resources (DER). Where the Board has limited issues to only the amount of the civil penalty assessment, and the appellant states that it will not challenge the amount of the penalty, there are no facts in dispute and DER is entitled to judgment as a matter of law.

O P I N I O N

This matter was initiated by the June 29, 1987 filing of a Notice of Appeal by Ingram Coal Company (Ingram) challenging a June 1, 1987 DER civil penalty assessment imposed due to Ingram's alleged failure to construct adequate treatment facilities at its Ingram No. 1 Mine in Union Township, Jefferson County. DER issued the assessment pursuant to the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as

amended, 52 P.S. §1396.1, et seq. (SMCRA) and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (CSL).

On February 3, 1988, the Board issued an opinion and order granting DER's motion to limit issues, holding that Ingram was precluded from challenging the factual or legal basis of the civil penalty assessment as a result of its failure to appeal the underlying compliance order and that Ingram could only contest the amount of the assessment.

On September 14, 1988, DER filed a motion for summary judgment. DER contends that Ingram specifically states in its pre-hearing memorandum that it is not challenging the amount of the civil penalty but only its liability for the pollutional discharge. DER maintains that since the Board has limited the issues in this appeal to the amount of the civil penalty, and since Ingram is not contesting the amount of the assessment, there are no remaining disputed issues of fact in this appeal.

On October 4, 1988, Ingram replied to DER's motion by arguing that it was not responsible for the seep in question and that therefore, there is a factual dispute remaining in this appeal. Ingram further stated it was contesting its liability for the seep in order to preserve its right to appeal at such time that the Board's February 3, 1988 interlocutory order became final.

The Board has authority to enter summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Commonwealth, DER v. Summerhill Borough, 34 Pa.Cmwlth. 574, 383 A.2d 1320 (1978). In this appeal, the only material facts relate to the amount of the civil penalty, since the Board has precluded Ingram from contesting its liability for the seep. Ingram has asserted that it does not

contest the amount of the penalty. Since that is the only issue remaining in the case, DER is entitled to judgment as a matter of law.

O R D E R

AND NOW, this 31st day of October, 1988, it is ordered that the Department of Environmental Resources' motion for summary judgment is granted and the appeal of Ingram Coal Company is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: October 31, 1988

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M. DIANE SMITH
SECRETARY TO THE BOARD

A. P. WEAVER & SONS, INC.	:	
	:	
v.	:	**EHB Docket No. 88-027-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 31, 1988**

OPINION AND ORDER

Synopsis

Where the Department of Environmental Resources withdraws the compliance order which formed the sole underlying basis for an appeal, there is no dispute and no effective relief the Board can provide. The appeal must be dismissed as moot.

O P I N I O N

This matter was initiated with the February 2, 1988 filing of a notice of appeal by A. P. Weaver & Sons (Weaver) seeking the review of a compliance order issued by the Department of Environmental Resources (DER) on February 2, 1988. The order, which related to Weaver's Billing Station, a coal preparation plant in Elk Township, Clarion County, alleged that Weaver had failed to adequately monitor groundwater in the vicinity of the mine site.

After Weaver filed its pre-hearing memorandum, counsel for DER sent a letter to the Board stating that the compliance order issued to Weaver had

been withdrawn on February 22, 1988. DER stated that, since there was no longer an enforcement action pending at this docket number, the appeal should be dismissed.

On August 31, 1988 the Board entered a Rule to Show Cause upon Weaver as to why this appeal should not be dismissed for mootness. The rule was returnable on September 20, 1988 and to date, Weaver has failed to respond.

The Board believes that the withdrawal of DER's compliance order has mooted this appeal, as there is neither a dispute between the parties nor any relief that the Board can grant. The Board will dismiss an appeal as moot if, during the pendency of the appeal, an event occurs which deprives the Board of its ability to provide effective relief. Keystone Sanitation Co., Inc. v. DER and Union Township, Intervenor. EHB Docket No. 84-349-M (Opinion and Order issued August 5, 1988). This is clearly the case in the instant matter. Accordingly, this appeal must be dismissed.

O R D E R

AND NOW, this 31st day of October, 1988, it is ordered that the appeal of A. P. Weaver & Sons is dismissed as moot.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: October 31, 1988

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M. DIANE SMITH
SECRETARY TO THE BOARD

THE RONDELL COMPANY	:	
	:	
v.	:	EHB Docket No. 85-136-F
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: November 1, 1988

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT
AND COUNTER-MOTION FOR SUMMARY JUDGMENT

Synopsis

A motion for summary judgment and counter-motion for summary judgment are both denied in an appeal from the forfeiture of fourteen surface mining bonds by the Department of Environmental Resources (DER). DER's motion for summary judgment is denied because the violations of law by the Rondell Company--established in a 1983 DER Order and in a 1986 Commonwealth Court decree--have not been tied to Rondell's activities under specific mining permits. In addition, there are unresolved factual issues regarding the amount of acreage affected under each mining permit. Although Rondell's legal arguments on these issues are correct, its counter-motion for summary judgment must also be denied because it is necessary to resolve these factual issues.

OPINION

This matter involves an appeal by The Rondell Company (Rondell)[1] from four letters of the Department of Environmental Resources (DER) dated

[1] Rondell is a partnership. The partners are Wendell Charles and Ronald Lovrich.

March 18, 1985 forfeiting various bonds posted by Rondell in connection with its surface mining at several sites. DER filed a motion for summary judgment on May 15, 1986. Rondell filed a reply to this motion and a counter-motion for summary judgment. DER then filed a reply to Rondell's counter-motion. This Opinion and Order addresses DER's motion and Rondell's counter-motion for summary judgment.

DER's letters forfeited a total of 14 bonds posted in connection with 14 mining permits (MP's) issued to Rondell. DER has broken these 14 mining permits down into four separate sites which correspond to four mine drainage permits (MDP's) issued to Rondell. The sites, mining permits, and associated bonds are as follows:[2]

Mine	Permits	Bonds	Location
Mt. Pleasant I Mine MDP #3474SM21	MP #511-12 #511-12(A) #511-12(A2) #511-12(A3) #511-01-4	Surety Bond #152E8304 Surety Bond #313E510A Surety Bond #558E3996 Collateral Bond #14210 Collateral Bond #14209	Mt. Pleasant Twp. Westmoreland Co.
Mt. Pleasant II Mine MDP #6579108	MP #511-16	Collateral Bond #14220	Mt. Pleasant & Donegal Twps.
Bullskin Mine MDP #3373SM7	MP #511-10 #511-10(A) #511-10(A2) #511-10(A3) #511-10(A4)	Collateral Bond #1726 Collateral Bond #1566 Collateral Bond #1855 Surety Bond #497B078A Surety Bond #498B0201	Saltlick & Bullskin Twps. Fayette County
Saltlick Mine MDP #3372SM4	MP #511-8 #511-9 #511-9(a)	Collateral Bond #1583 Collateral Bond #1651 Collateral Bond #1701	Saltlick Twp. Fayette County

DER alleged in its Motion for Summary Judgment that all of the bonds posted by Rondell were conditioned upon Rondell's compliance with the

---

[2] Our listing of the sites is similar to DER's listing in paragraph 1 of its motion, except that we have listed the mining permits so that they are on the same horizontal line as the bonds they are associated with. The need to correlate bonds with specific mining permits will be discussed below.

Surface Mining Conservation and Reclamation Act (Surface Mining Act), 52 P.S. §1396.1 et seq., the Clean Streams Law, 35 P.S. §691.1 et seq., the regulations of the Environmental Quality Board, and the terms and conditions of the permits authorizing the operations. DER's letters forfeiting the bonds alleged numerous violations at each of the four sites. DER also argued in its motion that Rondell's actions at the four sites have been the subject of an equity action brought by DER in Commonwealth Court (3327 C.D. 1983), and that the Court issued a memorandum opinion and decree nisi on February 3, 1986 in which it found that Rondell had committed violations at each of the four sites. In addition, DER contended that it issued an order to Rondell on May 31, 1983 which found violations at the Saltlick and Bullskin sites and which directed Rondell to correct these violations. Since Rondell did not file objections to the Commonwealth Court's decree nisi and did not appeal DER's May 31, 1983 order, DER argued in its motion that these decisions establish as a matter of law that Rondell has committed violations at the sites. Finally, DER argued that the surface mining bonds are "statutory bonds," and that the operator's liability arises upon proof of any violation--DER is not required to prove actual damages. See American Casualty Co. of Reading v. DER, 1981 EHB 1, affirmed, 65 Pa. Commw. Ct. 223, 441 A.2d 1383 (1982).

Rondell argued in its reply and counter-motion for summary judgment that the forfeiture of the bonds was unwarranted for several reasons. First, Rondell argued that DER erred in forfeiting the bonds because it did not relate the violations found in the Commonwealth Court's decree and DER's May 31, 1983 order to the particular mining permits which the bonds are associated with. Second, Rondell argued that DER erred by forfeiting the entire amount of each of the bonds without making an effort to determine how much acreage was affected under each mining permit. Third, Rondell argued that DER erred

in forfeiting certain bonds because favorable inspection reports were issued recommending release of the bonds; Rondell alleged that, under the law in effect when these bonds were issued, these inspection reports created a mandatory duty in DER to release the bonds. For these reasons, and other reasons which we will not discuss here, Rondell contended that it is entitled to summary judgment.

The Board may grant summary judgment when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Summerhill Borough v. DER, 34 Pa. Commw. Ct. 574, 383 A.2d 1320 (1978), Emerald Mines Corp. v. DER, 1986 EHB 605. Summary judgment will be granted only when the legal right to summary judgment is clear. The American Insurance Co. and Fireman's Fund Insurance Co. v. DER, 1981 EHB 470.

We will deny both DER's motion for summary judgment and Rondell's counter-motion for summary judgment. First, DER has not demonstrated that it is entitled to judgment as a matter of law. With regard to bond forfeitures, the law is clear that bonds are issued as part of a specific mining permit and not as an unbrella to cover all mining being performed by an operator. Chester A. Ogden v. DER, 1984 EHB 374, aff'd 93 Pa. Commw. Ct. 153, 501 A.2d 311 (1985). In this case, neither the Commonwealth Court's decree nor DER's Order of May 31, 1983 are specific enough to justify forfeiture of the bonds. We can understand why, for the sake of simplicity and ease of reference, DER would group the areas covered by the various mining permits together and refer to them as "Mt. Pleasant I," "Saltlick," and "Bullskin," but in order to succeed in this bond forfeiture proceeding DER must show that violations occurred in the areas covered by each of the mining permits.[3] Neither the

[3] Since only one mining permit is involved at the Mt. Pleasant II site, our discussion here does not apply to that site.

Commonwealth Court's decree nor DER's order breaks down the violations by specific mining permits; therefore, these decisions do not contain findings which can be used in deciding this case. A hearing is necessary to determine whether violations occurred in the areas covered by each mining permit.

Another reason why DER is not entitled to summary judgment is that it is not clear how much acreage has been affected under each of the mining permits. The law is clear that for bonds such as these--where liability accrues on the basis of acreage affected--DER must prove the number of acres affected by the alleged violations. Chester A. Ogden v. DER, 1984 EHB 374, aff'd 93 Pa. Commw. Ct. 153, 501 A.2d 311 (1985), Southwest Pennsylvania Natural Resources, Inc. v. DER, 1982 EHB 48, 53-55. With regard to two permits--MP 511-10(A3) (Bullskin site) and MP 511-12(A3) (Mt. Pleasant I site), DER admits that the entire area has not been affected and, thus, that it is only entitled to partial collection on the bonds associated with these permits. (DER Reply, para. 14). With regard to the other bonds, DER seems to assume--without saying so--that the entire acreage has been affected. At the hearing, DER will have the burden of proving how much land has been affected under each mining permit. American Casualty Company of Reading, PA v. DER, 1981 EHB 1, 16.

We will also deny Rondell's counter-motion for summary judgment. While we agree with Rondell's legal arguments that violations must be shown at each mining permit and that DER must delineate the acreage affected by each violation, our acceptance of these arguments does not eliminate the need for a hearing.[4] With regard to Rondell's argument that DER was barred from

---

[4] This is not to say that we endorse DER's forfeiting the entire amount of the bonds without articulating sufficiently specific grounds to justify the forfeiture. This practice breeds litigation by requiring operators to appeal to this Board to vindicate their rights.

forfeiting some of these bonds because its inspectors issued inspection reports recommending that the bonds be released, we shall defer ruling on this question until the end of the proceeding.

In summary, there are factual issues which must be resolved in this proceeding; therefore, DER's motion for summary judgment and Rondell's counter-motion for summary judgment must be denied.

ORDER

AND NOW, this 1st day of November, 1988, it is ordered that the Motion for Summary Judgment filed by the Department of Environmental Resources and the Counter-motion for Summary Judgment filed by the Rondell Company are both denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Hearing Examiner

DATED: November 1, 1988

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M. DIANE SMITH
SECRETARY TO THE BOARD

FRANCIS NASHOTKA, SR., et al.	:	
	:	
v.	:	EHB Docket No. 88-216-M
	:	(Consolidated)
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: November 2, 1988

OPINION AND ORDER
SUR
APPELLANTS' MOTION FOR A PROTECTIVE ORDER

Synopsis

A Motion for a Protective Order will be denied when the requested discovery is relevant to the subject matter of the pending actions, as required by the procedural rules, and is not prohibited by the procedural rules.

OPINION

Judging from the documents filed with the Board, a chronic case of "bad blood" has developed between the Department of Environmental Resources (DER) and some or all of the Appellants in these cases. Regrettable as that may be, it is a sometimes inevitable byproduct of a governmental agency's regulation of the activities of citizens. It is inexcusable, however, for the attorneys representing the various parties to allow themselves to become infected with the same virus that afflicts their clients.

Unfortunately, that appears to have occurred in these cases, producing a series of discovery disputes that the attorneys do not seem

willing to resolve among themselves. As a result, the Board has been called upon to issue "last minute" orders, frequently with little more to go on than a telephoned request or a thelecopied motion. The Board's limited resources of time and money can be put to better use in reducing the substantial backlog of cases pending before it.

The latest Motion for a Protective Order was filed by Appellants on November 2, 1988, seeking to prevent DER from entering onto four parcels of real estate either owned by Appellant or involved in some other way in these cases. DER's Request to Permit Entry, attached as Exhibit "A" to Appellants' Motion, is dated October 24, 1988, and seeks entry on November 3, 1988, in order to prepare for depositions scheduled to be taken on November 7, 1988. The Board, once again, is being asked to take action "at the last minute" on a matter that could have been brought before it sooner. This is especially annoying because DER's attorney originally filed and served a Request to Permit Entry on September 23, 1988, to which Appellants' attorney filed no objection.

Appellants' Motion opposes DER's entry onto the four parcels of real estate principally on the ground of relevance, arguing that (1) prior inspections have been made by DER, and (2) the condition of the real estate now would have no bearing on its condition earlier this year when the alleged violations occurred. Appellants also maintain that they do not own the Doran farm and that the Moore farm is not the subject of any alleged violations.

In its Response to Appellants' Motion (also filed November 2, 1988), DER withdraws its request to enter the Doran and Moore farms. It insists on its right to enter the Nashotka farm and the Hartpence farm, however, in order

to prepare for depositions. It claims that the prior entry by DER personnel was done by inspectors in response to complaints and not for the preparation of DER's case.

Discovery in proceedings before the Board is governed by the Pennsylvania Rules of Civil Procedure (R.C.P.), 25 Pa. Code §21.111. R.C.P. 4009 (a) (2) provides for entry upon land for the purpose of "inspecting and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rules 4003.1 through 4003.5 inclusive." R.C.P. 4003.1 lays out a broad range of permissible discovery extending to "any matter, not privileged, which is relevant to the subject matter involved in the pending action...." This language, adopted in 1978, was intended to expand the concept of allowable discovery beyond its previous boundaries (see Note of the Procedural Rules Committee to R.C.P. 4003.1). Even under prior versions of the discovery rules, however, relevancy was given a liberal meaning. (See Goodrich-Amram 2d §4001:3, §4003.1:1, §4003.1:5, et seq.), and was never confined to evidence admissible at trial.

The "subject matter involved" in the present cases is the alleged unpermitted disposal of septic tank pumpings on the Nashotka farm and the Hartpence farm and DER's denial of an application for permission to dispose of such wastes on the Moore farm. It is difficult to understand how anyone could claim that entry upon these farms is not relevant to the subject matter.

R.C.P. 4011 prohibits discovery which (1) is sought in bad faith, (2) would cause unreasonable annoyance, embarrassment, oppression, burden or expense, (3) relates to matter which is privileged, or (4) would require the making of an unreasonable investigation by the person against whom it is directed. Appellants do not specifically claim that any of these

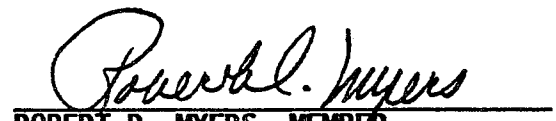
circumstances apply, but argue generally that DER's purpose is to harass the Appellants. The evidence available to the Board does not support this argument. DER's prior entries on the farms involved here all occurred before these cases began and had as their purpose the conduct of investigations prompted by complaints. Those entries cannot be treated as prior acts of discovery because they all took place before there was any "pending action" as required by R.C.P. 4003.1.

There are pending actions now and DER is entitled to enter, for purposes of discovery, the three farms involved in those pending actions. Since DER has withdrawn its request as far as the Moore and Doran farms are concerned, there is no need to discuss the issues of ownership and control that would be pertinent to those properties. Such issues have not arisen with respect to the Nashotka and Hartpence farms and DER's right to enter those properties is clear.

ORDER

AND NOW, this 2nd day of November, 1988, the Motion for a Protective Order filed on behalf of Francis Nashotka, Lawrence Hartpence and Hydro-Clean, Inc. is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS, MEMBER

DATED: November 2, 1988

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M. DIANE SMITH
SECRETARY TO THE BOARD

FORTUNE ASSURANCE COMPANY, INC.	:	
	:	
v.	:	EHB Docket No. 84-043-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: November 4, 1988

OPINION AND ORDER

Synopsis

Appeal of a surety company is dismissed for lack of prosecution where the surety has been dissolved by order of the Commonwealth Court and prohibited from pursuing any actions.

OPINION

This matter was initiated by the February 3, 1984 filing of a notice of appeal by Fortune Assurance Company (Fortune) seeking review of the Department of Environmental Resources' (Department) January 9, 1984 letter forfeiting bonds relating to mine drainage and surface mining permits issued to Neshaminy Enterprises International, Inc. (Neshaminy). This appeal was docketed at Docket No. 84-034-M. Because the notice of appeal did not contain the information required by the Board's rules of practice and procedure, the Board, on February 13, 1984, sent an acknowledgement and request for additional information to Fortune.

Fortune's response to the Board's acknowledgement and request for additional information was erroneously docketed as a new appeal at Docket No.

84-043-M. The Board rectified this error on February 27, 1984, by consolidating the appeals at Docket No. 84-043-M. The Board then issued its customary pre-hearing order, which required Fortune to file its pre-hearing memorandum on or before May 7, 1984.

The Department then, on September 5, 1986, filed a motion to dismiss Fortune's appeal for failure to comply with Pre-Hearing Order No. 1 and failure to prosecute. Fortune responded to the Department's motion on October 1, 1986, alleging that it never received Pre-Hearing Order No. 1 and that it was engaged in discussions with the Department to complete the work. Fortune also made reference to Docket No. 84-034-M, but contended that it related to an appeal by Mid-Continent Insurance Company of forfeitures of Neshaminy's bonds. Because it appeared that there was a great deal of confusion relating to the correct docket numbers, which may, in some part, have been caused by the Board, the Department's motion to dismiss was denied on December 18, 1986. Fortune was directed to file its pre-hearing memorandum on or before January 16, 1987.

Fortune filed its pre-hearing memorandum on January 21, 1987, and the Department filed its pre-hearing memorandum on March 4, 1987. On March 11, 1987, the Board placed the matter on the hearing list for scheduling of a hearing on the merits. Because of the Board's backlog of cases awaiting hearing, this case could not be scheduled until 1988.

The Board requested a status report from Fortune by order dated August 2, 1988. When Fortune did not file the status report, the Board advised it of the default in a letter dated August 31, 1988, which was sent by certified mail, return receipt requested. The Board's letter was returned with a notation that the forwarding order for Fortune's counsel's mail had expired. The Board secured another address for Fortune's counsel and mailed

another default notice requiring Fortune to respond on or before October 3, 1988. Fortune again did not respond, and the Board sent another default notice to Fortune advising it that a response must be filed on or before October 27, 1988, in order to avoid the imposition of sanctions.

By letter dated October 20, 1988, Fortune's counsel advised the Board that:

> Fortune Assurance Company, Inc. was determined to be insolvent by the Commonwealth Court by Order dated July 21, 1987. The Insurance Commissioner was, by the terms of that Order, appointed liquidator of Fortune Assurance Company, Inc. The administration of the above matter, has, therefore, been undertaken by the Insurance Department. I am not authorized to make any responses to the matters raised by the Default Notice.

The posture of this matter is similar to Fortune's posture in Fortune Assurance Company, Inc. v. DER, EHB Docket No. 85-496-R (Opinion and order issued March 24, 1988) wherein the Board dismissed Fortune's appeal for lack of prosecution. The Board noted that Fortune's failure to respond to the Department's motion to dismiss, coupled with its repeated extensions to comply with the Board's pre-hearing orders, was indicative of Fortune's lack of intention to prosecute its appeal. But, the Board also held that it was impossible for Fortune to pursue its appeal in light of the Commonwealth Court's July 21, 1987 order dissolving Fortune, as that order prohibited Fortune from instituting or further prosecuting any actions.

Although the Board could take the additional procedural step of issuing a rule upon Fortune to show cause why its appeal should not be dismissed for lack of prosecution, issuance of such a rule would be meaningless in light of Fortune's October 20, 1988 letter and our disposition of Fortune's appeal at Docket No. 85-496-R. Accordingly, we will dismiss Fortune's appeal for lack of prosecution.

O R D E R

AND NOW, this 4th day of November, 1988, it is ordered that the appeal of Fortune Assurance Company, Inc. is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

William A. Roth
WILLIAM A. ROTH, MEMBER

Robert D. Myers
ROBERT D. MYERS, MEMBER

DATED: November 4, 1988

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M. DIANE SMITH
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA FISH COMMISSION and LITTLE CLEARFIELD CREEK WATERSHED ASSOCIATION	:	EHB Docket No. 86-338-W
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and AL HAMILTON CONTRACTING COMPANY	:	Issued: November 4, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

The Pennsylvania Fish Commission has standing under the Surface Mining Conservation and Reclamation Act to appeal a surface mining permit variance involving mining within 100 feet of a stream. Surface mining permit revisions or modifications are appealable actions.

OPINION

In August, 1984, Al Hamilton Contracting Co. (Hamilton) applied for a revision to Mining Permit No. 17800142, later transformed to No. 17803167, to incorporate the relocation of Campbell Run as part of its Anderson surface mining operation in Ferguson Township, Clearfield County. The revision was issued by the Department of Environmental Resources (Department) in February, 1986, pursuant to the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. (Surface Mining Act), in particular 52 P.S. §1396.4(e)(i).

However, the Department failed to consult the Pennsylvania Fish Commission (Commission) or submit the permit revision application to it for review, in accordance with an April 20, 1982 Memorandum of Understanding between the Commission and the Department dealing with applications for new or revised surface mining permits or variances when mining is proposed within 100 feet of an intermittent or perennial stream. In response to objections raised by the Commission, and others, the approved permit was suspended on February 14, 1986, for a period of 90 days, and a meeting was held with Hamilton and the Commission on March 19, 1986 to discuss alternatives to the stream relocation proposal. As a result of this meeting, Hamilton proposed an alternate plan which did not involve the stream relocation, but, rather, involved mining within 25 feet of the center of Campbell Run and auger mining under part of the stream.

On June 5, 1986, the Department approved Hamilton's proposal and incorporated it into a revised permit. The Commission, which had not been consulted about this new plan after the March 19, 1986 meeting, appealed the revised permit on July 3, 1986. The Commission then filed a petition for supersedeas on July 23, 1986, requesting the Board to suspend the permit until the matter could be adjudicated on the merits. On August 22, 1986, the Little Clearfield Creek Watershed Association moved to intervene in the appeal, and its petition was granted on October 27, 1986.

A hearing was held on the petition for supersedeas [1] on November 5, 1986, and during the course of that hearing Hamilton moved to dismiss the Commission's appeal.

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[1] On March 23, 1987, the Board granted the Commission's petition for supersedeas.

Hamilton maintains that the Commission lacks standing to appeal the permit revision and maintains that even if the Commission did have standing, the action is not appealable. In support of these contentions, Hamilton argues that the Commission is not an aggrieved party nor does it have the necessary nexus to confer standing. Hamilton argues that the Commission cannot show an immediate injury, rather only a possibility of future harm, and supports this with the fact that Hamilton has revised its proposal so that the stream will not be relocated, thus providing more protection than the originally approved plan. Furthermore, Hamilton contends that the Commission failed to avail itself of the procedures to resolve conflicts between the Commission and the Department which are set forth in the Memorandum of Understanding.

Hamilton's motion to dismiss also alleges that this permit revision is not an appealable action because approval of the modification is not an adjudication as defined in 2 Pa.C.S.A. §101[2] and, therefore, does not fall under 2 Pa.C.S.A. §702,[3] authorizing an aggrieved party to appeal an adjudication. Hamilton further argues that even if the modification is somehow considered an adjudication, it could not affect the rights of any party more than the original permit, which the Commission did not appeal, because it afforded greater protection to the environment than the original unappealed permit.

In response to the motion to dismiss, the Commission maintains it does have standing under the Fish and Boat Code of 1980, 30 Pa.C.S.A. §102 et seq.,

---

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

[3] "Any person aggrieved by an adjudication of a Commonwealth agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals..."

and the Surface Mining Act. Additionally, the Commission argues that since any agency may intervene as of right under 1 Pa.Code §35.28(b) when necessary or appropriate to the administration of a statute, that agency ought to be able to bring an action in its own name as well. The Commission, in response to Hamilton's argument that it lacks standing for failure to exhaust administrative remedies as set forth in the Memorandum of Understanding, points out that this document was intended to avoid conflicts and to resolve concerns of the Commission and Department before a permit or revision thereof was approved. Once the Department takes action and the Commission is dissatisfied, the Commission contends it may appeal the Department's action to the Board. Finally, the Commission contends that the permit revision is appealable. For reasons discussed below, we find the Commission has standing to appeal this permit and that the permit revision is an appealable action.

According to §1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21,, the Board has the power to hold hearings and issue adjudications "on any order, permit, license or decision of the Department of Environmental Resources." For an appeal to lie with the Board, the action of the Department must constitute an adjudication as defined by 2 Pa.C.S.A. §101 and 25 Pa.Code §21.2. Quentin Haus Restaurant v. DER, 1987 EHB 276. 2 Pa.C.S.A. §101 defines adjudication as

> Any final order, permit, license, or decision determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liability or obligations of any or all of the parties to the proceeding in which the adjudication is made.

The Board's rules of practice and procedure at 25 Pa.Code §21.1 define action to include "denials, modifications, suspensions and revocations of permits, licenses and registrations..." Emphasis added.

The Board has recently held that the Department's issuance of a permit amendment is an appealable action. Consol Pennsylvania Coal Company v. DER, EHB Docket No. 87-284-R (Opinion and order issued May 26, 1988) (involving an application to amend a mining activity permit to modify the osmotic pressure limitations for a mining activity permit). We feel this precedent is equally binding for the modification of a mining permit under the variance provision in 52 P.S. §1396.4(e)(i). Accordingly, we hold the granting of a permit variance under the SMCRA, 52 P.S. §1396.4(e)(i) to be an appealable action.

It is well known that in order for a party to have standing it must show a substantial, direct and immediate interest in the subject matter of the litigation. William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). The question of a government agency's standing to challenge actions of a fellow agency, as is the situation presented here, was addressed by the Commonwealth Court in Com. Pa. Game v. Com. Pa. Dept. of Env. Res. 97 Pa.Cmwlth. 78, 509 A.2d 877 (1986) ("Ganzer") , wherein the Board's determination at 1985 EHB 1 that the Game Commission did not have a standing to raise the applicability of the Dam Safety and Encroachments Act in a challenge to the issuance of a solid waste management permit was affirmed. The Commonwealth Court found that the "Game Commission would have been required to show that violations of the DSEA bore a direct, immediate, and substantial relation to its status as a trustee of the Commonwealth's wildlife...." 509 A.2d at 881. The court held that there was no substantial, direct, and immediate interest of the Game Commission in the issuance of the solid waste permit, emphasizing that the Department, and not the Game Commission, was entrusted with the responsibility of protecting wildlife under the DSEA.

The Commission's position in this matter differs greatly from that of the Game Commission in the appeal of the Ganzer permit. Here, the Surface

Mining Act, unlike the DSEA in the Ganzer case, gives the Commission a direct role in reviewing variance applications to mine within 100 feet of a stream. 52 P.S. §1396.4(e)(i). Thus, the Commission has a statutorily conferred interest here. The Commission's interest is substantial, direct, and immediate, given its authority under 52 Pa.S. §1396.4e(i) to comment on variance proposals.

We will briefly address two other issues raised by Hamilton. As to Hamilton's argument that the Commission failed to exhaust the administrative remedies set forth in the Memorandum of Understanding, we cannot agree that an inter-agency memorandum operates to supersede statutes or regulations. Moreover, the Memorandum of Understanding does not address a procedure to resolve differences between the Commission and the Department after a permit is issued. And, the Commission's failure to appeal the initial permit does not preclude it from appealing the modification, unless it raises issues which are precluded by administrative finality, collateral estoppel, or other principles of issue preclusion. That Hamilton or the Department believe that variance provides more environmental protection is, in and of itself, of no consequence.

O R D E R

AND NOW, this 4th day of November, 1988, it is ordered that Al Hamilton Contracting Company's Motion to Dismiss is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

DATED: November 4, 1988

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For Permittee:
William C. Kriner, Esq.
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M. DIANE SMITH
SECRETARY TO THE BOARD

G. B. MINING COMPANY	:	
	:	
v.	:	**EHB Docket No. 87-408-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** November 4, 1988

OPINION AND ORDER SUR
MOTION FOR JUDGMENT ON THE PLEADINGS

Synopsis

Where appellant admits to engaging in activity defined as mining activity under 25 Pa.Code §86.1 without a permit, and no other facts are at issue, the Department is entitled to judgment as a matter of law and its motion for judgment on the pleadings will be granted.

OPINION

This action stems from the activities of G. B. Mining Company (G.B.) in Coal Township, Northumberland County. In October, 1986, G.B. filed an application for an underground mining permit with the Department of Environmental Resources (Department) pursuant to the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (the Clean Streams Law), the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. (the Surface Mining Act), and the rules and regulations adopted thereunder. On August 27, 1987, before a permit was issued, the Department inspected the site and found that G.B. was in violation of 25 Pa.Code §§86.11 and 86.13 in that it was

timbering an old airway on an area which was to be reclaimed by North Mountain Coal Company without first obtaining a permit. On that same day, the Department issued a compliance order requiring cessation of G.B.'s mining activities. A permit was issued to G.B. on September 11, 1987. G.B. then filed a notice of appeal of the compliance order on September 25, 1987.[1]

On April 18, 1988, the Department filed a motion for judgment on the pleadings, contending that the conduct admitted to by G.B. in its notice of appeal was proscribed by 25 Pa.Code §§86.11 and 86.13 and, therefore, the Department was entitled to judgment.

Under Pa.R.C.P. No. 1034, judgment on the pleadings will be granted where, on consideration of the pleadings themselves, a cause of action does not exist as pleaded. Bensalem Township School District v. Commonwealth, 544 A.2d 1318 (1988). In considering a motion for judgment on the pleadings, all facts pleaded by the non-moving party are deemed true, and only those facts admitted can be considered against it. See 6 Standard Pa. Practice 2d §31.19, citing, among others, Bata v. Central-Penn National Bank, 423 Pa. 373, 224 A.2d 174 (1966), cert. denied. 386, US 1007.

Section 315 of the Clean Streams Law and §4 of the Surface Mining Act require that a permit be obtained to conduct coal mining activities. See also 25 Pa.Code §86.13. In Bloom v. Commonwealth, DER, 101 Pa.Cmwlth 8, 515 A.2d 361, 364 (1986), the Commonwealth Court held that 25 Pa.Code §86.13 and §315(a) of the Clean Streams Law,[2] read together, "clearly expresses a

---

[1] A copy of a penalty assessment worksheet indicating a $1000 civil penalty was attached to G.B.'s notice of appeal. However, this penalty was not mentioned in the compliance order or the notice of appeal, nor was there any indication that the civil penalty assessment was issued by the Department pursuant to 25 Pa.Code §86.193(f).

[2] 35 P.S. §691.315(a) says, "Operation of the mine shall include preparatory work in connection with the opening or reopening of a mine."

legislative and regulatory intent to require all ongoing and future coal mining activities to be conducted only under permits issued pursuant to the primacy regulations." Emphasis added.

Coal mining activities consist of surface mining activities, underground mining activities or coal refuse disposal activities, as defined in 25 Pa.Code §86.1. Underground mining activities are defined as

> (i) Surface operations incident to underground extraction of coal or in situ processing, such as construction, use, maintenance and reclamation of roads, above-ground repair areas, storage areas, processing areas, shipping areas, areas upon which are sited support facilities, including hoist and ventilating ducts, areas used for the disposal and storage of waste and areas on which materials incident to underground mining operations are placed.
>
> (ii) Underground operations such as underground construction, operation and reclamation of shafts, adits, underground support facilities, in situ processing and underground mining, hauling, storage and blasting.
>
> (iii) Operation of a mine, including preparatory work in connection with the opening or reopening of a mine, backfilling, sealing and other closing procedures, and any other work done on land or water in connection with a mine.
>
> (emphasis added)

In its notice of appeal, G.B. admits to "retimbering and mine maintenance in preparation for coal production." However, the area where this work was being performed was not even included in the application for a permit. Even if it had been included, the activity comes within the above-quoted definition of underground mining activities; therefore, there is no dispute and no cause of action, as the Department's action in issuing the compliance order was entirely proper under §§5 and 610 of the Clean Streams Law and §4c of the Surface Mining Act, 52 P.S. §1396.4c. See Bensalem Township School District v. Commonwealth, 544 A.2d 1318 (1988). Therefore, the Department

is entitled to judgment as a matter of law. Bearnell v. Western Wayne School District, 91 Pa.Cmwlth 348, 496 A.2d 1373 (1985).

O R D E R

AND NOW, this 4th day of November, 1988, it is ordered that the Department of Environmental Resources' Motion for Judgment on the Pleadings is granted and G. B. Mining Company's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

William A. Roth
WILLIAM A. ROTH, MEMBER

Robert D. Myers
ROBERT D. MYERS, MEMBER

DATED: November 4, 1988

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M. DIANE SMITH
SECRETARY TO THE BOARD

SOUTH HANOVER TOWNSHIP BOARD OF SUPERVISORS	:	
v.	:	**EHB Docket No. 88-166-M**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** November 4, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A Motion to Dismiss an appeal is denied where the letter of the Department of Environmental Resources (DER) forming the basis for the appeal directs a municipality to comply with the Pennsylvania Sewage Facilities Act (SFA), Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 et seq., by updating its Official Plan to the extent necessary to gain DER's approval. Such a letter "affects" a "duty" of a "person" and constitutes an "action" of DER under 25 Pa. Code §21.2(a).

OPINION

On April 25, 1988, South Hanover Township Board of Supervisors (Appellant) filed a Notice of Appeal from a March 25, 1988, letter of DER pertaining to Appellant's Official Plan provided for in the SFA. DER has filed a Motion to Dismiss the appeal, contending that the letter of March 25,

1988, does not constitute "action" of DER. Appellant, in response, maintains that the letter constitutes a denial of an update to its Official Plan and is, therefore, appealable.

In order for the Board's jurisdiciton to be invoked, an appeal must challenge a particular "action" of DER. That word is defined at 25 Pa. Code §21.2 (a) to mean:

> "any order, decree, decision, determination or ruling by the Department [DER] affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any person...."

The definition is simple to state but often difficult to apply to a given fact situation.

DER's letter at issue here discusses deficiencies in Appellant's Official Plan update. The letter reminds Appellant at the outset that DER had disapproved a revision to the Official Plan on December 9, 1986. It then states that the current submission does not resolve the problems that prompted the previous disapproval. It goes on to point out that Appellant has been since 1983, and continues to be, in violation of the SFA and its underlying regulations. It directs Appellant to take certain action and submit certain information to DER within 60 days.

While the letter characterizes Appellant's submittal as "incomplete," the manifest intent is to force Appellant to comply with the SFA by updating its Official Plan to the extent necessary to gain DER's approval. DER clearly has the authority to issue such an order under §10 of the SFA, 35 P.S. §750.10, and under the rules and regulations adopted thereunder, 25 Pa. Code §71.15 (a).

An "order" of DER "affecting" the "duties" of a "person" (defined in 25 Pa. Code §21.2 (a) to include a political subdivision) constitutes an

"action" from which an appeal may be taken. York Township v. DER, 1986 EHB 515. DER's letter to Appellant in the present case rises to that level.

ORDER

AND NOW, this 4th day of November, 1988, it is ordered as follows:

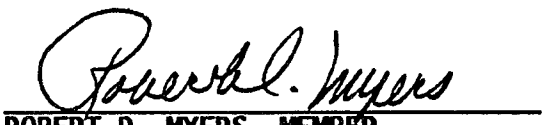
1. The Motion to Dismiss filed by the Department of Environmental Resources is denied.

2. Pre-Hearing Order No. 1, dated May 4, 1988, is modified as follows:

(a) the date by which all discovery shall be completed is December 15, 1988.

(b) the date by which Appellant shall file its pre-hearing memorandum is December 15, 1988.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS, MEMBER

DATED: November 4, 1988

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Middletown, PA

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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Suites Three - Five
Harrisburg, PA 17101
(717) 787-3483

M. DIANE SMITH
SECRETARY TO THE BOARD

BISON COAL COMPANY :
:
v. : EHB Docket No. 88-263-F
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: November 4, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A motion to dismiss filed by the Department of Environmental Resources (DER) is denied. The Appellant has submitted the information requested by the Board. The degree to which the Appellant was late in doing so does not warrant dismissing the appeal.

OPINION

This proceeding stems from an appeal filed on July 5, 1988 by Bison Coal Company (Bison). On July 8, 1988, the Board sent a Notice to Bison that its appeal did not comply with 25 Pa. Code §21.51 in that a copy of the appealed-from letter or order of the Department of Environmental Resources (DER) was not attached; this notice requested Bison to file the information within ten (10) days, or its appeal may be dismissed. Bison did not submit the information, so on July 26, 1988 the Board sent a "Second Notice" to Bison again requesting the missing information. Bison did not respond to the Second Notice. On August 9, 1988, DER filed a motion to dismiss the appeal due to Bison's failure to submit the information requested by the Board. The

Board sent a letter to Bison directing that it file an answer, if any, to DER's motion by August 31, 1988. On August 19, 1988, Bison filed with the Board the DER letter which it was appealing from along with a three-page letter in which it outlined its financial and other difficulties. [1]

The Board's regulations provide that an appeal which is filed within the required time, but which does not meet the Board's requirements for form and content, shall be docketed as a skeleton appeal. 25 Pa. Code §21.52(c) The regulations also provide that "[t]he appellant shall, upon request from the Board, file the required information or suffer dismissal of the appeal." Id. In the instant case, Bison has now provided the information requested by the Board; the only question is whether its tardiness in doing so justifies dismissing the appeal. We believe that dismissal of the appeal would be unduly harsh under the circumstances of this case. We will, however, advise Bison to respond promptly to the Board's notices in the future.

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[1] DER's letter, dated April 7, 1988, suspended Bison's Surface Mine Operator's license for the stated reason that Bison had not replaced certain bonds which had become invalid. Bison's letter implied that Bison could not replace the bonds because of its financial difficulties, and stated that Bison was soliciting other companies to take over the mining of the site.

ORDER

AND NOW, this 4th day of November, 1988, it is ordered that the Department of Environmental Resources' Motion to Dismiss the appeal of Bison Coal Company at EHB Docket Number 88-263-F is denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick
TERRANCE J. FITZPATRICK
Hearing Examiner

DATED: November 4, 1988

cc: **Bureau of Litigation**
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Central Region
For Appellant:
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Bison Coal Company
East Stroudsburg, PA

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M. DIANE SMITH
SECRETARY TO THE BOARD

DANIEL E. BLEVINS :
v. : EHB Docket No. 88-018-W
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES :
and :
SOUTHEASTERN CHESTER COUNTY : Issued: November 7, 1988
REFUSE AUTHORITY, Permittee

OPINION AND ORDER SUR PETITION TO APPEAL NUNC PRO TUNC

Synopsis

A petition for leave to file an appeal nunc pro tunc will be denied where a petitoner fails to allege good cause such as fraud or breakdown of the Board's operations.

OPINION

This action was initiated on January 20, 1988, by the filing of a petition for an appeal nunc pro tunc by Daniel Blevins. Blevins was seeking the Board's review of the Department of Environmental Resources' (Department) September 9, 1987 issuance of an amendment to Solid Waste Disposal Permit No. 101069, which authorized the Southeastern Chester County Refuse Authority (SECCRA) to operate a solid waste disposal facility in London Grove Township, Chester County.

Blevins alleges that, at the time this amendment was granted, he was appealing the May 7, 1982 reissuance of the underlying permit at Docket No.

82-154-M. Blevins alleges his counsel received no notice that an amendment was requested or granted until December 23, 1987, when he received a copy of a motion filed by SECCRA at Docket No. 82-154-M which made mention of the amendment. Counsel states that he has been unable to confirm whether Blevins himself had received notice. The petition argues that 25 Pa.Code §21.32 and 1 Pa.Code §31.26 "require service of notice on counsel of record of any notices or communications required to be served to the parties to an action." See Petition, No. 6, p.2.

The Department's January 29, 1988 answer to Blevins' petition to appeal nunc pro tunc alleges that notice of the amendment was served on counsel and on petitioner, by way of publication in the Pennsylvania Bulletin, citing 17 Pa.B 4243-4244 (October 24, 1987). As to 25 Pa.Code §21.32 and 1 Pa.Code §31.26, the Department contends the regulations deal only with notices or communications "in proceedings" to which they relate.

This Board has jurisidiction to hear appeals from an action of the Department if the appeal is filed within 30 days after a party receives written notice of the action or within 30 days after notice of the action is published in the Pennsylvania Bulletin. 25 Pa.Code §21.52(a). Recently, the Commonwealth Court held that the appeal period for a third party appellant does not start to run until notice appears in the Pennsylvania Bulletin, regardless of whether or not the appellant has already received written notice. Lower Allen Citizens Action Group, Inc. v. DER, ___ Pa.Cmwlth ___, 546 A.2d 1330 (1988), interpreting an inconsistency perceived between 25 Pa.Code §21.36 and 25 Pa.Code §21.52(a).

This Board is empowered to take judicial notice of the fact of publication in the Pennsylvania Bulletin, 45 Pa.C.S.A. §506, and it will exercise

its power to do so in this case. Since Blevins, a third party, did not file an appeal within 30 days after notice was published in the Pennsylvania Bulletin, the Board's jurisdiction was never invoked. Good Shepherd Rehabilitation Hospital v. DER, EHB Docket No. 88-258-M (Opinion and order issued September 26, 1988).

The Board may hear appeals nunc pro tunc if a would-be appellant can show good cause. Good cause has been interpreted as involving, among others, fraud or breakdown in the operation of the Board. Franklin Township Municipal Authority v. DER, EHB Docket No. 87-358-R (Opinion and order issued January 12, 1988).

No such cause was alleged by Blevins. The only argument advanced for allowing this petition is that Blevins and his counsel, as participants in the appeal pending at Docket No. 82-154-M, were entitled to written notice of the permit amendment. 25 Pa.Code §21.32(a) requires that "pleadings, submittals, briefs and other documents, filed in proceedings pending before the Board, when filed or tendered to the Board, shall be served upon participants in the proceeding..." 1 Pa.Code §31.26 requires that, when an attorney has entered an appearance in a proceeding, "a notice or other written communication required to be served upon or furnished to the client shall also be served upon or furnished to the attorney..."

Blevins would have us construe these provisions as imposing a requirement upon the department in the proceeding pending at Docket No. 82-154-M to give notice to Blevins and his attorney of the permit amendment application. The subject matter of that proceeding, however, is the permit reissuance of May 7, 1982. The permit amendment issued September 9, 1987, is

a distinctly different subject. The Department was under no obligation to notify Blevins, as a party to Docket No. 82-154-M, that a permit amendment was requested or issued.

25 Pa.Code §21.36 states, "Publication of a notice of action or proposed action by the Department or Board in the Pennsylvania Bulletin shall constitute notice to or service upon persons, except a party, effective as of the date of publication." Since Blevins was not a party to the permit amendment application, publication in the Pennsylvania Bulletin constituted sufficient notice to Blevins of the issuance of the amendment. See Lower Allen Citizens Action Group, supra.

Because Blevins failed to file his appeal in accordance with 25 Pa.Code §21.52(a) and alleged no good cause to allow the filing of an appeal nunc pro tunc, this petition is denied.

O R D E R

AND NOW, this 7th day of November, 1988, it is ordered that the petition for leave to file an appeal nunc pro tunc of Daniel Blevins is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

William A. Roth
WILLIAM A. ROTH, MEMBER

Robert D. Myers
ROBERT D. MYERS, MEMBER

DATED: November 7, 1988

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

C & K COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 86-532-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: November 8, 1988

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

A motion for summary judgment will be granted where there are no material facts in dispute and the Department of Environmental Resources is entitled to judgment as a matter of law.

O P I N I O N

This matter was initiated by C & K Coal Company's (C & K) September 15, 1986 filing of a notice of appeal from an August 15, 1986 assessment of a $440 civil penalty issued to it by the Department of Environmental Resources (DER). The assessment, which was issued by DER pursuant to the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. (SMCRA) and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (CSL), pertained to discharges to Licking Creek at C & K's Gourley mine in Monroe and Piney Townships, Clarion County, which allegedly exceeded the allowable effluent

limits for iron contained in C & K's mine drainage permit.

On January 29, 1988, DER filed a motion for summary judgment, contending that the assessment stemmed from two compliance orders issued as a result of November 21, 1985 discharges of mine drainage from the Gourley Mine. DER issued Compliance Order No. 86-K-025S on January 17, 1986, which cited C & K for the non-complying discharges and required their abatement. On February 10, 1986 DER issued Compliance Order No. 86-K-050S, which reiterated the findings and requirements of Compliance Order No. 86-K-025S, but extended the abatement date. DER asserts that C & K did not appeal these DER actions within the 30-day appeal period but, rather, filed appeals nunc pro tunc in July, 1986, which were denied by the Board on November 20, 1986. C & K petitioned the Commonwealth Court for review, and, on January 13, 1988, the Commonwealth Court affirmed the Board's order. DER asserts that the only defense being raised by C & K in the present appeal is that it was not responsible for the discharges from the Gourley Mine and that C & K is precluded from contesting its liability for the November 21, 1985 discharges because, under the principle of administrative finality, Compliance Order Nos. 85-K-025S and 85-K-050S are final and their legal and factual bases are unassailable. Because there are no material facts in dispute, DER concludes that it is entitled to judgment as a matter of law.

In its February 18, 1988 response, C & K admits to DER's factual allegations. The only objection raised by C & K is that the issue of the finality of the findings underlying Compliance Orders 85-K-025S and 85-K-050S be allowed to remain open as a result of C & K's petition for allowance of appeal of the Commonwealth Court order to the Pennsylvania Supreme Court.

The Board may grant summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Norwin YMCA v. DER, EHB Docket No. 87-384-R (Opinion and order issued October 18, 1988). There are no material facts at issue, since C & K's failure to timely appeal establishes its liability for the discharges from the Gourley mine. The Board's denial of C & K's petitions for allowance of appeals nunc pro tunc of the two compliance orders was affirmed by the Commonwealth Court, C & K Coal Company v. DER, ____ Pa.Cmwlth. ____, 535 A.2d 745 (1988), and on July 11, 1988, C & K's petition for allowance of appeal was denied per curiam by the Supreme Court. In neither its notice of appeal nor its response to DER's motion does C & K contest the amount of the assessment. Indeed, in its answer to DER's motion, C & K only contests its liability for the discharges. Therefore, there are no material facts in dispute and all that remains for us to decide is whether DER is entitled to judgment as a matter of law. DER is authorized by §18.4 of SMCRA to assess civil penalties for violations of permit conditions. Because it is established that C & K discharged mine drainage in violation of its mine drainage permit and since C & K doesn't contest the amount of the assessment, DER's motion for summary judgment is granted.

O R D E R

AND NOW this 8th day of November, 1988, it is ordered that the Department of Environmental Resources' motion for summary judgment is granted and the appeal of C & K Coal Company at Docket No. 86-532-R is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: November 8, 1988

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M. DIANE SMITH
SECRETARY TO THE BOARD

HARLAN J. SNYDER and FRED EYRICH	:	
v.	:	EHB Docket No. 88-196-F
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and OLEY TOWNSHIP, Permittee and MARATHON LAND CORPORATION, Intervenor	:	Issued: November 8, 1988

OPINION AND ORDER
SUR
MOTIONS TO DISMISS

Synopsis

Two Motions to Dismiss are denied in an appeal from the Department of Environmental Resources' (DER) approval of a revision to a township's official sewage facilities plan. The Appellants have alleged that they both live within the township which has obtained the revision approval from DER, and that they obtain their water from wells which could be affected by the on-lot septic systems allowed by the revision. These allegations suffice to establish that the appellants have a direct, substantial, and immediate interest in DER's approval of the revision.

OPINION

This case involves an appeal by Harlan J. Snyder and Fred Eyrich (Snyder and Eyrich) from the Department of Environmental Resources' (DER) approval of a revision to the Oley Township Official Sewage Facilities Plan. DER's approval accepted on-lot sewage disposal for six residential units located in a portion of the Pine Creek Subdivision. Marathon Land Corporation

(Marathon), the developer of the Pine Creek Subdivision, has intervened in the proceeding.

This Opinion and Order addresses motions to dismiss filed by DER and Marathon. Both of these motions assert that Snyder and Eyrich lack standing to bring this appeal. Snyder and Eyrich have filed answers to both motions, and have also filed a motion to supplement their appeal and a memorandum of law in opposition to the motions to dismiss.

DER's and Marathon's motions raise identical arguments. They contend that only a party who has a "direct, substantial, and immediate interest" in a matter has standing to institute litigation. See William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). They allege that neither Snyder nor Eyrich owns property in Oley Township,[1] and that the appeal states only that Snyder and Eyrich live in the "affected area," an allegation which DER and Marathon contend is insufficient to satisfy the requirements for standing set out in William Penn Parking Garage.

In their answers to the motions to dismiss, Snyder and Eyrich contend that they do have a direct, substantial, and immediate interest in the subject matter of this appeal. Snyder and Eyrich base their arguments upon the facts alleged in their motion to supplement appeal. First, they allege that while they do not own property in Oley Township, they do reside in the Township. Snyder allegedly lives on property owned by his grandmother which is adjacent to the Pine Creek Subdivision; Eyrich lives on property owned by his father which is within three miles of the subdivision. Both Snyder and Eyrich contend that they obtain their water from wells, and that these wells could be affected by damage to the aquifer in the area of the subdivision because

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[1] This allegation was based upon a title search conducted by Marathon.

groundwater flows freely through the limestone bed underlying the area. In addition, Eyrich allegedly walks in the area of the subdivision. Finally, in their memorandum of law in opposition to the motions to dismiss, Snyder and Eyrich contend that land ownership is not a prerequisite to standing.

In ruling upon a motion to dismiss, the record must be reviewed in a light most favorable to the non-moving party, and all doubts must be resolved against the moving party. Fetterolf Mining, Inc. v. DER, 1987 EHB 508, Herskovitz v. Vespicco, 238 Pa. Super. 529, 362 A.2d 394 (1976). In this case, we will deny the motions to dismiss because the facts alleged in the motion to supplement appeal (which we will grant) are sufficient to establish that Snyder and Eyrich have a direct, substantial, and immediate interest in the action appealed from. Snyder and Eyrich allege that they live in Oley Township and that the on-lot sewage disposal approved here could affect the wells from which they obtain their water. These allegations are sufficient to establish that DER's approval of the revision could cause an adverse affect upon Snyder and Eyrich.[2] The requirements of an "adverse affect" and "causation" are the key elements in determining standing. William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269, 282-286 (1975).

We also agree with Snyder and Eyrich that land ownership is not a prerequisite to standing to appeal. If the wells which Snyder and Eyrich

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[2] We question whether Eyrich's walking in the area of the subdivision would be sufficient to establish standing. Interference with this interest results from the subdivision itself, not from revision of the Township's sewage facility plan to allow on-lot sewage disposal in the subdivision. Stated differently, protection of Eyrich's recreational interest in walking does not appear to be among the policies underlying the Sewage Facilities Act, 35 P.S. §§750.1, 750.3. See William Penn Parking Garage, 346 A.2d at 284. Commonwealth, Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. Commw. 78, 509 A.2d 877, 880-881 (1986), allocatur granted 514 Pa. 620, 521 A.2d 934 (1987).

obtain their water from were tainted as a result of the on-lot sewage disposal approved here, they might be adversely affected in a number of ways. For example, they might drink the water and become ill. It could hardly be argued that this was not an "adverse affect." Of course, they might suffer an even greater injury if they also owned the properties which they reside upon, because then pollution emanating from the subdivision could affect their economic interest (property values) as well. But this does not detract from the conclusion that they have an interest due to their residency.

In summary, the facts alleged in the motion to supplement appeal are sufficient to establish Snyder and Eyrich's standing to appeal; therefore, the motions to dismiss must be denied.

ORDER

AND NOW, this 8th day of November, 1988, it is ordered that:

1) The Motion to Supplement Appeal filed by Harlan J. Snyder and Fred Eyrich is granted.

2) The Motions to Dismiss filed by the Department of Environmental Resources and Marathon Land Corporation are denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Hearing Examiner

DATED: November 8, 1988

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

KENNAMETAL, INC.	:	
	:	
v.	:	**EHB Docket No. 87-227-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** November 9, 1988

OPINION AND ORDER SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

The Department's motion for summary judgment is denied when it fails to meet its burden of demonstrating that there are no genuine disputes over material facts.

OPINION

This matter was initiated by the June 15, 1987 filing of a notice of appeal by Kennametal, Inc. (Kennametal) seeking the Board's review of a May 14, 1987 order of the Department of Environmental Resources (Department) requiring Kennametal to close three surface impoundments for the treatment of hazardous waste (lagoons) at its facility in Bedford Township, Bedford County, and to provide the Department with certification that these lagoons have been closed. The order was issued pursuant to the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq., and the rules and regulations adopted thereunder at 25 Pa.Code §75.265 et seq.

Several Department actions preceded the order at issue in this appeal. On August 11, 1982, the Department requested that Kennametal submit a

closure plan pursuant to 25 Pa.Code §75.265. Kennametal did so by submitting a "Hazardous Waste Lagoon Closure Plan" dated October 8, 1982 and prepared by Gwin, Dobson and Forman, Inc. (GDF). On January 19, 1983, the Department notified Kennametal that the GDF plan was deficient and on January 23, 1984, requested that Kennametal submit an adequate plan. In response, on March 9, 1984, Kennametal submitted "Plans for Lagoon Closure and Groundwater Remediation at the Kennametal Bedford Facility" prepared by Michael Baker, ISA (MB). On May 9, 1984, the Department notified Kennametal of deficiencies in the MB closure plan as well and asked Kennametal to address them. On June 26, 1985, after receiving no reply from Kennametal, the Department issued a notice of violation. The next day, June 27, 1985, the Department modified the MB plan and notified Kennametal that this was the approved closure plan pursuant to 25 Pa.Code §75.265(o)(6) and (18) and that, as such, it must be implemented pursuant to 25 Pa.Code §75.265. Kennametal did not appeal the Department's action. On May 14, 1987, the Department issued an order requiring implementation of the closure plan, which order is the subject of the present appeal.

In its motion for summary judgment the Department argues that, in accordance with 25 Pa.Code §75.265(o)(6) and (18), it modified the closure plan and Kennametal is now obligated to implement this plan. The modifications of the closure plan, the Department argues, constituted a final action of the Department and, as such, were appealable to the Board. The Department maintains that Kennametal's failure to appeal the modified plan rendered it final, that Kennametal cannot now collaterally attack the plan, and that Kennametal is bound, as a matter of law, to implement the plan.

Kennametal responded to the Department's motion on January 11, 1988, alleging that the motion was untimely filed because pre-hearing memoranda had

not yet been filed. Additionally, Kennametal argues that summary judgment is inappropriate because there are material facts in dispute. In support of this, Kennametal points to its notice of appeal which makes several statements which, if uncontroverted, would negate the obligation of Kennametal to implement the closure plan at all. Thus, Kennametal contends, if the Department argues the plan must be implemented, then it must dispute some of the statements contained in the notice of appeal, making summary judgment impossible.

Kennametal also maintains that the Department is confusing the merits of the modified closure plan with Kennametal's obligation to implement a closure plan. Even if Kennametal is precluded from challenging this particular plan (although it maintains otherwise), Kennametal still argues the implementation of any plan, not the particular plan itself, is at issue.

On February 11, 1988, the Department replied to Kennametal's response to the motion for summary judgment, claiming, inter alia, that the factual issues raised by Kennametal are more appropriate in an action to enforce the Department's order, not an appeal from the order. On February 22, 1988, Kennametal responded to the Department's reply.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 1035(b), Summerhill Borough v. DER, 34 Pa.Cmwlth 574, 383 A.2d 1320 (1978). In considering this motion for summary judgment, the Board must look at the facts in the light most favorable to the non-moving party. Robert C. Penoyer v. DER, 1987 EHB 131, and C&K Coal Co. v. DER, EHB Docket No. 85-306-W (Opinion and order issued February 16, 1988.)

While the Department's allegations that Kennametal is now precluded from challenging the facts upon which the closure plan modification was based are well taken as a matter of legal principle, that, in and of itself, is not determinative of whether summary judgment in the Department's favor should be entered by the Board. However, because the Department failed to provide the Board with this modification, we cannot assume Kennametal is precluded from asserting the factual allegations in its notice of appeal, for we do not know what factual allegations are foreclosed by the principle of administrative finality. Furthermore, at least three averments of fact appear in the appeal, which raise doubt that no facts are in dispute.[1] These averments are sufficient to defeat the Department's motion.

We also cannot agree with the Department's characterization of Kennametal's appeal as being merely an attack on the modified closure plan. Kennametal is, in part, contesting its obligation to implement the modified closure plan, an obligation which has been imposed by the issuance of the Department's order. Depending on the provisions of the modified closure plan, Kennametal's arguments regarding its obligation to implement the closure plan may be a prohibited collateral attack. But, again, without the closure plan in front of us, we cannot make that determination. Furthermore, we cannot agree with the Department that Kennametal's obligation to implement the plan is an issue more appropriately raised in a proceeding to enforce the order.

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[1] The following statements appear in Kennametal's notice of appeal:

g. There is no hazardous waste on the site...
i. The waste in the former lagoons has been removed and disposed of...
j. Closure of Lagoons 1 and 2 has been completed...

Because of our holding that material facts exist sufficient to defeat the motion for summary judgment, we will not address the other arguments advanced by the parties.

O R D E R

AND NOW, this 9th day of November, 1988, it is ordered that the Department's motion for summary judgment is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: November 9, 1988

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

O'HARA SANITATION COMPANY, INC., et al.	:	
	:	
v.	:	EHB Docket No. 88-443-M
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: November 14, 1988

OPINION AND ORDER
SUR
MOTION FOR PROTECTIVE ORDER

Synopsis

A Motion for Protective Order, seeking [under R.C.P. 4007.2(b)] to prohibit depositions from being taken within 30 days after a Notice of Appeal is filed, is denied. The provisons of R.C.P. 4007.2 (b) are not applicable to appeal proceedings before the Board, in light of 25 Pa. Code §21.111 (a) and (b).

OPINION

On November 3, 1988, the Department of Environmental Resources (DER) filed a Motion for Protective Order, seeking to prohibit O'Hara Sanitation Company, Inc., et al. (Appellants) from taking depositions of certain DER personnel on November 7 and 9, 1988. The Motion is based on R.C.P. 4007.2 (b) which, with some exceptions not pertinent here, forbids the taking of depositions within 30 days after service of original process except by leave

of court. DER argues that, since the Notice of Appeal (which represents original process in most Board proceedings) was only filed on October 28, 1988, the 30 day period will not expire until November 27, 1988.

While discovery in Board proceedings generally tracks the Pennsylvania Rules of Civil Procedure, there are exceptions. Discovery in civil actions is virtually open-ended, extending up to, during, and after, trial; but it may not begin until 30 days after the case has begun, except by leave of court. The Board's rules, on the other hand, permit discovery only for a limited period of time concluding 60 days after the case has begun: 25 Pa. Code §21.111 (a). After that, Board approval must be obtained. While 25 Pa. Code §21.111 (b) provides that depositions "shall be taken in the manner prescribed by the Pennsylvania Rules of Civil Procedure," it also contains the qualification "except where this section provides otherwise."

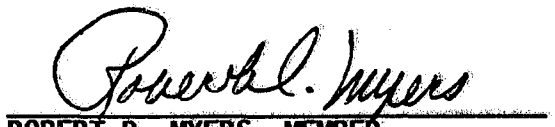
Since discovery in Board proceedings is limited to the first 60 days after the filing of the Notice of Appeal, it would make little sense to block out the first 30 days as in civil practice. This would unnecessarily limit the time period for unrestricted discovery for no apparent reason. Civil proceedings are begun by complaint, to which the defendant must file a responsive pleading within 20 days after being served. Allowing depositions during this period would enable the plaintiff to divert the defendant from the critical task of investigating the case and preparing his answer. No similar circumstances are present in the typical Board proceeding initiated by the filing of a Notice of Appeal. No responsive pleading is required or allowed: 25 Pa. Code §21.64 (c). Consequently, the appellee does not face the same danger of being prejudiced by depositions during that first 30 days as a defendant in a civil action.

A proper interpretation of 25 Pa. Code §21.111 (a) and (b) is that R.C.P. 4007.2 (b) is not applicable to proceedings begun by a Notice of Appeal. However, 25 Pa. Code §21.111 (e) provides for the issuance of protective orders pursuant to R.C.P. 4012 whenever necessary to protect a party from unreasonable discovery requests. In a given case, that protection might be appropriate to discovery launched too soon after the Notice of Appeal is filed. DER does not raise that issue here, and the Board expresses no opinion as to whether it would be applicable.

ORDER

AND NOW, this 14th day of November, 1988, it is ordered that the Motion for Protecive Order filed by the Department of Environmental Resources on November 3, 1988, is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS, MEMBER

DATED: November 14, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Mary Young, Esq.
Eastern Region
For Appellant:
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M. DIANE SMITH
SECRETARY TO THE BOARD

DEL-AWARE UNLIMITED, INC., et al.	:	
	:	
v.	:	EHB Docket No. 88-075-M
	:	(Consolidated Appeals)
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES, et al.	:	Issued: November 16, 1988
	:	

OPINION AND ORDER
SUR
MOTIONS TO DISMISS

Synopsis

The issuance of permits extending the construction completion dates of previously issued permits, after the Secretary of the Department of Environmental Resources (DER) conducted a new and independent assessment based on an evaluation by a nationally recognized expert and uninfluenced by prior decisions, does not constitute new permit issuances reopening for litigation questions that otherwise would be precluded by previous appeals. Where the changes made in the extended permits do not bring about a material deviation from the water allocation scheme approved in previous appeals, there is no basis for reopening for litigation questions precluded by previous appeals. Questions that could not have been raised in previous appeals are not precluded. When all the issues raised in an appeal either are precluded or the appellants are foreclosed from litigating them, the appeal may properly be dismissed. When certain appellants are foreclosed from litigating the issues raised in an appeal, they are subject to dismissal as party appellants.

OPINION

On February 12, 1988, DER issued the following permits related to the Point Pleasant Project (Project): WA-0978601A, WA-0978601B, E09-51A, E09-77A, E09-81A, E09-81T-1 and E09-116. On the same date, DER announced that on November 30, 1987, it had issued Amendment No. 6 to a Right-of-Way Agreement pertaining to Roosevelt State Park and the Delaware Division of the Pennsylvania Canal. Del-AWARE Unlimited, Inc. (Del-AWARE), joined by Environmental Policy Institute (EPI), Friends of Branch Creek (FBC), Beaver Run Watershed Association[1] and Montco AWARE, filed appeals from these actions at docket numbers 88-075-M, 88-076-M, 88-077-M, 88-078-M, 88-079-M, 88-080-M, 88-081-M and 88-082-M. FBC and two individuals filed a separate appeal from the issuance of E09-77A at docket number 88-096-M. All of these appeals have been consolidated at docket number 88-075-M.

Philadelphia Electric Company (PECO) and North Penn and North Wales Water Authorities (NP/NW) were allowed to intervene in all appeals in which they were not permittees by a Board Order dated May 27, 1988. The Joint Petition to Intervene filed on behalf of 12 organizations united in opposition to the Project was denied in an Opinion and Order issued on June 28, 1988. PECO and NP/NW have moved to dismiss all of the above appeals (except the one docketed at 88-081-M relating to E09-116) on the grounds of issue preclusion, mootness and lack of standing. The movants have not raised specific objections on the standing issue because of the necessity for discovery into Appellants' memberships. Appellants have opposed the Motions to Dismiss.

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[1] Beaver Run Watershed Association was permitted to withdraw a a party appellant on June 28, 1988.

Prior Board decisions at 1986 EHB 919 (DEl-AWARE II) and 1987 EHB 351 (Del-AWARE III) have addressed the same issues forming the basis for the Motions to Dismiss in the present case. Del-AWARE III held, inter alia, that:

1. The only remaining issue pertinent to Water Allocation Permit WA-0978601 was whether DER acted in compliance with Section 8 of the Water Rights Act, Act of June 24, 1939, P.L. 842, as amended, 32 P.S. §638, in extending the deadline for completion of construction.

2. All issues raised in connection with Encroachment Permit ENC09-51 were precluded.

3. The only remaining issues pertinent to Encroachment Permit ENC09-77 were (a) whether DER's handling of the velocity control issue comported with the Board's decision in Del-AWARE I, (b) whether DER's handling of the NPDES permit issue comported with the Board's decision in Del-AWARE I, and (c) whether DER's handling of the Bucks Road Gauge cutoff issue comported with the Board's decision in Del-AWARE I.

4. The only remaining issues pertinent to Encroachment Permit ENC09-81 were (a) whether DER's handling of the velocity control issue comported with the Board's decision in Del-AWARE I, and (b) whether DER's handling of the NPDES permit issue comported with the Board's decision in Del-AWARE I.

As a result of these holdings on issue preclusion and related holdings on standing and mootness, the Board in Del-AWARE III dismissed all of the appeals pending before it except 87-039-R (Encroachment Permit ENC09-77, limited to the issues referred to above) and 87-037-R (Encroachment Permit ENC09-81, limited to the issues referred to above). The

Board's action in dismissing the appeals is currently being reviewed by Commonwealth Court. The two remaining appeals, 87-037-R and 87-039-R, are proceeding toward a hearing on the non-precluded issues.

This procedural history is important because, in all of the appeals docketed at 88-075-M through 88-082-M, Appellants have attached Exhibit A-1 setting forth reasons for appeal. This Exhibit A-1 is identical to the Rider A that was attached to the appeals docketed at 87-037-R through 87-041-R and scrutinized by the Board in Del-AWARE III. The preclusion holdings in Del-AWARE III, therefore, are of equal application here to Appellant Del-AWARE which was involved in those earlier appeals. The other Appellants have never appealed from the original issuance of the permits or from the series of extensions issued prior to February 12, 1988. Those actions are now final and binding upon these Appellants and they are prohibited from attempting to litigate here the issues involved in those earlier actions. Del-AWARE Unlimited, Inc. v. DER, 1986 EHB 919 at 931.

Rider B, attached to the appeals docketed at 88-075-M through 88-081-M, contains reasons for appeal specific to these proceedings. Appellants claim, first of all, that DER's February 12, 1988, actions amounted to new permit issuances independent of the permits involved in all the prior appeals. For this reason, Appellants argue that all issues relevant to these permits are open for litigation even though they otherwise would be precluded. These issues include need for the Project, available alternatives and the myriad of social and environmental questions disposed of in Del-AWARE I.

In support of this position, Appellants point out that DER Secretary Arthur Davis, who made the decison to issue the permits on February 12, 1988, repeatedly stated that he was making a new and independent assessment of the entire Project, based on an evaluation by a nationally recognized expert and

uninfluenced by any prior decisions. This is a valid assessment of what Secretary Davis said. Assuming that the Secretary did everything exactly as he said, the decision he reached was to affirm the decisions made previously -- to allow the Project to continue.

Secretary Davis' commitment to conduct his own independent review of the Project was made, in part, as a result of political activity[2] on behalf of citizens' groups such as Appellants. But a project such as this, replete with complexities and unforeseen conditions, requires almost continuous review by a regulatory agency such as DER. While Secretary Davis may have probed deeper into the details, he did essentially no more than his predecessors had done before issuing the permits initially and the series of permit extensions. The fact that Secretary Davis may have engaged in a more thorough review before performing his duties does not justify reopening for relitigation the need for the Project, available alternatives, and all of the social and environmental questions previously adjudicated by this Board and affirmed by Commonwealth Court.

Secondly, Appellants claim that the permits issued on February 12, 1988, substantially change and alter the Project by approving a massively different water allocation scheme. It is apparent that Water Allocation Permit WA-0978601 has been reissued as two permits (WA-0978601A and WA-0978601B) and that NP/NW have become the permittees on WA-0978601B in place of Neshaminy Water Resources Authority (NWRA), the sole permittee previously. The same thing has happened to Encroachment Permit ENC09-81 (NWRA the sole permittee) which now has been reissued as E09-81A (NWRA the permittee) and

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[2] No derogatory connotation is intended. Political activity is a legitimate and long-recognized method of seeking change in governmental policies, through both the legislative and the executive branches.

E09-81T-1 (NP/NW the permittees). Encroachment Permits ENC09-51 and ENC09-77 have been reissued as E09-51A and E09-77A. Whether these changes are merely superficial or are significant enough to constitute a material deviation from the water allocation scheme approved in Del-AWARE I depends on an analysis of each permit. The analysis that follows also will consider whether other issues pertinent to these appeals have been properly raised.

WA-0978601A and WA-0978601B (88-075-M and 88-076-M)

As already noted, NWRA is the permittee on "A" and NP/NW are the permittees on "B." Prior to February 12, 1988, there was just one permit (WA-0978601) and NWRA was the only permittee. A comparison of the "A" and "B" permits with WA-0978601 reveals that the original permit was divided. NWRA retained in the "A" permit what had been item (2) in the original permit -- the privilege of taking 49.8 mgd from the Delaware River at a diversion point near Point Pleasant. NP/NW obtained in the "B" permit what had been item (1) in the original permit -- the privilege of taking a maximum of 40 mgd in prescribed quantities from several sources, including North Branch Neshaminy Creek, Pine Run, Lake Galena and the Delaware River diversion at Point Pleasant. The original permit was divided in this manner as a result of applications filed by NWRA and NP/NW pursuant to rulings of the Court of Common Pleas of Bucks County in Sullivan et al. v. County of Bucks et al., No. 83-8358, and North Wales Water Authority et al. v. Neshaminy Water Resources Authority et al., No. 84-3273 (Sullivan case).

The sources and the sum total of water allocations authorized by the "A" and "B" permits are identical to those authorized in the original permit. No additional allocations have been made. Thus, even though new permits were issued on February 12, 1988, and even though the previous permit was simultaneously revoked, there is no basis for reconsidering the issues that

were pertinent to these allocations when originally made and which should have been litigated at that time.[3]

Issues that could not have been raised previously are not foreclosed, however. Foremost among them is the granting of a portion of the allocations to NP/NW. The "A" permit requires NWRA to reserve for NP/NW the entire 49.8 mgd authorized to be diverted from the Delaware River. The "B" permit allocates this 49.8 mgd to NP/NW. Obviously, the division of permit WA-0978601 has reduced NWRA to little more than a conduit for the water diverted from the Delaware River and has substituted NP/NW for NWRA as the primary water supply agencies. This conclusion is also manifested by two requirements imposed upon NP/NW in the "B" permit. Condition 8 prohibits NP/NW from supplying water to any public water supply agencies, including themselves, that have not obtained subsidiary water allocation permits. Condition 9 requires NP/NW to obtain, within 2 years, a permit for the construction of the water treatment plant at Chalfont (referred to in the "B" permit as the Forest Park Water Treatment Plant and in the original permit as the Chalfont Treatment Plant but apparently the same facility).

This result undoubtedly stems from the rulings in the Sullivan case which held, inter alia, that (1) NP/NW were third party beneficiaries to the construction, operation and water sales agreements among Bucks County, Montgomery County and NWRA; and (2) NP/NW have the right to take over and assume ownership of the major public water supply elements of the Project. The order issued in the Sullivan case required NWRA to retain jurisdiction over that portion of the Project which delivers water from Point Pleasant to

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[3] No appeals were filed by any of the Appellants from the original issuance of WA-0978601 on November 1, 1978, from the amendment issued on October 31,1980, or from the extensions issued on January 7, 1985, and May 28, 1985.

the Bradshaw Reservoir and to transfer to NP/NW that portion which conveys water from the Bradshaw Reservoir to NP/NW's service areas. Since the Project, from the start, contemplated that the entire 49.8 mgd diverted by NWRA at Point Pleasant would flow through Bradshaw Reservoir and the North Branch Transmission Main into the North Branch Neshaminy Creek, it is apparent that the transfer of facilities to NP/NW ordered by the Sullivan court would of necessity reduce NWRA to the status of a conduit.

The Sullivan decision, it must be remembered, was based upon the interpretation of contracts legally entered into among Bucks County, Montgomery County and NWRA. The order was framed in such a way as to give to NP/NW the advantages they were entitled to as intended beneficiaries of these contracts. The scope of the Project was not changed; only the names of the agencies that would carry out the various portions of it. That decision, rendered by a court of competent jurisdiction and affirmed in its entirety by Commonwealth Court, 92 Pa. Cmwlth. 213, 499 A.2d 678 (1985), allocatur denied, 532 A.2d 21 (1986), is binding upon the Board insofar as it determines the rights and obligations of NWRA and NP/NW inter se.

The allocation of water rights involves more than the interpretation of contracts, however. Where public water supply agencies are involved (as in this case), the Water Rights Act must be considered. As the agency charged with the responsibility for administering that Act, DER advised the Sullivan court that (1) the original allocation to NWRA of 40 mgd at the Chalfont (Forest Park) Treatment Plant was predicated upon the conjunctive use of all the sources identified in that portion of the permit, and (2) there is no legal basis for NWRA to claim the exclusive right to control the use of the flowing streams and lakes in Bucks County (see DER's Extension Order of September 19, 1986). It is apparent that DER maintained this same viewpoint

when it divided the original Water Allocation Permit into the "A" and "B" permits.

Appellants have adequately raised this issue but have framed it vaguely and much broader than what is appropriate. The following questions may be litigated: (1) whether the transfer from NWRA to NP/NW of the entire 40 mgd water allocation at the Forest Park Treatment Plant deprives NWRA of any legally cognizable right to control the use of the flowing streams and lakes in Bucks County; and (2) whether NP/NW satisfied the requirement for a water allocation permit as set forth in the Water Rights Act.

E09-51A (88-077-M)

This permit, authorizing PECO to construct the Perkiomen Transmission Main from Bradshaw Reservoir to an outfall structure on the East Branch Perkiomen Creek, contains only one material change from Encroachment Permit ENC09-51 in the form in which it existed prior to February 12, 1988 -- the construction completion date is extended to December 31, 1998. This change is hardly enough to constitute a material deviation from the water allocation scheme previously approved. Major changes had been made to ENC09-51 when it was extended on December 31, 1986. Del-AWARE's appeal from that extension at docket number 87-041-R was dismissed in Del-AWARE III on the ground that all issues were precluded. Those issues had been raised in Rider A to that Notice of Appeal and are incorporated in the present Notice of Appeal as Exhibit A-1.

As noted above, Del-AWARE is bound by the issue preclusion rulings in Del-AWARE III; and the other Appellants are foreclosed from litigating issues pertinent to the original issuance of this permit and to all of the previous extensions, since they did not appeal those actions.

The only issue potentially involved in the present appeal is whether DER had good cause to extend the construction completion date. However,

Appellants have not raised that issue in Rider B or anywhere else; and as a result, there are no issues to be litigated with respect to this permit.

E09-77A (88-078-M and 88-096-M)

This permit authorizes PECO to construct and maintain an outfall structure and associated facilities along the left bank of the East Branch Perkiomen Creek. This permit differs from ENC09-77 (in the form in which it existed prior to February 12, 1988) only in three important respects: (1) the construction completion date is extended to December 31, 1998; (2) a requirement for flowage easements has been added; and (3) a requirement for ecological monitoring and reporting has been added.

As was the case with ENC09-51, major changes had been made to ENC09-77 when it was extended on December 31, 1986. Del-AWARE's appeal from that extension, docketed at 87-039-R, is still pending before the Board. However, most of the issues raised in that appeal were held in Del-AWARE III to be precluded. The only remaining questions to be litigated relate to DER's handling of the velocity control issue, the NPDES permit issue and the Bucks Run gauge cutoff issue.

Since Rider A attached to the appeal at 87-039-R is incorporated as Exhibit A-1 in the current appeal at 88-078-M, the issue preclusion holdings of Del-AWARE III are binding upon Del-AWARE in this appeal. Consequently, Del-AWARE can litigate only the three issues raised in Exhibit A-1 that survived the Del-AWARE III ruling, i.e., the same three issues mentioned in the previous paragraph. The other Appellants, however, did not previously file any appeals from the issuance or extensions of ENC09-77. As a result, those actions have become final with respect to these Appellants and they are foreclosed from litigating any of the issues raised in Exhibit A-1.

The differences between ENC09-77 (in the form in which it existed prior to February 12, 1988) and E09-77A do not materially change the Project in general or this segment of it in particular. Thus, while the specific changes are potential subjects of litigation, there is no basis for reopening the multitude of issues decided in Del-AWARE I. Appellants in 88-078-M do not properly raise, in Rider B or elsewhere, the specific changes made in E09-77A. They do not challenge the extension of the construction completion date. While they claim that DER did not consider the rights of riparian owners, they overlook the fact that DER inserted a new provision requiring PECO to obtain flowage easements. They make no mention of the other new requirement of ecological monitoring and reporting.

The only issues to be litigated in 88-078-M, then, are the same three as those pending a hearing in 87-039-R. Del-AWARE is the only Appellant able to raise those issues.

FBC, Mark Dornstreich and Judy Dornstreich also filed an appeal from the issuance of E09-77A. In their Notice of Appeal, docketed at 88-096-M, they cite issues that pertain solely to DER's handling of the velocity control question raised in Del-AWARE I. DER's handling of that question took the form of modifications to ENC09-77 when it was extended on December 31, 1986. Neither FBC nor the Dornstreichs filed any appeals from that action of DER and, consequently, it became final as to them more than two years before they filed their present appeal. They are foreclosed from litigating these issues now.

E09-81A and E09-81T-1 (88-079-M and 88-080-M)

These two permits represent a division of ENC09-81, originally issued to NWRA and related to an intake structure in the Delaware River, the Combined Transmission Main and an outfall structure in the North Branch Neshaminy Creek. E09-81A, issued to NWRA, includes the authorizations in the original permit except the outfall structure in the North Branch Neshaminy Creek. That authorization is incorporated into E09-81T-1, issued to NP/NW. As was the situation with the Water Allocation Permit, ENC09-81 was divided as the result of applications filed by NWRA and NP/NW pursuant to rulings in the Sullivan case.

A comparison of the permits reveals that no additional authorizations were granted and no other changes were significant enough to constitute a material deviation from the water allocation scheme approved in Del-AWARE I. Consequently, even though new permits were issued on February 12, 1988, there is no basis for reopening issues precluded by earlier decisions. Del-AWARE III held that all questions pertaining to ENC09-81 were precluded except the velocity control issue and the NPDES permit issue. These two issues, raised in 87-037-R, are still pending before the Board.

Since Rider A attached to the appeal at 87-037-R is incorporated as Exhibit A-1 in the current appeals at 88-079-M and 88-080-M, the issue preclusion holdings of Del-AWARE III are binding upon Del-AWARE in these appeals. Consequently, Del-AWARE can litigate only the two issues raised in Exhibit A-1 that survived the Del-AWARE III ruling, i.e.,the same two issues mentioned in the previous paragraph. The other Appellants, however, did not previously file any appeals from the issuance or extensions of ENC09-81. As a result, those actions have become final with respect to these Appellants and they are foreclosed from litigating any of the issues raised in Exhibit A-1.

Issues that could not have been raised previously are not precluded, however. The advent of NP/NW as permittees is one of these. In its extension order of September 19, 1986, DER advised the Sullivan court that, pursuant to the court's adjudication of rights and responsibilities between NWRA and NP/NW, (1) authorization for the outfall structure in North Branch Neshaminy Creek should be assigned to NP/NW, and (2) NWRA should retain the authorizations related to the intake structure in the Delaware River and the Combined Transmission Main. The division subsequently made in E09-81A and E09-81T-1 reflects this same viewpoint.

Appellants complain about the assignment to NP/NW of part of the Water Allocation Permit but voice no objection, in Rider B or elsewhere, to the assignment to NP/NW of that part of Encroachment Permit ENC09-81 which relates to the outfall structure in North Branch Neshaminy Creek. Neither the division of that permit nor the qualifications of NP/NW as permittees is mentioned. Other changes, similarly, have gone unchallenged. These include the extension of the construction completion date to December 31, 1998, and the approval of certain construction detail revisions. Although Appellants charge that DER failed to consider reparian rights, they apparently overlook the fact that a new condition was inserted requiring NP/NW to obtain flowage easements in North Branch Neshaminy Creek.

The only issues to be litigated are the same two issues as those pending a hearing in 87-037-R. Since they relate only to the authorization for the outfall structure in North Branch Neshaminy Creek, they are pertinent solely to the appeal filed at 88-080-M from the issuance of E09-81T-1. All issues pertinent to the appeal filed at 88-079-M from the issuance of E09-81A are precluded. As previously noted, Del-AWARE is the only Appellant that can litigate the remaining issues in 88-080-M.

Amendment No. 6 to Right-of-Way Agreement (88-082-M)

On September 1, 1982, DER and NWRA entered into a Right-of-Way Agreement authorizing NWRA to install an intake conduit under the Delaware Division of the Pennsylvania Canal and Roosevelt State Park. Amendments to this Right-of-Way Agreement were entered into on January 28, 1983, November 30, 1983, August 31, 1987, September 29, 1987, and October 30, 1987. Appellants never filed appeals from any of these actions. They did file an appeal, however, from Amendment No. 6 entered into on November 30, 1987.

Rider B, attached to the Notice of Appeal and citing the reasons supporting it, is identical to Rider B attached to all of the appeals docketed at 88-075-M through 88-081-M. Exhibit A-1 to Rider B also appears in all the other appeals and is identical to Rider A attached to the appeals filed on January 26, 1987, and considered in Del-AWARE III. A probing of Rider B and Exhibit A-1 with a fine-tooth comb discloses that the only issue even remotely concerned with the Right-of-Way Agreement relates to archaeological sites in and around Point Pleasant. This subject was considered at length in Del-AWARE I, along with the impact of the Project upon the canal and the state park (1984 EHB 178 -- Findings of Fact 114 to 137). The Board's decision in that case, affirmed by Commonwealth Court, held that (1) the plans were adequate to protect the scenic, archaeological and historic aspects of Point Pleasant Village, the canal and the state park; and (2) the grant of a right-of-way under the canal and through the state park was appropriate (1984 EHB 178 at 300-303).

Issues decided in Del-AWARE I were held in Del-AWARE II and Del-AWARE III to be precluded. Those rulings are applicable to Del-AWARE in the present appeal. Since the other Appellants never appealed from any of the prior actions of DER on this Project, those actions are final and binding upon them.

They are, therefore, prohibited from litigating in this proceeding issues pertinent to DER's prior actions on the Right-of-Way Agreement. That includes the subject of archaeological sites. The changes made by Amendment No. 6 have no significant impact upon the character of the Project. Consequently, these changes do not furnish a basis for a general relitigation of the Project as a whole or of this segment of it. There are no issues to be litigated in this appeal.

As noted at the outset, NP/NW and PECO also have challenged generally the standing of Appellants to bring the appeals. Specific objections could not be raised, however, because of the necessity for conducting discovery into Appellants' memberships. The Board, in Del-AWARE II, adopted a procedure for bringing the standing issue into sharp focus. Part of that procedure is applicable here and is incorporated in the Order that follows. It is possible that one or more Appellants will be dismissed for lack of standing. It is also possible that one or more appeals will be dismissed because of a lack of standing on the part of all the Appellants. In order to avoid a piecemeal handling of these consolidated appeals, therefore, the Board will refrain from entering a final Order dismissing any Appellants or appeals at this time.

ORDER

AND NOW, this 16th day of November, 1988, it is ordered as follows:

1. The appeals filed at docket numbers 88-077-M, 88-079-M, 88-082-M and 88-096-M are appropriate for dismissal because all the issues raised in the Notices of Appeal either are precluded or the Appellants are foreclosed from litigating them. All proceedings in these appeals are stayed until further notice.

2. Environmental Policy Institute, Friends of Branch Creek, and Montco AWARE are subject to dismissal as Appellants in the appeals docketed at

88-078-M and 88-080-M, because they are foreclosed from litigating any of the issues not precluded in these appeals. All proceedings in these appeals are stayed as to these Appellants until further notice.

3. The issues that may be litigated in the appeals docketed at 88-075-M, 88-076-M, 88-078-M, 88-080-M and 88-081-M are those specifically authorized in the body of the foregoing Opinion.

4. All proceedings in the appeals docketed at 88-078-M and 88-080-M are stayed pending a final decision by the Board on the appeals docketed at 87-037-R and 87-039-R.

5. With respect to the appeals docketed at 88-075-M, 88-076-M and 88-081-M:

(a) Each of the Appellants remaining in any of said appeals shall, within thirty (30) days after the date of this Order, file with the Board and serve on every other party to such appeal, a written statement containing specific factual allegations (including pertinent names and addresses of persons who were members of said organization when the appeal was filed) which, in its opinion, give it standing to litigate each specific issue which is authorized to be litigated in such appeal.

(b) Within thirty (30) days after the date for filing such written statements, Philadelphia Electric Company and North Penn and North Wales Water Authorities shall file either Amended Motions to Dismiss for lack of standing or Petitions for Additional Discovery, or both. Failure to make such filings shall be deemed a withdrawal of any further objections to Appellants' standing.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS, MEMBER

DATED: November 16, 1988

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

ROBERT D. McCUTCHEON, et al.	:	
	:	
v.	:	EHB Docket No. 88-256-M
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: November 18, 1988
and COMMUNITY REFUSE, LTD., Permittee	:	

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A Motion to Dismiss for untimely filing is denied when a skeleton appeal is filed within the applicable 30-day period and perfected within a reasonable time thereafter. A Motion to Dismiss for lack of standing is denied when the Notice of Appeal, while not stating a precise distance, gives sufficient indication of the appellant's proximity to the permitted facility as to make a prima-facia showing of standing.

OPINION

On June 27, 1988, Robert D. McCutcheon (Appellant), in propria persona, filed a letter with the Board stating that the "concerned citizens of this community" wish to appeal the modification issued by the Department of Environmental Resources (DER) on May 27, 1988, to Permit No. 101100 held by Community Refuse Ltd. (Permittee) for a landfill in Franklin County.

According to the letter, the modification authorized Permittee to increase its volume to 1,000 tons per day. Appellant also stated that the Notice of Appeal form would be prepared and forwarded as soon as possible.

On July 13, 1988, the Board sent to Appellant its standard form of Acknowledgement of Appeal and Request for Additional Information (Acknowledgement and Request), informing Appellant of the specific things he needed to do to perfect his appeal. On July 26, 1988, Appellant filed the Notice of Appeal form, a copy of the permit modification and an expanded statement of his reasons for appealing. In a postscript he stated that notice of the appeal was being given on the same date to Permittee and DER.

On August 25, 1988, Permittee filed a Motion to Dismiss the Appeal, claiming that the appeal was not perfected in a timely manner and that Appellant has no standing to file an appeal. Appellant's only response to this Motion, filed on September 7, 1988, was that he did not concur in it.

The first prong of Permittee's Motion to Dismiss asserts that the letter filed by Appellant on June 27, 1988, did not fulfill the Board's requirements for an appeal. The Board acknowledged this fact on July 13, 1988, by notifying Appellant of the things he had to do "within ten (10) days of the date of receipt of this notice" in order to perfect his appeal. Permittee maintains that Appellant's filing of July 26, 1988, was not within the 10-day period and, consequently, was inadequate to confer jurisdiction on the Board.

Permittee misconstrues our rule on skeleton appeals. 25 Pa. Code §21.52(c) provides that, when an appeal is filed that does not comply with the Board's requirements, it shall be docketed as a skeleton appeal. The rule goes on to state that the "appellant shall, upon request from the Board, file the required information or suffer dismissal of the appeal." This rule does

not say that the Board lacks jurisdiction over such an appeal; it provides for dismissal of the appeal if the information is not filed. Nor does the rule contain a time limit for filing the required information. The Acknowledgement and Request contains a 10-day time limit, but does not threaten automatic dismissal if that period is exceeded. It states that "your appeal may be dismissed" (emphasis added). Obviously, the Board reserves the discretion under the rules and under the Acknowledgement and Request to determine when an appeal should be dismissed for failure to file the required information.

Appellant filed the required information on July 26, 1988, thirteen days after the date on which the Acknowledgement and Request was sent out. The 10-day period was to begin upon Appellant's receipt of the Acknowledgement and Request. There is nothing in the record to indicate when this occurred, but it is reasonable to assume that it took about two days for the mailing. If so, Appellant's filing (mailed on July 24, 1988, and received by the Board on July 26, 1988) was a substantial compliance with the Board's request.

Permittee maintains, however, that before Appellant's June 27, 1988, letter can be treated as a skeleton appeal, it must be perfected, 25 Pa. Code §21.52 (c). Perfection requires service upon the Permittee of a copy of the Notice of Appeal, 25 Pa. Code §21.52 (b). Since the Board's jurisdiction depends upon an appeal being filed and perfected within the 30-day period, 25 Pa. Code §21.52 (a), it was necessary for Appellant to serve Permittee within that time.

This same argument has been rejected by the Board in previous cases. Czambel v. DER, 1980 EHB 508, drew a distinction between the Board's present rules (which became effective August 1, 1979) and its former rules, and held that the 10-day provision for serving the permittee is no longer

jurisdictional. The Board ruled that, while 25 Pa. Code §21.52 (a) requires the appeal to be filed within 30 days and to be perfected in order to invoke the Board's jurisdiction, the perfection will be sufficient if it occurs within a reasonable time after the filing. The Czambel case was followed in Kemerer v. DER, 1983 EHB 276, and in Ferri Contracting Company, Inc. v. DER, 1984 EHB 675.

Appellant admitted receiving written notice of the issuance of the permit modification on June 19, 1988. However, the decisions of Commonwealth Court in Lower Allen Citizens Action Group, Inc. v. Commonwealth, Dept. of Environmental Resources, ____ Pa. Cmwlth. ____, 538 A.2d 130 (1988), and on reconsideration, ____ Pa. Cmwlth. ____, 546 A.2d 1330 (1988), provide that when a third party appeals from the issuance of a permit, the 30-day appeal period runs from the date notice of the issuance is published in the Pennsylvania Bulletin, regardless of whether or not the third party has received notice otherwise. The Board can take official notice in this case (25 Pa. Code §21.109) that the publication in the Pennsylvania Bulletin occurred on June 18, 1988. Appellant's 30-day appeal period began to run from this date.

Appellant's June 27, 1988, filing, treated as a skeleton appeal, clearly was filed within this 30-day period. The perfection of the appeal took place when a copy of the appeal was served on Permittee by being deposited in the mail, 25 Pa. Code §21.33 (a). There is no evidence establishing when that occurred; but, since Permittee acknowledges receiving it on July 28, 1988, it is reasonable to assume it was mailed a day or so prior to that date. The appeal was perfected, therefore, on or about July 26, 1988, 29 days after it was filed.

It should be noted that, under 25 Pa. Code §21.51 (f), service on the permittee is to be made within 10 days after the Notice of Appeal is filed. The 30-day appeal period did not expire in this case until July 18, 1988. An appeal filed on the last day and served on the tenth day following would have strictly satisfied the technical requirements of 25 Pa. Code §21.51 (f) and §21.52 (a) and still not have reached Permittee's hands until sometime after July 28, 1988. That being the case, it is difficult to conceive how Permittee could have been prejudiced by the delay that actually occurred. This may be the explanation for Permittee's failure to claim any prejudice. Accordingly, the Board concludes that the Appellant's delay in perfecting his appeal was not unreasonable.

The other prong of Permittee's Motion to Dismiss challenges Appellant's standing to bring the appeal. The Board has followed the Supreme Court's decision in William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975), in holding that an appellant must have an interest which may be substantially, immediately, and directly affected by DER's action. Jerry Haney et al. v. DER, 1987 EHB 997.

In his June 27, 1988, filing, Appellant states that Permittee's landfill is located "near Upton" and that the "residents of this area" are concerned about the increase in daily tonnage. He then goes on to state that "we" have met with the landfill management and have written to DER to no avail. In his July 26, 1988, filing, Appellant refers to Upton as the "community around the landfill," and claims that the community has been affected by odors, dust, noise, unsightliness, litter and safety hazards caused by the landfill.

While a precise distance is not alleged, Appellant's filings taken together indicate that Appellant lives within sufficient proximity to the

landfill to be affected adversely by its operation.[1] Permittee has been provided with Appellant's address on the materials mailed to it. If it believed that Appellant's residence was too remote from the landfill to be affected, Permittee could have stated the precise distance in its Motion to Dismiss.

Permittee argues, additionally, that the reasons for appeal stated in Appellant's filings all relate to past operations and have no relationship to the action appealed from. The point Appellant makes in his reasons for appeal is that Permittee has not been able to operate its landfill in an environmentally acceptable manner on a 300 tons per day basis. Consequently, DER should not have authorized Permittee to increase its daily tonnage to 1,000. These reasons are manifestly relevant to the question of whether DER abused its discretion in issuing the permit modification.

---

[1] While Appellant's filings refer to "others" and "residents of this area," he has named no other persons. Accordingly, he is the only Appellant in the case.

ORDER

AND NOW, this 18th day of November, 1988, it is ordered as follows:

1. The Motion to Dismiss filed by Community Refuse, Ltd. is denied.

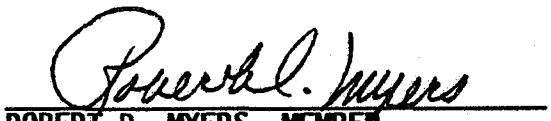
2. Robert D. McCutcheon shall respond to the interrogatories of Community Refuse, Ltd. no later than December 6, 1988.

3. All discovery shall be completed no later than December 23, 1988.

4. Robert D. McCutcheon shall file his pre-hearing memorandum no later than December 23, 1988.

5. All other provisions of Pre-Hearing Order No. 1, issued July 28, 1988, shall remain in effect.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS, MEMBER

DATED: November 18, 1988

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mjf

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M. DIANE SMITH
SECRETARY TO THE BOARD

GERALD W. WYANT	:	**EHB Docket No. 84-422-M**
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
BOROUGH OF NEWRY, Permittee	:	**Issued:** November 21, 1988

OPINION AND ORDER SUR
APPLICATION FOR REHEARING

Synopsis

An application for rehearing under 25 Pa.Code §21.122(a)(2) is denied where the appellant has failed to support his allegations or substantiate how he would justify a reversal of the Board's adjudication. Even considering the new evidence sought to be offered by the appellant, the Board held that it would not justify an alteration of its decision, since appellant was precluded from raising one of his contentions and waived another and the remaining contention was adequately addressed by the Department of Environmental Resources through conditions imposed in the permits at issue in the appeal.

OPINION

In an adjudication dated October 24, 1988, the Board dismissed Gerald W. Wyant's appeal of the Department of Environmental Resources' (Department) issuance of National Pollutant Discharge Elimination System (NPDES) Permit No. PA 0081621 and Water Quality Management (WQM) Permit No. 9184403 to the

Borough of Newry. The permit authorized Newry to construct and operate a sewage treatment plant. Wyant filed a timely application for rehearing on November 7, 1988, to which Newry responded on November 10, 1988. The Department has not responded to Wyant's application.

As grounds for rehearing, Wyant alleges that he has recently learned that a meat packing plant in Blair Township will discharge its wastes into the Newry sewage treatment plant. Wyant contends that the acceptance of the meat packing plant wastes by the Newry sewage treatment plant is inconsistent with Newry's official plan adopted pursuant to the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 et seq. (the Sewage Facilities Act), that the plant was not designed to handle the wasteload generated by the meat packing plant, and that the WQM and NPDES permits issued by the Department did not provide for adequate pre-treatment of the waste water generated by the meat packing plant. He also urges the Board that issuance of the permits was in contravention of Article I, §27 of the Pennsylvania Constitution, stating that

> Moreover, the appellant refers the Board to Attachment F, ¶ 7, of the stipulations agreed to by counsel pursuant to its Pre-Hearing Order No. 3. As ordered by the Honorable Anthony Mazullo at the prehearing conference in this case on September 25, 1985, the Borough undertook to prepare and file, sometime in the future, an application for a Flood Plain Management Act permit which would authorize construction of the proposed treatment facility on the 100-year flood plain of Poplar Run if appropriate; the Department and the Borough further agreed to make the appellant a party to those proceedings and to provide him with copies of the application and all of its supporting documents and exhibits. This has yet to be done, as a consequence of which issuance of the Clean Streams Law permits is still unlawful under 25 Pa.Code §106.21 and the holding of Payne v. Kassab.

Newry generally asserts that Wyant has failed to meet the requirements for rehearing enunciated in 25 Pa.Code §21.122 and that Wyant has not provided any verification of the facts asserted in his application for rehearing. More particularly, Newry argues that if the meat packing plant is a new development, it is not germane to the propriety of the permit issuance, and that if it is not a new development, Wyant could have conducted discovery and presented evidence during the 1986 hearings on the merits. Newry contends that Wyant is again attempting to litigate issues relating to sewage facilities planning which were foreclosed by the Board and that he has incorrectly characterized pre-treatment requirements as being applicable to Newry rather than the meat packing plant. Finally, Newry asserts that Wyant himself, by stipulation, removed the issue of flood plain permits from the Board's consideration.

The Board's rules of practice and procedure provide at 25 Pa.Code §21.122 that

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

> (b) The provisions of subsection (a) supersede the provisions of 1 Pa.Code §35.241 (relating to rehearing or reconsideration).

We believe Wyant's application to be a request under 25 Pa.Code §21.122(a)(2). For the reasons set forth below, we will deny Wyant's application.

Wyant's allegations in his application for rehearing are unverified and unsupported. Furthermore, he has failed to substantiate how these allegations would merit rehearing in this matter under 25 Pa.Code §21.122(a)(2). Denial of his application for these reasons alone is warranted. However, we have also considered the substance of Wyant's allegations and believe rehearing is unwarranted.

We have already, at 1985 EHB 849, dismissed that portion of Wyant's appeal relating to the Department's approval of Newry's revision to its official plan to incorporate the sewage treatment plant, and our dismissal was sustained by the Commonwealth Court in Gerald W. Wyant v. DER and Borough of Newry, No. 3237 C.D. 1985 (Pa.Cmwlth, filed January 7, 1987). To the extent that introduction of the meat packing plant wastes into the Newry sewage treatment plant was addressed in the plan revision, any attack on it by Wyant at this time is precluded as untimely in accordance with our 1985 opinion. To the extent that introduction of the meat packing plant wastes is a new development, we are mindful that our jurisdiction is limited to considering whether the Department's issuance of the permits in 1984 was an abuse of discretion, not whether the permits are now, in 1988, an abuse of discretion.

Even if the introduction of meat packing plant wastes into the Newry sewer system were germane, we believe that the Department accounted for industrial waste discharges in the conditions which the Department imposed in Newry's NPDES permit (App. Ex. 41). Section I of Part B extensively addresses the introduction of wastes from industrial users, such as a meat packing

plant, and imposes management and reporting requirements on Newry. Section I of Part B states:

I. MANAGEMENT REQUIREMENTS

A. Publicly Owned Treatment Works (POTW)

1. Where the permittee is a Publicly Owned Treatment Works (POTW), the permittee shall provide adequate notice as discussed in A(2) below to the Department of the following:

   (a) Any new introduction of pollutants into the POTW from an Industrial User which would be subject to Sections 301 and 306 of the Clean Water Act if it were otherwise discharging directly into waters of the United States.

   (b) Any substantial change in the volume or character of pollutants being introduced into the POTW by an Industrial User which was discharging into the POTW at the time of issuance of this permit.

   (c) Any change in the quality and quantity of effluent intoduced into the POTW.

   (d) The identity of significant Industrial Users served by the POTW which are subject to pretreatment standards adopted under Section 307(b) of the Clean Water Act; the POTW shall also identify the character and volume of pollutants discharged into the POTW by the Industrial User.

2. The submission of the above information in the POTW's annual Wasteload Management Report, required under the provisions of 25 Pa.Code Chapter 94, will normally be considered as providing adequate notice to the Department. However, if the above changes in industrial pollutant loadings to the POTW are significant enough to warrant either modification or revocation and reissuance of this permit, then the permittee is required to meet the provisions of Managements Requirements B below.

3. The POTW shall require all Industrial Users to comply with the reporting requirements of Sections 204(b), 307, and 308 of the Clean

Water Act and any regulations adopted thereunder, and the Clean Streams Law and any regulations adopted thereunder.

4. This permit shall be modified, or alternatively, revoked and reissued, to incorporate an approved POTW pretreatment program or a compliance schedule for the development of such program as required under Section 402(b)(8) of the Clean Water Act and regulations adopted thereunder or under the Department's approved pretreatment program.

The Department's rules and regulations also independently impose obligations on industrial users and municipal treatment plants. Under 25 Pa.Code §97.91, industrial users must meet various pretreatment standards. The sewage treatment plant permittee has obligations under 25 Pa.Code §94.12 to monitor industrial waste discharges into its sewer system, as well as control them through ordinances and regulations. If the municipal treatment plant is not meeting the effluent limitations in its NPDES permit as a result of industrial waste discharges into its system that are interfering with the treatment process, the Department has a variety of enforcement mechanisms available under the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, to compel correction of the problem.

Finally, with regard to Wyant's contention relating to the flood plain issues, we agree with Newry that Wyant waived this issue in the stipulation filed by the parties with the Board on March 3, 1986. The relevant portion of the stipulation states:

> The converse problem was presented by the Appellant's contention that the decision to locate the proposed sewage treatment facility on the 100-year flood plain of Poplar Run was imprudent and unlawful. <u>At the pre-hearing conference counsel for the Borough and the Department agreed with the Appellant's earlier allegation that construction of the facility requires a permit under the Pennsylvania Flood Plain Management Act and that no such permit had been applied for the Borough. The parties</u>

> agreed at that time that the only sensible course was for the Permittee to apply for a Flood Plain Management permit to the Department and generate the evidence needed to pass upon the propriety thereof. It was also agreed that the Appellant would be made a party to the permit proceedings and be provided with copies of the documents submitted to the Department, which he had already requested during the discovery process in this case. Flood Plain Management Act permit proceedings before the Department have not yet been commenced. Issues proper thereto will not be litigated at the hearing.
>
> (emphasis added)

Wyant chose to follow another path to register his objections relating to the flood plain management issues. The Board can hardly be faulted for accepting the stipulation entered into by Wyant. We may only speculate as to the progress of the flood plain management proceedings before the Department, and our speculation is of no import, as the issue was removed from our consideration and has not been brought back before us through an appeal of the Department's disposition of the flood plain management permit application.

O R D E R

AND NOW, this 21st day of November, 1988, it is ordered that Gerald W. Wyant's application for rehearing is denied and the Board's adjudication of October 24, 1988 is affirmed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

William A. Roth
WILLIAM A. ROTH, MEMBER

Robert D. Myers
ROBERT D. MYERS, MEMBER

DATED: November 21, 1988

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M. DIANE SMITH
SECRETARY TO THE BOARD

RONALD BURR	:	EHB Docket No. 87-434-R
ROY AND MARCIA CUMMINGS	:	EHB Docket No. 87-435-R
CHARLES AND MARY LOU HAUDENSHIELD	:	EHB Docket No. 87-436-R
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: November 21, 1988

OPINION AND ORDER
SUR
PETITION TO AMEND ORDER TO
ALLOW INTERLOCUTORY APPEAL

Synopsis

A petition to amend an order to allow an interlocutory appeal is granted. Where the question of the Board's jurisdiction to hear appeals of insurance claim denials by the Coal and Clay Mine Subsidence Insurance Board involves a controlling question of law upon which there is substantial disagreement, and where immediate review would expedite the proceedings, the Board may amend its interlocutory order to permit appellate review.

OPINION

On October 9, 1987, appeals were filed by Ronald Burr (EHB Docket No. 87-434-R), Ray and Marcia Cummings (EHB Docket No. 87-435-R), and Charles and Mary Lou Haudenshield (EHB Docket No. 87-436-R) (collectively, Appellants) from the September 10, 1987 denial of mine subsidence damage claims Nos.

B-1865, B-1786 and B-1876, respectively, by the Coal and Clay Mine Subsidence Insurance Fund (Subsidence Fund). Each of the Appellants lives on Stonebrook Drive, McMurray, Washington County and each claims damages to their respective residences due to coal mine subsidence. The Subsidence Fund is administered by the Coal and Clay Mine Subsidence Insurance Board (Subsidence Board), which is chaired by the Secretary of the Department of Environmental Resources (DER), and also composed of the Commissioner of Insurance and the State Treasurer. The Subsidence Fund and Subsidence Board were created by the Act of August 23, 1961, P.L. 1068, as amended, 52 P.S. §3201 et seq. (Subsidence Act).

By our opinion and order issued August 31, 1988, the Board denied a DER[1] motion to dismiss these appeals for lack of jurisdiction. The Board ruled that §24.1 of the Subsidence Act[2] confers upon this Board jurisdiction to hear appeals of subsidence insurance claims denials by the Subsidence Board. Up to the time of that ruling, such appeals apparently were routinely filed with and heard by the Board of Claims, whose jurisdiction over contractual disputes is defined by the Act of May 20, 1937, P.L. 728, as amended, 72 P.S. §4651-1 et seq.

On October 20, 1988, DER filed a petition to amend the Board's August 31, 1988 order to permit an interlocutory appeal by including the statement required by §702(b) of the Judicial Code, 42 Pa.C.S.A. §101 et

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[1]Although the Subsidence Board is charged with approving or denying claims, its staffing and legal representation are provided by DER. The Subsidence Board and DER are interchangeable for the purposes of this opinion.

[2]Section 24.1 of the Subsidence Act, 52 P.S. §3224.1 states in toto:

> Any party aggrieved by an action of the board hereunder shall have the right to appeal to the Environmental Hearing Board.

seq.[3] DER, without directly stating so, apparently believes that there exists ground as to which there is substantial ground for a difference of opinion. It points to a portion of the transcript from a subsidence insurance claim denial action currently before the Board of Claims in which that tribunal asserted its jurisdiction over these types of contractual disputes. In their November 9, 1988 answer, Appellants oppose DER's petition, stating that while there may a controlling question of law, DER has not substantiated why there is a substantial ground for difference of opinion or why an immediate appeal would materially advance the ultimate termination of these appeals.

The issue of whether this Board has jurisdiction to review subsidence insurance claim denials by the Subsidence Board is a controlling question of law, as it involves the issue of jurisdiction. These appeals are cases of first impression, as this is the first time we have been called upon to decide whether we have jurisdiction to review Subsidence Board insurance claim denials.[4] While we are confident that our August 31, 1988 ruling is

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[3] §702(b) of the Judicial Code, reads as follows:

> Interlocutory appeals by permission. - When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.

[4] A review of the Board's docket reveals that only one prior subsidence insurance claim denial appeal was filed. See Raymond and Candia Phillips v. DER, EHB Docket No. 86-528-R. However, the question of this Board's jurisdiction was never raised in that appeal since it was withdrawn by the Appellants, who then filed an action in the Board of Claims.

correct, the Board of claims is equally confident of its jurisdiction. Thus there is substantial grounds for a difference of opinion.

We also believe that an immediate appeal to the Commonwealth Court would materially advance the ultimate termination of these matters. If this Board indeed has no jurisdiction, proceeding in the normal course to dispose of these appeals would needlessly expend the resources of the Board and the litigants. Moreover, the litigants would then be faced with the prospect of presenting the same evidence anew to the Board of Claims. An immediate review will serve to materially advance the ultimate termination of these appeals by assuring that the proper tribunal hears them.

In view of the foregoing, we will amend our order.

ORDER

AND NOW, this 21st day of November, 1988, it is ordered that the Board's order of August 31, 1988 is amended by adding the following sentence:

> The Board is of the opinion that its determination that it has jurisdiction to hear appeals from the denial of mine subsidence insurance claims by the Coal and Clay Mine Subsidence Insurance Board involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of the matter.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: November 21, 1988

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M. DIANE SMITH
SECRETARY TO THE BOARD

RIGHT OF WAY PAVING COMPANY, INC., and AMERICAN INSURANCE COMPANY, Intervenor	:	
v.	:	EHB Docket No. 86-079-R
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: November 23, 1988

OPINION AND ORDER

Synopsis

An appeal is dismissed where the Appellant fails to appear at a scheduled hearing on the merits and fails to respond to a rule to show cause why its appeal should not be dismissed for lack of prosecution.

OPINION

This matter was initiated by the February 13, 1986 filing of a notice of appeal by Right of Way Paving Company, Inc. (R/W Paving) from two Department of Environmental Resources (DER) bond forfeitures pertaining to R/W Paving's mine site in Fallowfield Township, Westmoreland County. In due course, R/W Paving and DER filed their pre-hearing memoranda, and the Board, by notice dated March 21, 1988, scheduled the matter for a hearing on the merits for April 19-22, 1988.

On April 11, 1988, the Board was contacted by the parties and informed that a stipulation of facts had been prepared which would obviate the need to cover most of the evidentiary issues at the hearing. In addition,

counsel for R/W Paving informed the Board that his client did not intend to put forth a defense to DER's case at the hearing and, indeed, that it was possible that neither he nor his client would attend the hearing at all.

On the morning of the first scheduled day of the hearing, April 19, 1988, counsel for R/W Paving telephoned the Board and stated that neither he nor his client would be attending the hearing. At the appointed hour of 10:00 a.m., with no one from R/W Paving being in attendance, Board Member Roth, who was to have heard this appeal, made a statement on the record in which he outlined the foregoing events and indicated his intention to propose an order to his fellow Board Members which would dismiss R/W Paving's appeal for failure to prosecute.

On April 22, 1988, the Board received a renewed petition to intervene by American Insurance Company, the surety for some of R/W Paving's bonds and, by its opinion and order of June 2, 1988, the Board granted the petition to intervene.[1] On September 27, 1988, a proposed consent adjudication between DER and American Insurance Company relating to the American Insurance Company surety bonds was submitted to the Board for its approval. The Board approved the consent adjudication on October 12, 1988, pursuant to 25 Pa.Code §21.120.

In a final attempt to determine R/W Paving's intentions, the Board, on September 27, 1988, entered upon R/W Paving a rule to show cause, on or before October 27, 1988, why its appeal should not be dismissed for failure to

---

[1] Shortly after this appeal was filed, American Insurance Company filed its original petition to intervene. However, the Board denied the petition on the basis that American Insurance Company was unable to show that its interests would be inadequately represented by R/W Paving. As matters turned out, R/W Paving provided no representation of its interests.

prosecute. Although the rule was received by R/W Paving on September 28, 1988, it did not respond.

In bond forfeiture actions, DER bears the burden of proving that its actions were justified. King Coal Company v. DER, 1985 EHB 104. Generally, the Board is reluctant to dismiss appeals where DER bears this burden. Howard D. Will v. DER, 1987 EHB 27. However, an appellant has the responsibility to diligently prosecute its appeal before the Board, Springbrook Township v. DER, 1986 EHB 306, and an appellant's failure to prosecute its appeal is grounds for dismissal. Mary Louise Coal Company v. DER, 1986 EHB 1351. R/W Paving's failure to appear to present a defense at the hearing on the merits and its failure to respond to the rule to show cause demonstrate that it has no intention of prosecuting its appeal. Accordingly, dismissal of this appeal for failure to prosecute is entirely appropriate.

ORDER

AND NOW, this 23rd day of November, 1988, it is ordered that the appeal of Right of Way Paving Company, Inc. is dismissed for failure to prosecute.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: November 23, 1988

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

PARADISE WATCH DOGS	:	
	:	
v.	:	EHB Docket No. 88-247-W
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
	:	
and	:	Issued: November 23, 1988
	:	
JAMES, JOHN AND ALBERT MARINARI, Permittee	:	

OPINION AND ORDER
SUR
MOTION TO QUASH

Synopsis

An appeal is dismissed as moot where the plan approval which is the subject of the appeal has expired.

OPINION

This matter was initiated by Paradise Watch Dogs (Paradise) on June 22, 1988, with the filing of a notice of appeal seeking review of a plan approval issued to James, John and Albert Marinari (Marinaris) on November 1, 1985, authorizing the construction of an incinerator in New Hanover Township, Montgomery County. The plan approval was issued by the Department of Environmental Resources (Department) pursuant to the Air Pollution Control Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 et seq., and 25 Pa.Code §127.1 et seq.

On July 29, 1988, the Marinaris filed a motion to quash Paradise's appeal, arguing that the Board is without jurisdiction to hear the appeal because the Department's April 23, 1986 issuance of an operating permit to the Marinaris and the expiration of the plan approval on September 30, 1986 rendered the appeal moot. The Marinaris also argued that the appeal was untimely filed because Paradise had actual notice of the Department's action, as was evidenced in a complaint filed in the U. S. District Court for the Eastern District on August 4, 1987.

Paradise responded to the motion on August 1, 1988, contending that dismissing its appeal as moot would violate the public's due process rights to challenge the validity of the plan approval. Additionally, Paradise argued that the appeal was timely because it never received written notice, nor did the Department publish notice of its action in the Pennsylvania Bulletin, as required by its own policy. Paradise disputed the contention that actual knowledge of the plan approval was the equivalent of written notice and asserted that its appeal period only began to run after notification of the Department's issuance of the plan approval was published in the Pennsylvania Bulletin.

The Commonwealth Court recently held, in Lower Allen Citizens Group v. DER, ___ Pa.Cmwlth.___, 546 A.2d 1330 (1988), that, in the case of third party appeals, the 30 day appeal period begins to run upon publication of notice of the Department's action in the Pennsylvania Bulletin, even if the third party had previously received written notice of the Department's action. On its face, Lower Allen would seem to control here, but the Commonwealth Court did not address the situation where the Department failed to publish notice of its action in the Bulletin. Although certain regulatory programs have requirements that notice of Department actions be published in the

Pennsylvania Bulletin (e.g., 25 Pa.Code §86.39(b) for coal mining permits), the majority do not, and the Department's publication of its actions in the Pennsylvania Bulletin is merely policy. We need not address that question here, however, as we believe that this appeal is moot and will dismiss it on those grounds.

Generally, a tribunal will not rule on moot issues. 17 Stand Pa. Practice 92.9. An issue is moot when there is no longer a live controversy. Id. Additionally, when a court is no longer able to grant any relief, a case will be considered moot.[1] Delta Excavating & Trucking, Inc. v. DER, 1987 EHB 319.

This matter is analogous to Silver Spring v. Commonwealth of Pa, DER, 28 Pa.Cmwlth. 302, 368 A.2d 866 (1977), wherein the Commonwealth Court, affirming a Board ruling, held that an appeal of plan approvals issued under 25 Pa.Code §127.1 et seq. was moot because the plan approvals had expired and the equipment authorized by the plan approvals was removed and replaced by other equipment pursuant to an unappealed operating permit. The Commonwealth Court held that because there was no relief which the Board could grant, the Board properly dismissed the appeal. While the plan approvals in Silver Spring expired as a result of a determination that the equipment was unsatisfactory, and the plan approval which is the subject of this appeal expired by its own terms, the grant of the operating permits in both cases was unappealed. Thus, as in Silver Spring, there is no relief which the Board can grant.

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[1] There are exceptions to the mootness doctrine, such as situations capable of repetition, yet evading review, James E. Martin v. DER, 1986 EHB 313, citing Port Authority of Allegheny Cty. v. Division 58, Amalgamated Transit Union, 34 Pa.Cmwlth. 71, 383 A.2d 954 (1978), but Paradise does not argue that it falls within any of the exceptions.

Paradise has claimed that dismissing this appeal as moot would violate its due process rights, but we do not believe its argument has merit. Mootness is a doctrine founded primarily on jurisdiction.[2] Assertions of constitutional claims, or potential hardship cannot operate to confer jurisdiction in the absence of a justiciable controversy.

O R D E R

AND NOW, this 23rd day of November, 1988, it is ordered that the Motion to Quash of James, John, and Albert Marinari is granted and the appeal of Paradise Watch Dogs is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

William A. Roth
WILLIAM A. ROTH, MEMBER

Robert D. Myers
ROBERT D. MYERS, MEMBER

DATED: November 23, 1988

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[2] Mootness is also founded on policy considerations, with one of its aims to prevent the useless expenditures of judicial resources. Marshall v. Whittaker Corp, Berwick Forge & Fabricating Co., 610 F.2d 1141 (3rd Cir. 1979).

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M. DIANE SMITH
SECRETARY TO THE BOARD

SWISTOCK ASSOCIATES COAL CORPORATION	:	
	:	
v.	:	EHB Docket No. 88-240-M
	:	(Consolidated)
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: November 28, 1988

OPINION AND ORDER
SUR
MOTIONS FOR SANCTIONS AND PROTECTIVE ORDERS

Synopsis

A Motion for a Protective Order, requiring depositions of three witnesses to be taken out of the presence of one another, will be denied where the only basis alleged in support of the Motion is a concern that the witnesses will echo one another's testimony. Sanctions will not be imposed when the breakdown of depositions is not the fault of either party or is the fault of both parties.

OPINION

A discovery dispute arose on October 27, 1988, at oral depositions scheduled by the Department of Environmental Resources (DER) to be taken of James Swistock, William Shaw and David Moffit. Swistock is the president and sole shareholder of Swistock Associates Coal Corporation, Apellant in the above-captioned cases. Shaw is an employee of Appellant; but is not an officer, director or shareholder. Moffit is a former employee of Appellant.

At the outset of the depositions, DER's attorney requested that the deponents be sequestered so that they would not be tainted by one another's testimony. Appellant's attorney refused the request. When efforts to resolve the dispute failed, DER's attorney telephoned the Board and was instructed to have both attorneys discuss the controversy with Edward J. Potteiger, one of the Board's legal assistants.

Although Appellant's attorney refused to be a party to the initial telephone call to the Board, he did participate in a joint telephone conference with Mr. Potteiger. After hearing the arguments of the attorneys and having no success in getting them to resolve the dispute themselves; Mr. Potteiger suggested that written motions be filed with the Board. The depositions did not take place.

DER filed a Motion for Sanctions and Protective Order on November 2, 1988, requesting that Appellant be held in contempt, that DER be awarded costs for appearing at the aborted depositions, and that the same three witnesses be ordered to appear for depositions on a sequestered basis. On November 3, 1988, Appellant filed a Motion for Sanctions and a Protective Order, requesting the imposition of sanctions upon DER, and a prohibition against DER's taking the depositions of the three witnesses without first paying the costs and lost wages suffered with respect to October 27, 1988. Each party has answered the other's Motion and the dispute is now ready for decision.

Discovery in proceedings before the Board generally corresponds with that applicable to civil proceedings under the Pennsylvania Rules of Civil Procedure (R.C.P.) 25 Pa. Code §21.111. R.C.P. 4012 (a) (6) authorizes the issuance of protective order limiting the persons who may be present at an

oral deposition. Such an order may be issued "for good cause shown" and if "justice requires" to protect a party or person from "unreasonable annoyance, embarrassment, oppression, burden or expense."

In its Motion, DER represents that each witness needs to be deposed outside of the hearing of the others so that he will not be coached by the others and "merely echo" their answers. Allowing the witnesses to sit in on each of the other depositions, according to DER, would discourage candor and make the taking of depositions a farce.

If that statement is true, one would expect the Rules of Civil Procedure to require the sequestration of deponents in all but exceptional circumstances. That is not the case, however. Sequestration is mentioned in the discovery rules (R.C.P. 4001 - R.C.P. 4025) only as one of nine possible types of protective orders under R.C.P. 4012 (a). Since such orders are to be issued only for good cause and to protect against unreasonable abuse of the discovery process, it is obvious that sequestration is expected to be the exception rather than the rule.

DER has the burden of showing that Swistock, Shaw and Moffit each need to be deposed out of the presence of the others in order to be protected from unreasonable annoyance, embarrassment, oppression, burden or expense. DER's Motion does not allege this, however; it simply expresses a fear that each witness will be influenced by the others and tell the same story. Such a fear, by itself, is not sufficient to justify the issuance of a protective order. Facts must be alleged showing that there is a substantial reason for believing that the presence of the other witnesses will so intimidate the deponent that he will commit perjury. Such facts have not been alleged; and

it would be wholly improper to infer them solely from the employment relationships that, presently or formerly, existed among them. Consequently, the protective order requested by DER cannot be issued.

Since the protective order portion of DER's Motion can be disposed of on this ground, it is unnecessary to discuss Appellant's argument that James Swistock, as president and sole shareholder of one of the parties to this appeal, is entitled to be present at the depositions of the other two witnesses.

The remainder of the controversy revolves around the costs and expenses incurred by the parties and the witnesses as a result of the failed attempt to take the depositions on October 27, 1988. DER wants its costs to be assessed against Appellant. Appellant wants DER to pay Apellant's expenses and attorney's fees, and Moffit's lost wages.[1] Appellant maintains that DER should not be permitted to depose the three witnesses without first paying these costs.

Appellant bases its argument on the assertion that DER's attorney should have done one of three things before the day of the depositions. He should have (1) discussed sequestration with Appellant's attorney, (2) incorporated sequestration in his notice of deposition, or (3) sought and obtained a protective order requiring sequestration. Since he did none of these things, DER must be blamed for the cancellation of the depositions.

In retrospect, it is clear that any one of these actions would have been desirable. However, there is no provision in the discovery rules

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[1] This type of sanction cannot be imposed upon the Commonwealth under R.C.P. 4019 (j). While Appellant's Motion could be dismissed on this ground without further comment, the discussion that follows will address DER's actions as a necessary element in deciding whether sanctions should be imposed upon Appellant.

mandating such action. (See e.g., R.C.P. 4007.1 with respect to the contents of the notice.) It is expected that the parties will accommodate each other's discovery requests in a mutually beneficial manner. This is the concept that underlies the freedom given to the parties in R.C.P. 4002.

DER maintains that, in six previous depositions taken by Appellant of DER's witnesses, DER's witnesses were sequestered. The circumstances that gave rise to the sequestration have not been alleged; so it is impossible for the Board to know whether this was the result of prior conversations between the attorneys or of a statement incorporated in the notice of depositions or simply by happenstance. However it came about, a pattern of sequestration had been established; and DER's attorney had some justification for believing that it would continue, without objection, at the depositions of Appellant's witnesses. Blame for the dispute cannot be laid solely at the feet of either party. It could well be that neither is at fault.

When the controversy broke out on October 27, 1988, both attorneys tried to save the depositions that had been scheduled. DER criticizes Appellant's attorney for resisting efforts to have the matter resolved by the Board in a telephonic conference. Appellant criticizes DER's attorney for not going ahead with the depositions in spite of the dispute. Certainly, it would have been desirable if some settlement could have been reached that would have enabled the depositions to go forward that day. The fact that a settlement was not reached was a joint failure of the attorneys. A reading of the transcript, submitted with DER's Motion, reveals that both attorneys, while uncertain of the validity of their legal positions, were equally adamant in their refusal to compromise. To assess costs against just one of the parties, under the circumstances, would be unfair. Each should bear its own costs and expenses.

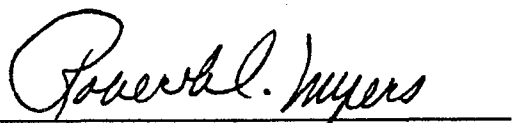
ORDER

AND NOW, this 28th day of November, 1988, it is ordered as follows:

1. The Motion for Sanctions and Protective Order, filed by the Department of Environmental Resources on November 2, 1988, is denied.

2. The Motion for Sanctions and a Protective Order, filed by Swistock Associates Coal Corporation on November 3, 1988, is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS, MEMBER

DATED: November 28, 1988

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M. DIANE SMITH
SECRETARY TO THE BOARD

NAZARETH BOROUGH MUNICIPAL AUTHORITY	:	
	:	
v.	:	EHB Docket No. 83-043-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: November 30, 1988

OPINION AND ORDER SUR REQUEST TO DISMISS AS MOOT

Synopsis

A request to dismiss an appeal of a National Pollutant Discharge Elimination System Permit is granted where the contested effluent limitations have been superseded by a subsequently executed consent order and agreement and the issuance of a revised permit.

OPINION

This matter was initiated by the March 3, 1983 filing of a notice of appeal by the Nazareth Borough Municipal Authority (Nazareth) seeking the Board's review of National Pollutant Discharge Elimination System (NPDES) Permit No. PA0041742. The NPDES permit was issued by the Department of Environmental Resources (Department) on January 24, 1983, pursuant to the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. In particular, Nazareth objected to the limits in the permit for ammonia expressed as nitrogen (1 mg/l), dissolved oxygen (5 mg/l minimum), BOD_5 (20 mg/l monthly average), and flow (0.5 million gallons per day (MGD)) as being arbitrary, capricious, and unreasonable. Nazareth also contended

impossible to meet the flow limitation without expansion of the plant and that the receiving stream, Schoeneck Creek, was improperly classified in 25 Pa.Code §93.1 et seq. as a Cold Water Fishery.

The Board issued its standard pre-hearing order on March 14, 1983, requiring that Nazareth file its pre-hearing memorandum on or before May 27, 1983. By letter dated May 18, 1983, Nazareth requested, and was granted, an extension to September 19, 1983 to file its pre-hearing memorandum. Nazareth failed to file its pre-hearing memorandum and the Board, by order dated September 27, 1983, advised Nazareth of its default. Thereupon, by letter dated October 7, 1983, Nazareth requested that its appeal be continued generally pending the Department's review of water quality standards for Schoeneck Creek, the receiving stream for Nazareth's discharge. The Board, by order dated November 3, 1983, granted Nazareth's request and required the parties to submit status reports every 90 days.

Nazareth submitted a status report dated January 31, 1984, which indicated that the Schoeneck Creek study was not completed and that the appeal should be continued. Thereafter, there was no activity at the docket until March 24, 1986, when the Board issued a rule upon Nazareth to show cause why its appeal should not be dismissed for inactivity.

Nazareth responded in a letter dated April 10, 1986, that the water quality standards for Schoeneck Creek were to be revised and, as a result, the NPDES permit would require revision and that a continuance would be proper until the revisions were made. The Board then issued an order on April 16, 1986, which continued the matter to January 2, 1987, and required the parties to submit status reports on August 2, 1986, and January 9, 1987. The Board

also required the January 9, 1987 status report to be accompanied by a request for action by the Board and warned that if no activity occurred by April 15, 1987, the matter would be subject to dismissal.

Nazareth duly filed its status report by letter dated August 4, 1986, which letter merely reiterated the contents of its previous requests for extensions and status reports. The Department's September 3, 1986 status report indicated that the study of Schoeneck Creek had been completed and that the study concluded that Schoeneck Creek had been mis-classified as a Cold Water Fishery. However, the Department also reported that other changes to its water quality standards could also affect Nazareth's permit, as well as redesign of the Nazareth plant.

By letter dated January 20, 1987, Nazareth requested another six months continuance on the basis of the information contained in the Department's September 3, 1986 status report. The Department, by letter dated February 19, 1987, took a differing position. The Department agreed that new permit limitations would be developed, but contended that once these limitations were developed and incorporated in Nazareth's permit, its appeal would be useless. The Department, therefore, requested the Board to dismiss Nazareth's appeal. By letter dated February 27, 1987, Nazareth disagreed with the Department's request to dismiss its appeal, stating that dismissal would not recognize, as the Department now did, that the permit limitations were incorrect.

The Board then, on March 2, 1987, issued an order continuing the appeal to June 1, 1987, at which time Nazareth was to either file its pre-hearing memorandum or a request to withdraw its appeal. Nazareth duly filed its pre-hearing memorandum on May 26, 1987, but the transmittal letter which accompanied it stated, "It would appear pointless to proceed with a

hearing in this matter, as DER does not have different criteria, though admitting that the existing criteria are inaccurate."

The Department, in response to a notice from the Board that it was in default of its obligation to file a pre-hearing memorandum, filed a letter with the Board which stated that:

> The current status of the case, from the Department's point of view, is as follows:
>
> 1. The Department has, by proposed rulemaking to the Environmental Quality Board, requested the reclassification of Schoeneck Creek from Cold Water Fishery to Warm Water Fishery. Once the stream has been reclassified, the permit limits originally appealed by appellant will be changed by DER. In the interim, DER considers the old effluent limitations (at least those affected by the reclassification) to be inappropriate and unenforceable.
>
> 2. The appellant has submitted to DER a compliance plan and schedule for the upgrade of the appellant's sewage treatment plant, and DER counsel is currently reviewing a draft Consent Order and Agreement which will be sent to the Authority within the next several weeks. In addition, the Authority should receive its consolidated DER/DRBC Part II (Facilities) Permit for the upgrade by the end of the year.

In response to the Department's letter, the Board continued the matter to October 13, 1987 to allow the parties to complete negotiation of the consent order and agreement and required the parties to submit reports concerning the status of the negotiations (Nazareth) and the rulemaking (the Department).

Nazareth submitted its status report by letter dated November 6, 1987. The letter enclosed a copy of an October 27, 1987 consent order and agreement between the Department and Nazareth and stated

> To our knowledge, no further work has been done by DER on the reclassification of the Schoeneck Creek and our appeal as to the existing NPDES criteria is specifically excluded from the Consent Order. We request that the matter be continued until an agreed

> revised criteria for the permit has been established. It is, of course, possible that the revised criteria and the erection of the new plant will render the entire matter moot as the Authority will then be in compliance with an appropriate NPDES permit.

The Department's status report was contained in a November 12, 1987 letter, which explained:

> The parties have executed a Consent Order and Agreement covering the construction of a new NBMA sewage plant and, until April 1, 1989, interim effluent limits for those parameters for which the old plant is unable to meet the limits in the NPDES permit as issued in 1983. The Department is likely to issue the new NPDES permit by the end of the year. Unfortunately, it is impossible to tell at this point whether the proposed changes in the classification of Schoeneck Creek will have been approved by the EQB before DER issues the permit. If the change in classifiction has been approved, the permit will be modified based on that change, as has been discussed with the Authority.
>
> The Department continues to take the position described in our letter to you of February 19, 1987 (copy attached), that is, that the maintenance of this appeal serves no useful purpose, especially now that the effluent limits for the parameters of concern to the Authority have been superseded in the Consent Order and Agreement.
>
> (emphasis added)

However, this Consent Order and Agreement was not the last Department action relating to Nazareth.

The new NPDES permit mentioned in the Department's November 12, 1987 status report was, in fact, issued much later. Pursuant to 25 Pa.Code §21.109, we take official notice that public notification of the issuance of the new NPDES permit to Nazareth was published at 18 Pa.B 2932 (July 2, 1988). The Board required the Department, by order dated September 29, 1988, to

submit a copy of the NPDES permit to the Board, which the Department did by letter dated October 6, 1988. The permit was issued on June 8, 1988, and will expire on June 8, 1993.

For the reasons which follow, the Board will dismiss this appeal as moot. The Board cannot possibly provide any relief to Nazareth in light of the execution of the consent order and agreement and the June 8, 1988 issuance of a revised NPDES permit to Nazareth.[1]

Paragraph 8 of the October 27, 1987 Consent Order and Agreement provides in relevant part that:

> Between the date of this Consent Order and Agreement and April 1, 1989 the effluent limits of the NPDES Pemit for the following parameters are superseded and the Authority shall meet the following interim effluent limits:
>
> | | Mo.Avg. Conc. (mg/1) |
> |---|---|
> | Biochemical Oxygen Demand (5-day) (11/1 - 4/30) | 50 |
> | Biochemical Oxygen Demand (5-day) (5/1 - 10/31) | 40 |
> | Ammonia-Nitrogen | * * * Monitor Only * * * |

Thus, the BOD_5 and ammonia-nitrogen limitations challenged by Nazareth have been superseded by the Consent Order and Agreement.

The June 8, 1988 NPDES permit also alters the effluent limitations contested by Nazareth. It contains a two-tier system, effluent limitations

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[1] We also take official notice that the Environmental Quality Board revised the classification of Schoeneck Creek, the receiving stream for Nazareth's discharge, from a Cold Water Fishery (CWF) to a Warm Water Fishery (WWF). See 18 Pa.B 4089 (September 10, 1988). We will not address any impact this rulemaking will have on this appeal, as there are no facts of record which would enable us to do so.

from the date of issuance through the date of completion of the expansion/upgrade or expiration, and effluent limitations from the date of completion of the expansion/upgrade through expiration. For this initial period, flow from the plant must not exceed 0.5 MGD and the following effluent limitations will apply:

DISCHARGE PARAMETER	CONCENTRATIONS (mg/l) AVERAGE MONTHLY
CBOD-5 (5-1 to 10-31)	10
CBOD-5 (11-1 to 4-30)	20
AMMONIA as N 5-1 to 10-31	1.5
AMMONIA as N 11-1 to 4-30	4.5
DISSOLVED OXYGEN	Minimum of 5.0 mg/l at all times

For the period from completion of the expansion/upgrade to the expiration of the permit, a flow of 1.1 MGD is authorized and the following effluent limitations pertinent to this appeal will apply:

DISCHARGE PARAMETER	CONCENTRATIONS (mg/l) AVERAGE MONTHLY
CBOD-5 (5-1 to 10-31)	15
CBOD-5 (11-1 to 4-30)	25
AMMONIA as N 5-1 to 10-31	1.5
AMMONIA as N 11-1 to 4-30	4.5
DISSOLVED OXYGEN	Minimum of 5.0 mg/l at all times

While neither the Consent Order and Agreement nor the revised 1988 NPDES permit contain any language regarding their relationship, we do not believe that the omission affects our determination that this matter is now moot. The fact remains that the effluent limitations at issue have been modified twice since the filing of the notice of appeal, the flow authorized from the plant will more than double under the terms of the 1988 NPDES permit, and the Nazareth plant is in the process of an expansion/upgrade. The present complexion of this matter, therefore, bears little or no resemblance to its complexion in 1983. There is no effective relief we can grant because of the changed circumstances, and we must dismiss this appeal as moot.

The Board has expended a great deal of resources in attempting to move this appeal to a resolution. We note that the purpose of an appeal of the Department's issuance of an NPDES permit is not to delay the matter until it can be determined that the facility can meet the effluent limitations or to delay it until the permit expires in five years. The purpose of the appeal is to determine whether the permit's issuance was an abuse of discretion by the Department.

O R D E R

AND NOW, this 30th day of November, 1988, it is ordered that the Department of Environmental Resources' request to dismiss the appeal of Nazareth Borough Municipal Authority is granted.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

William A. Roth
WILLIAM A. ROTH, MEMBER

Robert D. Myers
ROBERT D. MYERS, MEMBER

DATED: November 30, 1988

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M. DIANE SMITH
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, BUREAU OF DEEP MINE SAFETY, Plaintiff	:	
v.	:	
WILBUR GUILE, Defendant	:	EHB Docket No. 84-332-F
ANGELO SWANHART, Defendant	:	EHB Docket No. 84-333-F
JAMES MILLIGAN, Defendant	:	EHB Docket No. 84-335-F
	:	Issued: November 30, 1988

OPINION AND ORDER SUR
MOTION TO LIMIT THE ISSUES AND
MOTION TO QUASH CERTAIN SUBPOENAS

Synopsis

A motion to limit issues filed by the Department of Environmental Resources (DER) is granted in part and denied in part in a complaint proceeding alleging that the Defendants violated the Bituminous Coal Mine Act (Act), 52 P.S. §701-101 et seq. The motion to limit issues is denied to the extent that it would bar the Defendants from attempting to prove that DER interpreted the Act differently before the accident in question. The motion to limit issues is granted to the extent it would preclude evidence regarding the propriety of appointing a commission to investigate the accident. Similarly, DER's motion to quash certain subpoenas is granted to the extent the subpoenas would lead to evidence regarding the appointment of the investigating

commission and evidence regarding an unrelated investigation by DER, and denied in all other respects.

OPINION

These three proceedings were initiated by separate complaints filed by the Department of Environmental Resources (DER) on September 11, 1984. The complaints arose from the circumstances surrounding an accident in which a miner was killed at the Helen Mining Company Mine in Homer City, Indiana County, Pennsylvania on July 3, 1983. Defendants Wilbur Guile, Angelo Swanhart, and James Milligan--whose complaints have been consolidated for hearing[1]--were all assistant mine foremen at the mine. DER's complaints allege that the Defendants breached, in varying degrees, their duties attendant to the certificates of qualification which authorize the Defendants to engage in the profession of assistant mine foreman. DER is seeking a one-year suspension of the certificate of Milligan, and an absolute revocation of the certificates of Guile and Swanhart.

This Opinion and Order addresses DER's "Motion to Limit the Issues and Motion to Quash Certain Subpoenas" filed on September 27, 1988.[2] In its motion to limit issues, DER seeks to eliminate three issues (Numbers 35, 36 and 44) which the Defendants listed in their response dated August 29, 1988 to the Board's Pre-Hearing Order No. 2. The issues in question state:

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[1] The accident in question spawned seven complaints against officials at the mine. The Board's May 12, 1988 Order consolidated these complaints into two groups for hearing. One group consists of the upper management of the mine--Michael Hancher, Clark McElhoes, and Joseph Dunn. The other group originally consisted of Guile, Swanhart, Milligan, and Francis Dwyer, who were all assistant foremen at the mine. On October 28, 1988, the Board granted a motion to dismiss the complaint against Dwyer.

[2] The Defendants filed a response to this motion. DER filed a reply to this response, and the Defendants then filed a second response.

35. Whether DER's acceptance of the examination practices at the Homer City Mine require a finding that decertification under 52 P.S. §11 is inappropriate.

36. Whether DER's acceptance of the examination practices at other mines similar to those at the Homer City Mine prevents DER from proceeding with the complaints against defendants under 52 P.S. §11 et seq.

44. Whether the Commission which was appointed by DER and upon whose investigation the complaints are based was improperly appointed in a fashion contrary to Section 401 of the Act.

Related to its motion to eliminate these three issues, DER seeks to bar the introduction of 67 exhibits which the Defendants intend to introduce at the hearing. DER argues that all of these exhibits should be barred because they tend to prove the Defendants' positions on the three issues stated above. In its Motion to Quash Certain Subpoenas, DER contests ten subpoenas which have been issued to 10 former and current DER employees.[3] Again, DER argues that the evidence sought from these employees relates solely to proposed issues 35, 36, and 44, which DER contends are irrelevant.

The "examination practices" mentioned in Defendants' issues 35 and 36 seem to involve the proper method of testing whether the air in the mine was moving in its proper course and volume, and whether examinations must be conducted and recorded whenever a certified mine examiner enters the mine during idle shifts. DER argues that Section 228(a) of the Act, 52 P.S. §701-228(a), requires the use of an amemometer to measure the course and volume of air in the mine, and that this section also requires that examinations must be conducted and recorded when a mine examiner enters the mine on idle shifts. The Defendants contend that DER did not interpret Section 228(a) in this manner prior to the Homer City accident.

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[3] The Defendants argue, without citation to legal authority, that DER's counsel may not represent former DER employees. This argument is rejected.

DER argues in its motion to limit issues and in its reply to the Defendants' response that Defendants' issues 35 and 36 are irrelevant because they raise as a defense prior laxity of enforcement of Section 228(a). DER cites cases holding that prior laxity of enforcement by a government agency does not preclude the agency from enforcing statutes. See e.g., Commonwealth v. Barnes & Tucker Co., 455 Pa. 392, 319 A.2d 871 (1974), Lackawanna Refuse Removal v. Commonwealth, DER, 65 Pa. Commw. 372, 442 A.2d 423 (1982). DER argues, with regard to issue 35, that even if DER had failed to enforce Section 228 previously at the Homer City Mine, the Board may still only consider whether the Defendants have--during the period listed in the complaint--violated the Act, "as the Board determines the Act is to be interpreted." (Motion, para. 18). Similarly, DER argues that whatever DER's actions at other mines were before the accident, the issue in this proceeding is still simply whether the Defendants have violated the Act during the period listed in the complaint.

DER also argues that issue number 44, concerning the manner in which the Commission was appointed, is "irrelevant and vexatious" (Motion, para. 32). DER contends in its reply to the Defendants' response that Section 124 of the Act, 52 P.S. §701-124, allows DER to appoint a commission to investigate a fatal accident, and that section 401(c) of the Act, 52 P.S. §701-401(c), does not dictate that such an investigation may only be conducted by the district mine inspector.

The Defendants argue in their response to DER's motion and in their response to DER's reply that issues 35 and 36 are relevant. They contend that DER's alleged acceptance of the examination practices at the Homer City mine and at other mines is relevant because it shows that DER's current interpretation of Section 228(a) differs from DER's interpretation before the accident.

The Defendants contend that it is improper to judge them based upon an interpretation that was not developed until after the events upon which the complaints are based, citing Warren Sand and Gravel Co., Inc. v. Commonwealth, DER, 20 Pa. Commw. 186, 341 A.2d 556, 566 (1975). Furthermore, the Defendants argue that decertification requires proof that, first, there was a violation of the act and, second, that the violation is such that it leads to the conclusion that the particular official is no longer qualified to protect the safety of miners, citing George Cerjanic, 1973 EHB 283. In making this determination, Defendants contend that the Board has applied a "reasonable man" standard, thus, it is relevant to examine past practices at Homer City and other mines to establish an "industry standard of conduct" (Defendants' Response, p. 4). See, DER v. William Milesky, 1981 EHB 344.[4]

With regard to issue number 44, the Defendants argue that DER erred by appointing a Commission to investigate the accident. The Defendants contend that Section 401 of the Act, 52 P.S. §701-401, required that this investigation be conducted by the mine inspector for the Helen Mine. The Defendants argue that the specific language of Section 401 takes precedence over the general language of Section 124 of the Act, 52 P.S. §701-124, which provides for the appointment of commissions to investigate any questions within the purview of the Act.

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[4] The Defendants also argue that evidence as to DER's acceptance of past examination practices is relevant to whether DER has violated their constitutional right to equal protection of the law by selectively enforcing the law against them, citing Commonwealth v. Webb, 1 Pa. Commw. 151, 274 A.2d 261 (1971); appeal dismissed 445 Pa 609, 284 A.2d 499 (1971), Kroger v. O'Hara Township, 481 Pa. 101, 392 A.2d 266 (1978). Since we will allow the Defendants to present evidence regarding DER's alleged acceptance of certain practices in order to show DER's past interpretation of the Act, it is not necessary for us to address the Defendants' constitutional argument in this opinion.

We will deny DER's motion to limit issues as to issues 35 and 36, although we do not completely agree with the Defendants' argument in support of the issues. The fact that DER might have accepted certain practices at the Homer City mine and other mines would not normally mean that DER is estopped from taking enforcement action to halt those practices. As DER correctly argues, prior laxity of enforcement is not a valid defense in an enforcement action. See, Sechan Limestone Industries v. DER, 1986 EHB 134, Sanner Brothers Coal Co. v. DER, 1987 EHB 202. A distinction must be drawn, however, between cases where DER was simply lax in enforcing a clear standard of conduct, and cases--such as the present one--where the defendants allege that DER has changed its interpretation of the statute or regulations which contain the standard.

Section 228 of the Act, 52 P.S. §701-228, is entitled "duties of mine examiners." Subsection (a) of Section 228 provides in relevant part:

> The mine examiner shall . . . . inspect to determine whether the air in each split is traveling in its proper course and in proper volume . . . . No person on a non-coal producing shift (other than a certified [mine examiner] designated under this paragraph) shall enter any underground area in a gassy mine, unless such area, which shall include all places on that particular split of air, has been examined as prescribed in this subsection within three hours immediately preceding his entrance into such area.

52 P.S. §701-228(a). On its face, this language does not lead to the inescapable conclusion that an anemometer must be used to determine whether the air is moving in its proper course and volume, and that mine examiners must conduct and record examinations whenever they enter the mine during idle shifts. Thus, the Defendants' argument that DER has changed its interpretation of Section 228 is at least plausible, and the Defendants must be given the opportunity to prove it. DER may not prosecute the Defendants based upon an interpretation which was devised after the events on which the

prosecution is based. See Warren Sand & Gravel Co. v. Commonwealth, DER, 20 Pa. Commw. 186, 341 A.2d 556, 566 (1975).[5] We emphasize, however, that we would not accept this type of evidence if we felt that DER's current interpretation of Section 228 was beyond serious dispute, thus rendering the Defendants' contention implausible. The danger with allowing this type of evidence is that, if not properly limited in scope, it would allow the Defendants to distract our attention from the main issue of the Defendants' responsibilities. We will allow the evidence, but we will carefully monitor the Defendants' presentation to assure that it is kept within the bounds outlined above.[6]

With regard to issue 44, we will grant DER's motion and strike this issue. DER alleges that the appointment of the commission to investigate the accident was authorized by Section 124 of the Act, 52 P.S. §701-124, which provides in relevant part:

> The secretary may, at his discretion, appoint a commission for the purpose of investigating any question within the purview of this act to enable him to make a decision in accordance therewith . . . .

52 P.S. §701-124. The Defendants' argument, on the other hand, is based upon Section 401(c) of the Act, 52 P.S. §701-401(c), which provides in relevant part:

> The said mine inspector shall proceed to investigate [any fatal accident] and ascertain the cause of the accident, and make a record thereof .. . . If it is found, upon investigation, that the accident is due to the violation of any of the provisions

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[5] We recognize that DER is entitled to change its interpretation of statutory language. However, it must do so in a prospective manner, and not impose a "penalty" (as opposed to, for example, ordering someone to abate a nuisance) upon someone who relied upon the former interpretation.

[6] In determining that this evidence is relevant, we are not foreclosing other arguments which may be raised to limit it--for example, that the evidence is unduly repetitive.

> of this act by any person other than those who may be deceased, the mine inspector in the district shall institute appropriate proceedings against such person or persons.

52 P.S. §701-401.

We disagree with the Defendants' argument that Section 401 required that DER's investigation in this case be conducted by a mine inspector rather than a commission. In our view, Section 124 authorized DER to appoint a commission to investigate this accident, because determining whether any violation caused the accident is "a question within the purview of the act" as stated in Section 124. While it might normally be a mine inspector's responsibility to investigate a fatal accident, we see no reason to construe Section 124 narrowly and hold that DER may not appoint a commission to conduct such an investigation. Accordingly, we will grant DER's motion as to issue 44.

DER also argued in its motion to limit issues that several of the Defendants' exhibits should be barred from the hearing because these exhibits relate to the issues which DER contends are irrelevant. Most of these exhibits relate to issues 35 and 36, which we have held are relevant in this proceeding. Therefore, the exhibits relating to these issues are also relevant. As to certain other exhibits (specifically, D-29 and D-36-42), we question their relevance, but we will withhold ruling on admissibility until the hearing because it is difficult to determine whether the exhibits are relevant until the hearing is underway.[7] DER is free to raise any objection to the Defendants' exhibits at the hearing.

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[7] For example, some of the Defendants' proposed exhibits may become relevant depending upon what issues DER raises in its case-in-chief.

With regard to DER's motion to quash certain subpoenas, we will grant this motion as to Walter Vicinelly and grant it in part as to Thomas Ward, but we shall deny it as to all other DER employees and former employees.

The subpoenas to DER employees other than Walter Vicinelly and Thomas Ward are related to issues 35 and 36--DER's alleged acceptance of mining practices at Homer City and other mines which were similar to those for which the Defendants are now being prosecuted. As we stated above, issues 35 and 36 are relevant to the extent that DER may have changed its interpretation of Section 228 of the Act, 52 P.S. §701-228, and is seeking to apply the new interpretation here. Therefore, we shall deny the motion to quash the subpoenas issued to State Mine Inspectors Richard Murphy, James Richards, Raoul Vicinelly, Frank Pohopin, Joseph Ardini, Felice Libertini, and Robert Monaghan, and to retired inspector John Swick.

We shall grant the motion to quash the subpoena issued to retired Deep Mine Safety Bureau Director Walter Vicinelly. The Defendants contend that Mr. Vicinelly has been subpoenaed to testify on the appointment of the commission that investigated the accident "as well as other issues" (Defendants' response to DER's motion, para. 29). As we stated above, DER had the discretion under Section 124 of the Act, 52 P.S. §701-124, to appoint a commission to investigate the accident. Therefore, Mr. Vicinelly's testimony on this issue is unnecessary. With regard to the Defendants' allegation that Mr. Vicinelly would testify on "other issues," we will not uphold the subpoena on this vague basis.

We will grant, in part, DER's motion to quash the subpoena issued to Deep Mine Safety Bureau Director Thomas Ward. The Defendants state that Mr. Ward is being subpoenaed because he is the custodian of certain records sought by Defendants (Defendants' Response to DER's motion, para. 21). Some of the

documents which the Defendants seek from Mr. Ward, however, are clearly irrelevant. Specifically, the records relating to appointment of the commission which investigated this accident and records concerning an alleged investigation of a member of the United Mine Workers whom DER did not take action against, are beyond the scope of this proceeding. In our view, these are spurious issues which can only distract us from the main issue of whether the Defendants have breached their responsibilities. Therefore, we will grant DER's motion to quash Mr. Ward's subpoena to the extent that it seeks production of the records described above, and deny the motion in all other respects.

ORDER

AND NOW, this 30th day of November, 1988, it is ordered that:

1) DER's motion to limit issues is denied as to Defendants' proposed issues 35 and 36, and granted as to Defendants' proposed issue 44.

2) DER's request to bar the introduction of Defendants' proposed Exhibits D-2 through D-21, D-29, D-36 through D-42, D-45 through D-61, and D-63 through D-84, is denied without prejudice to DER's right to object to these Exhibits during the hearing.

3) DER's motion to quash certain subpoenas is granted as to the subpoena issued to Walter Vicinelly, and granted in part as to the subpoena issued to Thomas Ward to the extent that this subpoena requires the production of documents relating to appointment of the commission which investigated the Homer City accident, and documents relating to an alleged investigation by DER of an incident involving a member of the United Mine Workers. DER's motion to quash the subpoenas issued to Richard Murphy, James Richards, Raoul Vicinelly, Frank Pohopin, Joseph Ardini, Felice Libertini, Robert Monaghan, and John Swick is denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick
TERRANCE J. FITZPATRICK
Hearing Examiner

DATED: November 30, 1988

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

NEW HANOVER TOWNSHIP, et al.	:	
v.	:	EHB Docket No. 88-119-W
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
NEW HANOVER CORPORATION, Permittee	:	Issued: November 30, 1988

OPINION AND ORDER SUR
BROWNING-FERRIS INDUSTRIES, INC'S
MOTION FOR PROTECTIVE ORDER

Synopsis

A motion for protective order is granted to the extent appellant is seeking irrelevant information regarding the corporate and financial relationship between a prospective purchaser and the current owner of a landfill and is denied to the extent appellant is seeking relevant information regarding technical and general assistance given by the prospective owner to the current landfill owner as part of the permitting process.

OPINION

This matter was initiated on March 29, 1988 with the filing of a notice of appeal by New Hanover Township (Township) challenging the issuance of Solid Waste Permit No. 101385, National Pollutant Discharge Elimination System (NPDES) Permit PA 0052345, and a water quality certification by the Department of Environmental Resources (Department) to New Hanover Corporation (Corporation). The Township also challenged the Department's waiver of permit requirements under the Dam Safety and Encroachments Act, the Act of November

26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 *et seq.* and its failure to require permits under certain other statutes administered by the Department. These approvals by the Department authorized the construction and operation by the Corporation of a municipal waste landfill in New Hanover Township, Montgomery County.

On October 17, 1988, Browning-Ferris Industries, Inc. (BFI) filed a motion for stay and for protective order to prevent the Township from deposing Alan Magan, a BFI employee, and from seeking production of BFI's documents pursuant to Pa.R.C.P. 4012. The subpoena served on Magan requests that he produce "any and all documents relating in any way to New Hanover Corporation, Albert Marinari, James Marinari, the proposed New Hanover Corporation landfill, the wetlands in New Hanover Township, and the proposed leachate treatment plant at New Hanover Corporation landfill." The Board granted BFI's motion for stay on October 27, 1988 pending the outcome of the motion for protective order.

In support of this motion, BFI pointed to the rulings made by the Board in its September 22, 1988 opinion and order dealing with various other discovey disputes that have arisen in the course of this appeal. In that opinion, the Board held that it was without authority to join BFI, a prospective purchaser of the landfill operator's stock, as a party to this appeal. As a result, the Board granted a protective order limiting the deposition of James Marinari, a Secretary/Treasurer of the Corporation, to issues related to technical assistance provided by BFI to the Corporation during the preparation of the permit application and excluding information regarding the Corporation's commercial, financial and corporate negotiations with BFI. The Board also granted a motion for a protective order for information generated by Roy F. Weston, the company that provided engineering

services relating to BFI's evaluation of its option agreement to both the Corporation and BFI.

BFI now asserts, on the strength of those two protective orders, that the Township should also be prohibited from deposing Magan regarding the same issues on which it sought to depose Weston and Marinari. BFI also argues that the subpoena for a deposition and documents seeks irrelevant information.

On November 7, 1988, the Township filed its response opposing the motion, claiming it is seeking relevant information and documenting correspondence between Magan and other individuals in order to implicate Magan and BFI as active participants in the permitting process.

Pa.R.C.P. 4012(a) states:

> (a) Upon motion by a party or by the person from whom discovery or deposition is sought, and for good cause shown, the court may make any order which justice requires to protect a party or persons from unreasonable annoyance, embarrassment, oppression, burden or expense.

The current discovery dispute can be resolved within the framework established by the Board's September 22, 1988 opinion and order.

In the previous Board order, a motion for a protective order on a similarly worded subpoena request of Roy F. Weston was granted because the Board found the request to be overbroad and irrelevant to the extent it included documents prepared by Weston, an outside engineering consultant, for BFI to use in evaluating its option agreement to purchase the Corporation. The Board added that disclosure of BFI's commercial relationships could injure BFI in anticipated contract negotiations.

In ruling on a protective order for Marinari, an officer of the Corporation, the Board held that Marinari could be deposed regarding any

technical assistance provided by BFI to the Corporation during the permitting process, but not regarding the Corporation's option agreement negotiations with BFI. The Corporation admitted that BFI provided the Corporation with technical assistance and general support in the permitting process[1] and it was this limited information the Board found to be discoverable.

Consistent with the Board's previous order on discovery matters, this protective order will be granted in part to exclude questions and document requests dealing with the corporate and financial relationship between the Corporation and BFI, while allowing any questions of this BFI employee relating to any technical assistance provided by BFI to the Corporation during the permitting process.

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[1] In a reply brief dated November 15, 1988, BFI argues that each document attached to the Township's brief, for the purpose of demonstrating Magan and BFI's involvement in the permitting process, fails to establish any such involvement. The brief goes on to suggest that Magan and BFI were not actively involved in the permitting process at all (Reply Brief, p.4), but rather participated only as observers concerned with the permitting process because of BFI's potential ownership interest at the landfill.

This directly contradicts statements made by the Corporation in its Memorandum of Law in Support of Permittee's Motion for a Protective Order Prohibitting Inquiry into Certain Matters and Governing the Disclosure of Confidential Commercial Information (filed with the Board on May 13, 1988), which states, "Consistent with protecting its possible future interest, BFI provided New Hanover Corporation with technical assistance and general support to assist in the permitting process. For example, BFI has made presentations to New Hanover Township, communicated with Montgomery County officials and assistated in development of a state-of-the-art leachate treatment plant." (Memorandum, p.2).

O R D E R

AND NOW, this 30th day of November, 1988, it is ordered that Browning-Ferris Industries, Inc.'s Motion for Protective Order relating to the deposition of Alan Magan is granted in part and denied in part; New Hanover Township may depose Magan concerning any technical support or assistance provided by BFI to New Hanover Corporation during the permitting process.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

DATED: November 30, 1988

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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Eastern Region
For New Hanover Township:
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M. DIANE SMITH
SECRETARY TO THE BOARD

CHESTER COUNTY SOLID WASTE AUTHORITY	:	**EHB Docket Nos. 87-441-W**
	:	**88-112-W**
v.	:	**88-205-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 2, 1988

OPINION AND ORDER SUR
MOTIONS TO DISMISS AND CONSOLIDATE

Synopsis

Notice of violation requiring the recipient to submit sample results to the Department of Environmental Resources constitutes an appealable action.

OPINION

Chester County Solid Waste Authority (CCSWA) is a municipal authority which owns and operates the Lanchester Landfill (landfill) in Lancaster and Chester Counties.

The previous owner of the landfill leased part of the property to I.U. Conversion Systems, Inc., now known as Envirosafe Corporation, for a hazardous waste site. The former owner's closure plans were under review by the Department of Environmental Resources (Department) and the U.S. Environmental Protection Agency (EPA) at the time CCSWA acquired the property. In early 1987, CCSWA submitted plans for remedial work on the closure plans at

the site to the Department. Once the plans were approved, the work was put up for bid and eventually awarded to Rollins Environmental Services, Inc. (Rollins).

On September 15, 1987, the Department issued an order to CCSWA directing CCSWA to control erosion and sedimentation and the discharge of leachate at its municipal waste landfill, to submit revised erosion, sedimentation and closure plans, and to submit a closure bond and proof of insurance for the former hazardous waste site. Pursuant to cited provisions of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* (SWMA), CCSWA appealed from that order on October 1, 1987, and that appeal was docketed at No. 87-441-W.

On February 18, 1988, the Department issued CCSWA a notice of violation regarding removal of hazardous waste sediment and runoff in the landfill. CCSWA filed an appeal from the notice of violation on March 23, 1988, and that appeal was docketed at No. 88-112-W.

On April 18, 1988, the Department issued a letter to CCSWA denying a number of permit and permit modification applications based, in part, on violations listed in the September 15, 1987 order and the February 18, 1988 notice of violation. CCSWA appealed from this letter on May 19, 1988, and the appeal was docketed at No. 88-205-W.

On June 21, 1988, the Department filed a motion to dismiss the appeal at Docket No. 88-112-W, arguing that the February 18, 1988 notice of violation was not a final action affecting CCSWA's rights or duties and, therefore, was not appealable to this Board. The Department also requested that the Board consolidate all of CCSWA's appeals, since they involve common questions of law and fact and the May 19, 1988 appeal references and incorporates the two earlier appeals.

CCSWA filed its response to the motion on July 11, 1988, alleging that if the February 18, 1988 notice of violation was not appealable as a matter of law when it was appealed, it became an appealable action on April 18, 1988, since it formed part of the basis of the decision to deny the permit and permit modification applications. CCSWA also requested that the appeals be consolidated in order to preserve the allegations made in its appeal from the February 18, 1988 notice of violation, specifically that the notice of violation becomes a permanent part of the Department's record and is considered in future applications for permits, permit expansions and modifications, and other actions, and, therefore, could cause substantial harm if not expunged.

Actions of the Department are appealable only if they are adjudications within the meaning of the Administrative Agency Law, 2 Pa.C.S.A. §101, or "actions" under §1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21, and 25 Pa.Code §21.2(a)(1). Adjudications are defined as those actions which affect the personal or property rights, privileges, immunities, duties, liabilities or obligations of the party. While the Board has generally held that a notice of violation is not appealable because it does not affect the recipient's rights or duties, we have also held that "...the title of a document is not necessarily determinative of its substantive effect." Chester County Solid Waste Authority v. DER, 1986 EHB 1169, 1170. Thus, it is necessary to evaluate the substantive effect of a document entitled "Notice of Violation" before it can be concluded that it does not affect the rights or duties of the recipient.

We have examined the language of the February 18, 1988 notice of violation and conclude that, in part, it does constitute an adjudication which is

reviewable by the Board. The notice begins with a recitation of the violations at the landfill. The second portion of the letter then states:

> In order to achieve compliance with the SWMA, the implementation of the following procedures is recommended:
>
> A. Submit to the Department, copies of all lab analysis conducted on discharged water from the sedimentation pond and results on sediment deposited in the municipal waste landfill. Times and dates of all referenced activities along with sample results should be submitted to the Department by February 26, 1988.
>
> B. The Department sent a letter, dated October 15, 1987, which indicated the following:
>
> > Finally we are not convinced that the liquid in Manhole No. 1 is from the storm water pond. Even if this is the case, this condition must be corrected since all the leachate manholes must be watertight. The investigation and proposed corrective actions must be reviewed and approved by the Department.
>
> To this date, the Department has not received any data concerning the above matter. Again, the closure approval is contingent upon the Department's satisfaction with this investigation and corrective action.
>
> (emphasis added)

The letter, as it relates to analysis of the sedimentation pond effluent and the sediments, imposes an affirmative obligation upon CCSWA to submit laboratory results to the Department by a date certain. It, therefore, operates as an order and is appealable to the Board. South Hanover Township Board of Supervisors v. DER, EHB Docket No. 88-166-M (Opinion and order issued November 4, 1988). Paragraph B, however, merely reminds CCSWA that it has failed to submit information as requested in an October 15, 1987 letter from the Department and that the Department cannot approve CCSWA's closure plan

until it receives the information. It does not affect CCSWA's duties or obligations and is not reviewable by the Board.

Finally, because all three appeals in this matter involve the same landfill and common issues of fact and law, consolidation is appropriate.

O R D E R

AND NOW, this 2nd day of December, 1988, it is ordered that:

1) The Department of Environmental Resources' motion to dismiss at Docket No. 88-112-W is denied as it relates to Paragraph A of its February 18, 1988 letter and granted as it relates to Paragraph B of the letter; and

2) The Department's motion to consolidate is granted and Docket Nos. 87-441-W, 88-112-W, and 88-205-W are consolidated at Docket No. 87-441-W.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

William A. Roth
WILLIAM A. ROTH, MEMBER

Robert D. Myers
ROBERT D. MYERS, MEMBER

DATED: December 2, 1988

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M. DIANE SMITH
SECRETARY TO THE BOARD

RUSHLAND GROUP, INC.	:	
	:	
v.	:	**EHB Docket No. 88-415-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 2, 1988

OPINION AND ORDER

Synopsis

The Board is without jurisdiction to hear an appeal from the Bucks County Department of Health's affirmance of the denial of a request to extend the construction deadline for a rural residence permit under §7 of the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.7. Rather than dismiss the appeal, the Board, pursuant to 42 Pa.C.S.A. §5103(a), transfers it to the Bucks County Court of Common Pleas, which properly has jurisdiction under 42 Pa.C.S.A. §933(a)(2).

OPINION

This matter was initiated by the Rushland Group, Inc. (Rushland) on October 11, 1988 with the filing of a notice of appeal seeking the Board's review of the Bucks County Department of Health's (Health Department) September 27, 1988 letter affirming the denial of Rushland's request for an extension of the construction date for a rural residence permit under §7 of the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.7 (Sewage Facilities Act). The Health

Department had, on September 20, 1988, held a hearing concerning the denial of Rushland's request.

After reviewing Rushland's pre-hearing memorandum, it became apparent to the Board that Rushland's appeal was not from an action of the Department of Environmental Resources under the Sewage Facilities Act, and, therefore, the Board would be without jurisdiction to hear it. The Board, on November 14, 1988, conducted a telephonic conference call with the parties to discuss the issue of jurisdiction.[1] The Board explained to the parties that under the Sewage Facilities Act and its own precedent it lacked jurisdiction and the appeal should be transferred to the Bucks County Court of Common Pleas. The Board then advised the parties that it would issue an opinion and order addressing the issue.

Under §8 of the Sewage Facilities Act local agencies, such as the Health Department, are empowered to administer and enforce the permitting program for on-lot sewage disposal systems in §7 of the statute. Section 16(a) of the Sewage Facilities Act provides in pertinent part that:

> Any person aggrieved by an action of a sewage enforcement officer in granting or denying a permit under this act shall have the right within thirty days after receipt of notice of the action to request a hearing before the local agency... Hearings under this subsection and any subsequent appeal shall be conducted pursuant to the Act of December 2, 1968 (P.L. 1133, No.353), known as the 'Local Agency Law'...

The letter which Rushland appealed to the Board is the Health Department's decision relating to the §16(a) hearing on Rushland's permit denial. As a result, we are without jurisdiction to entertain an appeal from the Health Department's letter. Thomas Fahsbender v. DER, EHB Docket No. 87-514-W

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[1] The Board may, *sua sponte*, raise the issue of its jurisdiction at any time.

(Opinion and order issued May 18, 1988). Jurisdiction over Rushland's appeal properly lies in the Bucks County Court of Common Pleas pursuant to the Local Agency Law, 2 Pa.C.S.A., Ch. 7B, and 42 Pa.C.S.A. §933(a)(2).

Rather than dismiss Rushland's appeal for lack of jurisdiction, we are required by 42 Pa.C.S.A. §5103(a) to transfer this appeal to the Bucks County Court of Common Pleas. That section of the Judicial Code provides in relevant part that:

> ...A matter which is within the exclusive jurisdiction of a court or district justice of this Commonwealth but which is commenced in any other tribunal of this Commonwealth shall be transferred by the other tribunal to the proper court or magisterial district of this Commonwealth where it shall be treated as if originally filed in the transferee court or magisterial district of this Commonwealth on the date when first filed in the other tribunal.

"Tribunal" is defined in 42 Pa.C.S.A. §5103(d) as including any

> judicial officer of this Commonwealth vested with the power to enter an order in a matter, the Board of Claims, the Board of Property, the Office of Administrator for Arbitration Panels for Health Care and any other similar agency.

Because the Board is such a tribunal, transfer of this matter is both appropriate and required.

O R D E R

AND NOW, this 2nd day of December, 1988, it is ordered that the appeal of Rushland Group, Inc. is, pursuant to 42 Pa.C.S.A. §5103(a), 42 Pa.C.S.A. §933(a)(2), the Local Agency Law, 2 Pa.C.S.A. Chapter 7B, and §16(a) of the Sewage Facilities Act, transferred to the Bucks County Court of Common Pleas.

ENVIRONMENTAL HEARING BOARD

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WILLIAM A. ROTH, MEMBER

Robert D. Myers
ROBERT D. MYERS, MEMBER

DATED: December 2, 1988

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M. DIANE SMITH
SECRETARY TO THE BOARD

WILLIAM FIORE, t/d/b/a MUNICIPAL AND INDUSTRIAL DISPOSAL COMPANY	:	EHB Docket No. 87-181-W
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: December 5, 1988

OPINION AND ORDER SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

The Department's motion for summary judgment is granted. The Department may revoke a permit issued under the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq., on the basis of violations of that Act established by a consent order and agreement and by the Commonwealth Court's contempt adjudication based on non-compliance with the consent order and agreement. Since the violations are established, there is no genuine dispute of material fact and, pursuant to §503(c) of the SWMA, the Department is entitled to judgment as a matter of law.

OPINION

This matter was initiated with William Fiore's May 11, 1987 filing of a notice of appeal from the Department of Environmental Resources' (Department) April 7, 1987 revocation of Solid Waste Permit No. 300863[1]

[1] The April 7, 1987 letter also revoked Permit No. 300679 authorizing the operation of Site "C." This revocation was not appealed by Fiore and we do not address it here.

which authorized the operation of Site "A" at Fiore's solid waste disposal facility in Elizabeth Township, Allegheny County. The basis for the revocation was Fiore's lack of ability or intention to comply with the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. (SWMA).

On October 22, 1987, the Department moved for summary judgment, contending that no material facts remained at issue in light of previous determinations by the Board and the Commonwealth Court that Fiore's violations of statutes and regulations were established, and that, as a result, the Department's revocation of the permit was proper under §503(c) of the SWMA and it was entitled to judgment as a matter of law. Fiore did not respond to the Department's motion.

Based on our review of the Commonwealth Court's decisions, our prior decisions, and Fiore's convictions in the Allegheny County Court of Common Pleas, we find that there are no disputes as to material fact, that the Department's revocation of Fiore's permit under §503(c) of the SWMA was not an abuse of discretion, and that the Department is entitled to judgment as a matter of law.

In order to understand the context of the permit revocation, a review of the past relationship between the parties follows.[2]

Fiore owned and operated solid waste disposal facilities in Elizabeth Township, Allegheny County, under the name Municipal and Industrial Disposal Company. On November 14, 1979, the Department approved the temporary storage of hazardous waste at Fiore's facilities for 90 days. In 1980, this approval was extended pending tests to determine whether the wastes could be discharged

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[2] The facts are taken from Commonwealth of Pa., DER v. Fiore, No. 2083 C.D. 1983 (unreported Memorandum Opinion, filed October 28, 1983).

into a disposal pit, known as Site B. The extension ended on May 4, 1981. On May 4 and July 31, 1981, and November 5, 1982, the Department informed Fiore that the waste must be removed from the temporary pits. As a result of waste remaining in the temporary storage pits, industrial and hazardous wastes were discharged into waters of the Commonwealth.

On January 25, 1983, the parties entered into a consent order and agreement (CO&A) requiring Fiore to, inter alia, remove the waste in the temporary pit, submit a closure plan, refrain from expanding the hazardous waste facility or constructing a facility which is not permitted, and to pay various civil penalties. The CO&A contained findings of fact, including Fiore's unlawful discharge of industrial and hazardous waste and the failure of Fiore to comply with conditions of the approval to store hazardous waste in the temporary waste pit.

When Fiore failed to comply with the CO&A, the Department petitioned Commonwealth Court to enforce the CO&A and to issue a contempt citation against Fiore. In a memorandum opinion and order dated October 28, 1983, the Commonwealth Court held that the CO&A represented a final action of the Department which could have been appealed. Since Fiore did not appeal the CO&A, he was precluded from attacking its content or validity in the enforcement proceeding. Commonwealth of Pa, DER v. Fiore, No. 2083 C.D. 1983 (Unreported Memorandum Opinion, filed October 28, 1983), citing Commonwealth, DER v. Derry Township, 466 Pa. 31, 351 A.2d 606 (1976). The Commonwealth Court proceeded to enter a contempt citation against Fiore for

failing to comply with the January 25, 1983 CO&A.[3]

In August, 1983, the Department suspended Solid Waste Disposal Permit No. 300679 for Fiore's failure to comply with the CO&A,[4] and Fiore appealed the suspension to the Board at Docket No. 83-160-G. The Board, in ruling upon the Department's motion for summary judgment at 1984 EHB 643, ruled that the Commonwealth Court's finding at No. 2083 C.D. 1983 that Fiore violated paragraphs 4, 5, 7, and 9[5] of the CO&A was not subject to challenge because it was res judicata[6] for purposes of the appeal of the permit suspension.[7] The Board then granted summary judgment to the Department, ruling that the violations of the CO&A justified suspension of the permit pursuant to §503(c) of the SWMA. The Commonwealth Court affirmed the Board's decision in Fiore v. Comm. Dept. of Env. Res., 96 Pa.Cmwlth. 477, 508 A.2d 371 (1986).

The Department then denied Fiore's application for renewal of his hazardous waste transporter's license, and Fiore appealed that denial to the

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[3] On appeal to the Pennsylvania Supreme Court, 506 Pa. 564, 486 A.2d 950 (1985), the contempt citation was affirmed, although some other provisions of the order were stayed pending remand to the Commonwealth Court for further determination of the suitability of the Phase II pit for storage or disposal of waste material.

[4] That permit, Permit No. 300679, has since been revoked by the Department. See footnote 1.

[5] The Pennsylvania Supreme Court stayed part of the Commonwealth Court's order pending remand; however, it affirmed the adjudication of civil contempt for violations of paragraphs 4, 5, 7, and 9 of the CO&A.

[6] The Commonwealth Court's opinion at 508 A.2d 371 (1986) affirmed the Board's opinion at 1984 EHB 643, distinguishing collateral estoppel and res judicata, noting that regardless of how the preclusion was characterized, Fiore was precluded from challenging the CO&A.

[7] We note that unreported opinions have no precedential value; however, we are relying on the contempt adjudication only for the facts established for purposes of res judicata/ collateral estoppel.

Board at Docket No. 84-292-G. The Board granted the Department's motion for summary judgment at 1985 EHB 414, holding that as a result of the Commonwealth Court's finding concerning violations of the CO&A, no disputes over material facts existed and §503(c) of the SWMA entitled the Department to judgment as a matter of law. In a memorandum opinion at No. 705 C.D. 1985, filed April 4, 1986, the Commonwealth Court affirmed the Board's opinion.

Fiore's permit application to operate a hazardous waste disposal facility was denied by the Department on the grounds of Fiore's inability and unwillingness to comply with the law and appealed by Fiore to the Board at Docket No. 85-020-G. Again, at 1985 EHB 527, the Board granted the Department's motion for summary judgment, holding that §503(c) of the SWMA provided for the denial of a permit "for a demonstrated lack of ability or intention to comply with the SWMA 'as indicated by past or continuing violations' (emphasis supplied)" and that the prior decisions of the Commonwealth Court and the Board established such violations. The Commonwealth Court affirmed the Board's decision in a memorandum opinion at No. 1692 C.D. 1985 filed July 8, 1985.

Finally, Fiore has been convicted in the Court of Common Pleas of Allegheny County of 57 counts of criminally violating environmental laws,[8] including operating a hazardous waste facility without a permit, willful discharge of an industrial and hazardous waste into waters of the Commonwealth, and unauthorized disposal of residual waste.

Summary judgment may be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

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[8] Criminal Complaint filed June 6, 1985, OTN No. B109012-1, CC No. 8508740A.

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(b), Glen Irvan v. DER, EHB Docket No. 87-158-W (Opinion and order issued October 31, 1988).

In the present case, Fiore is precluded from denying the findings of violations by the Department in the CO&A and the findings in the contempt adjudication by the Commonwealth Court. See above cited cases. Although we must look at the facts in the light most favorable to Fiore, Robert C. Penoyer v. DER, 1987 EHB 131, we are hard-pressed to cast any favorable light on Fiore's compliance history. Violations have already been found to exist and Fiore is precluded from challenging them; therefore, no material facts can be disputed. All that remains for our determination is whether the Department is entitled to judgment as a matter of law.

Section 503(c) of the SWMA states:

> (c) In carrying out the provisions of this act, the department may deny, suspend, modify, or revoke any permit or license if it finds that the applicant, permittee or licensee has failed or continues to fail to comply with any provision of this act, the act of June 22, 1937 (P.L. 1987, No. 394), known as "The Clean Streams Law," the act of January 8, 1960 (1959 P.L. 2119, No.787), known as the "Air Pollution Control Act," and the act of November 26, 1978 (P.L. 1375, No. 325), known as the "Dam Safety and Encroachments Act," or any other state or federal statute relating to environmental protection or to the protection of the public health, safety and welfare; or any rule or regulation of the department; or any order of the department; or any condition of any permit or license issued by the department; or if the department finds that the applicant, permittee or licensee has shown a lack of ability or intention to comply with any provision of this act or any of the acts referred to in this subsection or any rule or regulation of the department or order of the depart-

> ment, or any condition of any permit or license issued by the department as indicated by past or continuing violations. In the case of a corporate applicant, permittee or licensee, the department may deny the issuance of a license or permit if it finds that a principal of the corporation was a principal of another corporation which committed past violations of this act.
>
> (emphasis added)
> (footnotes omitted)

Fiore's lack of ability or intention to comply with the SWMA has been amply demonstrated by his violations of the CO&A, the Commonwealth Court's contempt adjudication, and his criminal convictions. These numerous and repeated violations justify the revocation of his permit under §503(c) of the SWMA. Thus, the Department acted properly pursuant to §503(c) of the SWMA and is entitled to judgment as a matter of law.

O R D E R

AND NOW, this 5th day of December, 1988, it is ordered that the Department's motion for summary judgment is granted and the appeal of William Fiore is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

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WILLIAM A. ROTH, MEMBER

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DATED: December 5, 1988

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HEPBURNIA COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 86-279-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 6, 1988

OPINION AND ORDER SUR
CROSS MOTIONS FOR SUMMARY JUDGMENT

Synopsis

In granting a motion for summary judgment the Board holds that although auger mining falls within the definition of surface mining, consent need not be obtained from the owner of surface lands overlying a proposed auger mining operation where there will be no physical disturbance of the surface land.

OPINION

This action was initiated by the June 2, 1986 filing of a notice of appeal by Hepburnia Coal Company (Hepburnia) from the Department of Environmental Resources' (Department) May 6, 1986 letter denying an auger mining safety permit, Request No. 5129, to mine within an area located in Snyder and Washington Townships, Jefferson County, on the grounds that Hepburnia did not obtain the consent of the surface landowner as required by the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.4(a)(2)F (the Surface Mining Act), and 25 Pa.Code §86.64 (hereinafter referred to as "Supplemental C" form).

In its appeal, Hepburnia claimed that it owned the mineral rights in the area to be auger mined and, under Pennsylvania law, no consent from the surface landowner was necessary. Additionally, Hepburnia asserted the Department's denial was arbitrary, capricious, inconsistent with law and a taking of property without just compensation.

On July 9, 1986, the Department filed a motion for summary judgment, arguing that no genuine issue of material fact was disputed and that the only issue before the Board was the interpretation of the applicable statute and regulations. The Department claimed that the definition of surface mining in the Surface Mining Act requires an applicant for an auger mining permit to file a Supplemental C form.

On August 25, 1986, Hepburnia filed a response to the Department's motion, and, in the alternative, a cross-motion for summary judgment in its favor. Hepburnia claimed that there were genuine issues of material fact relating to whether or not the auger mining would have any effect on the surface area and to the Department's past implementation of the Supplemental C requirement in reviewing auger mining permit applications.

On September 25, 1986, this Board deferred ruling on both motions until the parties submitted affidavits supporting or opposing the claim that the proposed auger mining would not affect the surface. See Hepburnia Coal Company v. DER, 1986 EHB 1052. In response to this order, Hepburnia submitted the affidavit of Roger Thurston, the surveyor responsible for submitting Hepburnia's application for the auger mining permit, who stated that the proposed mining activity would have no effect on the land surface.

On September 30, 1986, the Department submitted a letter to the Board, attaching the affidavit of Keith Brady, a hydrogeologist with the

Department. Mr. Brady claimed that auger mining may affect the surface land and that the effects of auger mining can include surface water and groundwater pollution. The letter transmitting the affidavit reiterated the Department's position, arguing that §4(a)(2)F of the Surface Mining Act "requires landowner consent to entry if the land is to be 'affected by the operation by the operator and by the Commonwealth and any authorized agents'..." The Department also claimed that because it would be responsible for inspecting Hepburnia's permit area, entry on the overlying land by the Department's inspectors would occur and, therefore, affect the surface land. Consequently, unless landowner consent were obtained, the Department argued, it would be forced to trespass on private property in order to conduct inspections.

By order dated November 14, 1986, the Board further directed the parties to submit briefs on the issue of what constitutes surface effects of auger mining and the extent of such effects for purposes of landowner consent.

The Department submitted its brief on December 18, 1986, and, in large part, repeated its previous arguments. However, it also asserted that it has interpreted the Surface Mining Act as requiring landowner consent for auger mining and that its interpretation was entitled to deference unless clearly erroneous, citing Dept. of Public Welfare v. Forbes Health System, 492 Pa. 77, 422 A.2d 480 (1980), 493 A.2d 1055, and Duquesne Light Co. v. DER, 1985 EHB 423. Hepburnia's supplemental brief filed January 28, 1987, shed no more light on the issue and asserted that the Board's earlier opinion and order deferring a ruling on the motion for summary judgment supported its argument that a Supplemental C form is only required when the surface land will be affected, which was not the case here.

The Board may grant summary judgment, pursuant to Pa.R.C.P. 1035, when there is no genuine dispute as to material fact and the moving party is

entitled to judgment as a matter of law. Summerhill Borough v. Commonwealth, DER, 34 Pa.Cmwlth 574, 383 A.2d 1320 (1978). Additionally, summary judgment is appropriate where the interpretation of a statute is at issue. Emerald Mines v. DER, 1986 EHB 605, citing Pa. Mfg' Assn Ins. Co. v. Shepperd, 30 Pa.Cmwlth 186, 373 A.2d 760 (1977).

The Department correctly asserts that auger mining[1] is specifically within the definition of surface mining in the statute. But, regardless of this conclusion, the key issue, as we noted in our earlier opinion in this matter at 1986 EHB 1052, is the construction of the language of §4(a)(2)F and the almost identical language of 25 Pa.Code §86.64. Section 4(a)(2)F requires "the written consent of the landowner to entry upon any land to be affected by the operation" (emphasis added).

The Department, especially in its September 30, 1986 letter, argues for a very broad interpretation of the phrase, extending it to indirect effects, such as surface and groundwater contamination and even the presence of Department inspectors on the surface land. The Board's adjudications of bond forfeiture appeals provide guidance as to the interpretation of "land to be affected by the operation." The Board has limited the land "affected by the operation" to land actually mined or otherwise directly physically disturbed by the mining operations; land off the permit area, or even land on the permit area which has not been physically disturbed, is not included in the acreage "affected by the operation" for bond forfeiture calculational purposes. Chester A. Ogden v. DER, 1984 EHB 374, aff'd 93 Pa.Cmwlth. 153, 501

---

[1] Auger mining is defined at 25 Pa.Code §87.1 as

> A method of mining coal at a cliff or highwall by drilling holes into an exposed coal seam from the highwall and transporting the coal along an auger bit to the surface.

A.2d 311 (1985), and SPEC Coals, Inc. v. DER, 1986 EHB 1062. Bond forfeitures generally are imposed because the operator has failed to reclaim land physically affected by mining; an obvious purpose of the Supplemental C form is to ensure that the landowner cannot deny the operator permission to enter upon the land for reclamation purposes.

Interpreting "land to be affected..." as "land to be physically affected" avoids an interpretation of the Surface Mining Act which would be absurd or incapable of execution. If one construes "land to be affected," as the Department suggests, the operator would be required to obtain the consent of all landowners within the watershed in which the operation is located to account for possible surface and groundwater contamination, a task which may be next to impossible, as well as possibly meaningless. As for the Department's argument that the Supplemental C form is needed so that inspectors do not commit trespass during the course of their inspections, we find that equally untenable in the situation where the surface is not affected by auger mining, as there would be no reason to inspect the surface of the land.[2]

Since we have concluded that the phrase "to be affected by the operation" in §4(a)(2)F of the Surface Mining Act applies to direct physical disturbance by the operator, and not to the possibility of groundwater disturbance or to disturbance by DER inspection, we must, based on the opposing affidavits, grant Hepburnia summary judgment. Mr. Thurston's affidavit, which was submitted by Hepburnia in support of its motion for summary judgment, states:

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[2] The Department has broad authority under §§5(b)((8), 304, 305, and 604 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§691.5(b)(8), 691.304, 691.305, and 691.604, to enter upon land to investigate alleged water pollution. Should there be suspected pollution of water as a result of auger mining, the Department could invoke this authority.

> Based upon my 24 years of experience in the surface coal mining industry and my examination of the actual conditions at the mine site for which Hepburnia seeks to auger mine, I am of the opinion that the proposed auger operation will have no effect upon the property for which Appellee Department of Environmental Resources ("DER") has requested a signed right of entry or "Supplemental C" but which has not been submitted by Appellant Hepburnia.
>
> In addition, the entire area for which the right of entry of "Supplemental C" was not submitted is entirely beneath the surface with no surface openings.
>
> (emphasis added)

The Department's affidavit, on the other hand, declares:

> Deponent states that to the best of his knowledge, information and belief surface mining by the augering method may affect the surface land located above the seam which is mined. Deponent says that to the best of his knowledge, information and belief the effects to the surface resulting from augering operations can include but are not limited to surface water and groundwater contamination. Deponent also says that to the best of his knowledge, information and belief the effects to the surface resulting from the issuance of an auger mining permit include regular inspections by the Commonwealth and its agents.
>
> (emphasis added)

Hepburnia's affidavit asserts, and the Department does not dispute, that there will be no direct physical disturbance of the surface land overlying the augering operation; the Department's affidavit addresses auger mining in general and not Hepburnia's proposed auger mining. Thus, there being no material fact in dispute, we must grant summary judgment in Hepburnia's favor.

O R D E R

AND NOW, this 6th day of November, 1988, it is ordered that:

1) The Department's motion for summary judgment is denied;

2) Hepburnia's motion for summary judgment is granted and its appeal is sustained; and

3) This matter is remanded to the Department for action on on Auger Mining Safety Permit No. 5129 consistent with this opinion.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

William A. Roth
WILLIAM A. ROTH, MEMBER

Robert D. Myers
ROBERT D. MYERS, MEMBER

DATED: December 6, 1988

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M. DIANE SMITH
SECRETARY TO THE BOARD

DUNKARD CREEK COAL, INC.	:	
	:	
v.	:	**EHB Docket No. 86-143-R**
	:	**(Consolidated Appeals)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: December 7, 1988**

OPINION AND ORDER
SUR
MOTION IN LIMINE

Synopsis

Appellant's motion in limine to assign the burden of proof to the Department of Environmental Resources (DER) in an appeal of a denial of the appellant's request for release of bonds is denied. The affirmative issue is whether the appellant has met the criteria for bond release and, under 25 Pa.Code §21.101(a), the party asserting the affirmative bears the burden of proof.

OPINION

These matters were initiated by the March 12, 1986 filings by Dunkard Creek Coal, Inc. (Dunkard) of three notices of appeal from three February 21, 1986 denials of its bond release applications by DER relative to Dunkard's surface mining sites located in West Wheatfield Township, Indiana County. DER denied completion report 23-83-079 pertaining to Mine Drainage Permit (MDP) 3279115, Mining Permit (MP) 01-1 (Docket No. 86-143-R); completion report

23-83-087 pertaining to MDP 3279115, MP 939-7 (Docket No. 86-144-R); and completion report 23-83-088 pertaining to MDP 32810120. By order dated May 2, 1986, these appeals were consolidated at the Docket No. 86-143-R.

Although the completion reports, which were all submitted by Dunkard on January 27, 1983, pertain to different mine drainage and mining permits, the reasons for DER's denial as well as suggested corrective action were identical. In relevant part, the three denial letters stated:

> . . . The reasons for the denial include the following:
>
> Site has degraded spring #2 and discharge BS 10.
>
> In order to secure the release of your bonds, you must resubmit a new completion report and take the following corrective actions.
>
> Provide interim treatment for these two discharges and submit permanent abatement plan to the Ebensburg Office . . .

On July 11, 1988, Dunkard filed a motion in limine seeking to assign to DER the burden of proving that the degradation of spring #2 and discharge BS 10 was caused by Dunkard's mine sites. Dunkard believes that the affirmative assertion in these matters is that its sites are the cause of the degradation of spring #2 and discharge BS 10. Citing §21.101(a) of the Board's rules of practice and procedure, 25 Pa.Code §21.101(a)[1], Dunkard argues that DER has the burden of proving that the degradation is attributable

---

[1] §21.101(a) provides as follows:

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

to Dunkard's mine sites. Dunkard also justifies assigning the burden of proof to DER by characterizing DER's denial letter as an abatement order, since Dunkard's ability to secure the release of its bonds is tied to its providing treatment for spring #2 and discharge BS 10. If the letter is actually an abatement order, DER would have the burden of proof pursuant to 25 Pa.Code §21.101(b)[2].

DER responded to the motion on August 8, 1988, alleging that although the mine sites were degraded by unreclaimed mining from earlier times, Dunkard further degraded the area by redisturbing previously exposed toxic materials. DER further alleges that while the site may appear restored, Dunkard's activities, in fact, worsened the quality of the two off-site discharges. As to the nature of the bond release denials, DER distinguishes between responsive actions, such as permit denials, and affirmative actions, such as compliance orders. DER argues that although, pursuant to 25 Pa.Code §21.101(b), it bears the burden of proof for its affirmative actions, appellants dissatisfied with its responsive actions have the burden of proof

---

[2] §21.101(b) provides, in relevant part, as follows:

> The Department shall have the burden of proof in the following cases:
>
> * * * * *
>
> (3) When it orders a party to take affirmative action to abate air or water pollution; or any other condition or nuisance, except as otherwise provided in this rule.
>
> * * * * *

pursuant to 25 Pa.Code §21.101(c)[3]. DER compares its review of bond release application with its review of permit applications and argues that since Dunkard must demonstrate to DER that it meets bond release criteria, that Dunkard must bear the burden of proof in these proceedings. DER also rejects Dunkard's characterization of the denial letters as abatement or compliance orders, asserting that the letters merely inform Dunkard of the necessary actions to secure release of its bonds.

We see little question that in appeals of bond release denials, it is the appellant who bears the burden of proof. 21 Pa.Code §21.101(a); H & R Coal Co. v. DER, 1986 EHB 979. The affirmative issue in such appeals is whether the applicable bond release criteria were satisfied; therefore, the permittee seeking bond release must so convince the Board.

We reject Dunkard's characterization of the denial as an abatement order. The wording of DER's letters clearly shows that Dunkard must abate degraded spring #2 and BS 10 only if it wishes to secure release of its bonds. It was Dunkard's choice whether or not to renew its attempts to secure bond release.

In view of the foregoing, we will deny Dunkard's motion.

---

[3] §21.101(c) states, in relevant part, as follows:

> A party appealing an action of the Department shall have the burden of proof and burden of proceeding in the following cases unless otherwise ordered by the Board:
>
> (1) Refusal to grant, issue or reissue any license or permit.
>
> * * * * *
>
> (3) When a party who is not the applicant or holder of a license or permit from the Department protests its issuance or continuation.
>
> * * * * *

ORDER

AND NOW, this 7th day of December, 1988, it is ordered that Dunkard Creek Coal, Inc.'s motion in limine is denied.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: December 7, 1988

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

SNYDER TOWNSHIP RESIDENTS FOR ADEQUATE WATER SUPPLIES	:	
v.	:	EHB Docket No. 85-022-G
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and DOAN MINING COMPANY, Permittee	:	Issued: December 12, 1988

ADJUDICATION

By the Board

Syllabus

An appeal by a third-party from the issuance of a surface mining permit is dismissed. The third-party appellant, in such an appeal, has the burden of proof and must show that the Department of Environmental Resources (DER) abused its discretion in issuing the permit. The third-party appellant, Snyder Township Residents for Adequate Water Supply (STRAWS), failed to present sufficient evidence to show that (1) DER failed to consider the noise that would be generated by the mining operations at night; (2) the noise actually generated by night operations constitutes a public nuisance; (3) the dust experienced by one of the members of STRAWS is attributable to the mining operations; (4) the dust control plan contained in the permit is ineffective to prevent the escape of dust from the mining site; (5) a monitoring program should have been included in the dust control plan; (6) the blasting plan contained in the permit is ineffective to prevent damage or injury to nearby persons and properties; (7) the information available to DER was not of equal

value to that which would have been produced by a chemical overburden analysis; and (8) public notice of the filing of the application for the permit was not published in accordance with law and DER's regulations.

PROCEDURAL HISTORY

On January 24, 1985, STRAWS, by Deborah Bovaird, trustee ad litem, filed a Notice of Appeal from the December 21, 1984, issuance by DER to Doan Mining Company (Doan) of Surface Mining Permit No. 33840101 (Permit), authorizing Doan to conduct a bituminous coal surface mining operation on a tract of land in Snyder Township, Jefferson County. Hearings were held in Pittsburgh on November 25-27, 1985, before Honorable Edward Gerjuoy who was then a Member of the Board.

Post-hearing briefs were filed by STRAWS and Doan during April and May, 1986. Mr. Gerjuoy left his position on the Board as of January 1, 1987, without having prepared an Adjudication. In similar situations, the Board has issued an Adjudication based upon a "cold record" (where the person preparing the Adjudication did not preside at the hearings). This practice recently has been approved by Commonwealth Court in Lucky Strike Coal Company and Louis J. Beltrami v. Commonwealth, Dept. of Environmental Resources, ____ Pa. Cmwlth. ____, 546 A.2d 447 (1988).

The record consists of the pleadings, motions, briefs and memoranda, a hearing transcript of 513 pages[1] and 13 exhibits.

FINDINGS OF FACT

1. STRAWS is an association of residents adjacent to, and in the vicinity of, Doan's proposed surface mining operation. (Notice of Appeal)

[1] The pages in the transcript are numbered only to 487 but there are duplicate numbering of pages 334 through 359 both inclusive. These duplicate pages will be distinguished, when necessary, by adding the date of the transcript to the page reference.

2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Surface Mining Conservation and Reclamation Act (SMCRA), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq.; the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq.; and the rules and regulations adopted pursuant to said statutes. (71 P.S. §61)

3. On December 21, 1984, DER issued the Permit to Doan, authorizing Doan to operate a bituminous coal strip mine on portions of a 124.5-acre tract of land in Snyder Township, Jefferson County (the Site). (Appellant's Exhibit No. 10)

4. The Site is located on the south side of L.R. 61 (Route 28) between Brockway and Sugar Hill and on the east side of L.R. 33069. The frontage along L.R. 61 is approximately 2800 feet. (Appellant's Exhibits Nos. 2 and 9)

5. The Site, in general, is higher in elevation than the surrounding land. Surface water drains from the Site in all directions, but the predominant direction is to the east into a tributary of Mill Creek. (Appellant's Exhibit No. 9)

6. Doan and its predecessor in interest, Doan Coal Company, have conducted surface mining operations on the Site since about 1980. (N.T. 459, 467-468, 470)

7. Deep mining also has been done beneath the Site and beneath some of the land adjacent to it. (N.T. 99, 145, 249; Appellant's Exhibit No. 9)

8. Across L.R. 61 from the Site are properties owned by Sugar Hill Cemetery, William Schroth, Shawn Deter, Michael W. Bovaird, and J. Britton. The Site abuts properties owned by Ronald Delp, Charles Baker, C. Gorham, Fred O. Swift, Mabel and Patsy Mascaro/Bernard and Dorothy Calhoun on the east;

Helen J. Hook on the southeast; Margaret L. Morrison on the south; James McConnell on the southwest; and F. Keckritts, and A. Thompson on the west. Dwellings are erected and occupied on nearly all of these properties. (Appellants Exhibits Nos. 2 and 9)

9. Michael W. Bovaird and his wife, Deborah Bovaird, have lived across L.R. 61 from the Site since 1981. (N.T. 20, 26, 59-60, 108-109)

10. L. Foeks and his wife, Patricia L. Foeks, have lived across L.R. 61 from the Site since 1971. (N.T. 110, 119-120)

11. The haul road into the Site intersects with L.R. 61 approximately 1500 feet east of the intersection of L.R. 61 with L.R. 33069 and about 650 feet west of the nearest dwelling house (William Schroth) on the north side of L.R. 61. The haul road, which has existed at this same location since 1980, is characterized by sharp curves and a steep grade. (N.T. 261, 396-397, 435, 470; Appellant's Exhibits Nos. 2 and 9)

12. The Permit authorizes Doan to use a D-9 dozer, a 988 loader and a scraper on the Site. No draglines are authorized. Except for being newer models, these are the same items of equipment that have been used on the Site since 1980. (N.T. 140, 254, 460)

13. Both Doan and Doan Coal Company have hauled coal off the Site by the use of tri-axle dump trucks. Doan's hauling takes place on the average between one day per week and one day per two weeks and involves 13 trucks. No hauling is done at night. (N.T. 461-463)

14. All of Doan's mining equipment and trucks have warning devices that are automatically activated when the vehicles are operated in reverse. These devices are required by law. (N.T. 417-418, 460-461, 463)

15. The only equipment operated at night on the Site is the D-9 dozer and, occasionally, the 988 loader. (N.T. 463-464)

16. The Bovairds have experienced problems with noise, dust and blasting, and are fearful that their well and the nearby streams will become polluted. They complained to Doan about the blasting, but never complained either to Doan or to DER about their other concerns. (N.T. 42-43, 46-49, 62-64, 66-67, 82-101, 103-107, 276-277, 405, 427-428, 468, 474)

17. The Foeks have experienced a problem with blasting and are concerned about the potential pollution of their well, but have not been adversely affected otherwise. The have not complained either to Doan or to DER. (N.T. 114-117, 121-122)

18. Prior to issuing the Permit, DER was generally aware that some residents in the vicinity were concerned about noise. (N.T. 405-406)

19. In processing the application for the Permit, DER considered the impact of noise on nearby residents. After reviewing the distances between the Site and the adjacent properties, the differences in elevation, the number and types of equipment proposed to be used, the creation of earthen walls as the mine pit is opened and the presence of a strip of trees and shrubs along L.R. 61, DER concluded that noise would not be a problem. (N.T. 137-140, 167-169, 247-248, 253-256, 291, 401-402, 405-406, 415-417)

20. Mrs. Bovaird is bothered by noise mainly at night when she can hear the mining equipment and especially the back-up warning devices with which they are equipped. This latter noise was experienced only from June to September, 1985. (N.T. 46, 87-89)

21. DER's Douglas A. Stewart, who was involved in processing Doan's application for the Permit, visited the Site on eight occasions. He characterized the Doan operation as less noisy than other surface mining

operations he has observed. Mr. Stewart also went to the Bovaird property, after operations on the Site had begun, and did not find noise to be a problem there. (N.T. 244-248, 257-258)

22. DER's Javed I. Mirza also stopped at the Bovaird property--on November 13, 1985--but could not detect any noise coming from the Site. (N.T. 388, 395-396)

23. In module 17 of its application for the Permit, Doan proposed to control air pollution at the Site by holding down the speed of its equipment, and by stabilizing dust particles with the application of substances like water, oil and calcium chloride. (N.T. 259-261; Doan's Exhibit A)

24. Mrs. Bovaird is bothered by dust allegedly generated by coal trucks using the haul road to enter and leave the site. The dust enters her house daily (she keeps her windows open in summer) and settles on her dishes and furniture. This problem was not experienced prior to the summer of 1985. (N.T. 42, 62-64, 103)

25. The Bovaird residence is about 1200 feet from the haul road at the point where it intersects with L.R. 61. The Foeks residence is about 500 feet farther away from that intersection. (Apellant's Exhibit No. 9)

26. The haul road is built of sandstone material because of its durability. A number of other roads and driveways in the vicinity of the Site are not paved. (N.T. 451-453, 464)

27. Farming and strip mining activities in the vicinity and truck traffic on L.R. 61 also are potential sources of dust. (N.R. 60-62, 406-407, 454-456)

28. In processing the application for the Permit, DER considered the grade and alinement of the haul road, the number and types of equipment

proposed to be used, and the method of mining to be followed. DER concluded that Doan's operations on the Site would produce a minimum amount of dust and that the control methods proposed in Module 17 would be adequate. No monitoring program was required. (N.T. 396-398, 402, 413)

29. DER's policy is to require a permittee to use dust stabilizing materials when conditions require it. (N.T. 261-262, 418-420, 425-426)

30. DER has no firsthand knowledge of any violations by Doan of the air pollution control plan contained in Module 17 and approved by DER. No fugitive dust problems have been observed by DER personnel when visiting the Site. (N.T. 141-142, 261, 391, 448-449)

31. The Bovairds complained to Doan on one occasion about blasting on the Site shaking their house and causing damage to the foundation and furnishings. Doan sent two men to view the alleged damages and gave the Bovairds the name of Doan's insurance adjuster. This is the only blasting complaint Doan has received. (N.T. 42-43, 46, 105, 474)

32. The Foeks have felt their house shake from blasting on the Site and have discovered cracks in their foundation and garage wall. They have made no complaints either to Doan or to DER and have filed no claims for damages. (N.T. 114-116, 121-122)

33. DER reviewed the blasting plan in Module 16 submitted by Doan as part of its application for the Permit to make certain it complied with DER regulations and would protect nearby persons and properties. The plan was approved as submitted. (N.T. 310, 312, 339-340 (11/26/85), 348-351 (11/26/85)).

34. DER does not know if Doan has adhered to the approved blasting plan. (N.T. 340 (11/26/85), 351-352 (11/26/85), 354 (11/26/85)).

35. Blasting might have been done in the vicinity by persons or entities other than Doan. (N.T. 340-342 (11/26/85), 352-353 (11/26/85))

36. Mrs. Bovaird is concerned that Doan's mining operations on the Site may be producing acid mine drainage (AMD), which may be contaminating nearby streams and which may contaminate the Bovaird's well. She has observed orange-colored discharges, which she assumes to be AMD, entering Mill Creek; and she is aware of an old deep mine discharge on the Morrison property. (N.T. 47-49, 54, 96-99; Appellant's Exhibit No. 2)

37. The Bovaird's well has not been contaminated and Mrs. Bovaird is unaware of any other nearby resident whose water has been contaminated by Doan's operations on the Site. (N.T. 67, 85-86)

38. As part of its application for the Permit, Doan submitted, inter alia:

(a) a map identifying two deep mine discharges on the Morrison property; (Appellant's Exhibit No. 2)

(b) a water analysis sheet with respect to samples taken of the two deep mine discharges (8 and 8b) on the Morrison property, demonstrating that they are AMD; (N.T. 145-148; Appellant's Exhibit Nos. 2 and 5)

(c) a water analysis sheet with respect to samples taken of a deep mine discharge (7b) on the Site, originating in the same deep mine as the discharges on the Morrison property, showing no AMD; (N.T. 262-268; Appellant's Exhibit No. 2)

(d) water analyses with respect to samples taken of discharges at three other surface mining sites of Doan in the immediate vicinity, showing no AMD; (N.T. 213-214, 233; Board Exhibit No. 1)

(e) drilling logs for test holes drilled on the Site, showing the thickness and nature of subsurface materials; (N.T. 150; Appellant's Exhibits 6, 7, 8 and 9)

39. Prior to issuing the Permit, DER personnel reviewed the data submitted by Doan, the water quality data in DER's files with respect to seven other mining sites in the vicinity, the presence of limestone, and the historical data relating to the AMD-producing potential of the Lower Freeport and Upper Kittanning seams of coal. (N.T. 156, 169, 172, 179-180, 182, 194, 206-207, 219-220, 230-240, 269-272) Based on this review, DER concluded that:

(a) The water quality on the Hutchison permit area (within one mile east of the Site) is generally good, despite the fact that acid conditions are reflected in a few of the samples; (N.T. 158-159, 171-182, 280-281; Appellant's Exhibit No. 11)

(b) there are no AMD discharges from surface mining activities on any of the 10 mining sites in the vicinity of the Site; (N.T. 279-280)

(c) there has been no degradation of water quality in Mill Creek, despite the fact that surface runoff from the Site and the Hutchison permit area flows into Mill Creek; (N.T. 289)

(d) surface mining operations have not impacted the quality of the water in the area on, and adjacent to, the Site; (N.T. 232)

(e) the dark shales found in the test holes on the Site do not lend themselves to be toxic; (N.T. 191)

(f) mining of the Lower Freeport and Upper Kittanning coal seams (the same seams proposed to be mined by Doan on the Site) in this immediate area in the past has not produced AMD; (N.T. 180, 238-239; Appellant's Exhibits Nos. 6, 7, 8 and 9)

(g) an overburden analysis was not necessary. (N.T. 190, 195, 238-240; Board Exhibit No. 1)

40. Mrs. Bovaird learned in May 1984 that Doan had filed an application for the Permit. (N.T. 29)

41. Mrs. Bovaird and other members of STRAWS sent a letter to DER, dated May 25, 1984, objecting to Doan's application and requesting a public hearing. (N.T. 29-30; Appellant's Exhibit No. 3)

42. No public hearing on the application was held by DER. (N.T. 33)

43. Newspapers commonly delivered to homes in the vicinity of the Site are the DuBois Courier Express, the Brockway Record and the Brookville Democrat. The Foeks and four other residents subscribe to the Courier Express; the Bovairds do not subscribe to any newspaper, but usually choose the Record when buying one. (N.T. 33-34, 80-82, 118-119)

DISCUSSION

STRAWS, as a third-party appellant from the issuance of a permit, has the burden of proof in this case, 25 Pa. Code §21.101 (c) (3). To sustain its burden, STRAWS must show that DER acted contrary to law or abused its discretion in issuing the Permit. Warren Sand & Gravel Co., Inc. v. Commonwealth, Dept. of Environmental Resources, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975). The evidence presented by STRAWS at the hearings related to five distinct areas: (1) noise, (2) dust, (3) blasting, (4) water contamination, and (5) public hearing.

Noise

Mrs. Bovaird was the only witness who found the noise generated by Doan's mining operation on the Site to be objectionable. Mrs. Foek testified

that the noise did not bother her. Mrs. Bovaird's objections were focused primarily on night operations during the summer when the sounds of the equipment and of the back-up warning devices became "nerve-wracking."

There are no regulations adopted under SMCRA dealing with the subject of noise. Nonetheless, as part of its review of a permit application, DER is required to consider the amount of noise likely to be generated by a surface mining operation and to determine whether it will constitute a public nuisance abatable under §1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17. Baughman et al. v. DER, et al., 1979 EHB 1 at 18-19.

DER considered operational noise in processing Doan's application for the Permit and concluded that it would not create a public nuisance. This conclusion was based on a number of factors. The residences in the vicinity of the Site are at a lower elevation and are at least several hundred feet away from the locus of actual mining operations. As mining progresses, a pit will be created with walls of earth separating the mining operations from the adjacent areas and deflecting the sound upward. A row of trees and shrubs along L.R. 61 will absorb some of the sound. The number and types of machinery authorized to be used on the Site will minimize the amount of noise generated by the mining operations.

STRAWS does not challenge DER's inclusion of these factors but argues that DER failed to consider the impact of noise generated by night operations. The evidence on this point is sketchy at best. While Douglas A. Stewart testified that he did not consider placing any limitation on Doan's hours of operation (N.T. 169), he was never asked for his reasons. Although Javed I. Mirza testified that sounds might be more noticeable at night and that certain sounds, such as the back-up warning devices, might carry farther than others

(N.T. 437-438), he was never asked whether he considered those possibilities in assessing the noise potential of Doan's operations on the Site. Mr. Mirza also stated that, even though DER imposed no limits on Doan's hours of operation, such action could be taken if DER determines that noise is a problem (N.T. 443-444).

This testimony suggests that DER considered the noise that would be generated at night and determined that it would not be a public nuisance. If that, in fact, was not the case, it was incumbent upon STRAWS (with its burden of proof obligation) to show otherwise. It did not do so. This case is distinguishable from the Baughman case, supra., and from Kwalwasser v. DER et al., 1986 EHB 24, on this critical point; for, in both of those cases, the appellants had established that DER did not consider noise levels at all in processing the permit applications.

We are left only with the testimony of Mrs. Bovaird--and this is unsupported by any expert testimony or even by the testimony of any additional lay witnesses. Essentially, she finds the sound of the back-up warning devices nerve wracking during the summer months (but not every night) when she is putting her children to bed (N.T. 46, 87-89). We are not told how late at night this takes place, how long it lasts, how frequently it occurs, or if it causes any other disruption in the lives of the Bovairds.

We are sympathetic toward anyone forced to endure the discomforts of an increasingly noisy world. But reviewing the evidence as charitably toward STRAWS as we can, we can find no proof (1) that DER failed to consider noise levels at night, or (2) that the noise levels generated by Doan's operations, whether by day or by night, constitute a public nuisance. Accordingly, we cannot conclude that DER violated any statute or regulations, or abused its discretion, on this point.

Dust

Mrs. Bovaird complained about the dust; Mrs. Foeks did not have a problem with it. Mrs. Bovaird attributed most of the dust to the use of the haul road. She and her family live about 500 feet closer to it than the Foeks. The haul road, according to Doan's witness Raymond A. Mitchell, is built of sandstone materials. Nonetheless, dust can still be generated by the pulverizing action of dump trucks and other equipment. The finer the dust particles, the more likely they are to travel off-site (N.T. 414). This fugitive dust, as it is called (25 Pa. Code §87.1), is a violation of the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 et seq. An applicant for a surface mining permit is required to submit a plan for controlling it, 25 Pa. Code §§87.66 and 87.137.

Doan's plan (Doan's Exhibit A) included two dust control measures: (1) reducing the speed of trucks and equipment, and (2) placing stabilizing materials and other preparations on road surfaces. DER reviewed Doan's plan and determined that it was adequate; no monitoring program was imposed. The factors that influenced DER's decision most heavily were the grade and configuration of the haul road, which would reduce vehicle speeds to a minimum. DER also considered the number and types of equipment proposed to be used on the Site and concluded that they would produce only a small amount of dust.

The source of the dust that enters the Bovaird residence is uncertain. Mrs. Bovaird blames it on the trucks using Doan's haul road. The Board has some difficulty in accepting this charge, however, because the trucks operate only one day per week, at the most, while Mrs. Bovaird maintains that the dust problem exists every day. There are other potential sources of dust in the vicinity, including truck traffic on L.R. 61. We are

unable to conclude, from the evidence presented, that Mrs. Bovaird's dust problem is attributable to Doan's operations on the Site.

Even if we were able to lay the blame at Doan's feet, there is no evidence to indicate whether the fugitive dust results from a violation of the dust control plan or occurs in spite of adherence to the plan. In order for us to conclude that DER abused its discretion in issuing the Permit, the evidence would have to show that fugitive dust escapes the Site even when Doan complies fully with the dust control plan. No such evidence has been presented.

STRAWS cites the case of Wisniewski et al v. DER, 1986 EHB 111, as authority for the inadequacy of a dust control plan that does not include monitoring. That case involved a gravel driveway serving a landfill and lying 5 to 10 feet away from the Wisniewski residence. No dust control plan had been submitted with the application and none had been incorporated into the permit. Instead, DER relied on its landfill regulations which specified four acceptable types of dust control measures and required one or more of them to be implemented. The Board's decision criticized DER for relying on its regulations instead of requiring a specific plan to be submitted with the application. The Board stated that the application "should address the minimization of dust through both preventative and remedial measures. And, [DER] should impose monitoring conditions as appropriate to determine compliance." (1986 EHB 111 at 119)

Two weeks prior to issuing a decision in the Wisniewski case, the Board decided the case of Kwalwasser v. DER et al., 1986 EHB 24, discussed above in connection with noise problems. Kwalwasser involved a surface mining permit on land adjacent to Kwalwasser's residence. The mining company had submitted a dust control plan with its application. DER had reviewed it and

had incorporated it in the permit. The Board noted that, since Kwalwasser had presented no evidence to show that the plan was inadequate, he had not proved that DER had abused its discretion in issuing the permit (1986 EHB 24 at 61). While the Board expressed some concern that the approved plan did not require monitoring, it refused to charge DER with abuse of discretion in the absence of expert testimony showing that monitoring was necessary. (1986 EHB 24 at 62)

The Board's handling of these two cases is instructive. A dust control plan is mandatory (Wisniewski); but, if such a plan is proposed and approved, expert testimony is required to show that it is inadequate (Kwalwasser). The Board, in both cases, mentioned monitoring, stating that it should be required in Wisniewski but refusing to express an opinion on it in Kwalwasser. The reasons are obvious. Wisniewski dealt with a driveway, 5 to 10 feet away from a residence, that presumably would be used by heavy trucks on a daily basis. Dust problems would be a virtual certainty in such a situation. Kwalwasser dealt with a residence on a 65-acre tract of land near a proposed surface mine. At the time of hearing, the mining operation was 1 1/2 miles from Kwalwasser's property and would not reach the land bordering it for another two years. The need for dust control monitoring was not immediately apparent in this situation, and the Board refused to mandate it. Instead, the Board ordered DER to consider imposing a monitoring requirement if that became necessary as mining approached Kwalwasser's property.

In the case before us, DER dealt with a Site on which Doan and its predecessor had been mining for a number of years, using the same haul road. DER had received no dust complaints and had never cited Doan for a dust violation. The grades and curves on the haul road made it obvious that vehicles would have to travel at low speeds. The nearest residence to the

haul road was 650 feet away. It is impossible for us to conclude that DER's decison not to impose a monitoring requiremnt in a situation like this was an abuse of discretion. Events since the issuance of the Permit do not change our viewpoint. Trucks use the haul road only one day per week, at the most. This fact, coupled with the fact that DER witnesses have never observed a dust problem on their visits to the Site and the fact that Mrs. Bovaird is the only one who has complained of a dust problem, leads us to an even firmer belief that a monitoring program is unnecessary.

Blasting

The relevance of the issue was to be addressed in the post-hearing briefs since STRAWS had not raised the issue in its Notice of Appeal or pre-hearing memorandum. In its brief, STRAWS makes no mention of relevance but merely asserts that the blasting plan approved in the Permit is ineffective to prevent damage. Doan addresses the relevance of this issue in its brief and argues that the Board should not consider it.

Technically, Doan is correct and our consideration of the blasting issue should end at this point. However, in an effort to make certain that this citizens' group has the opportunity to have the Permit fully reviewed by this Board, we will discuss the issue briefly.

STRAWS points out that DER's regulations at 25 Pa. Code §87.127 (f)(6) and (g) require blasting to be done in a manner that does not create a hazard to persons or property in the vicinity. STRAWS then alludes to the evidence of blasting damage to the Bovaird and Foek residences, and concludes that the blasting plan approved in the Permit is ineffective. The missing link in the chain of reasoning is a finding that Doan was adhering to the approved blasting plan when the damage occurred. This link is missing because it does not exist--there is no evidence to establish it. Without this link,

it is impossible to conclude that DER abused its discretion in issuing the Permit.

Water Contamination

STRAWS fears that Doan's surface mining operations on the Site will create AMD which will pollute the surface and ground waters in the vicinity. STRAWS focuses its attack on DER's waiver of a regulatory requirement for an overburden analysis--a chemical study of the acid-forming potential of the materials overlying the coal seams proposed to be mined and of the coal itself.

25 Pa. Code §87.44 sets forth geologic data that must be submitted with an application for a surface mining permit. Included, inter alia, are stratigaphic and other data from test borings, a description of the geologic structure and information on other nearby mining sites. §87.44 (3) reads as follows:

> Chemical analyses of the coal and overburden or a request for a waiver. [DER] may waive the chemical analysis after making a written determination that it has equivalent information in a satisfactory form.

DER claims to have had "equivalent information" which justified granting Doan a waiver of the chemical analysis. That information is detailed in Findings of Fact 38 and 39 and need not be repeated here. Although it included some contrary indications, the information strongly suggested that the risk of AMD was minimal. DER analyzed the information and concluded that a chemical overburden analysis was unnecessary. That decision-making process was documented on a special DER form introduced as Board Exhibit No. 1.

STRAWS argues that the information available to DER was not "equivalent" to that which would be obtained in a chemical overburden

analysis, because it did not give a percentage of sulfur or the neutralization potential of the overburden. By this argument, STRAWS would change "equivalent" to "identical." While English is a dynamic language which accepts a variety of definitions for its words, "equivalent" continues to express the meaning of its Latin roots--equal strength. What is required by §87.44 (3) therefore, is not information that will provide the same identical details as the chemical overburden analysis, but information that will be of a strength or value equal to those details.

The information that DER claims to be equivalent comes primarily from analyses of water samples taken over a period of years on the Site and on other surface mining sites in the vicinity. Since these analyses show an absence of AMD, according to DER, it is obvious that there is no acid-producing potential in the materials on the Site. A chemical overburden analysis, in light of this information, would be a waste of time and money.

STRAWS produced no witnesses, expert or otherwise, to challenge DER's conclusions. It relied, instead, on the fact that the information used by DER did not give the chemical composition of the overburden. We cannot conclude that this was an abuse of discretion, as STRAWS maintains, without the testimony of a hydrogeologist to support it. No such testimony was presented.

In our judgment, DER had equivalent information that justified a waiver of the chemical overburden analysis requirement. That information, coupled with Mrs. Bovaird's testimony that she knows of no wells polluted by Doan's operations, fully supports DER's conclusion that AMD will not be generated on the Site.

STRAWS argues that Board Exhibit No. 1 does not constitute a "written determination" as required by §87.44 (3). This argument is so totally lacking in merit that we will dismiss it without further discussion.

Public Hearing

In its Notice of Appeal and pre-hearing memorandum, STRAWS alleges that (1) Doan's application for the Permit was not properly advertised in a newspaper of general circulation, as required by 25 Pa. Code §86.31; (2) STRAWS' request for a public hearing was timely because of the inadequate newspaper advertising; and (3) DER failed to conduct a public hearing, as required by 25 Pa. Code §86.34 (b) (1).

Mrs. Bovaird testified that STRAWS requested DER to hold a public hearing and that DER failed to do so. She also testified that she does not subscribe to a newspaper; that she usually reads the Brockway Record when she buys a newspaper; and that the Brookville Democrat and the DuBois Courier Express are other newspapers in her area. Mrs. Foeks testified that she and four of her neighbors subscribe to the Courier Express which is delivered to their homes.

That is the sum total of testimony on this subject. To the extent that it was supplemented at all, it was done by the attorneys during arguments. Such statements, of course, are not evidence and cannot be considered. These arguments, inter alia, alluded to a prior decision of the Board in an appeal filed by STRAWS on October 16, 1984, at 84-355-G, challenging DER's denial of a public hearing in connection with Doan's application for the Permit. That decision, reported at 1985 EHB 347, dismissed the appeal as premature since the Permit had not yet been issued. We have examined that docket but have found nothing to substitute for the lack of evidence in this case.

Section 4 (b) of SMCRA, 52 P.S. §1396.4 (b), requires an applicant for a surface mining permit to publish a notice "in a newspaper of general circulation, published in the locality where the permit is applied for, once a week for four consecutive weeks." DER regulations at 25 Pa. Code §86.31 (a) implement this statutory provision, requiring publication "in a local newspaper of general circulation in the locality of the proposed coal mining activities...."

Section 4 (b) of SMCRA also provides an opportunity for interested persons to file with DER written objections to the application for a permit and a request for an informal conference or a public hearing. Such requests must be made within 30 days after the last date on which the public notice was published. DER's regulations generally follow this procedure, 25 Pa. Code §§86.32 and 86.34.

It is apparent that, if the public notice was not published in accordance with the statute and the regulations, the 30-day period for filing objections and requesting a hearing (formal or informal) could not begin to run. Although there is no evidence on the point, we surmise that there was a public notice published at some point, but it was published in the DuBois Courier Express. STRAWS' request for a public hearing, dated May 31, 1984, apparently was rejected by DER as untimely. STRAWS' attorney acknowledged that, if the Courier Express was a proper newspaper, then the publication complied with the regulations and STRAWS'request was untimely (N.T. 363-364). The only issue, therefore, is whether the Courier Express is a "newspaper of general circulation" in the locality of the proposed surface mine for which the Permit was issued.

We know that Doan's application related to a site in Snyder Township, Jefferson County. In the absence of evidence, we can only presume that the

Courier Express is published in DuBois, Clearfield County. We take official notice of the fact that Jefferson County borders Clearfield County on the west; that Snyder Township is in the northeast corner of Jefferson County and borders partly on Clearfield County; and that DuBois is in western Clearfield County near the Jefferson County line. We also take official notice of the fact that DuBois (population 9290) is about 12 road miles from the Site; Brookville (population 4568) is about 15 road miles from the Site; and Brockway (population 2376) is about 2 road miles from the Site.

The most that we can deduce from these facts is that Brockway is the closest and smallest of the three towns and that a newspaper published there might be the most desirable to use for a public notice pertaining to the Site. While we presume that the Record is published in Brockway and that Mrs. Bovaird usually selects this newspaper when she chooses to buy one, we do not know if it is a newspaper of "general circulation" (see definition in 45 Pa. C.S.A. §101(a)). Obviously, it must have some shortcomings, since Mrs. Foek and four of her neighbors subscribe to the Courier Express. This fact, alone, seems to suggest that a notice published in the Courier Express had a greater likelihood of reaching the residents near the Site than one published in either of the other two newspapers.

Since STRAWS has the burden of proving that the processing of the application did not comply with SMCRA or DER's regulations, it was incumbent upon STRAWS to show that publication of the public notice was incorrect. STRAWS has not done so. Even when we give STRAWS the benefit of as much official notice as possible, and assume some facts that have not been proved but only alluded to by the attorneys, we still cannot find that STRAWS' allegations are legally sound. What is available to us points to the propriety of using the DuBois Courier Express.

CONCLUSIONS OF LAW

1. STRAWS has the burden of showing that DER abused its discretion in issuing the Permit.

2. In reviewing an application for a surface mining permit, DER is required to consider whether the noise likely to be generated by the operation will constitute a public nuisance.

3. STRAWS did not present sufficient evidence to show that DER failed to consider the noise likely to be generated by night operations and whether it would constitute a public nuisance.

4. STRAWS did not present sufficient evidence to show that the noise actually generated by mining operations at night constitutes a public nuisance.

5. An applicant for a surface mining permit is required to present a plan for controlling fugitive dust; DER is required to review the plan and to determine whether it is adequate.

6. STRAWS did not present sufficient evidence to show that the dust complained of by Mrs. Bovaird comes from the Site.

7. Even if it be assumed that the dust comes from the Site, there is insufficient evidence to show that it leaves the Site despite Doan's adherence to the approved dust control plan.

8. STRAWS did not present sufficient evidence to show that the approved dust control plan is ineffective.

9. STRAWS did not present sufficient evidence to show that a monitoring program should have been imposed as part of the approved dust control plan.

10. STRAWS did not present sufficient evidence to show that the blasting damage sustained by the Bovairds and Foeks was the result of an inadequate blasting plan.

11. "Equivalent information," as referred to in 25 Pa. Code §87.44 (3), does not mean information that will provide the same identical details as a chemical overburden analysis, but means information that will be of a strength or value equal to those details.

12. DER had "equivalent information" sufficient to justify a waiver of the chemical overburden analysis.

13. STRAWS did not present sufficient evidence to show that the public notice of Doan's application for the Permit was not published in accordance with law and regulation.

ORDER

AND NOW, this 12th day of December, 1988, the appeal of Snyder Township Residents for Adequate Water Supplies is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

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WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: December 12, 1988

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ALLEGHENY MOUNTAIN CHAPTER OF TROUT UNLIMITED	:	
v.	:	EHB Docket No. 86-524-W
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
BENJAMIN COAL COMPANY, Permittee	:	Issued: December 12, 1988

OPINION AND ORDER SUR MOTION TO DISMISS

Synopsis

A motion to dismiss a third party appeal of the issuance of a surface mining permit because of the appellant's alleged failure to submit comments to the Department of Environmental Resources during the 30 days following the last publication of a newspaper advertisement concerning submission of the permit application is denied. The 30 day comment period in 52 P.S. §1396.4(b) does not begin to run until the publication of the final newspaper advertisement following submission of a complete permit application.

OPINION

This action was initiated by the Allegheny Mountain Chapter of Trout Unlimited's (Allegheny) September 12, 1986 filing of a notice of appeal seeking the Board's review of the Department of Environmental Resources' (Department) August 13, 1986 issuance of Mining Permit No. 17860105 to Benjamin Coal Company (Benjamin) for its Marshall Site in Brady Township, Clearfield County.

The appeal was docketed at Docket No. 86-524-W.[1] A petition for supersedeas accompanied Allegheny's notice of appeal, and the Board denied the petition for supersedeas during the course of a hearing held on October 3, 1986.[2] On October 2, 1986, Benjamin moved to dismiss Allegheny's appeal, claiming the Board lacked jurisdiction over the appeal by virtue of §4(b) of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.4(b) (SMCRA).

Benjamin argues that the language in §4(b) of SMCRA, 52 P.S. §1396.4(b), allows a third party appellant to challenge the issuance of a surface mining permit before the Board only if it has filed written objections to the permit application within 30 days of final public notice of the filing of a permit application or if it has participated in a public hearing on the permit application. Benjamin alleges that the public comment period for its permit application ended on January 20, 1986, 30 days after the last notice was published in The Clearfield Progress on December 21, 1985, and that Allegheny did not submit any comments during that period. Thus, Benjamin argues, the Board lacks jurisdiction to hear this appeal.

In its response, Allegheny contends that the public notice provided by Benjamin was inadequate because most of its members reside in the Punxsutawney/DuBois area, which is outside the circulation area of The Clearfield Progress and that it did submit comments to the Department before a completed

---

[1] On October 1, 1986, Allegheny filed an appeal of the Department's order modifying Permit No. 17860105, and that appeal was docketed at Docket No. 86-557-W. By order dated October 21, 1986, the Board consolidated Allegheny's two appeals at Docket No. 86-524-W. The motion now before us was filed just one day after Allegheny filed its second notice of appeal, but before the two appeals were consolidated. We will treat it as applying only to the appeal originally docketed at Docket No. 86-524-W.

[2] A second petition for supersedeas was filed on June 11, 1987, and denied on June 30, 1987.

permit application was submitted by Benjamin. Furthermore, Allegheny argues that §4(b) of SMCRA, 52 P.S. §1396.4(b), does not exclude a person who did not file written comments from filing a notice of appeal with the Board and that any reply to this motion would be moot because of the Board's denial of the petition for supersedeas.

The Department also objects to Benjamin's motion to dismiss, contending that Benjamin has misconstrued 52 P.S. §1396.4(b), that Benjamin's interpretation of that section is inconsistent with federal law, and that prior Pennsylvania law allows the current appeal. The Department maintains that §4(b) of SMCRA must be read consistently with the provisions of the Federal Surface Mining Control and Reclamation Act, 30 USC §1201 *et seq.*, (Federal SMCRA) conferring the right to appeal the issuance of a permit, since state primacy programs must be consistent with the federal requirements.

We will deny Benjamin's motion for the reasons set forth below.

Section 4(b) of SMCRA provides in relevant part that:

> The applicant shall give public notice of every application for a permit or a bond release under this act in a newspaper of general circulation, published in the locality where the permit is applied for, once a week for four consecutive weeks. The department shall prescribe such requirements regarding public notice and public hearings on permit applications and bond releases as it deems appropriate....
>
> Any person having an interest which is or may be adversely affected by any action of the department under this section may proceed to lodge an appeal with the Environmental Hearing Board in the manner provided by law and from the adjudication of said board such person may further appeal as provided by Title 2 of the Pennsylvania Consolidated Statutes (relating to administrative law and procedure). 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 pursuant to this section. In

> all cases involving surface coal mining operations, any person having an interest which is or may be adversely affected shall have the right to file written objections to the proposed permit application or bond release within thirty (30) days after the last publication of the above notice which shall conclude the public comment period. ... The applicant, operator, or any person having an interest which is or may be adversely affedted by an action of the department to grant or deny a permit or to release or deny release of a bond and who participated in the informal hearing held pursuant to this subsection or filed written objections before the close of the public comment period, may proceed to lodge an appeal with the Environmental Hearing Board in the manner provided by law and from the adjudication of said board such person may further appeal as provided by Title 2 of the Pennsylvania Consolidated Statutes. ...

Here we find that we need not decide the question of whether failure to submit timely written objections during the public comment period deprives Allegheny of its opportunity to appeal Benjamin's permit because there was a deficiency in the public notification process.

Public notice requirements pertaining to surface mining permit applications are promulgated at 25 Pa.Code §86.31, which, in pertinent part, states:

> (a) An applicant for a permit, transfer or renewal, or for revision as required by §86.54 (relating to public notice of permit revision) shall place at the time of filing an application with the Department, an advertisement in a local newspaper of general circulation in the locality of the proposed coal mining activities at least once a week for four consecutive weeks. ...
>
> (b) No later than the first date of the newspaper advertisement under subsection (a), the applicant for a new permit, except as provided in §86.35(a)(1) (relating to public availability of information in permit applications), shall file a complete copy of the application for the public to copy and inspect at a public office approved by the Department in the county where the coal mining activities are to occur. The

> applicant shall file any subsequent revision of the application for a new permit with that office at the same time the revision is submitted to the Department. In the case of repermitting pursuant to §86.12 (relating to continued operation under interim permits) and §86.14 (relating to permit application filing deadlines), permit renewals pursuant to §86.55 (relating to permit renewals: general requirements), permit revisions pursuant to §86.52 (relating to permit revisions), and permit transfers pursuant to §86.56 (relating to transfer of permit), the permittee shall indicate in the public notice that a copy of the permit and accompanying documents is available for inspection and copying at the appropriate District or Regional Office.
>
> * * * * *
>
> (emphasis added)

The statute and the implementing regulations impose a duty on the permit applicant to both advertise notice of the filing of the permit application and to file a complete copy of the permit application at the appropriate government office so that the public may inspect and copy it.

There are voluminous requirements relating to the contents of a mining permit application, but two regulations contain a general description of the necessary elements of the application. 25 Pa.Code §86.15 states that

> (a) Application for a permit under this chapter shall be submitted to the Department in writing, upon forms furnished by the Department.
>
> (b) Each application for a permit shall be accompanied by such information, maps, plans, specifications, design analyses, test reports, and other data as may be required by the Department to determine compliance with the standards, requirements or purposes of this chapter.
>
> (c) Information set forth in the application shall be current, presented clearly and concisely, and supported by appropriate references to technical and other written material available to the Department.
>
> (d) Technial data submitted in the application shall include:

(1) Names of persons or organizations which collected and analyzed the data.

(2) Dates of the collection and analyses.

(3) Descriptions of methodology used to collect and analyze the data.

while 25 Pa.Code §86.16 requires that

> Persons submitting permit applications under §86.14(a) (relating to permit application filing deadlines), shall reapply for a permit within 2 months by submitting an initial application on forms available from the Department and shall thereafter submit a complete application, including proof of publication, in accordance with a schedule determined by the Department. Other applications submitted under §86.14(b) shall be complete and include, at a minimum, the applicable information required under this chapter and:
>
> (1) Chapter 87 (relating to surface mining of coal) for surface mining activities.
>
> * * * * *

Thus, we believe that the public comment period under §4(b) of SMCRA and the corresponding regulation at 25 Pa.Code §86.32(a) does not begin to run until a complete application has been filed with the Department (or other government office as prescribed by the Department under 25 Pa.Code §86.31(b), for a prospective commenter cannot frame accurate comments and objections to the permit application without such complete information.[3]

Notification of Benjamin's permit application was published in The

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[3] The Board is not unaware of the constant interplay among the Department, permit applicants, and the applicants' consultants. We do not suggest that a "complete" application is one in which all the Department's questions and concerns have been addressed. Rather, it is an application containing all the appropriate modules, forms, maps, data, and other information to enable the Department to begin review of the application.

Clearfield Progress on November 30, 1985 and December 7, 14, and 21, 1985.[4] However, testimony by Mr. Robert Weiss, hydrogeologist for the Department, at the hearing held on the petition for supersedeas on October 3, 1986, establishes that the Department did not receive the completed permit application from Benjamin until February 21, 1986.

By letters dated February 13, 1986 and February 15, 1986, Allegheny submitted comments on the permit application (see transcript of the hearing held on the petition for supersedeas, October 3, 1986, page 136 and Exhibit B to Benjamin's motion to dismiss). Although Benjamin argues these comments were submitted after the comment period ended, and, in fact, Allegheny admits in its letter that its time to respond may have expired, it is clear that Allegheny did submit comments before Benjamin's final completed application was received by the Department. Thus, any notice provided by Benjamin prior to its submittal of a completed permit application was ineffective to toll the 30 day period. Therefore, Allegheny cannot be precluded from maintaining an appeal of the issuance of Benjamin's permit by virtue of its failure to submit comments within 30 days of December 21, 1985, the last date of publication of the newspaper advertisement.

Because we deny the motion on the above grounds, we will not address additional arguments made by either party, although we do note that the dismissal of the petition for supersedeas does not render this motion moot. The question of jurisdiction remains, regardless of the disposition of the petition for supersedeas.

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[4] While there seemed to be confusion in the pleadings as to the dates of publication, during the hearing held on October 3, 1986 on the petition for supersedeas, the parties stipulated to the November 30, 1985 and December 7, 14, and 21, 1985 dates.

O R D E R

AND NOW, this 12th day of December, 1988, it is ordered that Benjamin Coal Company's Motion to Dismiss is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: December 12, 1988

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WILLIAM FIORE, t/d/b/a MUNICIPAL AND INDUSTRIAL DISPOSAL COMPANY	:	
v.	:	EHB Docket No. 86-665-W
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: December 13, 1988

OPINION AND ORDER SUR MOTION FOR SANCTIONS OR IN THE ALTERNATIVE TO COMPEL DISCOVERY

Synopsis

The Board will compel production of documents when the requests are relevant to the subject matter of the action, not overly broad or unduly burdensome, and not subject to any asserted privilege. The Board will conduct an in camera inspection of a memorandum from Department counsel to Department personnel to ascertain whether the memorandum is protected by the attorney-client privilege or the work product doctrine.

OPINION

This matter was initiated by the December 11, 1986 filing of a notice of appeal by William Fiore, t/d/b/a Municipal and Industrial Disposal Company (Fiore), seeking review of a November 17, 1986 Department of Environmental Resources' (Department) letter, which stated:

> We have been notified by Equibank that Letter of Credit No. 1261 will be cancelled effective February 10, 1987. Section 505(e) of the Solid Waste Management Act (35 P.S. 505(e)) and the Collateral Bond agreement authorize the Depart-

ment to withhold the bond for failure to comply with any order of the Department.

Since Municipal and Industrial Disposal Company has failed to comply with the consent order and agreement dated January 25, 1983, you are hereby advised to reinstate the subject Letter of Credit or provide an acceptable substitute Letter of Credit by December 14, 1986 or the Department will draw upon the subject Letter of Credit issued by Equibank and convert it into a cash collateral bond in accordance with the terms of this letter of credit.

This appeal was docketed at Docket No. 86-665-W.

On December 7, 1987, Fiore filed a notice of appeal seeking review of the Department's November 23, 1987 letter, which stated:

We have been been notified by Equibank that Letter of Credit No. 1261 will be cancelled effective February 10, 1988. This letter of credit was part of the collateral bond submitted to obtain your company's hazardous waste transporter license. Section 505(e) of The Solid Waste Management Act requires that liability under the bond shall be for the duration of the license and for a period of one year after the expiration or voluntary termination of the license. "This one year period of liability shall include, and shall be automatically extended for such additional time during which administrative or legal proceedings are pending involving a violation by the transporter of the Act or the rules and regulations promulgated thereunder, or the terms and conditions of the license to transport hazardous waste, or an order of the Department."

Municipal and Industrial Disposal Company is hereby advised to reinstate the subject Letter of Credit or provide an acceptable substitute Letter of Credit by December 23, 1987 or the Department will draw upon the subject Letter of Credit issued by Equibank and convert it into a cash collateral bond in accordance with the terms of this Letter of Credit.

This appeal was docketed at Docket No. 87-499-W.

As grounds for the appeals, Fiore alleged that the Department's action was arbitrary, capricious, unreasonable and without statutory right or

authorization, espousing contract, reliance and estoppel theories. Fiore maintained that the intent of the parties was to insure compliance with transportation related regulations, not the non-transportation related laws, rules or regulations. Also, Fiore asserted that because the letter of credit had expired, the Department did not have the right to draw on it, citing 25 Pa.Code §75.263(i)(8) and (9) and 42 Pa.C.S.A. §5523(3). Fiore also argued that the Department deprived him of due process because its rules and regulations were ambiguous, and finally, that he was not afforded the 30 days notice provided in §505(e) of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.505(e).

Simultaneous with the filing of his appeal at Docket No. 87-499-W, Fiore filed a First Request for Production of Documents and a First Set of Interrogatories. On January 13, 1988, the Department provided responses to the requests for documents, objecting to several of these requests. After a June 7, 1988 telephone conference call with the parties, the Board, by order dated June 8, 1988, consolidated the two appeals at Docket No. 86-665-W. That order also directed Fiore to file a motion to compel.

Fiore filed a Motion for Sanctions or in the Alternative Motion to Compel Discovery on June 15, 1988, and the Department responded to it on July 8, 1988.

After review of the requests, the Board grants Fiore's motion to compel with respect to Requests No. 1, 2, 4, 7, 8, 9, 11, and 12. With respect to Request No. 3, the Board orders the Department to submit the document in dispute for an in camera inspection to determine whether or not it is privileged. Requests No. 5, 6, and 10 were answered by the Department, but

it is not clear whether Fiore seeks additional information. Therefore, we will not rule on these numbered requests. We decline to impose sanctions at this time.

Discovery practice before the Board is governed generally by the Pennsylvania Rules of Civil Procedure, 25 Pa.Code §21.111. Pa.R.C.P. 4003.1 allows discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." For the purposes of discovery, relevance is to be construed liberally. 6 Standard Pennsylvania Practice, 2d 34:16. Envirosafe Services of Pa. v. DER, EHB Docket No. 83-101-W (Opinion and order issued October 31, 1988). There are limitations placed on discovery, including, *inter alia*, discovery which "would cause unreasonable annoyance, embarrassment, oppression, burden or expense" or which "relates to matter which is privileged." Pa.R.C.P. 4011(b) and (c).

Request No. 1 asks for information regarding a program guidance manual or policy guidelines for the solid waste management program, and specifically for the waste transportation program. The Department objected to this request, claiming it was overly broad, unduly burdensome and irrelevant to the only issue, whether the Department has the authority to hold Fiore liable for the bond amount for violations of regulations unrelated to the transportation of hazardous waste.

We cannot agree that the request is overly broad or unduly burdensome. As for relevance, Fiore's claim that the documents may include information about bond release is well-taken. Because relevance is construed broadly for purposes of discovery, we will compel production regarding Request No. 1.

Request No. 2 asks for information regarding other hazardous waste transporters whose bonds were forfeited or attempted to be forfeited by the

Department for non-transportation related violations of Department laws, rules or regulations. The Department objected to this request, arguing that it was overly broad, unduly burdensome, irrelevant and privileged. Fiore maintains the information sought is necessary to ascertain if similarly situated people are being similarly treated, thus giving rise to a possible equal protection challenge.

The request is not overly broad, nor is it unduly burdensome. Neither can we see any apparent privilege, and the Department has failed to make specific arguments which might otherwise convince us. As to its relevance, we find the information relevant to the subject matter of the action, relating to whether the Department has the authority to act as it did.

Request No. 3 asks for information going to whether the Department is empowered, or should be empowered, to forfeit transportation bonds for non-transportation violations of Department laws, rules or regulations. While the Department identified a memorandum dated August 25, 1985, from Department Counsel, Dennis W. Strain, to Chief of the Transportation and Reporting Section, Leonard W. Tritt, it refused to produce this memorandum, claiming that the attorney-client privilege and work product doctrine protected it from disclosure. Fiore claimed that the Department failed to specify on what basis the attorney-client privilege should be sustained and that the attorney work product doctrine was inapplicable because the memorandum was not prepared in anticipation of litigation.

We cannot rule on this aspect of Fiore's motion until we have conducted an in camera inspection of the memorandum at issue. Memoranda written by Department counsel to a Department employee will be privileged only if its disclosure would reveal the communication from the Department employee to Department counsel. Kocher Coal v. DER, 1986 EHB 945. Likewise, the memoran-

dum, if containing advice from Department counsel to a Department employee would only be protected if it would reveal the employee's confidential communication to the attorney. Kocher, *supra*, citing Bradford Coal Co., Inc. v. DER, 1985 EHB 938.

The memorandum at issue may be protected by the attorney work product doctrine. Fiore claims the memorandum was written before the appeal was filed and, thus, it could not have been written in anticipation of litigation. Since we do not know what the memorandum contains, we cannot yet rule on it. The Department is ordered to submit the memorandum in question to the Board for an in camera inspection and ruling.

Request No. 4 asks for information relating to any other bonds which were submitted by Fiore since 1975 under the SWMA or its predecessor statute, including copies of those bonds actually issued to or approved for Fiore. Request No. 11 asks for a copy of Fiore's license for transportation of hazardous waste and any renewals thereof. The Department objected to these requests, claiming they were overly broad, unduly burdensome, and irrelevant because the information sought was equally accessible to both parties. The Department also maintained that the documents were irrelevant, since it was always free to change the language in its forms.

We find that the requests are neither overly broad, nor unduly burdensome, since they appear to involve six bonds and one license. As for the Department's objections based on relevancy, Fiore claims he needs the documents in order to compare the language in the bonds and license to determine the intentions of the parties. This is relevant to Fiore's contract theory and, therefore, we will compel production of those documents. The fact that both parties may have equal access has been disputed by Fiore's claim that its record keeping has recently lapsed. In any event, knowledge of the

inquirer is not a barrier to discovery. Magnum Minerals v. DER, 1983 EHB 310, citing Goodrich Amram 2d §4003.1:25.

Request No. 7 asks for current copies of the application forms for a hazardous waste transportation license and bond, and Request No. 12 asks for representative copies of all bond forms the Department has used for hazardous waste transportation, including "every version or revision of 'ER-SWM-28'." The Department claims these requests are overly broad, unduly burdensome and seeking information unrelated to the present appeal. Additionally, with respect to Request No. 12, the Department claims it seeks irrelevant information because the Department is always free to change the language in its forms.

Fiore claims that the information is relevant because the bond form at issue has been revised and, thus, a comparison in language of each revision may shed light on the intention of the drafter. Fiore claims this information could be used to support various theories in the present controversy. Because we view relevancy liberally in discovery requests and because we feel that the information sought may lead to admissible evidence and is related to the subject matter of the litigation, we will compel responses to Requests No. 7 and 12.

Requests No. 8 and 9 ask for information showing how or on what basis the Department computed Fiore's bond amount and for all documents relating to the method for calculation of hazardous waste transportation bond amounts. The Department objected to these requests as being irrelevant because the computation of Fiore's bond amount constituted a final action which can no longer be appealed. The Department argues, in its response to this motion, that its method of calculating bond amounts is irrelevant because §505 of the SWMA, 35 P.S. §6018.505, makes bonds conditional on compliance with every re-

quirement of the Act. Therefore, bond forfeiture does not depend on the method in which the bond is calculated.

Fiore claims it is not attempting to relitigate the computation, rather it is trying to prove the bond amount is computed on the basis of hazardous waste expected to be transported, thus going to the belief that the bond at issue was intended to cover transportation related violations only. We agree with Fiore that this information may well show the intention of the parties in the issuance of the transporter's license and falls within the broad purview of allowable discovery.

O R D E R

AND NOW, this 13th day of December, 1988, it is hereby ordered that:

1) William Fiore's motion to compel with respect to Requests No. 1, 2, 4, 7, 8, 9, 11, and 12 is granted. The Department shall provide the information requested therein on or before January 12, 1989; and

2) The Department shall, on or before December 23, 1988, submit the memorandum from Mr. Strain to Mr. Tritt to the Board for an in camera inspection to determine whether it is privileged.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: December 13, 1988

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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

MAX FUNK, WILBUR E. JOHNSON and WILLIAM GLOEKLER	:	**EHB Docket No. 87-078-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
ERIE ENERGY RECOVERY COMPANY, INC., Permittee	:	**Issued:** December 13, 1988

OPINION AND ORDER
SUR
MOTION TO LIMIT ISSUES

Synopsis

Motion to limit issues to those raised by the appellants in their pre-hearing memorandum is granted.

OPINION

This matter was initiated with the March 3, 1987 filing of a notice of appeal by Max Funk, Wilbur E. Johnson and William Gloeckler (Appellants) challenging the February 5, 1987 issuance of a solid waste permit and air quality plan approval by the Department of Environmental Resources (Department) to Erie Energy Recovery Company, Inc. (EERC). The permit and plan authorized the construction of a waste-to-energy incinerator facility in Erie.

A motion to dismiss the appeal for lack of standing was filed by EERC on September 22, 1987, and the Board denied the motion on August 31, 1988. By notice dated August 9, 1988, the Board scheduled a hearing on the

merits for January 23 to 27, 1989; Pre-Hearing Order No. 2 was appended to the notice of hearing and required the parties to submit stipulations and witness and document lists on or before January 11, 1989.

On September 14, 1988, EERC filed a motion to limit issues and/or clarification,[1] arguing that Appellants' pre-hearing memorandum only addressed the air quality plan approval and did not challenge the issuance of the solid waste permit, thereby waiving their right to raise any issues related to the solid waste permit. EERC cited Melvin Reiner v. DER, 1982 EHB 183, in support of its position. On October 3, 1988, the Department notified the Board that it would not respond to this motion.

The Appellants filed a response to the motion to limit issues on September 26, 1988, arguing that because the air quality plan approval and solid waste permits are so intertwined, requirements under the plan approval may affect requirements under the solid waste permit and vice-versa if any additional conditions are imposed by the Department as a result of this appeal. Further, Appellants contend that limiting issues at this point is premature, since the Board has requested amended pre-hearing memoranda.

The Board's rules of practice and procedure provide at 25 Pa.Code §21.82(c) that the Board may issue such pre-hearing orders as it deems necessary for limiting issues of fact and law in a proceeding. The Board employs two standard pre-hearing orders. Pre-Hearing Order No. 1 requires the submission of a pre-hearing memorandum which states the facts a party intends to prove, cites the contentions of law relied upon, identifies the order of the witnesses at hearing, and includes all documents and other

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[1] The Board overlooked EERC's request in its motion to dismiss for lack of standing that the appeal be dismissed as it related to the solid waste permit because Appellants had failed to raise this issue in their pre-hearing memorandum. Hence, this request for clarification.

exhibits the party intends to introduce at the hearing. The order further states that "a party may be deemed to have abandoned all contentions of law or fact not set forth in its pre-hearing memorandum." Pre-Hearing Order No. 2 mandates the parties to file a stipulation listing exhibits, expert witnesses, evidence and facts agreed upon, and a statement of the legal issues on which the matter turns; this stipulation must be filed approximately two weeks before the hearing. The two pre-hearing orders are designed to complement each other; Pre-Hearing Order No. 1 operates to define the issues after a period of discovery, while Pre-Hearing Order No. 2 operates to refine the issues for presentation at the hearing on the merits.

In Reiner v. DER, 1982 EHB 183, the Board refused to permit the Department to introduce evidence not set forth in its pre-hearing memorandum at a hearing on the merits. We expressed our reluctance to enforce the waiver language contained in Pre-Hearing Order No. 1 unless the refusal to waive a contention of law or fact not set forth in a party's pre-hearing memorandum would be prejudicial to the opposing party. Reiner, at 200. We find that under the circumstances presented herein, allowing the Appellants to raise the issue of the solid waste permits in their Pre-Hearing Order No. 2 submission would be extremely prejudicial to EERC and will limit Appellants' presentation to issues relating to the air quality permit.

Pre-Hearing Order No. 1 was issued by the Board on March 23, 1987; it required all discovery to be completed within 75 days and the filing of Appellants' pre-hearing memorandum by June 3, 1987. At Appellants' request, the discovery period was extended to June 30, 1987 and the filing deadline for the pre-hearing memorandum was extended to July 18, 1987. Appellants' pre-hearing memorandum, which was filed on July 20, 1987, made no mention of the solid waste permit, but extensively addressed the air quality plan

approval. To allow Appellants to raise the solid waste permit in their Pre-Hearing Order No. 2 filing is contrary to the purpose of that pre-hearing order, in that it would expand, rather than narrow, the issues, immediately prior to hearing. This would, in turn, severely prejudice EERC in that it would be forced to prepare to counter the solid waste issues in 12 days or further delay its project by seeking a continuance of the hearing.

O R D E R

AND NOW, this 13th day of December, 1988, it is ordered that Erie Energy Resource Corporation's motion to limit the issues in this matter to those associated with the air quality plan approval is granted.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

DATED: December 13, 1988

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

MARIO L. MARCON	:	
	:	
v.	:	EHB Docket No. 88-110-R
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
VALLEY SANITATION, Permittee	:	Issued: December 13, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A motion to dismiss for lack of standing is granted where the appellant fails to show that his interest in a civil penalty imposed on a third party is substantial, immediate and direct.

O P I N I O N

This matter was initiated by the March 28, 1988 filing of a notice of appeal by Mario L. Marcon (Marcon) challenging the sufficiency of a $100 civil penalty assessed by DER against Valley Sanitation (Valley) for allegedly conducting non-coal surface mining near its landfill in Penn Township, Westmoreland County. DER assessed the civil penalty pursuant to the provisions of the Non-Coal Surface Mining Conservation and Reclamation Act, the Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. §3301 et seq. (Non-Coal SMCRA).

Valley was utilizing a tract of land, apparently an old strip mine which adjoined Marcon's land, as a borrow area for soil cover for its landfill. Marcon contends that the amount of the penalty should be assessed based on the value to Valley of the soils used, the future costs of reclamation to approximate original contours and the effects on his land. In addition, Marcon charges that DER failed to enforce unspecified regulations to prevent the removal of soil from stripped areas and that Valley failed to post a bond sufficient to assure future reclamation.

On May 18, 1988, DER filed a motion to dismiss Marcon's appeal for lack of standing. Relying upon the direct, immediate and substantial interest test of William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975), DER argues that Marcon has no legally cognizable interest in the civil penalty assessment, since Marcon is not asserting financial responsibility for paying or indemnifying Valley for the amount of the assessment. Further, DER contends that no basis in law exists for Marcon to act as a private attorney general asserting the protection of the public's interest in deterring future environmental degradation and protecting private property through the imposition of a larger civil penalty.

On June 10, 1988, Marcon, who is acting pro se, filed a response that failed to address DER's arguments. Rather, Marcon repeats and expands upon the arguments made in his notice of appeal.

It is important to keep in mind that the DER action at issue here is the civil penalty assessed on Valley. Aside from being an adjoining landowner, Marcon has not indicated, nor can the Board discern, any substantial, immediate or direct interest in DER's $100 civil penalty assessment. Marcon has no obligation to pay the assessment. Nor has DER imposed any duties on him. We therefore rule that Marcon failed to meet the

criteria for standing. William Penn Parking Garage, supra.

DER correctly points out that standing under "private attorney general" status cannot be conferred upon Marcon unless the General Assembly has specifically conferred such status. Robert A. and Florence Porter v. DER, 1985 EHB 741. The Non-Coal SMCRA has no such provisions.

In view of the foregoing, we will grant DER's motion and dismiss Marcon's appeal for lack of standing.

O R D E R

AND NOW, this 13th day of December, 1988, it is ordered that the Department of Environmental Resources' motion to dismiss is granted and the appeal of Mario L. Marcon at Docket No. 88-110-R is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: December 13, 1988

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Western Region
Appellant pro se:
Mario L. Marcon
Harrison City, PA
Permittee:
Valley Sanitation
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M. DIANE SMITH
SECRETARY TO THE BOARD

WALTER OVERLY COAL COMPANY	:	
	:	
v.	:	EHB Docket No. 86-601-M
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: December 14, 1988

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

Summary judgment is granted in favor of the Department of Environmental Resources (DER) on a bond forfeiture action when no issues of material facts remain to be resolved and when DER is entitled to judgment as a matter of law. When a Motion for Summary Judgment is supported by affidavits, the adverse party cannot rely upon the allegations in his pleadings but must show, by his own affidavits or otherwise, that a genuine issue of material fact exists. The existence of uncorrected violations on a mining site warrants the forfeiture of the bonds posted with respect to that site.

OPINION

This appeal was filed October 27, 1986, challenging DER's September 29, 1986, forfeiture of two bonds applicable to a mining site in Mount Pleasant Township, Westmoreland County. On June 6, 1988, the Board issued an Opinion and Order denying a Motion for Summary Judgment filed by DER on January 7, 1988. The denial was based on the absence of affidavits and

documentary material sufficient to establish the necessary elements of a bond forfeiture proceeding. DER filed a new Motion for Summary Judgment on September 26, 1988. Walter Overly Coal Company (Appellant) has filed no response.

DER's new Motion attempts to overcome the deficiencies of the prior Motion. It contains copies of the bonds, copies of Compliance Orders 85G282 and 85G382, and a four page affidavit of Robert Musser, a Mine Conservation Inspector in DER's Greensburg District Office. Musser's affidavit declares, inter alia, as follows:

(1) Appellant has operated a surface mine in Mount Pleasant Township, Westmoreland County, pursuant to Mine Drainage Permit (MDP) 3477SM25 and Mining Permits (MPs) 1865-1 (c) and 1865-1 (c) (A).

(2) As originally issued, the MPs were designated 1865-1 and 1865-1 (A). Because the name of the landowner, John Keck, had been misspelled on these MPs, corrected MPs were issued bearing the designations 1865-1 (c) and 1865-1 (c) (A). Except for the designations, the corrected MPs were identical to those originally issued.

(3) Appellant posted a collateral bond and a surety bond in connection with the issuance of the MPs. The first, dated April 25, 1978, applies to MP 1865-1, is in the amount of $5,000 and covers the 5 acres intended to be affected by mining. The second, dated January 12, 1979, applies to MP 1865-1 (A), is in the amount of $15,000 and covers the 15 acres intended to be affected by mining. Liability under both bonds accrues at the rate of $1,000 per acre, and the minimum liability under each bond is $5,000.

(4) DER forfeited both bonds on December 28, 1983, because Appellant had not completed reclamation and revegetation of the mining site.

(5) Subsequent to the bond forfeiture, Appellant agreed to continue reclamation activities, specifically the removal of erosion and sedimentation (E&S) control ditches in order to permit revegetation.

(6) DER reinstated, without prejudice, the forfeited bonds on February 26, 1985.

(7) Appellant failed to stablize the area where the E&S controls had been removed and, as a result, further erosion occurred.

(8) Musser's site inspections on May 1 and 3, 1985, discovered the erosion problem and noted other deficiencies.

(9) Compliance Order (CO) 85G282, issued May 3, 1985, as a result of Musser's inspections, called Appellant's attention to specific violations of DER's rules and regulations and ordered Appellant to take corrective action by June 3, 1985.

(10) Appellant did not take an appeal from CO 85G282.

(11) Musser's site inspection of June 3, 1985, revealed that Appellant had not complied with CO 85G282.

(12) CO 85G382, issued June 7, 1985, as a result of Musser's inspection, called Appellant's attention to its failure to comply with CO 85G282 and its failure to submit an amended E&S control plan. Immediate corrective action was ordered on the former; a July 3, 1985, deadline was given on the latter.

(13) Appellant did not take an appeal from CO 85G382.

(14) The violations cited in CO 85G282 have not been corrected as of September 22, 1988, the date of Musser's affidavit.

(15) The violations cited in CO 85G282 existed on the acreage covered by both MPs and both bonds.

(16) Appellant's surface mining activities affected all 5 acres covered by MP 1865-1 (c) and all 15 acres covered by MP 1865-1 (c) (A).[1]

As noted at the outset, Appellant did not file any response or counteraffidavits to DER's latest Motion for Summary Judgment. From Appellant's Notice of Appeal and pre-hearing memorandum, however, it appears that Appellant's objections to the bond forfeiture relate solely to the propriety of the corrective action DER ordered in CO 85G282 and to the amount of acreage involved.

Appellant's right to challenge the corrective action ordered in CO 85G282 expired when Appellant failed to take an appeal from that CO. Middlecreek Coal Company v. DER, 1987 EHB 30; Commonwealth v. Wheeling-Pittsburgh Steel Corp., 473 Pa. 432, 375 A.2d 320 (1977). No collateral attack can now be made against that CO. As for any dispute over the acreage affected Appellant has filed no affidavit disputing Musser's averment that the entire permit acreages were involved. R.C.P. 1035 (d) clearly provides that, when a Motion for Summary Judgment is made and supported as provided in that rule,

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

There are no issues of material fact to be resolved. DER has established that violations occurred on the areas covered by the MPs, that Appellant was ordered to correct them, that they remained uncorrected as of

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[1] The Motion has been supplemented by an affidavit and copies of correspondence showing that the bond surety has been advised of the bond forfeitures and reinstatement, has voiced no objections, and has filed no appeals.

September 22, 1988, and that the entire area of the MPs was affected. Under such circumstances, DER was required to forfeit the bonds posted in connection with the issuance of the MPs. Section 4 (h), Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.4 (h); Section 315 (b), Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. 691.315 (b). DER's action in forfeiting the entire amount of the bonds identified above was factually and legally correct. Summary judgment will be entered in DER's favor.

ORDER

AND NOW, this 14th day of December, 1988, the Motion for Summary Judgement filed by the Department of Environmental Resources on September 26, 1988, is granted.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

William A. Roth
WILLIAM A. ROTH, MEMBER

Robert D. Myers
ROBERT D. MYERS, MEMBER

DATED: December 14, 1988

cc: **Bureau of Litigation**
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WALTER OVERLY COAL COMPANY

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M. DIANE SMITH
SECRETARY TO THE BOARD

JAMES E. MARTIN and AMERICAN INSURANCE COMPANY	:	EHB Docket No. 85-120-R (Consolidated Appeals)
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: December 20, 1988

ADJUDICATION

By: William A. Roth, Member

Synopsis:

Appeals of bond forfeiture actions are sustained in part and dismissed in part. DER has the burden of showing, by a preponderance of the evidence, that site conditions justify bond forfeiture and, in the case of bonds written with a per acre liability, that it properly determined the amount of the bond to be forfeited. On a corrected mining permit covered by five separate bond instruments, each written to cover a specific acreage under prior permits, DER must establish violations on each bonded area in order to justify forfeiture. Where DER could not attribute a violation to a bonded area, it failed in its burden of proof. The existence of any violation of reclamation requirements on a bonded area affected by surface mining operations is sufficient to warrant bond forfeiture.

INTRODUCTION

This matter involves two appeals taken by James E. Martin (Martin) and three by the American Insurance Company from six Department of Environmental Resources' (DER) bond forfeiture actions.

On April 4, 1985, the American Insurance Company filed three appeals, Docket Nos. 85-098-R, 85-099-R and 85-100-R, challenging DER's March 13, 1985 forfeiture of, respectively, Surety Bond Nos. 2383393, 2391414 and 2391415. These three bonds, for which it was the surety, were posted by Martin as a condition of obtaining Mining Permit (MP) 419-4C on Mine Drainage Permit 2869BSM25.

On April 12, 1985, Martin filed a notice of appeal at Docket No. 85-120-R from four March 13, 1985 DER letters which declared forfeit bonds pertaining to the following of his mining operations: Mine Drainage Permit 3573SM14 (MDP-14), forfeiture of 9 bonds on 9 mining permits; Mine Drainage Permit 3578BC16 (MDP-16), forfeiture of 2 bonds on 2 mining permits; Mine Drainage Permit 2869BSM25 (MDP-25), forfeiture of 9 bonds (3 of which were Surety Bond Nos. 2383393, 2391414 and 2391415) on 3 mining permits; and Mine Drainage Permit 3574SM12, (MDP-12), forfeiture of 12 bonds on six mining permits.

On April 26, 1985, Martin filed a second notice of appeal at Docket No. 85-156-G from two April 2, 1985 DER bond forfeiture letters. The earlier March 13, 1985 forfeiture letter pertaining to MDP-12 was amended by adding 6 mining permits to the caption. However, the body of the letter was the same as in the March, 1985 forfeiture letter with the exception that the description of the bond posted for MP 419-13A3 was amended. The March 13, 1985 forfeiture letter pertaining to MDP-14 was amended by changing the listing of one of the forfeited bonds.

Upon a petition by Martin, which stated that he had an indemnity agreement with American Insurance Company and would be representing its interest in this matter, the Board consolidated all of the appeals at Docket Number 85-120-R.

A view of the sites was held on June 26, 1987 in the presence of counsel for both Martin and DER. The three-day hearing on the merits, from July 7 through July 9, 1987, was followed by the filing of post-hearing briefs by both parties. Prior to the hearing, the bond forfeitures relating to MDP-14 were resolved; hence, the hearing was, and this adjudication is, concerned only with the bond forfeitures pertaining to mining permits within MDP-12, MDP-16 and MDP-25.

FINDINGS OF FACT

1. The Appellant in this matter is Martin, an individual whose mailing address is R.D. #11, Templeton, Pennsylvania 16259.

2. The Appellee in this matter is DER, the executive agency of the Commonwealth of Pennsylvania vested with the authority and duty to administer and enforce The Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq.; the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. (SMCRA); and Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17.

3. Martin was formerly in the business of mining coal by the surface mining method.

4. Martin stipulated to the accuracy of the information contained in Board Exhibit 2, which lists, by mine drainage permit and mining permit, the

acreage on the mining permit, the present (or outstanding) bond liability, the acreages and reclamation stages for which liability remains and the bond instrument(s) that cover the mining permits (Board Ex. 2; N.T. 150).[1]

BOARTS SITE - Mine Drainage Permit No. 3578BC16

5. Mine Drainage Permit No. 3578BC16 (MDP-16) was issued to Martin and covered 68 acres in Kittanning Township, Armstrong County. (Stip. Para. 1; Cmwlth. Ex. 1)

6. Mining Permit (MP) 419-16 was issued to Martin and authorized the surface mining of 20 acres of coal (Stip. Para. 2; Cmwlth. Ex. 2).

7. MP 419-16 is covered by Surety Bond No. BD 1562, issued by Mid-Continent Insurance Company, in the amount of $20,000.00 (Stip. Para. 3; Cmwlth. Ex. 5).

8. Liability on Surety Bond No. BD 1562 is proportional to acreage affected at the rate of $1,000 per acre (Cmwlth. Ex. 5).

9. Martin affected 5.3 of the 20 acres on MP 419-16 (Stip. Para. 8).

10. The Department released bond liability on the remaining 14.7 acres of MP 419-16 in the amount of $14,700.00 (Stip. Para. 9).

11. Backfilling on the affected area of MP 419-16 has not been completed (Stip. Para. 10.)

12. Regrading on the affected area of MP 419-16 has not been completed (Stip. Para. 11).

13. The affected area of MP 419-16 has not been planted (Stip. Para. 12).

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[1] "Stip. Para." refers to the July 1, 1987 stipulation of the parties, which has been marked Board Exhibit 1. "Cmwlth. Ex." refers to DER's exhibit. "App. Ex." will refer to Martin's exhibits. N.T. refers to the hearing transcript.

14. Erosion and sedimentation (E&S) controls as required by an October 18, 1983 Consent Order and Agreement (1983 CO&A) have not been implemented at MDP-16 (Stip. Para. 13).

15. MP 419-3578BC16-01-1 (MP 419-01-1) was an amendment to MP 419-16 and authorized the surface mining of 20 additional acres of coal (Stip. Para. 4; Cmwlth. Ex. 3).

16. MP 419-01-1 is covered by a collateral bond secured by Mellon Bank Savings Certificate P42564, in the amount of $35,000.00 (Stip. Para. 5; Cmwlth. Ex. 4).

17. Liability on the collateral bond for MP 419-01-1 is for the full amount of the bond (Cmwlth. Ex. 4).

18. Martin affected all 20 acres on MP 419-01-1 (Stip. Para. 7).

19. There is a bowl-shaped depression on MP 419-01-1 (Stip. Para. 14).

20. Approximately 10 to 15 feet of highwall which has not been backfilled remains on MP 419-01-1 (Stip. Para. 14).

21. On March 13, 1985, DER forfeited Surety Bond BD 1562 on MP 419-16 and the collateral bond on MP 419-01-1 (Stip. Para. 6).

KARCHER SITE - Mine Drainage Permit 3574SM12

22. Martin operated a mine site covering 374 acres in Boggs and Valley Townships, Armstrong County, referred to herein as the Karcher site, pursuant to MDP-12 (Cmwlth. Ex. 21).

23. Martin stipulated that on MP 419-7, 7A, 7A2, 7A3, 7A4, 13, 13A2, 13A3 and 13A4, whatever areas that had qualified for bond release were, in fact, released by DER, that any remaining areas were affected by Martin's surface mining operations and that reclamation of the affected areas was not complete (Stipulation at N.T. 151-53).

24. By letter dated March 13, 1985, DER forfeited Martin's bonds that covered the following mining permits: MP 419-7, 7A, 7A2, 7A3, 7A4, 13, 13A, 13A2, 13A3, 13A4, 13A5 and 14 (Notice of Appeal).

MP 419-7

25. MP 419-7 authorizes the surface mining of 10 acres of coal (Cmwlth. Ex. 22).

26. MP 419-7 is covered by Insurance Company of North America Surety Bond No. M918354, in the amount of $5,750.00 (Cmwlth. Ex. 35).

27. 6.1 acres were affected on MP 419-7 for which liability under Surety Bond M918354 is being charged (Board Ex. 2).

28. Under Surety Bond M918354, liability accrues at the rate of $575 per acre affected by surface mining, but may not be less than $5,000.00 (Stipulation at N.T. 150; Board Ex. 2; Cmwlth. Ex. 35).

29. Martin stipulated that reclamation on the affected areas of MP 419-7 is not complete (Stipulation at N.T. 152).

MP 419-7A

30. MP 419-7A authorizes the surface mining of coal on 57.1 acres (Cmwlth. Ex. 23).

31. MP 419-7A is covered by a collateral bond secured, in part, by Mellon Bank Savings Certificates 71662 and 71663, each in the amount of $10,000.00, and a check in the amount of $190.00 (Cmwlth. Ex. 36; Stipulation at N.T. 150; Board Ex. 2).

32. Liability under the collateral bond accrues at the rate of $500 per acre affected (Cmwlth. Ex. 36).

33. Board Exhibit 2 shows that the amount of bond liability is $20,190 and that present liability as to acreage involved and the stages of

reclamation[2] to be completed is a follows: 14.2 acres - Stage 3 reclamation; 34.7 acres - all reclamation stages (Board Ex. 2).

34. Martin stipulated that reclamation on the affected areas of MP 419-7A is not complete (Stipulation at N.T. 152).

MP 419-7(A)2

35. MP 419-7(A)2 authorizes the surface mining of 20 acres of coal (Cmwlth. Ex. 24).

36. MP 419-7(A)2 is covered by a collateral bond secured by Northwest Pennsylvania Bank and Trust Company Certificate 37105 for $20,000 (Cmwlth. Ex. 38; Board Ex. 2).

37. Liability under the collateral bond for MP 419-7(A)2 accrues at the rate of $1,000 per acre affected (Cmwlth. Ex. 38).

38. Martin affected 18.1 acres on MP 419-7(A)2 (Board Ex. 2).

39. Bond liability on MP 419-7(A)2 is $18,100.00 (Board Ex. 2; Stipulation at N.T. 150).

40. Martin stipulated that reclamation of the affected area on MP 419-7(A)2 is not complete (Stipulation at N.T. 152).

MP 419-7(A)3

41. MP 419-7(A)3 authorizes the surface mining of coal on 12.8 acres (Cmwlth. Ex. 25).

42. MP 419-7(A)3 is covered by a collateral bond secured by Northwest Pennsylvania Bank and Trust Company Certificate 37110 in the amount of $12,800 (Cmwlth. Ex. 39).

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[2] Reclamation work is typically done in three stages: Stage I - backfilling, regrading and drainage control in accordance with the approved reclamation plan; Stage II - topsoil placement and establishment of permanent vegetation cover; Stage III - all reclamation requirements are fulfilled, the area is capable of supporting the approved post-mining land uses and the period of liability is released.

43. Liability under the collateral bond for MP 419-7(A)3 accrues at the rate of $1,000 per acre affected (Cmwlth. Ex. 39).

44. Martin stipulated that bond liability on MP 419-7(A)3 is $11,300.00 (Stipulation at N.T. 150; Board Ex. 2).

45. Martin stipulated that reclamation on the affected areas of MP 419-7(A)3 is not complete (Stipulation at N.T. 152).

MP 419-7(A)4

46. MP 419-7(A)4 authorizes the surface mining of coal on 8.8 acres (Cmwlth. Ex. 26).

47. MP 419-7(A)4 is covered by a collateral bond secured by Northwest Pennsylvania Bank and Trust Company Certificate 37111 in the amount of $8,800.00 (Cmwlth. Ex. 40).

48. Liability under the collateral bond for MP 419-7(A)4 accrues at the rate of $1,000 per acre affected (Cmwlth. Ex. 40).

49. Martin affected 7.5 acres on MP 419-7(A)4 (Board Ex. 2).

50. Board Exhibit 2 shows that bond liability on MP 419-7(A)4 is $8,800.00 (Board Ex. 2).

51. Martin stipulated that reclamation of the affected areas of MP 419-7(A)4 is not complete (Stipulation at N.T. 152).

MP 419-13

52. MP 419-13 authorizes the surface mining of 10 acres of coal (Cmwlth. Ex. 27).

53. MP 419-13 is covered by a collateral bond secured by Northwest Pennsylvania Bank and Trust Company Certificate 37108 in the amount of $10,000.00 (Cmwlth. Ex. 41).

54. Liability under the collateral bond for MP 419-13 accrues at the rate of $1,000 per acre affected (Cmwlth. Ex. 41).

55. Martin affected 8.0 acres on MP 419-13 (Board Ex. 2).

56. Bond liability on MP 419-13 is $8,000.00 (Stipulation N.T. 150, Board Ex. 2).

57. Martin stipulated that reclamation of affected areas on MP 419-13 is not complete (Stipulation at N.T. 152).

MP 419-13A

58. MP 419-13A, issued May 31, 1978, authorizes the surface mining of 10 acres of coal (Cmwlth. Ex. 28).

59. MP 419-13A is covered by a collateral bond secured by Northwest Pennsylvania Bank and Trust Company Certificate 37107 in the amount of $10,000.00 (Cmwlth. Ex. 42).

60. Bond liability accrues at the rate of $1000 per acre affected (Cmwlth. Ex. 42).

61. Martin affected all 10 acres of MP 419-13A (N.T. 158, Board Ex. 2).

62. Liability on MP 419-13A is $10,000.00 (Stipulation at N.T. 150; Board Ex. 2).

63. There is a mound of earthen material on the northwestern portion of MP 419-13A (N.T. 156, 183; Cmwlth. Ex. 48).

64. Rills and gullies exist on the western portion of the mound above the unnamed tributary between MP 419-13A and MP 419-7(A2) (N.T. 156; Cmwlth. Ex. 48).

65. The rills and gullies are deeper than 9 inches (N.T. 186).

66. James M. Davis, DER's Mine Conservation Inspector (MCI), who recommended forfeiture, measured the depth of the rills and gullies using the "boot" method. According to Davis, ". . . you just step down in them and take a little bit over the top of your boot, that's over nine inches." (N.T. 186-87, 125).

67. Martin presented no evidence as to the depth of the rills and gullies and no evidence to cast doubt as to the reliability of Davis' "boot" method of measurement.

68. MCI Davis testified that the mound is spoil material which must be pushed back on adjacent mining permits to the north (N.T. 156, 184).

69. MCI Davis began inspecting Martin's mining operations in 1982 (N.T. 30, 186).

70. MP 419-13A was in essentially the same condition in 1985, the time of the forfeiture, as it was when Davis first began inspecting Martin's operations in 1982 (N.T. 190).

71. There is no evidence to show that Davis had knowledge of site conditions before 1982.

72. Neither the 1982 nor the 1983 CO&A's mention a mound on MP 419-13A (Cmwlth. Ex. 51 and 50).

73. DER presented no testimony or documents to directly show whether the mound existed before MP 419-13A was issued.

74. According to Martin, the mound of earthen material is actually spoil from a deep mine operated in the 1940's (N.T. 327, 332-33).

75. A June 16, 1976 "Field Engineer's Report on Application for Mine Drainage Permit" accompanied Martin's application for Amendment No. 1 to MDP-12 (Cmwlth. Ex. 21).

76. The field engineer's report states, in part, that "...[s]everal old pre-act strip areas are noted on the southern portion of the Property Map..." (Cmwlth. Ex. 21).

77. The southern portion of MDP-12 includes MP 419-13A (Cmwlth. Ex. 21).

78. Martin "dressed-off" the mound with "good" material during the time now-deceased MCI Bernard Snyder inspected Martin's operation, which was the mid to late 1970's (N.T. 327, 333, 347).

79. Martin did not mine on this permit but used it as access to other permits (N.T. 332).

80. MP 419-13A is approved for a terrace restoration (Cmwlth. Ex. 28).

81. There is an unreclaimed haul road on MP 419-13A (N.T. 156; Cmwlth. Ex. 48).

82. Martin and his wife, Mary E. Martin, are the owners of the land on which the haul road exists and want the road to remain intact (N.T. 330; App. Ex. 8).

83. Martin submitted Completion Report No. 61-84-039 to DER on February 27, 1984; the completion report was supplemented by a letter from Martin and his wife, which states, in toto, as follows:

> The access roadway across 419-13(A) and 419-13(A5) is to be left intact at the request of the landowners, James E. Martin and Mary E. Martin for the future access and development of the property.
>
> (App. Ex. 8)

84. The letter was not notarized (App. Ex. 8).

85. It has been DER's policy, since June, 1983, that when a landowner wants a haul road to remain after mining is completed, the mine operator must submit a written notarized statement from the landowner requesting it (N.T. 411, Cmwlth. Ex. 66).

86. The purpose of the notarization policy is to protect the landowner by assuring the landowner is aware of the mine operator's intention to retain haul roads (N.T. 398).

MP 419-13(A)2

87. MP No. 419-13(A)2, issued May 31, 1978, authorizes the surface mining of 10 acres of coal (Cmwlth. Ex. 29).

88. MP 419-13(A)2 is covered by a collateral bond secured by Northwest Pennsylvania Bank and Trust Company Certificate 37109 in the amount of $10,000.00 (Cmwlth. Ex. 43).

89. Liability under the collateral bond for MP 419-13(A)2 accrues at the rate of $1,000 per acre affected.

90. Martin affected 10.0 acres on MP 419-7(A)2 (Board Ex. 2).

91. Bond liability on MP 419-13(A)2 is $10,000.00 (Stipulation at N.T. 150, Board Ex. 2).

92. Martin stipulated that reclamation on the affected area on MP 419-13(A)2 is not complete (Stipulation at N.T. 152).

MP 419-13(A)3

93. MP 419-13(A)3 authorizes the surface mining of 10 acres of coal (Cmwlth. Ex. 30).

94. MP 419-13(A)3 is covered by a collateral bond secured by Mellon Bank Certificate T18565 in the amount of $5,875.00 (Cmwlth. Ex. 44).

95. Liability under the bond for MP 419-13(A)3 is for the full amount of the bond (Cmwlth. Ex. 44).

96. Outstanding liability on MP 419-13(A)3 is $5,760.00 (Stipulation at N.T. 150; Board Ex. 2).

97. Martin stipulated that reclamation on MP 419-13(A)3 is not complete (Stipulation, N.T. 152).

MP 419-13(A)4

98. MP 419-13(A)4 authorizes the surface mining of 20 acres of coal (Cmwlth. Ex. 31).

99. MP 419-13(A)4 is covered by a Mid-Continent Surety Bond BD1563 in the amount of $20,000.00 (Cmwlth. Ex. 45).

100. Liability under the bond for MP 419-13(A)4 accrues at the rate of $1,000 per acre affected (Cmwlth. Ex. 45).

101. Martin affected 5.9 acres on MP 419-13(A)4 (Board Ex. 2).

102. Liability on MP 419-13(A)4 is $5,900.00 (Stipulation at N.T. 150; Board Ex. 2).

103. Martin stipulated that reclamation on MP 419-13(A)4 is not complete (Stipulation at N.T. 152).

MP 419-13(A)5

104. MP 419-13(A)5, issued June 27, 1980, authorizes surface mining of coal on 6.5 acres (Cmwlth. Ex. 32).

105. MP 419-13(A)5 is covered by Mid-Continent Surety Bond BD1784 in the amount of $13,000.00 (Cmwlth. Ex. 46).

106. Liability under the bond for MP 419-13(A)5 is for the full amount of the bond (Cmwlth. Ex. 46).

107. E&S controls on MP 419-13(A)5 are inadequate (N.T. 160).

108. Martin was required to install a collection ditch on MP 419-13(A)5 to feed sedimentation pond "J" as part of the DER-approved upgrade to MDP-12 (Cmwlth. Ex. 34, Map labeled "EXHIBIT IV").

109. Martin stipulated that these controls were not installed (N.T. 170).

110. Rills and gullies of about two feet in depth exist on MP 419-13(A)5 (N.T. 160, 164).

111. MP 419-13(A)5 requires backfill to approximate original contours (AOC) (Cmwlth. Ex. 32).

112. DER presented no evidence to show original contours.

113. MCI Davis began inspecting this mining operations in 1982 (N.T. 30, 186).

114. MP 419-13(A)5 was in essentially the same condition in 1985, the time of the forfeiture, as it was when Davis first began inspecting Martin's operations in 1982 (N.T. 190).

115. There is no evidence to show that Davis had knowledge of site conditions before 1982.

116. Neither the 1982 nor the 1983 CO&A's specifically identify any deficiencies for this permit (Cmwlth. Exs. 51 and 50).

117. An unreclaimed haul road exists on this site (N.T. 160; Cmwlth. Ex. 48).

118. Martin and his wife, Mary E. Martin, are the owners of the land on which the haul road exists and want the road to remain intact (N.T. 330; App. Ex. 8).

119. Martin submitted Completion Report No. 61-84-039 to DER on February 27, 1984; the completion report was supplemented by a letter from Martin and his wife, which states, in toto, as follows:

> The access roadway across 419-13(A) and 419-13(A5) is to be left intact at the request of the landowners, James E. Martin and Mary E. Martin for the future access and development of the property.
>
> (App. Ex. 8)

120. The letter was not notarized (App. Ex. 8).

MP 419-14

121. MP 419-14 authorizes the surface mining of coal on 10 acres (Cmwlth. Ex. 33).

122. MP 419-14 is covered by a collateral bond secured by Northwest Pennsylvania Bank and Trust Company Certificate 37112 in the amount of $10,000.00 (Cmwlth. Ex. 47).

123. Liability accrues at the rate of $1000 per acre affected (Cmwlth. Ex. 47).

124. The southern half of MP 419-14 was not fully regraded (N.T. 161, 342).

125. Rills and gullies greater than 9 inches deep exist on the northern portion of MP 419-14 (N.T. 162, 164).

126. Martin cleared brush on the northern portion of MP 419-14 and explored for coal by drilling, but found no coal (N.T. 337-38).

127. Under the DER approved upgrade to MDP-12, Martin was to install diversion and collection ditches and sediment pond "G". (Cmwlth. Ex. 34, Map labeled "EXHIBIT IV").

128. Martin stipulated that he did not install the upgrade controls (N.T. 170).

129. The only portion of MP 419-14 that Martin did not affect was a one acre area on the northern portion (N.T. 337).

130. Bond liability on MP 419-14 is $9,000.

VALRAY SITE - Mine Drainage Permit 2869BSM25

131. Martin operated a mine site covering 374 acres in Valley Township, Armstrong County, referred to herein as the Valray site, pursuant to MDP-25 (Cmwlth. Ex. 6).

MP 419-4(C)

132. MP 419-4(C), issued to Martin on March 4, 1974, authorized the surface mining of 84.3 acres of coal (Cmwlth. Ex. 7).

133. MP 419-4(C) is a corrected permit which replaced original mining permits 419-4, 419-4(A) and 419-4(A2). (Cmwlth. Ex. 7).

134. The area encompassed by MP 419-4(C) is covered by six bond instruments, which DER declared forfeited. The bond documents and amounts are:

Bond Document	Bond Type	Bond Amount	Acreage Bonded
Am. Ins. Co. 2391414	Surety	$ 5,000.00	10
Am. Ins. Co. 2383399	Surety	$10,500.00	21
Mellon Bank Certificate 52261	Collateral	$ 2,650.00	5.3
Am. Ins. Co. 2391415	Surety	$13,000.00	26
Penn State Mutual 0153	Surety	$ 6,000.00	12
Penn State Mutual 0154	Surety	$ 5,000.00	10

Liability on each of these bond instruments is proportional to acreage affected and accrues at the rate of $500 per acre. Minimum liability is $5000.00 (Stipulation at N.T. 150; Board Ex. 2; Cmwlth. Exs. 10, 11, 12, 13, 14, and 15).

135. With the exception of Mellon Bank Certificate 52261, all of the bond instruments listed in Finding of Fact 133 were deposited with DER as part of the original mining permits, cover a total of 79.0 acres of land and were transferred to MP 419-4(C) (Cmwlth. Ex. 7).

136. The outstanding total bond liability on MP 419-4(C) is $29,790.00. The liability on each bond is as follows:

Bond Document	Present Liability
Am. Ins. Co. 2391414	$ 5,000.00
Am. Ins. Co. 2383399	$ 4,740.00
Mellon Bank Cert. 52261	$ 2,650.00
Am. Ins. Co. 2391415	$13,000.00
Penn State Mutual 0153	$ 2,400.00
Penn State Mutual 0154	$ 2,000.00

(Stipulation N.T. 150; Board Ex. 2)

137. A haul road exists that connects Township Road 566 with the main area of MP 419-4(C) (the "entrance haul road") (Cmwlth. Ex. 19; N.T. 34-35).

138. The entrance haul road crosses an unnamed tributary to South Fork Pine Creek, which tributary flows in a northwesterly direction along the northeast side of MP 419-4(C) (Cmwlth. Ex. 19; N.T. 34).

139. Where the entrance haul road crosses the tributary, it is supported by an earthen embankment (embankment) 25 to 30 feet high, as measured on the downstream side of the embankment (N.T. 35).

140. The embankment has been retaining water on the upstream side since 1975 (N.T. 35, 246).

141. There was a stream crossing at the site of the embankment from a logging operation carried on before Martin began mining. Martin put a 16-inch pipe in the then-existing crossing and put additional fill across the tributary to construct the embankment (N.T. 241).

142. The area on which the entrance haul road and the embankment exist is part of the 5.3 acre tract of land bonded by Mellon Bank Certificate 52261 in the amount of $2,650.00 (N.T. 240).

143. The embankment was the subject of a February 15, 1983 abatement order and a May 10, 1984 compliance order. Specifically, DER charged that Martin was maintaining this stream crossing without a dams and encroachment permit (Cmwlth. Exs. 52, 53).

144. Martin never appealed either the February 15, 1983 or May 10, 1984 orders.

145. MCI Davis testified that steep slopes exist on MP 419-4(C) at several locations (N.T. 42; Cmwlth. Ex. 19).

146. MCI Davis did not measure the slope but determined steepness "[b]y practical experience, looking at them, running equipment on them. You know just about what a dozer will crawl, what it won't." (N.T. 121, 119).

147. DER presented no evidence to show that MCI Davis could correlate the degree of steepness of a slope and the ability to operate equipment on it.

148. MCI Davis examined topographic maps showing slopes, but none were introduced into evidence (N.T. 120, 121).

149. MP 419-4(C) specifies that, for terracing type backfills, ". . . the steepest contour of the highwall shall not be greater than thirty-five degrees from the horizontal." (Cmwlth. Ex. 7, emphasis in original).

150. The areas where Davis claimed that the slopes were too steep did not occur at the highwall side of the mine site but on the outslopes (Cmwlth. Ex. 19; N.T. 422)

151. Martin stated that "...if a dozer could traverse the slopes, that was better than a 35 degree slope." (N.T. 248).

152. There was no evidence to correlate the ability of a dozer to traverse a slope with steepness measured in degrees.

153. There are devices to measure the steepness of slopes, but MCI Davis did not use any of them (N.T. 121).

154. MCI Davis testified that inadequate vegetation exists at several locations on Segment 3 of MP 419-4(C) (Cmwlth. Ex. 19; N.T. 44, 45).

155. MCI Davis considers ground cover of less than 70% to be sparse and, thus, inadequate (N.T. 100).

156. MCI Davis determined that the vegetation was inadequate "[j]ust by looking at it . . ." (N.T. 101).

157. It is not MCI Davis' responsibility to make final determination whether vegetation is adequate but only to conduct preliminary checks. A forester makes final determinations (N.T. 101, 26).

158. MCI Davis' responsibilities are mainly in the areas of stripping, backfilling, blasting, water quality, and E&S controls (N.T. 22-26).

159. MCI Roberts reviewed the vegetation on MP 419-4(C) "[i]n a cursory manner . . ." (N.T. 139).

160. According to MCI Roberts, most of the vegetation on Segment 2 was adequate, but there were some areas on the northern outslope that were "sparse" (N.T. 142).

161. On Segment 3, MCI Roberts testified that there were vegetation deficiencies on the "cut slope", i.e., in the same area discussed by MCI Davis (N.T. 142-43).

162. There was no testimony or other evidence to establish the criteria MCI Roberts used to determine whether vegetation was "sparse", "deficient" or "adequate".

163. At the extreme northwestern end of the permit is an area with volunteer growth, e.g. trees, briars (N.T. 44, 143).

164. Volunteer growth is that vegetation that has not been introduced into an area by man but which establishes itself through natural processes.

165. The area had a blocky, rubble surface with no topsoil and there was a gully on the slope (N.T. 143).

166. MCI Roberts holds a bachelor of science degree with a concentration in geology. He has taken coursework in the geology and chemistry of soils with emphasis on agronomic uses (N.T. 136-37).

167. Rills and gullies exist on the northern outslope of MP 419-4(C) (N.T. 43, 45; Cmwlth. Ex. 19).

168. The rills and gullies are greater than 9 inches in depth (N.T. 125; Cmwlth. Exs. 53, 64).

169. There are three locations on MP 419-4(C) where water collects (N.T. 46; Cmwlth. Ex. 19).

170. Each of the bond instruments was written for a specific number of acres (see Finding of Fact 133) at the rate of $500 per acre (Cmwlth. Exs. 10, 11, 12, 13, 14, 15).

171. With the exception of the 5.3 acres of the entrance access area (see Finding of Fact No. 141), there is no evidence to show what areas within MP 419-4(C) are covered by which bond.

172. Commonwealth Exhibit 19 contains markings which show bond numbers at various places on MP 419-4(C) but there was no interpretation of these markings to permit a determination of where one bonded area stops and another begins.

173. Surety Bond Nos. 2391414, 2383399, 2391415, 0153 and 0154 were all written in 1970 or 1971, before MP 419-4(C) was issued. There is nothing to indicate the bonds were changed in any way when they were transferred to MP 419-4(C) from the original permits (Cmwlth. Exs. 10, 12, 13, 14, 15).

174. An unreclaimed haul road goes through the main portion of MP 419-4(C) (N.T. 43, 122, 237, 391).

175. Martin, who does not own the land, did not secure a notarized statement from the landowner requesting that the road be retained.

176. The post mining use of this area is pastureland (N.T. 142).

MP 419-4(C)A

177. MP No. 419-4(C)A authorizes the surface mining of coal on 10 acres (Cmwlth. Ex. 8).

178. MP 419-4(C)A is covered by Mid-Continent Surety Bond BD1359 for $10,000.00. Liability on this bond accrues at the rate of $1,000 per acre affected (Cmwlth. Ex. 17).

179. Outstanding liability on Mid-Continent Surety Bond BD1359 is $10,000.00 (Board Ex. 2, Stipulation at N.T. 150).

180. MP 419-4(C)A requires backfilling to AOC (Cmwlth. Ex. 8).

181. MCI Davis began inspecting MDP-25 in 1982 (N.T. 65).

182. MCI Davis was born and reared about 1 1/2 miles from MDP-25 and had seen the area before it was mined (N.T. 120).

183. In determining that MP-419-4(C)A was not backfilled to AOC, MCI Davis looked at topographic maps made prior to mining and compared those contours with the current site (N.T. 120-21, 128-229).

184. The topographic maps used by MCI Davis were not produced at the hearing.

185. Contours after mining do not have to exactly conform to original contours (N.T. 129).

186. MCI Davis believes that final contours can vary up to 15 percent from original contours (N.T. 129).

187. Other than stating that the final contours of MP 419-4(C)A varied more than 15 percent from original contours (N.T. 129), MCI Davis presented no supporting evidence.

188. Martin, who also was familiar with the area since he was "just a little kid," emphatically contends that MP 419-4(C)A is backfilled to AOC (N.T. 253-54).

189. DER presented no evidence to show the degree of slope.

190. Rills and gullies averaging 10 or more inches in depth exist on the eastern outslope of MP 419-4(C)A (N.T. 47).

191. There is no topsoil on the southeastern portion of MP 419-4(C)A (N.T. 142, 148).

192. Most of the vegetation on the southeastern portion is volunteer growth (N.T. 141) and is not adequate.

193. Martin affected all 10 acres of MP 419-4(C)A (N.T. 48).

Mining Permit 419-12

194. MP 419-12 authorized the surface mining of coal on 25 acres (Cmwlth. Ex. 9).

195. MP 419-12 is covered by a collateral bond secured by Northwest Pennsylvania Bank and Trust Certificates No. 24455, in the amount of $17,500.00, and Collateral Bond 165-001097-C in the amount of $5,750.00 (Cmwlth. Ex. 18; Board Ex. 2).

196. Liability accrues at the rate of $1,500 per acre affected (Cmwlth. Ex. 18).

197. Remaining liability on MP 419-12 is $23,250.00 and represents liability on 15.5 acres (Board Exhibit 2; Stipulation at N.T. 150).

198. Martin stipulated that the affected areas on MP 419-12 are unreclaimed (N.T. 21).

199. By letter date March 13, 1985, DER forfeited the bonds listed in Findings of Fact Nos. 133, 177 and 194 (Notice of Appeal).

DISCUSSION

These consolidated appeals involve a review of DER's forfeiture of assorted bonds posted by Martin for his Boarts (MDP-16), Karcher (MDP-12) and Valray (MDP-25) mining sites. In bond forfeiture cases, DER has the burden of proving, by a preponderance of the evidence, that forfeiture is justified. 25 Pa.Code §21.101; King Coal Company v. DER, 1985 EHB 104. Under §4(h) of SMCRA, DER has a mandatory duty to forfeit a bond if the operator fails to comply with reclamation requirements of the act, in any respect, for which liability has been charged on the bond. 52 P.S. §1396.4(h); Morcoal Coal Company v. Commonwealth, DER, 74 Pa.Cmwlth. 108, 459 A.2d 1303 (1983). In the enforcement of a mandatory provision of a statute or regulation, the Board must either

uphold or vacate DER action based on the evidence. Warren Sand and Gravel Company v. DER, 20 Pa.Cmwlth. 186, 341 A.2d 556 (1975).

MARTIN'S DEFENSES

Aside from those few permits where he challenges the bases for DER's forfeiture action (see discussion, infra.), Martin raises three general affirmative defenses:

> 1. Martin's refusal to meet a bribe demand by a DER employee resulted in discriminatory and retaliatory enforcement actions which precipitated his insolvency and inability to complete reclamation.
>
> 2. Martin's insolvency, which rendered him financially unable to complete reclamation, was due to improper DER actions and delays.
>
> 3. DER is barred from collecting certain bonds based on a 5 year limitation in the bonding document.

The Board considered the first two defenses in its June 12, 1987 interlocutory opinion and order in this matter, See James E. Martin v. DER, 1987 EHB 408, which is incorporated by reference herein. By that order, Martin was precluded from presenting evidence on either the bribery or insolvency issues.

It must be remembered that our review of a bond forfeiture action entails determining if the site conditions warrant forfeiture, i.e., whether violations of laws and regulations under which bond liability has been charged are present so as to trigger DER's mandatory forfeiture action. If DER can show that such violations are present, we must uphold the action.

Martin's allegation of a 1981 bribe demand by a DER employee is a serious charge but, in and of itself, is a criminal matter over which this Board has no jurisdiction. If Martin's refusal to meet the alleged bribe demand led to a series of purportedly harsh DER enforcement and other actions, any such actions which would have affected Martin's personal or property

rights, duties, immunities or obligations would have been reviewable by this Board. The merits of each action appealed from would be reviewed to determine if the relevant facts and applicable law indeed supported the action, regardless of DER's initial motivation. However, any of those alleged actions are not a part of this appeal of bond forfeitures. As to the insolvency defense, Martin concedes that, by itself, it is not a defense to forfeiture.

With respect to Martin's third argument, we find that he is raising a timeliness issue which has already been settled. Twenty-one of the bonds at issue in this proceeding were written under an earlier version of SMCRA, which provided, in relevant part, as follows:

> "...Liability under such bond shall be for the duration of surface mining at each operation, and for a period of five years thereafter, unless released in whole or in part prior thereto as hereinafter provided..."

Each of the bonds conforms to SMCRA as they contain language requiring that liability shall be for the duration of mining activities and for 5 years thereafter, unless released earlier. Martin contends that, under the bonds and the SMCRA version in effect when they were written, DER cannot forfeit any bond covering a mining permit where coal removal last occurred more than 5 years prior to the forfeiture.

This issue is controlled by the reasoning of our Commonwealth Court in American Casualty Company of Reading, Pa. v. DER, 65 Pa. Cmwlth. 223, 441 A.2d 1383 (1982). In that matter, DER had forfeited bonds written under the now-repealed Anthracite Strip Mining and Conservation Act, the Act of June 27, 1947, P.L. 1095, as amended, 52 P.S. §681.1 et seq. The bonds involved in American Casualty contained language similar to the instant bonds and §6 of the Anthracite Act, 52 P.S. §681.6 contained language similar to the earlier SMCRA version Martin is relying upon. The Commonwealth Court ruled that

liability continues until all requirements are met and reclamation is completed.

This Board applied the reasoning of American Casualty to American Insurance Company and Fireman's Fund Insurance Company, 1983 EHB 1 and ruled that the 5-year period under the same SMCRA section and similar bonds begins when the operator files a completion report and not from when the last coal was removed. Martin has presented evidence on only 2 completion report submissions - January, 1981 and February, 1984. DER's 1985 forfeiture action was within 5 years of either completion report. We thus reject Martin's third defense and now proceed to examine whether site conditions on the various permits warrant forfeiture.

BOND INSTRUMENTS - ACCRUAL OF LIABILITY

These appeals involve two type of bond instruments, namely, those where liability accrues at a specified rate per acre affected by surface mining and those where liability is for the entire amount of the bond.

In forfeiture actions involving bonds on which liability accrues in proportion to the acreage affected, DER's burden is twofold: it must show that site conditions justify forfeiture and it must show that it properly determined the amount of the bond to be forfeited. Coal Hill Contracting Company, Inc. v. DER, 1984 EHB 374, citing Southwest Pennsylvania Natural Resources v. DER, 1982 EHB 48. DER may only forfeit the amount corresponding to the number of acres affected multiplied by the per acre liability specified by the terms of the bond. King Coal Company v. DER, 1985 EHB 104.

On bonds where liability is for the entire bond amount, a deficiency anywhere on the bonded area justifies the forfeiture of the entire amount.

Thus, it is not necessary for DER to show the acres affected but, simply, that violations of reclamation requirements exist somewhere on the bonded area which was affected by mining. Yellow Run Energy Company v. DER, 1986 EHB 171.

BOARTS SITE - MINE DRAINAGE PERMIT 3578BC16 (MDP -16)

On MP 419-16, Martin stipulated that neither backfilling nor regrading has been completed and that the affected 5.3 acres have not been revegetated. On MP 419-01-1, he stipulated that there is a bowl-shaped depression and that approximately 10 to 15 feet of unbackfilled highwall remains. On both permits, E&S controls have not been implemented.

Martin has violated 25 Pa.Code §87.141(a) which requires, in part, that grading be such to eliminate depressions. Backfilling was not performed concurrent with mining, as required by 25 Pa.Code §§87.140 and 87.141(c). The revegetation requirements of 25 Pa.Code §§87.147 through 87.156 have been violated. E&S controls as required by 25 Pa.Code §87.106 have not been installed.

Section 4 of SMCRA, 52 P.S. §1396.4(h) provides, in relevant part, that:

> [i]f an operator fails or refuses to comply with the requirements in any respect for which liability has been charged on the bond, the Secretary shall declare such portion of the bond forfeited . . .

Violations on MP's 419-16 and 419-01-1 of the reclamation requirements of SMCRA and the rules and regulations promulgated thereunder have been established. Accordingly, we will uphold DER's forfeiture of $5,300 of Mid-Continent Insurance Company Bond No. BD1562 for violations on MP 419-16

(5.3 acres affected X $1,000 per acre affected) and Mellon Bank Certificate No. P42564 for MP 419-01-1 in the amount of $35,000 (liability for full bond amount).

KARCHER SITE - MINE DRAINAGE PERMIT 3574SM12 (MDP-12)

MP Nos. 419-7, -7A, -7A2, -7A3, -7A4, -13, -13A2, -13A3, -13A4

There is no dispute that the affected areas on these mining permits have not been fully reclaimed, since Martin has so stipulated. In general, these sites violate the revegetation requirements of 25 Pa.Code §§87.147-156, as well as the backfilling and regrading requirements of 25 Pa.Code §§87.140-141.

On MP 419-7, Martin affected 6.1 acres and his liability would be 6.1 acres X $500 per acre, or $3,050. However, since the bond requires a minimum liability of $5,000, DER is entitled to forfeit that amount.

For MP 419-7A, Board Exhibit 2, a stipulated document, contains an internal inconsistency. While it shows the remaining liability to be $20,190, liability should be for a lesser amount, based on the acreage affected reclamation stages. On 14.2 acres, Stage III[3] reclamation of the bond outstanding remains to be performed. Therefore, DER could forfeit 14.2 acres x $500 per acre x 15%, or $1,065 on this area. On another 34.7 acres on which all stages of reclamation remain to be performed, DER could forfeit 34.7 acres x $500per acre, or $17,350. The total for both of these areas would be $18,415. We recognize that Martin stipulated to the accuracy of Board Exhibit 2. However, there can only be one correct forfeiture amount. The $20,190 figure

[3] At Stage III reclamation, 15% of the orgininal bond amount is still outstanding. Upon completion of Stage I, an operator is entitled to seek release of 60% of the the total bond amount. Upon completion of Stage II, another 25% may be sought. See 25 Pa.Code §85.172(b)

happens to be the total of three collateral instruments posted by Martin for these areas. The $18,415, figure, however, is derived from the above calculation. We will resolve the inconsistency by calculating revised amounts from the acreages and reclamation stages for MP 419-7A shown on Board Exhibit 2; therefore, DER may forfeit $18,415 of Martin's collateral bond.

On MP 419-7A2, Martin affected all 18.1 acres of the site and the Department may forfeit 18.1 acres x $1,000 per acre, or $18,100.

For MP 419-7A3, Board Exhibit 2 does not show how many of the 12.8 acres Martin affected, but does show the outstanding liability to be $11,300. Martin stipulated to the accuracy of the document, and in the absence of anything to the contrary, we will uphold DER's forfeiture of $11,300.

On MP 419-7A4, Board Exhibit 2 presents another internal inconsistency. Outstanding liability is shown as $8,800, but the acreage involved is only shown to be 7.5 acres as to all reclamation stages. Therefore, DER could only forfeit 7.5 acres x $1,000 per acre, or $7,500. $8,800 happens to be the face amount of bond instrument, while $7,500 is a calculated figure. As with MP 419-7A above, we will uphold DER's forfeiture of this lower figure.

On MP 419-13, Martin affected 8 of the 10 acres and, at the rate of $1,000 per acre affected, DER may forfeit $8,000 of the bond for this MP.

On MP 419-13A2, Martin affected all 10 acres and, therefore, DER may forfeit the entire bond amount of $10,000.

On MP 419-13A3, the bond liability is for the full amount of the bond, $5,875. A violation anywhere on the bonded area would justify forfeiture of the entire amount. However, Board Exhibit 2 shows the outstanding liability on this bond to be $5,760. Since the bond liability is for the full amount, and since Martin has stipulated that reclamation on this permit is not complete, we rule that DER may forfeit the entire amount of the bond.

On MP 419-13A4, Martin affected 5.9 of the 20 acres. At the rate of $1,000 per acre affected, DER may forfeit $5,900 of the underlying bond.

MP 419-13A

DER claims that three reclamation deficiencies exist on this permit: a mound of spoil which must be pushed onto adjacent MP 419-13 or MP 419-13A2; rills and gullies on the hillside of the mound, north of the haul road and near the unnamed tributary between MP's 13A and 7A2; and an unreclaimed haul road.

MCI Davis testified that the mound is a spoil pile which came from, and must be pushed back to, adjacent MP's 419-13 or 13(A2). Martin counters that the mound is actually ". . . a fairly large size bony pile from an old deep mine that was on that point . . ." before he affected the area (N.T. 327). To show that the mound is a reclamation deficiency, DER points to the findings of the 1983 CO&A (Cmwlth. Ex. 50) and to cross-examination testimony from Martin by which he could not show that adequate material exists on MP's 419-13 and 13(A2) to allow for their reclamation.

In sorting out this matter, we find the 1983 CO&A of little value, since it pertains to MP 419-13 and amendments but does not specifically address deficiencies on MP 419-13A. Nowhere in the 1983 CO&A can we find any indication of an offending mound of spoil on this MP. Indeed, as indicated in the reclamation schedule in Exhibit A to the 1983 CO&A, some of the areas of MP 419-13 and amendments were still to be mined. The 1983 CO&A does not establish when the mound was placed, by whom or from where the material originated. The mere fact that a backfill material deficiency may exist on adjacent permits does not prove that the mound is made up of material from those permits.

We consider both Davis and Martin to have been credible witnesses on this issue. While both grew up in the area, Davis did not claim any knowledge of this site before he began inspecting Martin's operations in 1982. Davis testified that he was not aware of any spoils on this site before Martin's mining took place (N.T. 185-86), even though a 1976 "Field Engineer's Report on Application for Mine Drainage Permit," which is part of Commonwealth Exhibit 21, states that there were several pre-act strip areas on the southerly portion of the property. Martin, on the other hand, clearly stated that the mound was spoil from an old deep mine. Indeed, DER's 1976 report tends to support Martin's view. Further, he stated that no mining actually occurred on this permit and that he used it for access to other permits.

We do not find MCI Davis' knowledge of MP 419-13A to be a reliable basis to conclude that the earthen mound is a spoil pile of material from adjacent permits. DER has not corroborated Davis' testimony with any other evidence to show that Martin created the mound. Accordingly, we rule that DER has not shown, by a preponderance of the evidence, that Martin created the mound from spoil from adjacent mining permits.

While Martin did not create the mound, the evidence is clear that Martin affected its surface in the course of his surface mining activities. Martin plainly states that the mound was dressed off during the late MCI Snyder's time of inspection. While Martin doesn't specifically say that <u>he</u> dressed off the slopes of the mound, we believe that it is a reasonable inference that, in fact, Martin dressed off the mound while he was conducting mining operations in the area and, therefore, he affected the mound in the course of surface mining activities.

Rills and gullies exist on the western side of the mound above the unnamed tributary, a fact Martin has not challenged. Since Martin affected

this area, rills and gullies deeper that 9 inches in an area affected by surface mining activities are a reclamation deficiency that violates 25 Pa.Code §87.146, which provides, in relevant part:

> When rills and gullies deeper than nine inches inches form in areas that have been regraded and planted, the rills and gullies shall be filled, graded, or otherwise stabilized and the area re-seeded or replanted according to §§87.147-87.156 (relating to vegetation). . .

DER has thus established a basis for forfeiture.

Martin has also affected part of MP 419-13A with a haul road. However, Martin and his wife are the landowners and want the haul road to remain. The question is whether DER has shown that Martin is not entitled to retain the haul road. The Board has not been presented with very much clear evidence, but most of what we must consider involves Martin's Completion Report 61-84-039 (App. Ex. 8) and its return by DER (Cmwlth. Ex. 57), as well as DER policies.

We note that DER returned Completion Report 61-84-039 (along with 10 others not relevant hereto), by the following July 25, 1984 letter (Cmwlth. Ex. 57):

> The above referenced bond release applications are being cancelled and returned to you. These applications have been held for corrective work for a long period of time and you have failed to perform the corrective work required to complete reclamation of the site. You must submit new bond release applications after you have completed reclamation of the site in order to have your bond released.

This letter sheds no light on the haul road issue. The only thing this letter is conclusive of is that Completion Report 61-84-039 was returned for failure "...to perform the corrective work required to complete reclamation

of the site..." The "corrective work required" was not specified.[4]

Keeping in mind that we are not adjudicating whether Martin is entitled to a bond release but, rather, whether DER may forfeit his bond due to existence of the haul road, we look to the applicable DER regulations or policies. DER's Scott Roberts testified that it was DER policy to allow a haul road to remain if the operator provided a notarized statement from the landowner. The notarization was required as a protection for the landowner.

In this case, Martin is the mine operator and, with his wife, one of two joint landowners. We see the wisdom of DER's requirement of notarized statements from landowners in that operators cannot seek to avoid reclaiming haul roads without a landowner's knowledge and consent. However, we fail to see, in the case where the mine operator and his wife are joint landowners, that their interests will be protected by a notarized statement. DER has pointed to no specific regulation that requires a notarized landowner statement with regard to retention of haul roads. In this matter, the mine operator has presented sufficient evidence that he and his wife wish the road to remain. Therefore, we hold that Martin's failure to reclaim the haul road on MP 419-13A is not a basis for upholding DER bond forfeiture.

On MP 419-13A, DER has demonstrated violations of its reclamation regulations with regard to rills and gullies. Further, Board Exhibit 2 and Davis' unchallenged testimony show that all 10 bonded acres of this mining permit have been affected by Martin. Therefore, this Board is constrained to uphold the forfeiture of the $10,000 collateral bond posted by Martin.

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[4] We are mindful of DER's inspection report of May 4, 1984 (Cmwlth. Ex. 65), which clearly deals, in part, with the haul road. Nonetheless, we don't know for sure why DER returned Completion Report 61-84-039.

MP 419-13(A5)

DER claimed that the following reclamation deficiencies exist on MP 419-13(A5): an unreclaimed access road; inadequate E&S controls; rills and gullies in a regraded area north of the access road; and failure to regrade to approximate original contour. As far as the access road is concerned, the analysis in the previous discussion on MP 419-13(A) applies to this permit as well.

We find no dispute that rills and gullies one to two feet deep exist on portions of this permit north of the haul road. Furthermore, Martin failed to install the necessary E&S controls. As shown on the drawing labeled "Exhibit IV", which was part of the DER-approved upgrade to MDP-12, Martin was required to install a collection ditch on MP 419-13(A5) to collect surface runoff and direct that runoff to sedimentation pond "J." Martin stipulated that these controls were not installed. DER has established that rills and gullies over nine inches in depth exist, a violation of 25 Pa.Code §87.146, and that required E&S controls were not installed and maintained, a a violation of 25 Pa.Code §106.

We do not believe that DER has shown us that the site is not backfilled to approximate original contours (AOC). MCI Davis came on site in 1982 and testified that, except for deeper rills and gullies, the site was essentially the same in 1985 as it was in 1982. Davis claimed no prior knowledge of this site and DER produced no other evidence to show what the original contours were. Therefore, we reject DER's non-AOC contention.

On this permit, DER is seeking the forfeiture of the full amount of the bond, $13,000. The terms of the bond for MP 419-13(A5) specify that liability is for the full amount and not on a per acre accrual basis. On such bonds, a deficiency anywhere on the bonded area justifies the forfeiture

of the entire amount. DER has shown unreclaimed rills and gullies and that Martin was required to install E&S controls but failed to do so. We, therefore will uphold its forfeiture action with respect to this permit.

MP 419-14

DER claims that the southern portion of this permit was affected by Martin's mining but not regraded, that E & S controls were not upgraded, that 4-7 feet deep rills and gullies exist on the southern portion, and that a large gully exists on the northern portion. Martin admitted that while the southern portion of this permit was close to AOC, final grading for topsoil remained to be accomplished. Thus, a violation of the backfilling requirements of 25 Pa.Code §87.141 has been established. DER has also established a violation of 25 Pa.Code §87.146 by showing the existence of rills and gullies greater than 9 inches deep. Finally, Martin's E & S upgrade plan shows that diversion and collection ditches as well as sediment pond "G" were to have been installed on this permit, something Martin stipulated was not done. Thus, a violation of 25 Pa.Code §87.106 has been established.

Martin's contention that he did not affect the northern portion with mining activity is without merit. Martin admitted under cross-examination that he drilled the northern portion and found that there was no coal, that the land was cleared, but that the area was to be developed into farmland. However, we find that he was, in reality, exploring for coal. SMCRA's definition of "surface coal mining activities" clearly states that "... [t]he term shall include ... exploration ..." 52 P.S. §1396.3. Thus, the northern portion was affected by Martin's mining activities and DER has established that site conditions warrant forfeiture on MP 419-14. However, DER did not rebut Martin's testimony that 1 acre was unaffected, which we find to be

credible. Accordingly, we will only uphold the forfeiture as it pertains to 9 affected acres. Since liability on this bond accrues at the rate of $1,000 per affected acre, DER may forfeit $9,000 of the bond posted for this site.

Summary - MDP-12

Based on the foregoing, DER has justified its forfeiture of the following bonds in the amounts indicated:

Mining Permit	Bond Instrument	Amount
419-7	Insurance Co. OF N. Amer. SB M918354	$ 5,000
419-7A	Check ($190) & Mellon Bank Svgs. Certs. Nos. 71662 & 71663 (@ $10,000 ea.)	18,415
419-7A2	NW PA Bank & Trust Cert. 37105	18,100
419-7A3	NW PA Bank & Trust Cert. 37110	11,300
419-7A4	NW PA Bank & Trust Cert. 37111	7,500
419-13	NW PA Bank & Trust Cert. 37108	8,000
419-13A	NW PA Bank & Trust Cert. 37107	10,000
419-13A2	NW PA Bank & Trust Cert. 37109	10,000
419-13A3	Mellon Bank Cert. T18565	5,875
419-13A4	Mid-Continent SB BD1563	5,900
419-13A5	Mid-Continent SB BD1784	13,000
419-14	NW PA Bank & Trust Cert. 37112	9,000

VALRAY SITE - MINE DRAINAGE PERMIT 2869BSM25 (MDP-25)

MP 419-4(C)

Reclamation deficiencies claimed by DER on this permit fall into the following categories: two unauthorized and unreclaimed impoundments, an unreclaimed haul road, rills and gullies deeper than 9 inches, water-collecting depressions, steep slopes, and inadequate vegetation.

IMPOUNDMENTS

DER claims that there are two offending impoundments. The first impoundment supports the main haul road to this site from Township Road 566.

(See Segment 1 on Cmwlth. Ex. 19). DER contends that this impoundment, which crosses an unnamed tributary to the South Fork of Pine Creek, is an unauthorized waterway obstruction for which Martin needs, but does not have, a permit. Martin contends that he was never informed of the need for a permit until 1982. Further, he points out that the stream crossing existed before he began mining.

There is no question that this impoundment exists and that Martin put a 16 inch pipe through it as well as additional fill on it to provide for a roadway. Currently, the embankment has impounded water flowing in the unnamed tributary so that the impounded waters extend upstream and off the permit area.

Water obstructions of this sort are now governed by the provisions of the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 et seq. (DS&EA), which became effective July 1, 1979. However, prior to that enactment and since 1913, water obstructions were governed by the Water Obstructions Act, the Act of June 25, 1913, P.L. 555, as amended, 32 P.S. §681 et seq., repealed by the Act of October 23, 1979, P.L. 204, No. 70, §1(27). Under §1 of the Water Obstructions Act, 32 P.S. 681, the embankment supporting Martin's haul road constituted a water obstruction. Under §2, any person who built or modified an obstruction was required to apply for and obtain a permit.

While there is no evidence to suggest that Martin created the water obstruction, there is no question that, in 1975, he altered and enlarged it. Thus, under the now-repealed Water Obstructions Act, Martin was obligated to obtain a permit before altering the obstruction. Notwithstanding that he failed to obtain the required permit under the Water Obstructions Act, §6 of the DS&EA, 32 P.S. §693.6, required persons who did not hold a valid permit

under the Water Obstructions Act to apply for and receive a permit under the new act on or before January 1, 1981. The fact is that Martin has no permit.[5]

It is a requirement of SMCRA that an operator comply with the requirements of, inter alia, the DS&EA. 52 P.S. §1396.4(a)(2)H. Because the impoundments existed when SMCRA was amended to include the DS&EA compliance provision, the amended SMCRA is applicable to Martin. His claim that he was unaware he needed a permit, even if true, is meritless since he is charged with knowledge of the law. We thus conclude that DER met its burden of showing that this impoundment is a violation of the requirements of SMCRA.

As to the second impoundment, located on the northernmost portion of the mining permit (See Cmwlth. Ex. 19), we know that it exists but little else. The entire evidence presented by DER on this impoundment consists of the following direct testimony by MCI Davis:

> Q Are there any other impoundments on this mine drainage permit?
>
> A Yes, there is.
>
> Q Could you show us where that is?
>
> A It would be down -- could I extend this line a little bit here? I don't have my position --
>
> Q Oh, sure.
>
> A Okay. This other impoundment would be on area 2 [Segment 2, Cmwlth. Ex. 19]. It would be the -- where this other road comes in, the first road we went in, drove back, and walked down there. The other impoundment would be the tributary here (indicating), mark that as an "I."
>
> (N.T. 49)

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[5] In May, 1984 DER issued Compliance Order No. 84G295, alleging, in part, that Martin was maintaining an unauthorized impoundment. Since Martin did not appeal CO 84G295, this allegation is conclusively established and may not be challenged in these proceedings. West Pine Construction, et al. v. DER, 1987 EHB 653.

Quite simply, DER failed to establish that Martin created or operated this impoundment or to point out that any particular requirement or regulation has been violated. We will not infer violations simply from the impoundment's existence. DER failed to sustain its burden of proof on this impoundment.

INADEQUATE VEGETATION

DER claims that inadequate vegetation exists at several locations on this permit. Evidence was presented on two types of inadequate vegetation: areas that were topsoiled and planted but are still inadequate, and an area that was not topsoiled and has only volunteer growth (i.e. growth that occurs through natural processes). The latter area can be dealt with rather quickly. The evidence shows that there is an area at the northwestern portion of this site that was not topsoiled and has only volunteer growth of trees and briars. Based on the evidence and the Board's view of this site, we conclude that a reasonable inference from the existence of volunteer growth is that the site had not been planted. Thus, the vegetation requirements of 25 Pa.Code §§87.147-156 have been violated.

The matter of inadequate vegetation in areas that were planted by Martin requires a closer examination. DER's regulations specifying the standards for successful revegetation, 25 Pa.Code §87.155, provide, in relevant part, at follows:

* * * * *

> (b) When the approved postmining land use is other than cropland:
>
> (1) The standards for successful revegetation shall be determined by ground cover.
>
> (2) The approved standard shall be the percent ground cover of the vegetation that exists on the

> proposed area to be affected by surface mining activities. In no case shall [DER] approve less than a minimum of 70% ground cover of permanent plant species with not more than 1% of the area having less than 30% ground cover with no single or contiguous area having less than 30% ground cover exceeding 3000 square feet . . .
>
> * * * * *

Quite simply, DER has failed to show us that its standards for successful revegetation, as spelled out in §87.155(b), have been violated. Its only evidence was MCI Davis' determination of inadequate vegetation which he arrived at "just by looking at it", and MCI Roberts' determination done in a "cursory manner."

DER's own standard requires a 70% ground cover, as MCI Davis testified, but also makes allowances for small areas where vegetative cover may even be less than 30%. We believe that, except in extreme cases where no vegetation at all exists, §87.155 contemplates that some type of measurement be done to determine not only overall <u>percent</u> cover but also the areal extent of places where the cover is less than 70% to find out if an exception applies. However, it is clear that DER made no measurement. Maybe there is a simple measurement that can be performed to determine percent ground cover -- perhaps an analog to the "boot" method of measuring the depth of rills and gullies -- but we are unaware of it. Nor did DER present evidence that MCI Davis accurately determined the percentage cover by merely looking at it or that MCI Roberts could do so through cursory review.

In view of the numerical standards established in §87.155, we reject DER's claim of inadequate vegetation in this case solely on the basis of visual observation and cursory review. DER has not shown us that the numerical standards have been violated.

RILLS AND GULLIES

DER presented uncontroverted evidence that rills and gullies deeper than nine inches exist on the northern outslope of the permit area. Thus, DER has established that the provisions of 25 Pa.Code §87.146 have been violated and, therefore, has established a basis for forfeiture. These rills and gullies existed well before the forfeiture, having been cited in unappealed Compliance Order 84G295 (see Commonwealth Exhibit 53).

WATER-COLLECTING DEPRESSIONS

DER submitted uncontroverted evidence that water collecting depressions exist at three locations on MP 419-4(C) (See Commonwealth Exhibit 19). 25 Pa.Code §87.141(a) requires, in relevant part, that ". . . [a]ll spoil shall be . . . graded to eliminate spoil piles and depressions . . ." DER has established a violation of reclamation requirements and thus has established a basis for bond forfeiture.

UNRECLAIMED HAUL ROAD

There is no dispute that a haul road extending from the connecting haul road discussed earlier exists on the main area of MP 419-4(C). Rather, the dispute is whether Martin is entitled to retain the road under DER's policy.

Unlike MP 419-13A and 13(A5) discussed earlier, Martin is not an owner of the land covered by MP 419-4(C). Rather, the land is owned by Valray Nurseries, Inc. Hence, Martin was required to provide DER with a notarized letter from Valray Nurseries, Inc. requesting that the road remain. The only evidence Martin offered was a photocopy of a letter purportedly written to Martin from Valray. (See Appellant's Exhibit 6). The letter is pure hearsay

and nothing in the record even begins to support the truth of the matters contained therein. Accordingly, we reject Martin's claim that he is entitled to keep the haul road under DER's policy.

Martin's failure to reclaim the haul road is a violation of 25 Pa.Code §87.166 which provides for the restoration of haul roads after they are no longer needed for surface mining activities. DER has proven a violation of reclamation requirements and thus has established a basis for bond forfeiture.

STEEP SLOPES

DER contends that, although the site is approved for a terrace type backfill, areas on the northern outslopes are too steep. (See Commonwealth Exhibit 19). MCI Davis stated that the slopes can be a maximum of 35 degrees, which is consistent with the actual permit. MCI Davis based his conclusion on his estimation of the ability to run a dozer on the slopes. Martin, on the other hand, asserted his belief that one could run a dozer on the slopes on MP 419-4(C).

The precise terrace backfill requirement is not immediately clear. Martin's permit specifies that the steepest contour of the highwall shall not be greater than 35 degrees from the horizontal. However, the areas where MCI Davis claims steep slopes is not at the highwall side of the permit but on the outslope. 25 Pa.Code §87.144 specifies the requirements for final slopes and, with respect to terrace outslopes, states in relevant part:

> * * * * *
>
> (c) . . . [t]he terraces shall meet the following requirements:
>
> * * * * *
>
> (3) The slope of the terrace outslope shall not exceed 1v:2h - 50% . . .
>
> * * * * *

Whether the criterion of 35 degrees or 1v:2h-50% is applicable, we believe that the regulations contemplate measurements be performed in order to determine conformity. In this case, it is clear that DER performed no slope measurements and, instead, relied on MCI Davis' experience in running equipment. However, DER did not present evidence to show that MCI Davis is qualified to judge the ability to operate equipment on a slope and then, without actually having run such equipment, conclude a numerical value for the slope. Moreover, Martin, who has been in the coal and construction business since 1951, directly counters Davis' contention. The real issue is not whether equipment can negotiate the slopes but whether the slopes exceed the numerical standards in DER's regulations. DER has offered no other evidence to support Davis' assertion and, indeed, has not even shown us which numerical limitation governs which slopes. We conclude, DER has failed to show that there are slopes that are too steep on this permit.

VIOLATIONS AND THE APPLICABLE BONDS

On MP 419-4(C), DER has established that violations of the reclamation requirements exist with respect to rills and gullies, the haul road, the impoundment carrying the connecting haul road and water-collecting depressions. Thus, DER has met its burden of showing that violations of SMCRA exist and its mandatory forfeiture duty is triggered. However, it must also show us that it has properly calculated the amount of the forfeiture. King Coal, supra.

With respect to the 5.3 acre area covered by Mellon Bank Certificate No. 52261, in the amount of $2,650, there is no question that an unauthorized impoundment and an unreclaimed haul road justify its forfeiture. Therefore, we will uphold the forfeiture of 5.3 acres x $500 per acre, or $2,650.

However, as to the other 5 bonds which cover areas of MP 419-4(C), the correctness of DER's determination of the amount of the forfeiture is far from clear.

The 5 bonds covering the main area of MP419-4(C)A -- American Insurance Company surety bonds 2383399, 2391414 and 2391415 and Penn State Mutual surety bonds 0153 and 0154 -- were written under prior permits and for specific acreage. When transferred to MP 419-4(C), there is no evidence that the terms of the bonds were amended in any way. Thus, each continued to cover the same acreage as when originally posted. The problem we face in determining if DER is justified to claim the amount of each bond as shown on Board Exhibit 2 is that DER has presented no evidence to show which of the problems accrue to which bond. The violations established on this permit could have accrued to all the bonds, to 3 of them or to only 1 of them. The violations could be accruing solely to the American Insurance bonds or solely to the Penn State Mutual bonds or to some of either set of bonds.

We note that Commonwealth Exhibit 19, a map of MP-419-4(C), contains marking which indicate the 5 bonds. However, DER provided no interpretation for us to ascertain where one bond leaves off and another begins. We also note that the violations were not located on Commonwealth Exhibit 19 with any exactitude. We conclude that DER has failed to establish by a preponderance of the evidence that it properly computed the amount of the forfeiture relative to MP 419-4(C). Since it has not given the Board sufficient information to permit it to make any computations, we will vacate DER's forfeiture with respect to the 5 bonds covering the main portion of MP 419-4(C).

MP 419-4(C)A

DER's claimed deficiencies on this permit are: steep slopes, backfill not to approximate original contours, rills and gullies deeper than 9 inches, and inadequate vegetation.

We reject DER's claim of steep slopes for the same reasons as discussed in MP 419-4(C), supra. We likewise reject DER's claim that the site was not backfilled to AOC. There was no evidence presented to show what the original contours were or how great a variance existed between original and final contours. The topographic maps used by Davis to declare a non-AOC backfill were not produced for the Board to examine. Davis' boyhood recollections were contradicted by Martin's boyhood -- as well as pre-mining -- recollections. In short, DER has not put forth a preponderance of evidence to show that the permit is not AOC.

DER has, however, presented uncontroverted evidence that rills and gullies deeper than 9 inches exist on this permit. Moreover, most of the permit area is characterized by volunteer growth. Areas of the permit were not planted. We thus find that there are violations of reclamation requirements with regard to rills and gullies greater than 9 inches, 25 Pa.Code §87.146, and that Martin has failed to revegetate the permit in accordance with 25 Pa.Code §§87.147-156.

The bond for this permit is a proportionate bond. However, since Martin affected all 10 acres, DER is entitled to forfeit the entire bond, or $10,000.

Martin has stipulated that 15.5 affected acres of this site remain unreclaimed. Since bond liability accrues at rate of $1,500 per acre affected, DER may forfeit 15.5 acres x $1,500 per acre, or $23,250.

CONCLUDING REMARKS

We note that on those permits where Martin stipulated that conditions warrant bond forfeiture, actual site conditions -- e.g., unreclaimed highwalls, spoil piles, unregraded and unplanted areas -- represent serious violations of reclamation requirements and amply justify the harsh action taken by DER. However, on some of those permits where we upheld DER with respect to, for example, rills and gullies or depressions, one may question the seriousness of the violations. Indeed, Martin, in his brief, tried to assert that certain of the violations were de minimus and cited King Coal, supra. In the King Coal adjudication, as well as its subsequent reconsideration at 1985 EHB 604, the Board held out the possibility that it may be an abuse of DER's discretion to forfeit bonds on the basis of de minimus violations. However, since Martin presented no evidence to show that any of the violations are de minimus, we reject Martin's claim.

We believe that the words of the statute clearly indicate that the General Assembly intended the harsh measure of bond forfeiture to be a major weapon in DER's enforcement arsenal. 52 P.S. §1396.4(h) is unambiguous in its mandatory charge that DER shall forfeiture an operator's bonds for failure to comply with the requirements of the act in any respect. Under this language, 0.1 acres with unreclaimed rills and gullies or 2,000 square feet of properly regraded area with inadequate vegetation is equal in seriousness to a wholly unbackfilled pit or unregraded highwall. Thus, under the current statute and

regulations, the Board will be constrained to uphold a bond forfeiture when DER can show that any of the reclamation requirements have been violated.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties to this appeal and the subject matter thereof.

2. The burden of showing that the forfeiture of Martin's bonds was not an abuse of discretion or an arbitrary exercise of its duties or responsibilities falls on DER.

3. When DER seeks to forfeit a proportionate bond -- i.e., one on which liability accrues at a specified rate per acre affected -- its burden is twofold. It must show that violations of SMCRA exist and it must show that the violations exist on the area covered by the bond it seeks to forfeit.

4. When DER determines that violations of SMCRA exist, its duty to forfeit bonds is mandatory.

5. On the evidence, this Board must either uphold or vacate DER's forfeiture.

6. On a proportionate bond, DER can forfeit an amount equal to the liability accrual rate per acre multiplied by the number of acres affected.

7. When DER's standards for successful revegetation specify numerical percentage criteria and exceptions, mere visual observation -- absent any other evidence -- is insufficient to support a claim that vegetation is inadequate, except in extreme cases where no vegetation at all exists.

8. When DER-issued permits and DER regulations specify numerical criteria for the steepness of final slopes, mere visual observation of and

speculation that backfilling equipment could not negotiate final slopes -- absent any other evidence -- is insufficient to support a claim that slopes are too steep.

9. A DER claim that backfill was not to approximate original contours based on a review of topographic maps is insufficient to sustain a forfeiture action when the maps were not introduced into evidence.

10. The existence on a bonded area of rills and gullies with a depth of more than 9 inches justifies forfeiture of the bond.

11. The existence on a bonded area of areas that were not planted in accordance with DER revegetation requirements justifies the forfeiture of a bond.

12. Even one violation of DER's reclamation requirements is sufficient to justify the forfeiture of the applicable bond.

13. On the basis of Martin's stipulation of violations of reclamation requirements, DER properly forfeited the following bonds and, on the basis of the foregoing findings and analysis, in the amounts indicated:

Permit	Bond Instrument	Amount
MDP 3578BC16		
419-16	Mid-Continent Insurance BD 1562	$ 5,300
419-3578BC-01-1	Mellon Bank Certificate P42564	35,000
MDP 3574SM12		
419-7	Insurance Co. of North America M918354	5,000
419-7A	Mellon Bank Certs. Nos. 71662 and 71663 and check for $190	18,415
419-7A2	NW Pa. Bank & Trust Co. Cert. No. 37105	18,100
419-7A3	NW Pa. Bank & Trust Co. Cert. No. 37110	11,300
419-7A4	NW Pa. Bank & Trust Co. Cert. No. 37111	7,500
419-13	NW Pa. Bank & Trust Co. Cert. No. 37108	8,000
419-13A2	NW Pa. Bank & Trust Co. Cert. No. 37109	10,000
419-13A3	Mellon Bank Certificate T18565	5,875
419-13A4	Mid-Continent Insurance BD 1563	5,900

MDP 2869BSM25		
419-12	NW Pa. Bank & Trust Co. Cert. No. 24455	17,500
419-12	Collateral Bond 165-001097-C	5,750

15. On the basis of the evidence presented at the hearing, DER's forfeiture action is justified as it pertains to the following permits, bonds and amounts:

Permit	Bond Instrument	Amount
MDP 3574SM12		
419-13A	NW Pa. Bank & Trust Co. Cert. No. 37107	10,000
419-13A5	Mid-Continent Insurance BD 1784	13,000
419-14	NW Pa. Bank & trust Co. Cert. No. 37112	9,000
MDP 2869BSM25		
419-4C	Mellon Bank Cert. No. 52261	2,650
419-4(C)A	Mid-Continent Insurance BD1359	10,000

16. When a bond is written for a specific area or tract of land, only violations on that area or tract accrue to the bond, and when violations are shown to exist on the area or tract covered by a bond, DER is justified in forfeiting the bond in accordance with the language of the bond.

17. On MP 419-4C, DER showed by a preponderance of the evidence the existence of violations of reclamation requirements but failed to show which of the violations accrued to specific bonds. Therefore, it has failed in its burden to show that the its forfeiture of the following bonds and amounts was justified:

Permit	Bond Instrument	Amount
MDP 2869BSM25		
419-4(C)	American Insurance Co. Bond 2383399	$ 5,000
419-4(C)	American Insurance Co. Bond 2391414	4,740
419-4(C)	American Insurance Co. Bond 2391415	13,000
419-4(C)	Penn State Mutual Bond 0153	2,400
419-4(C)	Penn State Mutual Bond 0154	2,000

O R D E R

AND NOW, this 20th day of December, 1988, it is ordered that:

1. The appeals of James E. Martin and American Insurance Company are sustained with respect to DER's forfeiture of the following bonds:

Permit	Bond Instrument	Amount
MDP 2869BSM25		
419-4(C)	American Insurance Co. Bond 2383399	$ 5,000
419-4(C)	American Insurance Co. Bond 2391414	4,740
419-4(C)	American Insurance Co. Bond 2391415	13,000
419-4(C)	Penn State Mutual Bond 0153	2,400
419-4(C)	Penn State Mutual Bond 0154	2,000

2. Martin's appeal is dismissed with regard to all other forfeitures which were the subject of this appeal.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: December 20, 1988

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
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Western Region
For Appellant James E. Martin:
Eugene E. Dice, Esq.
Harrisburg, PA
For Appellant American Insurance Co.:
Robert F. McCabe, Jr., Esq.
LINDSAY, McGINNIS, McCANDLESS & McCABE
Pittsburgh, PA

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TELECOPIER: 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

INGRID MORNING	:	
	:	
v.	:	**EHB Docket No. 88-094-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 20, 1988
and PIKE TOWNSHIP	:	

OPINION AND ORDER
SUR
JOINT MOTION FOR JUDGMENT ON THE PLEADINGS

Synopsis

A Joint Motion for Judgment on the Pleadings will not be granted when there are factual disputes on issues crucial to a final decision.

OPINION

On October 6, 1988, the Board issued an Opinion and Order sur Joint Motion for Judgment on the Pleadings, ruling, inter alia, that Pike Township, Berks County (Township), is a party appellee in this case and giving the Township 30 days to file a response to the Joint Motion. The Township filed its response on November 4, 1988, opposing the Joint Motion on several grounds. These include an assertion that the information supplied by the Township was complete and adequate for review by the Department of Environmental Resources (DER), and a challenge to Ingrid Morning's standing to file this appeal.

Obviously, there are factual disputes that must be resolved before a decision can be reached on the legal issues. The adequacy of the Township's

submission is one of these. The nature of the Township's submission -- plan supplement or plan revision -- is another. The existence of these factual disputes on matters crucial to a final decision prevents the entry of judgment on the pleadings: Goodrich-Amram 2d §1034(a):1.

Because of the belated entry of the Township into the case, the Order that follows includes provisions which the Board deems appropriate for the protection of all parties.

ORDER

AND NOW, this 20th day of December, 1988, it is ordered as follows:

1. The Joint Motion for Judgment on the Pleadings, filed by Ingrid Morning and the Department of Environmental Resources on August 30, 1988, is denied.

2. All parties shall be permitted to engage in discovery until January 20, 1989.

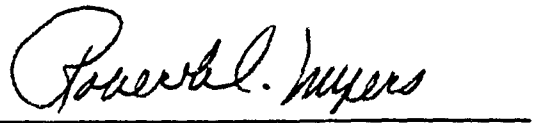
3. Ingrid Morning shall file a supplement to her pre-hearing memorandum, if she so desires, on or before January 30, 1989.

4. The Department of Environmental Resources and Pike Township each shall file its pre-hearing memorandum on or before February 15, 1989.

5. The Motion to Dismiss, filed by the Department of Environmental Resources on July 18, 1988, and answered by Ingrid Morning on August 30, 1988, was deemed by the Board to have been superseded by the Joint Motion for Judgment on the Pleadings also filed on August 30, 1988. If it desires to renew said Motion, the Department of Environmental Resources shall refile it on or before February 15, 1989.

6. If Pike Township desires to contest the standing of Ingrid Morning to take this appeal, it shall file a Motion to Dismiss on or before February 15, 1989.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS, MEMBER

DATED: December 20, 1988

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M. DIANE SMITH
SECRETARY TO THE BOARD

ROBERT KWALWASSER	:	
	:	
v.	:	EHB Docket No. 84-108-M
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: December 22, 1988
and KERRY COAL COMPANY, Permittee	:	

OPINION AND ORDER
SUR
PETITION FOR COUNSEL FEES

Synopsis

A Petition for Counsel Fees under Section 4 (b) of the Pennsylvania Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.4 (b), will be handled consistent with similar petitions under Section 525 (e) of the Federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C.A. §1275 (e), and the regulations adopted thereunder at 43 CFR §4.1290 et seq. The operational equivalent of a final order has occurred when no appeal is filed from the decision of the Department of Environmental Resources (DER) on issues remanded to it by the Board's Adjudication. A third-party appellant from the issuance of a surface mining permit does not achieve the necessary "degree of success on the merits" when he succeeds only in getting an interlocutory order on two minor issues and a two-month's suspension of the permit.

OPINION

On April 24, 1986, Robert Kwalwasser (Kwalwasser) filed a Petition for Counsel Fees, seeking an award of $27,037.50 for counsel fees and $4,856.06 for costs applicable to the filing and prosecuting of an appeal from the issuance by the Department of Environmental Resources (DER) of a surface mining permit to Kerry Coal Company (Kerry). The facts surrounding the issuance of this permit are set forth in detail in the Board's Adjudication at 1986 EHB 24 and will not be reiterated here.

On April 28, 1986, Kerry filed a Motion to Strike the Petition for Counsel Fees on the ground that the Board lacked jurisdiction since the Board's Adjudication in the underlying case had been appealed to Commonwealth Court. DER filed its Response to the Petition for Counsel Fees on May 12, 1986, challenging it on a number of procedural and substantive grounds. The Board, on June 2, 1986, entered an Order deferring action on Kwalwasser's request until final disposition of the appeal pending in Commonwealth Court.

Commonwealth Court quashed the appeal as interlocutory on November 19, 1987. Kerry's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied on June 22, 1988. This denial was brought to the Board's attention by Kwalwasser on July 20, 1988. By an Order dated August 1, 1988, the parties were directed to file briefs on the propriety of awarding counsel fees and costs to Kwalwasser. Kwalwasser's brief was filed on September 19, 1988. Kerry and DER filed their briefs on October 20, 1988. At the same time, DER also filed a Supplementary Response to the Petition for Counsel Fees.

While the Petition is vague on the point, Kwalwasser's brief makes it clear that his claim is based on Section 4 (b) of the Surface Mining

Conservation and Reclamation Act (Pa. SMCRA), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.4 (b), which provides in pertinent 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 pursuant to this section.

This statutory provision was involved in Jay Township et al. v. DER et al., 1987 EHB 36, where the Board held that, in order for Pennsylvania's primacy program to remain in effect, the award of fees and costs under Section 4 (b) of Pa. SMCRA must be no less effective than awards made by the federal government under Section 525 (e) of the Federal Surface Mining Control and Reclamation Act of 1977 (Fed. SMCRA), 30 U.S.C.A. §1275 (e). Section 525 (e) of Fed. SMCRA reads as follows:

> whenever an order is issued under this section, or as a result of any administrative proceeding under this chapter, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary [of the Interior] to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review of agency actions, may be assessed against either party as the court, resulting from judicial review or the Secretary, resulting from admininstrative proceedings, deems proper.

Regulations adopted pursuant to this statutory provision at 43 CFR §4.1290 et seq. require, inter alia, that the proceedings result in a final order and that the petitioner prevail "in whole or in part, achieving at least some degree of success on the merits, upon a finding that such person made a substantial contribution to a full and fair determination of the issues."[1]

---

[1] The quoted language is from 43 CFR §4.1294 (b), the only subsection that seems to apply to the nature of the present case. The "substantial contribution" measure under subsection (a) (1) applies only to enforcement actions and has no bearing on permit issuances.

The language of Section 525 (e) of Fed. SMCRA was not specifically addressed in Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983). The "when appropriate" language of Section 520 (d) of Fed. SMCRA was construed in that case, however, along with nearly identical language in 16 other regulatory statutes. The Supreme Court's ruling that, in order to be entitled to an award, a party must achieve some degree of success on the merits, appears to apply as well to the "deems proper" language of Section 525 (e); and the regulations quoted above reflect this application. The Board, of course, is not bound to follow the Ruckelshaus decision or the language of the federal regulations; but, since Pa. SMCRA and Fed. SMCRA seek to regulate the same activity in a coordinated manner, it is appropriate that the Board's awards of fees and costs under Pa. SMCRA reflect the standards applied by the federal government.

The first question to be answered is whether a final order has been issued in this case. The Board's Adjudication at 1986 EHB 24 held, inter alia, that DER had abused its discretion in issuing the permit (1) without considering whether the noise generated by the mining activity may constitute a public nuisance, and (2) without considering whether a monitoring program should have been included in the dust control plan. The Board suspended the permit and remanded it to DER for further review. The suspension was lifted by Commonwealth Court on April 1, 1986, but Kerry's appeal ultimately was quashed as interlocutory because of the remand. On July 16, 1987, according to DER's Supplemental Response to Petition for Counsel Fees, DER reported its decisions on the remanded issues in a letter to Kerry with a copy to Kwalwasser. No dust control plan monitoring program was necessary, according

to DER, and the noise levels expected to be generated by mining activities would not constitute a public nuisance. No appeal was filed from these decisions.

While a final order on the merits of this appeal has not been entered formally, the same effect has been achieved by DER's action on the remanded issues which now has become final and binding in the absence of an appeal. This is the "operational equivalent of a final order," as the Board termed a similar set of circumstances in Jay Township (1987 EHB 36 at 44).

Deciding whether Kwalwasser is a prevailing party who has achieved "at least some degree of success on the merits" is a more formidible task. Kwalwasser argues that this determination should be made on the posture of the case at the time the Petition for Counsel Fees was filed. Viewing the position of the parties at that point, without considering any subsequent events, the Board would have some justification for concluding that Kwalwasser had, indeed, achieved some success on the merits. The permit had been suspended and had been remanded to DER for further review.

Such a truncated view of the case is not warranted, however. Since a final order is a necessary prerequisite to an award of fees and costs, a petitioner's status as a prevailing party should be measured at the time the final order is entered. In the present case, that point in time cannot be precisely determined. DER's action on the remanded issues became final when no apeal was filed within 30 days after notice of the action was received by Kwalwasser, 25 Pa. Code §21.52 (a). The record does not show when this occurred, but it probably was sometime in the latter part of August, 1987. Kerry's appeal was still pending in Commonwealth Court at that time and

remained there until it was quashed on November 19, 1987. Thus, while the appeal became final on the merits in August 1987, that fact was not apparent until three months later.

Fortunately, this circumstance does not affect the outcome, because the status of the case remained fixed during this three-month period. The permit continued in effect, unchanged from its original form, and Kwalwasser had achieved no success in having it altered or revoked.

Kwalwasser argues that the remand itself was a sufficient degree of success on the merits to justify an award of fees and costs. A thorough review of the record pertaining to the merits of this appeal discloses that the two remanded issues, noise and dust, were very minor accessories to the major topics of contention. Noise and dust are not specifically mentioned in the Notice of Appeal or the Petition for Supersedeas. In Kwalwasser's pre-hearing memorandum, the two subjects account for only 4 of the 88 statements of fact and for 1 of the 22 contentions of law. In the transcript of the four days of hearing, noise and dust account for only 36 pages out of a total of 714. This figure includes about 20 pages of actual testimony and about 16 pages of discussion between the hearing officer and the attorneys. Part of that discussion (page 374) included the following statement by Kwalwasser's attorney: "I don't consider it [dust] the major issue in the case, as I'm sure you don't." Kwalwasser's post-hearing brief devoted 6 of 67 proposed findings of fact, 2 of 11 proposed conclusions of law and 2 of 10 pages of argument to noise and dust. The Board's Adjudication is 44 pages long. Noise and dust account for 13 of 116 findings of fact, 3 of 10 conclusions of law, and 4 1/2 of 25 1/2 pages of argument.

While a quantitative analysis should never be controlling, it is nonetheless an indication of the importance attached to particular issues.

When the quantitative analysis is combined with a substantive analysis of the record, it is clear that the noise and dust concerns were subsidiary to the major concern about acid mine drainage. The Board's Adjudication ruled against Kwalwasser on the major issue and on each of the subsidiary issues other than noise and dust. The Board remanded those two issues to DER, because the evidence did not show that DER had considered whether a dust control monitoring program was necessary or whether the noise would consititute a public nuisance. The Board was careful to point out that it was not mandating any changes in the permit (1986 EHB 24 at 62 and 64), but was only requiring that DER consider the two questions. DER's reconsideration resulted in an affirmance of the terms of the permit as originally issued. The fact that Kwalwasser took no apeal from DER's remand decision strongly suggests that the noise and dust issues were of little importance to him.

What appeared to be Kwalwasser's initial success in obtaining a suspension of the permit also proved to be illusory. Commonwealth Court lifted the suspension after 67 days and, apparently, it was never reinstated.

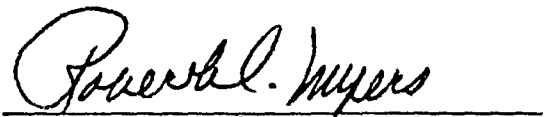
The Board cannot conclude that Kwalwasser's fleeting success in obtaining an interlocutory order on two minor issues and a two-month suspension of the permit is sufficient to warrant the award of fees and costs under Section 4 (b) of Pa. SMCRA. Kwalwasser having failed this threshold test, there is no reason for considering the other issues raised by the parties.

ORDER

AND NOW, this 22nd day of December, 1988, the Petition for Counsel Fees, filed by Robert Kwalwasser on April 24, 1986, is denied.

ENVIRONMENTAL HEARING BOARD

WILLIAM A. ROTH, MEMBER



ROBERT D. MYERS, MEMBER

As with the underlying adjudication, Chairman Woelfling did not participate in this decision.

DATED: December 22, 1988

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

MARIO L. MARCON	:	
	:	
v.	:	EHB Docket No. 88-110-R
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
VALLEY SANITATION, Permittee	:	Issued: December 28, 1988

OPINION AND ORDER
SUR
PETITION FOR RECONSIDERATION

Synopsis

A petition for reconsideration of an order dismissing an appeal for lack of standing is denied where the petitioner fails to satisfy the criteria for reconsideration in 25 Pa.Code §21.122.

O P I N I O N

Mario L. Marcon (Marcon) has timely filed a petition seeking the Board's reconsideration of its order of December 13, 1988 that dismissed, for lack of standing, his appeal of a $100 civil penalty assessed by the Department of Environmental Resources (DER) against Valley Sanitation (Valley) for allegedly conducting non-coal surface mining near its landfill in Penn Township, Westmoreland County. The Board held that Marcon failed to demonstrate any substantial, immediate and direct interest in the assessment and, therefore, failed to meet the standing test enunciated in William Penn

Parking Garage, Inc. v. City of Pittsburgh, 464 Pa 168, 346 A.2d 269 (1975).

Reconsideration of a Board decision is generally limited to instances where the decision rests on a legal ground not considered by any party and the parties in good faith should have had an opportunity to brief such question or where the crucial facts set forth in the petition for reconsideration are not as stated in the decision and are such as would justify a reversal. 25 Pa.Code §21.122.

Marcon's petition for reconsideration consists of virtually the same statements made in his notice of appeal and in his response to DER's motion to dismiss, alleging that DER had failed to enforce various statutes and regulations. Nothing in Marcon's petition, however, even begins to address why the Board may have erred in concluding that he had no standing to contest the issuance of the assessment to Valley. Accordingly, we conclude that Marcon has not met the criteria for reconsideration and thus will enter the following order.

O R D E R

AND NOW, this 28th day of December, 1988, it is ordered that Mario L. Marcon's petition for reconsideration of the Board's dismissal of his appeal at Docket No. 88-110-R is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: December 28, 1988

cc: **Bureau of Litigation**
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Appellant pro se:
Mario L. Marcon
Harrison City, PA
Permittee:
Valley Sanitation
Irwin, PA

rm

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M. DIANE SMITH
SECRETARY TO THE BOARD

WILLIAMS TOWNSHIP BOARD OF SUPERVISORS, et al.	:	
v.	:	**EHB Docket No. 84-036-M**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and FRANK RAUSCH, Permittee	:	**Issued:** December 29, 1988

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

Appeals will be dismissed as moot when the permit on which they are based has been revoked and the revocation action has become final and binding.

OPINION

This appeal was instituted by Williams Township and the Williams Township Board of Supervisors (collectively called the Township) on February 6, 1984, challenging the issuance by the Department of Environmental Resources (DER) of a permit for the Frank Rausch Class II Demolition Waste Site in Williams Township, Northampton County, pursuant to the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P.L. 788, as amended, 35 P.S. §6001 et seq. Another appeal from the same permit issuance was filed on February 10, 1984, by 14 individuals and docketed at No. 84-041-M. The two appeals were consolidated at Docket No. 84-036-M by a Board Order dated May 14, 1984.

The consolidated appeals were not prosecuted because some or all of the parties were involved in civil litigation by which Frank Rausch, the Permittee, sought to establish the width of a private access road at 12 feet or more, the width required by DER in the permit. Mr. Rausch was unsuccessful in that litigation before the Court of Common Pleas of Northampton County and before the Superior Court of Pennsylvania. The Supreme Court refused his Petition for Allowance of Appeal on May 29, 1987.

While the civil litigation was winding its way through the courts, Mr. Rausch, on September 5, 1986, requested DER to return his bond. Following an inspection of the permit site, DER released Mr. Rausch and his surety from any liability on the bond and returned it on November 10, 1986. Subsequently, on July 29, 1988, DER formally revoked the permit. Frank Rausch appealed the revocation on August 29, 1988, at Docket No. 88-334-F.

Unaware of this latest appeal, the Appellants in the appeals consolidated at Docket No. 84-036-M filed a Motion to Dismiss on September 20, 1988. The Motion argued that the appeals were now moot since the permit had been revoked. Mr. Rausch filed no response to this Motion. Nor did he prosecute his appeal at Docket No. 88-334-F. After repeated requests for the additional information required to perfect the appeal, the Board issued, on September 30, 1988, a Rule to Show Cause why the appeal at Docket No. 88-334-F should not be dismissed. When Mr. Rausch failed to respond to the Rule, the Board dismissed the appeal on November 4, 1988.

As a result of all of this activity, the permit which is the subject matter of the consolidated appeals has now been revoked by DER and such action has become final and unassailable. Since this is precisely the relief sought by Appellants, there is nothing further that the Board can do. The consolidated appeals, therefore, are moot and will be dismissed.

ORDER

AND NOW, this 29th day of December, 1988, it is ordered that the Motion to Dismiss, filed by Williams Township et al., on September 20, 1988 is granted, and the consolidated appeals are dismissed for mootness.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

William A. Roth
WILLIAM A. ROTH, MEMBER

Robert D. Myers
ROBERT D. MYERS, MEMBER

DATED: December 29, 1988

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

WALTER OVERLY COAL COMPANY	:	
	:	
v.	:	EHB Docket No. 86-601-M
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 6, 1988

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

A Motion for Summary Judgment will be denied in a bond forfeiture proceeding where the record does not contain sufficient affidavits or documentary material to establish (1) that the Compliance Orders apply to the specific Mining Permits involved, (2) that the Mining Permits referred to in the bond forfeiture letter are the same Mining Permits referred to in the bonds, and (3) that the bonds were legally in effect when the bond forfeiture letter was sent.

OPINION

On November 6, 1986, Walter Overly Coal Company (Appellant) perfected its appeal from the September 29, 1986, action of the Department of Environmental Resources (DER) forfeiting bonds posted under the Surface Mining Conservation and Reclamation Act (SMCRA), 52 P.S. §1396.1 et seq. On January 7, 1988, DER filed a Motion for Summary Judgment to which Appellant has not responded.

In its Motion, DER maintains that, since Appellant did not appeal from Compliance Orders issued by DER on May 3, 1985 and June 7, 1985, it can

no longer contest the violations set forth in those Compliance Orders. Attached to the Motion is an Affidavit of Robert Musser, a Mine Conservation Inspector in DER's Greensburg District Office, detailing the violations and averring that they have not been corrected as of December 29, 1987, the date of the affidavit.

Proceeding from this basis, DER argues that there are no genuine issues of material fact and that DER is entitled to judgment as a matter of law. This is the proper standard against which a Motion for Summary Judgment is to be measured under Pa. R.C.P. 1035.

DER is correct in asserting that principles of administrative finality bar Appellant from contesting in this proceeding the existence of violations set forth in prior Compliance Orders from which no appeals were taken. DER v. Wheeling-Pittsburgh Steel, 22 Pa. Cmwlth. 280, 348 A.2d 765 (1975), affirmed 473 Pa. 432, 375 A.2d 320 (1977). However, there must be a factual connection on the record between those Compliance Orders and the present proceeding.

The Compliance Orders mentioned by DER are 85G282 and 85G382. Musser's Affidavit discusses them in detail but fails to tie them specifically to any of Appellant's Mining Permits or bonds. Copies of the Compliance Orders are attached to DER's Motion. While they refer to Appellant's Mine Drainage Permit No. 3477SM25 (which covers 37.42 acres), they make no reference to any Mining Permits. The bond forfeiture letter, dated September 29, 1986, refers to certain Mining Permits aggregating 20 acres but does not mention Compliance Orders 85G282 and 85G382.

A representation that Compliance Orders 85G282 and 85G382 pertain to Mining Permits 1865-1 and 1865-1(A) is contained in DER's Motion. However, a

Motion for Summary Judgment is not considered a "pleading" within the scope of Pa. R.C.P. 1035. It is not required to be verified by the moving party and is not required to be answered by the non-moving party. 2 Goodrich-Amram 2d §§1035(a):4 and 1035(b):1; Ritmanich v. Jonnel Enterprises, Inc. et al., 210 Pa. Super Ct. 198, 280 A.2d 570(1971); Roberts v. Hazle Yellow Cab Co., 69 Luz. Leg. Reg. Rep. 252 (1979). Consequently, this representation cannot be considered in disposing of DER's Motion. We are left without the facts necessary to support the application of administrative finality.

Although we could end this Opinion at this point, we feel compelled to point out other uncertainties on the record before us. The bond forfeiture letter, dated September 29, 1986, alludes to Mining Permits 1865-1(C) and 1865-1C(A). DER's Pre-Hearing Memorandum uses the same designations. However, DER's Motion for Summary Judgment identifies the Mining Permits as 1865-1 and 1865-1(A), the same numbers used on the bonds attached to the Motion. DER has provided no explanation for this discrepancy and has furnished no affidavit or other documentary evidence to establish that, despite the different nomenclature, the same mining permits are involved. We are not at liberty to assume that such is the case.

Finally, the bonds themselves are stamped "Forfeited 12/28/83" and "Reinstated 2/26/85." DER has provided no explanation for these notations. Since we do not know the circumstances giving rise to the notations, we cannot determine whether the bonds are still in effect. If they were forfeited on December 28, 1983, DER's forfeiture letter of September 29, 1986, had no legal effect. If they were forfeited and later reinstated, we need to be supplied with record evidence sufficient for us to conclude that the bonds were legally in operation on September 29, 1986.

For all of these reasons, we find DER's Motion for Summary Judgment deficient.

ORDER

AND NOW, this 6th day of June, 1988, it is ordered that DER's Motion for Summary Judgment is denied.

ENVIRONMENTAL HEARING BOARD

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: June 6, 1988

cc: **Bureau of Litigation**
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